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JOHN J. O'CONNOR, APPELLEE, V. JOHN TIMMERMANN, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,815.

**Landlord and Tenant: LEASE: FORFEITURE.** The leniency of a landlord in not insisting upon prompt payment of rent when due does not constitute a waiver of his right to a forfeiture of the lease for nonpayment of rent.

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

*Charles W. Haller* and *James T. Begley,* for appellant.

*J. J. O'Connor, I. J. Dunn* and *A. E. Langdon, contra.*

LETTON, J.

This is an action of forcible detainer to recover possession of 280 acres of land. The original written lease was made for five years, ending March 1, 1905. With the exception of the first year, as to which it was agreed the rent should be $750, the stipulated rent was $800 a year, payable $400 upon March 1 and $400 upon September 1, annually. At the expiration of the lease it was agreed that defendant should hold over as under the old lease. There is no dispute but that during the whole seven years the tenant never paid his rent promptly at the time due, and never paid the amount that he actually agreed to pay by the terms of the lease. A large amount was due at the end of the five-year term.

Perhaps the theory of the defense is best stated in the language of counsel: "That the verdict and judgment are against the weight of the evidence and contrary to law, chiefly for the reason that O'Connor by a long course of dealings with Timmermann lulled him into a feeling of security and repose, and made him believe that failure to make prompt payment of rentals would not cause a forfeiture of his lease, and said O'Connor could not with-

out notice as to the future maintain a forfeiture." It is further contended that credit should have been allowed by the court for the flooded lands, the new lease being made on that basis, and that, if this were done, there would be nothing due. The real defense seems to be that the plaintiff agreed that, because about 150 acres of the land were flooded for a number of years, the rent should be reduced. The evidence fails to show any definite agreement of this nature. Moreover, we think this defense cannot be considered in this case, since, whatever may be the actual amount due under the contract, it is evident that at least $500 was long past due at the time the notice to quit was served. In a letter dated February 11, 1907, defendant paid $45, and promised to pay $500 more on the rent, which he never did. The defendant at that time was more than $500 in arrears by his own admission. If the leniency of a landlord in not insisting upon the strict payment of rent according to the terms of a lease would be a defense to an action to recover possession of the premises, then, indeed, the lot of a tenant might often be a hard one, since for their own protection landlords would insist upon strict compliance with the contract.

Defendant cites the case of *Hukill v. Myers,* 36 W. Va. 639, 15 S. E. 151, as sustaining his position, but we think it is not applicable. That was an action in equity to enjoin subsequent lessees from interfering with a tenant in possession, and for specific performance of the lease by the lessor. The tenant had been paying rent, but not within the time required by the lease. Upon the theory that by reason of nonpayment the lease was forfeited, the landlord without acquiring possession or declaring a forfeiture made a second lease under which the defendant lessees sought to take possession. Relief was given, but the power of the court to extend relief to the tenant was placed upon the ground that it was a court of equity, which was founded "to relieve against the hardness of courts of common law, and notably to relieve against

forfeiture, even where it clearly exists." The cases are not parallel. The evidence shows O'Connor had been demanding payment, and accepting such sums as the tenant was willing and able to pay. When the accumulation of arrears became too great, he requested the tenant to come in and have a settlement. Upon his failure to do this, he began this action under the provisions of section 1020 of the code, which provides that the action will lie against tenants holding over their terms, and that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due."

It is further contended that the acceptance of payment of rent after September 1, 1906, constituted a waiver of forfeiture. This cannot be so. The unpaid rent constituted a debt owing from the tenant to the landlord, and the acceptance of money owing upon this debt, in the absence of any agreement or conditions whereby the landlord agreed to waive the forfeiture and reinstate the tenancy, could not affect his right to recover possession. A somewhat similar case is *Cochran v. Philadelphia Mortgage & Trust Co.*, 70 Neb. 100, where a tenant long in arrears attempted to compel the landlord to waive the forfeiture by sending a check in payment of present rent, except that in the present case no attempt was made by the tenant to evade the forfeiture.

The question of the right of defendant to a reduction of the amount of the rent on account of floods can be determined if an action is brought to recover upon the unpaid rent. It is immaterial here, because there is no claim that any portion of the rent for 1906 had ever been paid.

There is no evidence that by the plaintiff's leniency the defendant has been put in any worse position than he would have been in had strict performance on his part been enforced. There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is entitled to do so, waives the right,

but this rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures or made valuable improvements believing that, by the landlord failing to assert the right of forfeiture after breach of condition, it would not be asserted. This is not such a case.

Under the law, no defense was established and the district court properly directed a verdict for the plaintiff. The judgment of the district court is

AFFIRMED.

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GEORGE W. BERGE, APPELLEE, V. FRANK D. EAGER, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,818.

Fraud: FALSE REPRESENTATIONS. In an action to recover for fraud and deceit in the sale of a newspaper plant and business wherein it is alleged that the vendor falsely represented the newspaper had a *bona fide* subscription list of 14,000 subscribers, when in truth it had not to exceed 1,000, and that it was falsely represented that the net profits of the business were $5,000 per annum, when in fact it was a losing business, *held*, that the number of subscribers to the paper and the amount of the business and profits of the establishment were material considerations inducing the purchase. *Held*, also, that the representations were such as the buyer had a right to rely upon, the matters concerning which they were made being peculiarly within the knowledge of the seller.

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

*Charles O. Whedon,* for appellant.

*George W. Berge, contra.*

LETTON, J.

This is an action to recover damages for fraud and deceit whereby it is alleged the plaintiff was induced to

enter into a contract for the purchase of a certain newspaper plant. An answer and reply were filed, and the case submitted to a jury, which rendered a verdict in favor of the plaintiff. After the return of the verdict the defendant moved for judgment *non obstante veredicto*. This motion was overruled and judgment entered upon the verdict, from which judgment the defendant has appealed.

The only question before us is upon the motion and whether or not the pleadings are sufficient to uphold the verdict. The petition is by no means a model pleading. Under its allegations the plaintiff seeks to recover damages for fraud in inducing him to enter into the contract. He also seeks to recover on account of certain acts of defendant which he alleges constitute a breach of the contract, and these are combined in one cause of action. It is also unnecessarily long and prolix, consisting of nearly eight typewritten pages. Summarized, it pleads: (1) That on the 6th day of April, 1905, defendant owned a weekly newspaper, known as the "Nebraska Independent," with a printing establishment, consisting of the machinery, material and fixtures usually used in such plants, and particularly described in exhibit B. (2) The defendant had been in the business for ten years and was fully acquainted with the value of the plant, newspaper and subscription list; that these facts were peculiarly within his knowledge, and not within the knowledge of any one else. (3) That the plaintiff was inexperienced in the business and had no knowledge of the value of any of the items; that he had no means of ascertaining the value except as represented by the defendant, and that he relied upon the defendant's statements. (4) That he so informed defendant; that defendant then stated that the representations were based upon his own knowledge, and he would warrant that the property and business was of the value of $12,000; that the physical property was valued $6,000, and the newspaper and subscription list were worth $6,000; that the

type, machinery and appliances were new and in good condition; that the newspaper had a *bona fide* circulation and subscription list of 15,000 names; that the subscription list and other names in the office were not in the hands of any other persons, and that the list then exhibited and furnished by defendant was the only copy in existence; that the business had yielded a net profit of $5,000 a year. (5) That the plaintiff believed these representations and relied upon them, and that while plaintiff was considering the purchase defendant reduced the price to $11,500, and reduced the number of names in the subscription list to 14,000, again representing that this was a *bona fide* subscription list in every respect, and that all the persons represented by said list were *bona fide* subscribers to the paper; that plaintiff, relying upon all of defendant's representations, closed the deal and paid defendant $11,500 for the property. The sixth paragraph specifically and at great length negatives the representations alleged, and pleads their falsity, and the petition ends with allegations of damage and prayer for recovery.

The answer admits the execution of the contracts and the payment of $11,500 for the property, and denies any false representations whatever. It further alleges that shortly prior to the 6th of April, 1905, the plaintiff entered upon an investigation of the books of the business and of the subscription list; that on the 6th of April, by agreement, he took possession of all the property for the purpose of investigation and examination; that he selected one Watkins, a practical and experienced newspaper man, for that purpose, and that Watkins was placed in possession and control of the office and business between the 6th and 18th days of April; that during this time all mail for the newspaper was delivered to the plaintiff, who had possession and control of the property, except the editing and publishing of the paper; that on the 15th of April plaintiff stated he had about concluded not to purchase unless defendant would make a reduction; that negotiations continued during the day, and

defendant finally agreed to sell the property for $11,500; that plaintiff was afforded every opportunity to acquaint himself with the value and extent of the same and of the subscription list, and is now estopped to recover anything from the defendant.

In reply, the plaintiff denies that either by himself or by his agent he entered upon an investigation of the books, subscription list and property; avers that he told defendant he would have to rely entirely upon his representations and statements; denies that he placed Watkins in charge of the plant for the purpose of examining the property; and alleges that Watkins was present in the office of the newspaper with the defendant for the purpose of learning something about the way of running the newspaper and printing plant, so that he would be able to conduct the business. He denies that he complained of the condition or value of the property on April 15, and says that he knew nothing about the value or condition of the property until in May, 1905, and that as soon as he discovered the fraud he demanded that the plaintiff either take the property back and refund the purchase money or pay the damages he had sustained.

The first point made by defendant is that the pleadings do not contain the statement of any fact which affords a basis of an action for fraud and deceit. A large portion of his brief is devoted to a discussion of the proposition that the false representations of the value of the property charged to have been made are not sufficient to support a verdict for deceit. While admitting that it is a general rule, which, however, has many exceptions, that a statement by a vendor of the value of the article he is selling is usually held to be merely the expression of an opinion, "dealer's talk," and not the representation of a fact upon which an action for fraud and deceit might be founded, we believe it unnecessary to consider this point. We will also accept as sound the further proposition that a fraudulent representation must be of a material fact, and that injury must result in order to recover. Tested by these

canons, let us see whether the petition contains any direct and specific statements of fact upon which, if made as alleged, the vendee was entitled to rely, and the truth or falsity of which statements of fact he was not then in a position to know or readily ascertain, and as to which he would be compelled to rely upon defendant's representations.

The first direct statement of fact as to which it was impossible that the plaintiff could acquire any definite and certain knowledge as to its truth or falsity within the time allowed is "that said weekly newspaper had a *bona fide* circulation and subscription list of 15,000 names." The direct representation of this as a fact is alleged, and it is further alleged that "the defendant wilfully and fraudulently put on said subscription list, prior to said sale to this plaintiff, thousands of names which were not *bona fide* subscribers and who had not in any way subscribed for said paper." The fact of whether or not the newspaper had 15,000 *bona fide* subscribers or whether in truth or in fact it only had 1,000 paying subscribers was one of great importance and of much moment in determining whether the publication was or would be in the future a profitable enterprise or whether it was worth the price. The income depended largely on the number of *bona fide* paying subscribers, and, while in the future the patronage might be withdrawn, a *bona fide* list of 14,000 or 15,000 subscribers would be an asset of great value. From its very nature, its genuineness could not be readily ascertained. It was peculiarly within the defendant's knowledge, and, if the representation was false, it would be an actionable deceit.

Another direct representation pleaded is that the subscription list furnished to plaintiff by the defendant was the only copy in existence; that this list and all other names in the office were not in the hands of any other person or persons; and it is charged that the defendant himself had retained a copy of the list and other names as well, and that copies had been taken by other persons

with the knowledge and consent of defendant and were in the hands of other publishers. It is also charged that by reason of this fact another publisher, who had one of these copies, was enabled to circulate an article injurious to plaintiff among the subscribers to the paper. The fact that a rival publisher had a copy of the list might materially affect the value of the business and might entitle plaintiff to recover damages to the extent that he might prove he suffered pecuniary loss in consequence. If he had known of this fact before the purchase, it might, and probably would, have had the effect to make him decline to buy. If made, we think it was a material representation.

Another direct representation set forth is "that said printing and newspaper business had yielded the defendant a net profit of $5,000 a year." This is a fact which was peculiarly within the knowledge of the vendor, and could not be within the knowledge of the vendee, unless true and accurate books of account had been kept for some years previous to the sale, and sufficient opportunity afforded to the vendee to investigate and determine whether such was the fact.

It is also alleged "that the business had not yielded a profit to the defendant of $5,000, or any other sum, a year, but was a losing business when defendant sold it to plaintiff." A direct representation and warranty, as the petition pleads was made, that a certain business produced a net amount of profit per annum is a direct allegation of a fact, upon which a vendor has the right to rely, and which, if false, will support an action for deceit. *Harvey v. Smith,* 17 Ind. 272, is a case very similar to this. It concerned the sale of a newspaper plant and business, and the plaintiff counted upon false representations as to the volume of the subscription list and the profits of the business. The court held that the number of subscribers to the paper and the amount of the business and profits of the establishment were material considerations inducing the purchase, and that the represen-

tations were such as the buyer had a right to rely upon, the matters concerning which they were made being peculiarly within the knowledge of the seller. To the same effect as to the principles involved are *Foley v. Holtry*, 43 Neb. 133; *McKibbin v. Day*, 71 Neb. 280; *Olcott v. Bolton*, 50 Neb. 779; *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794; *Clark v. Ralls*, 24 N. W. (Ia.) 567.

Aside from the denial of the allegations of the petition, the answer and reply present the issue of whether or not the plaintiff made, or was permitted to make, such independent investigation of the facts with reference to the property and subscription list that he should be held to have relied upon this investigation instead of upon the representations, if any, made to him by the defendant. As to this issue, if the proofs supported plaintiff's position, the pleadings would sustain a verdict, if the jury also found the facts stated in the petition to be true. The evidence is not before us, but we are entitled to presume that it conformed to the issues made. This presumption being indulged in, we think the petition pleaded a number of direct representations of fact affecting the value of the property sold, which representations, if false in the particulars alleged, would justify and uphold an action for damages.

For these reasons, the judgment of the district court is

AFFIRMED.

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BEN TROUSIL, APPELLEE, V. JOSEPH W. BAYER, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,834.

1. **Assault and Battery: DAMAGES: PLEADING.** In a civil action for assault and battery, it is unnecessary to specifically allege such damages as are necessary and usual consequences of the act complained of.

2. ———: ———: ———. In such a case, recovery may be had for

all such damages as are shown to have necessarily followed the act from the time of the wrongful act to the time of trial, upon a general plea of the wrongful act of the defendant and the personal injury of the plaintiff.

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

*M. H. Fleming* and *Hastings & Ireland,* for appellant.

*Hall, Woods & Pound* and *Bartos & Bartos, contra.*

LETTON, J.

This is an action to recover damages for assault and battery. Verdict and judgment for plaintiff for $200, and defendant appeals. The principal errors assigned by the defendant are that the damages are excessive, and that the verdict is not sustained by the evidence, and was the result of passion and prejudice.

The evidence shows that the plaintiff, who was a young farmer about 22 years old, was quite severely injured by reason of the assault. The physician who was called to attend him upon the day of the assault testified that the young man was delirious when he arrived at his home; that both eyes were blacked; that his nose was bloody and the bones crushed, and that there was a swollen and bloody place upon his head. There is other evidence as to the severity of the injuries, which, together with that of the physician, was sufficient to sustain a much larger verdict. As to the evidence not being sufficient to support the verdict generally, it is enough to say that, while it was conflicting in its nature, and while it was impossible for all the facts testified to by the witnesses to be true, still, if the jury believed the plaintiff's witnesses, there is no lack of evidence to support the verdict, and it bears no appearance of being the result of anything but careful consideration of the testimony.

It is next contended that the allegations in the petition are such that the plaintiff is not entitled to recover ex-

cept for damages which he suffered before the beginning of the action, and that evidence as to his condition afterwards is not within the issues, and was erroneously admitted. The assault was committed upon the 18th of May, 1907, and the petition was filed upon the 29th of May, 1907. The allegation of the petition in this respect, after setting out the assault and battery in detail, is "that by reason of said assault plaintiff became sick and continued so for a week, and is likely to continue so sick to be for some time to come." Under the allegations in the petition, we think that it was entirely competent for the plaintiff to prove the extent of his injuries and the extent of the physical disability which resulted from the assault and battery. The present injury suffered with all the consequences which directly ensued therefrom constituted a single cause of action, and the plaintiff was entitled to prove the same up to the time of the trial. The petition, while inartistically drawn, is sufficient to allow such recovery. The petition in *Harshman v. Rose,* 50 Neb. 113, had a greater paucity of allegation than the petition in this case, and it was held sufficient to admit evidence of plaintiff's condition up to the time of trial. In an action for assault and battery, special allegations are unnecessary where such damages only are sued for as are necessary or usual consequences of the act complained of. 3 Cyc. 1082. The cases cited by plaintiff are none of them applicable to a cause of action for personal injury.

Defendant also complains of the refusal of the court to admit testimony as to specific acts of the plaintiff for the purpose of proving that he was of a quarrelsome and contentious disposition. But proof of this nature must be as to general reputation, and not as to specific acts. *Golder v. Lund,* 50 Neb. 867.

The form of the judgment is also complained of, since it permits the plaintiff to recover from the defendant "the sum of $200 and interest and costs of suit." While it was unnecessary for the court to render judgment for interest,

the statute providing that interest shall be paid upon judgments, it could in nowise harm the defendant.

A large number of objections were also made to the form and substance of certain questions asked plaintiff upon his examination in chief. Possibly it would not have been error to have sustained the objections to some of these questions, but, as to the greater number of them, we find no error in admitting the testimony. As to the others, while the evidence was perhaps immaterial, we find nothing prejudicial to the defendant.

After considering the whole testimony, we are inclined to think that the appellant ought to thank the jury for letting him off so easily, if they believed the testimony of plaintiff's witnesses. The judgment of the district court is

AFFIRMED.

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JOHN L. CHAN ET AL., APPELLEES, V. CITY OF SOUTH OMAHA, ET AL., APPELLANTS.

FILED NOVEMBER 19, 1909. No. 15,809.

1. **Cities: REPAVEMENT: REMONSTRANCE: "OWNER."** An executor or an administrator in the possession of and exercising complete control over the real property of his decedent, if his authority to remonstrate is not challenged by the heirs or devisees of said decedent, is an owner of such real estate within the meaning of the statute authorizing the owners of 50 per cent. of the foot frontage of real estate subject to special assessments within an improvement district by remonstrating to deprive the city council of power to repave the streets within said district at the expense of the real estate situated therein.

2. ———: ———: ———: ———. A guardian in like control of the real estate of his ward, is also an owner within the meaning of said statute. So, also, the surviving spouse of the owner of a homestead and a tenant in common are owners.

3. ———: ———: ———: SIGNATURE OF CORPORATION. The name of a corporate owner of real estate subject to such an assessment may lawfully be affixed by the president thereof to such a remonstrance.

4. ———: ———: ———: SIGNING BY INITIAL. Names signed by initial which identify the remonstrant by reference to the property owned by the signer should also be received, where objection is not made by the council to the fact that the first name is not signed in full.

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

*W. C. Lambert* and *S. L. Winters,* for appellants.

*A. H. Murdock* and *E. T. Farnsworth, contra.*

ROOT, J.

This is an action to cancel special assessments levied upon plaintiffs' real estate in South Omaha for the purpose of defraying three-fifths of the expense incurred in repaving a part of Twenty-fourth street in said city. Plaintiffs prevailed, and defendants appeal.

The tax was assessed in 1905. In 1903 the legislature by chapter 17, laws 1903, authorized the city of South Omaha to issue bonds to pay for improving street intersections and such parts of streets and alleys as are not subject to special assessments but are within improvement districts. In 1905 the city charter was so amended that streets might be repaved upon the city's initiative, and provided: "No repavement, as herein provided, shall be ordered or made if a remonstrance against the making of the same is filed with the city clerk during the time the ordinance declaring the necessity therefor is pending, which remonstrance shall be signed by the owners of fifty per cent. at least of the foot frontage on the street, or the part thereof to be repaved as the case may be." Laws 1905, ch. 20, sec. 110, subd. XVI. A remonstrance purporting to represent more than 50 per cent. of the foot frontage in said district was filed July 10, 1905, and submitted by the council to the city engineer and the city attorney. The record does not show that the remonstrants were given a hearing on their objections, nor that they

were afforded any opportunity to establish their claim of ownership to the tracts and lots of land represented by them. The city attorney and the city engineer, on the third day after the objections were filed, reported to the council that a frontage of only 5,180 feet was represented by the remonstrance, but in nowise indicated the names rejected. The remonstrance does not seem to have been formally overruled, but from thenceforward was ignored. The statute does not provide that a hearing shall be given the remonstrants if their right to remonstrate or the sufficiency of their number is questioned, so that, whenever the sufficiency of the remonstrance is questioned in court, the fact should be determined without reference to the action of the city officials. The district court found that the owners of 50 per cent. of the foot frontage in said district had remonstrated against the repavement of the street, and that the city council was without jurisdiction to levy the assessments in suit.

1. It appears from the stipulations in the bill of exceptions that the total foot frontage of the district repaved is 2,121.3 feet, and that the United States government is the owner of 130 feet thereof. The 130 feet should be deducted from the entire frontage, leaving 1,991.3 feet. *Armstrong v. Ogden City,* 12 Utah, 476; *Herman v. City of Omaha,* 75 Neb. 489. Defendants admit that all of the signatures to the remonstrance are genuine, and that many of the remonstrants owned the real estate described opposite their names. The issue, therefore, is whether in July, 1905, certain signers of the remonstrance owned lots or parts of lots fronting on twenty-fourth street in said paving district.

2. It seems that John J. Joslin died prior to 1905, the owner of certain lots aggregating 630 feet frontage in said district. By his last will and testament, which has been duly probated in Douglas county, the testator nominated Suviah Joslin and Charles S. Joslin as executrix and executor thereof, and authorized them to sell all of his real estate not specifically devised. He made specific

devises of real estate other than the South Omaha property, created various trusts, authorized his executors to complete improvements on his South Omaha property, and devised the residue of his estate in equal shares to said Suviah Joslin, Charles S. Joslin and one other person. The estate had not been settled in 1905, but all of its assets were in the possession of the executrix and executor, who signed the remonstrance. The remonstrants were owners within the meaning of the statute, *supra*. *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50. Complaint is made that the executrix signs as to certain lots and the executor for the remaining tracts owned by the estate and included in the district, and it is argued that each representative of the estate should have signed the protest as to all of said lots. While it may be necessary for the representatives to act jointly to convey the real estate, a remonstrance signed by either representative for the purpose of protecting the estate is valid.

The respective administrators of the Akofer, Crowell and Eggers estates and the executrix of the last will and testament of William Schmeling, deceased, signed said remonstrance. In each instance the decedent at the time of his demise owned real estate fronting on Twenty-fourth street within said district. In each case the remonstrator was in possession of and managing the estate of his or her decedent. Mrs. Schmeling owned one-third of the real estate represented by her remonstrance, and Mrs. Eggers, Mrs. Akofer and Mrs. Schmeling, respectively, occupied as a home for herself and children the lots represented by her remonstrance, and had so occupied the property preceding the death of her decedent. Mrs. Eggers was also guardian for her infant children. No one disputed the right of any one of said remonstrants to represent the property of the estate, and, under the circumstances, the remonstrant was an owner within the meaning of the statute. The word owner has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. A

moment's reflection will recall that in the criminal law a mere bailee may be the owner of personal property, that the same rule holds good in replevin and trover, and that in condemnation proceedings all persons having any interest, estate or easement by way of lien, charge or incumbrance in the property to be taken is an owner thereof. Many examples may be found by an examination of 6 Words and Phrases, p. 5135 *et seq.* In *Allen v. City of Portland*, 35 Or. 420, and *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 156, it is held that an executor, a guardian or a tenant in common is the owner of land within the meaning of the statute granting owners power identical with that conferred by the Nebraska statute, *supra*. See, also, *Morey v. City of Duluth*, 75 Minn. 221. It may be that, if the heir, devisee or other person entitled to the fee of the lots had denied the right of the remonstrant to represent the estate, the city council would have been justified in rejecting the signatures. The record affirmatively discloses that the authority of the remonstrants was not questioned by any other owner of the property represented by the signers.

We have not lost sight of the cases holding that an administrator or an executor not vested with title to the real estate of his testator is not an owner thereof within the meaning of the statutes directing city authorities to make improvements and levy special assessments to defray the cost thereof upon abutting lots, whenever a certain percentage of such owners petition the authorities to so act. There is sound reason for relaxing the definition in the former and restricting it in the latter instance. In Nebraska, an executor, unless authorized by his testator's will, an administrator or a guardian, cannot sell, convey or in any manner incumber the estate which he represents, except in conformity with an order of court made in proceedings provided therefor by statute, but it is his duty to exert himself under all circumstances to protect and conserve the estate within his possession or under his control. A cotenant also has authority to pro-

tect the property which he holds for the benefit of all of the persons interested therein. In some instances the executor or administrator merely added his title to his signature, and in other cases representatives signed without descriptive or qualifying words other than a reference to the property they were assuming to represent. It is insisted that the quality of those acts is individual, and not representative. *Allen v. City of Portland,* 35 Or. 420, is cited in support of the argument. In that case a title was rejected as surplusage and a signature upheld because the remonstrant owned the land in his individual capacity. And we are of opinion that, if a remonstrant is an owner of real estate in any sense of the word, and no other person claiming to own the identical property challenges the remonstrant's authority to represent said real estate, the municipal authorities cannot lawfully reject the signature for the sole reason that technical words of description are not grammatically included in the signature.

3. The signature of S. Ritchie by his attorney in fact, A. S. Ritchie, should be counted. Ritchie's power of attorney was not recorded at the time the remonstrance was signed, but it had been executed, and authorized the attorney to manage the real estate, lease it, collect rents and remove tenants. The principal never repudiated the act of his attorney, and the city council could not usurp the prerogative of the landowner.

4. Objection is made to the signature of K. Tombrink and of H. Tombrink, each for 60 feet frontage in said district. The litigants have stipulated that Herman Tombrink owned lot 6, block 61, and Katie Tombrink lot 4, block 23. The remonstrance is signed K. Tombrink and H. Tombrink. Mrs. Tombrink testified that she told her husband to sign her name to said remonstrance for her, and that he did so in her presence. The fact that he signed for himself by his initial only ought not to defeat his remonstrance. The signatures are genuine. Each signer is identified in the remonstrance as the owner of a definite

lot or a certain tract of land in the improvement district. No objection seems to have been made that signing by initial did not amount to a legal signature. We think, therefore, that Tombrink's signature should be counted. For the same reasons, the signatures of Peterson, Heafey, Gay, Fisher and McCreary should be counted. Jacob Levy, who signed as J. Levy, was a witness in the case, and testified to signing the remonstrance.

5. Certain property in the district is owned by the Fowler-Cowles Mortgage Company, a corporation, and its name was attached to the remonstrance by its president. All of the corporate stock was then, and still is, owned by the president and his wife. A nominal board of directors was in existence; but the president had possession and control of the property. The board of directors did not authorize the signature; but the stockholders all assented thereto, and have never repudiated this act of the president. The signature was sufficient to warn the city council that the owner of that property was objecting to the repavement.

We also count the signature of C. A. Birney. The testimony of the witness Wilcox, taken altogether, and uncontradicted as it is, establishes that Birney owned the property he purported to represent in the remonstrance. The signatures of Honey and Chandler, tenants in common, have been counted for but 60 feet, being lot 6, block 78. John Carroll's signature is counted. The deed dated July 6, conveying his property, was not delivered until August, subsequent to the enactment of the repavement ordinance. We have not counted the signatures of Rowley, Rudersdorf, Huberman, Frank Wallace or Darling & Sons, nor included the frontage they claimed to represent.

A careful examination of the evidence, assisted by the arguments and briefs of counsel for both sides, convinces us that the proof establishes that the owners of 1,585.3 feet of frontage within the improvement district remonstrated against the repavement thereof, and that the

remonstrance has an excess of 589 feet over the amount required by statute to divest the council of authority to make that improvement at the expense of said property owners.

The judgment of the district court therefore is right, and is

AFFIRMED.

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BANK OF ALMA, APPELLANT, V. DAVID N. HAMILTON ET AL., APPELLEES.

FILED NOVEMBER 19, 1909. No. 15,836.

1. **Equity: LIMITATIONS.** If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions.

2. **Quieting Title: EVIDENCE.** The evidence examined in the opinion, and *held* to sustain the judgment.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*John Everson, W. S. Morlan* and *J. G. Thompson,* for appellant.

*G. Norberg* and *Gomer Thomas, contra.*

ROOT, J.

This is an action to quiet plaintiff's title to a quarter section of land in Harlan county. Defendant Hamilton made a cross-demand for an accounting and prevailed. Plaintiff appeals.

In 1895 Hamilton and a Mr. Gardner traded certain chattels to Mrs. Carpenter for the farm in question, and she, by their direction, conveyed it to plaintiff's cashier. The land was subsequently transferred to plaintiff, and by it sold to a Mr. Robinson, but a deed has not been made to the purchaser. Plaintiff alleges that it has had

adverse possession of the land for more than ten years next preceding the commencement of this suit. Counsel for plaintiff suggests in his briefs, and argued at the bar, that the bank was a mortgagee in possession; that Hamilton's right to redeem accrued more than ten years before this action was instituted and the statute of limitations bars him from any relief. Plaintiff asks for affirmative equitable relief and it should do equity as a condition precedent to receiving any assistance from the court. *Kerr v. McCreary,* 84 Neb. 315. The statute of limitations does not deprive the court of power to impose those conditions. *Hobson v. Huxtable,* 79 Neb. 340.

Coming therefore to the merits of the case, the cashier testifies that he loaned Hamilton and Gardner $600 upon the latter's representation that it was to be used as boot money to close up the trade with Mrs. Carpenter; that title to the land was taken by the witness as security for the payment of that loan; that subsequently he loaned the parties, for Hamilton's exclusive benefit, $100; that the notes have not been paid, but that Gardner, about two years after the execution of the deed, orally renounced all right to redeem the land. Hamilton did not participate in the negotiations which were carried on with plaintiff's cashier by Gardner. Hamilton testifies that no money was paid Mrs. Carpenter in the trade, but that Beddoe, her agent and brother-in-law, received about $100 commission; that the witness did not authorize Gardner to borrow money from the bank or pledge Hamilton's interest in the land. It is argued that the bank ought to recover $700, with interest, because no one explicitly contradicts the cashier's testimony that that amount of money was loaned on the credit of the transfer from Mrs. Carpenter. There is, however, evidence tending strongly to corroborate Hamilton and weaken plaintiff's evidence on this point. In the first place, the $641 note is signed by Gardner alone, whereas the bill for $106 bears the signature of Gardner and Hamilton. At the time the Carpenter deed was made there were unreleased chattel

mortgages from Gardner to plaintiff and to its cashier, aggregating $2,000, on file with the county clerk of Harlan county. Gardner and the cashier testified that the former owed little, if anything, to the mortgagees, and they were protecting Gardner's property from seizure by his creditors; but it is probable that Gardner did owe those mortgagees considerable money at the time the deed was made, and that the $641 note evidenced part of that debt. No entries in the records of the bank or in the private books of its cashier were produced to show that anything was paid to Gardner or Hamilton about the time the larger note was given. True, there is evidence to the effect that mice had mutilated some of these records; but the bank's cashbooks for that period were intact, and confessedly did not contain any evidence relevant in this case. Gardner, an intimate friend and one time business associate of the cashier, testified for plaintiff, and states that he has forgotten all of the details of the transaction. Carpenter and Beddoe were not produced, nor their testimony taken, and the evidence fairly preponderates in favor of a finding that the woman was not paid any cash consideration in the trade, nor her agent more than $100, which is evidenced by the smaller note. Finally, the bond for a deed was signed one day, and acknowledged two days subsequent to the date of the larger note. It was prepared by plaintiff's vice-president, a practicing attorney, and signed by the cashier. The cashier testified that he always examined documents before signing them, and probably read the bond before signing his name thereto, although he does not remember the fact. Documents executed contemporaneous with a transaction in dispute become landmarks by which to correct, adjust and supply the imperfections and uncertainties of memory. They supply convincing evidence of controverted facts and will be construed most strongly against their author. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) *62; *Miller v. Cotten*, 5 Ga. 341; *Thomas v. Paul*, 87 Wis. 607; 1 Moore, Facts, sec. 11.

Considering all of the evidence, the trial court was justified in finding that Hamilton's interest in the land was not pledged for payment of the $600 note. The amount found due him is $774.61. Counsel for plaintiff assert that upon any theory of the case the judgment is excessive, but fails to furnish dates and amounts from which a computation should be made according to his scheme, and does not make the calculation himself. It is evident from the briefs that some allowance was made the cashier for services rendered, and the record indicates that Hamilton is not given credit for the use of the grass land. It also appears from the evidence, although such an issue was not presented by the pleadings, that each of the notes is tainted by usury. If credit is given plaintiff for $700 with 10 per cent. simple interest thereon to the date of the sale of the farm, for taxes paid with 10 per cent. interest thereon, and $5 a year for collecting rents, and it is charged with $1,900, the net consideration of said sale, there is a balance due Hamilton of $694.45. If Hamilton's share is not to be held for any part of the $600 note, there is due him $840.52. He does not ask to have the decree of the district court modified, and plaintiff has no just cause for complaint.

The judgment of the district court is

AFFIRMED.

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## WILLIAM HENDERSON V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1909. No. 16,219.

1. **Rape: EVIDENCE.** In prosecutions for rape, where the defendant testifies and unequivocally denies committing the offense, the testimony of the prosecutrix as to the main fact must be corroborated to uphold a conviction.

2. ———: ———. In such a case, after the prosecutrix has testified to a commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that, recently after

the alleged outrage, she made complaint to those to whom a statement of such an occurrence would naturally be made; but on direct examination such testimony should be confined to the bare fact that complaint was made, and details of the event, including the identity of the person accused, are not proper subjects of inquiry, unless the complaint was a spontaneous unpremeditated statement so closely connected with the act as to be part of the *res gestæ*.

3. ———: INSTRUCTIONS. In the trial of a case for rape, it is error for the court to inform the jury that such complaint is a corroborating circumstance, but the jury should be permitted to give it such weight in that regard as to them may seem proper.

4. Cases Distinguished. *Fitzgerald v. State*, 78 Neb. 1, and *Mott v. State*, 83 Neb. 226, distinguished.

ERROR to the district court for Grant county: JAMES R. HANNA, JUDGE. *Reversed.*

*W. A. Prince*, for plaintiff in error.

*William T. Thompson, Attorney General*, and *George W. Ayres, contra.*

ROOT, J.

Plaintiff in error was convicted in the district court for Grant county of the crime of rape, charged to have been committed upon one Emma C. Biles, forcibly and against her will. Henderson testified in his own behalf, and admitted the fact of sexual intercourse, but stated that it was with the woman's consent. The woman made complaint to her husband about 20 hours after the event, and they were permitted, over defendant's objections, to testify to that fact. The court instructed the jury that, unless the prosecutrix was corroborated upon material points, they ought not to convict the defendant. Instruction numbered 12 was also given, and is as follows: "The jury are instructed that, if you believe from the evidence that the prosecuting witness told her husband of the assault alleged to have been made on her, at the earliest opportunity, then that is a corroborating circumstance tending to sustain the truth of her statements."

Defendant urges that the court thereby invaded the province of the jury, and that in no event could the prosecutrix by any act or statement of her own corroborate her testimony as to the criminal act. *Fitzgerald v. State,* 78 Neb. 1, is cited by the defendant. In that case the defendant was not arrested until after the prosecutrix gave birth to an illegitimate child, and theretofore she had made no complaint. The only evidence purporting to corroborate the prosecutrix was proof that about the time she became pregnant she was frequently in defendant's company. It was properly held that a conviction could not be sustained upon that state of facts because of the lack of corroborative evidence. *Mott v. State,* 83 Neb. 226, is also cited. In that case the prosecutrix made no complaint until in an advanced state of pregnancy. Upon a consideration of all of the facts in that case, it will be understood that the point now considered was not involved. The gist of that decision is that the testimony of the prosecutrix concerning independent collateral facts will not be received in corroboration of her testimony relative to the main fact. It was furthermore held that the evidence was insufficient to sustain the verdict.

In *Garrison v. People,* 6 Neb. 274, we held that it was not error for the court to refuse to instruct the jury that it could not convict the defendant upon the unsupported testimony of the prosecutrix. In *Mathews v. State,* 19 Neb. 330, the attention of the profession was drawn to the fact that in *Garrison v. People, supra,* a bill of exceptions of the evidence had not been preserved, and that it was not intended in that case to hold that a conviction of rape would be sustained upon the testimony of the prosecutrix, if her sworn statements were disputed by other testimony, and "there were no marks upon her person or clothing showing a recent struggle, *or no complaint as soon after the occurrence as an opportunity offered.*" In *Murphy v. State,* 15 Neb. 383, the prosecutrix testified that the defendant, a colored man in her husband's employ, came into her room as she was packing a trunk, and ravished her.

She made no complaint until after arriving in Burlington, Iowa, the next day. It was held that it was for the jury, in the light of explanatory evidence submitted by the state, to say whether her complaint under all of the circumstances should be considered in corroboration of the main fact testified to by her. In *Wood v. State,* 46 Neb. 58, it was held that such testimony may be received in corroboration of the main fact. So, also, in *State v. Meyers,* 46 Neb. 152, we held that such testimony may be received as corroborative, but not independent, evidence of the main fact. This view of the law is fully sustained in a discussion of the subject written by the lamented Maxwell, for many years a member of this court. 32 Cent. Law J. 102. But, while the injured female is permitted to show by her own testimony and that of others cognizant of the fact that she made complaint, we do not think that the details thereof, when not part of the *res gestæ,* should be received on her direct examination or as part of the state's case in chief. In *Oleson v. State,* 11 Neb. 276, we accepted with approval Professor Greenleaf's definition of the law of this subject; that is to say, that the prosecutrix may only be asked "whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no." In *Wood v. State, supra,* Judge IRVINE, in his inimitable manner, discusses the philosophy of the rule, and it may be said to be well established in the jurisprudence of this state. It is possible that counsel in their ardor may succeed in inducing the trial court to permit the prosecutrix and those to whom she makes her statement to give the details thereof, on the theory that thereby they are simply testifying to her *complaint,* but a discriminating examination of our decisions upon that subject will instruct the student that, where the complaint did not form part of the *res gestæ* of the transaction, the fact of the complaint, but not its details, may be shown on direct examination in the state's case in chief. *Regina v. Osborne,* Car. & Mar. (Eng.) *622; *Bray v. State,* 131 Ala. 46; *Thompson v. State,* 38 Ind. 39; *Stevens*

*v. People,* 158 Ill. 111; *State v. Daugherty,* 63 Kan. 473; *Johnson v. State,* 21 Tex. App. 368; *State v. Niles,* 47 Vt. 82; *Brogy v. Commonwealth,* 10 Grat. (Va.) 722; *Stephen v. State,* 11 Ga. 225; *Commonwealth v. Phillips,* 162 Mass. 504. Of course, if the defendant desires to draw out the facts on cross-examination of the witness, he may do so, and in that event the ordinary rules governing the redirect examination of witnesses will apply. The time that elapsed between the alleged commission of the offense and the making of the complaint will not, as a matter of law, always control the admissibility of the testimony. *State v. Niles, supra; Murphy v. State,* 15 Neb. 383.

Counsel for defendant cite Iowa decisions, but they have reference to a statute which provides that a defendant cannot be convicted of rape unless the prosecutrix "be corroborated by other evidence tending to connect the defendant with the commission of the offense." In the application of that statute, the courts of our sister state hold that the prosecutrix cannot by her own testimony furnish that corroboration. Proving that the prosecutrix has been ravished and establishing that a defendant is the guilty man are very different propositions, and evidence tending to corroborate one fact does not necessarily nor logically confirm the other. We recognize the distinction, and, in the absence of a statute on the subject, hold that the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established. *Younger v. State,* 80 Neb. 201. In Iowa it is held that evidence to the effect that the prosecutrix did make complaint corroborates her testimony concerning the main fact. *State v. Peterson,* 110 Ia. 647; *State v. Carpenter,* 124 Ia. 5; *State v. Ralston,* 139 Ia. 44. In the instant case the fact that the prosecutrix made complaint to her husband may or may not tend to support her testimony that she had been ravished, and the court should have permitted the jury to say whether that fact corroborated her or not. The jury should not have been told that testimony *is* corrobo-

rative. The jury, with propriety, might have been told that, if they found from the evidence that the prosecutrix made timely complaint to her husband, they might consider that fact in connection with the other facts and circumstances established by the evidence, in ascertaining whether the woman had been corroborated in her sworn statement that she had been ravished. From a consideration of the authorities heretofore cited, it will also be apparent that the state ought not to have been permitted to prove by Mr. Biles, over defendant's objections, the details of the woman's complaint. In *Younger v. State,* 80 Neb. 201, the statement made by the prosecutrix was part of the *res gestæ,* and therefore not within the general rule. As there must be a new trial of this case, we refrain from commenting upon the evidence.

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

REVERSED.

LETTON, J., concurring.

I concur. I think it was error to give the fourteenth instruction, which is identical with the one which was given in *Cardwell v. State,* 60 Neb. 480, because, while applicable to the facts in that case, it is not at all applicable to the facts in this.

Further, I am of the opinion that the evidence does not sustain the verdict.

FAWCETT, J., concurs.

AMELIA S. JOHNSON, APPELLEE, V. WILLIAM DAHLE, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,798.

1. **Bastards:** EVIDENCE. In a prosecution for bastardy, proof that defendant promised to marry complainant, when informed of her pregnancy, may be admitted to corroborate her testimony as to paternity, where the promise was voluntarily made without reference to a compromise or settlement.

2. **Appeal:** EXCLUSION OF WITNESSES: REVIEW. An order excusing a witness without permitting him to testify for the reason that he violated a rule excluding witnesses from the courtroom cannot be reviewed in absence of an exception.

3. ———: ———: HARMLESS ERROR. An order excusing a witness without permitting him to testify for the reason that he violated a rule excluding witnesses from the courtroom cannot be made the basis of a reversal, where the record fails to show that appellant was prejudiced by the ruling.

4. ———: DISCRETION OF COURT. Whether complainant's answer to a question at a preliminary hearing in a bastardy case should be read a second time to the jury in the district court, because misstated by her counsel in his argument, is a matter for the determination of the trial court, and its ruling thereon will only be reversed for an abuse of discretion.

APPEAL from the district court for Polk county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

*John C. Martin* and *E. E. Stanton,* for appellant.

*King & Bittner* and *Mills, Mills & Beebe, contra.*

ROSE, J.

This is an appeal by defendant from a judgment of filiation directing him to pay $1,200 for the maintenance of plaintiff's child. Some question is raised as to the sufficiency of the evidence, but it is ample in every respect to justify the jury's verdict of guilty.

At the trial plaintiff and her father were permitted to testify that in their presence defendant was informed of

plaintiff's pregnancy, and that he confessed he was to blame and offered to marry her. The admission of this testimony is assigned as error, within the meaning of the rule that a defendant's rejected offer to compromise a contemplated prosecution for bastardy by marrying complainant is not admissible in evidence. *Lisy v. Dufek,* 50 Neb. 226; *Robb v. Hewitt,* 39 Neb. 217; *Olson v. Peterson,* 33 Neb. 358. In the present case there was no suit pending between the parties at the time the offer was made, and plaintiff's proofs indicated that no intention of a purpose to bring one had been communicated to defendant. Plaintiff and her father stated there had been no attempt on their part to make a compromise, and that the admission of guilt and offer of marriage were voluntarily made without threat or inducement. On the testimony as it appears in the record the trial court was fully justified in admitting proof of the proposal under the rule that defendant's promise to marry complainant, if voluntarily made with knowledge of her pregnancy, but not as an offer of compromise or settlement, may be received to corroborate her testimony on the question of paternity. *Woodward v. Shaw,* 18 Me. 304; *Laney v. State,* 109 Ala. 34. This assignment of error must therefore be overruled.

At the beginning of the trial the court on the urgent request of defendant adopted a peremptory rule for the separation of witnesses on penalty of excluding from the stand any one who should remain in the courtroom and listen to testimony. In violation of this rule defendant himself offered as a witness Art. A. Johnson. Objection was made by plaintiff. The court enforced the rule and would not permit the witness to testify. This is also made the basis of an assignment of error, but it cannot be considered for the reason the record fails to disclose an exception to the order excusing the witness. Henning Larsen was also offered as a witness on behalf of defendant, but was excused on the same ground without having been permitted to testify. There was an ex-

ception to this ruling, which is likewise assigned as error. The objection to the court's holding is based on the following circumstances as viewed from defendant's standpoint: Larsen had not been subpœnaed as a witness, but was in the courtroom, heard part of plaintiff's testimony just before an evening adjournment, and immediately thereafter notified defendant for the first time of material facts at variance with statements made by plaintiff in her testimony. Upon the opening of court next morning these circumstances were disclosed and Larsen was called as a witness. Defendant insists he was not at fault and ought not to be deprived of the benefit of Larsen's testimony. The question thus presented requires a reference to some of the proofs. Plaintiff in corroborating her direct evidence testified that defendant on the evening of October 6, 1906, took her to Stromsburg, for the second time, to Dr. Flippin for the purpose of procuring an abortion, and that defendant and the physician tried to induce her to submit to an operation for that purpose. When the court excused Larsen as a witness without permitting him to testify, defendant offered to prove by him that on the evening of October 6, 1906, shortly after 6 o'clock, Larsen drove with defendant from the latter's residence to the village of Clarks to attend lodge, remained with defendant until 10 or 11 o'clock and then drove home with him. There was no offer to prove any other fact by Larsen. Plaintiff's corroborating testimony that defendant took her to a physician October 6, 1906, for the purpose stated had already been contradicted by both defendant and Dr. Flippin. Defendant's criticism of the court's ruling as stated in his brief is: "The testimony offered and rejected directly impeached the complainant as to her statements as to when and where such attempt was made." The testimony which defendant thus intended to impeach in a civil suit related to a mere corroborating circumstance, and not to the direct, convincing evidence on which the verdict is based. If the witness had been allowed to testify and the offered

proof had been excluded in the regular course of examination, the rulings to that effect would not have required a reversal on account of prejudice, when viewed in the light of the entire record. It is therefore unnecessary to determine whether the court erred in excusing the witness Larsen without permitting him to testify.

Misconduct of counsel for plaintiff in the argument to the jury and an erroneous ruling in reference thereto are the remaining points. A controversy arose between opposing counsel with respect to a variance in plaintiff's testimony at the preliminary hearing before the county court and at the trial in the district court. Defendant insists that counsel for plaintiff misstated one of her answers, and that the trial court refused to correct the misstatement or to have the testimony read to the jury. The jury heard the testimony, including that reduced to writing by the county judge. While opposing counsel disagreed, the record does not show that either the jury or the court had any misapprehension as to what plaintiff said at either hearing. The jury did not ask the court to restate any of the evidence or to have any part of it read. The trial court in its discretion was the judge of whether either was necessary or proper, or whether both propositions should be ignored. It left the jury to their recollection of the testimony, and instructed them that on behalf of defendant it was their duty to consider any variations in plaintiff's testimony before the county court and before the jury. The trial court did not correct any statement of plaintiff's counsel further than to refer the jury to the evidence, and the record does not show any abuse of discretion in that respect or in refusing to restate or read the statement in dispute.

No prejudicial error appearing in the proceedings below, the judgment is

AFFIRMED.

FAWCETT, J.

I think the evidence is wholly insufficient, and that the

court erred in excluding the testimony of the witness Larsen.

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JULIUS THIELE, APPELLANT, V. J. E. L. CAREY, APPELLEE.

FILED NOVEMBER 19, 1909. No. 15,808.

1. **Pleading**: SUFFICIENCY. A petition disclosing by alleged facts that defendant received a payment of purchase money on a land contract which was terminated under circumstances showing that in justice and fairness the money ought to be returned to plaintiff states a cause of action.
2. **Limitation of Actions**: ACTION FOR MONEY HAD AND RECEIVED. The statute of limitations does not begin to run against an action for money had and received, where the suit is brought by a purchaser of land for the sole purpose of recovering a payment thereon under a contract violated by defendant, until the contract has been terminated.

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

*T. M. Franse,* for appellant.

*Moodie & Burke, contra.*

ROSE, J.

This is an action to recover back a payment of $50 on the purchase price of 244 acres of land in Cuming county under a petition containing allegations to the effect that defendant agreed to convey the land to plaintiff for $12,810 and subsequently repudiated the contract. Defendant demurred on the grounds that the petition does not state facts sufficient to constitute a cause of action and that the action is barred by the statute of limitations. The district court sustained the demurrer on both grounds. Plaintiff refused to plead further and the action was dismissed. This is an appeal by plaintiff.

The questions presented require an examination of the

petition, which alleges, in substance, that on June 10, 1902, plaintiff by his agent, William Givens, purchased from defendant 244 acres of land in Cuming county at $52.50 an acre, and as a partial payment gave Givens a $50 check for defendant, who cashed it and retained the money with full knowledge that plaintiff was purchaser and that Givens acted as plaintiff's agent; that defendant agreed to convey the land within a reasonable time and to furnish an abstract showing good title, whereupon plaintiff was to pay $12,760, the remainder of the purchase price; that the check was indorsed by Givens, and that it was in the following form: "West Point, Neb., June 10, 1902. Pay to the order of William Givens ($50) fifty and no-100 dollars. J. Thiele. Part payment on land deal for J. E. L. Carey land. Paid June 14, 1902. Nebraska State Bank, West Point, Nebraska"; that upon the giving of the check defendant gave a receipt as follows: "June 10, 1902. Received from William Givens $50 on farm for two weeks. J. E. L. Carey. Witnessed by C. L. Stockman"; that plaintiff at all times has been and is now ready to perform his part of the contract, and has at all times insisted and now insists upon its performance; that the failure to perform was and is exclusively the fault and neglect of defendant; that plaintiff frequently, until the commencement of the suit, demanded performance of the contract, but defendant rescinded the same and refused to perform; that on July 15, 1903, plaintiff and his agent again demanded performance and the execution of a deed, and that defendant then repudiated his agreement, rescinded the contract, and stated he would not be bound by it and would never deed the property to plaintiff; that at the time of making the contract defendant had no title to a portion of the land, 160 acres in extent, having acquired title thereto December 14, 1905, and conveyed the same February 28, 1906, to Johann Brehmer for $8,574.15, thereby divesting himself of the power to keep his agreement. The prayer is for judgment for $50 and interest from June 10, 1902.

The holdings of the trial court that the petition is insufficient and that the action is barred by the statute of limitations lead to an inquiry into the nature of plaintiff's cause of action, if one exists under the facts pleaded. The petition does not state that plaintiff entered into possession of the premises under his contract, and consequently no question of surrendering possession is material to the inquiry. It is clear the pleader did not attempt to sue for damages for breach of contract. The only relief sought is a recovery of the purchase money paid and interest, the consideration for the payment having failed. Plaintiff might have brought a suit on the contract for a breach of its provisions, and might have asked to recover the $50 payment as an item of damages. Such a suit could have been brought as soon as vendor refused to perform. *Beck v. Staats,* 80 Neb. 482. This, however, he did not do. The petition nevertheless states a cause of action, if the facts alleged bring plaintiff's case within the well-established rule that a party who has made a payment of purchase money on a contract which has been rescinded under circumstances entitling him to a return of the amount paid may recover the same in an action for money had and received. *White v. Wood,* 15 Ala. 358; *Scott v. Wallick,* 24 Ind. 124; *Hunt v. Sanders,* 1 A. K. Marsh. (Ky.) *552; *Wright v. Dickinson,* 67 Mich. 580; *Davis v. Strobridge,* 44 Mich. 157; *Atkinson v. Scott,* 36 Mich. 18; *Taylor v. Read,* 19 Minn. 372; *Weaver v. Bentley,* 1 Caines (N. Y.) *47; *Bier v. Smith,* 25 W. Va. 830; *Simmons v. Putnam,* 11 Wis. *193; *Tollensen v. Gunderson,* 1 Wis. 103. While an action for money had and received is not recognized by the code, the courts of this state have authority to apply the principle on which it rests. Excluding immaterial statements as to defendant's breach of contract by refusal to perform, enough is alleged in the petition to show that defendant received and retained $50 of purchase money which in justice and fairness he ought to return to plaintiff, and the latter's remedy under the facts stated is a civil action in the na-

ture of one for money had and received. *School District v. Thompson,* 51 Neb. 857.

The next inquiry is: When did the statute of limitations begin to run? The answer to this question depends on the date when the cause of action accrued. As long as the contract of purchase was in force, plaintiff could not maintain an action of this nature. Such an action will not lie until the contract has been terminated. *Middleport Woolen Mills Co. v. Titus,* 35 Ohio St. 253; *Towers v. Barrett,* 1 T. R. (Eng.) 133; *Simmons v. Putnam,* 11 Wis. *193. In *Chesapeake & Ohio Canal Co. v. Knapp,* 9 Pet. (U. S.) *541, *565, the supreme court of the United States said: "There can be no doubt that where the special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it."

It is positively stated in the petition that defendant rescinded the contract July 15, 1903, and declared he would never deed the property to plaintiff. To that time at least plaintiff demanded performance and stood upon the contract. After that date he acquiesced in the rescission, elected to consider the contract at an end, and brought suit for the sole purpose of recovering his payment of purchase money. Until the contract was actually at an end by his consent to the rescission, plaintiff had a right to insist on performance. As long as plaintiff was in good faith demanding a conveyance under the contract, when it was in force, he could not maintain a suit to recover back the payment made. In *Simmons v. Putnam,* 11 Wis. *193, it is said: "If the contract is not rescinded, but remains open and in force, an action for money had and received would not lie to recover back the consideration paid, but the remedy was an action for damages." It follows, therefore, that the statute of limitations does not begin to run against an action for money had and received, when brought for the sole purpose of recovering

back a payment made under a contract to purchase land, until the agreement has been rescinded or otherwise terminated. *Collins v. Thayer,* 74 Ill. 138; *Walker's Assignee v. Walker,* 21 Ky. Law Rep. 1521, 55 S. W. 726; *Richards v. Allen,* 17 Me. 296; *Fogal v. Page,* 13 N. Y. Supp. 656. In the present case the check through which defendant received the money was marked paid June 14, 1902, but it does not appear on the face of the petition that the contract had been terminated at a date earlier than July 15, 1903. Defendant admits the suit was commenced May 4, 1907. The time between these dates being less than four years, the petition does not show on its face that the action was barred. The contrary holding of the trial court was therefore erroneous.

REVERSED.

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H. F. MILLER, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 19, 1909. No. 15,794.

1. Carriers: LIABILITY. "A common carrier of live stock cannot, by contract with a shipper, relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence." *Chicago, R. I. & P. R. Co. v. Witty,* 32 Neb. 275.
2. ———: ———. The acts of congress examined and referred to in the opinion *held* not to in any manner supersede or amend the rule at common law with reference to the liability of a common carrier for its negligence in the transportation of property by interstate shipments.

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

*James E. Kelby* and *Arthur R. Wells,* for appellant.

*Sullivan & Squires, contra.*

FAWCETT, J.

On September 18, 1906, plaintiff shipped two stallions from Cambria, Iowa, over defendant's railroad to Broken

Bow, Nebraska. While the animals were in transit, the bedding in the car in which they were loaded caught fire and one of the stallions died as a result of inhaling the flames and smoke from the fire. This action was brought to recover $2,000, the alleged value of the stallion. Defendant by its amended answer alleged that the shipment was interstate; that the rate of charge for the transportation of the animal depended upon and was proportioned to the value of said horse, which value was fixed and declared by plaintiff; that plaintiff was advised of the rate to be charged, and that a greater rate would be charged for a greater value; that plaintiff placed the value of $100 on said horse, upon which valuation the freight rate was assessed, and that by reason thereof plaintiff obtained the benefit of the lower rate determined by the value fixed by him, rather than the higher rate placed on a higher valuation according to the tariffs and classifications of defendant published and in force according to law at the time, whereby plaintiff is bound by said valuation, and in no event can he recover more than $100 for the loss of the horse. For reply to this amended answer, plaintiff set up the statute of the state of Iowa, which provided that no contract, rule or regulation should exempt any railroad corporation from its liability as a common carrier, and denied that he agreed to the valuation fixed upon the horse, or authorized any other person or agent to agree for him as to what the valuation of said horse was at the time of the shipment, and never agreed that the defendant was to be relieved from any liability which it might incur with reference to, or in connection with, said shipment. There was a trial to a jury, which resulted in a verdict for plaintiff for $1,315.50. Judgment was rendered upon the verdict, and defendant appeals.

Defendant in its brief states the real questions in controversy thus: "The defendant requested the trial court to give a series of instructions numbered 2, 3 and 4, to the effect that the plaintiff was bound by the provisions of the tariffs under which the rate of charge for transporting

the animals had been fixed, and could recover not to exceed $100 and interest from the date of shipment. The court refused the instructions asked by defendant, and gave to the jury instructions 9, 10 and 11, wherein he told the jury that the defendant was subject to all the liabilities of a common carrier of said horse; that a contract between the shipper and the carrier, which limits the liability of the carrier or relieves it entirely or partially from damages for the loss of such stock, is void and of no effect, and that the defendant must answer for the full value of the animal. * * * The rulings on these instructions severally were assigned as grounds of the motion for a new trial, which was overruled, and errors assigned thereon. It is to secure a review of these errors that this appeal is prosecuted. * * * Stated in its simplest terms, the question is whether the liability of the defendant for the loss of the horse is governed by the laws of Nebraska or by the laws of the United States with reference to which and in compliance with which the tariffs of the carrier had been published and filed."

The contract relied upon by defendant contains a provision to the effect that the shipper had been offered by the railroad company alternative rates proportioned to the value of said animal, said value being fixed and declared by the shipper or his agent, and that the shipper, in order to avail himself of said alternative rates and to secure the benefits thereof, declared the value of each of the said animals to be $100. The rate charged for the transportation of the animal was the rate fixed by the tariffs based upon the value declared in the contract of $100 a head. The record fairly sustains plaintiff's resume of the evidence as contained in his brief, viz.: That while the horses were en route, near the town of Hastings, in the state of Iowa, while the train was pulling up a steep grade, a fire originated in the car in which the horse was placed, caused probably by the sparks from the engine. As a result of the fire, the horse in controversy was burned and injured so that he died in the car somewhere between

Lincoln and Broken Bow, in the state of Nebraska. The occupants of an adjoining freight car discovered the fire and notified the engineer and train crew of that fact. The engineer and train crew made no immediate effort to extinguish the fire, but continued to run the train, while the car was burning, until they reached the top of the grade. Those who discovered the fire carried water from some barrels in a box car, and later from the engine tender, while the train was still running, and tried to extinguish the fire, but were unable to do so. With full knowledge of the burning car, the engineer refused to stop his train until as above indicated. That plaintiff did not personally load and bill the horse, nor was he present when the same was done. That his brother, Luther Miller, had this done. That Luther Miller did not personally superintend the loading or procure the bill of lading, but had one L. O. Nelson, an employee, do so. Nelson was not expressly authorized to waive any of plaintiff's rights, to fix any rates for shipment of the horse, or to agree to any value of the horse less than its true value. There was no conversation between Nelson and the company's agent as to the rate charged for shipment, the value of the horse, or of the conditions of the contract of shipment. After loading the horse upon the car, Nelson hurriedly went into the depot and procured the bill of lading. That the agent of the company had inserted in the contract of shipment as the value of the horse the sum of $100, and by the terms of the contract to which Nelson signed the name of Luther Miller, and not the name of the plaintiff, the company's liability in connection with the shipment and the loss or injury to the horse was limited to the sum of $100. No freight was paid for the horses at the initial point of shipment, but freight was paid at the point of destination for the live horse, which was shipped with the horse involved in this case. The contract upon which defendant relies is substantially set out in defendant's amended answer.

The law in force in the state of Iowa at the time the

shipment was made (code, sec. 2074) was as follows: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Section 4, art. XI of the constitution of Nebraska, is as follows: "The liability of railroad corporations as common carriers shall never be limited." If the law governing this shipment is to be found in the sections of the Iowa statute and Nebraska constitution above quoted, defendant's appeal is clearly without merit. But defendant insists that it is not bound by these sections, for the reason that the powers of congress over interstate commerce are plenary, and that legislation by congress supersedes any state laws which may have been theretofore in force; that the acts of congress regulating interstate commerce constitute a comprehensive body of law for the regulation of that commerce and of the rights and duties of those who engage therein; that the rights of the shipper and the duties of the carrier as to rates charged and service furnished and liabilities incurred in interstate commerce are fixed and determined by the tariffs which are published and filed by the carrier with the interstate commerce commission in pursuance to acts of congress; that to compel the defendant to pay the judgment rendered in this case would be to force it to violate the federal statutes regulating interstate commerce; that the reasonableness of the rate charged or the regulation of the tariffs as to the liability assumed by the carrier cannot be inquired into in this proceeding. In support of its contention, the defendant calls attention to the act of congress to regulate commerce, approved February 4, 1887 (24 U. S. St. at Large, ch. 104, p. 379), the amendatory acts approved March 2, 1889 (25 U. S. St. at Large, ch. 382, p. 855), February 10, 1891 (26 U. S. St. at Large, ch. 128, p. 743), and February 8, 1895 (28 U. S. St. at Large, ch. 61, p. 643), the Elkins act, approved February 19, 1903, and the

Hepburn act, approved June 29, 1906, amending both the original interstate act and the Elkins act. Defendant quotes from the amended section 6 of the interstate commerce act as follows: "That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * * No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 34 U. S. St. at Large, pt. 1, ch. 3591, p. 586.

Defendant also quotes from the Elkins act as amended by the Hepburn act, as follows: "The wilful failure upon

the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor; * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * * Whenever any carrier files with the interstate commerce commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act." 34 U. S. St. at Large, pt. 1, ch. 3591, p. 587.

Counsel for defendant also quote from and place great reliance upon *Armour Co. v. United States,* 209 U. S. 56, and *Hart v. Pennsylvania R. Co.,* 112 U. S. 331. *Hart v. Pennsylvania R. Co.* was a very similar case indeed to the one at bar; and, if it were to be accepted as authority in this state, it would be conclusive of the defendant's right to a reversal of the judgment complained of. But that case has been previously cited to this court in numerous other cases, among which are: *Chicago, R. I. & P. R. Co. v. Witty,* 32 Neb. 275; *Atchison, T. & S. F. R. Co. v. Lawler,* 40 Neb. 356; *Chicago, B. & Q. R. Co. v. Gardiner,* 51 Neb. 70; *Pennsylvania Co. v. Kennard Glass*

*& Paint Co.*, 59 Neb. 435. In all of these cases this court disregarded *Hart v. Pennsylvania R. Co.*, and adhered to the rule announced in *Chicago, R. I. & P. R. Co. v. Witty, supra,* that "a common carrier of live stock cannot, by contract with a shipper, relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence." In that case, speaking through Mr. Justice NORVAL, we said: "The recovery in this case is placed solely upon the ground of the negligence of the plaintiff in error in handling of its cars. As the stipulation in the contract, under which the horse in question was shipped, relieved the carrier from all liability for damages, excepting those which should result from its own gross negligence, such provision is contrary to sound public policy, and is therefore void. It is claimed that the limitation in the contract, as to the amount of damages in case of loss or injury, does not tend to exempt the carrier from liability for negligence. The authorities cited in brief of plaintiff in error (among which was *Hart v. Pennsylvania R. Co., supra*) so hold; but we are unable to draw such a distinction. If a carrier cannot, by stipulation, be relieved from liability for its negligence, it is equally clear, for the same reason, that it cannot, by contract with the shipper, limit the amount of damages resulting from such negligence. If the plaintiff in error can lawfully stipulate that the damages shall not exceed $100, it could likewise contract that it should not be more than $25, or any smaller sum, thereby practically relieving itself from all responsibility for injuries occasioned by its own negligence. That would be accomplishing indirectly what it could not lawfully do directly."

Even if we did not feel bound by our former holdings as above set forth, we think that defendant must fail in its contention that the acts of congress relied upon have in any manner superseded or modified the rule at common law, or the right of a state to determine the liability

of a common carrier for its negligence in the transportation of property by even interstate shipments. Section 7 of the Hepburn act amends section 20 of the interstate commerce act. Paragraph 11 of section 20, as fixed by this amendment, provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liabilities hereby imposed: *Provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." 34 U. S. St. at Large, pt. 1, ch. 3591, p. 595.

There is much force in plaintiff's contention that this amendment was "designed to destroy the precedent that might have arisen by virtue of the *Hart* case." Certain it is that no case, since the adoption of that amendment, has been cited sustaining that case. In attempting to distinguish the cases of *Chicago, M. & St. P. R. Co. v. Solan,* 169 U. S. 133, *Pennsylvania R. Co. v. Hughes,* 191 U. S. 477, and *Martin v. Pittsburg & L. E. R. Co.,* 203 U. S. 284, counsel for defendant concede that, "prior to the passage of the amendments to the interstate commerce laws which are known as the Elkins act, which became effective February 19, 1903, and the Hepburn act, which was approved June 29, 1906, and became effective August 28, 1906, it was held that the state statutes forbidding contracts limiting liability were valid and enforceable as applied to interstate shipments." This concession by defendant repudiates *Hart v. Pennsylvania R. Co., supra,* as an authority. That case having been decided

November 24, 1884, long before the passage of any of the acts of congress relied upon, and being at variance with the later cases above cited, which admittedly establish the rule existing at and prior to the passage of those acts, it is eliminated as an authority upon the question under consideration. This leaves, as the only point for determination, defendant's contention, that the acts of congress referred to have superseded the statute of Iowa and constitution of Nebraska, and that the liability of defendant is fixed and to be determined by the tariffs which had been published and filed by defendant with the interstate commerce commission pursuant to said acts of congress. In holding, as we do, that this contention must fail, it is not necessary to consider the power of the congress to supersede the constitution and laws of a state. It is sufficient to say that we do not think the acts of congress referred to were designed to have such effect. That the constitutional inhibition against limiting its liability, by a railroad company, as was attempted to be done in the case at bar, is not only just, but in harmony with a sound public policy, is settled law in this jurisdiction. *Chicago, R. I. & P. R. Co. v. Witty,* 32 Neb. 275; *Atchison, T. & S. F. R. Co. v. Lawler,* 40 Neb. 356; *Chicago, B. & Q. R. Co. v. Gardiner,* 51 Neb. 70; *Pennsylvania Co. v. Kennard Glass & Paint Co.,* 59 Neb. 435.

The contention that plaintiff is estopped by the valuation stated in the contract of shipment cannot be sustained. Such a limitation is prohibited by both the statute of the state in which the shipment originated and the constitution of the state in which delivery was to be made, and is therefore void. If the rate agreed to be paid for the shipment under such void contract were not the correct rate, it did not bind either party, and would not have done so had it been paid in advance. If too low, the agent at the point of delivery could have demanded the shortage. If too high, the shipper could have demanded a return of the excess. Moreover, if the value fixed in the contract is binding upon a shipper, it is equally so upon

the carrier, and, under the doctrine of estoppel contended for, the shipper could fix the value of a very inferior animal at a ridiculously high amount and, in case of loss, collect from the carrier such fictitious value. The old adage, "It is a poor rule that does not work both ways," would seem to be apropos.

The negligence of defendant and amount of plaintiff's damage having been fully established, the judgment of the district court is

AFFIRMED.

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SUMMIT LUMBER COMPANY, APPELLANT, V. CORNELL-YALE COMPANY, APPELLEE.

FILED NOVEMBER 19, 1909. No. 15,831.

Appearance: JURISDICTION. "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.

APPEAL from the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*James I. Rhea,* for appellant.

*Charles C. St. Clair, contra.*

FAWCETT, J.

Plaintiff brought suit against defendant in the county court of Phelps county claiming damages for breach of a contract to ship a number of car-loads of lumber. The defendant being a nonresident, service was attempted to be had by publication after an attachment and garnishment. Defendant made what it termed a special appearance, and filed a motion as follows: "Comes now the de-

fendant, the Summit Lumber Co., a corporation, and, appearing specially and making a special appearance only for the purpose herein mentioned, objects to the jurisdiction of the court over the person of the defendant, and the subject matter in controversy, by virtue of the attachment proceedings, and moves the court to quash the writ of attachment and garnishee proceedings for the following reasons: Because the facts stated in the petition are not sufficient to justify the issuance of the attachment and garnishee, for the reason that the claim attached and garnisheed upon is for an unliquidated sum in damages; for the reason that no personal service has been had upon the defendant; for the reason that the attachment and garnishee proceedings are founded on an alleged claim for unliquidated damages and not a debt or demand arising upon contract, judgment or decree, and the grounds for the alleged attachment being that the defendant is a foreign corporation." The county court discharged the attachment and released the garnishee, but held that the motion above set out constituted a general appearance. Subsequently the case was called and set down for hearing on the original petition. Whereupon defendant filed the following objections to the jurisdiction of the court: "Comes now the defendant in the above entitled action, appearing specially and only for the purpose herein mentioned, and objects to the jurisdiction of the court over the person of this defendant and the subject matter of this action for the following reasons, to wit: (1) For the reason that this defendant has not been served with summons in this action and no jurisdiction obtained over the person of this defendant, it being a foreign corporation, and the only notice given of the pending of this action being by publication in a newspaper. (2) For the reason that the jurisdiction of the subject matter was attempted to be obtained by attachment proceedings which had been declared void and quashed by this court, and for that this court has no jurisdiction of the subject matter by reason of the invalidity of said attachment proceedings along

with the fact that this defendant is a foreign corporation and has not been served with summons herein." The objections were overruled, and judgment entered in favor of the plaintiff. Defendant then prosecuted proceedings in error to the district court. The district court found that there was no error in the proceedings of the lower court, and affirmed the judgment of the county court, with costs. A motion for a new trial was filed and overruled, and defendant appeals.

The only question argued here is that the district court erred in affirming the judgment of the county court. *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, adhered to on rehearing at page 273, is conclusive against defendant upon the point contended for. In that case the alleged special appearance read: "Comes now specially the above named defendant, for the sole purpose of objecting to the jurisdiction of the court and for no other purpose, and submits the court is without jurisdiction of the subject matter or of the person of the defendant for the following reasons: * * * (5) That the defendant is a foreign cooperative and mutual insurance company, doing business in the state of Nebraska only by virtue of license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson county or in the state of Nebraska, and the plaintiff is not now, nor ever has been, a resident or citizen of the state of Nebraska." On the rehearing of that case we held: "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." Under the authority of that case, which is in harmony with the holdings of this court, ever since *Cropsey v. Wiggenhorn*, 3 Neb. 108, defendant's appeal must fail.

The judgment of the district court is therefore

AFFIRMED.

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BEDILIA WARD, APPELLEE, V. ÆTNA LIFE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 19, 1909. No. 16,275.

1. **Insurance:** INSTRUCTIONS. In an action on a policy of accident insurance, which provides that the company shall be liable for the death of the assured resulting from bodily injuries effected through external, violent and accidental means which, independently of all other causes, produced his death, it is error to instruct the jury that there may be a recovery under such policy if they find that the death resulted proximately and as the moving cause of the accident, where "there were other causes that accelerated, or, even being added, resulted in death."

2. **Appeal:** INSTRUCTIONS. And when such an instruction has been given, and the jury while considering of their verdict request a further instruction from the court as to whether or not they are permitted to render a verdict for the plaintiff if they find that the death of the assured "was caused by the sum of the two causes," the court should answer said request, "No"; and a refusal so to do, when requested by defendant, is reversible error.

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

*Greene, Breckenridge & Matters,* for appellant.

*John M. Macfarland* and *Weaver & Giller, contra.*

FAWCETT, J.

This case is before us for the second time. Our former opinion by Mr. Commissioner CALKINS, 82 Neb. 499, contains a fair statement of the case. It is true the testimony of some of the physicians, notably that of Dr. Smith, makes the case somewhat stronger for defendant. Still, on the whole record, we are again constrained to hold that we cannot determine as a matter of law that there was

not sufficient evidence to take the case to the jury. The district court instructed the jury prior to the argument of the case by counsel. Defendant by its second instruction requested the court to charge the jury as follows: "The only question in this case is whether the death of Frank Ward resulted solely from bodily injuries effected through external, violent and accidental means which, independently of all other causes, produced his death. You are instructed that there is no presumption that the death of Frank Ward resulted from the accident which he sustained August 1, 1905, and the burden of proof rests upon the plaintiff to establish by the preponderance of the testimony that the accident of August 1, independently of all other causes, produced Ward's death on the 17th of August following; and, if you find that the death of Ward resulted from sickness which would not have been fatal but for the lowered vitality which followed his injury, the sickness, and not the lowered vitality, was the cause of the death, and your verdict in such case will be for the defendant." The court refused to give the instruction, but gave in lieu thereof its instruction numbered 6½, as follows: "6½. You are instructed that there is no presumption that the death of Frank Ward resulted from the accident which he sustained August 1, 1905, and the burden of proof rests upon the plaintiff to establish by the preponderance of the testimony that the accident of August 1, independently of other causes, produced Ward's death on the 17th day of August following; and, if you find that the death of Ward resulted from sickness which would not have been fatal but for the lowered vitality which followed his injury, the sickness, and not the lowered vitality, was the cause of the death, and your verdict in such case will be for the defendant."

The arguments were not concluded on the day the instructions were given. On the coming in of court on the following morning, the court, on its own motion, gave to the jury instruction numbered 6¾, as follows: "6¾. You are instructed that as to instruction 6½ further you are

not to construe instruction 6½ as meaning that there could be no recovery in case you should find that the death resulted proximately and as the moving cause from the accident of August 1, 1905, because there were other causes that accelerated, or, even being added, resulted in death. If the cause of death was later sickness as a moving cause, accelerated by a weakened condition resulting from the accident that was not the moving cause, then there can be no recovery. If the cause of death was the accident, its results being quickened or accelerated by later conditions, then there may be recovery. This instruction is added to those previously given by reason of the words 'independent of other causes' in their relative use in said 6½."

The giving of this instruction was error. The court in the first paragraph thereof says: "You are not to construe instruction 6½ as meaning that there could be no recovery in case you should find that the death resulted proximately and as the moving cause from the accident of August 1, 1905, because there were other causes that accelerated, or, even being added, resulted in death." We think the court went too far in using the words "or, even being added, resulted in death." If a beneficiary under an accident policy can add other causes than those resulting from the accident and base a recovery upon the death of the assured from such added causes, there would be no limit to the liability of an accident insurance company, and the conditions in its policy would be valueless. That these words had great weight with the jury is evident from what occurred after they had retired to consider of their verdict. After the jury had been out for some time they returned into court and propounded the following question: "To the Court: Your Honor: Does the first paragraph of instruction No. 6¾ permit the jury to render a verdict for the plaintiff if they find that the death of Frank Ward was caused by the sum of the two causes?" This question shows unusual intelligence on the part of the jury in considering instructions given by

the court. When the question was asked, defendant's counsel requested the court to answer the question, "No." This the court refused to do, and indorsed upon defendant's request, and also upon the request of the jury, the following: "The court, concluding that the point has been sufficiently charged with reference thereto, does not instruct further." This was error. Plaintiff was not entitled to recover if death was caused by the sum of these two causes, and the court should have answered the question of the jury, "No," as requested.

The evidence upon which a liability on the part of the company is claimed is of so unsatisfactory a character that the trial court should exercise great care in instructing the jury as to the law of the case. Other points are discussed at some length, but we think they are all fairly covered by our former opinion.

For the errors above indicated, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

LETTON, J. I concur in the result because I am of opinion that the evidence does not sustain the verdict.

REESE, C. J., dissenting.

I do not contend that the judgment of the district court should be affirmed, but I cannot agree that there was error in the instructions given, nor in refusing to give the ones not given. I think instruction numbered 6½ fully and correctly stated the law. Neither can I agree that the court erred in giving instruction numbered 6¾. If the *cause* of the death was the accident referred to, the fact that the result was quickened or accelerated by later conditions would not relieve the defendant. In order to have that effect I think the cause of the death should be the "later conditions." If the accident were of so serious a nature as to *cause the death,* it would make no difference

if other conditions, not sufficient to cause the death, should intervene, even though they rendered the prospect of recovery more doubtful, or quickened or accelerated the dissolution.

I also think the district court did not err in refusing to answer the question propounded by the jury. They had been sufficiently and properly instructed upon that point. To have answered "No" would have been equivalent to saying that "if there were anything else the matter" with deceased at the time of his death there could be no recovery. If the accident was the proximate (nearest) cause of the death the defendant would be liable, notwithstanding there might be other conditions which might quicken or hasten the decease. Ailments of even a trivial nature might, when added to the cause, hasten the end and yet defendant be liable. In that event the death would be owing, in a sense, to the sum of the causes, at least that might and probably would have been the construction the jury would have adopted. When we consider the instructions already given it seems clear to me that the court had gone far enough.

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FRUIT DISPATCH COMPANY, APPELLEE, V. BERNARD GILINSKY, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,743.

OPINION on motion for rehearing of case reported in 84 Neb. 821. *Former opinion modified and rehearing denied.*

PER CURIAM.

Defendant insists, in a supplemental brief for a rehearing, that the fourth paragraph of the syllabus and so much of the opinion as refers thereto do not state the law, nor respond to the facts in the case. There is apparent, but

not actual, ground for complaint. Plaintiff pleaded the Iowa statute of frauds and the interpretation given thereto by the supreme court of Iowa. Defendant, among other defenses in his answer, alleges that the contract in suit is void because no note with respect thereto had been subscribed by him, and he had not accepted nor received said bananas or any part thereof, nor paid any part of the purchase price therefor. The case was tried on the theory that the transaction was controlled by the laws of Iowa. Defendant requested the court to instruct the jury that the bananas had not been delivered to defendant, "but that they were tendered to the defendant in Council Bluffs, Iowa, and if you find that at the time they were tendered to the defendant in Council Bluffs, Iowa, the bananas were green, clean and in good condition, you should find for the plaintiff, but, if they were not green, clean and in good condition when they were tendered to the defendant in Council Bluffs on November 12, 1905, then your verdict must be for the defendant." Nowhere in the record of the trial is there any evidence that defendant presented the Nebraska statute of frauds as a defense. In defendant's brief first filed in this court the only reference to the statute is that the proof does not establish a delivery of the bananas. In the brief for a rehearing the statute of frauds is not mentioned, but in the supplemental brief for the first time defendant insists that principle of law controls the rights of the parties, and was erroneously applied in the opinion of Judge ROSE. It is elementary that a party in an action at law will not be permitted in this court to abandon the theory upon which he tried his case in the district court and predicate error upon rulings of the trial court which were fair when considered in the light of that theory. The Nebraska statute of frauds is immaterial in view of defendant's conduct in the district court. Whether the Iowa statute should control, had defendant insisted in the district court upon the protection of the Nebraska statute, is immaterial, and will not be determined in the condition of the record.

The fourth paragraph of the syllabus and so much of the opinion as refers to defendant having urged the Iowa statute of frauds as a defense are therefore withdrawn. The other matters referred to in the motion for a rehearing have been considered, but do not justify a rehearing.

The motion for a rehearing is

OVERRULED.

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GLENN L. METZGER ET AL., APPELLEES, V. ROYAL NEIGHBORS OF AMERICA, APPELLANT.*

FILED DECEMBER 14, 1909. No. 15,852.

Appeal: DISMISSAL. Where the record in a law action shows the filing of a motion for a new trial, but no ruling thereon by the trial court, the appeal will be dismissed as prematurely taken.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Appeal dismissed.*

*John D. Dennison, Jr., C. M. Miller* and *Perry & Lambe,* for appellant.

*John Everson* and *J. G. Thompson, contra.*

PER CURIAM.

This is an appeal from the district court for Harlan county. The action is for the amount alleged to be due upon a benefit certificate issued by defendant upon the life of Mary A. Metzger, now deceased. There was a jury trial, which resulted in a verdict in favor of plaintiffs, and upon which a judgment was immediately rendered. A motion for a new trial was filed, but the record shows no action thereon by the court. This being true, the appeal is prematurely taken, and the proceeding will for that reason have to be dismissed, which is done.

APPEAL DISMISSED.

* Judgment of dismissal vacated, and case resubmitted.

FLORENCE E. SEWALL ET AL., APPELLANTS, V. HELEN J. WHITON, APPELLEE.

FILED DECEMBER 14, 1909. No. 15,948.

APPEAL from the district court for Rock county: JAMES J. HARRINGTON, JUDGE. *Appeal dismissed.*

*F. M. B. O'Linn,* for appellants.

*Arthur F. Mullen* and *James A. Douglas, contra.*

PER CURIAM.

This is an action in partition. The plaintiffs alleged that they were each the owner of an undivided one-third of a certain parcel of land. The defendant admitted she was in possession of the premises, but denied the title of the plaintiffs to an undivided one-half interest to the property; asserted title thereto in herself; prayed that the title be quieted in her, and that the plaintiffs be enjoined from asserting any right, claim or interest in the same. She further prayed for partition and an accounting. The reply denied these allegations. The action was tried to the court, which found for the defendant; granted her affirmative relief; ordered the premises partitioned, and appointed referees to make partition. This appeal is from this judgment and order.

Defendant has filed a motion to dismiss the appeal, asserting that the judgment from which the appeal is attempted to be taken is an interlocutory order and that this court has no jurisdiction to pass upon the question presented by the record.

We deem it advisable, in this connection, to point out the proper method of practice in appeals in partition cases where an issue is raised upon a question of title.

In *Seymour v. Ricketts*, 21 Neb. 240, it is pointed out

that it is a general rule in an action for partition where the title of plaintiff is denied that the partition proceedings will be suspended to give the plaintiff a reasonable opportunity to try his title at law, and the court will, in the meantime, retain the petition. This case was followed in *Phillips v. Dorris,* 56 Neb. 293. In *Schimpf v. Rhodewald,* 62 Neb. 105, the action was begun as an action for partition; but, when it was disclosed that a question of title was involved, the court properly ordered that the title be first tried as in an action of ejectment. Afterwards, by agreement of parties, a jury was waived and the issues as to title tried to the court, and at the same time the court also tried the right of partition. The proceedings in partition were suspended upon bringing the action here, and, upon the judgment being affirmed, the case was remanded for further partition proceedings. See, also, *Fisher v. Fisher,* 80 Neb. 145. In neither of those cases was the question now before us raised.

We think there is no conflict in the cases to which our attention has been called. When a petition has been filed asking for partition, if the plaintiff's title is controverted, the parties have a right to suspend the partition proceedings until the question of title is determined, either by a jury or by the court. A judgment rendered upon the issue of title alone is a final judgment, from which appeal will lie, and which may be reviewed by this court while the partition proceedings are suspended. If, however, the parties unite the issues and litigate the question of title and the right to partition at the same time, and the court determines both questions in the same judgment, such a judgment or order is only one step in the partition proceedings, is interlocutory in its nature, and cannot be reviewed until the final decree of partition, or until sale and confirmation. *Schick v. Whitcomb,* 68 Neb. 784. The order complained of in this case is of this interlocutory character, and cannot be reviewed until the end of the partition proceedings. *Skallberg v. Skallberg,* 84 Neb. 717; *Vrana v. Vrana, ante,* p. 128.

The appeal therefore is premature, and the motion must be sustained.

APPEAL DISMISSED.

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OLIVER P. CARTER ET AL., APPELLEES, V. HENRY ROBERTS, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,801.

1. Sales: PLACE OF DELIVERY: DAMAGES. Plaintiffs sent to defendant a bid for grain by the car-load on track at defendant's place of business, fixing the price they were willing to pay and a time within which the grain was to be furnished. Defendant responded by telegraph, accepting the bid and agreeing to furnish a stated number of bushels of the kind and quality of grain named in the bid. Plaintiffs replied by letter, confirming the purchase "your track, subject to our card conditions," etc. Defendant failed to furnish all the grain promised. In an action on the contract for damages for nonperformance, it is *held* that defendant's place of business where the grain was to be placed in cars on the track was the place of delivery, and that the market price of the grain at the place of delivery was to be considered in estimating the damages, if any were sustained by the purchaser.
2. ———: CONTRACT: CONSTRUCTION. In such case, where the bid contained the provision that, if the grain was not shipped within the specified time, the contract would be held open until the shipment was made or it was closed by the bidder, the bidder would have a reasonable time, after the expiration of the period named, in which to close it.
3. ———: ———: ACTION FOR BREACH: INSTRUCTIONS. Under the facts set out in the opinion, it is *held* that the court properly instructed the jury that plaintiffs were under no obligation to purchase grain in the markets of the place to which the grain was to be consigned for the purpose of supplying the quantity of grain which defendant had undertaken to furnish.

APPEAL from the district court for Burt county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

*F. Dolezal* and *J. A. Singhaus,* for appellant.

*F. S. Berry* and *Hopewell & Hopewell, contra.*

REESE, C. J.

This action was instituted by plaintiffs and against defendant in the district court for Burt county. It appears from the record that plaintiffs were dealers in grain, with their principal place of business in the city of Minneapolis, Minnesota. Their method of transacting business was by sending what are termed "card bids" to the dealers in grain throughout the country, by which they offered to purchase grain by the car-load at the station of the seller, at the price fixed in the bid, less freight charges, the rate of such charges being furnished in a separate statement, and changed or modified when changes or modifications were made for transportation by the carriers or transportation companies. After the freight rates were furnished to the dealers they continued in force until changed by the carriers. The card bids were in the following form; the price offered being placed opposite the kind and quality of grain referred to:

"CARTER, SAMMIS & CO.
GRAIN DEALERS.
907 Chamber of Commerce,
Minneapolis, Minn.

"Acceptance to reach us by wire 9:30 o'clock A. M. tomorrow or next business day. We bid you for grain on board cars your station, 'less freight as per our letter,' and billed as we may direct. 'Apparent errors excepted.' We give state weight and grades on all purchases. Acceptance reaching us later than time specified will be accepted if no material change in the market, otherwise we will send prompt counter bid by wire. 3 white oats, —; 4 white oats, —; 3 yel. corn, —; 3 mixed corn, —; 2 rye, —; 1 nor. wheat, —; 2 nor. wheat, —; 2 Durum wheat, —; 1 flax, —. Ship, —. Mail us samples of BARLEY for special bids.

"Shipments at your station at your convenience before 20 days. 700 bu. a car wheat, flax, corn and rye. 1,200

bu. car oats. We charge terminal weighing and inspection, and freight on dockage on wheat, flax and rye. Acceptance for over 10 cars subject to our confirmation. If grain is not shipped within specified time, we consider contract open until shipped or advised you that we have closed same. Grain grading other than purchased will be applied on purchase, market difference, day of arrival. 48 lbs. to a bushel of barley. Consignments will receive careful attention."

Printed on the right hand margin of the card is the following:

"Are you figuring daily what these bids net your track."

In answer to the receipt of the card bids, defendant telegraphed plaintiffs, on various occasions, agreeing to furnish the quantity of grain given in the telegram, and plaintiffs replied confirming the purchase. It is alleged in the petition, in three counts thereof, that at the dates alleged the plaintiffs purchased of defendant, in the manner stated, the number of bushels set out in each count, but that defendant failed to furnish the quantity purchased, although partial shipments were made, and that plaintiffs had been damaged by such failure in the amounts named in the petition. The pleadings are quite voluminous and need not be here set out. The answer consists of averments of considerable length, by which the allegations of the petition, except as to the agreements to sell, are traversed, and defendant's theory of the case stated. It is alleged in the petition that the grain was purchased to be delivered in cars at the station from which it was to be shipped, while it is claimed in the answer that the delivery was to be made at Minneapolis, or such other point as might be designated by plaintiffs as the place of delivery. There was no verbal or oral agreement between the parties. All the written evidence consists of letters and telegrams which passed between them. The correspondence cannot be here set out without extending this opinion to an unreasonable length, and no effort will be made to do so. When a card bid was re-

ceived by defendant he would send plaintiffs a telegram, of which the one of July 9, 1906, may serve as an illustration. It was as follows: "Tekamah, Neb., July 9. To Carter, Sammis & Co. Accept your bid on twenty thousand three white oats. Henry Roberts." To this plaintiffs responded by letter as follows: "Minneapolis, Minn., July 9, 1906. Henry Roberts, Tekamah, Neb. We herewith confirm purchase of you today by wire of 20,000 bu. 3 white oats @ 27⅞ your track subject to our card conditions Sep. or Oct. shipment. Please ship same to CARTER, SAMMIS & CO., and draw on us at MINNEAPOLIS, MINN., with bill lading attached to draft. Shipping instructions later on. CARTER, SAMMIS & CO. De Veau."

There were three agreements of the kind above set forth, all being substantially alike, except as to the kind and quantity of grain to be shipped, and upon these three agreements arise the three causes of action stated in the petition. An important question arises upon these contracts as to the place of delivery. It is contended by defendant that the place of delivery was at Minneapolis, or such other point as plaintiffs might direct, and that the market at Tekamah, or other points from which the grain was to be shipped, could not furnish the true measure of damages, if any were sustained, by the nonfulfilment of the contract by defendant; that had the grain been damaged, lost or destroyed in transit, or on the track at Tekamah, the loss would have fallen on defendant; and that the title could not pass to plaintiffs until the grain was delivered to and received by them at Minneapolis. The trial court instructed the jury, in substance, that the place of delivery was on board the cars on track at the place of shipment, and that the market price at such place would furnish the basis for their calculations, and that if defendant had failed to comply with the contract in the delivery of grain, and the jury found for plaintiffs, the measure of damages would be the difference between the contract price and the value

at the time the grain should have been delivered, if the value exceeded the purchase price. As we view the question presented, we are persuaded that it is settled by our decisions in *Van Valkenburgh & Son v. Gregg,* 45 Neb. 654, and *McKee v. Bainter,* 52 Neb. 604. Those cases were in some respects similar to this one, and the question of law involved was the same as here, and it was held that the place of delivery was, as specified in the contract, "on track" at the point of shipment. The card bid in this case was: "We bid you for grain on board cars your station, 'less freight as per our letter,' and billed as we may direct." The answer to this was by wire accepting the bid and specifying the number of bushels sold. The letter from plaintiffs to defendant, dated the same day as the telegram of acceptance, confirmed the purchase "your track" subject to card conditions, etc. The district court did not err in its construction of the contract.

The evidence shows that by agreement of the parties the contracts were extended to various dates after the expiration of the 20 days, and that they were finally closed by plaintiffs after defendant had refused to furnish the remainder of the grain due plaintiffs. The tendency of the market was upward, and the question as to whether plaintiffs had closed the contract within a reasonable time after the expiration of the time agreed upon was submitted to the jury by proper instructions. We find no error in this part of the case.

There was some correspondence between the parties that when defendant failed to get and deliver the grain, as per contract, plaintiffs might purchase on the market at Minneapolis sufficient in quantity to complete the delivery, and in some instances the purchases were made. In others the grain could not be had at a reasonable price in that market. On October 27, 1906, defendant wrote plaintiffs the following letter: "Tekamah, Neb., Oct. 27, 1906. Carter, Sammis & Co., Minneapolis, Minn. Gentlemen: We are going to telegraph you in a day or two asking you what price you can buy in the other

20,000 bu. of oats at. When we do we want you to answer us by wire within half an hour after you receive our message. The way you have been doing in not answering except by letter the day following, when we ask you for any information, has cost us already 5 to $600, and we want you to give our questions immediate attention. We have only three more days to close out that 20,000 bu. oats, and if you don't want to answer because of the expense of the telegram we will pay the expense of your telegram. Yours truly, Henry Roberts." Whether the promised telegram was sent or not, we do not know, as we fail to find it in the record before us, but we do not deem this material, as plaintiffs wrote defendant October 29, two days later, as follows: "Minneapolis, Minn., Oct. 29, 1906. Mr. Henry Roberts, Tekamah, Neb. Dear Sir: Received your favor of Oct. 27, and we wrote you a short line yesterday stating that you could have thirty days more time in which to deliver the 20,000 bushels of oats, if necessary. Now the chances are that we have got to have the oats on this sale, as we have been filling up some sales in Omaha with other oats that we intended these oats for. When you get ready to ship these oats, why let us know, and we will give you shipping instructions on the same. Now in regard to your telegrams about your oats. Will state that it isn't the easiest thing on earth to be able to buy some oats that will fill our sales, as, for instance, we have sales made against the oats we bought of you in Omaha, and we were only lucky to be able to buy a few here the other day to fill up the 10,000. We can't figure on this market here in Minneapolis as a basis to buy in your oats on. Awaiting your favors, we remain, Yours truly, Carter, Sammis & Co. De Veau."

This was followed by a letter from defendant to plaintiffs, dated October 29, accepting the extension of time offered, and the contract was continued in force. On this part of the case the court instructed the jury that there was no evidence submitted which would warrant them in finding that plaintiffs were in any way bound to

buy in the oats for defendant on the Minneapolis market. We have examined the bill of exceptions with all the care and diligence at our command, and can find nothing, either admitted or offered, which tends to show any obligation on the part of plaintiffs to make such purchases. True, they expressed a willingness to do so if desired, upon the payment of their usual commission therefor, but there was no binding contract to do so.

In defendant's answer he presented three counterclaims. The first was founded upon the alleged failure of plaintiffs to make the purchases referred to on the Minneapolis market. On this the court properly instructed the jury that nothing could be allowed defendant. As to the second and third, the instructions were that they were admitted and the amounts due defendant thereon agreed to, which amounts were stated in the instructions.

Finding no reversible error in the proceedings in the district court, the judgment is

AFFIRMED.

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W. S. GILMAN, APPELLEE, V. ALMIDA A. IRWIN, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,837.

**Ejectment:** ADVERSE POSSESSION: EVIDENCE. On a trial in an action in ejectment where the defense was that the premises involved had been in the open, adverse and continued possession of the defendant for more than the statutory period of limitation, and the trial court found upon sufficient evidence that the possession of the defendant, although for more than ten years, had been under and by permission and license of plaintiff's grantors, the question of the competency and sufficiency of plaintiff's proof of ownership is not material, and the judgment in favor of plaintiff for the possession of the property will be affirmed.

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

*Alfred Pizey* and *J. J. McAllister,* for appellant.

*H. A. McManus* and *M. C. Beck, contra.*

REESE, C. J.

This is an action in ejectment which was instituted in the district court for Dakota county for the possession of lots 4, 5 and 6, block 53, Covington Annex to South Sioux City, in said county. The petition is in the usual form. The answer consists of (1) a general denial of the averments of the petition; (2) a plea of the statute of limitations; (3) an averment alleging the open, notorious, exclusive, continuous, adverse possession of the property as owner thereof from about the 1st day of October, 1880, until the commencement of the suit, which occurred in 1906. The prayer of defendant is that her right and title be established and declared paramount and superior to that of plaintiff, and for general relief. Plaintiff replied (1) by a general denial of the averments of the answer; (2) alleged that the cause of action did not arise within ten years; and (3) that the possession was not adverse, but that it was subservient to plaintiff's title, and with the consent and permission of plaintiff's grantors, that it was that of an agent, and that improvements made by defendant were made by the consent and permission and at the request of plaintiff's grantors. The cause was tried to the court without the intervention of a jury, a jury trial having been waived by both parties in open court.

The finding and judgment were in favor of plaintiff, and defendant appeals. The specific finding, hereafter stated, is that the plaintiff is the owner in fee of the property and entitled to the immediate possession of the same; that "defendant entered into possession of said premises under and by virtue of a verbal license with plaintiff's grantors, and wrongfully and unlawfully withholds possession thereof from plaintiff. By reason thereof plaintiff has been damaged in the sum of ten dollars." The

judgment, following the finding, is in the usual form of judgments in such cases, and included the recovery of the $10 damages. The evidence shows that the land on which the town site of Covington was located was government land, and that the patent therefor was issued to the board of trustees of the town of Covington under the town site act of congress on the second day of July, 1860, and that the property in dispute, with a large number of other lots, was deeded to Francis Hattenbach by Thomas L. Griffey, the chairman of the board of trustees for said town, November 12, 1858. The grantee subsequently died testate, devising his estate to his seven children, share and share alike, and his will was duly admitted to probate. By subsequent conveyances the property in dispute was deeded to plaintiff. A number of questions involving alleged errors on the part of the court in the admission of documentary evidence are urged, and it is claimed that by following the rules of evidence in their application to the case plaintiff has failed to establish his title by competent proof, and that, if the rule that plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary, be applied, the judgment must be reversed and a new trial granted.

As we view the case and the rule to be applied in its final solution and decision, these questions lose their importance and become immaterial. If, as the court found, the defendant's possession of the property was by the permission and consent of plaintiff's grantors, it would seem that the possession was not adverse, that it was subservient to their title, and, under the well-known rule that the possession of a tenant or a licensee is the possession of the landlord or licensor, and the title of the landlord or licensor may not be disputed while such possession continues, the judgment will have to be affirmed without reference to the quality, or even the existence, of the landlord's title. Upon this part of the case the evidence was contradictory. Indeed the cause was largely tried upon this issue. It is clearly shown, is in fact conceded, that

defendant and her husband, during his lifetime, were in possession of the property to the extent of inclosing it with a fence and the construction of minor buildings thereon for the convenience of the occupancy of defendant's home, which is on an adjoining lot, for more than ten years. The evidence upon the question of the permissive use of the property was such that, had the decision and judgment been in favor of defendant, it is quite probable that such finding and judgment would have merited an affirmance; but we are persuaded that if the evidence can be said to preponderate in either direction it is in favor of plaintiff, and we therefore the more readily affirm the judgment. While the evidence of plaintiff and his witnesses is contradicted by defendant and some of her witnesses, the fact remains that the evidence on the part of plaintiff, if true, establishes the license or permission of defendant to occupy and use the lots in dispute; that such permission was recognized on many occasions by her; that she, although in possession for many years over and above the ten years' limitation, never paid any taxes assessed against the property until a short time previous to the institution of the suit; that she and her husband, while he lived, were authorized to look after and care for the property of plaintiff's grantor, consisting of some 80 lots in the town; that she and they acted under such authority; that they were authorized to act as agents with reference to the property and claimed to be such, pointing out and designating the lots in controversy, as well as others, as the property of the Hattenbachs; that she on several occasions complained to them of the condition of the sidewalks along the line of the lots; and that her authority and that of her husband were in writing, although the writing itself was not produced nor introduced in evidence. As we have said, much if not all this evidence was contradicted by the defense, but the question of the weight of the testimony of the witnesses, all of whom were before the court, was largely for the solution of the court who heard and saw them, and observed

their demeanor and apparent candor in testifying. Under the circumstances we would not feel justified in disturbing the judgment of the court upon that part of the case.

Complaint is made in the brief of appellant that the court erred in rendering judgment for $10 damages, no damages having been proved. This objection to the judgment cannot be examined, since no mention of the alleged error is made in the motion for a new trial.

The judgment of the district court is

AFFIRMED.

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WILLIAM W. WHITE, APPELLEE, V. ANNA S. MCCULLOUGH ET AL., APPELLANTS.

FILED DECEMBER 14, 1909. No. 16,299.

**Intoxicating Liquors:** LICENSE: PETITION. Upon a hearing of an application for a license to sell malt, spirituous and vinous liquors in the village of B., it was stipulated that said village contained 43 resident freeholders and no more. The petition of the applicant contained 23 names. Two of the signers were members of the village board, but did not vote on the question of the issuance of the license, although both were present and testified as witnesses for the applicant upon the hearing. The evidence failed to show that one of the signers was a resident of the village of B., and no proof was offered that the name of another person appended to the petition was signed by her or with her knowledge or consent. *Held*, That under a general denial, and specific denials that the petition was signed by a majority of the resident freeholders of the village, the license should be refused.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

*William E. Shuman*, for appellants.

*H. D. Rhea* and *W. A. Stewart, contra.*

REESE, C. J.

Appellee, White, filed a petition before the board of trustees of the village of Brady for a license to sell malt,

spirituous and vinous liquors within that village. A remonstrance was filed, and a hearing was had before three members of the board, and the license was granted. The remonstrants appealed to the district court, where the action of the board in granting the license was affirmed. They appeal to this court.

The first contention made by appellants is upon the question of the board to act under the notice of his application as published by the appellee. The notice was, substantially, in the usual form, except that it closed with the following language: "If there be no objection, remonstrance or proest filed within two weeks from May 15, A. D. 1909, said license will be granted." The notice was published May 21, 28, and June 4. The "two weeks from May 15" would end May 29, which would be prior to the last publication and one day after the second publication. It is contended that this publication, being jurisdictional, did not give authority to the board to act at any time. Without deciding whether the two weeks' notice required by the statute should date from the first or second publication, that question not having been presented, we must hold that, since no objection is made to the notice except as to the clause above quoted, the remonstrants not having been misled or deprived of any right to object to the issuance of the license, the clause will be treated as surplusage and the notice not vitiated thereby.

So far as is shown by the record before us, the first meeting of the board at which any action was taken upon the application for the license was held June 5, which was one day after the last, and eight days after the second, publication. It is recited in the record of that meeting that the chairman stated that the purpose of the meeting was to set a time for the hearing of the remonstrance against the issuance of the license to W. W. White. The record then recites that "the board, having previously ascertained that Thursday, June 10th, '09, would be agreeable to the contending parties, hereby set

the time for the hearing of said remonstrance at 9 o'clock A. M., Thursday, June 10th, '09," when the board adjourned. The next meeting of the board was held June 9, at which Mr. Ritenour, a member and the chairman, was present. After disposing of some routine business the board adjourned until the 10th at 9 o'clock, A. M. On that day the roll call shows that Rasmusson, chairman *pro tempore,* Marcott and Burke alone were present, but the record of the meeting shows that Ritenour, the chairman, was also present. The attorney representing the applicant asked leave to have his (Ritenour's) name added to the petition. This was objected to by remonstrants for the reasons that the petition then on file was insufficient, and that no proper notice had been published, and, further, that Ritenour was a member of the board. It was "then moved by T. T. Marcott and seconded by R. C. Burke that V. V. Ritenour be allowed to sign the petition." A vote was then taken, when Rasmusson, Marcott and Burke voted Aye. The record continues: "Chairman declares the motion duly carried, and Mr. Ritenour then signs the petition." Soderman, the other member, had previously signed the petition. Both were upon the witness stand and testified on behalf of appellee. While it is true that neither Ritenour nor Soderman are recorded as voting upon the question of the granting of the license, none but the three above named answering the roll call on the final vote, yet the whole proceeding shows upon its face a want of appreciation of the duties and obligations of members of the municipal board which merits the condemnation of all lovers of official rectitude and fair play. The board consisted of five members, Mr. Ritenour being the chairman. It is evident that the petition was understood to be lacking in names. Two of the members disqualify themselves in order to insure the requisite number, leaving the other three to grant the license. The object and purpose is patent.

The next contention is that the petition is not signed by a sufficient number of resident freeholders of the vil-

lage of Brady. It was stipulated on the hearing that "there are forty-three and no more resident freeholders in the corporate limits of the village of Brady." This being true, it is apparent that, in order to confer jurisdiction, the petition would have to be signed by at least 22 persons having the necessary qualifications. If the names of Ritenour and Soderman are counted there were 23.

Johnson Ditto, one of the signers of the petition, was called as a witness on the part of the applicant. His testimony showed that he was the owner of real estate in the village of Brady, but we find no proof anywhere in the record that he was a resident thereof.

The name "Ellen St. Marie" appears on the petition as one of the signers. She was not called as a witness. A deed was introduced showing a conveyance of property to her. An effort was made to prove the genuineness of the signature to the petition as hers, but the witness interrogated testified that he did not know her writing and did not know if she signed the petition. It appears by reasonable inference, at least, that she is the wife of Fred St. Marie, one of the signers, but he was not called as a witness, and we are unable to find any proof that Mrs. St. Marie signed or authorized the signing of her name as one of the petitioners. The matter of the residence of the petitioners, as well as their signatures to the petition, were put in issue by the general denial as well as specific denials, and by a well-settled rule this placed the burden upon the applicant to prove the facts.

It is not deemed necessary to pursue the inquiry further, as the failure to qualify as to the two signers reduces the number remaining to 21, which is less than the number required by section 25, ch. 50, Comp. St. 1909, and it follows that the judgment of the district court must be reversed and the license canceled, which is done.

REVERSED.

FRANK H. BARNES, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED DECEMBER 14, 1909. No. 15,844.

**Elections:** CONTEST. When a citizen, taxpayer and elector of a city, in his own name and on his own behalf, seeks to defeat the presumed will of the people of his municipality upon any subject as declared by a canvass of their votes at an election, and for that purpose invokes the provisions of section 5715, Ann. St. 1907, for contesting the validity of such election, then the special statute invoked must, expressly or by necessary implication, authorize such elector to maintain in his own name and on his own behalf such proceeding, or it will be dismissed. *Thomas v. Franklin*, 42 Neb. 310.

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

*M. A. Low, Paul E. Walker, E. P. Holmes* and *G. L. De Lacy*, for appellant.

*John M. Stewart, T. F. A. Williams, C. C. Flansburg* and *L. A. Flansburg, contra.*

BARNES, J.

Frank H. Barnes, who alleges in his petition that he is a citizen, resident and taxpayer of the city of Lincoln, commenced this action in the district court for Lancaster county to contest an election which was held in the city of Lincoln on the 7th day of May, 1907, at which election was submitted to the vote of the people the proposition of empowering the mayor and city council to compel the Chicago, Rock Island & Pacific Railway Company to construct and maintain viaducts over its railway tracks where they cross P and J streets. The petition set forth sufficient grounds for contesting the election. The defendant answered, in substance, that the plaintiff was without authority of law to commence or prosecute an action to contest the election in question; that the plaintiff did not

commence and prosecute the proceeding in good faith or in his own interest, but for and on account and solely in the interest of the railroad company, and further concluded with a general denial. To this answer the plaintiff demurred. Upon the hearing the district court invoked the rule that a demurrer searches the whole record, and held that there was no statute in the state of Nebraska authorizing or empowering the plaintiff to contest the election in question, and dismissed his action. The plaintiff has appealed, and now contends that the district court erred in sustaining the demurrer and deciding that the plaintiff had no right, power or authority to maintain the action.

It was conceded upon the argument that, in order to reverse the judgment of the district court, we must overrule *Thomas v. Franklin,* 42 Neb. 310; *Sebering v. Bastedo,* 48 Neb. 358; *Dodson v. Bowlby,* 78 Neb. 190.

*Thomas v. Franklin, supra,* was a case where it was sought to contest a county seat election. The action was brought under the provisions of chapter 26, Comp. St. 1893, which is the statute upon which the present action is based, and it was there held that the contestant could not maintain the action. In the body of the opinion we find the following: "Can the appellant maintain this proceeding? If he can, it must be because the statute authorizes any elector of a county to contest the result of an election held for the purpose of relocating the county seat thereof. The statutory provisions for contesting elections are found in chapter 26, Comp. St. 1893. Section 64 of this chapter provides: 'The election of any person to any public office, the location or relocation of a county seat or any proposition submitted to the vote of the people may be contested.' * * * Section 70 of said chapter is as follows: 'The district courts of the respective counties shall hear and determine contests of the election of county judge, and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county,

and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers.' Section 72 of said chapter provides that any elector of the state may contest the validity of the election of any of the officers of the executive department of the state, and that an elector of a county or legislative district may contest the election of a member of the legislature from such county or district. And section 80 provides as follows: 'The election of any person declared elected to any office other than executive state officers and members of the legislature may be contested by any elector of the state, judicial district, county, township, precinct, city, or incorporated village in and for which the person is elected.' It will thus be seen that, while the legislature has provided that the validity of an election locating or relocating a county seat may be contested, it has not provided by whom such contest may be instituted and carried on. The proceeding for contesting an election provided for by this statute is, strictly speaking, neither an action at law nor in equity. It is a summary proceeding of a political character, and the proceeding cannot be maintained by any person unless express authority therefor is found within the statute itself." In this case the same difficulty exists as was found there. The statute does not provide, nor does the city charter, that a citizen, elector and taxpayer of the municipality can contest an election like the one in question.

*Sebering v. Bastedo, supra,* was a case where another attempt was made to contest the validity of a county seat election in Boyd county whereby Butte city, upon the face of the returns, as against Spencer, was declared by the canvassing board to have been successful. Upon authority of *Thomas v. Franklin, supra,* the proceeding was dismissed, thus affirming and following that case.

In *Dodson v. Bowlby, supra,* quoting from *Thomas v. Franklin,* 42 Neb. 310, it was said: "When one elector of a county, in his own name and on his own behalf, seeks to defeat the presumed will of the people of his

county upon any subject as declared by a canvass of their votes at an election, and for that purpose invokes the provisions of a special statute for contesting the validity of such election, then the special statute invoked must, expressly or by necessary implication, authorize such elector to maintain in his own name and on his own behalf such proceeding, or it will be dismissed."

Whatever might have been our conclusion had this case been one of first impression, the law denying the right of the plaintiff to maintain this action is so well settled that we decline to now adopt a different rule.

For the foregoing reasons, we are constrained to hold that the judgment of the district court was right, and it is therefore

AFFIRMED.

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BOYD BURROWES, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,846.

1. **Appeal:** BILL OF EXCEPTIONS. Affidavits or other evidence used in support of a motion objecting to the jurisdiction of the district court cannot be considered on appeal to this court, unless made a part of the bill of exceptions. In such case the ruling of the district court retaining jurisdiction will not be disturbed.
2. **Carriers:** LIABILITY. To render a transportation company liable as a common carrier for the loss or destruction of goods, they must have been delivered to and accepted by it for transportation.
3. ———: ———. The plaintiff, who was the proprietor of a tent show, loaded a part of his outfit on Sunday afternoon into a car furnished him by the railroad company and retained the remainder for his use during the following night, under an agreement with the agent that the plaintiff would finish loading the car on the following Monday morning, when it was to be hauled to a station some twelve miles distant. The car containing the goods was destroyed by fire, without negligence on the part of the defendant company, before the time came for loading the remainder of plaintiff's outfit. *Held*, That defendant was not liable as a common carrier for the loss occasioned thereby.

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

*N. K. Griggs,* for appellant.

*M. F. Harrington, contra.*

BARNES, J.

Action in the district court for Holt county to recover damages for the destruction of property alleged to have been delivered to the defendant as a common carrier to be transported and safely delivered at Ashton, Nebraska. Plaintiff had judgment, and the defendant has appealed.

Two questions are presented by the record, which may be briefly stated as follows: (1) The court erred in overruling the defendant's objection to the jurisdiction; (2) the judgment is not sustained by the evidence.

Considering the first assignment, it appears that suit was originally brought against appellant and the Chicago, Burlington & Quincy Railroad Company and the Burlington & Missouri River Railroad in Nebraska jointly. All of the defendants, by special appearance, objected to the jurisdiction of the court for want of proper service of summons upon them, and supported their objections by affidavits tending to impeach the officer's return upon the writs, and show that the service was not made upon either of the defendants in the manner provided by law. On the 23d day of March, 1908, the district court overruled these objections, to which the defendants duly excepted, and thereafter applied for and were given until the 30th day of that month to answer plaintiff's petition, and it was agreed between the parties that the cause should be set down for trial on the 1st day of April, 1908. Answers were filed, by which the defendants renewed their objection to the jurisdiction of the court, admitted their corporate existence, and denied all of the other allegations of plaintiff's petition. On the trial plaintiff dismissed his action as to the Chicago, Burlington & Quincy Rail-

road Company and the Burlington & Missouri River Railroad. The defendant offered no evidence to support its plea to the jurisdiction, and the affidavits used in support of its motion objecting to the jurisdiction of the court are not contained in the bill of exceptions. It is true that what purport to be copies of the affidavits are attached to the transcript; but, as above stated, not having been made a part of the bill of exceptions, they cannot be considered.

In *First Nat. Bank v. Carson,* 48 Neb. 763, it was held: "The action of the district court in overruling a motion cannot be reviewed here where evidence was necessary to support such motion and such evidence was not preserved by a bill of exceptions." In *Morsch v. Besack,* 52 Neb. 502, we said: "Affidavits used on the hearing of a motion in the trial court, to be available on review, must be included in a bill of exceptions." *Carmichael v. McKay,* 81 Neb. 725, was a case where jurisdiction of the justice of the peace who rendered the judgment, from which an appeal was taken to the district court, was challenged in such a manner as to present a question of fact, and it was contended by the appellant that the record disclosed that the facts had been determined upon the affidavit of one Justice Burton. There was no bill of exceptions, but there was an affidavit in the transcript. It was said: "As no bill of exceptions was preserved, we are unable to say upon what evidence the district court acted in determining the question of fact. This court has repeatedly held that, where affidavits are used on the hearing of a motion, or in support of or against the issuance of a temporary injunction, if they are not preserved in a bill of exceptions, they will not be considered in this court." We are not aware of the existence of any case where we have announced a contrary rule. It follows from the foregoing that, the presumption in favor of the validity of the judgment of the district court not having been overcome by anything contained in the record, its ruling on the question of jurisdiction should be affirmed.

We will now consider defendant's remaining contention that the judgment is not sustained by the evidence. It appears from the transcript that plaintiff's petition was framed with a view to charge the defendant with liability as a common carrier and also as a warehouseman or bailee; but, having failed to show negligence of any kind on the part of the defendant, plaintiff must recover, if at all, on defendant's liability as a common carrier or an insurer of the safe delivery of his property. There seems to be little, if any, conflict in the evidence. The plaintiff testified, in substance, that just prior to the 12th day of May, 1907, he had been giving a tent show in the village of Loup City, Nebraska; that he desired to move his show to the village of Ashton, some twelve miles distant on the line of the defendant's railroad, and to that end applied to defendant's agent for a car in which to ship his entire outfit to that point; that on Saturday before his loss occurred he spoke to defendant's agent about loading on Sunday afternoon, and the agent said it would be all right. Plaintiff said: "I told him I wanted to load my freight and baggage, and I wanted to keep my cook tent and a couple or three sleeping tents out, putting them in Monday morning, and he advised me that it would be all right." It appears that a car was placed on defendant's side or passing track at the plaintiff's disposal, and he was notified of its position. It further appears that no trains were due to pass that station until the next Monday morning at 9:30 o'clock; that defendant's agent visited another village some distance away on Sunday, and that plaintiff had notice of those facts. On Sunday afternoon plaintiff and his employees took possession of the car, and placed therein his main tent, with its poles, stakes, ropes, etc., together with a gas machine which he used to manufacture gas, and thus supply light for his evening performances. When he had partly loaded his outfit, he or one of his men closed the car door. The remainder of his plant, which included his cook tent, his sleeping tents and bedding, together with some personal

baggage, his gasoline stove and cooking utensils, was kept out for use over night. These were to be loaded the following morning, and plaintiff was then to furnish a statement of weights and the contents to the agent, who would then seal the car and fix the charges for transportation. The car was then to go forward in the 9:30 passenger train, to which the defendant company was to attach it. On Monday morning, at about 5 o'clock, it was discovered that the car containing plaintiff's goods was on fire, apparently having become ignited from the inside. In spite of all efforts to extinguish the fire, the car, together with its contents, was totally destroyed. No notice was given the defendant or its agent that plaintiff had commenced to load the car, and the agent had no actual knowledge of that fact until the car was discovered to be on fire.

There is thus presented the question as to whether the defendant was liable to the plaintiff as a common carrier for the loss of his property. The rule seems to be well settled that, in order to render a transportation company liable as a common carrier for the loss of goods, delivery of the goods must be made to the carrier or his agent for transportation; "for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depositary or bailee until the appointed time has expired, or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be; for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depositary or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or convenience to do so." 1 Hutchinson, Carriers (3d ed.), sec. 112. See, also, secs. 113-125.

In *Basnight v. Atlantic & N. C. R. Co.*, 111 N. Car. 592,

16 S. E. 323, it was held that the mere loading of goods into a car standing on a side-track does not constitute a delivery to the carrier, where the station agent, on being notified of the fact, declines to ship the goods. In *St. Louis, A. & T. H. R. Co. v. Montgomery,* 39 Ill. 335, it was held that the technical liability of a common carrier does not attach until the delivery to him of the property is complete. In that case A delivered to the railroad company for transportation a quantity of hay, which was placed on platform cars. The next day, when the company was about to send it forward, A requested that it should not be taken away until he could first see the party to whom it was sold, which request was complied with, and the next day the hay was ignited by sparks from a passing locomotive and a portion of it burned. It was held that, from the moment A requested the hay to be detained, the liability of the company was that of a warehouseman only. *Missouri P. R. Co. v. Riggs,* 10 Kan. App. 578, 62 Pac. 712, was an action instituted against the railroad company to recover the value of certain goods delivered by the agent of the plaintiff to the agent of the defendant at its station in the city of Osborne, to be carried to the city of Chicago, Illinois, and there delivered to the plaintiff. The defendant denied that the goods were received by it as a common carrier, and alleged that they were received by it as a warehouseman only, and that the same was destroyed by the act of God, lightning having struck the warehouse or depot in which the goods were stored, and that they were destroyed by fire as the result thereof. There was a trial to the jury, a verdict in favor of the plaintiff, and judgment was rendered thereon; and it was held that, where goods are delivered to a carrier to be shipped, but not to be shipped until other goods are delivered the next morning to be shipped with them, its liability in the meantime is that of a warehouseman only. In *Missouri P. R. Co. v. McFadden,* 154 U. S. 155, it was said: "'The liability of a carrier begins when the goods are delivered to him

or his proper servant authorized to receive them for carriage.' Redfield, Carriers, sec. 80. 'The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and, until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them.' Hutchinson, Carriers (2d ed.), sec. 82." It was further said: "Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that, when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill. Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper."

It seems clear, in the case at bar, that there was no delivery of the plaintiff's goods for immediate shipment; that, while it is true the car was on defendant's side-track, yet it was in the possession of the plaintiff. He had only loaded a part of the goods for shipment, and it had been agreed that the remainder of them should not be loaded until the following morning at a time subsequent to the destruction of the car by fire. No bill of lading had been issued by the company; no receipt for the goods had been given, and it still remained for the plaintiff to finish loading the car, to notify the defendant when he had done so, to furnish weights and contents, after which the rate for transportation was to be fixed by the agent be-

fore the car was sealed and ready to go forward to its place of destination.

We are not without authority of our own on this question. In *Chicago, B. & Q. R. Co. v. Powers,* 73 Neb. 816, it was held that a railroad company which constructs its yards by the side of its track to facilitate the loading and unloading of stock is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water before the shipment is actually made, and its liability is no greater than that of an ordinary depositary or bailee. It was said in that case that the liability of a common carrier "does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier." The foregoing rules are so well established that it is unnecessary to cite further authorities in support of them.

In a well-written brief counsel for the plaintiff has cited certain authorities in support of his contention that defendant's liability is that of a common carrier. Those authorities will now receive our consideration. *Southern Express Co. v. Newby,* 36 Ga. 635, was a case where the express company was to receive certain goods at the depot, where they were delivered at the time agreed upon. It was held that the liability of the express company as a common carrier began when they were so delivered. In *Watson v. Memphis & C. R. Co.,* 56 Tenn. 255, the shipper applied to the agent of the defendant company the day before his cotton was hauled to the depot, who made an absolute agreement, in consideration of the freights to be paid, to receive the cotton when tendered and to forward it as soon as he could. It was held that this was a complete contract, and the force of it could not be avoided by refusing to receive the cotton when tendered the next day. It was insisted on the part of the company that the agreement was that the company was to receive it when tendered, and forward it as soon thereafter as it was able. It was held that the question was one for the jury.

and if the agreement was that the cotton was to be received when tendered the next day, and the company suffered plaintiff to leave it at its depot without objection, it was at its risk from that day; that the risk of the common carrier begins upon the delivery and acceptance of the goods. *Southwestern R. Co. v. Webb,* 48 Ala. 585, was a case where cotton was delivered or placed upon the platform at the defendant's station for shipment. There was a failure to deliver the cotton at the place of consignment. It was held that the company was not liable for the cotton stolen or lost after a deposit on the platform at a station house, unless it be shown that the railroad company or its agents had notice of the deposit, and received the cotton for transportation as a common carrier. And it was further held that whether there was a delivery or not to the common carrier for transportation was a question for the jury where there was conflicting evidence on that point. In *Montgomery & E. R. Co. v. Kolb & Hardaway,* 73 Ala. 396, the goods were delivered for shipment where it was the custom and usage of the common carrier to receive goods for transportation. It was held that there was a delivery to the company for immediate transportation, and the fact that it gave no receipt for the merchandise did not affect its liability, delivery having been satisfactorily shown. In *Merriam v. Hartford & N. H. R. Co.,* 20 Conn. *354, which was an action to recover for the loss of goods, it was contended that the carrier was not liable without express notice of the deposit. It appeared that the goods were delivered in the usual manner for transportation by a common carrier at its private dock in its exclusive use for the purpose of receiving the property to be transported. It was held that such delivery was a good delivery to the carrier, and rendered him liable for the loss of the goods. *Shaw v. Northern P. R. Co.,* 40 Minn. 144, was a suit to recover for the loss of personal baggage of a passenger delivered to the carrier and received solely for transportation, and not for storage. There was a recovery, and it was held

that the consent of the carrier, for its own convenience, to some delay in the transportation could not be used as a matter of defense. It seems clear from the foregoing review of plaintiff's authorities that they are not applicable to the undisputed facts as shown by the record herein. We are of opinion that this case should be ruled by *Missouri P. R. Co. v. Riggs,* 10 Kan. App. 578, 62 Pac. 712, and that the evidence does not sustain the judgment.

For the foregoing reason, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

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## JOHN HOLMES V. STATE OF NEBRASKA.

FILED DECEMBER 14, 1909. No. 16,056.

1. **Criminal Law**: ACCUSED AS WITNESS: CREDIBILITY: INSTRUCTIONS. Where a person on trial for a crime testifies in his own behalf, he becomes as any other witness, and his credibility is to be tested by the same rules as are legally applied to other witnesses. It is proper for the court to so instruct the jury, and in addition thereto to inform them that in determining the credibility which shall be accorded to his testimony they may take into consideration the fact that he is interested in the result of the prosecution; but it is error for the court to inform the jury that as a general rule the witness who is interested in the result of the suit will not be as honest, candid and fair in his testimony as one who is not so interested.
2. **Case Overruled.** So much of the opinion in *Clary v. State,* 61 Neb. 688, as upholds such an instruction is disapproved and overruled.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

*J. G. Thompson* and *Ed L. Adams,* for plaintiff in error.

*William T. Thompson,* Attorney General, and *George W. Ayres, contra.*

BARNES, J.

John Holmes was convicted of the crime of assault and battery in the district court for Harlan county, and was sentenced to pay a fine of $100, together with the costs of prosecution. He has brought the case here by petition in error, and will hereafter be called the defendant.

The record contains several assignments of error, but one of which will be considered in this opinion. That contention is that the district court erred in giving paragraph 9 of his instructions, which reads as follows: "You are instructed, gentlemen of the jury, that the credit of a witness depends largely upon two things, that is, first, his ability to know what occurs, and his disposition for telling the truth as to the occurrence. Statements made by a witness having superior opportunities for knowing what took place, and superior intelligence and memory, and being entirely uninterested in the event of the suit, other things being equal, are entitled to greater weight before the jury. One of the tests for determining the credibility of a witness is his interest in the result of the suit. As a general rule, the witness who is interested in the result of the suit will not be as honest, candid and fair in his testimony as one who is not so interested; but the degree of weight to be given to each and all of the witnesses is a question for you alone, and not for the court." We think defendant's exception to the instruction quoted is well founded. The law gives a defendant in a criminal prosecution the right to testify in his own behalf, and, if he sees fit to exercise that right, he becomes as any other witness, and his credibility should be subjected to the same tests as are legally applied to other witnesses. *Burk v. State,* 79 Neb. 241. The court should not attempt to discredit him and destroy the effect of his evidence, but should leave its weight and credibility to the jury without unfavorable comment.

By the tenth paragraph of his instructions the trial court stated the correct rule. That paragraph reads as

follows: "You are instructed, gentlemen of the jury, that the defendant in this case has taken the stand and testified in his own behalf, and that this under the law he is entitled to do, and you are bound to consider his testimony; but, in determining what weight you will give the testimony, you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, and give to his testimony such weight as under all the circumstances you think it is entitled to." This form of instruction was approved in *Richards v. State,* 36 Neb. 17, and is fair alike to the defendant and the state. In such a case the court should not by unfavorable comment single out the evidence of the defendant and discredit him before the jury.

The attorney general has directed our attention, however, to *Clary v. State,* 61 Neb. 688, where an instruction like the one in question was upheld, and contends that we should again give it our approval. It appears in the *Clary* case that there was no bill of exceptions, and the court was therefore unable to say that the defendant was prejudiced by the instruction. Commenting on the question it was there said: "Without the bill of exceptions we cannot know that the accused was prejudiced. * * * We have said that in the absence of a bill of exceptions instructions will be presumed free from error, unless they are erroneous under any possible case made by the proofs under the issues. *Home Fire Ins. Co. v. Weed,* 55 Neb. 146."

In *Omaha B. R. Co. v. McDermott,* 25 Neb. 714, an instruction in the following language was held to have been properly refused: "And you are instructed that witnesses who are disinterested are entitled to more weight than those who for any reason are shown to have an interest in the determination of the case. A witness who has a lawsuit of a similar character to this, against the same defendant, is not entitled to the same consideration, and his opinion is not entitled to have the same weight as that

of a witness who is disinterested, and who has equally as good knowledge of what he testifies to." It was there said that the infirmity of the instruction condemned is that part which suggested the idea that a witness who has a lawsuit against one of the litigants is not entitled to the same consideration as a witness who is disinterested.

In the case at bar it appears from the bill of exceptions that the defendant testified, in substance, that, while he was having an altercation with another, the complaining witness seized him by the shoulder, at the same time calling him a rowdy, and it then appeared to him as though the witness had attacked him; that he delivered the blow, with his fist, which is complained of, in what he thought was necessary self-defense. There was a conflict of evidence on this point. One or two other witnesses corroborated the defendant, while the complaining witness testified that he did not lay hands on the defendant, but was about to arrest him for riotous conduct, and before he could do so defendant struck him and knocked him down. It therefore seems clear that the statement coming from the court that, "as a general rule, the witness who is interested in the result of the suit will not be as honest, candid and fair in his testimony as one who is not so interested" must have been highly prejudicial to the defendant, and calls for a reversal of the judgment. We therefore disapprove of and overrule so much of the opinion in *Clary v. State,* 61 Neb. 688, as upholds the instruction complained of.

For the foregoing reason, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

WALTER R. BEDDEO V. STATE OF NEBRASKA.

FILED DECEMBER 14, 1909. No. 16,057.

**Case Followed.** *Holmes v. State, ante,* p. 506, followed.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

*J. G. Thompson,* for plaintiff in error.

*William T. Thompson, Attorney General,* and *George W. Ayres, contra.*

BARNES, J.

Walter R. Beddeo has prosecuted error from the district court for Harlan county in a case wherein he was convicted of the crime of assault and battery. One of his assignments is that the court erred in giving the eighth paragraph of his instructions to the jury. An examination of the record discloses that the instruction complained of is a literal copy of the one on which our reversal of *Holmes v. State, ante,* p. 506, was predicated, and therefore the judgment herein complained of is reversed and the cause is remanded for further proceedings.

REVERSED.

CHARLES W. CAVES, APPELLEE, V. JOSEPH B. BARTEK, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,805.

1. **Landlord and Tenant: FAILURE TO REPAIR: DAMAGES.** In this action, in which damages are claimed for failure to repair plastering by a landlord whereby damage to bedding and clothing by mice was occasioned, the difference in the value of the articles damaged before and after the injury is not the proper measure of damages, and it was erroneous so to instruct the jury.

2. **Chattel Mortgages: FAILURE TO RELEASE.** A mortgagee cannot be mulcted in damages for failing to release a chattel mortgage when he in good faith disputes the validity of another claim, not connected with the obligation to secure which the mortgage was given, which it is sought to compel him to accept as a part payment of the amount due on the note, and which he refuses to allow.

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

*John H. Barry* and *Morning & Ledwith,* for appellant.

*C. M. Parker* and *George A. Adams, contra.*

LETTON, J.

This action was brought by a former tenant against his former landlord upon four causes of action. As to the first cause, the petition sets forth that at the time the plaintiff rented the farm the defendant represented the buildings to be in good repair, but that the dwelling was in such a defective condition that mice and rats came through broken places in the plastering and injured his household goods and wearing apparel, to his damage in the sum of $25. He also alleges certain items of work performed and money expended for defendant to the amount of $17.10, upon which he claims a balance due of $8.30. The second cause of action was taken from the jury by the court, and will not be noticed. The third

alleges that plaintiff executed a chattel mortgage to secure the rent; that he fully paid the same, and requested defendant to satisfy the mortgage on the first of March, 1905, but that defendant refused to release it until September 28, 1905; that plaintiff was thereby prevented from selling his stock, and was compelled to buy feed for the same during the intervening period, to his damage in the sum of $60. The fourth cause of action is for the $50 penalty provided by statute for the refusal of a mortgagee to release a chattel mortgage of record on payment and demand. The answer admits the lease and the giving of the mortgage, denies the refusal to release the mortgage, and sets up certain counterclaims. The reply is a general denial. The jury found for plaintiff, and assessed his recovery at $175, a sum in excess of the amount sued for in the three causes of action submitted to them. A motion for a new trial was filed. The court required a remittitur of $50, and overruled the motion.

The jury were properly instructed as to liability for repairs. Before the case was submitted, the defendant made a motion to strike from the petition the claim of damage to household goods by rats and mice. This motion was overruled, and exception taken. In its charge the court instructed the jury: "In the event that you find from the evidence, and under these instructions, for the plaintiff under his allegations in his amended petition touching damages to bedding and clothes by rats and mice, and in the event you find for the defendant touching damages to hay by plaintiff's cattle, and other allegations of a similar nature, you will allow the party injured the difference between the fair market value of the articles in question immediately before and immediately after the damage so inflicted." Under the circumstances of this case we think this was not the true measure of damages for a failure to plaster. Assuming, as the jury did, that plaintiff's account of this matter is true, it seems that when he took possession under the lease the plastering in one room was in very bad condition, and in other

parts of the house there were holes in it. When defendant first came to the place this condition was pointed out to him, and he told plaintiff to take the plastering off the room, wainscot it, get the plastering done, and take payment out of the rent. Plaintiff introduced a postal card from defendant in evidence, dated May 20, 1904, authorizing plaintiff to hire a plasterer, and deduct charges from the rent. He says that in June defendant told him that he would send a man to do this work, but that it was not done until October.

While the general rule is that the measure of damages upon the breach of an agreement by a landlord to make repairs is the difference between the rental value as the premises actually are and as they should have been according to the contract, still there are exceptions to this rule, and in this case, the agreement being made subsequent to the lease, and the premises being as they were, we think the plaintiff should have had the plastering done, and charged the defendant with the cost of it. It could not reasonably have been foreseen by the parties that, if the plastering was not promptly repaired, $25 worth of bedding and clothing would be destroyed by mice. Moreover, if mice were prevalent, it was the duty of the tenant, in any event, to try to guard against loss from this source by some means, and not to let the damage go on when it might presumably have been prevented by reasonable effort. A discussion of this topic may be found in 24 Cyc. 1097, in line with these views.

The complaint is also made that there is no competent evidence as to the damages set forth in the third cause of action, and that no instruction was given to guide the jury in measuring such damages. We have repeatedly held that a nondirection is not a misdirection, and will not usually work a reversal. If the defendant had requested such an instruction, in all probability the court would have given the same.

The other objections are more serious, and the same

apply to some extent to the fourth cause of action as well. The plaintiff's evidence shows that about two weeks before March 1, 1905, when the $200 note and mortgage became due, he sent to defendant a bill for $5.80 for work in connection with the plastering and wainscoting and for money paid. On March 1 plaintiff paid to the Oak Creek Valley Bank, to apply on the mortgage debt, a check for $191.20, and presented a bill against the defendant for $8.80 for the same items as in the former bill, with others. Bartek was not present, but when he was informed of these facts the claim of $8.80 was disputed by him, and he refused to allow credit for the same upon the note. The matter was left unsettled until September 11, when the parties met at Valparaiso, and at that time the claim of $8.80 was allowed. At that time defendant was again requested to release the chattel mortgage. A release was made out on September 25 and filed September 28. All the damages claimed in the third cause of action occurred prior to this time. It is clear that there was a controversy between the parties as to these items claimed by plaintiff, and other items claimed by defendant, all growing out of other transactions than the debt secured by the mortgage. A mortgagee cannot be mulcted in damages for failing to release a chattel mortgage when he in good faith disputes the validity of another claim, not connected with the obligation to secure which the mortgage was given, which it is sought to compel him to accept as a part payment of the amount due on the note, and which he refuses to allow. The clear weight of authority is that a mortgagee is not liable for a failure or refusal to release a mortgage when the right of the person demanding such release is a doubtful question. *Sullivan Savings Institution v. Sharp*, 2 Neb. (Unof.) 300; *Kronebusch v. Raumin*, 6 Dak. 243; *Parkes v. Parker*, 57 Mich. 57; *Huxford v. Eslow*, 53 Mich. 179. If such a dispute existed, no damages can be allowed for anything occurring prior to the time when the dispute was settled and the amount allowed as a credit.

As to the right to recover the statutory penalty, this depends upon what took place at the time the settlement was made, and upon this point we think the instruction of the court proper.

Considering the whole case, we think error occurred prejudicial to the defendant, and that a new trial should be had. The jury evidently were confused as to the issues, or they would not have rendered a verdict in excess of the amount claimed by plaintiff.

The judgment of the district court is

REVERSED.

REESE, C. J., not sitting.

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CLYDE E. PARKER, APPELLEE, V. OMAHA PACKING COMPANY, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,845.

1. **Appeal:** VARIANCE. "A variance between *allegata et probata* will not be held to be prejudicial, requiring a reversal of the judgment, where it appears that the party complaining was not actually misled or surprised to his disadvantage." *Ittner Brick Co. v. Killian*, 67 Neb. 589.

2. ———: INSTRUCTIONS. While not a technically accurate statement of the law as to the extent of a master's obligation to see that the appliances furnished his servants are reasonably safe for use, still a judgment will not be reversed because the jury were instructed that "it is the duty of the master" to provide a reasonably safe working place and reasonably safe machinery and appliances, unless it is evident that under the circumstances of the case the jury were misled thereby, to defendant's prejudice.

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

*Greene, Breckenridge & Matters,* for appellant.

*T. W. Blackburn, contra.*

LETTON, J.

The plaintiff, while working as a laborer for the defendant under the direction of a foreman, was engaged, with other workmen, in the work of removing a brine pump from its foundation in a building, known as "The Old Omaha Packing Company Plant," for the purpose of transferring it to another building. While thus engaged, he was directed by the foreman to remove a block from under one side of the pump; one end of the pump having been raised to a height of about eighteen inches by two jacks, one on each side. The pump was about nine or ten feet long, four feet wide and four feet high, and very heavy. The foreman, with several workmen and the plaintiff, were upon one side of the pump, when the plaintiff was directed to go to the other side and remove the block. A witness named Monroe testifies that, when the plaintiff was directed to remove the block, witness told the foreman that the jack on the side on which they were standing, the east side, which was then tipped, was going to slip, and the foreman said, with an oath: "You go ahead and pull that block out." This is denied by the foreman. The plaintiff went to the other side of the pump, and while removing the block, as directed, the jack on the east side slipped and the pump came down upon his thumb, crushing it to an extent that necessitated amputation. For the defendant, the foreman testifies that the falling of the jack was occasioned by its being struck by a plank in the hands of one Poloski; that Poloski was on the same side of the pump as he and Monroe; and that while Poloski was in the act of removing this plank from under the pump he carelessly struck the jack, knocking it down, and allowing the pump to fall on the plaintiff's hand. This is contradicted by Monroe, who says that Poloski was a boy about 19 years old; that he was not near the jack at the time that it fell, but was standing farther from the jack than the witness, and at a distance of at least four feet away. None of the other workmen present

upon that side of the pump were called. The jury found for the plaintiff, assessing his recovery at $1,200, and defendant appeals.

A number of grounds of error are assigned by the defendant, but the one principally relied upon is that the *allegata et probata* do not agree; that the issue submitted to the jury is not an issue made by the pleadings in the case. It is insisted that a defect in the jacks is averred to be the proximate cause of the injury to the plaintiff, and that there is no testimony to show that the jacks were in any way defective. It is further insisted that the doctrine of safe place to work does not apply in such a case as this because the condition is constantly changing; that the plaintiff "was assisting in a work of dismantling, and change of a place which was provided, not for the plaintiff, but for whoever may have been assigned to the care and operation of the brine pump," and therefore that the only actionable negligence charged was that he was supplied with defective jacks with which to do the work. On the other hand, the plaintiff argues that the allegations show that the defendant's foreman was directing the plaintiff, and that while plaintiff was acting under such direction the accident occurred, and that the language of the petition is sufficiently general to cover any kind of negligence shown by the evidence, whether it should be the unsafety of the place, the unsafe character of the tools, or the negligent order of the foreman to perform work in a place made dangerous by defective machinery, of which the foreman was informed and the plaintiff knew nothing.

It is a settled rule that the allegations of a petition will be liberally construed when not attacked until during the trial. There was a general demurrer to the petition filed before answer, and properly overruled, but this did not attack the defect now relied upon, the contention now being that the evidence is not within the allegations of negligence. We have said that "a pleading may be said to allege what can by reasonable and fair intendment

be implied from its statements." *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396; *Roberts v. Samson*, 50 Neb. 745.

The petition alleges that the plaintiff was working under the direction of defendant's foreman; "that while thus engaged, and while the said foreman was directing, and pursuant to the direction of said foreman, the plaintiff was engaged, * * * and while so performing the work directed, and in the act of pushing the said block out from beneath the brine pump, owing to the unsafe and defective jack upon the opposite side of said brine pump, said defective jack gave way," etc. This language is followed by an allegation that "the accident was due wholly to the negligence of defendant, and said negligence consisted in providing plaintiff an unsafe place in which to perform his work and defective machinery for the purposes of the work undertaken, as hereinbefore described, which unsafety as to place and defects in machinery was wholly unknown to the plaintiff."

It is evident that the jury must have believed the testimony of the plaintiff's witnesses as to the defective and unsafe manner in which the jack was placed, and disbelieved the account of the accident given by the foreman. The jack itself was in good order, but was carelessly set. It must therefore be regarded as settled by the verdict that the foreman knowingly directed the plaintiff to perform work in a place when there was an extraordinary risk made specially unsafe by the situation of the jack. While the law requiring an employer to furnish a safe place to work is subject to many modifications depending upon the nature of the work, and while it is true, as defendant contends, that such work as dismantling is to some extent an exception to the general rule, still, even in such work, if an employer directs a servant to perform some work made especially hazardous by reason of the master's negligence, of which special hazard the servant is unaware, the servant does not assume such special hazard, and, if he is injured by reason

of such negligent act or omission of the master, a liability ensues. *Bell v. Rocheford,* 78 Neb. 304, 310.

Section 138 of the code provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." It is clear that proof of all the circumstances surrounding the accident was before the jury, and that no different defense would have been made if a more specific allegation as to the cause of the dropping of the pump had been set out in the petition. A variance between the *allegata et probata* will not be held to be prejudicial, requiring a reversal of the judgment, where it appears that the party complaining was not actually misled or surprised to his disadvantage. *Toy v. McHugh,* 62 Neb. 820; *Ittner Brick Co. v. Killian,* 67 Neb. 589.

Complaint is also made of certain language used in the fourth instruction, as follows: "You are instructed that it is the duty of every master to conduct his business with reasonable care and prudence, so as not negligently or carelessly to subject his servant to any danger not ordinarily incident to or connected with his employment. And it is likewise the duty of the master to provide his servant with a reasonably safe working place, and with reasonably safe machinery and appliances with which to work." In this connection attention is called by defendant to the case of *Cudahay Packing Co. v. Roy,* 71 Neb. 600, in which an instruction stating that "it is the duty of the master to his servant to provide his servant with reasonably safe machinery," etc., was criticised, and it was held error to give this in connection with other instructions then given; but in that case the defect in the appliance was a latent defect and the vital point in

the case was whether the master had used reasonable care in furnishing the servant a lever which proved to be clearly defective for the purpose for which it was used by reason of a hidden flaw in the metal. While it is perhaps not always strictly accurate to say that "it is the *duty* of the master" to provide a reasonably safe working place because there may be cases such as the *Roy* case, in which a jury might be misled as to the liability of the master when defects in an appliance are latent, still the use of this phrase is a convenient form of expression, and one in constant use. A case will not be reversed on account of the use of this expression unless, under the peculiar circumstances of the case, a jury would be apt to be misled thereby as to the amount of care demanded on the part of the master in supplying tools. An instruction containing the language complained of is approved in *Cudahy Packing Co. v. Wesolowski*, 75 Neb. 786, and we have upheld instructions many times containing this expression.

It is also contended that evidence was erroneously admitted affecting the plaintiff's measure of damages. The evidence complained of was to the effect that previous to the employment of the plaintiff at common labor he had been employed by a telephone company as a lineman at $40 a month and expenses. The evidence shows that as a common laborer he was receiving $1.90 a day at the time of the accident. The plaintiff was a young man 25 years old. He suffered great pain and agony, and lost the thumb of his right hand by amputation at the second joint. We believe that, taking into consideration the injury, the plaintiff's expectancy proved, and the amount of the recovery, the admission of evidence showing such a slight difference in wages was not prejudicial error.

We are unable to see that any error or defect in the pleadings or proceedings has affected the substantial rights of the defendant.

The judgment of the district court, therefore, must be

AFFIRMED.

IN RE ESTATE OF MARY HELEN LEAVITT.

MAUD HAYWARD WATKINS, APPELLEE, V. MYRON D. SMITH AND WILSON O. BRIDGES, EXECUTORS, ET AL., APPELLANTS.

IN RE ESTATE OF LIZZIE O'SHEA.

JOHN J. O'SHEA, APPELLEE, V. HENRY J. BREUNIG ET AL., APPELLANTS.

FILED DECEMBER 14, 1909. Nos. 15,853, 15,670.

Executors and Administrators: ALLOWANCE TO HEIR. Under the provisions of section 176, ch. 23, Comp. St. 1905 (Ann. St. 1903, sec. 5041), as it stood before the amendment of 1907, the heir at law of the deceased, if there be no surviving husband and wife, is entitled to the specific articles described therein, whether the deceased dies testate or intestate, or whether the hein accepts the provision made for him in the will, if any, or not. Such, also, is the case with the surviving spouse. *In re Estate of Fletcher*, 83 Neb. 156.

APPEAL, in *In re Estate of Leavitt,* from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

*F. A. Brogan* and *G. W. Shields,* for appellants.

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

REHEARING, in *In re Estate of O'Shea,* of case reported, *ante,* p. 156. *Rehearing denied.*

LETTON, J.

Mary Helen Leavitt died in the county of Douglas leaving a last will and testament, by the terms of which she bequeathed specifically to various legatees certain jewelry, ornaments, paintings and personal wearing apparel. She also directed that a diamond brooch and other jewelry should be sold by her executors, and the proceeds turned into her general estate and used for the purpose of paying the cash legacies provided for by the will. A

number of bequests, payable in cash, were made to various charities and benevolent institutions, among which was the Women's Christian Association, and this association was also made residuary legatee. After the probate of the will a petition was filed by Maud Hayward Watkins, setting forth that she was niece, next of kin, and sole heir at law of the deceased. The petition set forth specifically the articles of wearing apparel, ornaments and household furniture left by the deceased, and prayed that an order be made by the county court assigning and distributing to her all such articles, as well as her selection of $200 worth of personal property of the estate in addition thereto. The executors resisted this petition, and answered, alleging that all ornaments and personal property were lawfully disposed of by the last will and testament of the deceased to other persons, and denied the petitioner's right to any of the property except a cash legacy of $100 left to her by the will. The Women's Christian Association also answered that the diamond brooch and other articles of jewelry by the terms of the will were directed to be sold to pay cash legacies, and that the residue of the entire estate had been bequeathed to it for a specific purpose, and further denied that the petitioner was entitled to any of the personal property except the cash legacy. The court found that the property belonged to the petitioner, who was the next of kin, and granted the prayer of the petition.

The question presented is identically the same as that disposed of by the court in the case of *In re Estate of Fletcher,* 83 Neb. 156, and *In re Estate of O'Shea, ante,* p. 156, in which latter case a motion for rehearing is now pending. For convenience this motion will be considered in connection with the argument in this case.

Counsel for appellants contend that, where specific articles of property included within the class mentioned in the first subdivision of section 176, ch. 23, Comp. St. 1905 (Ann. St. 1903, sec. 5041), to wit, "wearing apparel and ornaments and household furniture of the deceased, and

all property and articles that was or were exempt * * * from levy or sale upon execution or attachment" have been disposed of by the last will, the provisions of the section do not apply, and that it is only when the property is *intestate property,* meaning by this, property which has not been disposed of by the will, that it can be lawfully assigned under this provision. He further contends that the following portion of this section, "And this allowance shall be made to such surviving husband or wife or heir or heirs at law as will [well] when he or she or they shall receive provision made in the will of the deceased as when the deceased dies intestate," means that these specific articles were to be given to the surviving spouse or heirs if the articles are not mentioned in the will, even though the surviving wife or husband or heirs had received some provisions made for them in the will, because they fall within the class of intestate property. If the language of this section stood alone, or if it had never received judicial construction or interpretation heretofore, this argument might be worthy of much consideration. But we are convinced that the law is too well settled to permit the adoption of this construction. While the question is not a new one, on account of the fact that the amendment of 1901 giving an allowance to heirs seems to have given rise to much litigation and controversy, we have investigated at some length the origin of this provision. It was declared in Magna Charta that "the widow may remain in the mansion house of her husband forty days after his death, within which term her dower shall be assigned." In America the tendency from the earliest times has been to greater liberality in respect to the widow's portion. Since the origin of our probate law is to be found in the statutes of Massachusetts, a consideration of the legislation in this connection in that province and state may be interesting. By a law of the province passed in 1710 it was provided that every judge of probate "is hereby directed to have consideration, and make allowance of necessary bedding,

utensils and implements of household, necessary for the upholding of life, to the use of the wife and family of the deceased, where provision is not made for the wife in that respect by will," and it was further provided that such bedding, utensils and implements should not be accounted assets in the hands of the executor or administrator. Ancient Charters and Laws of Massachusetts Bay, ch. 100, sec. 2, p. 390. By chapter 36, Laws and Resolves of Massachusetts, 1783, in an act directing the descent of intestate estates, it was provided: "And when the personal estate shall be insufficient to pay the debts and funeral charges of the deceased, the widow shall nevertheless be entitled to her apparel, and such other of the personal estate as the judge of probate shall determine necessary, according to her quality and degree; and such part of the personal estate as the judge may allow the widow, shall not be assets in the hands of the executor or administrator." In Laws and Resolves of Massachusetts, 1805, ch. 90, sec. 2*d*, p. 508, we first find the language of the Nebraska statute: "When any person shall die possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by last will, the same, after" making the allowance to the widow, shall be distributed, etc.

In 1835 the general statutes of Massachusetts were revised by a commission. The law relating to decedents was revised and codified, and was included in the Revised Statutes of 1836. The first sentence of section 1, ch. 64 of this revision, is identical with the language we are considering, apparently applying alone to intestate estates, and the remainder of the section treats of the same matters as does the section in our statute, although a different disposition is made as to the property. By chapter 65, sec. 4, it was provided that the articles of apparel and ornaments of the widow and the apparel of the minor children, if any, and such provisions and other articles as shall be necessary for the reasonable sustenance of the widow and family for 40 days after the death of the de-

ceased, together with such further necessaries as the judge of probate shall order allowed, should be omitted in the inventory, and not be considered as assets, whether the deceased left a will or died intestate. In 1838 the law was slightly changed so as to express more fully that such articles should be considered as exclusively belonging to the widow or child respectively, and should not be considered assets. From this resume it will be seen that the allowance at first could only be made from intestate estates, but afterwards from both testate and intestate. As in our statute, the provisions of chapter 64 and chapter 65 seem somewhat inconsistent, but in *Williams v. Williams,* 5 Gray (Mass.) 24 (1855), construing the statute, it was decided that the power is not limited to intestate estates, that the allowance is given in all cases, whether there is a will or not, and whether the widow waives the provisions of the will or not.

The probate system of Massachusetts was adopted by Wisconsin. In the case of *Baker v. Baker,* 57 Wis. 382, this section is considered. As in this case, the argument was made that the section limited the allowance to intestate estates, or to that portion of the estate of a testator which had not been disposed of by the will. The court pointed out that the introductory sentence of the section, "When any person shall die possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows," is followed by a number of subdivisions containing specific provisions applicable alike to testate and intestate estates, and further calls attention to other sections in the law relating to inventory, etc., which, when construed in connection with this, show clearly that the allowances must be made from all estates, whether testate or intestate, and that the specific property mentioned does not become assets in the executor's hands.

The provisions of this section, as was pointed out in the concurring opinion by Judge ROOT in *In re Estate of*

*O'Shea, ante,* p. 156, have been the law of Nebraska since before its existence as a state, and so also has section 5065, Ann. St. 1907, as to such property not being assets of the estate. In its original form provision was made for the widow alone. The purpose of the law was to provide for the immediate necessities of the widow and family when deprived of their natural protector, to protect the helpless from the assaults of greedy creditors, and to provide a temporary relief for those placed in such an unfortunate position.

The courts as a rule construe such provisions liberally in line with their benevolent purpose. In some states no appeal can be taken from the order of allowance. *Leach v. Leach,* 51 Vt. 440; *Pope v. Hayc,* 30 Ga. 539. The courts will not inquire into the need of the recipient as to the specific property mentioned, and the statute operates to transfer the title of such articles to the widow, irrespective of whether or not she possesses sufficient separate property and estate so that her necessities do not require the allowance. *Heirs of Sawyer v. Sawyer,* 28 Vt. 245; *In re Estate of Lux,* 100 Cal. 593; *Griesemer v. Boyer & Rex,* 13 Wash. 171; *Wally v. Wally,* 41 Miss. 657. The law deems that her welfare and that of the family requires that she be not despoiled of the intimate household and personal belongings. Generally such provisions are upheld and the allowance made, whether the provisions of the will are accepted or not. *In re Estate of Walkerley,* 77 Cal. 642; *In re Estate of Lux, supra; Havens' Appeal,* 69 Conn. 684; *Collier v. Collier,* 3 Ohio St. 369; *Rutledge v. Rutledge,* 21 Ill. App. 357; *Crawford v. Nassoy,* 173 N. Y. 163; 1 Woerner, American Law of Administration (2d ed.) sec. 82.

We are not unaware of the fact that in Minnesota and in Michigan to some extent a different view has been taken, but we doubt whether in the cases considered the history of the law and the provisions of the statute calling for a special inventory were called to the attention of the respective courts. Such also seems to have been the

fact in the argument of the earlier case of *Godman v. Converse* in this court, 38 Neb. 657, 43 Neb. 463.

The amendment of 1901 (laws 1901, ch. 27), extending the class to whom the specific articles should go, did not rest upon the same forcible and cogent reasons as the widow's allowance, and has apparently been considered by the legislature to be ill advised, for in 1907 the law was again amended, and the words "heir or heirs at law" were changed to "child or children, if any, of the deceased," which seems a much wiser provision than the former, and to stand upon better reason.

We have considered the arguments and examined the cases cited in the brief on motion for rehearing in the case of *In re Estate of O'Shea,* as well as in the appellants' brief, but we see no reason for departing from the doctrine of *In re Estate of Fletcher,* 83 Neb. 156; *In re Estate of Manning, ante,* p. 60, and *In re Estate of O'Shea, ante,* p. 156.

The judgment of the district court in *In re Estate of Leavitt* is affirmed, and the motion for rehearing in *In re Estate of O'Shea* is denied.

JUDGMENTS ACCORDINGLY.

FAWCETT, J., dissents.

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GEORGE LANGENFELD, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 14, 1909. No. 15,856.

1. **Negligence, Elements of.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to disharge that duty; and injury resulting from the failure.

2. ———: PLEADING. The petition must allege these essential ele-

ments, and the proof must support the allegations, or there can be no recovery.

3. Evidence examined, and *held* insufficient to support the material and necessary allegations of the petition.

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

*N. H. Loomis, Edson Rich, James E. Rait* and *E. H. Crocker,* for appellant.

*Weaver & Giller, contra.*

LETTON, J.

This is an action to recover for personal injuries. The plaintiff at the time of the accident was in the service of the defendant as a cook upon a dining car running from Omaha to the Pacific coast. About 4 o'clock of the afternoon of the day on which the accident occurred, a fellow employee, named Roberts, was sent to his house in Omaha to request him to assist in stocking a dining car for the road. The shortest way to the car was through the yards of the railroad company. Roberts and the plaintiff entered the yards near Seventeenth street, and from thence started to walk eastward between the eastbound and westbound main-line tracks along a smooth and well-beaten track toward where the dining car stood, Langenfeld being about six or seven feet behind Roberts. At this locality there are four parallel railroad tracks. The track is curved from Fourteenth to Seventeenth streets. There was a long string of freight cars standing upon the first track to their right. As they reached Fifteenth street going east, a passenger train belonging to the Illinois Central Railroad Company using the defendant's tracks approached upon the south main-line track, going about 15 or 20 miles an hour, which was the usual rate of speed at that point. It is admitted that there is about five feet clear space between the sides of passenger coaches on this track and box cars upon the next track.

Plaintiff says he first saw the approaching train when it was about a half block away. He stepped over toward the box cars, and, as the train approached, stepped partially between the ends of two of them, having his feet outside of the rails, his side and head outside of the opening, but with his shoulder partly between the ends of the box car. The cars between which he stepped were out of repair and defective, in that the drawheads were broken and gone, and they were coupled together with chains which allowed the ends of the cars to come as close as six inches to each other and to draw apart about three feet. At the moment he placed his shoulder between the cars, an engine at a distance of over a block away, and around the curve, moved the line of cars, pinching the plaintiff's shoulder and inflicting upon him severe and permanent injuries. There is no evidence as to the presence or absence of signals when the cars were moved. As Roberts saw the train approaching, he stepped over to the box cars, leaned against the car, took hold of the bar or rail upon the side of the car which keeps the door in place, and held closely to it until the train had passed. A boy named Hourigan, who was employed as a call boy by the defendant, had ridden the switch engine to about Seventeenth street, when he got off and walked eastward between the same tracks as the plaintiff and Roberts, but about two or three car-lengths behind them. Like them, he first saw the Illinois Central train as it came around the curve, and, as it approached, was between it and the box cars in the same relative position as plaintiff and Roberts. He continued to walk on slowly between the passenger train and the box cars, until the train passed, in the same manner as before. Neither he nor Roberts were injured. He testifies that he saw Langenfeld put his shoulder between the cars just as the switch engine was backing down another string of cars to connect with these. He and Roberts both say that after they saw the Illinois Central train they had plenty of time to cross over

to the north side of the south track, and both say they saw a switch engine at work near the west end of the box cars. Plaintiff's testimony shows that he was fully acquainted with the *locus in quo,* passed along there frequently, that his reason for walking between the two main-line tracks was that it was easier to walk there than on either side on account of there being no dirt, ashes and coal between these tracks, while there was upon and between the other tracks. He further shows that he knew that the track upon which the box cars were standing was a main-line track liable to be used at any time, and that the track upon which the Illinois Central train approached was also a main-line track used every day. There is little, if any, dispute in the testimony. The witnesses for the defendant, Hourigan and Roberts, testify substantially to the same state of facts as the plaintiff, except that they saw the switch engine at work, while plaintiff says he did not see it. At the close of the evidence the defendant moved for a directed verdict. This motion was overruled and the case submitted to a jury, which found for the plaintiff.

The defendant first contends that the court erred in refusing to submit to the jury the question whether or not the approaching Illinois Central train was the proximate cause of the injury. The petition alleged that the Illinois Central train approached at a rapid and unusual rate of speed, and without signals, but there was absolutely no evidence to support this allegation of the petition. The undisputed evidence shows that the train was approaching in the usual and ordinary manner, and at a rate of speed not unreasonable, under all the circumstances. The court instructed the jury that the sudden approach of that train was not the proximate cause of the injury, and should not be considered, except as a circumstance in explaining the conduct of the plaintiff and in determining whether he was guilty of contributory negligence in doing what he did. We think there was no error in this.

The court instructed the jury that they should consider the grounds of negligence named in the petition, "which are: (1) Negligence in having the two defective cars fastened together in the manner in which they were; (2) the moving of said cars without any warning or signal"—and that, if they found defendant was guilty of such acts, or one of them, which was the proximate cause of plaintiff's injury, they should find for the plaintiff. Defendant contends that this was error, for the reason that there was no evidence that signals were not given before the cars were moved, and because it owed no duty to the plaintiff in respect to the defective bumpers. That plaintiff's occupation as a cook did not require him to enter the space between the cars, and there was no invitation, either expressed or implied, for him or any one else, except employees connected with the operation of the train, to place himself in such a dangerous position. It also takes the broad position that no actionable negligence of any kind is shown by the record, and further that plaintiff was guilty of contributory negligence.

For convenience, we will consider these points together, except the assignment as to contributory negligence. What were the plaintiff's rights, if any, between the tracks? We cannot accede to the position that he was a mere trespasser there. On the contrary, we think that the evidence shows such a permissive use of the way between the tracks by the employees of the defendant that there was an implied invitation to its use by plaintiff and other servants of the company when going to and from their work, or while engaged upon the company's business. This being so, the defendant was bound to use ordinary care to keep the way safe, so that persons using it would not be exposed to dangers other than might be reasonably expected in such locality. So far as shown by the testimony, this was done. If the defendant had been injured by a negligently and improperly loaded car whose load projected over the way, or if, while on the usual path, he had been injured by the negligent operation of a train,

it is probable that liability would exist. But, in order to permit a recovery even in such a case, the danger must have been such as not usually incident to, or as not liable to be foreseen as a result of, the usual and ordinary operation of trains in that place. The passage of trains in opposite directions is an incident which employees knowingly using a walk between main-line tracks must be charged with notice of, and the usual risk and danger from passing trains must be taken to be assumed by an employee who voluntarily chose this path, when, as the evidence shows, others were open to him. But the plaintiff was not injured while upon this path. The duty of the defendant to him while in that situation had been fully performed.

Plaintiff asserts, however, that the sudden approach of the Illinois Central train made it necessary for him to step between the box cars, and that the defendant owed him a duty of keeping such cars in repair. But his testimony clearly shows that he was fully advised of the dangers of the place in which he was walking, and the approach of the Illinois Central train was a circumstance which he must have foreseen. He can therefore base no claim against the defendant on account of its approach in the manner that it did.

It has been well said that, "in order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure." *Means v. Southern C. R. Co.*, 144 Cal. 473, 1 Am. & Eng. Ann. Cases, 206; *Indiana & Chicago Coal Co. v. Neal*, 166 Ind. 458, 9 Am. & Eng. Ann. Cases, 424; *Faris v. Hoberg*, 134 Ind. 269. The petition must allege these essential elements, and the proof must support the allegations, or there can be no recovery. The petition in the instant case may set forth sufficient facts to warrant a recovery, though this we do not decide, but the evidence falls far short of proving the material averments thereof. The

first charge of negligence is that the defendant negligently owned, kept and used two defective freight cars, which defective and broken condition had existed for a long time, and of which the defendant long prior to the happening of the injuries had due notice, but which was unknown to the plaintiff. As to this allegation of time and notice there is no testimony whatsoever. So far as the record shows, the defective condition of the cars might have been the result of an accident for which the defendant was not to blame and as to which no negligence existed, and it might have occurred so recently that the cars were being moved for the first time thereafter, and for the purpose of repair; in fact, the evidence does show the movement was in the direction of the shop yard.

Another charge is that the Illinois Central passenger train approached at a rapid and unusual rate of speed, and without signals or warnings, and was almost upon the plaintiff before he was aware of its presence; but he testifies that he saw it when it was about a half block away, and there is no evidence to show that the rate of speed was excessive or unusual.

The next allegation is that, in order to save himself, the plaintiff hurriedly stepped away from the track, and stepped between the freight cars, and that, while so standing, the cars were moved by the switch engine without signal or warning; but there is no evidence that the cars were moved without signal or warning, or in other than the usual manner, or that the defendant knew or should have known of his dangerous position.

Does the evidence establish the fact that the defendant owed plaintiff a duty in respect to the defective cars? He was not in any way connected with the operation of the freight train, hence he was under no obligation to his employer to go between the cars. The cars were upon a track where to plaintiff's knowledge they were liable to be moved at any time, and, even if the drawheads had been perfect, the position between them was one of danger. The license was to use the path between the tracks, and the

defendant's liability is only commensurate with the extent of the license. Note to *Ryerson v. Bathgate,* 57 L. R. A. 307, 67 N. J. Law, 337. When plaintiff stepped out of the beaten way between the cars, the only duty owing to him by the defendant was to exercise proper and reasonable care not to injure him, as soon as it acquired knowledge of his dangerous position. But the act of placing himself in danger and the act of moving the cars were apparently simultaneous. The defendant had no knowledge of his danger and no reason to anticipate that a stranger to the operation of the train would, while the cars were in its private yards, place himself in such a position. This view is in entire harmony with the principle laid down in *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645, that "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way." *Chicago, B. & Q. R. Co. v. Wilgus,* 40 Neb. 660. And is also consistent with *Shults v. Chicago, B. & Q. R. Co.,* 83 Neb. 272. See, also, *Hogan v. Chicago, M. & St. P. R. Co.,* 59 Wis. 139; *Illinois C. R. Co. v. Schmitt,* 100 Ill. App. 490; *Illinois C. R. Co. v. Parkhurst,* 106 Ill App. 467; *Schreiner v. Great Northern R. Co.,* 86 Minn. 245, 58 L. R. A. 75.

The case does not fall within the rule that, where one negligently places another person in a position of sudden danger, any injury which he may suffer by reason of the instinct of self-preservation is taken to be the effect of the dangerous exciting cause, for in this case the evidence fails to show any negligent act on the part of defendant, or any one else, causing a sudden or unusual circumstance calculated to deprive the plaintiff of his presence of mind to such an extent that he acted involuntarily. We think the evidence is insufficient to affirm-

atively disclose the neglect of any duty owing by the defendant to the plaintiff.

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

REVERSED.

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JAMES M. MCMILLAN, APPELLEE, V. CHARLES G. HEAPS ET AL., APPELLANTS.

FILED DECEMBER 14, 1909. No. 15,816.

1. **Statute of Frauds: PETITION: SUFFICIENCY.** Where a petition discloses that the contract in suit is for the sale of chattels, and in its inception was within the statute of frauds, the pleader should state some fact sufficient in law to take the contract without the statute; but, if he alleges facts from which it is possible to logically infer that the defendant received and accepted as owner part of the property sold, the pleading is not subject to a general demurrer because of the invalidity of the contract.
2. ———: SALES: DELIVERY: ACCEPTANCE. To satisfy the statute of frauds, the vendor must deliver part of the chattels with the intention on his part of vesting the right of possession in the vendee, and the vendee must receive and accept the property; but any act by the vendee in connection with, or after, the receipt of the property sold, from which it may fairly be inferred that his possession is that of an owner, presents a question of fact for the jury to determine whether the act was performed with the intention of thus accepting the property.
3. ———: ———: ACCEPTANCE: RESCISSION. Such receipt and acceptance will not be invalidated by a subsequent return of the chattels to the vendor, if he does not consent to a rescission of the contract.
4. **Appeal: EVIDENCE.** A verdict rendered upon conflicting evidence in an action at law will not be set aside on appeal unless it is manifestly wrong.

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

*Silas A. Holcomb, C. H. Holcomb* and *A. Wall,* for appellants.

*Sullivan & Squires, contra.*

ROOT, J.

This is an action for damages for the breach of an alleged contract for the sale of cattle. Plaintiff prevailed, and defendants appeal.

The vital question presented by the record is whether there was a receipt and an acceptance of any part of said chattels so as to take the contract without the statute of frauds. Defendants filed a general demurrer to the petition, and still insist that the last named pleading does not state facts sufficient to constitute a cause of action against them. The demurrer was overruled. The charge to the jury is a clear and succinct statement of the law, and no exceptions are taken thereto.

1. Defendants assert that the petition will not support the judgment, because the pleading discloses that the contract was oral, the price to be paid for the cattle exceeded $50, no part whereof was paid, and the pleader failed, so it is argued, to charge that any of the chattels were delivered to and accepted by the defendants. The pleader states the facts from plaintiff's standpoint, and alleges that the cattle were to be delivered at Halsey; that they were driven to said station, and "the defendants cut out and placed in a separate pen all of said cattle except the 19 head, and by their own efforts and directions selected from the whole bunch the cattle which they desired and intended to take. It proved upon a count at Halsey that there were only 106 head, and the defendants by themselves and their own effort and by their instructions to plaintiff's said agent selected said 87 head and put them in a separate pen ready for shipment. * * * After the defendants had, in the manner above stated, selected said cattle, they demanded of plaintiff's agent that he give them a bill of sale for the cattle, which he, the said agent, offered to do, but which they refused because the same was not personally signed by plaintiff." The pleader further charges that defendants knew that said agent had authority to give the bill of sale, and their

demands were but an excuse for the breach of their contract.

The words selected and accepted are not synonymous. The pleader may not have exercised the best judgment in stating that defendants selected the cattle, instead of pleading the ultimate fact that they received and accepted the stock, but we think it is possible to infer from the petition that part of the cattle were in fact delivered to and accepted by defendants. Any act of the vendee manifesting an intention on his part to accept the chattels, or some part thereof, will satisfy the statute if he also receives the property, and a selection under some circumstances may be evidence of an acceptance. *Cusack v. Robinson,* 9 Week. Rep. (Eng.) 735. If the evidence on this point has probative value, it is for the jury to say whether there was an acceptance or not. Browne, Statute of Frauds (5th ed.) sec. 321; *Smith v. Stoller,* 26 Wis. 671; *Somers v. McLaughlin,* 57 Wis. 358; *Gray v. Davis,* 10 N. Y. 285; *Jones v. Reynolds,* 120 N. Y. 213.

Defendants argue that the evidence is insufficient to support the verdict. Giving the utmost credence to the evidence produced by plaintiff and rejecting all contradictory evidence introduced by defendants, it appears that defendants orally agreed, after an examination of the cattle, to pay $4,300 for 90 steers, to be selected by them out of a herd believed by the parties in interest to contain 109, but amounting to only 106 head. The cattle were to be delivered at Halsey, the nearest railway station. Plaintiff's servants drove the herd into the stock yards of the railway company at Halsey, and defendants selected therefrom 87 and rejected 19 cattle, placed the larger number in a yard separate from the pen containing the rejected stock, and counted the cattle in each pen. No objections were then made to retaining the 87 cattle, but defendants fed and cared for them. About one hour thereafter defendant Heaps stated to plaintiff's servant, "McMillan isn't here, and I have a notion not to take these cattle," demanded a bill of sale for the stock, and

complained that there were but 106 head of cattle from which to select the ninety. Later, Heaps admitted to plaintiff's agent that the cattle were all right, but said that they were deficient in number, and that he wanted a bill of sale. Plaintiff's employee and his brother each offered to execute the bill, but Heaps questioned their authority to act for plaintiff, and abandoned the steers. The evidence produced by defendants contradicts many of the foregoing statements. The evidence would sustain a verdict for defendants, but there is proof to uphold the verdict if the jurors believed that defendants intended by their acts to accept the 87 steers selected and for a time controlled by them. We cannot enter the domain of the jury and substitute our judgment for theirs upon questions of fact.

2. Defendant Heaps testifies that he agreed to take 90 cattle upon condition that plaintiff would give a bill of sale therefor, and that the witness refused to accept the cattle because the bill was not executed. He explains that the cattle were branded and could not be sold to advantage in the stock yards at South Omaha or Kansas City without a bill of sale from the owner of the brands. The answers do not submit this defense. If defendants, as vendees, received and accepted part of the cattle purchased by virtue of the oral contract, it would thereby be taken out of the statute of frauds, notwithstanding its terms were in dispute. *Hinchman v. Lincoln,* 124 U. S. 38, 54. Nor would a return of the chattels theretofore received and accepted by the vendee replace the contract within the statute. *Jackson v. Watts,* 1 McCord (S. Car.) *288; *Galvin v. MacKenzie,* 21 Or. 184.

3. Defendants contend that the contract was rescinded, and hence there can be no recovery thereon. No such defense is presented by the pleading. Plaintiff never consented to a rescission of the contract, and defendants have not been damaged because he sold the cattle to the best advantage in the market. Furthermore, no exception is taken to the instruction as to the measure of damages.

While the evidence produced by plaintiff is emphatically contradicted, there is evidence in the record to support the verdict.

The judgment of the district court is

AFFIRMED.

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ROBERT RYAN, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED DECEMBER 14, 1909. No. 15,828.

1. **Adverse Possession.** "The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. His possession must be as owner and adverse to every other person." *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75.

2. ———: EVIDENCE. The exclusive occupation and use of real estate for ten consecutive years create a strong presumption that possession was held under a claim of right and adverse to all persons. If, however, the occupant testifies in support of his plea of adverse possession, and upon cross-examination will not state unequivocally that he occupied the land under a claim of right or that he asserted ownership to it during that period, the presumption arising from his overt acts will be overthrown and his claim to title by adverse possession denied.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*Shepherd & Ripley* and *Robert Ryan,* for appellant.

*John M. Stewart, T. F. A. Williams, C. C. Flansburg* and *Leonard A. Flansburg, contra.*

ROOT, J.

This is an action to quiet in plaintiff title to land originally within the public streets of the city of Lincoln, and to enjoin defendant from interfering with plaintiff's enjoyment of said real estate. Defendant prevailed, and plaintiff appeals.

1. Counsel for defendant requests us to review and overrule *Meyer v. City of Lincoln*, 33 Neb. 566, *Lewis v. Baker*, 39 Neb. 636, and *Webster v. City of Lincoln*, 56 Neb. 502. Were we to assent, the judgment would be affirmed as a matter of law. From our standpoint it will not be necessary to consider this branch of the case, and, while we shall not do so, we have no disposition to disparage the opinions referred to.

2. The judgment of the district court must be affirmed unless we find that the evidence establishes plaintiff's title by adverse possession. The basic element of every adverse title is possession under a claim of right. The rule is well stated in the second paragraph of the syllabus in *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75: "The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. His possession must be as owner and adverse to every other person." The opinion follows *Horbach v. Miller*, 4 Neb. 31, and is in accord with the reasoning of MAXWELL, J., in *Gatling v. Lane*, 17 Neb. 77, 80: "A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive adverse possession of the premises for ten years, thereby disseizes the owner; and this is so whether the entry and possession are contrary to the will of the owner or not, if the occupant denies the owner's title and claims the land as his own." *Smith v. Hitchcock*, 38 Neb. 104; *Hoffine v. Ewings*, 60 Neb. 729; *Knight v. Denman*, 64 Neb. 814; *Bush v. Griffin*, 76 Neb. 214; *Butler v. Smith*, 84 Neb. 78. Bearing this well-established principle in mind, we will examine the evidence.

The testimony of Thomas Ryan, plaintiff's grantor, establishes satisfactorily that in 1883 a substantial fence was constructed upon the outer boundary of the disputed tracts, and that the witness from said year until in 1887

held continuous, exclusive and adverse possession of the land. In 1887 plaintiff purchased the adjacent lots from Thomas Ryan and received possession of the disputed territory. Plaintiff testifies that in taking possession he did not have any intention of claiming the property as against the city; that he intended to take and continue possession and reap whatever fruits might accrue therefrom; and that his claim of right by adverse possession accrued in 1893, coincident with the end of ten years' possession of the premises by himself and his grantor. The following appears in the bill of exceptions as part of plaintiff's cross-examination: "Q. You will not swear that you went on there with the intention of exercising adverse possession? A. Simply went in with the intention of taking possession of whatever Tom had inclosed. That was pretty near open there then. Nobody thought much about what was inclosed then. Q. You intended that that possession should ripen into title and divest the city of ownership and vest ownership in you? A. I don't know as I had any intention of letting it ripen into title. I found the property surrounded by a fence, and possession was turned over to me with the lots, and I intended to hold possession with whatever would result from it, but I didn't look forward to see if I should ever have title that I might assert against the city." The witness further stated that he knew title to the property was in the city at the time he took possession, and that prior to 1893 he could not successfully assert title against the defendant. Plaintiff nowhere stated in his direct examination that he occupied the property under a claim of right or that he held possession as owner thereof. He did state, in answer to a question on cross-examination, that his possession was adverse to the city. The fact that the tract had been inclosed by a fence more than ten years preceding 1899, and that plaintiff and his grantors during that time had received all benefits that accrued from an exclusive occupation of the land, unexplained by other evidence, would unquestionably support a judgment in his favor. Those acts,

in the words of Judge GANTT, "are presumptive evidence and evincive of intention to assert ownership over and possession of the property." *Horbach v. Miller,* 4 Neb. 31. If, however, that presumption is met by the sworn admission of the occupant that in exercising dominion over the land he did not claim to own it, the presumption will disappear. It is not essential that the occupant accompany his possession with declarations of hostility toward the owner of the fee. *City of Florence v. White,* 50 Neb. 516. His exclusive occupation under a claim of right is sufficient ordinarily to establish an adverse possession. To constitute adverse possession there must be a combination of conduct and intent. If the actor testifies to his intention and purpose in performing his visible acts of authority over the property, and admits that he did not act under a claim of right or ownership, his testimony may, and as against himself ought to, overcome the conclusions and presumptions that otherwise would have been drawn from his conduct. It is presumed that a man will do that which tends to his obvious advantage, if he possesses the means to accomplish his purpose. Of all persons the plaintiff knew best whether his possession of the tract in question was under a claim of right or ownership, and if he has failed to unequivocally state the fact, while a witness in his own behalf upon this subject, but, on the contrary, has admitted that he held possession trusting that he would not be disturbed for ten years, and thereafter intended to assert title to the land, the court will not be justified in drawing inferences to support a judgment in his favor.

Upon the facts the judgment of the district court is right and is

AFFIRMED.

WILLIAM K. MILLER ET AL., APPELLANTS, V. FRED M. RAYMOND ET AL., APPELLEES.

FILED DECEMBER 14, 1909. No. 15,829.

1. **Negligence: SALES: LIABILITY OF SELLER.** Where a retail merchant at the suggestion of a customer sends for and sells him crude petroleum to be used for dipping cattle, and the vendee specifies the qualities said oil shall possess and the locality from whence it shall be procured, and the vendor procures oil as directed, deficient in one element only, he will not be liable in damages for injuries caused by the application of said oil to the vendee's cattle, where it is apparent that the vendee did not rely upon the judgment or knowledge of the vendor, but upon statements published by the government, and there is nothing in the record to prove that the deficiency in the one ingredient described in any manner injured or contributed to the injury of said cattle.

2. **Appeal: INSTRUCTIONS.** Where the facts are established by uncontradicted evidence and no verdict other than the one returned can be sustained thereby, this court will not examine alleged errors of the district court in giving or refusing to give instructions.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*Sullivan & Squires, Eugene Burton* and *Wilcox & Halligan*, for appellants.

*Wright & Wright, H. C. Brome* and *Boyd & Barker, contra.*

ROOT, J.

This is an action for damages flowing from injuries to plaintiffs' cattle, alleged to have been caused by the use of crude petroleum purchased from defendants for dipping said live stock. Defendants prevailed, and plaintiffs appeal.

Plaintiffs allege, in substance, that at the time of the transactions referred to in their petition they owned a herd of cattle within territory covered by a proclamation

of the government directing that all cattle therein should be dipped to prevent the spread of mange; that the bureau of animal industry had issued a pamphlet recommending the use of crude petroleum for dipping cattle, describing the oil suitable for said purpose, and warning the public that oils not containing the qualities detailed in the pamphlet were dangerous and likely to destroy cattle dipped therein. Plaintiffs further allege that defendants possessed a copy of said pamphlet, which contained, among other things, the following: "It is to be observed that petroleum from different wells in the Beaumont region varies considerably, some wells producing a thick heavy oil as low as 15° gravity Baume, other wells producing a light oil 22° to 23° gravity, and some even higher, a production recently showing 29½°. The bureau experiments with the different oils have shown that the thick heavy oil of low gravity is apt to irritate the skins of animals dipped in it, sometimes producing quite serious results, while the light oil is more bland and not liable to injure the animals. It is therefore important that only the light, higher gravity oil should be used for dipping purposes. In ordering, the kind of oil should be distinctly specified as Beaumont crude petroleum of 22½° to 24½° Baume, containing 1½ to 1¼ per cent. sulphur, and that 40 per cent. will distil over when the oil is heated to a temperature of 200° to 300° C." Plaintiffs further charge that they applied to defendants for oil of the quality recommended in said pamphlet for the purpose of dipping their cattle, ordered about 800 gallons thereof, and later procured 700 gallons of the liquid from defendants; that they did not know the quality of the oil thus received by them, and could not by inspection or test determine that fact, but relied on the information and knowledge of defendants; that defendants did not order oil according to the directions contained in said pamphlet, and failed and neglected to furnish oil with the qualities specified in said circular, but delivered to plaintiffs other oil with destructive qualities; and that defendants knew

plaintiffs intended to use said liquid for dipping their cattle. Plaintiffs further plead that, believing the oil they received from defendants contained the qualities named in said pamphlet, they dipped their cattle in the liquid, to the injury of said stock and their own damage. The answer contains a general denial, and an allegation that the oil was ordered by defendants at plaintiffs' request and in accordance with their instructions. The reply is a general denial.

Alleged errors of law occurring at the trial and errors in the giving and refusing to give instructions are assigned and argued in the brief, but in our view of the case it will be unnecessary to discuss those assignments for the reason that the pleadings and evidence will not in our judgment sustain a verdict for plaintiffs. The action is not to recover for the difference in value, if any existed, between the oil ordered and that delivered to plaintiffs, nor are defendants charged with malice or fraud. The word warranty does not appear in the pleadings; but, from a statement made in the district court by plaintiffs' counsel, we conclude that the purpose of the suit is to recover upon an implied warranty that the oil was reasonably suitable for the purposes for which plaintiffs expected to use it. Plaintiffs in effect contend that a sale by description carries with it an implied warranty not only that the chattel shall answer to the specifications, but that it is suitable for the purpose for which it is bought. It is quite generally held that, where a manufacturer or dealer contracts to supply an article which he produces or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the vendor, an implied warranty exists that the goods shall be reasonably fit for the purposes for which they are ordered. *Jones v. Just,* 3 L. R. Q. B. (Eng.) *197; *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68. But, where the purchaser specifies the qualities, dimensions or characteristics which the article to be supplied shall

possess, the buyer necessarily relies upon his own judgment or knowledge, and not upon the knowledge, judgment or experience of the seller. *Milwaukee Boiler Co. v. Duncan,* 87 Wis. 120.

In the instant case the oil was not an article manufactured by man, but a product of nature. Plaintiffs and defendants were in equal ignorance concerning the constituents of the liquid. Defendants did not profess to have any knowledge of the subject, and plaintiffs knew that defendants had not been handling crude petroleum. Plaintiffs and defendants alike received their information from the government pamphlet. This circular informed the reader that oil secured from different wells in the Beaumont district was not of uniform quality. Three specifications as to quality and one concerning locality were given in the pamphlet and plainly constituted the matters of description entering into the purchase and sale of the oil in question. The oil should be ordered from the Beaumont district. The evidence is undisputed and unquestioned that the oil came from the Beaumont district, and further that oil of the same grade had been sold to the government for dipping cattle. As to quality, the government recommended oil of a specific gravity of from 22½° to 24½° Baume, containing 1¼ to 1½ per cent. of sulphur, and 40 per cent. of the oil should distil over when heated to a temperature of 300° Centigrade. Plaintiffs caused samples of oil from their dipping tank to be analyzed by Messrs. Sewell and Crowley, and specimens taken from defendants' oil tank to be analyzed by Mr. Emery, all expert chemists.. Mr. Sewell testifies that the specific gravity of the oil analyzed by him was 20.8° Baume, 40 per cent. of the oil distilled over at a temperature of 300° Centigrade, and it contained but .56 per cent. of sulphur. Mr. Crowley testifies that the specific gravity of the oil analyzed by him was 21° Baume, 37 per cent. of the oil distilled over at a temperature of 300° Centigrade, and it contained only .25 per cent. of sulphur. Mr. Emery testifies that one sample of the oil analyzed

by him had a specific gravity of 21.5° and the other 23° Baume; 40.6 per cent. of one sample and 40.5 per cent. of the other distilled over at a temperature of 300° Centigrade; one sample contained .58 per cent. and the other .89 per cent. of sulphur. Mr. Sewell testifies that crude petroleum, if exposed to the air, will evaporate; that thereby volatile elements escape, carrying with them sulphur contained in the oil, and that partial evaporation will increase the specific gravity of the remaining oil.

It will be noticed that the oil taken from defendants' tank conformed in density to the government recommendations, whereas that procured from plaintiffs' open dipping tank was slightly heavier than 22½° Baume. Three out of four samples answered to the distillation test, and in but one particular did the oil fail to answer the specifications, a lack of less than 1 per cent. of sulphur. There is not a scintilla of evidence in the record to show that an addition of 1 per cent. or any other quantity of sulphur to the oil would have prevented injury to plaintiffs' live stock. In fact counsel for plaintiffs state in their brief: "It was not because the oil was heavier and contained less sulphur that rendered it harmful to plaintiffs' cattle, but was probably due to the presence of excessive quantities of certain caustics therein, such as carbolic acid, which probably could not exist or is never found in oil of the description contained in the order which produced the injury." The difficulty is, there is nothing in the record to support the argument. The analyses merely indicate that the oil contains sulphur. The other ingredients are not shown. Defendants did not undertake to furnish oil free from such caustics as may be found in crude petroleum. Under the circumstances of this case, when defendants delivered oil answering the description found in the government pamphlet, they had performed their undertaking, and, if the liquid did not come up to the specifications, it was incumbent on plaintiffs to prove that the imperfection was the proximate cause of the injury to their cattle. This they have not done, nor do

we believe it possible for them to do so. Verdicts and findings of fact must rest upon evidence, and not mere conjecture. Neither a court nor a jury ought to accept an argument for a fact, or for an inference logically to be drawn from facts proved in the case. *Leisenberg v. State,* 60 Neb. 628; *Babcock v. Fitchburg R. Co.,* 140 N. Y. 308.

The case was exhaustively tried in the district court. Plaintiffs have little, if any, just cause for complaint if it is conceded that upon any phase of the case they might recover, and, it appearing to us that upon no just application of the law to the facts can defendants be held liable, the judgment of the district court will be affirmed, without a discussion of the errors assigned.

AFFIRMED.

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JOHN W. ANDREWS, APPELLANT, V. ROBERT E. HASTINGS, APPELLEE.

FILED DECEMBER 14, 1909. No. 15,838.

1. **Adverse Possession.** The statute of limitations will not run in favor of an occupant of real estate unless his possession is under a claim of right or ownership, but the mere fact that while in possession he has been under a mistake as to the correct boundary of his tract will not render his possession permissive nor toll the statute as to the land within his inclosure and without his true boundary.
2. **New Trial: NEWLY DISCOVERED EVIDENCE: DILIGENCE.** A litigant is not entitled to a new trial on the ground of newly discovered evidence, unless it appears that he exercised due diligence before trial to procure such evidence, and that he was not negligent in failing to produce it during the trial.

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

*Charles H. Sloan, F. W. Sloan* and *J. J. Burke,* for appellant.

*F. B. Donisthorpe* and *Burkett, Wilson & Brown, contra.*

ROOT, J.

This is an action at law to recover possession of a triangular shaped tract of land within defendant's inclosure. A jury was waived, the court found for defendant, and plaintiff appeals.

1. It is argued that, although defendant has occupied the premises for more than ten years next preceding the commencement of this action, his possession was not adverse to plaintiff's title, but permissive, and therefore the statute of limitations is not a defense to this action. Plaintiff owns the southwest quarter and defendant the southeast quarter of section 24, township 6, range 2, in Fillmore county. The field notes of the government survey of said section are not in evidence, but witnesses testified to monuments evidently constructed by the government surveyors to perpetuate the section corners. It appears that the section has been twice surveyed, and two distinct corners were established as the northwest corner of the section. The county surveyor in 1877 located a quarter section corner in the north line of the section. Prior thereto the respective owners of the northeast quarter and the northwest quarter of the section had fixed their boundary line with reference to the western of the northwest corners, but in subsequent litigation the eastern of said corners was established as the northwest corner of the section. The parties hereto constructed a boundary fence commencing at a point in the south line of their farms and immediately north of the quarter corner; from thence the fence was built north to a point in the half section line running east and west so as to join the fence first constructed by their neighbors on the north. If the quarter corner in the north line of the section, as established in the litigation above referred to, is correctly located, the north end of the fence, constructed by the parties hereto, is about 49 feet too far west; but if the western corner at the northwest corner of the section is the proper standard, the fence is correctly located. Plain-

tiff testifies, and is corroborated by other witnesses, that it was agreed between the parties at the time the fence was built that it should be constructed so as to extend south the line existing between their neighbors to the north; that, subsequent to the termination of the litigation between those neighbors, the witness spoke to defendant about moving their fence to conform to the true line as settled by said lawsuit, and it was agreed between them that, whenever the fence became out of repair, it should be moved to the true line. Defendant denies any such agreement, and while he testifies that he was not claiming any part of the southwest quarter of the section, but the southeast quarter only, he swears that their boundary line was agreed upon by himself and plaintiff and the fence constructed accordingly, and that subsequently he occupied all of the land in that section east of the fence under a claim of ownership.

Each party accuses the other of making no claim as of right to the land in dispute. It is true, as argued by plaintiff, that we have consistently held, since *Horbach v. Miller,* 4 Neb. 31, that occupation of real estate will not ripen into title unless that possession is adverse to the true owner and with the intent and purpose of the occupant of asserting ownership to the land. See *Ryan v. City of Lincoln, ante,* p. 539. But possession may be adverse without any declaration of hostility to the true owner. *City of Florence v. White,* 50 Neb. 516. The occupant's intention at the time he took possession is not necessarily a controlling factor. It is sufficient if possession is taken and the premises held for ten years under a claim of right or of ownership. *Fitzgerald v. Brewster,* 31 Neb. 51. If the agreement testified to by plaintiff was made, then defendant's possession was not adverse. However, the court's finding upon this proposition is supported by defendant's evidence, and as the action is one at law we are not authorized to vacate that finding because the evidence to support it is strongly contradicted.

It is suggested that, as neither party claimed more than

a quarter section, defendant's possession never was adverse. If it is assumed that the parties were deceived by the government monuments and the fence constructed by their neighbors, they could not have remained under that influence subsequent to the close of the litigation in 1881, which resulted in a correction of the line between the northeast quarter and the northwest quarter of the section. If a mutual mistake existed to that time, it must have terminated 25 years before this suit was commenced. From 1881, if not before, the rule announced in *Tex v. Pflug,* 24 Neb. 666, would apply, if it is admitted that the agreement testified to by plaintiff did not exist. *Levy v. Yerga,* 25 Neb. 764; *Obernalte v. Edgar,* 28 Neb. 70; *Baty v. Elrod,* 66 Neb. 735. While defendant does not assert title to more than a quarter section of land, it seems reasonably plain that he contends that the fence referred to marks the western boundary of that quarter. The evidence supports the judgment.

2. It is urged that the district court should have granted a new trial because of newly discovered evidence. During the trial plaintiff and his witnesses testified that the fence between the litigants' respective farms was built in 1879 and 1880. Defendant and two of his witnesses testified that it was constructed about 1886. Plaintiff, after judgment, produced affidavits of the former owners of the north half of section 24 and of various neighbors who depose to the fact that the fence was erected in 1878 or thereabouts. This testimony is material, but cumulative, and we do not feel justified in holding that its production would probably have changed the result of the litigation. Neither do we consider that plaintiff exercised due diligence to secure the depositions of the witnesses or their presence at the trial. Plaintiff deemed it material to prove that the fence was constructed in the fall of 1879 and the spring of 1880, and produced witnesses to sustain him on this point. He ought to have anticipated that defendant might attempt to controvert that testimony. The fact that plaintiff failed to appreciate

that a difference might exist in the recollection of witnesses concerning conditions existing 25 or 30 years ago will not justify a court in granting him a new trial to the end that he may corroborate his own testimony upon a controverted fact. Moreover, the district court is vested with discretion in disposing of applications for a new trial because of newly discovered evidence, and ordinarily its judgment will not be disturbed. *Grand Lodge, A. O. U. W., v. Bartes,* 69 Neb. 637.

The judgment of the district court therefore is

AFFIRMED.

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GEORGE E. SNYDER, APPELLANT, V. FRANCIS J. COLLIER ET AL., APPELLEES.

FILED DECEMBER 14, 1909. No. 15,847.

1. **Pleading:** AMENDMENT. If plaintiff's petition is prepared, signed and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation.

2. **Dismissal.** A plaintiff may, as a matter of right, under section 430 of the code, dismiss his action without prejudice at any time before its final submission to the court.

3. **Pleading:** CROSS-PETITION: JUDGMENT. If a defendant desires an affirmative judgment against the plaintiff, he should state in his answer the ultimate facts to support his contention. If he fails to allege an essential fact, but it is pleaded by his adversary, an affirmative judgment in defendant's favor may be sustained by the pleadings.

4. **Vendor and Purchaser:** RECITALS IN DEED: NOTICE. The word "trustee" following the name of a grantee in a deed is notice that he may not be the owner of the real estate conveyed, and is sufficient to put those dealing with him concerning the property upon reasonable inquiry as to the existence and nature of the trust.

5. **Mortgages:** POWERS OF TRUSTEES: PRESUMPTIONS. The presumption ordinarily is that a trustee does not have authority to mortgage the trust estate, and mortgagees are bound to exercise reasonable diligence to ascertain whether that power exists.

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

*Baldrige & De Bord,* for appellant.

*Warren Switzler, contra.*

ROOT, J.

This is an action to foreclose two real estate mortgages. The district court foreclosed one, and canceled the other alleged lien. Plaintiff appeals from the judgment canceling his mortgage, and reference will be made solely to the record relating to that instrument.

The mortgage and note secured thereby were executed by "George B. Collier, Trustee," and he is identified in said instrument and in the acknowledgment thereto by the same title. The note is payable to the order of Harrison Snyder, but was given for the benefit of Harrison Snyder & Son, a partnership. George E. Snyder is the surviving member of said firm and sole legatee of the will of Harrison Snyder, now deceased. The pleader stated in the petition: "Plaintiffs show that at the time of the execution of said mortgage and note the maker of said note and said mortgage, George B. Collier, was acting as trustee for Hettie L. Collier, and held said property and executed said mortgage as such trustee." Before this action was instituted, Hettie L. Collier and the maker and the payee of said note had all departed this life. The suit was commenced in the name of the executors of the last will and testament of Harrison Snyder, deceased, but during the trial, by consent of all parties, George E. Snyder was substituted as plaintiff.

Francis J. Collier, the only defendant answering herein, is the surviving executor of the will and a son of Hettie L. Collier, deceased, and has apparent title to the mortgaged lots. Defendant pleads several defenses immaterial for an understanding of this opinion, and charges: "At

the time the note and mortgage is alleged to have been given, sued for in plaintiffs' second cause of action, the title and ownership of the real estate mentioned in plaintiffs' second cause of action was in Hettie L. Collier, now deceased, and the defendants deny that said George B. Collier, as trustee or otherwise, acted for or on behalf of the said Hettie L. Collier, or that she received any benefit from the said note and mortgage, and they deny that he had any authority to make said mortgage or to incumber said property with the same." Defendant asks that the mortgage be canceled, his title to said property quieted, and for equitable relief. The original reply is a general denial.

Over defendant's objections that the evidence was irrelevant and immaterial, plaintiff introduced copies of all of the files and the record made in proceedings prosecuted in the district court for Douglas county by the executor of Hettie L. Collier's will, for license to sell the mortgaged premises. The executor's deed and a conveyance from the purchaser to Francis J. Collier were likewise placed in evidence by plaintiff. During argument, plaintiff requested permission to file an amended and substituted petition, which omitted all reference to George B. Collier holding title to the mortgaged lots as trustee for his mother. Counsel for plaintiff made an affidavit that said allegation was inserted in the original petition by affiant after an examination of the records of Douglas county, and not because of any information furnished or instructions given by his client. Defendant objected, and was sustained, "for the reason that the testimony in the case has all been heard before the court, and part of the argument has been heard in the case," and that the amended pleadings would change the issue upon which the case was tried. Plaintiff then moved the court to dismiss without prejudice the second cause of action. The record discloses an extended discussion between counsel and the court, and that theretofore during the trial counsel had requested permission to file an amended reply

pleading that defendant is estopped from denying the validity of the mortgage. The court ruled that the second cause of action should be dismissed, but without prejudice to defendant's answer, which is referred to in this connection as a cross-bill. Thereupon plaintiff presented his amended reply, wherein he alleged that the executor of Hettie L. Collier's estate had sold said lots subject to said mortgage, and "denies that George B. Collier, trustee, at the time of giving said note and mortgage mentioned in second paragraph of said petition, was acting as trustee for Hettie L. Collier." The court denied plaintiff's request "because it is inconsistent with the petition on file," but subsequently struck out said denial and permitted the pleading to be filed.

1. Plaintiff contends that he should have been permitted to file the amended petition. Section 144 of the code authorizes amendments either before or after judgment in furtherance of justice, and the statute has always been liberally construed. The showing in the instant case is sufficient to bring plaintiff within the protection of the code, and he should have been permitted upon terms to file his amended petition.

2. Plaintiff argues that he had the right to dismiss the second cause of action, and that his pleading should not have been retained to support defendant's demand for affirmative relief. Section 430 of the code is imperative that a plaintiff, before the final submission of his case, may dismiss it without prejudice to a future action. The instant case had not been finally submitted when plaintiff made his request, and, had he at that time dismissed his second cause of action, the court would have been without jurisdiction to further consider it. *Grimes v. Chamberlain*, 27 Neb. 605. By requesting permission to dismiss, plaintiff merely observed that respect due the court, and it erred in not sustaining the application. *Beals, Torrey & Co. v. Western Union Telegraph Co.*, 53 Neb. 601; *Sharpless v. Giffen*, 47 Neb. 146; *Eden Musee Co. v. Yohe*, 37 Neb. 452; *Linton v. Cooper*, 75 Neb. 167.

3. Plaintiff contends that the answer is insufficient to support a decree canceling his mortgage. Defendant argues that the petition and the reply cure all defects in the answer. If the answer had been defensive solely, it would have followed the dismissal of plaintiff's case, but defendant asked for affirmative relief, and it was not within plaintiff's power by retreating to bar his adversary from a trial of the latter's counterclaim. Defendant did not ask relief against a codefendant, but pursued plaintiff, and therefore was not charged with the duty of filing a cross-bill; but the facts, to sustain an affirmative judgment in defendant's favor, should have been stated in his answer. Code, sec. 99; Maxwell, Pleading and Practice (4th ed.) pp. 152, 689. The actor in all suits not controlled by special statutes should allege in his pleading the ultimate facts upon which he demands affirmative relief; but, if he fails to state essential facts therein, the defect will be cured by an allegation thereof in his adversary's pleadings. The court will take into consideration all of the facts alleged in the various pleadings and render a judgment accordingly. The principle has generally been recognized in answer to assaults made upon pleadings in this court for the first time; but we would not reverse a case in equity for the sole reason that the district court had exercised that prerogative. In the instant case the allegations in the petition and answer, or those in the answer and reply, are sufficient to support a decree in defendant's favor. *American Exchange Nat. Bank v. Fockler,* 49 Neb. 713, cited by plaintiff, is not in point, because allegations necessary to sustain a judgment in the defendant's favor were not inserted in any or all of the pleadings.

4. The district court should have permitted plaintiff to deny in his reply that George B. Collier held title to the property as trustee for his mother. Subsequent to dismissing his second cause of action, plaintiff was not presenting the petition with respect to that cause to the court, and a denial in the amended reply of a trust re-

lation was not repugnant to nor inconsistent with the petition.

5. Counsel for plaintiff assert that defendant is estopped from denying the validity of the lien because he purchased the lots at judicial sale subject to the mortgage. Defendant contends that by pleading the estoppel plaintiff admits the invalidity of the mortgage. The law is well established that a grantee of real estate will not be permitted to question a lien deducted as part of his purchase price at either a private or a judicial sale. The mortgage is referred to in the application for license to sell, and the power given by the district judge conforms to the statute to sell subject to all liens; but we cannot say from the record before us that the lots were sold subject to the mortgage. Moreover, the lots were bid in by Reed as agent for the legatees named in Mrs. Collier's will, were conveyed by him to defendant as trustee for said legatees, and no consideration passed for either transfer. The evidence does not show that general creditors were prejudiced, or any person misled, or any advantage secured by the reference made in said proceedings to the Snyder mortgage. No error was committed in overruling the plea of estoppel. If no estoppel in fact exists, the plea in that regard is not a confession that the mortgage is invalid.

6. It has been suggested that we should permit amended pleadings to be filed in this court and render a judgment thereon; but we think the issues should be made up and the case first tried in the district court. Eliminating the elements of estoppel and confession from the case, the mind reverts to George B. Collier's title to the mortgaged premises and his authority to impress a lien thereon. Ordinarily a trust estate is created for administrative purposes, and he who deals therewith with notice of its character is bound in law to ascertain the trustee's authority with respect thereto. If a grantee receives title to real estate for the benefit of another, and next succeeding his name in the deed vesting him with title the

word "trustee" appears, all persons dealing with him concerning the land are charged with notice and placed upon reasonable inquiry concerning the nature of his title and the limits of his power. *Mercantile Nat. Bank v. Parsons,* 54 Minn. 56, 40 Am. St. Rep. 299; *Marbury v. Ehlen,* 72 Md. 206, 20 Am. St. Rep. 467; *Gaston v. American Exchange Nat. Bank,* 29 N. J. Eq. 98; *Union P. R. Co. v. Durant,* 95 U. S. 576; *Farmers Loan & Trust Co. v. Essex,* 66 Kan. 100, 71 Pac. 268. See, also, *Shaw v. Spencer,* 100 Mass 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Sternfels v. Watson,* 139 Fed. 505; *Geyser-Marion Gold-Mining Co. v. Stark,* 106 Fed. 558.

In *Stark v. Olsen,* 44 Neb. 646, cited by plaintiff, the trustee's powers were defined in the instrument creating the trust, so that all persons dealing with him had notice of and were bound by the limitations of his power. The cited case is not in point because George B. Collier was not vested with apparent title to the lots mortgaged by him. The word "trustee" is notice to all the world that he may have no more than a dry, naked, legal title. On the other hand, the word may be merely descriptive of an individual whose title is in fee simple. The evidence, independent of the allegation in the petition, does not prove that George B. Collier held the lots in trust, nor, conceding that he did, does it disclose the nature of that trust or the extent of his power. Ordinarily the legal presumption exists that a trustee has no power to sell or mortgage the trust estate. Prospective purchasers and mortgagees must therefore exercise reasonable diligence to ascertain whether the trustee has authority to sell or incumber the real estate. *Sternfels v. Watson, supra; Geyser-Marion Gold-Mining Co. v. Stark, supra; Jones v. Williams,* 24 Beav. (Eng.) 47, 62. The Nebraska cases cited by plaintiff do not sustain him. They refer to the official acts of trustees whose office was created by statute.

The judgment of the district court is reversed as to the second cause of action and the answer thereto, and the case is remanded, with directions to permit the litigants

to file amended pleadings. All costs in the district court up to and including April 8, 1908, are taxed absolutely to plaintiff.

JUDGMENT ACCORDINGLY.

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TATE & EHRHARDT, APPELLANT, V. HENRY LONEY, APPELLEE.

FILED DECEMBER 14, 1909. No. 15,854.

**Brokers:** ACTION FOR COMMISSIONS: ESTOPPEL. A broker was duly authorized to sell defendant's real estate for $25 an acre, $3,000 of the consideration to be paid in cash, and the "balance $1,000, payments at 6 per cent." A *bona fide* purchaser was procured, ready, able and willing to buy the land at said price. He paid the broker $3,000, and offered to pay the remainder of the purchase price upon the execution of a deed conveying the land to him. Defendant refused to convey for the sole reason that he wanted a greater price for his land. *Held*, That, in a suit brought by the broker to recover his commission, defendant was estopped to defend on the ground that by the contract he had the right to demand that all of the purchase price in excess of $3,000 should be evidenced by promissory notes maturing within some reasonable period to be fixed by the payee thereof, and that the offer to pay all of the purchase price in cash was not a compliance with the broker's contract.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Reversed.*

*Courtright & Sidner,* for appellant.

*M. H. Leamy* and *J. A. Williams, contra.*

ROOT, J.

This is an action to recover commission upon a broker's contract. There was an instructed verdict for defendant, and plaintiff appeals from the judgment rendered thereon.

The contract is in writing, signed by the parties, and by

its terms plaintiff, a partnership, was authorized to sell defendant's land for not less than $25 an acre. Three thousand dollars should be paid in cash, "balance $1,000, payments at 6 per cent." Defendant in his answer denies making the contract, but alleges that, although he signed the writing, it was prepared by a member of the plaintiff, and the minimum price for which the land was to be sold was fraudulently written $800 less than stated and understood by defendant. No evidence was introduced by defendant. Defendant's motion for a directed verdict is a demurrer to the evidence, and the court should consider as established all facts proved by the evidence and all inferences which can logically and reasonably be drawn therefrom. *Harris v. Lincoln Traction Co.*, 78 Neb 681. The evidence, undisputed as it is, proves that plaintiff, after the land was listed, exhibited it to 12 or more prospective purchasers, and finally sold it for $25 an acre to a Mr. Giffert, who paid plaintiff $3,000 on the purchase price. Mr. Tate, a member of the plaintiff firm, about two hours after the sale informed defendant of the fact. Defendant inquired how much the land had been sold for, and was told, "Just what you listed it for," and he replied, "I will not take that." Shortly thereafter Mr. Ehrhardt and the president of a local bank tendered defendant, for Mr. Giffert, $3,000 and offered to pay the remainder of the purchase price upon the execution of a deed, which offer was refused by defendant. It developed in the evidence that Mr. Giffert desired an abstract to exhibit the condition of defendant's title, but no demand was made on him therefor, nor does the proof demonstrate that he was requested or expected to pay for it. Defendant argues that he had the right to demand that all of the consideration in excess of $3,000 should be represented by promissory notes bearing 6 per cent. interest, and to fix the dates of their maturity within the limits of reason; that Giffert proposed to pay all of the consideration in cash, and hence a purchaser was not procured by plaintiff according to the terms of the contract. None of these objections

were urged prior to the institution of this suit. The purchaser was a man of wealth, and evidently desired the land. There is nothing in the record to show that Giffert would not have complied with these suggestions had they been made when defendant was informed that his land had been sold, and the evidence excites a grave suspicion that no such thought existed in his mind at that time. The precise point has been decided by this court in *Powers v. Bohuslav,* 84 Neb. 179. We held therein, in conformity with the preceding decisions of this court, that if a broker secures a purchaser, able, ready and willing to buy the principal's land at the price fixed in the broker's contract therefor, and the landowner refuses to comply for the sole reason that he wants a greater price for his land, and does not object because the purchaser offers to pay the entire consideration in cash, the principal will be estopped in a suit brought by his broker for commission, to defend because the purchaser offered to pay cash, instead of part cash, and the remainder of the purchase price for the land in promissory notes.

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

REVERSED.

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MERCANTILE INCORPORATING COMPANY ET AL., APPELLANTS, V. GEORGE C. JUNKIN, SECRETARY OF STATE, APPELLEE.

FILED DECEMBER 14, 1909. No. 16,426.

1. **Taxation**: EXTENT OF POWER. "The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself." *State v. Lancaster County,* 4 Neb. 537.

2. ———: CONSTITUTIONAL PROVISIONS: CONSTRUCTION. "The maxim, '*Expressio unius est exclusio alterius,*' does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." *State v. Lancaster County,* 4 Neb. 537.

3. ———: CORPORATIONS: OCCUPATION TAX. The grant of a charter to a corporation authorizing it to carry on a certain business does not import that it may engage therein without contributing to the support of the government by the payment of an occupation tax.

4. ———: ———: ———: VALIDITY. Chapter 25, laws 1909, is not obnoxious to section 1, art. IX of the constitution.

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

*John W. Battin, W. W. Slabaugh* and *Sullivan & Rait,* for appellants.

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

ROOT, J.

This is an action to recover back an occupation tax paid by plaintiff under protest to defendant the secretary of state. Defendant prevailed on his general demurrer to the petition, and plaintiff appeals from a judgment dismissing his action.

In 1909 the legislature by chapter 25, laws 1909, provided: "Section 1. No corporation heretofore or hereafter incorporated under the laws of this state, or of any other state, shall do or attempt to do business by virtue of its charter or certificate of incorporation, in this state, without a state occupation permit therefor." The title to the act is "An act providing for an annual occupation fee upon corporations, and issuing a permit therefor, providing for the enforcement of the same, providing for settling the affairs of the corporations where said fee has not been paid, and to provide a penalty for the violation thereof." In the act corporations are divided into nine classes according to their capital stock, and required to pay from $5 to $200 per annum.

Plaintiff asserts that the act violates section 1, art. IX of the constitution. The general principles underlying

the subject of taxation have been often stated and thoroughly discussed by text-writers and by courts of last resort. An extended investigation of the topic is unnecessary for an understanding of this case, and will not be attempted. It may safely be said that, in the absence of constitutional limitations, every species of property within the jurisdiction of the state, all privileges and franchises existing, and every trade or vocation exercised therein may be taxed by the legislature for the support of the state. *State v. Lancaster County,* 4 Neb. 537; *Society for Savings v. Coite,* 6 Wall. (U. S.) 594, 607. Section 1, art. IX of the constitution, is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." Counsel argue that the enumeration of 16 occupations upon which the legislature is authorized to impose an occupation tax, "by the universal rule of interpretation, excludes by necessary implication all occupations not enumerated; and this rule of construction has been applied by the supreme court of Illinois to this identical constitutional provision which was borrowed from the Illinois constitution of 1870." A contrary rule, supported it seems to us by reason and sound public policy, was announced in *State v. Lancaster County,* 4 Neb. 537. Judge GANTT'S opinion is directly in point, and has been cited with approval and followed many times in this court. *State v. Dodge County,* 8 Neb. 124; *Shaw v. State,* 17 Neb. 334; *State v. Bennett,* 19 Neb. 191; *State v. Vinsonhaler,* 74 Neb. 675. Statements found in *Banta v. City of Chicago,* 172 Ill. 204,

cited by plaintiff, apparently support its contention; but the point discussed in the quotation from that case was not decided by the Illinois court. In *Price v. People,* 193 Ill. 114, Mr. Justice Boggs, who wrote the opinion in *Banta v. City of Chicago, supra,* says that the canon of construction announced in his earlier opinion does not apply to the subject of taxation and was inadvertently stated by him. Plaintiff has cited no other authorities to sustain its argument upon this subject, and we are content to abide by our former decisions.

Plaintiff argues that the tax under consideration is imposed on corporate franchises, and is void because not levied upon a valuation. Franchises, if taxed under subdivision 1, sec. 1, art. IX of the constitution, must be taxed according to their value, but the legislature may, in the exercise of the taxing power, levy occupation taxes upon persons corporate or otherwise engaged in business or in the various vocations within the state, and in that event the element of value need not control. *State v. Boyd,* 63 Neb. 829; *Rosenbloom v. State,* 64 Neb. 342; *City of Newton v. Atchison,* 31 Kan. 151, 47 Am. Rep. 486; *City of Springfield v. Smith,* 138 Mo. 645, 60 Am. St. Rep. 569; *State v. Camp Sing,* 18 Mont. 128, 56 Am. St. Rep. 551; *Worth v. Wright,* 122 N. Car. 335; 2 Cooley, Taxation (3d ed.) pp. 1094-1100. Plaintiff insists that in transacting business it exercises a franchise, and that *Western Union Telegraph Co. v. City of Omaha,* 73 Neb. 527, controls the case at bar. In that case we considered a statute providing that the gross receipts collected in the transaction of express, telephone and telegraph business should, for the purpose of taxation, represent the value of the franchise enjoyed by the company, individual or association engaged therein, and should not be otherwise assessed. The opinion is confined to a discussion of the word "franchise" as employed in the particular act. The argument in the cited case plainly demonstrates that the legislation considered was subject to the limitation of subdivision 1, sec. 1, art. IX of the constitution, and for

that reason we held that the legislature could not lawfully select an arbitrary standard which, if applied, might greatly exceed or grossly underestimate the property rights and privileges taxed under the descriptive word "franchises." Judge LETTON states, in substance, in his opinion that, if the legislature had imposed an occupation tax upon those engaged in the express, telegraph or telephone business, moneys collected therein could have been lawfully considered for the purpose of fixing the tax. In *Nebraska Telephone Co. v. City of Lincoln,* 82 Neb. 59, the same distinction is made between a franchise, the right to do business which is to be taxed according to value, and a business or occupation which may be taxed without reference to its worth. On page 64 of the opinion Judge LETTON most happily states: "It seems clear that a property tax based upon the value of the franchise and a business or occupation tax based upon the gross earnings of a public service corporation are in nowise identical as to the subject of taxation, and do not constitute double taxation in any sense." The grant to a corporation in its charter to transact business during its existence does not import permission to do so without payment of an occupation tax should the legislature resort to that species of taxation. The people certainly did not intend to limit the power of the legislature to levy occupation taxes, so that, although individuals engaged in business might be compelled to pay taxes levied thereon, corporations engaged in the identical kind of business might ply their vocations immune from occupation taxes. *City of New Orleans v. State Nat. Bank,* 34 La. Ann. 892; *State v. Citizens Bank,* 52 La. Ann. (pt. 2) 1086; *Cobb v. Commissioners,* 122 N. Car. 307.

The case presented at the bar and in the briefs is simple; the controlling principles have been announced in repeated decisions of this court, cited *supra,* and an application of those rules will result in an affirmance of the judgment of the district court.

AFFIRMED.

STATE, EX REL. B. K. BUSHEE, RELATOR, V. WILLIAM G. WHITMORE ET AL., RESPONDENTS.*

FILED DECEMBER 14, 1909. No. 16,427.

1. **Experimental stations** may be lawfully maintained in connection with the college of agriculture in the university of Nebraska.
2. **Colleges and Universities: BOARD OF REGENTS: DUTIES.** It is the duty of the board of regents to obey the will of the legislature as expressed in chapters 143 and 144, laws 1909.

ORIGINAL application for a writ of mandamus to compel respondents, the board of regents of the university of Nebraska, to equip and maintain two agricultural experimental stations, as required by law. *Writ allowed.*

*Shepherd & Ripley,* for relator.

*C. S. Allen, contra.*

ROOT, J.

This is an original action for a writ of peremptory mandamus to compel the board of regents of the university of Nebraska to locate, equip and maintain two experimental stations according to the provisions of chapters 143, 144, laws 1909; sections $32f^{2}$-$32f^{14}$, ch. 87, Comp. St. 1909. Respondents do not attack relator's right to maintain this action, but assert that in each of said acts the legislature explained that the object of the legislation is "to determine the adaptability of the arid and semiarid portions of Nebraska to agriculture, horticulture, * * * such as the producing of grain, grasses, root crops and fruits of kinds commonly grown in same latitude in other states, also the most economical methods of producing such crops without irrigation." Respondents further contend that the funds under their control consist of the income of trust funds pledged to the support of a college teaching

* Opinion modified. See 86 Neb. ——.

branches of study relating to agriculture and the mechanic arts, and the one-mill tax created by the legislature to support and maintain a state university, and that the appropriations made from the temporary university fund cannot lawfully be expended for the purposes expressed in chapters 143 and 144, *supra*.

Section 10, art. VIII of the constitution, directs that the general government of the University of Nebraska shall, under the direction of the legislature, be vested in the board of regents, and that their duties and powers shall be prescribed by law. Section 6, ch. 87, Comp. St. 1909, provides that the university may embrace, among other departments, a college of agriculture. The legislature has also authorized the selection of a state botanist, a state chemist, a state entomologist, and a state geologist, and these officials are directed to give special attention to the interests of the state in their respective departments. By section 8 of said chapter it is made the duty of the governor to set apart two sections of state land for a model farm as part of the college of agriculture. In obedience to the expressed will of the legislature, the regents have created an agricultural college, wherein instruction is given in the arts and sciences as applied to theoretical and practical agriculture. To create, develop and maintain this college, vast sums of money have been from time to time appropriated by the legislature to pay for improving the land segregated by the governor for a model farm, to purchase live stock and tools, and remunerate learned and skilful men for devoting their time and talents to the education of the youth of this state and to the collation and dissemination of facts relating to agriculture.

In 1903 the legislature by chapter 114, laws 1903 (Comp. St. 1909, ch. 87, secs. 32*a*-32*f*), directed the regents to locate and maintain an experimental substation in Nebraska, west of the one hundredth meridian. The act of 1903, *supra*, and chapter 143, laws 1909, are identical, with the exception of the territory described in the re-

spective acts. Chapter 144, laws 1909, is also very like the act of 1903, *supra*. The legislature in 1903 appropriated from the temporary university fund for the benefit of the experimental station $15,000. In 1905 the legislature appropriated from said fund $25,000 to defray the expense of the experimental station and for other purposes. No appropriation was made in 1903 or 1905 from the general fund for the benefit of that institution. In 1907 the legislature appropriated $25,000 from the general fund for improving and maintaining said substation. No appropriation was made that year from the temporary university fund for the benefit of the experimental station. The acts of 1909, in question, appropriate $15,000 and $5,000, respectively, from the temporary university fund for the purpose of defraying the cost of acquiring, preparing and maintaining the new experimental stations. The legislature further appropriated from the general fund for the benefit of the university $20,000 in lieu of the money theretofore appropriated from the temporary university fund for the benefit of the experimental stations, but the governor vetoed the appropriation from the general fund. Ninety-five per cent. of the one-mill university tax is appropriated for the benefit of the university, and all money on hand in the university cash fund, or that will be added thereto during the biennium, is likewise appropriated.

The temporary university fund is derived from various sources and is created for the maintenance of the university. *State v. Brian*, 84 Neb. 30. The agricultural college is a constituent part of the university; and, if the maintenance of the experimental stations will advance the purposes for which that college was instituted and is maintained, money may be appropriated from the temporary university fund to defray the expense incident to the creation and maintenance of such stations. Many townships in Nebraska are included within a region described as arid or semiarid. The application of knowledge acquired by observation, experiments and study is rapidly trans-

forming that territory into fertile farms, and a considerable part of that information has been acquired in the first instance through the maintenance of experimental stations. With each recurring year important accretions are added to the stock of knowledge upon this subject. To maintain a well-balanced agricultural college in Nebraska, it is essential that the state acquire, prepare for use and sustain experimental farms, so that scientific observation may bring to light and demonstrate the great truths underlying successful agriculture in Nebraska. If the maintenance of experimental stations will demonstrate "the adaptability of the arid and semiarid portions of Nebraska to agriculture, horticulture and forestry," the efficiency of the college of agriculture will be increased many fold.

The subject of education has been delegated by the people to the legislature. In the exercise of a lawful discretion, which we have neither authority nor a desire to curb, the legislature, in effect, has said that the experimental stations considered are necessary to the welfare and shall become a component part of the college of agriculture in the university of Nebraska. The board of regents is but a mere governmental agency expressly subjected by the constitution to the will of the legislature to work out its projects for higher education. They found no barrier in 1903 to the expenditure of $15,000 from the temporary university fund for the purchase of land and the maintenance thereon of an experimental station, and subsequently have applied like apropriations for the upkeep of that institution. No lawful reason exists for discriminating against the acts in question, nor for refusing to expend appropriations for an extension of the system inaugurated in 1903. Great latitude within certain lines is given respondents in the expenditure of the temporary university fund available for the present biennium, but the appropriations considered have preference over all other beneficiaries of the one-mill levy for that period.

The other defenses suggested have not been overlooked,

but they are not deemed of sufficient importance for specific reference thereto.

The writ will issue.

WRIT ALLOWED.

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DAVID BRADLEY & COMPANY, APPELLANT, V. WEST BROTHERS, APPELLEES.

FILED DECEMBER 14, 1909. No. 15,807.

Appeal: BILL OF EXCEPTIONS. Rulings of the district court in admitting or rejecting evidence cannot be reviewed in the supreme court after the bill of exceptions has been quashed.

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

*O. C. Anderson* and *Flickinger Bros.*, for appellant.

*A. R. Oleson, contra.*

ROSE, J.

Plaintiff brought this suit to recover $300, the price of a cornsheller. Defendants had been agents of plaintiff at Wisner, and, according to the allegations of the petition, made themselves liable to plaintiff for the sum stated by delivering a cornsheller to the purchaser thereof in violation of their contract of agency. Defendants admitted the making of the contract, but alleged, among other things, that they complied with all its terms during the time it remained in force, and that they did not violate any of its conditions or provisions. Pursuant to a peremptory instruction at the close of plaintiff's testimony, the jury rendered a verdict for defendants. A judgment of dismissal followed, and plaintiff appeals.

Several rulings of the trial court in admitting and in excluding evidence are assailed as erroneous, but they cannot be reviewed for the reason that the bill of excep-

tions was quashed on motion of defendants at a former session of this court. The pleadings, upon investigation, do not affirmatively show any error in directing a verdict or in dismissing the case, and consequently the judgment must be

AFFIRMED.

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JOSEPH WARNER, APPELLANT, V. EPHRAIM SOHN ET UX., APPELLEES.*

FILED DECEMBER 14, 1909. No. 15,851.

1. Appeal: DIRECTING VERDICT: FAILURE TO EXCEPT. Assignments of error, when based alone on the giving of a peremptory instruction to which there was no exception, may be disregarded on appeal.

2. Appeal: MOTION FOR NEW TRIAL. Where the jury in obedience to a peremptory instruction returns a verdict for defendant in an action of replevin and fixes the damages for detention of the property, error in assessing the amount, to be available on appeal, should be specifically assigned in the motion for a new trial.

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

*Perry & Lambe,* for appellant.

*Morlan, Ritchie & Wolff, contra.*

ROSE, J.

The parties are disputing about the value, ownership and possession of three stacks of rye valued by the jury at $45. July 11, 1902, the stacks were standing on the Hall land west of and near Arapahoe. Plaintiff insists he was a tenant, that he sowed the rye field the fall before, and that he was entitled to two-thirds of the crop. Defendants contend that they were the owners of the land,

* Judgment vacated, and case resubmitted.

and that plaintiff was a trespasser without any right to a share of the crop or to its possession. When the rye was ripe, plaintiff went on the premises with the owner of a harvester to perform the duties of a husbandman, but withdrew after having been knocked down by defendant Ephraim Sohn who asserts he thereafter directed the harvesting. When the rye was in stack, plaintiff replevied it. Defendants' answer to the petition in replevin consisted of a general denial and a prayer for judgment, for a return of the property or for its value, if a return could not be had, and for damages for wrongful detention. Witnesses testified on both sides of the case at the trial in the district court. In obedience to a peremptory instruction at the close of the testimony, the jury rendered a verdict for defendants. The value of the property was assessed at $45, and defendants' damages by reason of the detention were fixed at $17.85. From a judgment on the verdict plaintiff appeals.

Plaintiff argues that by his proofs he made a *prima facie* case showing his right to crop the land, to a division of the rye and to possession thereof, and that therefore there was error in directing a verdict against him. Defendants suggest in their brief, however, that plaintiff is not in a position to urge error in the peremptory instruction, for the reason he did not except to it. The point seems to be well taken. The record does not disclose such an exception. The instruction is as follows: "The court instructs the jury, under the issues joined and the evidence, your verdict must be for the defendants; and in returning your verdict you must find that the right of property and right of possession of said property at the commencement of this action were in the defendants. You must also assess the value of said property and place the full value of the same in your verdict, and also assess the damages sustained by the defendants by reason of the detention of said property, which damages will be interest at the rate of 7 per cent. per annum from July 12, 1902, to the present time, on the value of the property as found

by you." There being no exception to this instruction, assigned errors in giving it may be disregarded on appeal. In *Startzer v. Clarke,* 1 Neb. (Unof.) 91, this court announced the following rule: "An exception is indispensable to secure a review of the action of the trial court in directing a verdict." In following this doctrine it was said in a later case involving the same question: "No exception was taken to the action of the trial court in directing a verdict for the defendant, and the conclusive presumption arises that plaintiff was satisfied with this instruction." *Beckwith v. Dierks Lumber & Coal Co.,* 75 Neb. 349. Assignments of error predicated on the holding of the court in directing a verdict for defendants will therefore be disregarded.

Plaintiff argues further that in any event the amount of defendants' recovery as fixed by the jury was too great. This point is also unavailing, because it was not properly presented to the trial court in the motion for a new trial. One of the statutory grounds for a new trial is: "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." Code, sec. 314. The right of defendants to recover was settled by the peremptory instruction to which there was no exception. If the amount found by the jury was excessive, that question should have been submitted to the trial court by a specific assignment of error, and in absence of one may be disregarded on appeal. *Riverside Coal Co. v. Holmes,* 36 Neb. 858; *Beavers v. Missouri P. R. Co.,* 47 Neb. 761; *Hammond v. Edwards,* 56 Neb. 631; *Dickenson v. Columbus State Bank,* 71 Neb. 260. In the present case the motion for a new trial contains an assignment that "the verdict is not sustained by sufficient evidence," but "error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence." *Hammond v. Edwards,* 56 Neb. 631; *Dickenson v. Columbus State Bank,* 71 Neb. 260.

Plaintiff has not pointed out an error requiring a reversal, and the judgment must be

AFFIRMED.

REESE, C. J., dissenting.

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STATE, EX REL. EDWARD C. JACKSON, APPELLEE, V. ROBERT WILSON, COUNTY JUDGE, ET AL., APPELLANTS.

FILED DECEMBER 14, 1909. No. 15,855.

Appeal: MOTION FOR NEW TRIAL. Where the allowance of a peremptory writ of mandamus results from the trial of an issue of fact, an overruled motion for a new trial is a necessary part of a transcript filed in the supreme court for the purpose of reversing a judgment sustained by the pleadings.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

*Jackson & Kelsey,* for appellants.

*J. B. Smith* and *O. A. Williams, contra.*

ROSE, J.

In this case the district court allowed a peremptory writ of mandamus to compel the county judge of Antelope county to deliver to relator as his exempt property the sum of $335 which had been garnished in the Elgin State Bank in a suit brought in the county court by Garfield Baugh to recover from Edward C. Jackson, relator herein, $285 for money had and received. The answer to the process of garnishment was that the bank owed relator $498.41. From that fund the garnishee was directed by the county judge to pay into the county court $335, and he obeyed the order. This is the fund which the county judge is required by mandamus to turn over to relator. In the petition for mandamus it is stated that

relator, when the bank was summoned as garnishee, was a resident of the state and the head of a family consisting of a wife and three children; that he was not the owner of any realty subject to exemption, or any of any kind or character; that the whole of the personal property owned by him was the sum of $498.41 on deposit in the Elgin State Bank; and that he served on the garnishee written notice and the necessary inventory and affidavit showing he claimed his bank deposits as exempt from execution, garnishment and attachment. It is also stated in the petition that, after the money had been paid into the county court in the manner described, relator again asserted his exemption rights by filing with the county judge in due form an inventory and affidavit, and by demanding possession of the fund in dispute, and that the county judge refused to turn it over to him. An alternative writ of mandamus was issued, and in his return the county judge pleaded a former adjudication in the county court that the fund garnished was not exempt under the laws of the state. Baugh intervened as a party defendant in the action for mandamus, set up the same defense as the county judge, and alleged relator was not a resident of the state; that the whole of his personal property was not included in his inventory and affidavit, and that the fund in dispute was not exempt. At the trial in the district court oral and documentary proofs were adduced on both sides of the issues as to exemption and former adjudication. There was a general finding in favor of relator, and from the order allowing the peremptory writ defendants appeal.

It is argued by defendants that the district court was without jurisdiction to issue the writ, and for that reason they insist that the judgment should be reversed. On the record presented, the position is untenable, for the reason jurisdiction was an issue of fact tried by the district court, and when the question was decided defendants filed no motion for a new trial. They pleaded a former adjudication of the question as to exemption. This was controverted by relator, and the district court tried that issue.

Defendants alleged that relator was a nonresident and that his personalty was not exempt. These issues were also tried in the proceeding for mandamus, which is an action at law. *State v. Affholder,* 44 Neb. 497. An overruled motion for a new trial is necessary where the judgment presented to the supreme court for review resulted from the trial of an issue of fact. *Wollam v. Brandt,* 56 Neb. 527. This rule is applicable to mandamus. *Marsh v. State,* 2 Neb. (Unof.) 372.

AFFIRMED.

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JESSE C. ROOT ET AL., APPELLEES, V. JOHN H. GLISSMANN, APPELLANT.*

FILED DECEMBER 14, 1909. No. 15,835.

1. **Appeal:** FINAL JUDGMENT. "To obtain the review of a case in this court, there must be a final judgment upon the merits of the case in the court below." *Nichols, Shepard & Co., v. Hail,* 5 Neb. 194.
2. ———: MOTION FOR NEW TRIAL. If the consideration of a record of the district court requires the examination of issues of fact or errors of law occuring at the trial, which could only be preserved by a bill of exceptions, a motion for a new trial in the district court is a condition precedent to a review of that record in this court.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON and WILLIAM A. REDICK, JUDGES. *Plaintiffs' appeal dismissed. Judgment against defendant affirmed.*

*John O. Yeiser* and *George A. Magney,* for appellant.

*John T. Cathers* and *J. O. Detweiler, contra.*

FAWCETT, J.

If we have finally succeeded in solving the Chinese puzzle designated as "the record" in this case, defendant is

* Judgment modified. See opinion, p. 580, *post.*

appealing from a judgment rendered against him in the district court for Douglas county. The judgment was rendered on March 31, at the February, 1908, term of said court. The judgment recites: "And now on this day come the parties hereto with their attorneys, and this cause comes on for trial to the court without the intervention of a jury, the same having been waived by the parties hereto, and is submitted to the court upon the amended petition, heretofore ordered filed by the court herein, the evidence adduced and the arguments of counsel, upon due consideration whereof, and being fully advised in the premises, the court finds, etc." No motion for new trial was filed. At the subsequent May, 1908, term of said court, on June 12, 1908, when plaintiffs were about to order execution upon their judgment, defendant filed this objection: "Now comes the above named John H. Glissmann, and objects to the issuance of an execution in this case for the reason that the court has no jurisdiction over the said Glissmann, and for the further reason that the pretended judgment herein is illegal and of no effect, the court having no jurisdiction to enter judgment herein." It is argued that the case was originally commenced in the county court in the name of plaintiff Jesse C. Root alone against the defendant; that in the county court plaintiff Root was seeking to recover upon two causes of action, the first being for rent for certain premises, and the second, the one upon which the above judgment was rendered, upon an injunction bond; that, after the case had been appealed to the district court, plaintiff Cathers was permitted to come into the case as a party plaintiff with the plaintiff Root, and that plaintiffs were permitted to file a separate amended petition upon said second cause of action; that plaintiff Cathers, not having been a party in the county court, coming into the case in the district court, made the action then pending a different action from the one in the court below. Objection is also made that the amended petition was not filed at the

same term of court at which the leave was given. Conceding that the facts were as claimed (which the record does not clearly show), we think that by going to trial upon the second cause of action, as shown by the recitals in the journal entry of the judgment, the correctness of which recitals is not challenged, defendant waived the objections now attempted to be urged.

On the trial of the first cause of action the court directed a verdict in favor of the defendant. A motion for a new trial was duly filed by plaintiffs within the statutory three days. On June 18, 1908, before that motion for new trial had been passed upon by the court, defendant filed this motion: "Comes now John H. Glissmann, and moves the court to set aside the judgment heretofore rendered on the first cause of action in the above entitled cause for the reason that the same is irregular and void, and for the following particular reasons: (1) The court ordered plaintiff to docket separately in the first cause of action his petition filed in the above entitled cause. (2) The plaintiff did not docket separately as ordered, but delayed the matter for over 60 days, and filed amended petition in this case out of time and without notice to defendant. (3) That, without notice to the filing of said amended petition, the defendant filed same and took said judgment by default."

We are utterly unable to understand this motion. In the third paragraph of the motion defendant claims that "the defendant filed same and took said judgment by default." Defendant did not file any amended petition, nor was that judgment entered by default, nor was it entered against defendant, but, on the contrary, a verdict was directed for defendant and against the plaintiffs. On July 8, 1908, the record shows the following entry: "This cause now coming on for hearing on motion of defendant to set aside the verdict heretofore rendered herein, and said motion is submitted to the court without argument of counsel, the court being fully advised in the premises finds said motion should be overruled, therefore it is or-

dered that said motion be, and it is hereby, overruled, to which order the defendant herein duly excepts." The record will be searched in vain for any verdict that was ever rendered against the defendant. The only verdict which had been rendered in the case, as shown by the record, was the verdict in favor of the defendant and against the plaintiffs. As above stated, plaintiffs filed a motion for a new trial within three days after the rendition of that verdict, and on October 6, 1908, the court sustained the plaintiffs' motion and granted a new trial. If the order entered by the court on July 8 overruling "defendant's" motion for a new trial is to be construed as referring to defendant's motion filed June 18, 1908, it is meaningless, as is also the motion referred to, for the reason, as above indicated, that no judgment had, prior to either of said dates, been entered against defendant upon said first cause of action. The record, then, presents this situation: (*a*) A verdict was directed in favor of defendant on the first cause of action which has been set aside, and a new trial ordered which has not yet been had. It is evident therefore that, as to that cause of action, defendant is still *rectus in curia.* As early as *Nichols, Shepard & Co. v. Hail,* 5 Neb. 194, we held: "To obtain the review of a case in this court, there must be a final judgment upon the merits of the case in the court below." Such is still the rule. (*b*) A judgment was rendered in favor of plaintiffs and against the defendant upon a trial at which all parties were present, and to which none of the parties objected, and which has never been assailed by a motion in the district court for a new trial. This precludes a review by this court. *Zehr v. Miller,* 40 Neb. 791. It requires no further citation of authorities to show that defendant is entirely without standing in this court upon either of said causes of action.

The specific "points of error" assigned in defendant's brief, filed December 15, 1908, all refer to errors shown by the bill of exceptions, except the one point that "the court erred in refusing to dismiss the case for want of

jurisdiction." This point is based upon the contention that plaintiff's action involved the title to real estate. As the first cause of action is still undetermined in the court below, we dismiss that from our consideration. The second cause of action was for damages upon an injunction bond. Plaintiffs' petition alleges that upon a full and complete hearing "the court found that said restraining order should not have been issued, and dissolved the temporary injunction." There is nothing in the pleadings to support defendant's contention that a question of title to real estate was involved. In order to determine that question, reference would have to be made to the bill of exceptions. No bill of exceptions has been filed in this court. We must therefore presume that all of the orders and rulings of the court complained of were right, and that its final judgment is sustained by sufficient evidence.

Plaintiffs' appeal is therefore dismissed as to the first cause of action, and the judgment of the district court as to the second cause of action is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on motion to modify judgment was filed January 20, 1910. *Affirmed as modified:*

1. **Former Opinion Modified.** The first paragraph of the syllabus in our former opinion and so much of said opinion as relates thereto are withdrawn.
2. **Reaffirmance.** The second paragraph of the syllabus in said former opinion adhered to.

FAWCETT, J.

This case is now before us on a motion of plaintiffs to correct our former opinion and judgment, *ante,* p. 576, so as to affirm as to the first cause of action and to dismiss as to the second, on the ground that the court by mistake affirmed as to the second cause of action, and dismissed as to the first. We have again carefully examined the "Chinese puzzle" referred to in our former opinion

and find that the motion of plaintiffs should be sustained. Our present solution of the puzzle is that defendant John H. Glissmann, on May 25, 1905, obtained from the district court for Douglas county a restraining order against plaintiffs Root and Cathers, and on July 29, 1905, obtained a second restraining order against them. A bond was duly given by defendant Glissmann in each instance. After filing numerous motions, demurrers and pleadings on both sides, as shown by the record, plaintiff Root, on November 12, 1906, filed a petition against the said John H. Glissmann and one Hans C. Glissmann, in which he sought to recover upon two causes of action—the first being based upon the restraining order issued May 25, 1905, claiming damages in the sum of $159.80; and the second upon the restraining order issued July 29, 1905, in which he claimed damages in the sum of $60. On December 18, 1907, the Glissmanns filed an answer, alleging that the petition did not state a cause of action; that there was a defect of parties; that the injunction suits were not finally decided against defendants; and that the same were mutually settled between the parties by an agreement to the effect that the parties should dismiss their actions and cross-actions; that said agreement was carried out, and no final judgment was ever entered; and certain other allegations which we do not deem it necessary to consider. On December 23, 1907, the court entered an order reciting that, "it appearing that the original petition * * * has been lost or mislaid, it is therefore by the court ordered that a copy of the same be, and it hereby is, this day filed in lieu thereof." The court then made certain other orders which it is unnecessary to refer to. On the same day, evidently in response to the above order, plaintiff Root filed a substituted petition praying judgment for $159.80 on his first cause of action, and for $85 on his second cause of action. The record shows no answer as having been filed to this substituted petition, but it is evident that the answer filed December 18 was treated as defendant's answer to the substituted

petition, for seven days later, on December 23, 1907, plaintiff filed a reply. On the same date the parties entered upon a trial of the first cause of action. On the 31st day of December, during the progress of the trial, the court entered this order: "And now on this day again come the parties hereto with their attorneys, and come also the jury heretofore duly impaneled and sworn herein, on motion, it is by the court ordered that the order heretofore entered herein, to wit, on the 30th day of December, A. D. 1907, as to docketing as a separate cause of action, the first cause of action herein be, and the same hereby is, modified, so that such case shall proceed against John H. Glissmann alone, thereupon the trial of this cause proceeds." Further hearing was then continued until January 2, 1908, upon which date the court directed a verdict in favor of the defendant Glissmann. The next day, January 3, 1908, plaintiff filed a motion for a new trial. The record does not show any order made upon this motion for new trial until October 6, 1908, when an order was duly entered sustaining the motion and granting a new trial. Counsel for plaintiffs argue that as a matter of fact the motion for new trial was sustained prior to March 2, 1908, but for some reason the clerk failed to get the order of the court upon the journal. That counsel for plaintiffs is probably right in this contention is shown by the fact that on March 2, 1908, plaintiffs jointly filed an "amended petition by order of court" against John H. Glissmann only, in which they declare upon their first cause of action alone; together with the further fact that on March 31, 1908, we find in the record the following judgment: "And now on this day come the parties hereto with their attorneys, and this cause comes on for trial to the court without the intervention of a jury, the same having been waived by the parties hereto, and is submitted to the court upon the amended petition, heretofore ordered filed by the court herein, the evidence adduced and the arguments of counsel, upon due consideration whereof, and being fully advised in the premises, the court finds in favor of

the plaintiffs and against the defendant John H. Glissmann only, on the issues joined, and that there is due the said plaintiffs from the said John H. Glissmann, upon the cause of action set forth in the amended petition, the sum of $159.80, and interest at 7%, said interest amounting to the sum of $22.37, making a total of $182.17, and costs. It is therefore by the court considered," etc.

It appears from the recitals of this judgment that on the date named all parties appeared with their attorneys and went to trial without objection of any kind. Defendant Glissmann acquiesced in said judgment by failing to file any motion for new trial at that term of court, or in any manner questioning the validity of the judgment until June 12, 1908, when plaintiffs were evidently taking steps to enforce their judgment by execution. Defendant then filed the following "Objections to Jurisdiction of Court": "Now comes the above named John H. Glissmann, and objects to the issuance of an execution in this case for the reason that the court has no jurisdiction over the said Glissmann, and for the further reason that the pretended judgment herein is illegal and of no effect, the court having no jurisdiction to enter judgment herein." Six days later, on June 18, 1908, defendant filed this motion: "Comes now John H. Glissmann, and moves the court to set aside the judgment heretofore rendered on the first cause of action in the above entitled cause for the reason that same is irregular and void, and for the following particular reasons: (1) The court ordered plaintiff to docket separately in the first cause of action his petition filed in the above entitled cause. (2) The plaintiff did not docket separately as ordered, but delayed the matter for over 60 days, and filed amended petition in this case out of time and without notice to defendant. (3) That, without notice of the filing of said amended petition, the defendant filed same and took said judgment by default."

On the same day, to wit, June 18, 1908, the court overruled defendant's objections, and on August 10, 1908, defendant filed his notice of appeal. No bill of exceptions

was preserved, hence the case will have to be considered upon the record as above set out. From this record it appears that there has never been any adjudication or even a trial on plaintiffs' second cause of action, but that the first cause of action went to judgment on March 31, 1908, and that by reason of defendant's failure to file any motion for new trial, or to make any timely objections to said judgment, the same became final on the said 31st day of March, 1908.

As to all of the other specific "points of error" assigned in defendant's brief, our former discussion and judgment are adhered to.

Our former judgment is therefore modified to the extent that the first paragraph of the syllabus and so much of the opinion as relates thereto are withdrawn, and the judgment of the district court is in all things affirmed.

AFFIRMED AS MODIFIED.

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WENTZ-BATES MERCANTILE COMPANY, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 14, 1909. NO. 15,849.

**Carriers:** FREIGHT RATES. *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 139, reaffirmed, and *held* to be in all respects decisive of this case.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed.*

*Edson Rich* and *John A. Sheean,* for appellant.

*R. P. Drake, contra.*

FAWCETT, J.

The only real complaint which plaintiff makes in its petition is that it shipped in October, 1906, a car-load of

potatoes from Humphrey, Nebraska, to Kingfisher, Oklahoma, under a quotation from defendant of a rate of 42½ cents a hundred pounds; that, upon the arrival of the car at Kingfisher, defendant, before it would deliver the potatoes to plaintiff's consignee, demanded and collected freight at the rate of 60 cents a hundred, and plaintiff thereby was damaged in the sum of $54.25. The petition admits that defendant sent plaintiff its check for $32.55, in full for plaintiff's damage, but alleges that it refused to receive said sum and returned the check to defendant; that the defendant again sent the check to plaintiff and that it still is in plaintiff's possession. For answer defendant alleges that the rate of 42½ cents was quoted through mistake; that the correct rate was 49½ cents, as fixed in the tariffs naming said fares and charges on file with the interstate commerce commission. Plaintiff in its reply admits that the rate on potatoes in car-load lots at the time of its shipment between the points thereof "was 49½ cents per 100 lbs. as fixed by the schedules then on file with the interstate commerce commission and then in force, but denies that at that time plaintiff knew the correct or any other rate thereon, and applied to the defendant in the usual course of business for same, resulting as set forth in plaintiff's petition." It thus appears that defendant quoted to plaintiff a rate 7 cents below the true rate, and actually collected 10½ cents more than the true rate; but the difference of 10½ cents between the true rate and the rate collected is covered by defendant's check, which the petition admits was in plaintiff's possession at the time this action was commenced. This narrows the controversy to the difference between the rate quoted and the correct rate.

If plaintiff has suffered any damage by the shipment of its potatoes in the manner and under the circumstances alleged, such damage does not appear in the petition. The petition nowhere alleges that the potatoes would not have been shipped if the true rate had been quoted, nor does it state facts showing any damage to plaintiff other

than the fact that plaintiff was required to pay more than the quoted rate for its shipment. Whether the quotation of 42½ cents, when the true rate was 49½ cents, was intentional or a mistake is immaterial, as, under the law governing shipments of this character, the contract in either event would be void. This case is ruled in all respects by *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 139. In that case the case mainly relied upon by plaintiff, viz., *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, is expressly disapproved.

Following *Haurigan v. Chicago & N. W. R. Co., supra,* the judgment of the district court is reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

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WILBER I. CRAM, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 14, 1909. NO. 15,148.

1. **Carriers: PLEADING.** The petition examined, discussed in the opinion, and *held* to state a cause of action.

2. **———: ———.** The first proviso clause in section 10606, Ann. St. 1907, construed, and *held*, the exceptions therein noted are matters of defense and need not be negatived by plaintiff.

3. **Constitutional Law: PARTIES.** A litigant who is not shown to have been prejudiced by the enforcement of an act of the legislature is not in position to assail such act on the ground of its being unconstitutional.

4. **Statutes: PRESUMPTIONS.** The legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will.

REHEARING of case reported in 84 Neb. 607. *Affirmed on condition.*

DEAN, J.

Our former opinion in this case affirming the judgment of the lower court is reported in 84 Neb. 607, to which reference is had for a statement of the facts. The delayed shipment act of the legislature of 1905, under which this suit was brought, is assailed by defendant as being unconstitutional. The act upon which the attack is made also appears in our former opinion. A motion for rehearing supported by a brief in behalf of defendant has been filed, and also a reply brief by the plaintiff, and upon due consideration a reargument was ordered by the court, which has been submitted by counsel upon the following points: "(1) Does the petition state a cause of action? (2) Does the statute violate section 4, art. XI of the constitution, providing that the liability of railway corporations shall never be limited?"

The defendant argues that the burden is upon plaintiff to plead and prove every fact necessary to bring his case within the precise terms of the statute upon which his action is founded, and that the petition is fatally defective in each cause of action, and is so deficient in substance that a judgment predicated thereon cannot be sustained. That part of section 10606, Ann. St. 1907, that we are called upon to construe in order to determine the sufficiency of the petition reads as follows: "Provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance, including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule." Defendant now argues that plaintiff must, if he would avail himself of the benefit of the statute, plead and make proof of the time consumed in picking up and

setting out, loading or unloading stock at intermediate stations between the point of shipment and the point of destination. The plaintiff contends that the time so consumed by the company in the movement of its trains is defensive matter and that the burden of proof is on the defendant. Plaintiff's several causes of action are each pleaded separately, but in language substantially alike, the only changes being those required to meet the necessary allegations as to the time and the amount of the respective shipments. Omitting the formal parts, the following is plaintiff's twenty-first count in his petition, the language whereof, defendant argues, is so deficient in its allegations that it is insufficient to sustain the judgment: "That at all of the times hereinafter mentioned, the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of Iowa, and did, and now does, own and operate a railroad between Burwell and South Omaha, in the state of Nebraska, as a public carrier of passengers and freight for hire in said state; that the defendant's said line of railroad runs through the city of Aurora, in said state, and the portion of its said railroad extending between South Omaha and Aurora was, and is, a main line 125 miles in length, and the portion of its said railroad extending between Aurora and Burwell was, and is, a branch line 104 miles in length; that on the 8th day of September, 1905, the plaintiff delivered to the defendant, and it then received, at its railroad station in Burwell, Nebraska, one full car-load of live stock belonging to plaintiff, to be safely and securely conveyed by the defendant over its said line of railroad from Burwell to South Omaha, Nebraska, within the time provided for by statute, in consideration of the regular freight charges therefor, which the plaintiff paid to the defendant; that the defendant's train conveying said car-load of live stock left Burwell for South Omaha at 9 o'clock A. M. of said day, but did not arrive at South Omaha, the point of destination, until 4:55 o'clock A. M. on September 11, 1905, and the time

consumed in said journey was 52 hours and 18 minutes longer than permitted by the statutes of Nebraska, to the damage of the plaintiff in the sum of $520, as provided for by statute."

We have carefully examined the petition, and the law applicable to the points involved, to discover if the objections raised by defendant are well taken, and we conclude the pleading is not defective in the particulars pointed out. In view of the authorities, we are of the opinion defendant's contention cannot be sustained upon any reasonable theory of statutory construction. To do so would be to read a meaning into the statute which the lawmaking power evidently did not intend, and for which the legislative language, as used in the act, gives no warrant. The rule that seems to be applicable to the present case is concisely stated in 31 Cyc. 115: "Where a party relies upon a statute which contains an exception in the enacting clause, such exception must be negatived; but where the exception occurs in a proviso or in a subsequent section of the act, such exception is matter of defense and need not be negatived." This has long been the prevailing rule, and it appears to have been almost universally followed.

In 1 Chitty, Pleading (16th Am. ed.) p. *246, the author says: "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it to exempt himself from the penalty." On page *247 Chitty cites Lord Tenterden to the following effect: "If an *act of parliament,* or a *private instrument,* contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general

clause, then the party relying upon it must in pleading state it with the exception." In *Lynch v. People,* 16 Mich. 472, Cooley, C. J., speaking for the court says: "In pleading statutes where there is an exception in the enacting clause, the pleader must negative the exception; but when there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant." *Bush v. Wathen,* 104 Ky. 548, 47 S. W. 599: "When there is an exception in the enacting clause, the plaintiff must negative it. If the exception is in a subsequent clause to that giving the cause of action, then, if it gives the defendant exemption from liability, he must plead it." *Toledo, P. & W. R. Co. v. Lavery,* 71 Ill. 522: "Where a plaintiff relies upon a statute for a recovery, he need only to negative the exceptions in the enacting clause, and it is for the defendant to show, by way of defense, that the case falls within an exception in some other clause of the statute." *Harris v. White,* 81 N. Y. 532: "Where an exception is contained in the enacting clause of a prohibitory statute, one who pleads the statute must negative the exception, and must prove the negative unless the subject matter of the negative and the means of proof are peculiarly within the knowledge and power of the opposite party, or where the negative does not admit of direct proof." *Muller v. United States,* 4 Ct. Cl. 61: "When the enacting clause of a statute makes an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception. But when the exception is contained in a proviso, and not in the enacting clause, the party pleading the statute need not negative the exception. It is for the other party to set it up in avoidance of the general provisions of the statute." To substantially the same effect are the following: *Vandegrift v. Meihle,* 66 N. J. Law, 92; 1 Bates, Pleading, Practice, Parties and Forms, p. 225; *Fairbault v. Hulett,* 10 Minn. 15; Bliss, Code Pleading (3d ed.) sec. 202.

In support of its contention defendant cites *Hale v. Missouri P. R. Co.*, 36 Neb. 266. We have examined that case and do not believe the conclusions there reached are applicable to the facts in the case at bar. The section of the United States statute referred to therein differs materially from the statute under which the action in the case before us is brought. In the present case the exception relied on is not in the enacting clause of the statute, but occurs in a proviso, and it appears the prevailing weight of authority is to the effect that, where the exception is so stated in the statute, such exception is matter of defense and need not be negatived by the plaintiff. In *Hale v. Missouri P. R. Co.*, 36 Neb. 266, it does not appear the action was brought under the section of the United States statute that is referred to in that opinion. No reference is made to it in the record, nor in the briefs of counsel. The statute is noticed for the first time in the record of the *Hale* case in the opinion of the court, and appears to be dictum. The suit was brought evidently as a common law action on a contract of shipment for the loss of live stock by the alleged negligence of the railroad company, and appears to us to be clearly distinguishable from the one now before us. *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509, *Ruth v. Lowrey & Upton*, 10 Neb. 260, and *Haskins v. Alcott & Horton*, 13 Ohio St. 210, cited by defendant, do not seem to be applicable to the facts involved herein.

In a case arising under the statute here in question, it is obvious the exceptions noted with respect to the time consumed in picking up and setting out cars and in loading and unloading stock at stations are peculiarly within the knowledge of the employees of defendant, and doubtless the legislature had this thought in mind and the act was perhaps prepared in part to meet this condition. A shipper, as such, is not of necessity learned in the manifold intricacies attendant upon the active management of lines of transportation, and he would not, perhaps, be competent to determine with any reasonable degree of

accuracy whether the time occupied by the railroad company, in the respects noted, was necessarily occupied or otherwise. In any event, from the language of the statute as it appears in the act, it was evidently not the legislative intention to impose upon the shipper of live stock the burden of proving the exception noted in the statute before he could avail himself of its compensatory provisions. A shipper does not always accompany his stock to market, particularly if the shipment consists of but a single car-load, in which event knowledge of the delay contemplated by the statute, and the reasons therefor, would be, perhaps, exclusively within the knowledge and the power of defendant. It may be that these and kindred contingencies engrossed the legislative mind when the remedial act in question was enacted. The legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will. The presumption will also be indulged that the lawmaking body is conversant with the established rules of statutory construction, and that in the passage of the act in question it did not lose sight of the elementary proposition that the enacting clause of a statute is that part which immediately precedes the proviso. After careful consideration we hold upon this point that the contention of defendant cannot be upheld, and that the exception noted in the statute is matter of defense that need not be negatived by plaintiff.

Upon the second point to which the argument of counsel is directed, defendant contends that the act in question contravenes section 4, art. XI of the constitution, which provides that the liability of railroad corporations as common carriers shall never be limited, and should therefore be declared void. Following is the provision of the constitution which the defendant maintains has been violated by the act under which this suit is brought, and to which the argument on rehearing has in part been di-

rected: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." To the argument of defendant on this point plaintiff interposes the objection that the defendant company cannot be heard to urge the alleged unconstitutionality of the act, because it is not shown that it has been in any manner injured thereby. In this respect the record sustains the position of plaintiff. There is not a syllable of testimony to show that the amount of plaintiff's recovery under the statute is more than the actual damage he suffered by the delay of his shipments, and for which, even in the absence of a statute, the defendant would be liable. Until defendant is shown affirmatively to have been injured, he cannot be heard to complain that the act under which the suit is brought is unconstitutional. The rule is thus stated in Cooley, Constitutional Limitations (7th ed.) p. 232: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." In *Clark v. Kansas City,* 176 U. S. 114, Mr. Justice McKenna cites with approval the foregoing language of Judge Cooley, and adds: "We concur in this view, and it would be difficult to add anything to its expression." *Kellogg v. Currens,* 111 Wis. 431: "Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. * * * We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others." In *Wellington et al.,*

*Petitioners,* 16 Pick. (Mass.) 87, the court, speaking by Shaw, C. J., says: "Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power, and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected." The following authorities fairly support plaintiff's contention: *People v. Brooklyn, F. & C. I. R. Co.,* 89 N. Y. 75; *Williamson v. Carlton,* 51 Me. 449; *Pittsburg, C., C. & St. L. R. Co. v. Montgomery,* 152 Ind. 1; *Currier v. Elliott,* 141 Ind. 394; *Board of Commissioners v. Reeves,* 148 Ind. 467; 6 Am. & Eng. Ency. Law (2d ed.) 1090; *Commonwealth v. Wright,* 79 Ky. 22; *Sullivan v. Berry's Adm'r,* 83 Ky. 198; *Jones v. Black,* 48 Ala. 540; *Moore v. City of New Orleans,* 32 La. Ann. 726; *McKinney v. State,* 3 Wyo. 721; *Dejarnett v. Haynes,* 23 Miss. 600; *Marshall v. Donovan,* 10 Bush (Ky.) 681; *Small & Carr v. Hodgen,* 1 Litt. (Ky.) 16; *Henderson v. State,* 137 Ind. 552; *Embury v. Conner,* 3 N. Y. 511; *Supervisors v. Stanley,* 105 U. S. 305.

In support of its position defendant cites *Greene v. State,* 83 Neb. 84. We have carefully examined the citation, and it seems to us to be clearly distinguishable from the case now before us. The validity of a criminal statute was there in question that by its express terms limited its protective features exclusively to citizens or residents of this state. The act was held to be invalid because it contravened section 15, art. III of the constitution, which prohibits special legislation, and section 1 of the fourteenth amendment to the federal constitution, which provides that no state shall deny any person within its jurisdiction the equal protection of the laws. From an examination of that case it is obvious, if the defendant there could not invoke the protection of the constitutional inhibitions, no one could do so.

After careful examination, and in view of the foregoing authorities, and for the reasons stated in the opinion, we

find ourselves precluded from passing upon the constitutional points raised and argued by the defendant.

A minor feature remains for us to consider. In its brief for rehearing defendant maintains it is entitled to a remittitur of $170 from the amount allowed to plaintiff on his twenty-first cause of action, and in support of its contention invokes the rule applied by us in our former opinion to plaintiff's first cause of action, wherein we deducted $240 from the amount allowed by the trial court. Plaintiff sued under the act in question for 25 separate delayed shipments, and recovered judgment as damages therefor in the total sum of $1,640. In reviewing the judgment of the lower court in our former opinion we directed, for the reasons therein stated, and which need not be here repeated, that, unless the plaintiff within 30 days of the filing of the opinion remitted $240 as of the date the judgment was entered in the lower court, the case would be reversed and the cause remanded for further proceedings because of an excessive allowance for damages growing out of plaintiff's first cause of action, but that, if such remittitur were filed, the judgment of the district court would be affirmed. A remittitur was duly filed in the manner and within the time pointed out in the opinion. The record discloses without contradiction the twenty-first cause of action relates to a shipment made at Burwell on Friday, September 8, 1905, at 9 o'clock in the forenoon, which arrived in South Omaha, the point of destination, on the following Monday, September 11, at 4:55 o'clock in the morning. Plaintiff alleges this shipment was 52 hours and 18 minutes longer in transit than the time contemplated by the statute in question, and that the amount of the recovery to which he is entitled therefor under the statute as liquidated damages is $520. The answer alleges, and the proofs show, that this cattle shipment arrived at Lincoln, on its way to South Omaha, at 9:20 in the forenoon on the Sunday following the date of shipment, and was held there until 11:40 in the afternoon of the same day, in the meantime having been unloaded

and fed, when it was again loaded and reshipped to the point of destination, arriving there on Monday at 4:55 in the morning. The proofs show the cattle were in the pens and feed yards of the defendant 14 hours and 20 minutes at Lincoln, thus entitling defendant, by the terms of the act in question, to have deducted from the time allowed to plaintiff in the trial court the 14 hours and 20 minutes that the cattle were in the Lincoln feed yards. To this must be added an additional deduction of 2 hours and 40 minutes in favor of defendant, that being the difference in the time alleged in the petition and the time as actually shown by the record, in addition to the time consumed in feeding at Lincoln, which should be deducted from the delayed time for which plaintiff was allowed damages in the trial court, making a total deduction of 17 hours, and which, under the statute, amounts to $170, and for which amount defendant is entitled to an additional remittitur.

Upon careful reexamination of the questions argued upon the rehearing, we adhere to our former opinion, except to hold that defendant is entitled to an additional remittitur of $170 for the reasons stated herein; and, unless within 30 days after the filing of this opinion plaintiff remits that amount from the judgment obtained in the trial court, the case will be reversed and remanded for further proceedings, but, in the event of the filing of such remittitur within the time named, the motion for rehearing will be overruled and our former opinion sustained.

JUDGMENT ACCORDINGLY.

ROSE, J., did not sit, and took no part in this decision.

BARNES, J., dissenting.

I am constrained to dissent from the conclusion of my associates. The majority hold that the petition in this case is sufficient without an allegation that no part of the time employed by the carrier in transporting plaintiff's stock, in so far as delay is made the basis of recovery,

was "consumed in picking up and setting out, loading and unloading stock at stations." I am unable to concur in this holding. For anything appearing in the petition, the delay, for which the plaintiff recovered at the rate of $10 an hour for each car, may have been caused by the performance of the carrier's lawful and imperative duty to pick up and set out cars of stock. The time thus employed by the carrier cannot be made a basis of recovery, because the statute says: *"The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule."* It seems to me to be a strange rule of pleading which denies a carrier the benefit of this positive command, unless it is pleaded as a defense. The statute forbids a recovery for the time consumed by the carrier in the performance of the unavoidable duty of picking up and setting out cars at stations. In allowing shippers of live stock to recover for delays without regard to actual damages, the legislature attempted to create an arbitrary remedy which is a stranger to the common law, and which has few, if any, parallels in remedial legislation. I do not believe that the right of recovery should be extended by judicial construction of the statute. One invoking its provisions should be required to bring his case exactly within its terms, and show by affirmative allegations that the conditions making recovery unlawful do not exist. The courts are not responsible for hardships in making proof of facts essential to such statutory relief, and have no right to impose on a defendant the burden of proving non-existent conditions, simply because the information is within its knowledge, where the legislature by unambiguous language has pointed out a different course.

One reason given for the conclusion of the majority is that the conditions or exceptions are found in a proviso, and, hence, should be pleaded by the defendant, when relied on as a defense. I think a careful reading of the statute will show the fallacy of this reasoning. The material part of the enactment is as follows: "It is hereby

declared and made the duty of each corporation, individual, or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in said state in car-load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled, including the time of stops at stations or other points: Provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each 12 miles of the distance, including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule." Ann. St. 1907, sec. 10606.

It will be observed that the language following the word "provided," down to the concluding word of that clause, fixes the minimum rate of speed on all branch lines not exceeding 125 miles in length, and the preceding portion fixes the minimum rate of speed on all other lines. It follows that the proviso, if it may be so called, applies alone to the rate of speed on branch lines, and has no application whatever to that portion of the substantive and declaratory part of the act which applies to both main line and branches, and which reads: "The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in this schedule." When a carrier is sued for delay in transporting stock on a branch line only, where the minimum rate of speed is 12 miles an hour, is the plaintiff's measure of recovery determined by the main line speed of 18 miles an hour, unless the defendant pleads

that the stock was shipped over a branch line? If this question cannot be answered in the affirmative, then the correct rule has not been announced by the majority. The provision fixing a 12-mile rate of speed on branch lines is found alone in the so-called proviso, and precedes the clause relating to time consumed in picking up and setting out stock at stations, which declares: "The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time, as provided in this schedule." This clause is a substantive part of the declaratory provisions of the act, and applies to the schedule of both main and branch lines. The fact that the word "proviso" precedes the exception relating alone to the rate of speed on branch lines does not alter the situation or change the import of the legislation. If this be a correct conception of the statute, then the plaintiff's case is within the rule announced by this court in *Ruth v. Lowrey & Upton,* 10 Neb. 260, which reads as follows: "It is an elementary principle in pleading, that where a statute, upon certain conditions, confers a right or gives a remedy unknown to the common law, the party asserting the right, or availing himself of the remedy, must, in his pleading, bring himself or his case clearly within the statute. *Haskins v. Alcott & Horton,* 13 Ohio St. 210." It seems clear to me that in allowing the plaintiff to recover without pleading that no part of the whole time employed by the carrier in transporting the plaintiff's stock "was consumed in picking up and setting out, loading or unloading stock at stations," the majority has departed from the principle announced in *Hale v. Missouri P. R. Co.,* 36 Neb. 266.

Again, the majority of the court has declined to pass upon the question of the constitutionality of the act on which the plaintiff's right to recover depends, for the alleged reason that the defendant is not injured thereby. I am unable to understand the logic of this declaration. Solely by reason of the provisions of the statute in question, and without other cause, the decision of the majority

requires the defendant to pay to the plaintiff a sum of money amounting to about $1,500 as so-called liquidated damages, although plaintiff has not shown that he has suffered any actual damages whatever by any act of the defendant, negligent or otherwise. The effect of this decision is to take from the defendant that much of its property and transfer it to the pocket of the plaintiff, without any legal or equitable right other than the command of the statute complained of. To say that the defendant is not injured by the enforcement of the act, and therefore cannot question its constitutionality, seems absurd. Such a declaration should not find sanction in any judgment of this court.

For the foregoing reasons, I am of opinion that a rehearing should be allowed; that our former decision should be overruled, and the judgment of the district court should be reversed.

FAWCETT, J., concurs.

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JULIUS VOGEL ET AL., APPELLANTS, V. PATRICK RAWLEY ET AL., APPELLEES.

FILED DECEMBER 14, 1909. No. 16,200.

1. **Injunction**: RESTRAINING VILLAGE BOARD. The extraordinary writ of injunction will not be interposed to prevent performance of the political duties devolving upon the village board, in the absence of fraud or of a clear and unmistakable showing that an irreparable injury is about to be committed, and for which neither a law action nor an appeal from the action of the board will afford an adequate remedy.

2. ———: PUNISHMENT FOR ACTS COMMITTED. The writ of injunction cannot be properly employed as a punishment for acts already committed.

3. ———: DISCRETION OF VILLAGE BOARD. Injunction will not lie to control the discretion of a village board.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*A. D. McCandless* and *E. O. Kretsinger,* for appellants.

*Hazlett & Jack, contra.*

DEAN, J.

This is an injunction case tried on the pleadings and the affidavits of the respective parties. No oral testimony was offered on either side. The case is the outgrowth of a contention that arose between the parties over applications made to the village board of Barneston, in Gage county, for the issuance of saloon licenses in the fall of 1908. The district court found the petition herein did not state a cause of action, dismissed the case, and plaintiffs appeal.

The appellants Vogel and Wood, who were plaintiffs in the trial court, and are hereinafter called plaintiffs, were remonstrators before the village board against the issuance of the licenses. In their petition plaintiffs allege the corporate capacity of the village and the respective official positions of the defendants Rawley, Moran, McKelvey, Gerdes and Wyatt, who constitute the village board, and A. D. Spencer, who is village clerk. They make Edward W. Severance and John W. Wolken, who are applicants for saloon licenses, parties defendant, and also Charles Churda, alleging the latter is the real party in interest with respect to the application of Wolken. Plaintiffs also allege, in substance, that Severance and others in Barneston, who are actively interested in having a saloon license issued to him, have openly threatened to do great bodily injury to plaintiffs in the event they filed a remonstrance against the application of Severance, and that the latter and defendant Churda instigated one Frank Pisar to assault the plaintiffs, and that in pursuance of such instigation he struck and otherwise maltreated them without any

provocation other than that they were in the act of filing remonstrances against the applications of defendants Severance and Wolken. It is also alleged that the place of meeting of the village board is in a building situated some distance from the main street, and that there are no sidewalks leading thereto and no street lights, and that the building is partially surrounded by high weeds, and that future meetings will be held there for the hearing upon the present remonstrance in the nighttime, and that by threats and intimidation remonstrators' witnesses will be prevented from appearing and testifying; that the board is without jurisdiction because no legal liquor ordinance has ever been passed by the village council; that if licenses are granted to either of the applicants they will violate the law and maintain nuisances; that breaches of the peace will often occur; that the enforcement of law and order in the village will be impossible; that threats of great bodily violence to be visited upon plaintiffs have been made by defendants and their friends; that, unless the prayer of plaintiffs is granted, the defendants' and their friends' unlawful threats will be executed; that plaintiffs have no adequate remedy at law. The allegations of the petition are for the most part supported by affidavits and denied by counter affidavits.

After motions to vacate and to strike certain of the affidavits from the files were overruled, the defendant members of the village council and the village clerk filed a joint answer denying generally all the allegations of the petition, but admitted the official capacity in which they were sued, and admitted the board was about to proceed to consider the applications. Defendants Severance, Wolken and Churda filed their joint answer making the same admissions that were made by the members of the village board, but denying generally all other allegations in the petition. Plaintiffs' reply was a denial in the usual form of the allegations of the answer.

In support of their respective positions the plaintiffs and defendants together offered in evidence the affidavits

of upwards of 70 witnesses. We have examined all of them carefully. The affidavits on the part of plaintiffs and of defendants, and the record generally, indicate that during the summer of 1908 there was considerable activity on the part of some of the residents of Barneston both for and against the establishment of the saloon business in that community. Those opposing its establishment succeeded on two occasions by appropriate court proceedings in preventing the establishment of saloons. The activity of both sides in the former contests seems to have led to some feeling that has apparently culminated in this suit, and from the record before us appears to involve citizens and residents of the village who are not parties to this action. On the part of plaintiffs the affidavits charge they have been the object of threats, and on one occasion were assaulted by one Frank Pisar. The affidavits of the plaintiffs were met and flatly contradicted in all essential points by the affidavits of perhaps an equal or greater number of witnesses filed in behalf of the defendants. We cannot dismiss the thought that the district court who tried the case is doubtless acquainted with the local situation and perhaps knows personally the witnesses, and, after considering all the testimony and weighing it, resolved the controversy as seemed to him just and right. In the condition of the record, presenting as it does a massive volume of conflicting testimony that it is seemingly impossible to reconcile, we are not disposed to disturb the finding and judgment of the trial court.

A sameness with respect to the allegations of defendants' affidavits has not escaped our notice, but the same feature, and to perhaps as great an extent, seems to characterize the affidavits of plaintiffs. From a careful scrutiny of the record we are not convinced that the plaintiffs are without a remedy at law, or by appeal from the action of the board for the adjustment of the grievances of which they complain. In view of the record and the authorities applicable thereto, we are constrained to hold that plaintiffs have not shown a clear right to the issuance of the

writ. It is elementary that the writ of injunction cannot be properly employed as a punishment for wrongful acts already committed. Courts of equity will not permit the extraordinary writ of injunction to be interposed to prevent performance of the political duties which devolve upon a village board in the proper exercise of its municipal functions, in the absence of fraud or of a clear and unmistakable showing that some irreparable injury is about to be committed by the board for which neither a law action nor an appeal from the action of such board will afford an adequate remedy, nor in any event will the writ be allowed to control the exercise of the official discretion of the board. The rule is thus stated by Henry Wade Rogers in 22 Cyc. 808: "Where complainant has a right of appeal in the suit sought to be enjoined, and the injustice complained of can be redressed on such appeal, the action will not be enjoined, especially where a stay of proceedings pending the appeal can be obtained." *Hardesty v. Taft,* 23 Md. 512; *Stone v. Little Yellow Drainage District,* 118 Wis. 388; *Devron v. First Municipality,* 4 La. Ann. 11; *Leo v. Union P. R. Co.,* 17 Fed. 273; *Commissioners of Highways v. Deboe,* 43 Ill. App. 25; *Wehmer v. Fokenga,* 57 Neb. 510; *Warlier v. Williams,* 53 Neb. 143; *Eidemiller v. Guthrie,* 42 Neb. 238.

The contention is made by plaintiffs that the village ordinance of Barneston regulating the issuance of saloon licenses was not lawfully passed, aproved and published. The record discloses that on August 11, 1908, a special meeting of the village board was called by chairman Rawley to meet the following evening at 8 o'clock at the village clerk's office for the purpose of considering and voting upon the question of passing a liquor license ordinance. Section 43, art. I, ch. 14, Comp. St. 1909, among others, authorizes the chairman to convene the village board in special session, and the call issued by that official seems to have met the requirements of the statute. The object of the meeting was stated in the notice, and service thereof was accepted by all the members of the board by subscrib-

ing their names thereto. In pursuance of the notice the board convened with all members present, and the ordinance was introduced and read the first time, after which the meeting adjourned until the next morning at 9 o'clock, at which time the board again convened with all members present, and the ordinance was read the second time, when on motion the rules were duly suspended, and it was read for the third time and passed, and a motion made that it be published in the Barneston Herald one week, in which paper the record elsewhere discloses the publication was regularly made. The roll was called and a record made of the vote of each member at every step in the proceeding. It is shown that all the members of the board on roll call voted unanimously for every feature of the license ordinance and for every question that came before them with reference to its passage. There was not a dissenting voice. The ordinance appears to have been passed in compliance with the requirements of the statute.

A supplemental brief was submitted to us by plaintiffs after the oral argument, wherein it is contended that, if the licenses are permitted to issue, the saloons that will be opened up in pursuance thereof will constitute a nuisance. From the reply brief of defendants filed in response thereto, there appears to be a difference of opinion between the parties on this feature of the case, which in the present state of the record we are precluded from determining. The record fails to disclose grounds sufficient to warrant an inquiry into the subject urged in the supplemental brief of plaintiffs.

Finding no reversible error, the judgment of the trial court must be, and it hereby is,

AFFIRMED.

## IN RE I. J. DUNN.

FILED DECEMBER 23, 1909. No. 15,637.

1. Contempt: NOTICE: BRIEFS. "Where an offense in the nature of a contempt is committed in the presence of the court, notice to the offender is not usually essential before punishment (7 Wall. 372); and it is immaterial, where the contempt consists in the use of offensive language, whether it be spoken openly or presented to the court in a written or printed argument (19 How. 13)." *In re Woolley*. 11 Bush (Ky.) 95.

2. ———: BRIEFS. "*A petition* (brief) *for a rehearing* is not a pleading, but an argument addressed to the court and the individual members of the court; and to incorporate into such argument contemptuous, scandalous, or insulting matter, is to commit in open court an act constituting a contempt on the part of the attorney." *In re Woolley*, 11 Bush (Ky.) 95.

3. ———: DISAVOWAL. Where the matter spoken or written is of itself necessarily contemptuous, offensive and insulting, the disavowal of an intention to commit a contempt or reflect upon the court or any member thereof cannot justify the act, although it may be considered as tending to excuse, and in mitigation.

4. ———: POWERS OF COURTS. The power to punish for contemptuous, insolent, or insulting conduct or language is inherent in every court having common law jurisdiction, without any expressed statutory authority. "The right of self-preservation is an inherent right in the courts, not derived from the legislature, and cannot be made to depend upon the legislative will." *In re Woolley*, 11 Bush (Ky.) 95.

5. ———: SUSPENSION OF ATTORNEY. "An open, notorious, and public insult to the highest judicial tribunal of the state, for which an attorney contumaciously refuses in any way to atone, may justify the refusal of that tribunal to recognize him in the future as one of its officers; and in a proceeding against him for contempt, if the contumacy be therein manifested, there is no reason why the order revoking his authority until he does comply with the reasonable requirements of the court may not be made." *In re Woolley*, 11 Bush (Ky.) 95.

6. ———: ———. Under a citation to an attorney of this court requiring him to appear before the court on a day and hour designated to show cause why he "should not be dealt with for contempt on account of the language contained in" a brief in support of a motion for rehearing, filed in the office of the clerk of the

court, it is within the jurisdiction of the court to indefinitely suspend such attorney from practice.

7. ———: DUTY OF COURT. A part of the language used and presented in the brief referred to is set out in the opinion, and it is *held* to be the duty of the court to take notice of the same and to apply the required disciplinary penalty.

8. ———: INDEFINITE SUSPENSION. The judgment of suspension was made "indefinite," as stated from the bench, in order that, if at any time respondent made the necessary retraction and explanation to relieve and remove the contemptuous quality of the language used, the judgment would be vacated and the suspension removed, no intention of a permanent disbarment or even of a suspension for a definite time being intended. Until such time as respondent makes the proper and usual amends, the order will stand as made.

PROCEEDINGS for contempt. Motions to vacate order of suspension. *Motions overruled.*

REESE, C. J.

The case of *Anna J. Robinson v. City of Omaha* was appealed to this court from the district court for Douglas county, by the city, from a judgment rendered against it in favor of the plaintiff in the action. Upon the case being regularly submitted to this court, the judgment was affirmed, the opinion being written by Judge ROSE. A motion for rehearing was filed, supported by a brief of 50 pages, and which, from near the beginning to the close, consisted of personal attacks upon "Mr. Justice ROSE," as he is styled and referred to throughout. It must be sufficient to say that, if the use of language means anything, the brief was a studied, deliberate and malicious assault upon the writer of the opinion with the purpose of injuring his standing as a judge both as to his integrity and legal attainments. The brief bore the names of three attorneys of this court. It was stricken from the files, and a citation was served upon each of them in the following form:

"It is ordered by the court that the brief of defendant on motion for rehearing be stricken from the files, and

that Harry E. Burnam, I. J. Dunn and John A. Rine, attorneys for defendant, be cited to appear before the court November 4, 1909, at 9 o'clock A. M., to show cause why they should not be dealt with for contempt on account of the language contained in said brief."

On the return day the respondents appeared, and at their request time until the next sitting of the court was given, when it was shown by typewritten answers that Mr. Burnam, one of the three, was the city attorney of the city of Omaha, and the other two, Mr. Rine and the respondent, Mr. Dunn, were his assistants; that the management of the principal suit of *Robinson v. City of Omaha* was exclusively in charge and control of Mr. Dunn; that he had prepared the brief in their absence; and that they knew nothing of its contents until after it was filed and the citation to them had been issued. It is said by Mr. Burnam that, "had I known of the objectionable features contained in said brief, I would not have permitted them to remain, but would have had them eliminated therefrom." With commendable frankness he expressed his regret and that of his department "for the language in the brief objected to by the court." In his answer to the citation, Mr. Dunn stated that he prepared the brief, and that neither of the other respondents knew of its contents at the time it was prepared and filed, "and neither read it until after the citation had been issued"; that the brief was hurriedly dictated, and, owing to the shortness of time, it was "printed as rapidly as possible, and filed in this court." This is followed by a somewhat lengthy history of the case of *Robinson v. City of Omaha,* stating that he believed the evidence upon which the verdict was rendered against the city was in every essential feature wilfully false; that the defendant in the case had been outraged by the verdict; that the verdict was not supported by the evidence; "that there was no basis for the liability against the city"; that at least two of the instructions given to the jury were erroneous, and at least one reversible error had been committed with reference to the introduction of evidence;

that he felt sure the judgment would be reversed in this court, and was satisfied that this court would conclude that the testimony given on the trial was knowingly false, and was therefore convinced that this court would not hold that the verdict was supported by sufficient testimony, but was based principally, if not entirely, upon "the opinion, conclusions and conjectures of the plaintiff"; that, "when the opinion of the court was announced sustaining the judgment of the lower court," he "was not only surprised and disappointed, but felt that the judgment of the court was wholly wrong, and that there could be no possible theory of the law upon which the verdict of the jury could be legally upheld"; that he obtained a copy of the opinion, and became convinced from reading it that the opinion was not sound, and that due weight and consideration had not been given to the reasons urged by the attorneys for the city in their brief as to why the judgment of the lower court should be reversed; that he was satisfied that the complaint regarding two instructions given by the trial court had not been given due consideration, and that the complaint as to one of them had been entirely overlooked or disregarded; that he undertook to point out to the court why the opinion and judgment should not be adhered to; that he believed that his client was about to be wrongfully deprived of its property, and that the opinion of the court was based upon erroneous propositions of law, and a misconception and misconstruction of the evidence in the case; that he undertook to discuss the opinion of the court the same as he would discuss similar propositions of like importance in the brief of the opposing counsel; that he had but one object in view, which was to convince the court, if possible, that the opinion was not sound, and that due weight had not been given to the arguments presented on behalf of the city, and to protect it from what he considered an unjust verdict; that he had no interest of a personal nature in the result of the case; that if the verdict were sustained the legal department of

the city would in no way be blamed on that account; that he was simply an officer of the city, and it was his duty to protect its interests by presenting its side of the case to the court; that in writing the brief he was actuated by no other purpose than to properly represent the client on whose behalf he appeared, and to protect its interests to the best of his ability; that he did not intend to reflect upon the honor, dignity, or integrity of the court; that he intended to criticise the opinion of the court, and to criticise the reasons given by the writer of the opinion for the conclusions reached; that he intended to do that with all the force, energy and ability that he possessed; that he presumed he had a right so to do; that "the brief was intended for the consideration of the court alone, and not for public consumption"; that the judgment announced was the final judgment of the court, subject to its power to grant a rehearing, or, if the motion for a rehearing were overruled, the judgment would remain the final one. The closing part of the answer is as follows: "I deny that I intended to in any way reflect upon the court or any member thereof, or to obstruct its proceedings or hinder the due administration of justice."

Upon considering the three answers, the court ordered the dismissal of the proceedings against Mr. Burnam and Mr. Rine, fully exonerating them, their showing being all that could rightly be required, it appearing that if any wrong had been perpetrated they were entirely blameless. The matter as to Mr. Dunn was held for further consideration and hearing at a specified time. At the time fixed he appeared personally at the bar of the court and practically reiterated what was said in his written answer, as above given, urged that the case of *Robinson v. City of Omaha* had been finally disposed of, and that he could not be legally called to account for language used in his brief filed in the cause in support of his motion for rehearing, and, further, that the brief was intended only for the eyes of the court, and not the public, and therefore he could not be held to be in violation of any of his rights as an officer

of the court. He again stated, in substantially the language of his answer, that he did not intend to reflect upon the court or any member thereof. The matter was then taken under advisement until the next day, when it was announced from the bench that the answer of Mr. Dunn, together with his oral remarks, were not deemed sufficient, and that the unanimous decision of the court was that he be indefinitely suspended and debarred from practicing in any and all courts of record within this state.

We have sought, here, to give a fair and just synopsis of Mr. Dunn's defense, even at the risk of being prolix, in order that a full understanding of the case may be had.

Subsequent to the order of the court suspending respondent, he filed a motion for the vacation of the order, basing his application largely upon the alleged want of jurisdiction to make the order in this kind of a proceeding, and in support of which his counsel filed a brief on the law of "Contempt Disbarment." Before any action was had on the motion he filed an amended motion to vacate the judgment, assigning as his grounds therefor:

"(1) That contempt proceedings and disbarment proceedings are entirely separate and distinct, and a judgment of disbarment cannot properly or lawfully be entered in a case of contempt proceedings.

"(2) That power to punish contempts of court by fine and imprisonment, as provided by section 669 of the code, operates as a limitation upon the manner in which the power of courts with respect to punishment for contempts can be exercised and is a negation of all other modes of punishment.

"(3) That the establishment of a proper precedent and a proper determination of the law in the state of Nebraska requires that the said order and judgment of disbarment be vacated.

"(4) That the judgment of disbarment entered herein is the taking of a property right from this defendant, namely, the right to practice his profession and support himself and family, without due process of law.

"(5) That no complaint or information was ever filed against this defendant setting forth any facts or any charge upon which any judgment of disbarment could be legally based.

"(6) That no opportunity was ever allowed or given this defendant to make answer or defense to disbarment proceedings.

"(7) That the hearing which was had herein related solely to the alleged *contempt* of this defendant, and was in response to the order of this Honorable Court that this defendant and others show cause 'WHY THEY SHOULD NOT BE DEALT WITH FOR CONTEMPT OF COURT ON ACCOUNT OF THE LANGUAGE CONTAINED IN SAID BRIEF.'

"(8) There has been no finding of facts by the court sufficient to authorize or justify the entry of a judgment disbarring this defendant, or even sufficient to justify or authorize the entry of a judgment for contempt.

"(9) The finding of the court that the said I. J. Dunn failed and refused to 'maintain the respect due to the courts of justice and to judicial officers' and has failed to abstain from 'offensive practices' is not a finding of any fact defined by the statutes or known to the common law as constituting a contempt of court, but is a mere conclusion and declaration on the part of the court unsupported by the finding of any fact as to any act on the part of the said I. J. Dunn.

"(10) The alleged contemptuous conduct on the part of the said I. J. Dunn not having occurred in open court, nor in the presence of the court or of the judges thereof, and the court having failed to set out or specify the language complained of as constituting a contempt of court, or as constituting grounds of disbarment, the court was without right, authority or jurisdiction to proceed in the matter, and was without right, authority or jurisdiction to enter an order in suspension or disbarment, either as a punishment for contempt or any other alleged misconduct on the part of the attorney.

"(11) The writing and filing of the brief referred to in the order citing this defendant to show cause why he *'should not be dealt with for contempt'* was not disorderly, contemptuous, or insolent behaviour toward the court or any of its officers *in its presence,* and does not come within the terms of section 669 of the code relating to 'contempts,' and is not actual contempt under said section or the common law, but relates, as do also the findings of the court, to 'duties' of attorneys as set forth in section 5, ch. 7, entititled 'Attorneys.'

"(12) The court having failed to make, file or cause to be filed any information or complaint, setting out or specifying the facts or language complained of, and the said I. J. Dunn having had no opportunity under any disbarment proceeding to answer any such charge, and therefore not having had his day in court, this court was without right, authority or jurisdiction to pass upon or pronounce judgment upon his right to continue as a practicing attorney.

"And, upon the sustaining of this motion, the said defendant, as in his original motion filed herein, again respectfully requests this Honorable Court, before taking any further proceedings, to allow and permit him, as he desires to do, to expressly retract and withdraw the statements contained in his brief which are considered and declared by the court to be improper and disrespectful, and to allow and permit the said defendant to render to this Honorable Court complete apology therefor."

It is first contended in the brief, above referred to, that the power to punish for contempts committed in the presence of the court, or otherwise, is expressly conferred by statute, citing sections 669, 670 and 671 of the code. It may be noted that the sections cited do not in any way refer to attorneys or other officers of the court as the offending parties, but it is intended for the protection of the courts and their officers. It cannot be contended that the power of the court is limited or restrained by the provisions of the above sections. We apprehend that they are

but declarative of the common law, as far as their provisions go, but do not circumscribe the powers of the courts. In *Kregel v. Bartling,* 23 Neb. 848, we said: "The power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid. The doctrine in these broad terms is generally asserted and is believed to be sound; the narrower doctrine, about which there is no dispute, is, that the power is inherent in all courts of record"—citing a great number of cases. It is also to be observed that there is no statutory provision in this state conferring, limiting, or controlling the power of the courts of the state in the matter of the suspension or disbarment of attorneys, but that that is left to the inherent powers of the courts unaffected by any legislative sanction or limitation, except section 6, ch. 7, Comp. St. 1909, which was evidently not intended to limit those inherent powers.

Before proceeding to notice the holdings of the state courts, and of this court, upon the question of disbarment, we will give attention to some of the cases cited by respondent in his brief.

*Ex parte Bradley,* 7 Wall. (U. S.) 364, was where the supreme court of the District of Columbia entered an order striking the name of Bradley from the rolls of that court for contemptuous language used to the judge of the criminal court of that district. The holding was that the two courts were separate and distinct. The conclusion of the supreme court is "that the judges of the court below (the supreme court of the District of Columbia) exceeded their authority in punishing the relator for a contempt of that court on account of contemptuous conduct and language before the criminal court of the district, or in the presence of the judge of the same," and a mandamus was issued to that court directing *it* to restore Bradley's name. It requires no discussion to show that the case is no authority and furnishes no light in this. However, a vigorous and searching dissenting opinion was written by Justice Miller, in which he combated the decision of the

majority of the court as to its right to issue the writ in any case of disbarment.

*Ex parte Robinson,* 19 Wall. (U. S.) 505, is cited as a controlling decision by the supreme court of the United States. That it has no possible bearing upon this case must be conceded from the perusal of the first paragraph of the opinion by Judge Field. In that case the grand jury of the United States district court for the western district of Arkansas reported to the court that it had been unable to procure the attendance before it of a certain witness, and that the witness had been seen in the company of attorney Robinson, and had soon thereafter disappeared, and service of the subpœna could not be had. The court without further showing ordered that Robinson and others named show cause why they should not be punished for contempt, the deputy marshal being one of the persons cited. Robinson filed the response for the deputy marshal, when the court informed him that a rule was against him, also. Robinson responded that he was aware of the fact, and in the course of the conversation which followed, and in which the court, for the first time, directed the clerk to formulate the order in writing, Robinson remarked: "I shall answer nothing"—when the court cut him off without permitting him to complete the sentence, which would have been, "until the order to answer the rule in writing shall be served upon me," and immediately ordered the clerk to strike his "name from the roll of attorneys, and the marshal to remove him from the bar." A mandamus for reinstatement was sought against the judge. The supreme court held that the district courts of the United States were courts of limited jurisdiction; that what powers they had were derived from the acts of congress, and not from the constitution; that the courts themselves were created by act of congress; that "their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction"; that "the act of 1831 is, therefore, to them the law specifying the cases in which summary punishments for contempts

may be inflicted"; that "it limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts," following the provisions of the statute. It must therefore appear to the most casual reader, whether learned in the law or not, that no light can be drawn from that case, as the district court clearly exceeded and went beyond its jurisdiction.

*State v. Sachs,* 2 Wash. 373, 26 Pac. 865, was where an attorney had made use of improper language to the court while in session. The court imposed a fine for the contempt, and ordered that the attorney stand committed to the custody of the sheriff until the fine was paid, and that he purge himself of said contempt. The attorney paid the fine. Several days later he appeared in court and asked to be heard as to a matter therein pending, when the judge refused to allow him to proceed, and, upon the failure of the attorney to further purge himself, the court refused to hear him, and ordered that the said attorney "will not be permitted to appear as an attorney or counselor before this court until he does comply with said order, and until the further order of this court." It was held by the supreme court that the second order was void, and a mandamus was granted for reinstatement of the attorney. Upon just what ground the writ was granted does not very clearly appear from the opinion. If it was that the court had exhausted its jurisdiction in imposing the fine, the decision was no doubt correct. If it was on account of the hasty action of the court without citation or opportunity to be heard, it was probably equally so. If it was, as suggested, that there was no foundation for the pre-

ceedings which led to the second order, the holding can be approved, for there clearly was none.

*Withers v. State,* 36 Ala. 252, was where the mayor of the city of Mobile refused to allow the relator, who claimed to be an admitted practitioner, to appear before him in the police court of the city for the purpose of defending persons charged with violations of the city ordinances. An application was made to the state circuit court for a mandamus to compel the mayor, sitting as the judge of the police court, to allow the relator to appear for his clients. The writ was allowed by the circuit court, but the judgment was reversed by the supreme court upon the ground that it did not appear that the relator was a licensed attorney authorized to appear in any of the courts of the state. The contention that he was not was presented by the return of the mayor. There were no disbarment or contempt proceedings pending anywhere. The mayor had simply told the relator that he would not be heard. The mandamus was refused. The court then, by a dictum, decided that, if a person were a duly admitted attorney, he would have the right to practice his profession in the mayor's court, but, owing to the fact that the relator had failed to show that he was so admitted, the judgment of the circuit court granting the writ was reversed. (It might properly be noticed that the law of Alabama specifically provided for what reasons an attorney might be suspended or disbarred, but those provisions had no application to the case decided.)

*State v. Goode,* 4 Idaho, 730, 44 Pac. 640, was where, under the provisions of the statute fully prescribing the procedure in disbarment proceedings, the district attorney, after an investigation by a committee appointed by the court, filed his information against the accused. The cause was docketed, and notice issued and served, and a committee appointed to make an investigation and report the facts to the court. The accused moved for a change of venue on account of the prejudice of the judge. The objection was overruled. The accused applied to the su-

preme court for a writ of review and for a mandate to compel the district court to allow the change of venue, and also to direct the judge to set aside an order made, at the time of the filing of the information, depriving the accused of his right to bring or defend any causes in said court, except those on the calendar, in which he appeared as attorney. The writ of review was denied, but it was held that the district court could not rightfully suspend the accused *pending* the proceedings against him; that he was entitled to his day in court before he could be suspended or disbarred, hence that part of the order suspending the accused before the final hearing was vacated, and certainly properly so.

The state of North Dakota has enacted specific and elaborate provisions for proceedings for contempts, and also, by separate provisions, for the procedure where disbarment is sought. By no stretch of construction or interpretation can the law in one case be made applicable to the other. The provisions are entirely independent, and are framed with the evident purpose of covering and including the whole of the law applicable to each case. Under those provisions the decision of the supreme court in *State v. Root,* 5 N. Dak. 487, was made, and the case is cited by respondent. In that case the state's attorney presented to the district court a number of affidavits purporting to contain charges against the accused of various criminal contempts of court committed at divers times and places. Upon the filing of the affidavits, the court ordered that cause be shown at a certain time why the accused should not be punished for contempt of court, and why he should not be debarred from practicing law in that court and county. At the time named the cause was called for trial, when the accused sought to except to the jurisdiction of the court, but was not allowed to do so. He filed a motion to vacate the order to show cause, but that was overruled, "the defendant not being permitted to present any argument or explanation as to said motion." The defendant filed his answer, a trial was had,

and a judgment was entered finding the defendant guilty of contempt, and adjudging and directing "that defendant be confined in the county jail of Barnes county, North Dakota, for a period of thirty (30) days, commencing at noon of this 4th day of January, A. D. 1896, and that he pay a fine of two hundred ($200) dollars to the clerk of this court; that, in case of default made by the defendant of the payment of this fine, that he be committed to the county jail of Barnes county, North Dakota, until such fine is paid, or for a period not exceeding thirty (30) days; that defendant's imprisonment for nonpayment of said fine shall commence at the expiration of the first term of period of the defendant's imprisonment herein mentioned; and that defendant be suspended from further practicing law in this court until the further order of this court; and that a commitment be issued to carry this judgment into effect." It is shown by the opinion that the whole of the conduct of the accused was the indulgence of language concerning the official and private character of the judge uttered at various times upon the streets, in stores and in public places in the city of Valley City, but in no case within the presence and hearing of the court while in session. In one instance he had said in the court-room, and while the court was in session, that the defendants in certain criminal prosecutions, addressing them in the hearing of others, were "chumps" for having attorneys to defend them; that the judge would look out for them; that he knew what he was there for; that he understood his business; that he knew what he was elected for, and that they need not fear. But there was nothing to show that the court was there actually in session or that the judge knew of the language used. The defendant appealed from the judgment, and it was reversed upon two grounds; one, that the charge for contempt and proceedings to disbar was an attempt "to fuse and mass together in one proceeding two distinct special proceedings, which are wholly independent of each other, not only with respect to the results which each is designed to accomplish, but

with respect as well to the practice and procedure laid down in the statute for the government of each respectively"; the other, that the court had arbitrarily refused to allow the accused to present his objection to the jurisdiction, or to permit him to be heard in his defense by way of argument or explanation or to listen to the law bearing upon the case, the holding being as well that there was no jurisdiction in that proceeding to try the accused for contempt. The penalty imposed was the highest permitted by the law.

The case of *People v. Kavanagh,* 220 Ill. 49, is also cited. In that case the petitioner had been adjudged guilty of contempt of court in the superior court of the county, for conduct in the presence of the court, and sentenced to imprisonment in the county jail of Cook county. On the same day he sued out a writ of habeas corpus before a judge of the circuit court to obtain his discharge from the imprisonment, and was released on bail pending the hearing of that application. After his release he appeared in the same court, before the same judge, in causes which he had pending in the court, but the court refused to hear or recognize him as an attorney, and, without any proceeding to suspend or disbar, the judge stated to him that, until the contempt committed on a previous day was atoned for or the judgment satisfied or vacated, he would not permit the attorney to appear before him. A mandamus was granted directing the judge to allow the accused to proceed with his cases. The holding of the court, as stated in the syllabus, was that, where an attorney was sentenced to imprisonment for contempt and was released on bail pending habeas corpus, it did not revive the right of the judge who imposed the punishment to again punish for the same contempt and refuse to allow the attorney to appear before the court until the conviction was satisfied or set aside. It was held that the right of suspension from practice in an inferior court of the state, and one from which his right

to practice did not emanate, was vested in the *nisi prius* courts only by virtue of the statute.

We have thus examined all the cases quoted from in respondent's brief, except *State v. Graves,* 66 Neb. 17, *Jackson v. State,* 57 Neb. 183, and *State v. Livsey,* 27 Neb. 55, and, including those, we have found none which to our minds throw any light upon the case now before us.

The question remains: Has this court the authority or jurisdiction to indefinitely suspend a practitioner at its bar for the acts committed, under the citation issued, after a patient hearing and full opportunity for the respondent to be heard, both in writing and orally, and full extension of time in which to present his defense has been given? So far as this court is concerned, we are not without a precedent for our guidance in a case almost identical with this. Owing to the high standing of the attorney involved, we will omit his name, but refer to court journal "C" of this court, at page 19, where the record may be found. A case had been decided, and leave was asked to file a motion for rehearing. The application was supported by a printed brief in which the decision of the court was referred to as the "evasive presumption of an advocate, and not the judicial presumption of a court," and either "a monstrous error or a monstrous crime." The introduction or caption of the entry is: "And now on this 10th day of April, 1878, came on to be heard the matter of the contempt of ————, attorney at law, and practicing in this court." The body of the entry proceeds: "And the court being fully advised in the premises, and the said ———— appearing in open court and at the bar hereof, and refusing to purge himself from said contempt, or to apologize to the court, it is therefore considered and adjudged by the court that the said ———— be, and he is, hereby suspended from any further practice as an attorney of this court, or in any case pending herein or hereafter brought, until such time as he shall purge himself of such contempt and until the further order of the court." The matter thus stood until the 20th day of July

of the same year, when the offensive language was withdrawn, and the attorney was restored to his former place at the bar of the court. At that time the court was presided over by Honorable DANIEL GANTT, Chief Justice, and Judges SAMUEL MAXWELL and GEORGE B. LAKE, three of the most capable men who have sat upon this bench, and whose judgments have at all times carried weight. No opinion was written, and the case was not reported.

*In re Woolley,* 11 Bush (Ky.) 95, is almost identical with the present one. Woolley had made use of offensive language in a motion for rehearing filed in the court of appeals of Kentucky. The court issued a rule requiring him to show cause why his authority to practice as an attorney in said court should not be revoked and that he be otherwise punished for the contempt. He appeared, and, while declaring that he meant no disrespect to the court or its members, he failed to retract or in any way withdraw, explain or apologize for the language used. Much the same contention was made as in this case, that the power of the court to punish for contempt was limited by the provisions of the statute. The court did not adopt this view, and not only made the rule absolute, but imposed a fine and rendered judgment for the costs. We quote a clause of the syllabus: "An open, notorious, and public insult to the highest judicial tribunal of the state, for which an attorney contumaciously refuses in any way to atone, may justify the refusal of that tribunal to recognize him in the future as one of its officers; and in a proceeding against him for contempt, if the contumacy be therein manifested, there is no reason why the order revoking his authority until he does comply with the reasonable requirements of the court may not be made."

*In re Pryor,* 18 Kan. 72, involves questions, on principle, quite similar to those under consideration. Pryor had written an insulting letter to the judge concerning a case pending in the court. A warrant was issued for the arrest of the writer, and when brought before the court

he was fined for the contempt and suspended from practice until the fine should be paid. On appeal to the supreme court the judgment and order were affirmed.

In *Ex parte Secombe,* 19 How. (U. S.) 9, the supreme court of the United States refused a mandamus to the supreme court of the territory of Minnesota to restore the relator to practice after his disbarment by that court. It was shown that the removal was for a contempt committed in open court, and the proceedings were instituted by the court upon its own motion. The accused had no notice that he had been disbarred until after the adjournment of the term of the court, and had never been informed that the action was about to be, or had been, instituted against him. The writ was refused, the court holding that jurisdiction of the subject matter existed; that the court acted judicially, and that the question of the erroneous or irregular action of the court gave no ground for mandamus.

In *In re Philbrook,* 105 Cal. 471, Philbrook had filed a brief, which is referred to in the order of the court citing him to appear as being of a "scandalous and contemptuous character." The usual proceedings were inaugurated, and the attorney was prohibited from practicing in any and all the courts of the state for the period of 3 years, and thereafter until the further order of the court removing such suspension. The legal proposition is stated in the syllabus as follows: "Where an attorney at law has filed in the supreme court a brief in which he has violated his duty as an attorney by the use of unwarrantable language in assailing a justice of the supreme court, with intent to commit a contempt of the court, and by palpably attempting to influence the decision of the court by appeals to the supposed timidity of its justices, the attorney guilty of the same should be suspended from his office as an attorney at law."

*In re Breen,* 30 Nev. 164, was where the supreme court of Nevada had reversed the judgment of the district court in a capital case in overruling a motion for a change of

venue. The reversal was duly certified to the district court, the venue changed, and the accused removed from the courtroom. The district attorney then arose "to the question of privilege" relative to a statement made in the opinion filed by the supreme court. A part of the district attorney's statement was that the portion of the opinion referred to was "absolutely not the fact; further, that there is nothing in the records from the first page to the last which suggests or would warrant the supreme court in making such a statement in its decision, and where anything is shown on that record upon which the supreme court renders such a decision is beyond my understanding." Upon the conclusion of this statement by the district attorney the district judge, then presiding, commended the district attorney for what he had said, joined with him in denouncing the clause in the opinion as "absolutely without foundation"; that "the statement in the opinion as written by Judge Norcross, to which objection has been made, like some other assertions in the same abnormally strange document", was, in his opinion, neither fair to the district attorney nor to the court over which he (the judge) presided, and "whether or not it was made for the purpose of bolstering up a decision" which to his mind was "neither founded on law nor supported by fact", it was "highly reprehensible for its author, or authors, to have made it"; that it was "reprehensible if the court knew what it was doing, pitiful if it did not", and ordered the statements made by the district attorney and the court to be spread upon the record, which was done. Upon these facts being brought to the attention of the supreme court, the attorney general was ordered to investigate and to present the facts to the court in the form of an affidavit. This was done, and the court ordered citations to issue to the judge of the district court and the district attorney to appear and to show cause why they should not be adjudged guilty of contempt of court and punished accordingly, and that they show cause why they should not be guilty of conduct unbecoming mem-

bers of the bar of the state and be disbarred. A hearing was had in the supreme court, separate opinions of considerable length being written, and orders were entered disbarring the judge of the district court unless he caused the language and order entered of record to be expunged within 20 days, and suspending the district attorney from practice for 30 days. Upon the hearing the district attorney, being convinced of his error, confessed it, and with commendable frankness disavowed intentional wrong and manifested a willingness to make all amends possible, and received the favorable consideration of the court, his sentence being a mild one. The district judge presented, in part, the same contention as here insisted upon, viz., that the language was with reference to a decision in a case no longer pending; that the sections of the code of that state providing for punishments for contempts was a limitation of the powers of the court in that behalf; that he had the same right as any other citizen to criticise the past action of the court; that, while the information given him by the district attorney was incorrect, yet it was made and believed in good faith, and, believing that the supreme court had purposely gone outside the record to reflect upon the district attorney and to insult the judge and criticise his rulings, he had pursued the course adopted. All these contentions were overruled, with the result stated.

In *Michel De Armas' Case,* 5 Martin (La.) 64, De Armas filed a motion for a rehearing in *St. Romes v. Pore,* shortly before that time decided, and the court, "having noticed indecorous expressions" in the application, "requested the clerk to draw his attention thereto." On the report of the clerk that the attorney "declined amending his application, an order was made that he answer for the contempt." He appeared, admitted the authorship of the paper, and suggested that the court were disposed to punish him as the author of a prior publication in which he denounced the declaration made by

the court on a former occasion. The court then, without further proceedings, entered an order suspending him from practice for 12 months.

In *Blodgett v. State,* 50 Neb. 121, it was held by this court that a charge of malpractice against an attorney and counselor at law could be joined in the same information with one for contempt, where both involved a single transaction.

It would seem from this review of authorities cited, and consulting the former decisions of this court, that there can be no room for doubt that the proceedings in this matter are well within the rules of law, and under a citation, as in this case, the legality and validity of the order of indefinite suspension must stand until the proper action is taken by respondent, provided the course pursued by him will warrant any action on the part of the court. It was not our purpose to quote or more than refer in a general way to the statements in the brief referred to, but the case seems to demand that some specific reference be made. In doing so, owing to its length and the number and times and instances in which the objectionable language occurs, it will be difficult to fairly state them without extending this already lengthy opinion beyond reasonable limits. We make a limited number of extracts. On page 10 of the brief the following occurs: "It would seem that unless the city of Omaha is to be singled out and denied the same protection of the laws accorded to railroads and street railways, it must be held that instruction 10 was erroneous. On the first page of the opinion it is stated: 'In her petition plaintiff states in substance that there was nothing under the west end of the board walk to support it.' I submit that no such statement appears in the petition. On the contrary, the allegation of the petition was, and the contention of the plaintiff and her witnesses at the trial was, that the dirt was under the west end of the north stringer of the four-foot sidewalk, which permitted the west end of that stringer to sink down an inch or two when the north side

of the walk was stepped on. This would seem to show that Mr. Justice ROSE started out without understanding or having clear in his mind what the complaint of the plaintiff was, or just what negligence was charged against the city which it was claimed contributed to the accident which befell the plaintiff." On page 12, after referring to a case cited in the opinion, he says: "But it was scarcely necessary for Mr. Justice ROSE to go clear across the continent to discover the law with reference to defects which render the city liable for damages on account of a difference in elevation or lack of uniformity in the level of sidewalks. He might have turned to the case of *Forbes v. City of Omaha,* 79 Neb. 6, decided by this court on May 10, 1907, or *Foxworthy v. City of Hastings,* 31 Neb. 825, and discovered that this court does not agree with the decisions cited from the state of Maine." On page 14 he uses the following language: "I am not aware, of course, where Mr. Justice ROSE has been in the habit of seeing and using sidewalks. Nor where he obtained the information which enabled him to become a sidewalk expert, and inject into this case the evidence submitted in the opinion, that the condition of the board walk was not dangerous or evidence of negligence." On page 17: "Upon what theory, then, other than the arbitrary determination to sustain the verdict of the lower court, can it be said that eight inches of an elevation is entirely safe, and not even evidence of negligence, but nine inches rendered the walk dangerously defective? A verdict based upon such testimony, and upheld by an opinion sustained by such reasoning, reduces the law to a farce. In the opinion Mr. Justice ROSE makes the following statement: 'There is also testimony which shows that prior to the accident the section of the wooden sidewalk at the west end had been in a loose, rickety and rocking condition for several years.' I deny the correctness of the above statement. I submit that the testimony does not show anything of the kind, and that there is not a syllable in the evidence of any witness that even tends to sustain such

proposition." On pages 18 and 19: "I shall quote this testimony for the purpose of showing that Mr. Justice ROSE selected isolated statements from the testimony of the witnesses whom he chose to quote from at all, and set out the evidence of the witnesses, statements which were as positively contradicted or denied on cross-examination. Mr. Justice ROSE may be able to explain upon what principle of justice between litigants such testimony is quoted for the purpose of sustaining the judgment of the lower court, while he entirely ignored every syllable of evidence in the record which fairly presented the facts of the case. It appears to me that the writer of the opinion felt that the exigencies of the case were such that he was at liberty to ignore all of the evidence in the case except that favorable to the plaintiff, and to only select such portions as would have a tendency to support the judgment of the lower court, even when the portions selected had been rendered worthless by other statements and explanations of the witnesses themselves. And the construction placed upon the testimony such as the writer saw fit to quote, I submit is unfair, strained and distorted. The construction, however, was necessary because in no other way could a reversal of the judgment possibly have been avoided. The same methods, it will be found, were followed with reference to the testimony of other witnesses as well as that of Romano. The testimony of Mrs. Robinson was handled in the same way. And yet I submit that no candid mind could even casually examine the testimony of Mrs. Robinson, without reaching the conclusion that her testimony was wilfully false, and that the verdict in this case was obtained by perjury on on the part of the plaintiff. And it would seem that courts ought not to deem it their duty to place a strained, unfair and unreasonable construction upon testimony to sustain a verdict obtained by perjury and fraud." Pages 20, 21: "When the court is forced to rely upon such testimony, dragged from the witness under a command to answer a question in a particular way, which the witness

at half a dozen times denied knowing anything about, no wonder those who approved the majority opinion felt it necessary to offer some sort of an apology for the testimony which they were compelled to rely on, and admit that its strength had been greatly affected by other portions of the testimony of the witness, and had been greatly weakened on cross-examination. * * * Well, let us see just what the facts were as shown by the testimony of Romano and other witnesses. Not what conclusion Mr. Justice ROSE draws from such portions of the testimony as he sees fit to quote, but what the testimony of the witness Romano as a fact discloses." Page 28: "I submit there is no justification for the attempt on the part of Mr. Justice ROSE to extort from the testimony of Romano a statement as per his own construction, that the walk at the point where the injury occurred was *'rickety'* for several years prior to the accident. I repeat there is no such testimony in the record, and the testimony quoted by Mr. Justice ROSE cannot be construed as referring to the condition of the walk prior to the time the cement walk was laid." Page 29: "It seems to me that it requires a good deal of assurance on the part of this court to declare that a walk over which every witness who testified, that knew anything about it, traveled four times a day, one for four years, and the other for five years, in absolute safety, and found no defect, no unsafe or dangerous condition, no inconvenience and no difficulty, to declare that that sidewalk was for years unsafe and dangerous for public travel, and base that conclusion upon the statement that it was 'rickety.'" Page 30: "Again, Mr. Justice ROSE read the record by some peculiar method of his own, through which he discovered a good deal that was not there, and failed to discover a good deal that was there." Page 32: "And yet it is upon this kind of testimony, picked out evidently for a purpose, that it is sought to sustain the outrageous verdict in this case." Pages 35, 36: "So, for the purpose of this case, we cannot accept the opinion of Mrs. Robinson that she might have stepped

upon the walk if it had not raised an inch or two, that she might not have caught her foot if the walk had not tipped up, and the testimony of a similar character given by her sister. Reinforce her opinion by that of Mr. Justice ROSE that 'plaintiff might have done so, too (stepped upon the walk), except for the tipping of the walk, is altogether probable,' and we still have nothing but opinion, based upon what probably would or would not have occurred. If this court is ready to enter upon the task of revolutionizing the law, in that proof is no longer necessary, and that all that is required to rob a city or befoul a name is a probability drawn as a conclusion from an opinion based on nothing, the court has certainly made an excellent start." Page 40: "I find this also in the opinion: 'That, at the time and place of the accident, the sister and companion of plaintiff stepped on the wooden walk first without falling.' The evidence does not support this statement. Mr. Justice ROSE was again compelled to turn to the speculations, guesswork and conclusions of Mrs. Robinson and Mrs. McWhorter." Pages 41, 42: "Then Mr. Justice ROSE goes on to say: 'And that plaintiff might have done so, too, except for the *tipping of the walk, is altogether probable.*' Good Lord, yes! Most any old thing is probable. But how about proof? If the statement, 'that plaintiff might have done so, too, except for the tipping of the walk, is altogether probable,' constitutes proof, then we have read the law in vain. Here we have the basis of this opinion. Here we have the theory of the case upon which this court undertakes to say that a verdict may be sustained, finding that the city was negligent and that the defect complained of was the proximate cause of the accident. Does Mr. Justice ROSE undertake to say from the testimony which he has quoted, which he says justified the court in submitting the case to the jury, that the evidence shows that Mrs. Robinson would have stepped up on the walk, that she would not have caught her foot, if the walk had not tipped up? Oh, no. Even the portions of her testimony

which he has quoted from the record would not enable him to face the proposition that it constituted proof of anything of the kind. So he does not pretend that it proves anything, but that it creates a condition of affairs from which the jury might guess and speculate and conjecture, from which the jury might say that *'Mrs. Robinson might have done so, too, except for the tipping of the walk, is altogether PROBABLE.'*" Pages 45, 46: "Will Mr. Justice ROSE direct the attention of this court to a decision by any court in the land, or to the language of any text-writer, holding that a verdict may be sustained, which is based upon the probability that the defect complained of caused the injury? Are there any adjudicated cases, except this, that have ever recognized a mere probability sufficient proof of the cause of an accident or the existence of a defect? Let me say that there are none. Let me say, furthermore, that Mr. Justice ROSE found none, and can find none, and that the decisions here cited, which he saw fit to ignore, state the rule as recognized by every court that has ever passed upon the question." Page 50: "I take it that it is not necessary to cite authorities in support of the proposition that the complainant must recover on account of the defect and negligence complained of in her petition, or not at all. That it is immaterial what other defects may have existed at the time and place where the accident occurred; that such defects and dangerous conditions, if any, cannot be taken into consideration, but that the jury must be instructed that they must find that the identical defect, and no other, named in the petition, was the proximate cause of the accident, and that the city was guilty of negligence with that particular defect. The language quoted from the instruction by Mr. Justice ROSE was a gross violation of that rule."

It requires no argument to show that the foregoing consists of a flagrant violation of the rules of legitimate argument and was so clearly intended as an exhibition of disrespect as to call for such explanation as an attorney

who, upon his attention being directed to the subject, would and should willingly make. We have never known or heard of a court, no matter what its standing, whether of original or appellate jurisdiction, which did not, under pressure of labor imposed, make mistakes in the application of the rules of law and examination of evidence. The history of the whole country shows this to be the case, and that same history demonstrates the fact that they are all ready and anxious to correct the errors which have been made in their rulings and decisions. The history of this court, as shown by the many rehearings granted, and arguments permitted and called for on motions for rehearing, is a demonstration of its entire and patient willingness to rightly apply the rules of law and promote its just administration. And it may be truthfully said that none are more willing to grant the fullest opportunities than the judge who wrote the opinion and who has been thus unjustly personally assailed. There is no possible disposition to question the right of any and every person to criticise the actions of the court or its judges, but if the officers of the court, as attorneys are, are permitted to assail the judges, by briefs or other papers filed in and made a part of the records of the court, and thereby seek by questionable and unfair means to destroy the respect which is and should be entertained for the court as the highest judicial tribunal in the state, it would not be long until all respect for it would, and probably should, be lost. There is a well-recognized duty imposed upon the judge or judges to see that the respect and integrity of the courts are maintained, and, unpleasant as it may be, we cannot evade or flinch from the discharge of that duty. It affords a pleasure to be able to state that the members of the bar of the state have as a general, if not a universal, rule shown their appreciation of the obligation resting upon them, both by the statute and by the ethics of their calling, to "maintain the respect due to the courts of justice and to judicial officers" and to "abstain from all offensive practices," this being the first case for many years where

these obligations have been ignored. We hope it may long be the last.

We deem it not improper to say that there is not, and has not been, any feeling of personal animosity or unfriendliness entertained toward respondent by any member of the court. This was demonstrated from the beginning. Every opportunity was given for a retraction of the language used and the charges made. In the written answer filed by respondent everything of that character was most carefully and sedulously avoided. It was then hoped that in the oral presentation of his defense, by respondent himself, something of the kind would be presented. In this we were painfully disappointed. Even after the judgment was rendered respondent and his counsel were informed in open court that it was not the purpose or design of the court to hold him out of court, and that the door was at all times open for the retraction, but this suggestion was spurned, and by two motions filed the procedure was attacked, and the information given that if the court would first recede and vacate the order of indefinite suspension, thus admitting itself to be in the wrong, a sufficient retraction would be made. It must be sufficient to say that the court will not recede from its position, nor vacate its order, unless or until respondent so requests by pursuing the course which he should have adopted in the first instance upon the citation being served upon him.

The motions to vacate the order are

OVERRULED.

DEAN, J., dissenting.

The language reflecting on Judge ROSE that was used by respondent in his brief ought not to pass unnoticed; but, in view of the statute relating to contempt, respondent's motion, which is in effect an application for rehearing, should be treated as such, and on rehearing the case should be dealt with in pursuance of the statutory provisions. The thought expressed in the following language

by the learned chief justice is conceded: "The history of this court, as shown by the many rehearings granted, and arguments permitted and called for on motions for rehearing, is a demonstration of its entire and patient willingness to rightly apply the rules of law and promote its just administration. And it may be truthfully said that none are more willing to grant the fullest opportunities than the judge who wrote the opinion and who has been thus unjustly personally assailed. There is no possible disposition to question the right of any and every person to criticise the actions of the court or its judges."

In support of his contention, respondent filed a brief with his motions, citing numerous authorities, and also calling attention to sections 669, 670 and 671 of the code, which read as follows: "Section 669. Every court of record shall have the power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: *First.* Disorderly, contemptuous, or insolent behavior towards the court, or any of its officers, in its presence. *Second.* Any breach of the peace, noise, or other disturbance tending to interrupt its proceedings. *Third.* Wilful disobedience of, or resistance wilfully offered to any lawful process or order of said court. *Fourth.* Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts. *Fifth.* The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory.

"Section 670. Contempts committed in the presence of the court may be punished summarily; in other cases, the party, upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense.

"Section 671. Persons punished for contempt under the preceding provisions shall nevertheless be liable to indictment, if such contempt shall amount to an indict-

able offense; but the court before which the conviction shall be had, may in determining the punishment, take into consideration the punishment before inflicted in mitigation of the sentence."

It will be observed the language of section 669 is all embracing as to the persons to be affected by its provisions. No exceptions are noted therein. Respondent doubtless relied on the statute, and when cited to appear and show cause why he "should not be dealt with for contempt," finding no exceptions in the statute, was justified in assuming that at the hearing he would be dealt with in the manner provided by the terms of the law regulating procedure in contempt. The statute in question for the most part regulates merely the mode of procedure. It does not define the offense, but leaves that to the court's discretion. Following are a few authorities holding to the legislative right to impose reasonable regulations in the exercise by the court of the power to punish for contempt. *Wyatt v. People,* 17 Colo. 252: "For though the legislature cannot take away from courts created by the constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded as binding." 7 Am. & Eng. Ency. Law (2d ed.) 33: "When * * * the court is a creature of the constitution, the better opinion seems to be that it cannot, by legislative enactment, be shorn of its inherent right to punish for contempts; nor can the legislature abridge that right, although it may regulate its exercise." 9 Cyc. 26: "Independent of authority granted by statute, courts of record of superior jurisdiction, whether civil or criminal, possess inherent power to punish for contempt of court. Such power is essential to the due administration of justice, and the legislature cannot take it away or abridge it, although it may regulate its use. Statutes conferring the power are simply declaratory of the common law."

The following general rules are announced in this jurisdiction with respect to proceedings in contempt, showing

that the punishment for this offense has always been treated by us, so far as the reported cases disclose, as a statutory proceeding. It is true the respondents in the cases cited from our own state were not members of the bar, a distinction that, in view of the general language of the statute on contempt, is not believed to be controlling. *Herdman v. State,* 54 Neb. 626: "A proceeding against a party for contempt is in the nature of a prosecution for a crime, and the rules of strict construction applicable in criminal proceedings are governable therein." *Hydock v. State,* 59 Neb. 296: "Proceedings in contempt are in their nature criminal, the rules of strict construction applicable to criminal prosecutions obtain therein, and presumptions and intendments will not be indulged to sustain a conviction for contempt of court." To the same substantial effect are the following. *Vanzandt v. Argentine Mining Co.,* 2 McCr. (U. S. C. C.) 642: "Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein." *Haight v. Lucia,* 36 Wis. 355: "A proceeding to punish for contempt is a special proceeding, *criminal* in its character, in which the state is the real plaintiff or prosecutor." *Ex parte Secombe,* 19 How. (U. S.) 9, cited in the main opinion: From an examination of that case it appears a Minnesota territorial statute authorized the court to dismiss an attorney from practice if he did not maintain the respect due to courts of justice, and the order of the court dismissing the respondent from practice for contempt was there held by the United States supreme court to be a judicial act performed in the exercise of a judicial discretion vested by a territorial statute in the Minnesota court. In the state cases cited in the majority opinion from sister states where a suspension of an attorney for contempt is either approved or affirmed on appeal, so far as can be discovered from the citations, the state jurisdictions where the practice prevails, for the most part, either have a statute directly authorizing such removal from practice for contempt, as in *In re Breen,* 30

Nev. 164, or there is no disclosure in the citation indicating either the presence or the absence of a statute on the subject, as in *In re Pryor,* 18 Kan. 72, where Judge Brewer wrote the opinion affirming the judgment of the lower court in a proceeding where the respondent Pryor had been fined $50 for contempt and was suspended from practice until the fine should be paid. *In re Woolley,* 11 Bush (Ky.) 95, cited in the majority opinion, is a case where the respondent Woolley was charged with contempt under the provisions of article 27, ch. 29, Gen. St. of Kentucky, relating to that subject, but wherein the punishment is limited by section 1, which reads: "A court shall not, for contempt, impose upon the offender a fine exceeding thirty dollars, or imprison him exceeding thirty hours, without the intervention of a jury." The respondent there was not suspended from practice, but was fined $30 in pursuance of the maximum fine permitted by the statute. On the question of the right of that court to suspend an attorney from practice for contemptuous behavior, the court in closing said: "It remains an open question in this state, and we intend in this case to so leave it."

It may well be doubted if the framers of our fundamental law intended to clothe the judiciary with the power to deprive an attorney of his means of livelihood, where he has been adjudged in contempt, by suspending him from the practice of his profession, which is everywhere recognized as a valuable property right. Doubtless this thought was in the legislative mind when the contempt statute in question was adopted. It is contrary to the genius and the spirit of free institutions that any man or body of men in any capacity should try his or their own cause and render judgment therein. It is no sufficient answer to say that a contempt proceeding is the concern of the court, and not of the individuals composing that body. Disguised as it may be, the personal element everywhere remains and everywhere predominates in human affairs. Courts are everywhere sufficiently assertive of judicial prerogative where the statute fails to prescribe rules

of practice. Where reasonable regulations with respect to questions of court procedure are prescribed by the legislature, it would seem they should be acquiesced in until repealed.

The majority opinion holds: "So far as this court is concerned, we are not without a precedent for our guidance in a case almost identical with this. Owing to the high standing of the attorney involved, we will omit his name, but refer to the court journal 'C' of this court, at page 19, where the record may be found." The precedent referred to, it will be observed, as stated in the majority opinion, is not reported, and does not appear in the state reports, and for that reason loses much of its value as a precedent and guide to the bar in the application of the principles involved. For some reason, it seems to have been placed among the archives of the state, where it has long reposed without index or probability of discovery by the practitioner who may be so unfortunate as to offend against the rules of ethics which apply to the practice of his profession. The cited precedent in one respect is not unlike that law of the ancient state which was suspended at so great an elevation over the heads of the people that they could not for that reason read it, and so, without knowing its provisions, were punished for disobeying its precepts.

Admission to the bar is made to depend, not upon the will of the court, but upon compliance with statutory requirements. For cause the legislature may by law provide for the suspension or taking away of that which has been thus bestowed, or it may regulate the punishment for dereliction in one or more phases of professional duty. With respect to contempts, the legislature has exercised its prerogative in the adoption of the contempt statute, and it would seem to be the better rule that its action as to procedure in contempt should be exclusive and controlling. Suspension and disbarment proceedings are controlled by the provisions of chapter 7, Comp. St. 1909. The inherent right of a superior court created by the constitu-

tion to punish for actual or constructive contempts is conceded; but, in view of the authorities, I doubt the right of the court to so punish except in pursuance of such regulative provisions as the legislature may have seen fit to impose upon the court in the exercise of this tremendous power. The court may punish for contempt, but the better rule seems to be that the lawmaking body has the right to exercise its function in the imposition of a law to regulate the punishment. This our legislature has done in the adoption of the statute in question, and in my judgment it is binding upon us. If the effect merely of the law is bad, relief should be sought at the hands of the legislature. We should not be asked to ignore it.

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## STATE, ON COMPLAINT OF CHRISTINE EVERSON, APPELLEE, V. JOHN O'ROURKE, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,781.

1. **Bastards:** EVIDENCE. Evidence of the unchastity of a complainant in a bastardy proceeding, outside the period of gestation, is irrelevant to the issues presented for trial.

2. ———: ———. By section 5, ch. 37, Comp. St. 1909, it is provided that at the trial in a bastardy proceeding "the examination before the justice shall be given in evidence." Whether it was the purpose of the legislature to require, or permit, the examination to be read without reference to the usual rules of evidence, or whether or not it is within the discretion of the district court to pass upon and decide as to the competency, materiality or relevancy of the evidence taken before the justice of the peace, *quære*.

3. **Trial:** INSTRUCTIONS. Under the rule stated in *Johnson v. Johnson*, 81 Neb. 60, it is *held* that an instruction to the trial jury, that if a witness had knowingly sworn falsely to any material matter, they might, if they saw fit to do so, disregard all his testimony, "except such portions as are corroborated by the testimony of credible witnesses," is not prejudicially erroneous by reason of the statement of the exception.

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

*J. A. C. Kennedy,* for appellant.

*Shotwell & Shotwell, contra.*

REESE, C. J.

A proceeding in bastardy was instituted against defendant before a justice of the peace of Douglas county. A hearing was had in that court, the testimony of complainant, whom we will designate as plaintiff, being reduced to writing. Defendant was recognized to appear before the district court and all proceedings were certified thereto. A jury trial was had in the district court, which resulted in a verdict finding for the plaintiff and that defendant was guilty of being the father of the bastard child of plaintiff. Motions for a new trial and in arrest of judgment were filed and overruled, and judgment was rendered on the verdict. The defendant appeals.

On the trial of the cause in the district court the plaintiff was called and sworn as a witness. During the cross-examination defendant's counsel asked her the following question: "State whether or not you have a similar charge as the one presented here now pending in another court in this county against another man?" This was objected to by plaintiff's counsel as incompetent, irrelevant and immaterial, when the court said: "I will sustain the objection unless you show it is for this particular case, this child." Defendant excepted. The next question was: "State whether or not at the preliminary hearing of this matter you were asked the following question and made the following answer? 'State whether or not you have a similar charge as the one presented here now pending in another court of this county against another man?' and you answered, 'Yes.'" This was objected to by plaintiff upon the ground as above. The objection was sustained, to which defendant excepted. He then offered to prove that

the answer made by the plaintiff was "Yes." The court then said: "I will permit you to ask and have answered such questions as are proper, without respect to whether you were denied that (them) below or not." She was then asked: "State how many bastard children you have?" Objected to by plaintiff for the reasons above stated, and, further, as "tending to prejudice the jury against this plaintiff." The objection was sustained. Defendant then offered to prove "that the plaintiff has two bastard children alive." This was objected to for the reasons first herein above given, and the objection was sustained over defendant's exception. These rulings of the court are assigned as grounds of error.

It is, and must be, conceded that the mere fact that plaintiff was the mother of other illegitimate children cannot constitute a substantive defense in actions of this kind. The proof is unquestioned that at the time of the hearing before the justice of the peace the child was not yet born, but at the time of the trial in the district court it had been born alive and was then living. The mother was unmarried. Therefore some one was the putative father of the child, and it was the duty of such person to provide for its maintenance. It could make no difference as to the character of the mother, nor how many children she had, except in so far as the credibility of her testimony touching the paternity of the child might be impaired. If the purpose of the examination was to establish the bad character of plaintiff for chastity, the evidence was inadmissible. *Davison v. Cruse,* 47 Neb. 829. If it was sought to show by her that she had accused another of the paternity of the particular child referred to in these proceedings, the question was not sufficiently definite. By the same rule, stated in *Davison v. Cruse, supra,* if the question was intended to refer to another and former bastard child, the ruling of the court was correct. However, when the evidence taken on the preliminary hearing was offered and read by defendant, the

court permitted the affirmative answer of plaintiff to be read, which removed all grounds of complaint, if any existed.

As suggested above, defendant introduced and offered to read the examination of plaintiff taken before the justice of the peace. This was objectd to by the prosecution "as incompetent, for the reason that there were certain questions asked upon the preliminary examination which were incompetent to be asked at the time, to which the counsel for the plaintiff took exceptions at the time, and were overruled." The court responded: "It may be admitted and read subject to the objections made by the plaintiff or the defendant and the rulings of this court." This ruling is assigned for error. In view of the provision of section 5, ch. 37, Comp. St. 1909, that "at the trial of such issue the examination before the justice shall be given in evidence," it is probable that the ruling was erroneous, there being no limitation or exception in the statute. From the language used by the legislature it would seem that it was the purpose to require, or permit, the examination to be read without reference to the usual rules of evidence as to competency, materiality or relevancy. However, this question will not be conclusively decided here, as we are unable to find any ruling of the court in the admission or exclusion of the evidence which was to the prejudice of defendant. The record is somewhat involved upon this part of the case, but as we read and understand it there was no ruling excluding any part of the transcript of the testimony offered. It is true that an objection to one question was sustained, but the justice of the peace had sustained the same objection, and no answer had been given. In another instance an objection to a question was sustained, but upon further reflection the answer was permitted to be read. In some instances it is uncertain as to whether the ruling was by the justice or district court, but we must conclude from the way in which the transcript is written that the rulings not shown affirmatively to have been made by the district

court were made by the justice and certified to in the transcript which was being read. As we read the record, the whole of the transcript of the evidence of plaintiff was read to the jury, and our holding is in full accord with those in *Stoppert v. Nierle,* 45 Neb. 105.

Objection is made to a part of instruction numbered 7, given by the court upon its own motion. This instruction is as follows: "You are the sole judges of the credibility of the witnesses, and of the weight of the testimony, and you should so far as possible harmonize all the testimony so as to give credence to all the witnesses; but if you are unable to do this on account of any irreconcilable conflict in the testimony, it will be your duty then to determine which witnesses are the more worthy of belief, and to be governed in the finding of your verdict by their testimony. In passing upon the weight of evidence and the credibility of witnesses, you may consider their appearance on the stand, their manner of testifying, their apparent candor, fairness, bias or prejudice, their interest, if any they have in the result of the trial, their relationship to the defendant and the prosecuting witness, their means of knowledge, distinctness of recollection, and the probability or improbability of their statements as viewed in the light of all the facts and circumstances in evidence before you. *If you believe that any witness has knowingly sworn falsely to any material matter in the case, you may, if you see fit to do so, disregard all his testimony, except such portions as are corroborated by the testimony of credible witnesses.*"

The objection is to that part of the instruction which we have italicized. It is claimed, in particular, that the words, "except such portions as are corroborated by the testimony of credible witnesses," should not have been added, and that their addition renders the instruction erroneous. It is contended by plaintiff that the instruction is correct, citing *Walker v. Haggerty,* 30 Neb. 120, but that, even if it should be held not a correct statement of law, yet it could work no prejudice to defendant, as

there was no contradiction in the testimony. There certainly was a contradiction and conflict between the testimony of plaintiff and defendant. She testified positively to the intercourse. He as positively denied it. The questions then are: Is the instruction erroneous? If so, was it prejudicial? In *Walker v. Haggerty, supra,* an instruction containing the phrase objected to here was given to the trial jury, and was approved by this court "as an abstract proposition of law", and that, considering the condition of the evidence, it would have been error to refuse to give it. However, it does not appear in that case that the attention of the court was called to the particular language objected to here, and we cannot say what the ruling would have been had the use of those particular words been challenged.

In *Titterington v. State,* 75 Neb. 153, the refusal of the trial court to give an instruction on this subject, because it did not contain the qualifying words objected to here, was condemned, and the holding in *Denney v. Stout,* 59 Neb. 731, disapproved. But what the decision would have been had the trial court given the instruction with the limitation added, we are unable to say, for it appears that no instruction was asked or given upon the subject. It can subserve no good purpose to review the cases referred to by Judge BARNES in writing the opinion in *Titterington v. State, supra.* The instruction in this case gives the jury permission to disregard all the testimony of a false-swearing witness, "*except* such portions as are corroborated by the testimony of credible witnesses." The natural conclusion would be that the jury *cannot* disregard the corroborated testimony of the witness; in other words, that it must be considered. In *Atkins v. Gladwish,* 27 Neb. 841, Judge COBB, in writing the opinion, says that he does not find either the weight of authority or reason to indispensably require the use of the qualifying words in an instruction upon the subject under consideration; that "if the witness may not be believed unless corroborated, but may not be disbelieved if corroborated,

even then credence is given alone to the corroborating testimony, and not to that of the implicated witness." This reasoning is, to the mind of the writer, correct, and yet is not conclusive that in this case the court erred in the use of the modification objected to.

Practically this same question was presented in *Johnson v. Johnson,* 81 Neb. 60. In that case the contention was not that the witness had knowingly testified falsely, but that evidence had been introduced, the tendency of which was to impeach him as "a person of bad reputation for truth and veracity in the neighborhood where he resides." It is thought that the same rule is applicable to the one case as to the other. The trial court in that case instructed the jury that, if they believed from the evidence that the witness referred to was a person of bad reputation for truth and veracity in the neighborhood in which he resided, "then, as a matter of law, that fact tends to discredit his testimony, and as jurors you may entirely disregard it, except so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial." The objection to the instruction was to the closing portion thereof containing the exception. The language and use of the exception was approved, and the effect of the holding is that, if there were no corroborating evidence, the exception might be omitted, but, if there were, it was proper to give it. As there was some evidence produced in this case which tended in some degree at least to corroborate the testimony of the plaintiff, we cannot say that the inclusion of the exception in the instruction was prejudicially erroneous. The evidence of defendant's guilt is not, by any means, conclusive, but we are here met by the reflection that this is a civil action, that the evidence was conflicting, and that the jury were the sole judges of the facts, and we are barred thereby.

It follows that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

HENRY G. BORCHER, APPELLEE, V. CATHERINE MCGUIRE; MARY O'DONNELL ET AL., APPELLANTS; DAVID W. BURKE, APPELLEE.

FILED DECEMBER 23, 1909. No. 15,788.

1. Guardian and Ward: FINAL SETTLEMENT: RATIFICATION. The final settlement of a guardian with his ward, made in the proper court, after the ward has attained his majority, where full disclosures of the acts of the guardian have been made and the facts are known to the ward, the ward has accepted and receipted for his distributive share of the estate in the hands of the guardian and requested the discharge of the guardian, is, in the absence of fraud or misrepresentation, a ratification of his acts.

2. ———: ———: ———. In such case the knowledge of the ward that a portion of the funds received by him was the proceeds of the sale of his land in partition proceedings would be a ratification and affirmance of such sale, and it would make no difference whether the partition proceedings were regular, voidable or void.

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

*T. J. Mahoney* and *J. A. C. Kennedy,* for appellants.

*John J. Sullivan, P. M. Moodie* and *Henry M. Kidder, contra.*

REESE, C. J.

This is an action to quiet title to the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter, of section 18, township 24 north, of range 7, in Cuming county. The land originally belonged to James O'Donnell, who occupied it as the homestead of himself and family. He died testate in July, 1893. He left surviving him his wife Catherine, and his three minor children, Mary, John and Lizzie. His will was duly probated. By it, in a residuary clause, he devised the land above described to his widow and children in equal shares

of one-fourth each. In December, 1893, his widow married Alvin B. McGuire, who took up his residence upon the premises with the family. In October, 1904, Catherine McGuire, the mother of Mary, John and Lizzie, filed her petition in the district court, alleging the ownership of the land to be in herself and the three children, and praying for partition thereof. A summons was issued to the children, all of whom were yet under 14 years of age, and the same was personally served upon them, as stated in the return of the sheriff, by reading and delivering to each of them a true and certified copy of the original, and on A. B. McGuire, the "person having charge and care of said minors, with a true and certified copy" thereof. A guardian *ad litem* was appointed, who filed his answer, and such proceedings were had as resulted in a judgment in favor of Mrs. McGuire, and ordering a partition of the land and the appointment of three referees to make the division. The referees subsequently reported that, if the land were divided, the separate interest of each owner would be of little value, and recommended the sale of the property, which they appraised at $2,000. The court then ordered the sale of the land. After an abortive sale to Catherine McGuire, the referees readvertised the land and sold it to David W. Burke for $2,080. The sale was confirmed, and the referees were directed to convey the property to the purchaser, which was done, and Burke obtained possession. A partial distribution of the proceeds of the sale was made in 1896, but as the land was sold on time, less a certain amount paid in cash, the portion or distributive share of the minor children was withheld to be paid out of the proceeds of the deferred payments. Later, about February 27, 1903, Burke sold and conveyed the premises to the plaintiff, Henry G. Borcher, who went into possession, and later instituted this suit for the purpose of quieting his title, making Catherine McGuire and the three children, who had attained their majority, defendants. Catherine McGuire tendered no defense and a default

was entered against her. A decree was rendered in favor of plaintiff from which the three children appeal.

From the pleadings, evidence, briefs and arguments, it is shown that the three children of James O'Donnell claim that the procedings in partition were and are void for the following reasons: (1) That the service of summons upon them in that action did not give the court jurisdiction, they being at that time minors under the age of 14 years; (2) that the court in that proceeding rendered no judgment confirming the shares of the respective parties, as owners of the premises, and that in the absence of such judgment all proceedings to partition or sell were void; (3) that there was no bond given by each of the referees, and that, owing to this fact, their sale was without authority of law, and void. On the part of plaintiff these legal propositions are combated, and it is asserted that during the minority of appellants a guardian was appointed for them who received the proceeds of the sale, and that after appellants had attained their majority they had a settlement with their guardian, and received their several distributive shares of the proceeds of the sale, and are thereby estopped to claim the land.

The attack upon the service of the summons is based upon the fact that the delivery of a copy thereof to A. B. McGuire, the stepfather, was not a sufficient compliance with section 76 of the code, which provides: "When the defendant is a minor under the age of fourteen years, the service must be upon him, and upon his guardian or father; or, if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may be the same as in the case of adults." As we have seen, the father of appellants was deceased. There was no guardian, the guardian having been subsequently appointed. Their mother was the plaintiff in the suit, and, so far as that case was concerned, their adversary;

and, unless we adhere to the strict letter of the statute without reason, it would have been an idle form to serve a summons upon her. Again, were we to hold that service on her was essential, her relation to the case would probably be sufficient. It cannot be denied that the proper and legitimate course suggested by the conditions then existing would have been to defer the commencement of the suit until the appointment of a general guardian could be effected and service made upon him. Both reason and ordinary caution would have suggested that course. This, however, was not done, and the service had upon the stepfather whose interests, it may be inferred, were with those of the plaintiff in the action. At the time of the trial the sheriff who made the return of the summons was deceased, and two of the appellants testified that no copy of the summons was ever read or delivered to them. Were it not that we will have to affirm the decree upon other grounds, we would deem the question of the legality of the service and proceedings thereunder as a very serious one.

As we have suggested, it was alleged in the amended petition that a general guardian was finally appointed for appellants; that after the sale and collection of that part of the purchase price to which they were entitled had come into his hands, and after they had attained their majority, the guardian had made his final settlement with them, and paid them their distributive share of their father's estate, including the amount received for this land; that they accepted and retained the same; and that their guardian had been discharged. To this part of the amended petition appellants in their answer allege that they have never knowingly received from their guardian any portion of the proceeds of the sale, or that the funds or property received by them from him was in any way derived from the sale of said property; that, if it should appear upon an accounting that such was the case, they offer and tender to pay to the person entitled thereto the full amount thereof.

Upon the trial three receipts were offered and admitted in evidence, the signatures of appellants being stipulated to be genuine. They were as follows: "(*a*) In the county court of Cuming county, Nebraska. Received of F. J. Wiesner, guardian of the minor heirs of the estate of James O'Donnell, deceased, the sum of $571.38 in full payment and satisfaction of my distributive share and all of said estate, together with interest and all accumulations thereon, and I hereby consent that said guardian may be discharged from his trust, and I hereby declare that I am above 21 years of age. Dated this 15th day of September, A. D. 1904. John O'Donnell. In presence of O. E. Engel. (*b*) In the county court of Cuming county, Nebraska. Received of F. J. Wiesner, guardian for the minor heirs of the estate of James O'Donnell, deceased, the sum of $571.38 in full payment and satisfaction of my distributive share as an heir of said estate, together with interest and accumulations thereon, and I hereby consent that said guardian may be discharged from his trust, and I hereby declare that I am above 21 years. Dated this 15th day of September, 1893 (?). Elizabeth O'Donnell. In presence of O. E. Engel. (*c*) In the county court of Cuming county, Nebraska. Received of F. J. Wiesner, guardian of the minor heirs of the estate of James O'Donnell, deceased, the sum of $571.38 in full payment and satisfaction of my distributive share of said estate, together with interest and all accumulations, and I hereby consent that said guardian may be discharged from his trust, and I hereby declare that I am above 21 years of age. Dated this 15th day of September, A. D. 1904. Marie O'Donnell. In presence of R. F. Kloke."

It was admitted that these receipts were a part of the files of the county court of Cuming county, and conceded that the money was paid to appellants at the time stated. It is contended that at the time they did not know that the money was the proceeds of the sale of the land, but the admissions in their testimony clearly show that they knew the land had been sold to Burke; that he had gone

into possession, and that the family were out of possession and had been since 1896. The proofs show that the land sold by the referees to Burke brought, at least approximately, its fair value at the time of the sale. In his testimony on examination in chief, appellant John O'Donnell testified that at the time he received the money from the guardian on settlement he did not know that it included any part of the proceeds of the sale of the land, but upon cross-examination he weakened the force of his former testimony somewhat. We quote a part of his cross-examination: "Q. How did you come to call on your guardian for this money? A. Why, he wrote me about it. Q. And the only information you had about the amount of money that was coming to you was obtained from your guardian? A. Yes, sir. Q. Did he explain where it came from? A. No, sir; he didn't. Q. You mean that you settled up after you were 21 years old without knowing where it came from? A. Yes, sir; I do. Q. I suppose you knew in a general way that the money in your hands had come from the sale of the property left by your father. Was that your understanding? A. I didn't have any understanding about it. Q. Where did you think, John, that money came from, think it dropped out of the sky? A. No, sir; I understood that there was personal property and so forth. Q. Did you understand that there was land? A. Yes, sir; a part of it. Q. What did you suppose had become of the money for that land? A. No, sir. Q. Didn't it interest you the least bit enough to think about it? A. Yes, sir. Q. Why did you say, John, that you believed part of it came from the personal property, and that you didn't know part of it came from the land? A. I said I supposed part of it came from the personal property and part of it might have come from the land, I didn't know. Q. But you made no inquiry? A. No, sir. Q. So you took the guardian's word and settled with him? A. Yes, sir. Q. Understanding that the money you were getting from the guardian was your share of your father's estate? A. I supposed it was. Q. Derived from

the sale of the personal property and the land? Give a receipt? A. I suppose I did. I don't remember."

Mary O'Donnell, one of the appellants, was called as a witness by plaintiff. After stating that some land in Kansas belonging to her father's estate had been lost by the nonpayment of taxes by those in charge of the estate, she was asked: "Then you knew that none of the money you received came from the Kansas land? A. Yes, sir. Q. All came from the Cuming county land? A. That and papa's personal property. He left considerable personal property. Q. You stated a moment ago that you knew in a general way? A. Yes. Q. How many farms did he leave in Cuming county? A. Two. Q. You knew they were both sold? A. Yes, sir. Q. You knew, of course, that the money you received was the proceeds of the personal property and the farms that were sold? A. Yes, sir."

The deposition of the other appellant, Lizzie O'Donnell, was taken and read in evidence by defendants. In her examination in chief, with reference to the matter of her settlement with her guardian after she became of age, she stated, in substance, that she did not then know, and was not informed, as to the source from which the money paid her was derived, but that she did understand that the general source was from her father's estate; that she did not know that any of it "came from the sale of the old home place", and had no knowledge of any defects in the proceedings for partition, but that she knew that the land in dispute had been sold. She, doubtless, also knew that Burke was the purchaser and had long been in possession.

As to the accounts rendered by the guardian upon the final settlement, there is an unsatisfactory stipulation showing certain receipts, but no copy of the account is before us. While it appears that the final settlement was, probably, made in the county court, the parties being present, there is no transcript of the proceedings in that court among the papers or in the record. If the

guardian practiced any fraud or withheld any information or funds, the proof of the fact must be found outside of the files of this case. Under these circumstances we are constrained to hold that the receipt of the money as the distributive share of appellants, and the discharge of the guardian at their request after they had become of age, was a ratification of all that had been done in the sale of the property, and that they cannot now question its regularity or legality. It is quite probable that, had the proceedings in the partition suit been attacked by direct proceedings, the judgment and orders in the case might have been reversed; or, possibly, had a collateral attack been made thereafter, unincumbered by any ratification and receipt of the purchase price after appellants had attained their majority, the result might have been different. We think they foreclosed their right by that act. It would be against equity to permit them, in the absence of any fraud or deception practiced upon them, to receive and hold the proceeds of the sale until the land increased in value, and then elect to disaffirm and offer to return the money received after attaining their majority, while, had the property depreciated in value, no such reciprocal right would have existed in favor of plaintiff or his grantor.

*Handy, Trustee, v. Noonan,* 51 Miss. 166, was where a sale of real estate, which had descended from a deceased father to his minor children, had been made by their guardian under a decree of the probate court ordering the sale. It was conceded by all parties, and decided by the court, that the sale by the guardian was void and did not divest the heirs of their title. It is shown, however, that after the heirs had attained their majority they appeared in the probate court on the day of the final settlement with their guardian (his account containing as one of the debits the proceeds of the sale), and accepted the account and settlement as correct, and the court held: "An acceptance by the heir or ward, after attaining majority, of the purchase money of land sold under a void

probate decree, is a confirmation of the sale, in the sense and to the extent of working an estoppel in equity against an assertion of the legal title."

*Candy, Adm'r, v. Hanmore,* 76 Ind. 125, was where a guardian had made his final report which had been accepted and approved by the court having jurisdiction, and the ward executed a receipt for the amount found due, and the guardian was discharged. The guardian afterwards died, and suit was brought against his estate for funds alleged to have been in his hands, and receipted for, but never paid. The evidence tended strongly to sustain the allegations of the plaintiff, and the trial court decided in her favor, but the judgment was reversed by the supreme court. The contention of the appellant, defendant, was that the finding and decision of the trial court were contrary to law. In the opinion of the court is is said: "It is agreed by the parties, and fully proven by the evidence, that the deceased made his final settlement as such guardian, reported it to the proper court, that it was approved and the guardian finally discharged by the court, in March, 1868. This claim was embraced in, and finally adjudicated upon, in that proceeding, and appellant cannot now maintain a collateral suit to recover the same thing. Therefore, the finding of the court was contrary to law, and a new trial ought to be granted." See, also, *Briscoe v. Johnson,* 73 Ind. 573; *Holland v. State,* 48 Ind. 391; Wells, Res Adjudicata and Stare Decisis, secs. 425, 426; 1 Freeman, Judgments (4th ed.) sec. 319*a*; *Seward v. Didier,* 16 Neb. 58; *Wamsley v. Crook & Hall,* 3 Neb. 344; *Mote v. Kleen,* 83 Neb. 585; *Deford v. Mercer,* 24 Ia. 118, and note; 21 Cyc. 140.

Holding, as we do, that the settlement of appellants with their guardian, upon a full disclosure of his acts, the receipts for their shares of the estate, with request for the guardian's discharge, and his final discharge, was a ratification of the sale, it becomes unnecessary for us to inquire whether the sale was legal, voidable or even void, as those questions do not become material.

Appellants, by their answer, caused David W. Burke, the purchaser at the partition sale and the grantor of plaintiff, to be brought in as a party to the suit, for the reason that he held a mortgage on the property executed by plaintiff, and the cancelation of the mortgage was sought. Issues were formed substantially as in the main case; but, as the sustaining of plaintiff's title leaves the mortgage valid, that part of the case need not be further noticed.

It follows that the decree of the district court must be affirmed, which is done.

AFFIRMED.

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FRANK MCCARTNEY, APPELLEE, V. JOHN T. HAY, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,867.

**Habeas Corpus: EVIDENCE.** In habeas corpus to secure a release from the asylum, brought by one who has been found to be a dipsomaniac, his unsupported oral testimony that he had not been given a hearing is insufficient to overthrow the recitals of the warrant of commitment.

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

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

*Greene & Greene, contra.*

BARNES, J.

On the 30th day of July, 1908, Frank McCartney was found by the commissioners of insanity of Howard county to be a dipsomaniac, and was committed to the hospital for the insane at Lincoln, Nebraska, for treatment until

cured, however not exceeding three years. He was received at the asylum on July 31, 1908, and on the following 18th day of August made application to one of the judges of the district court for Lancaster county for a writ of habeas corpus. His petition was in the usual form, but had attached thereto as an exhibit the warrant of commitment, which reads as follows: "The State of Nebraska, Howard county, ss. To the superintendent of the Nebraska hospital for the insane at Lincoln. Whereas, upon application in due form of law, had before the commissioners of insanity in and for said county, the said commissioners have found Frank McCartney to be an inebriate and dipsomaniac and a fit subject for custody and treatment in said hospital, you are therefore hereby authorized to receive and keep Frank McCartney as a patient therein for the term of until cured, and not exceeding three years. The legal settlement of said Frank McCartney is found to be in Howard county, Nebraska. This warrant, with the custody of the said Frank McCartney, is delivered to W. C. Alexander, sheriff, for execution. Witness my hand and seal of the district court of said county this 30th day of July, 1908. (Seal.) Frank T. Shaughnessy, Clerk. Patient received at the hands of W. C. Alexander, attended by W. W. Bishop, this 31st day of July, 1908. Dr. J. T. Hay, Superintendent, per Dr. H. A. T."

The writ was issued, and the appellant made his return justifying his detention of the petitioner under the warrant of commitment above set forth. He also denied the allegations of the petition that "no examination had been had in the presence of the petitioner by the commissioners of insanity of Howard county, and that he was not a dipsomaniac." On the hearing McCartney was allowed to, and did, testify orally, as follows: "Q. Was any hearing had there before the insanity commissioners in your presence? A. Not in my presence. Q. Do you know whether or not any hearing was had at all? A. I do not. Q. Were you a dipsomaniac at the time you were brought

here? A. I think not." On this testimony, and no other, the district court rendered a judgment discharging McCartney from custody.

The sufficiency of the evidence to sustain the judgment below was raised by a motion for a new trial, and is now presented by the defendant's assignment of errors in this court. Section 2535, Ann. St. 1909, provides for a review of the proceedings in habeas corpus, and this appeal therefore presents the question of the admissibility and effect of the oral evidence taken upon the hearing to contradict the record of petitioner's conviction and commitment, and its sufficiency to sustain the order of the district court discharging him from the asylum. It may be stated at the outset that the order of the board of insanity, which appears in the proceedings herein, does not have the sweeping force and effect of a judgment of conviction of a criminal offense rendered by a court of competent jurisdiction, and we are of opinion that such order may be assailed and may be overthrown by clear, convincing and competent evidence showing its falsity. But we think no case can be found where the order of such a tribunal has been overthrown and the petitioner discharged from custody upon his unsupported oral testimony denying the statements contained in the warrant of commitment. In discussing the effect of the records and orders of boards and commissioners, Black, in his work on Judgments, says: "The records of their proceedings and judgments are entitled to the same respect as the records and judgments of other tribunals, so long as they act within their jurisdiction, and cannot be attacked collaterally." 2 Black, Judgments (2d ed.) sec. 532. It would seem that this rule is applicable to the proceedings and orders of the commissioners of insanity. The statute requires a formal record, and makes provision for a clerk. Section 2 of the dipsomaniac law (laws 1905, ch. 82) provides that the board "shall have the same powers and exercise the same jurisdiction as are conferred upon them

in the case of an insane person." In *In re Schwarting*, 76 Neb. 773, we held that the dipsomaniac law is a part of the statute governing the hospital for the insane, and the commitment of persons thereto. The statutory provisions relating to the record of the insanity board therefore apply to informations against dipsomaniacs as well as to proceedings in insanity cases. The statute requires the clerk to make a formal record of all the proceedings of the board. This statutory record is made by the clerk of the board, whose members are required to proceed in the regular and orderly manner followed in courts of justice. Therefore, if the record speaks on the question of jurisdiction, it can only be contradicted under allegations that it is false; and the oral testimony of the petitioner alone is insufficient to contradict it on that point.

As above stated, the record of a special tribunal, like a board of insanity, may not have the full force and effect of a judgment of a court of competent jurisdiction, yet the presumption which attaches to such a record may be likened to the presumption which accompanies the certificate of a notary public to the acknowledgment of a deed or other legal instrument. It is of such weight and character that it cannot be overthrown by the unsupported oral statement of the petitioner impeaching the verity of the record. To hold that the testimony of the petitioner alone contradicting the record that he had been given a hearing is sufficient to authorize a judgment discharging him from custody would be fraught with such serious consequences that we cannot for a moment consider it. Such a rule would empty our jails, our asylums, our reformatories, and even work a release of persons held in the penitentiary for safe keeping pending criminal prosecutions.

We therefore hold that the evidence in this case is not sufficient to impeach the record of the board of insanity, which appears to be regular upon its face, and is wholly insufficient to sustain the judgment of the district court discharging the petitioner.

We are of opinion that the judgment herein should be, and the same is hereby,

REVERSED.

ROSE, J., not sitting.

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MARY E. CARLON, APPELLEE, V. CITY SAVINGS BANK, APPELLANT.

FILED DECEMBER 23, 1909. No. 16,377.

1. **Appeal:** REFUSAL TO DIRECT VERDICT: LAW OF CASE. Where, on an appeal from a directed verdict in favor of the defendant in a personal injury case, this court has held that the cause should have been submitted to the jury on its merits, and the evidence upon a second trial is practically the same as on the first trial, upon a second appeal such holding will be treated as the law of the case; and error cannot be predicated on a refusal of the trial court to again instruct the jury to return a verdict for the defendant.

2. ———: EVIDENCE. In such a case it cannot be urged that the evidence is insufficient to sustain a verdict for the plaintiff.

3. ———: INSTRUCTIONS: HARMLESS ERROR. An unnecessary or inappropriate instruction is not a ground for reversal, unless it is shown to have worked an injury to the rights of the complaining party; and where it is apparent that the giving of the instruction was not in any manner prejudicial to the rights of such party, the giving of such an instruction will be held to be error without prejudice.

4. **Landlord and Tenant:** INJURY TO TENANT: INSTRUCTIONS. In a personal injury case where the plaintiff has introduced substantial evidence showing that the injuries complained of are of a permanent nature, it is not error to instruct the jury that "the plaintiff is entitled to recover for physical pain and mental suffering, if any, which the evidence shows she has endured, or which it is reasonably certain from the evidence she will endure in the future as a natural and direct result of such injuries, taking into consideration the age of the plaintiff at the time the accident happened and her reasonable expectancy of life."

5. **Appeal:** INSTRUCTIONS. Other instructions examined, discussed in the opinion, and *held* to have been properly given.

6. ———: REFUSED INSTRUCTIONS. Where the trial court has, upon his own motion, properly instructed the jury upon all of the issues involved in a case, it is not error to refuse additional instructions requested by either party.

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

*William Baird & Sons,* for appellant.

*H. H. Bowes* and *E. C. Hodder, contra.*

BARNES, J.

This was an action to recover damages for personal injuries sustained by the plaintiff by reason of the alleged negligence of the defendant bank in making repairs to premises occupied by her as its tenant. The case is here on a second appeal. Our former opinion is reported in 82 Neb. 582, where the facts are fully set forth. At the close of the first trial in the district court the jury were directed to return a verdict for the defendant, and from a judgment rendered thereon the plaintiff appealed. By our former opinion it was held that the cause should have been submitted to the jury on its merits. The judgment of the district court was therefore reversed and a new trial was awarded. On the second trial in the district court the jury returned a verdict for the plaintiff, judgment was rendered thereon, and the defendant has brought the case here by appeal.

Among defendant's assignments of error we find the following: "First. The verdict of the jury and judgment are not sustained by the evidence, and are contrary to the law and evidence. Second. The court erred in overruling the defendant's motion to instruct the jury for it at the close of the testimony." These assignments will be considered together. The evidence contained in the present bill of exceptions is practically the same as that which was before us upon the former appeal. Indeed, if there is any difference the plaintiff has strengthened her

case. However, the defendant still contends that there is no evidence which shows or tends to show that the bank made the repairs in question. An examination of the bill of exceptions discloses that the plaintiff testified that she paid the rent to the bank on the 19th day of March, 1903, and this fact is admitted by defendant's witnesses; that in less than a week thereafter she discovered that there was an old cistern concealed under the walk between the kitchen and outhouse, situated on the premises; that she considered it a source of danger, and immediately went to the bank and notified Mr. Badgerow, to whom she paid the rent, and who was at that time acting as its assistant treasurer, of the dangerous condition of the premises, and requested that they be repaired; that the same day Mr. Badgerow came down to the house and employed a workman to fill the cistern and replace the sidewalk, which was accordingly done. Badgerow admits that he collected the rent for the defendant bank, but denies that plaintiff notified him of the existence of the danger, and requested the making of the repairs. As there was a conflict of evidence upon this point the question was one for the jury. It was so held in our former opinion, and is now the law of the case so far as this part of the controversy is concerned. There seems to be no reason for setting aside our former judgment upon this point, and therefore the trial court did not err in refusing to instruct the jury to return a verdict for the defendant.

It is also contended that the district court erred in giving his fourth instruction to the jury, which reads as follows: "You are instructed that if you find from the evidence that the repairs in question were made by some employee of William K. Potter, receiver of the Omaha Loan & Trust Company, then you must determine whether said receiver was at that time acting as agent of the defendant bank or was acting solely for the Omaha Loan & Trust Company as holder of the second mortgage upon said premises, and unless you find by a preponderance

of the evidence that said Potter was acting for the defendant bank, in part at least, then your verdict should be for the defendant." An examination of the record discloses that the defendant bank took over the mortgage on the premises in question and the assignment of the rents thereon from its predecessor, the Omaha Loan & Trust Company Savings Bank, and thereby became, in effect, a mortgagee in possession. It also appears that some time in the year 1901 the Omaha Loan & Trust Company, which was the agent of the Omaha Loan & Trust Company Savings Bank, became insolvent, and that Potter was at that time appointed as receiver thereof; that for a time, as such receiver and agent for the defendant bank, he collected the rent for the premises in question. But it also appears, as above stated, that before the repairs were made the defendant bank had taken charge of the property and was collecting the rent. Under this state of facts it was unnecessary for the court to give the instruction complained of, but we are unable to see how it could have operated in any manner to the prejudice of the rights of the defendant. On the other hand, it injected into the inquiry an element which, if at all prejudicial to any one, could have only operated to the prejudice of the plaintiff. Therefore the giving of the instruction, if error at all, must be held to be error without prejudice.

Complaint is made of the fifth instruction, whereby the jury were told, in substance, that in ascertaining what damage, if any, the plaintiff had sustained by reason of her injuries, they were to take into consideration the character and extent of such injuries, as shown by the evidence; whether such injuries, or any thereof, were permanent or temporary only; her physical pain and mental suffering, if any, which the evidence showed she had endured, or which it was reasonably certain from the evidence she would endure in the future, as the natural and direct result of such injuries, taking into consideration the age of the plaintiff at the time the accident

happened, and her reasonable expectancy of life; and it is insisted that the nature of the injuries disclosed by the evidence were not such as to authorize the giving of this instruction. We find, however, considerable evidence in the record that the plaintiff's injury was of a permanent character; that it was perhaps possible to remove such permanency by means of a surgical operation, but that without submitting herself to the suffering and dangers attendant upon such an operation the injury would remain permanent. In this view of the case, we think the instruction was a proper one, and therefore cannot be urged as a ground of reversal.

Complaint is made of the fifth instruction given at the request of the plaintiff, by which the jury were told: "Ordinarily a landlord is under no obligation to repair premises unless he has contracted so to do; but, where a landlord assumes to repair premises, he must make such repairs in a reasonably careful and safe way, so as to render such place reasonably safe for the occupants or persons lawfully upon said premises. Especially is this true when said repairs are concealed and hidden from view." It will be observed that the instruction follows the rule announced in our former opinion in this case. But it is claimed that the closing sentence of the instruction should not have been given as a part thereof because it does not reflect the condition of the evidence. We do not so understand the record. It appears, without dispute, that the sidewalk, as it originally covered the old cistern, concealed its existence, so that it was only discovered when the plaintiff attempted to recover some marbles for her children, which they had lost under the walk. It follows that, when the filling was completed and the walk replaced, it would again obstruct the view of the cistern and conceal its condition, so that without special examination, such as removing or lifting a portion of the walk, the plaintiff would be unable to ascertain whether the material with which the cistern had been filled had settled or not. Again, the evidence shows that,

when the walk was replaced, looking at it from the upper side, no one would suspect that it was in such a condition as to give way and precipitate one attempting to use it into the cistern. So, in view of the evidence, it seems to us that the instruction complained of was a proper one.

Complaint is also made of the refusal of the trial court to give the sixth instruction requested by the defendant, which submitted to them the question of contributory negligence. So far as we are able to understand the record, there was no evidence before the jury which would support the theory of this instruction, although it appears that the court properly instructed the jury on that question on his own motion.

Error is assigned for the refusal of the trial court to give the eighth instruction requested by the defendant. This instruction relates to the question of proximate cause, and reads as follows: "You are instructed that the proximate cause of an injury is that which directly causes or contributes to the injury, and, if you find from the evidence that the giving way of the sidewalk in question was the proximate cause of the plaintiff's injury in this case, she is not entitled to recover, unless you further find that the walk was defective at the time the cistern in question was filled, and that it was placed back over the cistern in a defective condition, and further find from the evidence that the defendant negligently filled the cistern and replaced the walk over the same in a defective condition." An examination of the instructions given by the court upon his own motion discloses that the jury were properly instructed upon all of the questions at issue, including those covered by the request above mentioned. They were also given an instruction properly defining negligence, and contributory negligence, substantially as requested by the defendant. This being so, it was proper for the court to refuse to further instruct the jury at the request of the defendant.

Finally, it may be said that the evidence fairly discloses that the cistern was improperly filled, and replac-

ing the old walk which was partially decayed over the cistern when filled in that manner was also an act of negligence. It is true that the walk, if laid on solid ground, or placed over a cistern which had been properly filled, might not have given way under plaintiff's weight, but it seems clear that the concurrent acts of improperly filling the cistern and replacing the defective walk over it should be considered together as the act of negligence which was the proximate cause of plaintiff's injuries, and for which, if without negligence on her part, she was entitled to recover.

A careful examination of the whole record discloses no reversible error, and the judgment of the district court is therefore

AFFIRMED.

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DARR & SPENCER, APPELLEE, V. KANSAS CITY HAY COMPANY, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,868.

**Appeal: TRIAL TO COURT: FINDINGS.** The findings of fact in a law action tried to a court without the intervention of a jury are entitled to the same weight as the verdict of a jury in a like case.

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

*E. A. Cook* and *Halbert H. McCluer,* for appellant.

*John A. Sheehan, contra.*

LETTON, J.

This action was brought by the plaintiff to recover damages on account of the alleged violation of a certain contract for the sale by plaintiff to defendant of 400 tons of alfalfa hay of described quality at $7 a ton to be delivered between the 1st day of November, 1906, and

the 1st day of March, 1907, on board cars at Lexington, or at any station taking the same rate of freight. Plaintiff alleges that three cars of hay were delivered in November, 1906, and that defendant refused to accept and pay for the remainder of the hay according to contract, and that it was damaged thereby in the sum of $2,000. The defendant admits the execution of the contract and the receipt of three cars of hay, but, by way of counterclaim, alleges that the plaintiff refused to deliver the remainder of the hay according to contract, and that it has been damaged by said refusal in the sum of $2,208.20. The reply is a general denial. The case was tried to the court without the intervention of a jury. The court found for the defendant, dismissed plaintiff's cause of action, and awarded nominal damages to defendant in the sum of one cent. The defendant excepted to the finding and judgment allowing only nominal damages, and has appealed to this court.

The assignments of error are too general and indefinite to be considered, except the assignment that the court in allowing nominal damages only, and in refusing a judgment for defendant for substantial damages, and this presents the only question before us. It must be premised that the findings of fact in a law action tried to a court without the intervention of a jury are entitled to the same weight as the verdict of a jury in a like case. *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232. The court found that the plaintiff had broken the contract, and that it is liable in damages for such breach, and the evidence amply sustains the finding against the plaintiff on this point.

The only matter left for determination is whether the evidence sustains the finding that the defendant is only entitled to nominal damages. The defendant admits that the correct measure of damages for failure to deliver the hay is the difference between the contract price and the reasonable market value of the hay at the time and place that the same should have been delivered, but contends that, while the contract provides for delivery at Lexing-

ton, Nebraska, or some other place where the freight rate was the same to Kansas City, it was the duty of plaintiff to deliver the hay upon the cars and bill the same to defendant, and that the parties had in mind the Kansas City market at the time the contract was entered into. He next argues that the evidence of all the witnesses who testified on this subject showed clearly that there was no real market price at Lexington, and that the price there was found by taking the Kansas City price less freight and commissions. In this connection he cites the case of *Vanstone v. Hopkins,* 49 Mo. App. 386, to the effect that, where the goods have no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation, is the measure of their value at the place of delivery. It is argued by counsel that, taking the Kansas City market as a basis and deducting $3.40 a ton for freight, there would have been a profit of $5.60 upon each ton, for which judgment should have been entered in defendant's favor. We have no fault to find with the law of that case, but think it inapplicable. Under the contract the plaintiff had until March 1 to deliver the hay. The testimony shows that there was a market price for hay of the character described in the contract in Lexington in February, 1907, when the plaintiff had the right to deliver it. In fact, it was almost a drug on the market, a number of witnesses testifying that it was worth from $1.85 to $4 and $5 a ton, but that there was no demand for it at that time, though there was plenty to be had. It was also shown by one witness that he usually sold his hay at Lexington, upon the track, to other shippers. This indicates a local market. On cross-examination some of these witnesses testified that the Lexington price on hay depended upon what it could be sold for when shipped, deducting freight and commission. Defendant produced no testimony as to the market price of hay at Lexington, and no witness to prove that there was no market for such hay at that point. The testimony on the part of defendant was con-

fined to proving what the market price of hay of the grade described in the contract was in Kansas City at the time when it should have been delivered. This, however, was not the proper measure of damages. The hay was to be delivered on board the cars at Lexington, Nebraska, and defendant's proof should have shown what the market value of hay of the same kind and quality delivered upon the cars at Lexington was at the time when delivery was to be made, or that such hay could not have been purchased there. There is evidence enough to warrant the district court in coming to the conclusion that the defendant might have gone into the market at Lexington, the place of delivery, and purchased hay of the contract quality at a lower price than that which they agreed to pay the plaintiff. If this is the fact, they suffered no actual damage by the plaintiff's failure to deliver, and the judgment awarding them only nominal damages was correct. We have read the evidence carefully, and find that it sustains the judgment.

The judgment of the district court therefore is

AFFIRMED.

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HOLLY CLOW, APPELLEE, V. JOHN GREEN SMITH, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,860.

1. **Bastards: EVIDENCE.** In bastardy proceedings, defendant's wife having testified to facts tending to prove that about the time plaintiff became pregnant she was intimate with a man other than defendant, the trial court did not abuse its discretion in permitting plaintiff's counsel on cross-examination to ask the witness whether she believed that man to be the father of the bastard child.

2. ———: EVIDENCE OF CHASTITY: HARMLESS ERROR. The chastity of the prosecutrix at the time of the trial is not an issue in bastardy proceedings, and testimony concerning her reputation in that particular is irrelevant; but, if she is permitted to in-

troduce testimony to prove that reputation, the error is without prejudice to defendant.

3. ———: INSTRUCTIONS. In such proceedings the jury should not be instructed that they should consider whether or not, at or about the time the prosecutrix became pregnant, she associated with men other than defendant under such circumstances as to make it *possible* for her to have had sexual intercourse with them.

4. ———: ———. A judgment for the prosecutrix in bastardy proceedings will not be reversed because the court informed the jury that her uncorroborated testimony may be sufficient to sustain a verdict of guilty, where they are further instructed concerning the burden of proof, the duty of the jury to compare her testimony at the preliminary examination with that given before them, and the law of the case is given in other instructions as favorable to defendant as the facts in the case warrant.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*A. H. Byrum* and *W. C. Dorsey,* for appellant.

*George Marshall* and *W. H. Miller, contra.*

ROOT, J.

Defendant was adjudged to be the father of plaintiff's bastard child and charged with the payment of $950 for the support thereof. He appeals to this court.

1. It is urged that the evidence does not support the verdict. The testimony is in irreconcilable conflict; but, if the jury believed plaintiff's statement, their verdict is supported by sufficient evidence.

2. Defendant is plaintiff's uncle by affinity, and for ten years preceding the birth of her child she resided with him and worked as a servant in his hotel. During the trial defendant's wife testified in his behalf, and made a detailed statement concerning plaintiff's alleged conduct with defendant's transient patrons and regular boarders. The witness stated that her niece entertained those men in the hotel kitchen and submitted to their caresses; that she carried a duplicate key to a Yale lock maintained on the door of a bedroom occupied by one of the boarders;

that she would go into the boarders' rooms and remain in their company, and went out riding with young men. Many, but not all, of those alleged transactions occurred about the time plaintiff became pregnant. Upon cross-examination counsel for plaintiff asked the witness concerning one of those men: "Do you believe ———— is the father of this child?" The witness answered "No." Defendant's counsel did not object to two of the questions, but objected to the others as not proper cross-examination, incompetent and irrelevant. The objections were overruled. Counsel argue that a witness should testify to facts, that it is for the jury to draw whatever conclusions may fairly be deduced from the evidence, and that the court should exclude, so far as possible, the witness's inferences, conclusions and belief. Many cases are cited in support of the argument, but they deal with questions propounded upon direct examination. On cross-examination, immaterial and collateral matters may, in the sound discretion of the trial court, be inquired into where the examination tends to test the accuracy, veracity or credibility of the witness. Stephen, Evidence (Reynolds, 3d ed.) pp. 180, 181; *Hanoff v. State,* 37 Ohio St. 178; *Village of Shelby v. Clagett,* 46 Ohio St. 549. In In some cases the belief or impression produced on the witness's mind at the time of the transaction to which he testifies is admitted as giving the necessary and proper color to his testimony. The rule was applied in *Fraser v. Fraser,* 5 Notes of Eccl. Cas. (Eng.) 11, 34, a divorce case. In that litigation a maid had testified to suspicious conduct on the part of her mistress and the co-respondent, and it was held proper to show that the witness did not draw the conclusion of guilt from the facts testified to by her. In *Jordan v. State,* 120 Ga. 864, it was held competent to impeach a witness, who had testified to lewd conduct by the prosecutrix, by proving that after knowledge of the facts he had declared the woman was chaste and virtuous. We think the court did not abuse its discretion in ruling as it did. The witness was hostile to

plaintiff. In effect, she was suggesting, and asking the jury to believe, that plaintiff was a lewd woman, and that one of the men named by the witness was probably the father of the prosecutrix' child. While we do not say error was committed in admitting the evidence, the court would have made no mistake in rejecting it. Not many cases come within an exception to the generally recognized rule that, outside of the cross-examination of witnesses who have testified to the genuineness of handwriting, the belief of a witness should not be inquired into even on cross-examination. The exception should be applied cautiously and infrequently.

3. On rebuttal plaintiff introduced testimony, over defendant's objections, to show that her reputation for chastity was good in the community in which she resided. We agree with defendant's counsel that the testimony was irrelevant, but disagree with them concerning its effect. It would have been erroneous to receive evidence concerning defendant's reputation for chastity. He did not admit his guilt, and proof of that reputation would in nowise tend to prove or disprove the material fact of parentage in issue in the case. So far as the mother is concerned, no such issue is presented. She, by her sworn complaint, alleges that she is unchaste. By introducing testimony of her reputation for chastity, she assumed a burden not cast upon her by the record or the law. Defendant could not have been prejudiced by her action, and for that reason this assignment of error should be overruled. Code, sec. 145.

4. Instruction numbered 10, requested by defendant, should not have been given, because it made the possibility, and not probability, that plaintiff had sexual intercourse with men other than defendant a factor in the case.

The giving of instruction numbered 3 is also assigned as error. The instruction, in effect, informs the jurors that plaintiff is a competent witness, and need only prove her case by a preponderance of the evidence; that the jury

should take into consideration any variations in her testimony before the magistrate, compared with her testimony given at the trial, but, if they believed from a fair preponderance of the evidence that defendant was the father of the bastard, a verdict of guilty might be sustained, although plaintiff's testimony was not corroborated by other testimony. The criticism made is that the court singled out plaintiff's testimony and sought to give it weight in the eyes of the jury. Reference to the fact that plaintiff's testimony might sustain a verdict in her favor was unnecessary, but the jury were informed in other instructions that the burden was on plaintiff to prove her case by a preponderance of the evidence, and that the credibility of the witnesses was solely for the jury to determine. The instruction in no manner disparaged any witness who testified for, or evidence introduced by, the defendant, and he should not be granted a new trial because this instruction was given. Plaintiff's counsel suggest that this instruction is a copy of part of an opinion of this court. This may be true, but it does not follow that every argument written in a particular case should be given as an instruction to a jury in another action of like character.

The instructions, taken altogether, were fair to defendant, and the evidence, while conflicting, sustains the verdict. The judgment of the district court is

AFFIRMED.

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GEORGE H. MCCOLLUM, APPELLEE, V. CENTRAL GRANARIES COMPANY, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,872.

Appeal: NEW TRIAL: CONFLICTING EVIDENCE. Where conflicting testimony has been fairly submitted to a jury in an action at law, a new trial will not be granted if there is evidence sufficient to sustain the verdict, although this court might have found otherwise from a consideration of all of the evidence.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*Hall, Woods & Pound* and *Keester & Myers,* for appellant.

*J. G. Thompson* and *John Everson, contra.*

ROOT, J.

This is an action for the reasonable value of wheat sold and delivered by plaintiff to defendant. Defendant asks judgment for plaintiff's alleged failure to deliver 1,800 bushels of wheat. There was judgment for plaintiff, and defendant appeals.

The pleadings are somewhat inartificial; but, in substance, defendant contends that it made an oral contract with plaintiff for the purchase of 1,700 to 2,000 bushels of wheat, two wagon-loads whereof were delivered, whereby the transaction was taken without the statute of frauds. Plaintiff asserts that no specific contract was made between the parties hereto, but that he merely asked defendant's agent what defendant was paying for wheat, and informed him that the witness had about 2,000 bushels of said grain which he intended to market. Plaintiff further alleges that he sold defendant two wagon-loads of wheat on the market, without reference to any specific agreement.

1. It is strenously urged that the verdict is not sustained by the evidence. Plaintiff and defendant's agent, Mr. Whittaker, each gave his version of what was said and done at their conference, and it is impossible to reconcile their testimony. Some corroborating circumstances appear in support of each witness, and it may be fairly said that defendant produced more relevant evidence than did the plaintiff. The jury, however, believed the plaintiff, and he is not so strongly impeached

as to justify us in rejecting his testimony. It is true, as urged, that plaintiff does not directly contradict some important testimony given by Mr. Whittaker and corroborated by the witness Mussleman, but, if plaintiff's testimony concerning the transaction is correct, Whittaker's is not, and there is a contradiction in effect, if not in terms.

2. The court committed no error in refusing to give instruction numbered 1 requested by defendant. The issue was whether a contract had been made, not whether a reasonable person might consider from plaintiff's conduct that a contract had been entered into.

There is no error in the record prejudicial to defendant, and the judgment of the district court is

AFFIRMED.

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JOHN A. LUTHER V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1909. No. 16,245.

**Criminal Law**: MISDEMEANORS: FINES: IMPRISONMENT. When the district court assesses a fine in a misdemeanor case, it may, in its discretion, order the defendant to remain in the county jail until the fine and costs are satisfied. If no such order is made, the clerk has authority to issue an execution commanding the sheriff to collect the fine and costs by a levy upon and a sale of defendant's goods and chattels, and, for want thereof, to levy upon defendant's body and commit him to the county jail, there to remain until the fine and costs shall be paid, secured to be paid, or otherwise discharged according to law.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Petition in error dismissed.*

*John Everson*, for plaintiff in error.

*William T. Thompson, Attorney General*, and *George W. Ayres, contra.*

ROOT, J.

November 14, 1906, plaintiff in error was fined $500 and the costs of prosecution for violating the Slocumb law. Upon appeal to this court that judgment was affirmed. 83 Neb. 455. The district court upon receipt of our mandate ordered an execution issued, to be levied upon defendant's goods and chattels, and, for want thereof, upon his body, for the satisfaction of the judgment. The writ was issued and Luther committed to jail, and he again appeals to this court, contending that, since the district court, in 1906, did not order him to remain in jail until the judgment was satisfied, it could not thereafter direct his restraint for the satisfaction of the judgment. The criminal code provides: Section 497: "Whenever a fine shall be the whole or part of a sentence, the court may, in its discretion, order that the person sentenced shall remain confined in the county jail, until the amount of such fine and costs are paid." Section 500: "In all cases wherein courts or magistrates have now or may hereafter have the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, the said courts or magistrates may make it a part of the sentence that the party stand committed and be imprisoned in the jail of the proper county until the same be paid, or secured to be paid, or the defendant is otherwise discharged according to law." Section 521: "In all cases of misdemeanor in which courts or magistrates shall have power to fine any offender, and shall render judgment for such fine, it shall be lawful to issue executions for the same, with the costs taxed against said offender, to be levied on the goods and chattels of any such offender, and, for want of the same, upon the body of said offender, who shall thereupon be committed to the jail of the proper county until said fine and costs be paid, or secured to be paid, or the offender be otherwise discharged according to law." Section 525 makes it the duty of the clerk of the district court to issue executions for the collection

of all unsatisfied and unreplevied judgments for fines and costs. Sections 500 and 521, *supra*, were evidently copied, in substance, from the Ohio criminal code. Warren, Ohio Cr. Law (1870) pt. 1, ch. 2, secs. 35, 36.

*In the Matter of Beal*, 26 Ohio St. 195, it is held that the statute relating to executions refers to all cases where a fine has been imposed. We are of opinion that a like construction should be given our code. Section 497, *supra*, enacts that the court, in its discretion, may order that the defendant "shall *remain*" in the county jail until the fine and costs are paid. If it were the intention of the lawmakers to exempt a defendant from bodily restraint, unless the court ordered him to remain in custody, section 521, *supra*, in so far as it provides that an execution for the collection of a fine and costs shall command the sheriff to levy upon the defendant's body in case goods and chattels cannot be found for the satisfaction of the judgment, is surplusage. The more rational conclusion seems to be that the district court, in its discretion, may permit a defendant, against whom a fine is assessed, to depart the court until such time as the clerk shall issue and the sheriff serve an execution for the collection of the fine and costs. The fact that the district court in the first instance did not order plaintiff in error to remain in the county jail until his fine and the costs taxed were satisfied does not exempt him from subsequent arrest upon an execution issued by the clerk. The second order made by the district court was unnecessary, but it does not prejudice plaintiff in error.

The petition in error is therefore

DISMISSED.

# MCCOOK WATERWORKS COMPANY, APPELLANT, V. CITY OF MCCOOK ET AL., APPELLEES.

FILED DECEMBER 23, 1909. No. 15,870.

1. **Cities: ORDINANCES: WATER RATES: INJUNCTION.** Where a city, in the exercise of power delegated to it by the legislature, enacts an ordinance fixing the rates which a public service corporation may exact for water furnished to consumers, a court of equity should not interfere with the enforcement of the ordinance before there has been a fair trial showing the practical results of its actual operation, unless the rates are clearly confiscatory.

2. ———: ———: ———: **PRESUMPTIONS.** Rates which a public service corporation may exact for furnishing water to a city and its inhabitants are presumed to be lawful and reasonable, when fixed by an ordinance passed in the exercise of legislative power.

3. ———: ———: ———: **EVIDENCE.** A public service corporation engaged in the business of furnishing water to a city and its inhabitants must make a full disclosure of the value of the property devoted to that purpose and of its earnings and expenses, when it assails as confiscatory rates fixed by ordinance.

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

*Morlan, Ritchie & Wolff,* for appellant.

*J. R. McCarl, J. F. Cordeal, C. C. Flansburg* and *C. E. Eldred, contra.*

ROSE, J.

Plaintiff is a corporation owning a system of waterworks in McCook, and is engaged in the business of supplying that city and its inhabitants with water. This is a suit against the mayor and members of the city council to enjoin them from enforcing ordinance number 136, which establishes plaintiff's rates or charges for furnishing water to consumers. The principal objection to the ordinance is that the rates fixed by it are so low as to be unremunerative and confiscatory. Upon a trial in the

district court the suit was dismissed, and plaintiff has appealed.

The rates established by the ordinance which plaintiff seeks to enjoin went into effect August 12, 1907, and on plaintiff's petition they were suspended by a restraining order in this case December 31, 1907. The trial took place in April following and the case was submitted to the court on plaintiff's evidence. Defendants declined to offer any proofs on their own behalf, but demurred to plaintiff's. The demurrer was sustained, the restraining order dissolved and the action dismissed May 8, 1908. One of the findings of the district court is: "There has not sufficient time elapsed since ordinance number 136 has been in effect to determine that the same would be confiscatory or not, or whether the same would be fair as between the plaintiff and defendants." This finding seems to be justified by the pleadings and proofs. The ordinance was only in force from August 12, 1907, to December 31, 1907, a period of less than five months. In the meantime the system of charges for water had been changed from flat rates to meter rates. The service and earnings between those dates had not been fully adjusted to the new conditions. The change of systems required consumers generally to install meters, and many of them were not in use until late in the period during which the new rates were in force. The amount of water consumed varied with the different seasons, and the trial of the ordinance did not include all of them. August 29, 1907, plaintiff's power-house was destroyed by fire, and for a short time thereafter there was an interference with the water supply. Under the flat rate system formerly in force the charges were collected in advance, but under the meter system collections were necessarily delayed until the meters registered the amount of water consumed. This affected the receipts for a time at least. The circumstances and conditions mentioned make it clear that for lack of time a full and fair test of the earnings under the new rates had not been made, when they were suspended

by the restraining order. The finding quoted indicates the trial court considered a fair test of ordinance number 136 and the practical results thereof material matters in reaching a conclusion. This course is in harmony with the doctrine recently announced by this court in an opinion by Judge BARNES in *State v. Adams Express Co., ante,* p. 25. One of the rules stated in that case is: "A court of equity ought not to interfere with and strike down an act of the legislature fixing maximum express rates, before a fair trial has been made of continuing the business thereunder, and in advance of any actual experience of the practical result of such rates." The supreme court of the United States has applied the same principle to the rates fixed by a city ordinance for water supplied by a water company. In *City of Knoxville v. Knoxville Water Co.,* 212 U. S. 1, the following appears in the syllabus: "In determining whether a rate is confiscatory the court is not confined to evidence as to the income of the corporation affected for the fiscal year during, or preceding, that in which the rate was fixed; it may receive evidence as to such income in subsequent years. Federal courts should not declare an ordinance fixing rates for a public service corporation unconstitutional and suspend its operation before it goes into effect unless the rate is clearly confiscatory; and, unless complainant furnishes substantial evidence to that effect, the bill should be dismissed without prejudice to a further application to the courts if the rate after going into effect is actually confiscatory." In the light of these decisions and the conditions already described, the correctness of the finding of the trial court that the ordinance was not tried long enough for a fair test is free from doubt.

Plaintiff adduced proof of the value of its plant, of its operating expenses and of its earnings before the new rates had been fairly tested, and insists it is thereby shown that enforcement of the new rates will result in transacting business at a loss, and that therefore the ordinance is void. The sufficiency of evidence to overturn the rates

must be considered with reference to the following principles: The power to fix the rates which plaintiff may exact for furnishing water to the city of McCook and its inhabitants was committed by the legislature to that municipality. Comp. St. 1907, ch. 14, art. I, sec. 69, subd. 15; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1. When rates are fixed by ordinance in the exercise of such power, they are presumed to be reasonable, and in the present case the burden is on plaintiff to show by a preponderance of the evidence that the ordinance is clearly invalid. In doing this it is incumbent on plaintiff to make a full disclosure of the value of the plant and of the earnings and expenses. *State v. Adams Express Co., ante,* p. 25; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1. Plaintiff's evidence, when considered with the established fact that the ordinance had not been subjected to a sufficient trial to show the practical results of its operation, with the presumption that the rates are lawful and reasonable, and with the rule that the burden is on plaintiff to make full disclosures, cannot be said to clearly show that the ordinance is confiscatory.

Objection is also made to the title and form of the ordinance, but no sufficient reason has been urged for striking it down on these grounds.

By appealing to the district court to annul the ordinance before its results had been fairly shown by actual operation, plaintiff should not be prevented from making a further application for relief, if a practical test results in the confiscation of property. The judgment of the district court will therefore be so modified as to dismiss the action without prejudice to plaintiff's right to begin another suit, and as thus modified will be affirmed.

AFFIRMED AS MODIFIED.

MATILDA K. GARDINER, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED DECEMBER 23, 1909. No. 15,874.

Cities: VOID ASSESSMENTS: RELEVY: STATUTES: VALIDITY. Section 250, ch. 12*a*, Comp. St. 1909, the curative act authorizing cities of the metropolitan class to reassess void special assessments levied under the charter of 1897, is not void as class legislation, because it excludes from its operation void assessments levied under former charters.

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

*W. H. Herdman* and *W. J. Coad,* for appellant.

*Harry E. Burnam* and *John A. Rine, contra.*

ROSE, J.

This is a suit to enjoin the collection of a paving assessment of $80.64, which had been levied against a lot owned by plaintiff in the city of Omaha. Invalidity of a curative statute authorizing the assessment is the ground on which the injunction is sought. The district court upheld the act and sustained a demurrer to the petition. From a dismissal of the action plaintiff has appealed.

The following statements are summarized from the petition: In 1898 defendant levied against plaintiff's lot a void paving assessment which was canceled by a decree of the district court for Douglas county in 1904. In 1906 defendant reassessed the same lot for the same improvement, and in doing so assumed to exercise a power conferred by a curative act passed by the legislature of 1903 in the following form: "Whenever any special assessment or assessments upon any lot, or lots, block, lands, or parcels of lands for any of the local improvements which have heretofore been made under the provisions of an act entitled 'An act incorporating metropolitan cities and

defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled "An act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers and governments," approved March 30, 1887, and all acts amendatory thereof, being chapter 12*a* of the seventh edition of the Compiled Statutes of the state of Nebraska (edition of 1895) entitled "Cities of the Metropolitan Class" which passed and took effect March 15, 1897, are invalid, uncollectible or void or are found or adjudged by any court to be invalid, uncollectible or void for any reason whether because of the lack of a petition of the property owners or any insufficiency, irregularity or informality in said original petition therefor, or because of any defect, irregularity or invalidity in any of the proceedings on account of failure to observe any of the prerequisites or requirements of the said act or of the ordinances or resolutions of such city or rules adopted by the city council of such city, whether such defects are jurisdictional or otherwise, or whenever any such special assessment or assessments have been paid under protest and the money so paid has been recovered back from such city or may hereafter be recovered back from such city for any reason whether because of the lack of a petition of the property owners or any insufficiency, irregularity or informality in said original petition therefor or because of any defect, irregularity or invalidity in any of the proceedings on account of the failure to observe any of the prerequisites or requirements of said act or of the ordinances or resolutions of such city or rules adopted by the city council of such city, whether such defects are jurisdictional or otherwise, then in either case, the mayor and city council for the purpose of assisting in the payment of the cost of such improvement shall have the power to levy a new assessment or a reassessment of special taxes upon said lot, lots, blocks, lands, or parcels of lands upon which the former assessment is found to be invalid or uncollectible, or has been decreed or adjudged or found

to be invalid, uncollectible or void. Such special assessments so levied shall be in proportion to and not in excess of the special benefits derived by such property, as compared with the special benefits received by other properties on account of such improvements as found by the city council sitting as a board of equalization, after notice as required by law for the equalization of assessments in the first instance, and the mayor and city council shall deduct from such benefits and allow as a credit before such new assessment or reassessment an amount equal to the sum of the instalments of the original levy paid upon said property, except where said amount was paid under protest. Provided further that all proceedings connected with the making of any such local improvements under said act are hereby retrospectively legalized and validated and all defects in such proceedings are hereby cured, but the assessments heretofore levied therefor shall not thereby be legalized or cured, but new assessments and reassessments may be levied for such improvements after a new equalization as hereinbefore provided." Laws 1903, ch. 15; Comp. St. 1909, ch. 12*a*, sec. 250.

It is the reassessment under this act which plaintiff seeks to enjoin, and the petition further states: The legislation applies to void assessments levied subsequent to March 15, 1897, but excludes those levied at earlier dates. By general law Omaha became a city of the metropolitan class March 30, 1887, and since that time has continuously exercised statutory authority to make public improvements and to assess property benefited thereby. Many levies for the purpose stated were made prior to April 10, 1903, when the curative act became effective, and large sums thus assessed have been declared void by the courts. Of such canceled assessments the greater part, both in number of levies and in amount of taxes was levied prior to March 15, 1897. Many public improvements which were made in contemplation of the payment of special assessments subsequently canceled were in good condition April 10, 1903, though constructed prior to March 15,

1897, and many were worn out April 10, 1903, though constructed after March 15, 1897.

Plaintiff asserts that the facts pleaded by her show the curative act under which her lot was assessed affects diversely the rights and property of persons and classes similarly situated, and that it is founded on a classification so arbitrary, capricious and unreasonable, and is in its operation so partial, invidious and discriminatory, as to be within the inhibition of the constitutional provisions relating to due process of law, to equal protection of the law, and to special or class legislation forbidden by the following provisions: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Incorporating cities, towns, and villages, or changing or amending the charter of any town, city or village. * * * In all other cases where a general law can be made applicable, no special law shall be enacted." Const., art. III, sec. 15. An able argument has been presented in support of the proposition that the legislature in making time the basis of its classification, and in fixing March 15, 1897, as the dividing line between void assessments included within and void assessments excluded from the operation of the curative act, violated the rule that a classification for the purpose of legislation "must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the subjects classified." *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1. The argument assailing the classification, however, does not seem to be conclusive. The act applies to and without discrimination includes invalid, uncollectible, void and canceled special assessments levied under the metropolitan charter which became effective March 15, 1897. Such assessments are not "taxes" in the ordinary sense of that word, but are employed as a means of requiring owners of property specially benefited by city improvements to contribute to the cost of making them. The

power of the legislature to confer on a municipality authority to make public improvements and to assess property specially benefited thereby is conferred in direct language by the following provision of section 6, art. IX of the constitution: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited." The legislature may withhold or grant this power. That it may require a city to exercise it within a reasonable time, if granted, is too plain for argument. Time is certainly a reasonable basis of classification in determining how far back a city may go when exercising its power to relevy void special assessments. Would the condition of improvements or the present benefits to property be a more reasonable basis? The difficulty of framing a law with that end in view, or perceiving its application to any case and of enforcing its provisions would at least suggest questions as to its practicability. In any event the time for barring relevies or void special assessments is within the discretion of the lawmakers. It will be presumed that they acted with full knowledge of the conditions relating to that subject. The reasons of public policy which prompted them to make time the basis of their classification may not appear on the face of the act or in plaintiff's petition. Circumstances affecting sales of real estate, transfers of titles, and other matters relating to the public welfare may have suggested the repose of void assessments levied under former charters. It will be further observed that the lawmakers excluded from the operation of the law all void special assessments levied during or preceding a period of financial and industrial depression. When doing so they may have had knowledge of conditions which made the results of the panic important considerations in limiting to subsequent assessments the municipal power granted by the curative act. A classification based on time is not necessarily unreasonable, when applied to the facts pleaded. Whenever the legisla-

ture limits the time for filing a claim against a city, for redeeming land from a tax sale, or for bringing a suit, time is made an element in classification. Under laws of that character one person may enjoy the benefit of a remedy which by reason of a day's difference in time is denied to another; but the latter, for that reason, is not deprived of due process of law or of the equal protection of the law, and such statutes are not void as class legislation. The reasons for sustaining statutes of limitations apply to plaintiff's objections to the act in question. In arguing this point counsel for defendant cited *Hall v. Street Commissioners,* 177 Mass. 434, a case involving the validity of a curative act relating to the city of Boston, and containing the following provision: "The board of street commissioners of said city, at any time within two years after any new sewer or drain for the collection or disposal of sewage or of surface or ground water is completed, shall assess upon the several estates especially benefited by such sewer or drain a proportional part of the cost thereof, not exceeding in amount the sum of four dollars per linear foot. Any such assessment which shall be found to be invalid and is unpaid, or which shall have been recovered back, may be reassessed by said board to the amount for which and to the person to whom the original assessment ought to have been made." The opinion was delivered by Chief Justice Holmes, now a member of the supreme court of the United States, who said: "We see no objection to the statute in the fact that the statute does not apply to any sewer built before a certain date, it does not matter precisely what. Such a limit of liability by time is no more unreasonable or contrary to any principle of constitutional right than is a statute of limitations."

For the reasons given, the district court did not err in upholding the act assailed by plaintiff, and the judgment is

AFFIRMED.

GEORGE SOWERWINE ET AL., APPELLEES, V. CENTRAL IRRIGATION DISTRICT, APPELLANT.*

FILED DECEMBER 23, 1909. No. 15,866.

1. **Waters:** IRRIGATION DISTRICTS: COUNTY BOARDS: POWERS. "An order of the county board establishing and defining the boundaries of an irrigation district in pursuance of the provisions of section 2, art. III, ch. 93*a*, Comp. St. (Ann. St., sec. 6823), is conclusive, at least in a collateral proceeding, on the question whether the lands included therein will be benefited by irrigation by the system therein contemplated; *aliter*, on the question whether any of such lands cannot, from some natural cause, be irrigated thereby." *Andrews v. Lillian Irrigation District*, 66 Neb. 461.

2. ———: ———: DETACHING LANDS. "After an irrigation district has been duly organized, the statutory procedure prescribed in said chapter for detaching lands, other than those which cannot from some natural cause be irrigated, is exclusive." *Andrews v. Lillian Irrigation District*, 66 Neb. 461.

3. **Appeal:** SPECIAL FINDINGS. In a case appealed to this court upon the special findings of the trial court, this court cannot add to or take from the language of the trial court or enlarge the scope of its findings.

4. **Waters:** IRRIGATION DISTRICTS: DETACHING LANDS: EVIDENCE. Where the owner of land proceeds in equity to have the same detached from an irrigation district, in order to defeat the jurisdiction of the county board it must be clearly shown, and in like manner found by the court, that the land embraced within the district is in fact such that from some natural cause it is non-irrigable, or is expressly exempted by statute from the operation of the law providing for the organization of irrigation districts and the taxing of lands within the boundary of such district for irrigation purposes.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Reversed and dismissed.*

*L. L. Raymond* and *James E. Philpott*, for appellant.

*Wright & Wright, contra.*

FAWCETT, J.

This suit was brought in the district court for Scott's Bluff county by plaintiffs jointly, who are the separate

* Rehearing denied and case *remanded.*

owners of the lands described in the petition, for the purpose of having said lands detached from the irrigation district of defendant. The allegations in the petition are that all of lot 3 in section 31, lots 5 and 6 in section 32, lot 2 in section 5, and all of that part of the S. E. ¼ of the S. E. ¼ of section 31, and lot 1 in section 6, and lots 3 and 4 in section 5, lying and situated north of a line particularly described, "are low, wet and swampy lands, situated near and lying along the south bank of the North Platte river, and that a portion of said lands are now covered with water from natural causes, and all of said lands are totally unfit for irrigation, and it will be necessary to drain the same before the same can be farmed; that all of said lands are so situated that the irrigation of the same or flowing water thereon from defendant's canal will result in great and irreparable injury thereto and to the owners thereof, the plaintiffs herein; and the plaintiffs have no adequate remedy at law; that the defendant has caused taxes to be levied against said lands for irrigation purposes for the years 1903, 1904, and 1905, in the total sum of $724.95, and have caused the same to be entered on the tax rolls of Scott's Bluff county in the manner provided by law, and which taxes now stand of record together with claim for interest and penalities as an apparent lien against said lands and as a cloud on the plaintiff's title thereto, and have levied taxes on said lands for the year 1906, which are not yet made of record in the office of the county treasurer of said county." The prayer is that the lands be detached from said irrigation district; for an injunction enjoining the levying and collection of taxes for irrigation purposes; that the taxes already assessed be declared null and void, and the cloud on plaintiffs' title removed and plaintiffs' title quieted. The answer admits that plaintiffs are the respective owners of the lands set out in their petition; that defendant is an irrigation district; that it has caused taxes to be levied as alleged, and denies generally all allegations in the petition not specifically admitted. And, for further answer,

it alleges: "That at the time and before the organization of the defendant as an irrigation district, as aforesaid, the lands set out in plaintiffs' petition were susceptible to irrigation, and of such character, location, and elevation as to be, and the said lands were, benefited by irrigation furnished by the canal or ditch of the defendant, and that said lands were accordingly, and by and with the knowledge and full consent of the plaintiffs, included in and made a part of said irrigation district." The pleadings contain numerous other allegations and denials involving the question of estoppel, which, for the determination of this case, we do not deem it necessary to consider. There was a trial to the court and decree for plaintiffs, based upon special findings, from which defendant appeals. No bill of exceptions is presented, defendant basing its claim for a reversal upon the special findings of the court.

Plaintiffs base their right to the relief demanded upon section 49, art. III, ch. 93*a*, Comp. St. 1903, which provides that in no case shall land, which from some natural cause cannot be irrigated, be held in any irrigation district or taxed for irrigation purposes. The special findings in the decree are: (1) That the plaintiff, George Sowerwine, is the owner in fee of the lands claimed by him; (2) that plaintiff Elizabeth Sowerwine is the owner in fee of the lands claimed by her; (3) that all of said lands are included in and are a part of the defendant irrigation district; (4) as to lot 3 in section 31, lots 5 and 6 in section 32, lot 2 in section 5, and all that part of the S. E. ¼ of the S. E. ¼ of section 31, and lot 1 in section 6, and lots 3 and 4 in section 5, lying and situated north of the particular line above referred to, the court finds "that down through the central part of the same, from the west to the east, is a slough which holds more or less water during the entire year; that the North Platte river maintains its highest stage from about the 1st day of May until from the middle of July to the 1st of August; that during high water in the river said slough becomes prac-

tically full of water, and the part of the said land involved herein is more or less wet and spongy, and at different places has standing water holes of greater or less dimensions; that during the low water period of the year in the river, from about August to May, said slough becomes practically dry, and the land involved is dry; that the balance of said land is practically all dry and fit to be mowed, and the same has been mowed for hay for a number of years; that during the irrigation season said land is rendered more or less wet by reason of seepage from the central ditch and the laterals therefrom being thrown on the land herein." In its fifth finding the court proceeds to make findings in relation to the question of estoppel above referred to, and then recites: "By their acts in the premises and their personal knowledge they (plaintiffs) ought to be bound by the judgment of the county board in the formation of the defendant district including the lands involved therein, and in good conscience ought to be estopped from complaining at this late date, but under the doctrine laid down in the Custer county case, as well as the case of *Walsh v. Lincoln County,* the board was without jurisdiction to include the lands involved therein in the defendant's district; that the defendant has caused to be levied taxes against said lands for irrigation purposes for the years 1903, 1904 and 1905, in the total sum of $724.95; that the same are null and void because of said land being exempted under the statutes as construed by the supreme court, and it is therefore adjudged that said lands (the lands described in the petition) be, and the same are, hereby detached from said central irrigation district, and the defendant and all persons acting for and on behalf of the defendant district are enjoined from levying any taxes against said land for irrigation purposes; that the said taxes heretofore levied be, and the same are, adjudged to be null and void and no lien on or against said land, and plaintiffs' said lands are quieted in them as against all said taxes."

The case referred to in the findings of the court as "the

Custer county case" is *Andrews v. Lillian Irrigation District* (on rehearing) 66 Neb. 461. The case of *"Walsh v. Lincoln County,"* referred to in the court's findings, is reported as *State v. Several Parcels of Land,* 80 Neb. 424. We do not think either of these cases will bear the construction which the trial court seems to have put upon them. In *Andrews v. Lillian Irrigation District* the petition was substantially the same as in the case at bar. It alleged that the lands sought to be detached were low, wet, swampy lands, totally unfit for irrigation, and which required drainage of the water naturally standing thereon before they could be made fit or used for agricultural purposes. The defendant in that case filed a general demurrer to the petition, which was sustained by the trial court. The demurrer, of course, admitted the allegations of the petition as to the character of the lands, and we said: "This, we think, for the purposes of the demurrer, is equivalent to alleging that the lands were nonirrigable; that from natural causes they could not be irrigated by the proposed system of irrigation." In discussing the matter, on page 466, HOLCOMB, J., said: "Section 49 of said chapter provides that in no case shall land, which from some natural cause cannot be irrigated, be held in any irrigation district, or taxed for irrigation purposes. Thus it will be seen that the act under consideration clearly distinguishes between land which would not be benefited by irrigation and such as from some natural causes is nonirrigable. As already shown, whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes." In the case at bar the allegation that the lands are

low, wet, swampy lands and will require drainage before they can be made fit for agricultural purposes is expressly negatived by defendant's answer, and is not sustained by the special findings of the court. We do not think a finding that during three months of the year a slough running through the land is practically full of water, and a part of the land involved is more or less wet and spongy and at different places has standing water holes of greater or less dimensions, while during the low water period extending through the other nine months of the year the slough is practically dry and the land involved is dry, can be held to be tantamount to a finding that the lands "are totally unfit for irrigation," as alleged in plaintiffs' petition.

In *State v. Several Parcels of Land,* 80 Neb. 424, referred to in the findings of the court as *Walsh v. Lincoln County,* the lands were under an irrigation ditch which had been constructed before the enactment of the district irrigation law. After the enactment of that law the Suburban Irrigation District filed a claim with the secretary of the state board of irrigation for the appropriation of water to irrigate the lands in controversy, with other lands. Subsequently the order of the county board establishing such district was made. The directors of the Suburban Irrigation District then proceeded to levy taxes upon the lands in controversy. The section of the statute under which the owner of the land claimed exemption was as follows: "Provided, that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law." Comp. St. 1903, ch. 93*a*, art. III, sec. 1. The evidence clearly established the fact that the first ditch had been constructed before the passage of the act; that it was of sufficient capacity to water the land thereunder, and that the land in controversy was under that ditch. In consider-

ing that case we said: "The reasoning of this case (*Andrews v. Lillian Irrigation District*) applies to the question we are considering. If the provision that land which cannot, from any natural cause, be irrigated by a ditch excludes it from the jurisdiction of the county board, certainly the provision that land subject to be watered by a ditch constructed before the passage of the act and of sufficient capacity to water the same shall be exempt from the operation of the law would prevent the county board from passing upon and determining this question." We adhere to both of the cases referred to, but are unable to see how they can be applied to the case at bar. We think the findings of the court in the case under consideration clearly show that this case comes within that class which are for the determination of the board. If it is only during high water that the land is "more or less wet and spongy and at different places has standing water holes of greater or less dimensions" for three months in the year, but during the other nine months is dry, the court cannot say, as a matter of law, that it is nonirrigable, so as to bring it within the rule of *Andrews v. Lillian Irrigation District.*

It is contended by plaintiffs that the only theory on which the court could have made its finding, "that under the doctrine laid down in the Custer county case, as well as the case of *Walsh v. Lincoln County,* the board was without jurisdiction to include the lands involved therein in the defendant district," was to find that the lands by reason of their condition from natural causes were nonirrigable. They add: "And we think that the court's findings show that the land was, in fact, nonirrigable." We are unable to concur in either of these statements. In our opinion the court's findings do not show that the land was, in fact, nonirrigable, and we cannot add to or take from the language of the court, or enlarge the scope of its findings, by construction. In order to defeat the jurisdiction of the county board, it must be clearly shown, and in like manner found by the court, that the lands

embraced within the district are, in fact, nonirrigable. If, under the facts as found by the court, there is any doubt on that subject, such doubt must be resolved in favor of the jurisdiction of the board, and the parties left to the remedy provided by statute. This being, therefore, a case for the consideration of the board, then the order of the county board establishing and defining the boundaries of the district is conclusive, at least in this collateral proceeding, on the question whether the lands included will be benefited by irrigation. In such a case the second paragraph of the syllabus in *Andrews v. Lillian Irrigation District*, 66 Neb. 461, applies: "After an irrigation district has been duly organized, the statutory procedure prescribed in said chapter for detaching lands, other than those which cannot from some natural cause be irrigated, is exclusive."

The judgment of the district court is therefore reversed, and the suit dismissed.

REVERSED AND DISMISSED.

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JOSEPH S. CHRISTENSEN, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 23, 1909. No. 15,797.

1. **Appeal:** INSTRUCTIONS: REVIEW. Where the evidence would sustain no verdict except that rendered by the jury, assigned errors in giving or refusing instructions may be disregarded on appeal.

2. **New Trial:** NEWLY DISCOVERED EVIDENCE: DISCRETION OF COURT. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the court, and will not be overruled unless a clear abuse of discretion is shown.

3. **Street Railways:** INJURY TO PEDESTRIAN: NEGLIGENCE. The evidence examined, discussed in the opinion, and *held* sufficient to sustain the verdict of the jury.

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

*J. L. Kaley* and *H. H. Bowes,* for appellant.

*John L. Webster* and *W. J. Connell, contra.*

DEAN, J.

Joseph S. Christensen sued the defendant on March 4, 1905, to recover for personal injuries caused by reason of the alleged negligence of an employee of defendant in running one of its electric street railway cars in Omaha. The case was tried to a jury, and a verdict returned in favor of the company, upon which judgment was rendered, and plaintiff appeals.

The petition alleges, in substance, that the injury occurred about 9 o'clock in the evening of April 18, 1903, as plaintiff was in the act of stepping on defendant's track on Twenty-fourth street near Willis avenue; that the car approached him from the south at such a high rate of speed that he was unable to cross the track without being struck by the car; that, while he was in the act of stepping back from the track, he was suddenly struck on the leg by the car fender, and the left side of his face came in contact with the car; that he was thereby knocked down, and his right hand bruised by the car wheels, so that it became necessary to amputate two fingers; that at the time of the accident it was dark, and the street was lighted by an arc lamp suspended over the center of the intersection of Twenty-fourth street and Willis avenue; that, but for the negligence of the motorman, he might have seen and discovered plaintiff's presence and stopped the car; that the motorman negligently omitted to sound the gong or to give plaintiff any warning of the car's approach; that plaintiff was walking north, with his back toward the approaching car, and was unaware of its approach, and, but for the motorman's negligence, he could have stopped the car before the accident; that, if the motorman had

dropped the car fender, the injury would have been avoided; that plaintiff is thereby permanently disabled, and for two months has been unable to earn wages, and has expended $50 for medical attention, by reason of the injury, and is damaged in the sum of $5,000.

The defendant's answer, in substance, alleges that it operates a double line of electric street railway cars on Twenty-fourth street; that the north-bound cars pass along the east track and the south-bound cars pass along the west track at frequent intervals, all of which plaintiff well knew; that at the time of the accident plaintiff, without looking or listening to discover the approach of a car, carelessly and negligently, while crossing the street diagonally, and without exercising ordinary care, stepped up to the west rail of the east track at a time when a car was passing north thereon, and thereby came in contact with the front end of the car, but back of the vestibule thereof. Defendant denies that the motorman saw plaintiff at the track long enough before the accident to stop the car; alleges that prior to the accident, and as soon as he observed the dangerous position of plaintiff, the motorman sounded the gong, and stopped the car as soon as it was possible to do so; that when plaintiff approached the west rail of the east track he was within 6 or 7 feet thereof, and in front of the approaching car, and that it was impossible to stop the car within that space; that there was no reason why plaintiff could not have seen the approaching car; that the headlight was lighted, and within the car was lighted with electric lamps, and was thus plainly visible to plaintiff for a distance of several blocks; that when the accident occurred the car was running at the ordinary rate of speed; that plaintiff was intoxicated at the time, which was then unknown to defendant, its agents and servants. The defendant denies generally the averments of the petition that are not specially denied in the answer, and alleges that whatever injuries the plaintiff sustained were the result of his own negligence.

The plaintiff, in his reply, admits that he was intoxi-

cated when in the act of crossing the street at the time the injury occurred, and alleges that just before the accident his movements and acts clearly indicated his condition, and that the motorman by the exercise of reasonable and ordinary care and diligence could have discerned that he was intoxicated. He denies generally the allegations of new matter in the answer.

Twenty-fourth street in the city of Omaha extends north and south, and it is undisputed that defendant maintains thereon two parallel street railway tracks where its electrically propelled cars run at frequent intervals, the north bound cars running on the east track, and the south-bound cars running on the west track, and that the scene of the accident complained of is located on Twenty-fourth street near the intersection of Willis avenue, where a lighted electric arc lamp was suspended at the time plaintiff was injured. It is also undisputed that on the night and at the hour in question it was dark, cloudy and misty and had recently been raining. It is likewise without dispute that at about 9 o'clock in the evening of the accident plaintiff left a saloon on the west side of Twenty-fourth street, and about two blocks south of where the accident occurred, and that he was then intoxicated.

Plaintiff testifies that when he left the saloon he walked north on the west side of Twenty-fourth street about two blocks, when he left the sidewalk and started to cross the street in a diagonal direction, and just before he reached the middle of the street he turned to the north and walked in that direction between the east and west tracks about 60 feet, when he heard the approaching car, and, suddenly realizing that it was just behind him, he turned to get out of the way, when the car fender, which had not been lowered, struck the inside of his left leg about midway between the ankle and the knee. He says the blow threw him toward and in collision with the car, the latter as it approached coming in contact with his face with such violence that he thereby became unconscious. He testifies that the injury to his leg was such that it was black and

blue, and that it caused him to limp for about two weeks. As a result of the blow, he says he fell in such a way that the wheels of the car ran over the first and second fingers of his right hand, so that it became necessary to amputate them. He does not know anything about the rate of speed at which the car was running, and says he heard no warning. On cross-examination he admits that a car approaching the point of the accident from the south can be seen for a distance of about five blocks, and that, if he had looked in that direction, he thinks he could have seen the car, and says he knew the cars passed there every few minutes, but he did not think about it at that time. It is in evidence that plaintiff's hearing and eyesight are good.

F. Gilliam testified, on the part of plaintiff, that he was in the saloon for about an hour before the plaintiff's departure, and saw him go away intoxicated; that one William Holmes, who was in charge of the saloon that evening, requested him to follow the plaintiff and see that he reached his home safely; and that, in pursuance of Holmes' request, he left the saloon about 5 minutes after plaintiff, and followed him, but at a distance of about one block behind, and, gaining on him, saw plaintiff start to cross Twenty-fourth street in a northeasterly direction. Gilliam says he was a little over half a block away when the accident occurred, but that he shortly thereafter arrived at the scene, and overheard a statement made by some one to the effect that he had "run over him all right enough," to which some one replied, "I told you you would run over that drunken man," or words to that effect. He does not profess with certainty to identify either spokesman, but thought one of them was an employee of the company. When the car stopped he says it was about three car lengths beyond the point where the accident occurred and where plaintiff was lying. He says he did not hear the gong sounded.

Five or six witnesses were called by defendant, who were present immediately after the accident occurred, and

they testified that they had no recollection of seeing Gilliam there at the time. Witness King, the motorman, and witness Mason, who was with him, testified that they did not use the language imputed to them by Gilliam, nor did they hear the language or the import thereof repeated by any person. Holmes denied that he ever requested Gilliam to follow the plaintiff, and testified that he did not know when Christensen left the saloon. The material part of Gilliam's testimony is uncorroborated, and its probative value before the jury was evidently destroyed by the testimony of several witnesses who knew him, and who testified that his general reputation for honesty, truth and veracity in Omaha was bad. That the jury refused to consider his testimony is established by the affidavit of one of plaintiff's attorneys, who says that after the trial several of the jurors who sat in the case so informed him, without any solicitation.

W. E. Mason, a former motorman in the employ of defendant, testified that at the time of the accident he was a passenger, standing in the left side of the vestibule with the motorman who was running the car, and that he was looking ahead. He says the tracks were damp and wet, a condition that makes it difficult to make a quick stop. He saw plaintiff coming from the northwest and proceeding to the southeast between the east and west tracks, and when within about two feet of the car halted, and then lunged forward, when the front corner of the car just behind the vestibule struck him, and he fell. He says that when plaintiff halted he called out to Mr. West, the motorman: "Hold on! There comes a drunk"—and that the motorman shut off the current, tapped the gong, and immediately applied the brakes, and that the car came to a sudden stop. He says he was not talking to the motorman. He testified that plaintiff was not on the east track at any time before the accident, and that the fender did not strike him. When the car stopped he says plaintiff was lying near the trucks of the rear wheels. Dr. Adams, now a practicing physician, testified that on the night of

the accident he was the conductor of the car that inflicted the injury, and says that just before the accident he heard the gong, and that the car came to a stop so suddenly that it threw him forward, and that when it stopped plaintiff was lying even with the back platform. C. H. Peterson, a teamster, was a passenger, riding on the rear platform, and says he heard the gong sounded, and the car stopped so short that it threw him from the rear rail of the car to the platform. Dr. Ellis, the physician who attended plaintiff after he was injured, testifies that he discovered upon the person of his patient no injuries except the injury to his hand and the one on the left side of his face, and he does not recall that any complaint was made to him of any others. He says he made a careful examination of plaintiff for the purpose of discovering the extent of his injuries, and did not find anything aside from those mentioned that were sufficient to attract attention. G. M. King, now a carpenter, was the motorman on the car with which plaintiff came in contact. He says the evening was cloudy and rainy, and that the electric headlight of the car was lighted, and the interior was illuminated by the electric lamps. He corroborates the testimony of witness Mason with reference to his position and opportunity to observe the objects which the car approached, and says that just as they arrived under the arc light Mason said, "Look out!" and just about at that instant he saw plaintiff to the left of the track, and that he immediately shut off the power and reversed his car and put on the brake, struck the gong, and let down the fender. He says that he did not see anything about plaintiff to indicate that he was under the influence of liquor at the time, and that he, the motorman, was looking straight ahead when Mason made the exclamation. He says the fender of the car did not touch the plaintiff, and when the car stopped he was lying on the street opposite the rear trucks. The conductor and three or four witnesses testify that the car was running at the rate of about ten or twelve miles an hour when the accident occurred. It is established by the

testimony of several witnesses that at the point of the accident and for several blocks to the south of it the street is almost level.

Plaintiff makes complaint of several of the instructions given by the court, but, in the present state of the record, we cannot consider them because we are unable to discover from the record how the jury would have been justified in rendering any other verdict than the one it did render.

He also complains that the trial court erred in overruling his motion for a new trial on the ground of newly discovered evidence. We have examined this point, and believe the ruling of the trial court in this respect is without error. The newly discovered evidence, as shown by the record, is mostly cumulative, and besides plaintiff does not show that he did not know that one of the main witnesses upon whom he relies was about to leave Omaha, and that he did not, with that knowledge, have sufficient time before the witness departed to take his deposition. The record fails to disclose that diligence on the part of plaintiff that would entitle him to a new trial on the ground of newly discovered evidence. The testimony which he says he expects to procure was discovered by him within a few days after the return of an adverse verdict, while the record discloses an interval of more than a year intervened between the date of the accident and the trial. *Smith v. Graves,* 24 Neb. 545. One of the witnesses whose testimony plaintiff desires to procure has already contributed to the record two or more conflicting affidavits, and it is shown the testimony of this witness would be opposed to that already given by plaintiff upon a material point. *St. Paul Harvester Co. v. Faulhaber,* 77 Neb. 477.

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

AFFIRMED.

NELSON KUTCH, APPELLEE, V. ANNA KUTCH, APPELLANT.

FILED DECEMBER 23, 1909. No. 15,802.

1. **Marriage:** ANNULMENT: BURDEN OF PROOF. In an action brought to annul a marriage on the ground of fraud, the burden is on plaintiff to establish the fraud relied upon by him to effect the annulment.

2. ———: ———: EVIDENCE. The evidence examined and discussed in the opinion *held* insufficient to sustain the judgment of annulment of the marriage.

APPEAL from the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

*O. A. Abbott* and *J. H. Edmondson,* for appellant.

*Charles P. Craft* and *J. H. Grosvenor, contra.*

DEAN, J.

Nelson Kutch, plaintiff and appellee, who is hereinafter called plaintiff, was married to Anna Kutch, the defendant, at Seward, Nebraska, on October 16, 1907. The plaintiff commenced this action on January 23, 1908, to annul the marriage, and recovered judgment, from which the defendant appeals.

The petition, in substance, alleges that plaintiff and defendant are 81 and 33 years of age, respectively; that plaintiff is the owner of real and personal property of the value of $6,000; that his physical and mental condition is greatly impaired by reason of age, and that defendant wrongfully conspired with her mother, Caroline Newman, in the summer of 1907, to bring about the marriage of plaintiff and defendant to the end that defendant might become the owner of his property; that false representations were made by defendant and Mrs. Newman to plaintiff with respect to alleged unkind expressions that were made concerning him by his children and relatives to the effect that they desired his death that they might

inherit his property; that defendant informed him that, if she remained unmarried and took care of her mother during her lifetime, the latter would give to her the house and lot, of the value of about $2,000, where the two ladies lived alone in Aurora, but that, if she married, she would only share equally with other heirs in her mother's estate; that she thus prevailed upon plaintiff to make a deed to her of a house and lot in Aurora of the value of about $2,000 and to give to her $307 in cash, in consideration whereof, and as a recompense to reimburse her for the property she would otherwise have received from her mother if she remained unmarried, she agreed to marry plaintiff; that he believed and relied upon the representations made to him by defendant; that she at all times refused to live with plaintiff or to consummate the marriage, and at the time of the marriage was and now is physically incapable.

The defendant's answer denies generally all of the material allegations of the petition, but admits the marriage and the receipt of about $300 from plaintiff. As a reason for refusing to assume marital relations with her husband immediately after the marriage, she alleges, in substance, that some of his relatives, two days previous to the marriage, commenced an action in Hamilton county for the appointment of a guardian for plaintiff, and that, upon the advice of counsel and of friends, it was deemed imprudent for her to assume such relations with him until the determination of the guardianship proceedings. She pleads as a reason for her refusal to consummate the marriage immediately upon the preparation of their new home that it was owing to her over exertion in preparing the home for occupancy before moving therein, and that she thereby became tired, worn out and suddenly ill, and for that reason alone declined to accede to his request during such illness. She alleges plaintiff has abandoned the home furnished and prepared by the parties hereto, and that he has since refused to occupy the home and live with her therein, or to furnish her with means of sup-

port. She charges on information and belief that the pending suit was commenced and is maintained by one M. D. James, a son-in-law of plaintiff, who has conspired with other relatives of plaintiff to have him leave their home and remain separate and apart from her.

The plaintiff's reply is in the usual form, and denies all allegations of new matter in the answer.

The record herein is voluminous, and the case has been ably presented and argued on both sides. Upon examination of the pleadings and the testimony and the law applicable thereto, we conclude the contention of the learned counsel for plaintiff cannot be sustained. The proofs show, in substance, that plaintiff and defendant were married at Seward on October 16, 1907, and that plaintiff's first wife died about two years before that time. The defendant was a single woman, living with her widowed mother upon property owned by the latter in the same block and adjacent to residence property owned by plaintiff. After the death of his first wife plaintiff made his home with a married daughter in Aurora some distance away from the residence of defendant. The care of his property required his frequent presence on the premises, and its proximity to the residence of defendant and her mother, Mrs. Newman, naturally brought the parties together, and, as the record discloses, on terms of social equality. The testimony of the old gentleman shows that he began calling on the defendant at the Newman home in June, 1907, and that his visits were sufficiently frequent and extended to indicate that he entertained an unusual regard for her, and that he kept company with her from four to six weeks before the subject of marriage was discussed between them. He testifies that both defendant and her mother advised him that, if he would marry, it might prolong his life 15 or 20 years, and that Mrs. Newman assured him that Anna would be a suitable wife. He says that, when he proposed marriage, defendant told him she was not then at liberty to decide because her mother had promised to give to her the house

and lot where they lived and $2,000 if she would remain unmarried and live with her until the old lady died, and that, if she married plaintiff, he would have to give her as good a house and lot as her mother's property which she would lose because of the marriage, and that the only reason she was requiring this of plaintiff was that she might have a home if he died before her. The plaintiff testifies he had some misgivings about his ability to support her, and that he told her so, but that after they had together taken an invoice of his property it was found to be ample to warrant their venture into the domain of matrimony. He testifies he had an agreement and property settlement with defendant, and that he gave a deed to her of town property worth about $2,000, in considera- of marriage, but refused to accede to other requests made by her upon his bounty. When he asked defendant if she demanded that a deed for the house and lot be executed by him before the marriage, she answered in the affirmative, and the next day he executed the deed, and a few days thereafter under his direction it was recorded. He went before the county judge in Aurora in the forenoon of October 14 to procure a marriage license, and the judge refused to issue it. Elsewhere in the record that official testifies that he had been informed by a relative of plaintiff in the morning, just before plaintiff's arrival, that guardianship proceedings were about to be instituted against him. Failing to secure the marriage license plaintiff returned to the Newman home, and informed defendant and her mother of the situation, when the suggestion was made that plaintiff and defendant go to a neighboring town, procure the license, and be married there. They then went to Seward, where the license was obtained and the marriage ceremony performed. Before starting to Seward plaintiff gave to defendant $307 and asked her to take care of it for them. After the marriage they returned to her mother's home, and Anna told plaintiff, he testifies, that she did not believe they ought to live to-

gether until after the guardianship proceedings concerning him were settled, which his children had commenced in the county court, whereupon he returned to his daughter's home. He testifies that upon one pretext and another defendant has always refused to live with him as his wife or to consummate the marriage relation. Plaintiff admits on cross-examination that he went to their home on one occasion not very long after the marriage, and finding defendant alone requested her to step into another room to procure for him an article of wearing apparel, and that, when she started to enter the room, his son-in-law and several other men came into the house and began taking up the carpets preparatory to removing them and the furniture therefrom. He admits that he said nothing to his wife on that occasion about living with him, but that "he had proposed to her once, and it was her turn."

The defendant testified that she never sought the company of plaintiff, but that he continually sought her out. She denies that her mother ever said anything in her presence to plaintiff upon the subject of marriage or with respect to any of the arrangments which preceded that event. She says she told him, when he asked her to marry him, that she thought it would be foolish to give up the certainty of her present home with her mother without an assurance that she would have a home in case she married plaintiff and survived him. She testifies that he commended her prudence in this respect, and without solicitation offered to give her the choice of two residence properties that he owned, and that she selected property that was adjacent to her mother's residence, and that plaintiff told her that he ought to give to her more property, and that she refused to accept it. She denies that she ever requested $2,000 of plaintiff, or any other sum of money. She testifies that for about a week before they were married plaintiff importuned her daily to permit him to procure a license and wed her at once, and that, after the writ in the guardianship proceeding was

served on plaintiff, he said: "We will have to go ahead and head them off some way. This certainly don't hold good every place. As long as we have gone as far as we have and you have consented to be my wife, I am going to carry out the marriage if you will stay by me." And she says that it was solely upon his suggestion and importunity that they left Aurora to be married. She testifies that, upon their return to her mother's home the evening of their wedding day, plaintiff, after dinner, proposed to go to his daughter's, where he had been living, to do his evening chores, and that she then asked him if he did not think it would be better for him to remain at his daughter's home that night, because she thought it would be advisable first to know the nature of the proceedings that had been instituted against him before living with him as his wife, and also because their new home would be ready in a few days. Shortly thereafter plaintiff insisted that they live together, but she testifies that she thought it only decent, proper and modest to remain in her mother's home until the suit against him was dismissed. She says plaintiff told her that the children were about to settle the guardianship proceedings with him, but that he was first compelled to have his property placed so that he could not get hold of it. She testifies, in substance, that she overexerted herself in preparing the new home for their occupancy and in putting down carpets and the like, and that in the evening of their first day in their home he demanded that she then consummate the marriage, and that she declined to do so because of her overwrought condition and because she was ill. She says that to this he took serious exceptions, and told her, in substance, that, if she then refused his demands, he would begin legal proceedings to effect a separation, and just before leaving the house he told her that, if she ever wanted to see him again, she would have to send for him. Mrs. Newman denies that she ever talked with plaintiff on the subject of marriage, and testifies that she knew nothing of his marital intentions until a short time after

he executed the deed of the property to her daughter, and says that for many reasons she always opposed the marriage. She denies with some show of indignation that she ever commended her daughter to plaintiff as a suitable person for his attention, and says that she never spoke approvingly of her daughter to him until after the marriage when she told him that Anna was a good cook and a good housekeeper.

The parties to this action and their families are not strangers to each other nor to the locality in which the suit is brought, both families having lived in Hamilton county more than 25 years. It is in evidence plaintiff and defendant have been acquainted about five years, and during that period both lived in Aurora. The children of plaintiff, and other relatives, and several disinterested witnesses who had known him for many years testified with regard to his mental capacity to transact business on and for some time prior to the date of the marriage. On the part of plaintiff, the testimony that was intended to establish this feature of the case is far from satisfying, while, on the part of defendant, the fact is fairly brought out by his banker and other witnesses who had no interest in the result of the suit, and who had known him for a long time, that he did not appear to be disqualified in this respect. It is, however, fairly established that both his hearing and eyesight were considerably impaired. The direct examination of plaintiff covered a wide field, and in the cross-examination no details seem to have been omitted by defendant's counsel. The ordeal seems to have been severe, but he sustained himself well throughout. His testimony fails to sustain the allegations of the petition or the argument of his counsel with respect to the decrepitude and senile decay of their client.

Section 2, ch. 25, Comp. St. 1909, is as follows: "In case of a marriage solemnized when either of the parties are under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards,

or in case the consent of one of the parties was obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be deemed voidable." Disparity in the age of the contracting parties is not given as one of the statutory causes for the annulment of the marriage. It may be that the mating of the pair in question is not such as would have been made by the court if the responsibility of making the selection devolved upon that tribunal, but we do not believe courts of equity are clothed with power to annul a marriage merely because of a marked difference in age. In the marriage relation there is no inequality that is so embarrassing in the unfortunate situations it entails as disparity of disposition and temperament. The marriage in question may have been unwise, and to the court may have appeared foolish, but the record discloses an entire absence of proof of force or fraud exercised by the defendant, or by any person in her behalf, to induce plaintiff to marry her. Plaintiff's counsel argue that defendant is impotent, and thus perpetrated a fraud upon their client; but Dr. Steenburg overcomes this argument when he testifies that she is competent to perform the duties of a wife.

The record discloses the children and relatives of plaintiff maintain he is an incompetent person, and it shows they began proceedings to have him legally declared incompetent and to have a son-in-law of plaintiff appointed his guardian. It is also shown that while the guardianship proceedings were yet pending in the county court his children accepted a deed from him, with a life estate reserved, conveying to them jointly all of the real estate that he owned. They then procured his signature to an instrument empowering a son-in-law to take charge of all of the remainder of his property, collect the rents and the like. With this accomplished, the dismissal of the guardianship proceeding by the children promptly followed, thus suggesting the thought that the charge preferred by them against their aged parent was used

perhaps as a convenience for the attainment of a questionable end.

There is not a trace of testimony to show the defendant at any time was guilty of an immodest act. No fraud appears from the record to have been perpetrated by her. She does not seem to have coerced the plaintiff. The advances and overtures seem to have proceeded from her admiring suitor. With commendable frankness he testifies that in June, when the courtship began, he called at defendant's home, and after a prolonged visit she, at his request, plucked a flower for him from a vase, and when she stepped toward him with it he encircled her waist with his right arm, and said: "Anna, you are the flower I want." The record seems thus fairly to reflect the aggressive determination of plaintiff to win the affection of defendant that is disclosed in the tender sentiment to which he says he gave expression.

Some text-writers and adjudicated cases have been cited by plaintiff, but they seem to us to be inapplicable to the present case, because the citations are for the most part with respect to marriages in which the element of either fraud or force prominently appears, both of which seem to be lacking in the case before us. It is elementary that fraud is never presumed, but must be clearly proved by the party asserting it. We have examined the record carefully, and conclude plaintiff's action cannot be sustained.

The judgment of the learned trial court must therefore be, and it hereby is, reversed and the cause remanded.

REVERSED.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1910.

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SWAN ANDERSON, APPELLEE, V. PETER CARLSON, APPELLANT.

FILED JANUARY 5, 1910. No. 15,881.

**Appeal:** DISMISSAL. In order to give the supreme court jurisdiction of a cause on appeal from the district court, it must appear from the record that a judgment and final order was entered by the court from which the appeal is taken. When such judgment is not shown, the appeal will be dismissed as having been prematurely taken.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Appeal dismissed.*

*Wilbur F. Bryant* and *Peter H. Peterson,* for appellant.

*R. J. Millard, contra.*

PER CURIAM.

This was an action of forcible entry and detainer, instituted in the county court of Cedar county. The cause was appealed to the district court, and a jury trial was there had, which resulted in a verdict finding the defendant guilty. The record fails to show that any judgment was rendered thereon, or any final order of any kind entered. This being the state of the record, there is nothing upon which this court can act. The appeal is therefore dismissed as prematurely taken.

DISMISSED.

J. H. TEASDALE COMMISSION COMPANY, APPELLANT, V. SOLOMON C. KECKLER, APPELLEE.

FILED JANUARY 5, 1910. No. 15,602.

1. **Appeal:** CONFLICTING EVIDENCE. Where the testimony of witnesses adduced in the trial of a cause to a jury is conflicting, the verdict will not ordinarily be set aside, as the jurors are the sole judges of the weight of the evidence.
2. **Sales:** INSTRUCTIONS. The instructions given by the court to the trial jury examined, but not set out in the opinion, *held* to have been a fair submission of the issues and questions of law, and no prejudicial error is found.

REHEARING of case reported in 84 Neb. 116. *Former opinion vacated and judgment of district court affirmed.*

REESE, C. J.

This case is resubmitted upon a rehearing. The original opinion is reported in 84 Neb. 116. The statement of the facts deemed by the commissioner to be essential to a proper understanding of the case is contained in the opinion, and is correct. But, upon a re-examination of the record, we are persuaded that, in a limited number of instances, the statement is hardly complete. On the trial the defendant testified that in the conversation had with Thatcher over the telephone on the 3d day of December, the day after the receipt of the card-bid, he stated to Thatcher that he would fill the bid provided he could obtain the necessary cars in which to ship the grain. Thatcher admitted the fact of the conversation, but claims, and testified, that the acceptance by defendant was unconditional. The evidence is clear, and the fact undisputed, that the Missouri Pacific railroad is the only one operating through Manley, where defendant had his grain, and his place of business; that the railroad company did not furnish a sufficient number of cars to meet the demands of shippers, and that that condition had existed for some time prior to the receipt of the card-bid and the

conversation over the telephone wire. Defendant also testified that Thatcher replied that he would have to submit the matter of the conditional acceptance to plaintiff. If the testimony of defendant was the truth, and of that the jury were the sole judges, the contract was indefinite and made to depend upon the condition, and therefore, even had it not been void under the statute of frauds, there was no agreement to furnish any specific number of bushels. It is true the corn which defendant subsequently shipped took the contract out of the statute, yet, if the condition existed at all, it was carried throughout the whole transaction, and the number of bushels agreed upon were still subject to the condition. It appears that when Thatcher sent his telegram to plaintiff reporting the purchase he said nothing about any condition, but reported the purchase as unconditional. On the receipt of the telegram from Thatcher, plaintiff mailed to defendant the confirmation of the purchase. It is to be noted that this letter contained terms which were not mentioned between Thatcher and defendant. Defendant did not respond to the letter by signing the contract. He never at any time signed any memorandum or note by which he was obligated. He testified that at or about the time of the shipment of the corn furnished by him he wrote plaintiff a letter, in which he said, in substance, that the grain was furnished on the contract; that he had had trouble in obtaining cars; that he had other sales he could not fill, but, if he received the cars, he would fill plaintiff's order. Plaintiff denies having received the letter, but defendant testified that it was duly addressed, stamped and posted in the mail; that his return card was on the letter, and that it was never returned to him by the postal department of the government. This also presented a question for the consideration of the jury. Again, defendant testified that on the day he shipped the car-load of corn, by which it is claimed by plaintiff that he validated the contract, he called plaintiff's agent, Thatcher, by telephone and advised him of the shipment; that the confirmation

which he had received of plaintiff did not conform to the agreement and that it should be corrected, and that Thatcher said he would write plaintiff and have the correction made. By a liberal construction of Thatcher's evidence, which was by deposition, we might probably be justified in saying that this part of defendant's testimony was denied and contradicted by him, and yet the question of the truth of defendant's testimony was for the consideration of the jury alone.

Objection is made to the instructions given by the court. We have carefully examined them, and are persuaded that there was no prejudicial error in giving those submitted to the jury, nor in refusing those asked by plaintiff. It could subserve no good purpose to set them out here. Those given are believed to be correct statements of the law, and fairly covered all the issues of the case.

As we view the case, it rested upon the question of the veracity of the witnesses. That whole subject was for the jury. Their verdict in favor of defendant was a finding in his favor upon the controlling questions in the case. If it were true that the original agreement was made to rest upon the condition named and no change was made therein, that the condition failed, that defendant gave plaintiff notice of his (defendant's) reliance upon the terms of the contract, the verdict was right. The jury being the triers of the facts, with sufficient evidence to support defendant's theory, their verdict ought to be considered as final, and the judgment should not have been reversed.

The former decision is therefore vacated, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

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

FILED JANUARY 5, 1910. No. 15,894.

1. **Brokers:** ACTION FOR COMMISSION: EVIDENCE. Plaintiff and defendant entered into a written contract by which defendant employed plaintiff as a real estate agent to sell certain lands. The contract contained a clause that if the agent should sell said property, or be in any manner instrumental in selling the same, he should receive a stipulated compensation. Plaintiff advertised the property by the distribution of circulars, one of which he sent to another real estate agency in a distant part of the state, and by and through whom a person was found who, after failing to exchange farms with the owner, finally purchased it. *Held*, That, under the contract and contradictory evidence submitted, the jury were justified in finding in favor of the plaintiff.

2. **Trial:** INSTRUCTIONS. The cause being tried upon the theory that the contract furnished the basis of plaintiff's action, it was competent for the court to instruct the jury with reference thereto.

3. **Appeal:** CONFLICTING EVIDENCE. Where the testimony of witnesses is conflicting, the weight to be given to that of any witness is for the jury alone, and their finding thereon is binding upon the court.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*R. L. Keester*, for appellant.

*John Everson, contra.*

REESE, C. J.

This is an action for the recovery of commission as a real estate agent or broker. The land was listed with plaintiff for sale by a written contract creating the agency, and contained a clause that if the agent should "sell, or be in any manner instrumental in selling said property during said time, I will pay him commission thereon at the rate of 5 per cent. on the first one thousand dollars and 2½ per cent. on each additional dollar to the amount of the sale." The evidence shows that plaintiff advertised

the land by use of circulars, which he sent to different persons, and among whom was a firm of real estate agents at Wood River, in this state. From this arose a correspondence between plaintiff and the firm referred to, in which plaintiff was advised that a person (Mr. Collins) living near Wood River was the owner of a desirable farm which he would exchange for one more suited to his needs. Collins came to Alma, the place of residence of plaintiff, and was, by plaintiff, sent to view defendant's land. He made the proposition of exchange, but this was declined by defendant. He then went away. It appears that, from a hasty and superficial view of the property, he was favorably impressed with it, but could not, or would not, purchase until he had disposed of his farm near Wood River, which he soon thereafter sold through the agency at that place above referred to, and through which he kept up his correspondence with plaintiff, they notifying the latter that Collins was now ready to purchase, and inquiring if defendant's farm was unsold and yet on the market. Plaintiff answered both inquiries in the affirmative, and Collins came to the neighborhood of defendant's farm in search of a desirable location. He brought with him a letter to plaintiff from the Wood River agents, but did not deliver it. In the meantime defendant had, by verbal directions, authorized others to sell the land, and among whom were Waters & Martin of Stamford, near which the land was located. On the 28th of November, 1904, the agency at Wood River wrote the Stamford Bank, of which Waters was an officer, calling attention to Collins' farm, and giving a description of it and the price at which it was held. We find no other correspondence between them until February 8, 1905, when Waters wrote the agents at Wood River, calling their attention to defendant's farm and giving a description of its location, quality, etc. On February 28, 1905, they informed the bank, by letter, that their client would start in a short time in search of a farm. The written contract of employment between plaintiff and defendant was entered

into in the fall of 1904, and from December 29 of that year to April 15, 1905, the correspondence between plaintiff and the Wood River agency appears to have been kept up. In June, 1905, Collins came to Stamford with the purpose of again viewing defendant's farm, and was furnished a conveyance thereto by Waters & Martin. He purchased said farm, the defendant returning with him to the Stamford Bank and closing the sale. Defendant was informed by plaintiff that the commission would be expected. Waters & Martin also claimed the commission. Defendant refused to pay either, but was willing to pay the party entitled to the same. Waters & Martin indemnified him against plaintiff's demand, including all costs and expenses, when he paid the money to the Stamford Bank. This action was soon thereafter commenced, and is in reality a suit between plaintiff and Waters & Martin. A jury trial was had in the district court, which resulted in a verdict and judgment in favor of plaintiff. Defendant appeals to this court.

In the foregoing statement of facts we have aimed to state those which are not controverted. There was a sharp conflict upon many important elements of the case, but of which the jury were the sole judges. That the contract made with plaintiff by defendant was an improvident one might be conceded, but it does not follow that it is not binding, and it cannot be questioned but that plaintiff was in some manner "instrumental in selling said property." Aside from this we might have serious doubts as to the plaintiff's right to recover, and yet we could not disturb the verdict of the jury upon the conflicting evidence.

Complaint is made that the trial court erred in refusing to give each of ten instructions presented by the defense. It would serve no good purpose to set them all out here, and we must be content with saying that the principles contained in many of them were included in those given by the court upon its own motion, and in some the provisions of the contract of employment were lost sight of.

We are unable to find reversible error in this action of the court.

It is also contended that the court erred in giving instruction numbered 6 of those given. In that one the jury were instructed that if they found that plaintiff was instrumental in finding a purchaser, and aided and assisted in making the sale, or that he found the purchaser with whom defendant himself consummated the sale, he would be entitled to the commission as provided in the contract; that it would be sufficient if through his influence or agency the parties came together and entered into negotiations which ended in making the bargain; that it was not necessary for plaintiff to be present at the close of the sale; that he earned his commission if he found the purchaser who bought the land as a result of his efforts. While this instruction might possibly be open to criticism in the absence of a contract of the kind entered into, yet it was in accord with it, the execution of which could not be questioned, and therefore was not erroneous. It is not within the province of the courts to make contracts between litigants, but to enforce them if legal and not unconscionable. The free agency of contracting parties, so long as their contracts are legal and binding, must be recognized.

No reversible error being shown in the record, the judgment of the district court is

AFFIRMED.

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OHIO NATIONAL BANK, APPELLANT, V. GILL BROTHERS ET AL., APPELLEES.

FILED JANUARY 5, 1910. No. 15,873.

1. **Notes:** ACTION: BURDEN OF PROOF. In an action on a promissory note declared upon in the usual form, the answer being a general denial, the burden of proof is on the plaintiff to show the execution and delivery of the instrument sued on, and evidence

in defense tending to show a material alteration of the note after its execution and delivery does not shift the burden of proof to the defendant.

2. Appeal: CONFLICTING EVIDENCE. A verdict of the jury in an action at law rendered on conflicting evidence will not be set aside by a reviewing court.

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

*R. R. Dickson,* for appellant.

*R. M. Johnson* and *M. F. Harrington, contra.*

BARNES, J.

The plaintiff, who is the appellant here, commenced this action in the district court for Holt county to recover a balance due upon a negotiable promissory note, executed and delivered on the 8th day of July, 1903, by the defendants to McLaughlin Brothers, for the sum of $1,000, with interest at 6 per cent. per annum, payable on the 1st day of July, 1905. The petition is in the usual form, and alleges that the plaintiff purchased the note in due course of business, before due, for a valuable consideration, and without notice of any defense thereto, and was at the time of the commencement of this action the owner and holder thereof. All of the defendants except Gill Brothers answered plaintiff's petition by way of a general denial. The answer of the Gill Brothers, in addition to a general denial, alleged that proceedings in bankruptcy were pending against them in the district court of the United States for the district of Nebraska. There was a proper reply, and upon the issues thus joined a trial was had to a jury. There was a verdict and judgment for the defendants, and plaintiff has appealed.

It appears that to maintain the issues on its part the plaintiff introduced the deposition of Robert McLaughlin, a member of the firm of McLaughlin Brothers, the payee named in the note. He testified that the note was given

to him for McLaughlin Brothers, by the defendants, in part payment for a horse which he sold to the defendants at the time of its execution; that he saw each and all of the defendants sign the note in suit, and that it was then in the same condition as it is now. The plaintiff also showed, by competent evidence, that it purchased the note several months before it became due and paid the sum of $1,028.39 to the McLaughlin Brothers therefor, in the usual and ordinary course of business and without notice that any defense could be made thereto. Thereupon the note was introduced in evidence, which appears regular upon its face and bears no evidence of having been changed or altered in any respect. Evidence was also produced showing that no part of the note had been paid, except the sum of $66.66, which appears to have been paid by one John Higgins, and that the amount due from the defendants to the plaintiff was $933.34, with interest thereon from July 1, 1905. The plaintiff thereupon rested its case. and the defendants thereafter, to maintain the issues on their part, testified, in substance, that at the time they signed the note the words "or order" had been stricken out in some manner, either with a pencil or pen and ink, or otherwise, so that the note they executed and delivered was nonnegotiable, and that, if the note in suit was the one they signed, it had been altered and materially changed, in that the words "or order" now appear therein. Two of the witnesses testified that they never signed the note, but the others admitted their signatures, and relied for their defense upon the fact that it had been altered and materially changed, as above stated.

With the evidence in this condition, the district court instructed the jury as follows: "3. The jury are instructed that plaintiff sues these defendants to recover upon a promissory note, which he alleges they signed, and which the plaintiff alleges was in the following language, words and figures at the time defendants signed it, to wit: '$1,000. Stuart, Neb., July 8, 1903. On July 1, 1905, after date, for value received, we jointly and sev-

erally promise to pay to McLaughlin Bros., or order, one thousand dollars, at the Stuart Bank, of Stuart, Neb., with interest at 6 per cent. per annum, payable annually. Gill Bros., Charles Vollmer, Joe Verzal, E. Jacobs, Pling Kingsbury, J. F. Root, J. O. Root, A. L. Thomson, C. B. Parrish, Calvin Allyn, Louis Brodie, P. H. Mulford.' The jury are instructed that the burden of proof is on the plaintiff to prove that the note which they signed contained the words and language above stated. The plaintiff must prove by a preponderance of the evidence that at the time the defendants signed and delivered the three notes, which they say they signed, the words 'or order' were actually therein, and had not been marked out. (Plaintiff excepts.) W. H. Westover, Judge."

It is contended that the court erred in giving this instruction; that while, under certain circumstances, such an instruction might be proper, yet, in view of the evidence and the issue as made by the pleadings in this case, it was reversible error to so instruct the jury. No objection was made to the introduction of the testimony of the defendants that the note in suit had been changed or altered, as not being admissible under a general denial, and we have held that such evidence may be received under that issue, as we shall presently see. It is true that in *McClintock v. State Bank,* 52 Neb. 130, it was said: "Where the defense to a suit on a promissory note is that the same had been materially altered after its execution and delivery, the note itself not disclosing any evidence of such alteration, the burden of proof is upon the party alleging such alteration to establish the same by a preponderance of the evidence." It appears, however, that the defendant in that case, by his answer, assumed the burden of proof by alleging a material alteration of the note as an affirmative defense. In *Colby v. Foxworthy,* 80 Neb. 239, defendant also assumed the burden of proof by alleging a material alteration of the instrument, so those cases do not sustain the plaintiff's contention. On

the other hand, the rule announced in 8 Cyc. 202, is that under a general denial proof of alteration after delivery is admissible. In *Gandy v. Estate of Bissell,* 72 Neb. 356, we held that a fraudulent alteration of the note sued upon may be shown under the general issue. In *Walton Plow Co. v. Campbell,* 35 Neb. 173, which was an action to foreclose a real estate mortgage, and the petition alleged the execution and delivery of the note, to secure which the mortgage was given, and set out a copy of the note, it was held that evidence showing the note had been materially altered after its execution was admissible under an answer denying each and every material allegation contained in the petition. Keeping in mind the rule that the form of the pleadings ordinarily determines which party has the burden of proof, we are constrained to hold that, under the issues in the case at bar, the instruction complained of is not open to the objection urged against it and does not warrant us in setting aside the verdict.

It is also contended that the verdict is not sustained by the evidence. On the question of the material alteration of the note the evidence is conflicting, and whatever our opinion may be as to the merits of controversy, we cannot, without violating a long-established and well-settled rule of this court, disturb the verdict of the jury.

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

AFFIRMED.

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EFFIE M. HERMAN, APPELLEE, V. GEORGE BARTH ET AL., APPELLANTS.

FILED JANUARY 5, 1910. No. 15,882.

1. **Taxation:** VOID DECREE: CONSTRUCTIVE SERVICE. A decree foreclosing a tax lien based upon service by publication, prior to the year 1909, where the owner of the land is a resident of this state upon whom personal service of summons could have been made,

and the affidavit for service contains no statement which would authorize constructive service upon the land against which the taxes were assessed, is void; and such a decree may be attacked in an action to redeem the premises from the lien for taxes and remove the cloud created thereon by such void decree. *Humphrey v. Hays, ante*, p. 239.

2. ———: ———: SUIT TO REDEEM. Such an action may be maintained, not only against the purchaser of the premises under such void decree, but likewise against those claiming under him.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*Tibbets, Morey & Fuller,* for appellants.

*J. G. Beeler, Beach Hinman* and *Courtright & Sidner, contra.*

BARNES, J.

Action in the district court for Deuel county to redeem the south half of the northwest quarter, and lots 3 and 4 of section 2, township 13, range 42 west of the sixth P. M., situated in said county, from a lien for taxes, and quiet title thereto in the plaintiff. The plaintiff had judgment, and the defendants have appealed.

In this case there seems to be no disputed question of fact; and, as the record is made up, it appears that on and prior to the 20th day of October, 1897, one W. H. Bruner, who was the plaintiff's father, and who was a resident of Dodge county, in this state, owned the land in question; that on that day he conveyed it to the plaintiff by deed of general warranty, which he placed on record in Deuel county on the 6th day of November of that year, without giving her any information of those facts; that he shortly departed this life, leaving plaintiff the sole owner of said land; that thereafter certain taxes were levied and assessed against the premises, and that on the 2d day of April, 1900, an action was commenced by the county of Deuel to foreclose the lien of said taxes; that a decree of foreclosure was rendered therein, and the

land was sold thereunder to the county, and a sheriff's deed was executed therefor; that on the 14th day of January, 1903, the county conveyed the premises to one Edwin A. Phelps, Jr., who later on conveyed the same to defendant George Barth, and who, after refusing to allow plaintiff to redeem, conveyed to the defendant Zolman.

It appears, without dispute, that the only service ever made, or attempted to be made, in the tax foreclosure proceeding was by publication, based upon an affidavit of the county attorney of Deuel county, in which it was stated that the defendant Effie M. Herman, who is the plaintiff herein, was a nonresident of the state of Nebraska, and that service of summons could not be made upon her in this state. The fact that plaintiff at that time was a resident of Dodge county, in this state, where personal service of summons could have been made upon her, is not now disputed. It further appears that the plaintiff was not aware of the fact that she was the owner of the land in question, or of the pendency of the foreclosure proceedings, until some time in January, 1907; that thereupon she offered to redeem, and tendered defendant Barth, who then claimed to be the owner of the premises, all of the money he had invested therein, and that upon his refusal to accept the redemption money she promptly commenced this action.

The record thus again presents for our determination the question of the effect of a decree foreclosing a tax lien based solely on constructive service, where the owner of the land was a *bona fide* resident of this state upon whom service of summons could have been made at the time the foreclosure suit was commenced. Counsel for both parties have treated this as the sole question involved in this controversy, and we will so consider it. Counsel for the defendants, in an exhaustive and well-written brief, have strenuously urged us to adopt a rule herein at variance with the doctrine announced by our former decisions on this question, and hold that, because lack of jurisdiction does not appear on the face of the

record in the action to foreclose the tax lien, the decree therein must be treated as an absolute and unassailable verity, and thereby deprive the plaintiff of her property and leave her without any redress whatsoever. While some courts may have adopted such a rule, we have taken a contrary view of the matter. The first time we had occasion to pass on this question was in *Eayrs v. Nason,* 54 Neb. 143. That was a suit brought to foreclose a real estate mortgage. The owner of the equity of redemption was made defendant thereto, and constructive service was had on him by publication, he being at the time a resident of the state and actually present therein. He did not appear in the action personally or by attorney. After the decree the defendant died. *"Held,* That in a suit brought by his heir against the purchaser of the land at the sale under the foreclosure decree, to quiet the heir's title and redeem from the mortgage, that the heir might show that the averments of the affidavit filed to procure constructive service upon his ancestor, that he was then a nonresident of the state and that service of summons could not be made on him in the state, were false." In *Topliff v. Richardson,* 76 Neb. 114, service by publication was attempted on three defendants. Two of the defendants were residents of the state, and the third, a nonresident, had died previous to the publication of the notice. *Held,* That a decree entered on such attempted service was void. That case, like the one at bar, involved a tax foreclosure proceeding, which was held void, and a mortgagee of the premises was permitted to redeem and foreclose his mortgage against a grantee of the purchaser at the tax foreclosure sale. The question came before us again in *Payne v. Anderson,* 80 Neb. 216. That was a case where the lands of a resident of this state were sold under a decree rendered against him on service by publication. No appearance in the action having been made by or on behalf of such party, he brought an action to quiet title to the land as against one claiming title under the tax foreclosure decree. It was there said: "We are

not disposed, however, to recede from the rule announced in *Eayrs v. Nason,* 54 Neb. 143. Every resident is entitled to personal notice before being divested of his property. Service by publication may be had only in case of nonresident defendants, and not then when personal service can be had within the state. The court can acquire jurisdiction of the person of a defendant only as provided by statute. A judgment against a defendant of whom the court has no jurisdiction must, on principle, be void. The courts holding otherwise place it upon the ground that the nonresidence of the defendant is a question of fact to be determined by the court before the entry of the judgment. The evidence to establish this fact, as stated in *Davis v. Vinson Land Co.,* 76 Kan. 27, is the affidavit for publication filed by the plaintiff or his agent or attorney. Why should the validity of the judgment depend upon whether the party making such affiadvit was mistaken as to the defendant's residence, or knowingly misrepresented such place of residence? In either event, the affidavit is a false one, and the jurisdictional fact—nonresidence of the defendant—cannot be supplied by the good faith of the party who asserts it. The published notice in such case is not notice to the defendant, and gives the court no jurisdiction over him or his property."

In *Hayes County v. Wileman,* 82 Neb. 669, which was also an action to set aside a judgment foreclosing a tax lien, we said: "A judgment rendered on service by publication against a resident of this state, on whom personal service might have been had, is absolutely void. * * * A void judgment is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void. Such a judgment may be vacated at any time on motion made for that purpose by an interested party, and section 82 of our code has no reference to a void judgment."

It is contended, however, by the defendants that the cases above mentioned should not rule this controversy, because it is claimed that in this case the land is now

owned by an innocent *bona fide* purchaser. If the judgment rendered in the tax foreclosure case was absolutely void, as we have heretofore held, it is difficult to see how any rights can be predicated upon it, whether they be claimed by an innocent purchaser or not, and we are unable to see how the title can be good in such a purchaser and bad as between the parties to the suit. We are not without authority, however, upon this question.

In *Humphrey v. Hays, ante,* p. 239, the plaintiff filed a bill to set aside a decree foreclosing a tax lien, and certain deeds executed by the sheriff to the purchaser at the foreclosure sale, and by him to his immediate grantee. It thus appears that the question of *bona fide* purchaser from the sheriff's grantee was involved in that case. There the only service made or attempted to be made was by publication, and at the time of the commencement of the suit the owner of the land was a resident of this state and service of summons could have been personally made upon him. In that case, as in this, the affidavit for service contained no statement which would authorize constructive service upon the land itself against which the taxes were assessed, and it was there held that the decree might be attacked in an action to redeem the premises from a lien for taxes, and to remove the cloud cast thereon by such void decree. It thus appears that we have adopted the rule contended for by the plaintiff in this case, and we see no good reason for refusing to adhere to it. To hold otherwise would, in effect, deprive the plaintiff of her property without due process of law. In *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722, we said: "Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked as such by any one whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question." *German Nat. Bank v. Kautter,* 55 Neb. 103. In *Scott v. McNeal,* 154 U. S. 34, it was said: "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice

to the party. The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.'" Later on it was said by that court in *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U. S. 8: "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without due notice to the party. * * * No state can, by any tribunal or representative, render nugatory a provision of the supreme law. * * * It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and *has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

Finally, the equities in this case are all with the plaintiff. To hold that the tax foreclosure decree is sufficient to deprive her of her property, and leave her without remedy, presents a situation which a court of equity cannot sanction; while, if she is permitted, under our well-established rule, to have the decree of foreclosure set aside, and redeem the land by the payment of all of the taxes, interest, penalties and costs, together with the permanent improvements, if any, which the defendants have placed upon the land in question, affords them a

sufficient and ample remedy; and, when they are thus protected, the demands of equity in their behalf would seem to be fully satisfied.

For the foregoing reasons, we adhere to our former decisions, and the judgment of the district court is therefore

AFFIRMED.

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AMERICA STODDARD, APPELLANT, V. S. O. BAKER, APPELLEE.

FILED JANUARY 5, 1910. No. 15,895.

1. Appeal: CONFLICTING EVIDENCE. In a suit on a written contract to pay rent, where the execution of the contract is denied, the verdict of a jury rendered upon conflicting evidence will not be set aside by a reviewing court.
2. Pleading: QUANTUM MERUIT: EVIDENCE. In such an action, if the plaintiff's petition contains sufficient averments, a recovery as upon a *quantum meruit* may be had; but without proof of the reasonable rental value of the premises there can be no such recovery.
3. Appeal: EVIDENCE: HARMLESS ERROR. The admission of immaterial evidence does not require the reversal of a judgment, unless it appears that the complaining party was prejudiced thereby.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*R. L. Keester,* for appellant.

*John Everson, contra.*

BARNES, J.

Suit on a written agreement for the payment of rent, tried in the district court for Harlan county on appeal from justice court. Defendant had judgment, and the plaintiff has appealed.

The petition on which the cause was tried reads as

follows: "Plaintiff says for cause of action that she has been the owner of lot 16, in block 4, Second addition to the village of Republican City, Nebraska, since March 3d, 1902, to the 3d day of October, 1904; that on the 3d day of March, 1902, she leased said premises to the defendant, and that defendant agreed to pay to plaintiff the rental value of said premises for what time he occupied the same; that defendant occupied said premises from March 3d, 1902, to the 3d day of October, 1904; that the rental value thereof, during all of said time, was the sum of $10 a month; that said original contract with the defendant was made orally, but was afterwards reduced to writing, but said contract has been lost, mislaid or destroyed by plaintiff, and plaintiff is unable to locate the same at this time, but said written contract was, in substance, as follows: 'I, the undersigned, agree to pay to America Stoddard $10 per month rental for the use of lot No. 16, block 4, Second addition to the town of Republican City, Nebraska. S. O. Baker.' That no part of said rent has been paid, and said action, having been brought in justice court, plaintiff remits all of said rental due from defendant to plaintiff except the sum of $200 and interest. Wherefore plaintiff prays judgment against said defendant for said rental in the amount of $200, and costs of suit."

Defendant's answer was: (1) A general denial. (2) Specific denial that he ever promised or agreed to pay rent to the plaintiff for the premises, or that he knew the plaintiff owned or claimed the same until a short time before he moved from said premises; admitted that he occupied said premises for several years, but alleged that he occupied the same under a contract of purchase with the owner, and not as a tenant of the plaintiff; that he had paid the owner of the premises rent for all the time he occupied the same. Defendant also alleged that the pretended contract set out in the petition was a forgery and spurious, and specifically denied that he ever signed or executed the same. There was a reply, and, upon the

issues thus joined, the cause was tried to a jury, and resulted in a verdict and judgment for the defendant.

Plaintiff's first contention is that "the judgment is not sustained by the evidence; that the verdict is contrary to the evidence, and is not supported thereby." The record discloses that there was a conflict of evidence on the main question at issue. The plaintiff and her husband produced at the trial what they claimed was the original contract, and alleged that it was signed by the defendant in their presence. Defendant denied that he ever signed it, or that he ever had any agreement whatever with the plaintiff touching the matter of rent for the premises in question. He also produced evidence tending to show that he purchased the premises and took possession thereof under a contract with one Porter, who at that time was the owner thereof; that he paid Porter a considerable sum on account of the purchase price under his contract of purchase, which was introduced in evidence. It appears, however, that the plaintiff obtained a quitclaim deed from Porter some time subsequent to the execution of defendant's contract; that just before the defendant surrendered possession of the premises plaintiff's husband notified him that he owned the premises and demanded payment of rent; that thereupon the defendant immediately abandoned his possession and moved his family to another location. With the evidence in this condition, the jury returned a verdict for the defendant, and, there being a conflict of evidence, their finding and judgment on this point will not be set aside.

It is next contended that the district court erred in giving instruction No. 8 on his own motion, which reads as follows: "In order to entitle plaintiff to recover, she must recover upon a written contract, if at all, and you would not be warranted in finding in her favor for the rental value of the premises described in the petition for the time claimed. And, unless you find that the contract, exhibit B, was entered into between the plaintiff and defendant as alleged, you should find for the defend-

ant." The principal criticism of this instruction is that, if followed by the jury, it prevented them from returning a verdict for plaintiff on a *quantum meruit* for the use and occupation of the premises in question; and it is insisted by the plaintiff that her petition was so framed that, failing to establish the written contract sued on, still she might recover, as above suggested, upon a *quantum meruit*. It is possible that the petition would bear such a construction, but an examination of the record satisfies us that the plaintiff failed to make sufficient proof of the value of the use of the premises to sustain such a recovery. In other words, there is a complete failure on the part of the plaintiff to prove the fair rental value of the premises in question.

It is further contended that the court erred in permitting the defendant to introduce exhibits 9 and 10, for the reason that exhibit 9 is signed by the defendant, and no one else; that there is no evidence in the record to connect the real owner of the land with what is set forth in exhibit 9. It is also said that exhibit 10 seems to be a permission to the defendant to go upon the premises by one Burton, and there is no evidence in the record that Burton either owned the premises or that he was agent of the real owner. It is a sufficient answer to this contention to say that this evidence was within the issues on which plaintiff went to trial without objection, and there was no prejudicial error in its admission.

Finally, it is contended that the court erred in permitting the defendant to testify as to the condition of the premises when he took possession. We think this assignment requires no discussion. The cause was tried, as above stated, on the theory that plaintiff had a written contract with the defendant to pay rent. That question was determined in defendant's favor upon conflicting evidence. There was no testimony offered upon which to base a judgment in *quantum meruit*, and therefore the court was required to enter judgment for the defendant upon the verdict of the jury. This being so, the admis-

sion of the evidence complained of affords no ground for a reversal of the judgment.

The judgment of the district court is therefore

AFFIRMED.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JANUARY 5, 1910. No. 15,896.

Cities: ORDINANCES: INJUNCTION. As a general rule courts will not enjoin the passage of an alleged unauthorized resolution or ordinance by a municipal corporation. An injunction should not issue in such a case until some effort is made to enforce such resolution or ordinance.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed as modified.*

*M. A. Low, E. P. Holmes* and *G. L. De Lacy,* for appellant.

*J. M. Stewart, T. F. A. Williams, C. E. Flansburg* and *L. A. Flansburg, contra.*

BARNES, J.

This action was commenced in the district court for Lancaster county to restrain the mayor and council of the city of Lincoln from passing an ordinance requiring the plaintiff to construct, equip and maintain viaducts on P and J streets in said city over and across its railroad track where it crosses said streets. The petition assigns many reasons for the interposition of a court of equity, and, if the allegations contained therein are true, it is possible that at the proper time plaintiff may be entitled to the relief sought, but that question, however, is not determined in this action, and upon that point we express no opinion. Answer was filed by the defendants, challenging the truth of some of the averments of the

petition, and admitting others. A reply was filed by the plaintiff, and upon the issues joined there was a trial; judgment was rendered for the defendants dismissing the action, and the plaintiff has appealed.

It appears from the record that the district court found generally for the defendants, and so we are unable to ascertain upon what point the decision turned. It appears, without dispute, that at a general election held in the city of Lincoln on the 7th day of May, 1907, there was submitted to the voters the question: "Shall the mayor and council of the city of Lincoln have the power and authority to order, direct and require the Chicago, Rock Island & Pacific Railway Company to construct complete, ready for travel, a viaduct on P street over and across the tracks of said company, together with approaches thereto, and to keep and maintain the same in repair and safe for public travel?" It also appears that at the same time the following question was submitted to the vote of the people: "Shall the mayor and council of the city of Lincoln have the power and authority to order, direct and require the Chicago, Rock Island & Pacific Railway Company to construct and complete, ready for travel, a viaduct on J street at and near the intersection of Twenty-fourth and J streets over and across the tracks of said company, together with approaches thereto, and to keep and maintain the same in repair and safe for public travel." It further appears that the propositions above quoted were adopted or carried by a majority of the votes cast at said election.

It is alleged in plaintiff's petition that the defendants, the mayor and council of the city of Lincoln, threaten to and will introduce and pass an ordinance in pursuance of the authority thus granted them requiring the plaintiff to construct and maintain such viaducts, unless restrained by the order of the court. It thus appears that no ordinance has been introduced or passed by the defendants, and therefore there is no ordinance requiring the construction of the viaducts above mentioned. The

defendants' contention is that this action was prematurely brought, for the reason that the mayor and council cannot be enjoined from passing an ordinance under the authority granted them by the city charter and the adoption of the proposition above quoted, but can only be enjoined from enforcing such an ordinance in case the same invades the constitutional rights of the plaintiff, and the judgment of the district court must be affirmed.

We find the general rule to be that a municipal corporation, in the exercise of legislative power in relation to the subjects committed to its jurisdiction, can no more be enjoined than the legislature of the state. 22 Cyc. 890; 1 Dillon, Municipal Corporations (4th ed.), sec. 308, and note; *Stevens v. St. Mary's Training School,* 144 Ill. 336, 18 L. R. A. 832, 36 Am. St. Rep. 438; note to *Roberts v. City of Louisville,* 13 L. R. A. 844 (92 Ky. 95); *Lee v. City of McCook,* 82 Neb. 26; *Enders v. Friday,* 78 Neb. 510; *Kittinger v. Buffalo Traction Co.,* 160 N. Y. 377; *Des Moines Gas Co. v. City of Des Moines,* 44 Ia. 505. To this general rule, however, there are the following exceptions. Where the mere passage of the ordinance would ordinarily occasion, or would be followed by, some irreparable loss or injury beyond power of redress by subsequent judicial proceedings, or when it would cause a multiplicity of suits, the passage of the ordinance may be enjoined. It seems clear, however, that the facts of this case do not bring it within any of the exceptions. In the instant case the mere passage of an ordinance requiring the construction of the viaducts in question will cause no injury to the complainant. Plaintiff can only be injured, if at all, by the enforcement of such an ordinance, if one be subsequently passed. Although it is stated that the defendants threaten to pass the ordinance, they may never agree upon its passage, and, if passed, they may never attempt to enforce it, and so we are of opinion that until such an ordinance is passed, and its enforcement is attempted, injunction will not lie.

It thus appears that the judgment of the district court dismissing the action was the only one which could have been rendered. This opinion, however, shall not be construed to in any manner affect the proceedings in, or the merits of, any future action. It is therefore ordered that the judgment of the district court be modified so that it shall be a dismissal without prejudice, and as thus modified it is affirmed.

AFFIRMED AS MODIFIED.

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THOMAS YEARSLEY, APPELLANT, V. CHARLES BLAKE, ADMINISTRATOR, APPELLEE.

FILED JANUARY 5, 1910. No. 15,884.

1. **Depositions, Exceptions to.** An exception to a deposition, on the ground of a defect in the notice, cannot be considered unless made in writing, and filed before the commencement of the trial. Code, secs. 389, 390.
2. **Evidence** examined, and *held* to support the verdict.

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

*S. R. Smith,* for appellant.

*L. H. Cheney, contra.*

LETTON, J.

This is an action brought to recover from the estate of Baudway Yearsley, deceased, the sum of $838, for board, lodging, care, and medical attendance furnished the deceased, and for the board of deceased's wife and child. The petition alleges that the deceased, while sane, promised and agreed to pay for such service. The answer, in effect, admits the furnishing of the board, and rendition of the attendance and services, but, as to the deceased, alleges

a settlement and payment in full, and, as to the wife and child, alleges that they went to the plaintiff's home upon plaintiff's invitation, and that during their residence there the wife assisted in the household and farm work. The claim having been filed in the probate court and disallowed, upon appeal to the district court issues were made up and the case tried to a jury, resulting in a verdict for the estate, from which plaintiff appeals.

In December, 1901, Baudway Yearsley was an insane person confined in the asylum for the insane at Hastings, Nebraska. His brother, Thomas Yearsley, who lived in Iowa, took the insane man to his home, with the consent of the family, and with the assistance of his aged mother cared for him from December 5, 1901, to March 18, 1903. Baudway's wife and child afterwards went to Iowa and lived with Thomas from February 15, 1902, to March 18, 1903, when, Baudway's mental and physical health having been largely restored, he, with his family, returned to Nebraska, where he afterwards died. There is little dispute as to the facts, except as to the extent of deceased's incapacity during the first six months that he lived at his brother's home in Iowa. The plaintiff's witnesses testify, in substance, that he was confined to his bed for the first five or six months of his stay, that the plaintiff, his mother, and plaintiff's family cared for him, and that he promised to pay all that was owing for the services. On the other hand, Baudway's wife testifies that when she went to Iowa, on the 2d of March, 1902, it was in response to a letter from her niece, who was a member of plaintiff's family, inviting her to come there; that when she arrived her husband was able to come out to the wagon to meet her; that after the first week she occupied the same room with her husband, and that no one sat up with him after that time, and it was unnecessary for any one to do so; that she took care of him most of the time thereafter when he needed care, and that afterwards he helped to do light work out of doors dur-

ing the summer. She further testifies that just before she and her husband left for Nebraska her husband asked the plaintiff how much he owed him; that the plaintiff said $100, and that her husband told him that he would pay him as soon as he got back to Nebraska and settled; that after they returned she wrote for her husband a letter, inclosing a draft for $100, and sent same to plaintiff; that in response they received a letter written by the niece acknowledging receipt of the $100; that from that time until her husband's death neither she nor her husband had received any request for additional payment for the care of the deceased and herself and child while they were in Iowa. A copy of the letter written by Mrs. Yearsley, inclosing $100, and an indorsement thereon in Baudway's handwriting, as follows: "If this is not enough let me know and I will make it right"—is in the record. From that time until after Baudway's death, in July, 1905, no claim was made by the plaintiff for any further compensation.

The plaintiff complains that the verdict is not supported by the evidence. While it is clear that valuable services were performed and sustenance supplied by the plaintiff, we think the evidence as to a settlement was sufficient to uphold the verdict of the jury.

As to the objection made to the wife of deceased being allowed to testify to a conversation had between the deceased and the plaintiff with reference to the amount claimed by plaintiff, the evidence was admissible as an admission against interest on the part of plaintiff. Plaintiff complains that he had no time to meet this testimony without an adjournment of the case, because he was not present at the trial, but it is not uncommon for witnesses to testify in a manner unforeseen by the opposite party, and the objection was not made upon the ground of surprise, nor was any request for a continuance made.

Complaint is made as to the giving of instructions, but no exceptions were taken at the time, and, hence, they

cannot be reviewed. We have examined the errors assigned with reference to the rulings upon other objections to testimony, and think there is no prejudicial error therein.

As to the point that the notice to take depositions was not properly served, this need not be considered, because the alleged defect was known before the trial, but no exceptions were made before its commencement, as required by sections 389 and 390 of the code.

No prejudicial error being found, the judgment of the district court is

AFFIRMED.

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WILLIAM J. FURSE, APPELLEE, V. L. W. LAMBERT, APPELLANT.

FILED JANUARY 5, 1910. No. 15,885.

1. **Appeal**: PLEADING: SUFFICIENCY. Where a petition is assailed for the first time in this court it will be liberally construed, and relevant allegations in the answer thereto may be used in support of the cause of action litigated in the district court.

2. **Statute of Frauds**: SALE OF LAND: AGENCY: EVIDENCE. If a landowner in corresponding with a broker concerning a sale of the principal's real estate describes the land, the price for which it may be sold, and instructs his agent: "You may go ahead and close the deal with the man," the principal thereby satisfies the statute of frauds so as to furnish proof of the broker's agency.

3. ———: ———: CONTRACT: ORAL MODIFICATION. Where a broker has written authority to sell his principal's land, a subsequent oral modification of the price for which it is to be sold does not render the altered contract obnoxious to the statute of frauds.

4. **Specific Performance**: DISCRETION OF COURT: EVIDENCE. The specific performance of a contract for the sale of real estate rests largely in the sound legal discretion of the trial court, and, if the sufficiency of conflicting evidence to support the judgment depends on the credibility of the witnesses who appeared and testified before that court, its judgment will not ordinarily be disturbed.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

*Gomer Thomas, C. C. Wright* and *B. H. Dunham,* for appellant.

*John Everson* and *J. G. Thompson, contra.*

ROOT, J.

This is an action for specific performance of a contract for the sale of real estate executed by an alleged agent of defendant. Plaintiff prevailed, and defendant appeals.

1. It is argued that the petition does not state facts sufficient to constitute a cause of action. Plaintiff alleges that defendant on the 15th of December, 1907, owned the land in controversy, but resided in Iowa; that he corresponded with Myers, a real estate agent in Nebraska, "with the view of employing the said Myers to sell the land for him" by February 1, 1908, for $5,600; that Myers agreed to defendant's terms, "and entered into the employ of the defendant, by letters to defendant, which are now in his possession"; that Myers failed to sell for the price named, but received an offer of $5,000 therefor and communicated that fact over the telephone to defendant. "In said conversation the said defendant, L. W. Lambert, authorized and employed his said agent, O. H. Myers, to close said deal and sell the premises at that price"; that said agent did sell the farm to plaintiff, received part of the purchase price, and executed a contract in the name of his principal. A copy of the contract is made part of the petition. Defendant, answering, admits that he owns the land, and denies all other allegations in the petition, but alleges that by letter he authorized Myers to sell the land for $7,600, and "that the only authority the defendant gave to the said O. H. Myers to sell the land was the authority to sell the same for the amount and on the terms above stated." He repudiates the contract sued on.

No attack was made upon the petition in the district court, and a fair construction of all of the pleadings justifies an appellate court holding the pleadings sufficient, and the issue to be whether Myers had authority to sell the land for less than $7,600. We have held a verbal modification of written authority to sell real estate does not render the altered authority obnoxious to the statute of frauds. *Rank v. Garvey,* 66 Neb. 767. Coming, as the objection does, at this stage of the litigation, it should be overruled.

2. It is urged that the evidence does not sustain the judgment. The bill of exceptions discloses that defendant wrote Myers December 15, 1907, asking, among other things: "What in your judgment the quarter (¼) lying northeast of town and owned by me could be sold for between now and the first of February." Myers immediately answered by letter that, owing to crop failure and the existing panic, land in his neighborhood could only be sold at a bargain; that defendant's farm was worth $6,000, and "I have a man who will pay you $5,600 cash for it." December 19 defendant wrote Myers, stating: "Yours of the 18th at hand this ins't, will say in reply that if I am to receive $5,600, less your commission $150, you may go ahead and close the deal with the man, but it must be clearly understood that the man must assume the mortgage of $2,000 that is against the place and accept the papers just as I hold them. They consist of a mortgage deed guaranteed by John Everson." The man referred to in Myers' letter failed to secure money to pay for the land. Myers negotiated with other individuals, and finally plaintiff offered to pay $5,000 for the farm. December 25 Myers talked over the long distance telephone with defendant. Up to this point there is no dispute as to the facts, but from thence forward there is a conflict. Myers testifies that he explained the situation fully to defendant; that he experienced no difficulty in hearing defendant's language; and that, after being advised, defendant urged the witness to go ahead, close the deal, and

make a contract before the customer changed his mind. H. C. Furse corroborates Myers concerning what was said at the Nebraska end of the telephone. Furse is Myers' partner and plaintiff's brother, and we consider those facts in weighing his testimony. Mr. Hall, who had charge of the Alma telephone exchange, heard part of the conversation. He does not remember all of the details, but testifies that the subject of the conversation was whether the farm should be sold for $5,000 or $5,600; that Myers said, "I can get you $5,000," and that Lambert responded, "Get it. Go ahead and get it." Defendant admits talking over the telephone with Myers, but says he could not understand Myers; could not make out a single sentence. Two witnesses present in defendant's house at the time testify that defendant seemed to have difficulty in understanding the telephonic message, but that he said something about a letter. Defendant's wife testifies that her husband in answering the message said he could not understand what Myers was saying, but finally said: "All right, that is all right, if it is in accordance with my letter of instructions. If the deal is all right, go ahead." Myers then prepared the contract in suit, signed defendant's name thereto, accepted a draft for $1,000 from plaintiff, and mailed the documents to defendant. Lambert did not acknowledge receipt, and Myers again telephoned defendant. On the 29th Myers wrote to defendant, and received an answer stating that the draft and contract had not yet been received, but, if the contract was in accordance with the writer's letter of instructions, he would remit for the commission. December 30, Myers wrote again, giving complete details of the transaction, and inclosed a duplicate draft for $1,000 to take the place of the original which defendant denied having received. Defendant's local attorney then wrote a letter, which defendant signed, and sent to Myers, wherein he denied Myers' authority to sell the farm for less than $7,600, and stated that Lambert would retain the duplicate draft until his letter was answered by Myers.

Defendant argues that the letters did not authorize Myers to contract in Lambert's name, and cites *Ross v. Craven,* 84 Neb. 520. In the cited case Craven, the landowner, did not authorize Johnson, the broker, to make a contract for the sale of the former's land, whereas in the instant case Lambert wrote Myers to go ahead and close the deal. Argument is unnecessary to distinguish the cases and demonstrate that the case at bar is not ruled by the cited one.

It is further urged that general authority was not given Myers, but that he was empowered to sell to a specific individual. We do not agree with counsel. Lambert did not know the proposed purchaser, or his name, and his personality could not have entered into the principal's granting or withholding authority to his agent. The letters demonstrate Lambert's anxiety to sell before February 1, 1908. His subsequent conduct and his pleading indicate clearly that he did not construe Myers' agency as his counsel now urge it should be interpreted. Under the circumstances of this case, we think that, in so far as Myers had power to sell the land, his authority was general as to the person to whom it might be sold.

Finally, defendant contends that, viewed in the most favorable light for plaintiff, the evidence must leave the court in doubt as to whether or not Lambert understood Myers' statement over the telephone and authorized a diminution in the price for which his land might be sold. *Stanton v. Driffkorn,* 83 Neb. 36, is cited by defendant upon this subject. This objection, to our minds, presents the only serious question in the case. The evidence is clear and satisfactory that Myers, on Christmas of 1908, told defendant the facts over the telephone. If we credit Myers and Hall, defendant understood that the land could be sold for $5,000, but for no greater sum, and with that knowledge he directed Myers to "close the deal at once so that this fellow wouldn't get away." The only way the deal could be closed would be to perform some act or acts to satisfy the statute of frauds, and this was done.

Defendant's conduct has not been frank or convincing. From his letters and other evidence appearing in the bill of exceptions, we are satisfied that he did not expect in the first instance to receive more than $5,600 for the farm, yet he retained the duplicate draft about a month, and informed individuals that he had been advised by his attorney that he could hold plaintiff for $7,600. Lambert testifies that, although he is willing to abide by the court's construction of his letter to Myers, he did not authorize his farm to be sold for less than $7,600. Lambert's testimony that he did not hear what Myers said over the telephone is contradicted by his wife. There are other facts and circumstances tending strongly to discredit Mr. Lambert. The evidence does not show that the farm was worth more in December, 1907, than plaintiff agreed to pay therefor, nor is there a scintilla of evidence indicating bad faith on his part.

Upon a consideration of the entire record, the district court was justified in finding that Myers had authority to make the contract in suit, and that through him the minds of the parties did meet with a common intention with respect thereto. Whether a contract shall be specifically enforced rests largely in the sound judicial discretion of the trial court. The record presents little for consideration other than the credibility of witnesses who appeared and gave their testimony in open court. The trial court was in much better situation than we are to know which of those witnesses were telling the truth, and we are not convinced that error was committed in finding for the plaintiff.

We have not made specific mention of all the arguments presented by defendant. They have been considered, but are not believed to be important in settling the rights of the parties hereto.

The judgment of the district court is

AFFIRMED.

ADOLPH PETERSON, APPELLEE, V. AMANDA FISHER ET AL., APPELLANTS.

FILED JANUARY 5, 1910. No. 15,889.

Mortgages: VALIDITY. A mortgage executed to secure money borrowed for the specific purpose of satisfying a bid for real estate sold at sheriff's sale, and delivered simultaneously with the delivery of the officer's deed, is a purchase money mortgage, valid as against a claim of homestead made by the purchaser's spouse.

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

*Ernest R. Ringo,* for appellants.

*James T. Begley, contra.*

ROOT, J.

This is an action to foreclose a real estate mortgage. Plaintiff prevailed, and defendants appeal.

Some time preceding the year 1899 Ebenezer Fisher died seized of the land described in the mortgage. In September of that year the county judge of Sarpy county entered a final order in the matter of the estate of Ebenezer Fisher, deceased, and adjudged the decedent's widow, Henrietta Fisher, to be his sole heir at law. The collateral heirs of the deceased seem to have ignored the order, but the widow, by reason of the facts and the law, became the owner, during her natural life, of said real estate. In December, 1899, in an action to foreclose a tax lien upon said land, the widow and all of the heirs of Ebenezer Fisher were made parties. The succeeding year a decree of foreclosure was rendered, and the land duly sold by the sheriff to Casper Fisher, a brother of Ebenezer Fisher. The purchaser was unable to pay for the land, and borrowed from plaintiff $500 for that purpose. Henrietta Fisher departed this life intermediate the entry of the

decree of foreclosure and the execution of said deed and mortgage. Subsequently Casper Fisher died. The defense is that at the time said mortgage was executed the real estate constituted the homestead of Casper Fisher, and that Mrs. Fisher was then insane and the instrument for that reason void. The district court found that Mrs. Fisher was sane at the time she executed the mortgage, but we are of opinion that fact is immaterial. The money was loaned by plaintiff to Casper Fisher to purchase said land and for no other purpose. The money was paid and the mortgage and the sheriff's deed executed as simultaneous acts, so that at no time during the transaction did a homestead estate vest in Casper or Amanda Fisher which they can assert as against the lien of said mortgage. *Prout v. Burke,* 51 Neb. 24; *Jackson v. Phillips,* 57 Neb. 189; *Acruman v. Barnes,* 66 Ark. 442.

Defendants argue that Casper Fisher was an heir of his brother Ebenezer and therefore part owner of the land before the suit to foreclose the tax lien was instituted; that his ownership continued up to the time he signed the mortgage in controversy, and that the evidence is undisputed that he occupied the land with his family for some years next preceding the execution of plaintiff's mortgage. The evidence, however, does not show in what capacity he occupied said land; whether as tenant of his brother's widow, who owned the life estate and was entitled to sole possession thereof, or by virtue of some right independent of his brother's seizin and title. In any event, consummation of the sheriff's sale cut off Amanda Fisher's estate in the land, and at no time between the instant her interest was thus extinguished and the lien of the mortgage created did a homestead estate vest in Mr. or Mrs. Fisher so as to prejudice the rights of the mortgagee. We have not overlooked the principle of law directing a sheriff's deed to relate back to the date of sale, but it has no application to the case at bar.

While we are willing at all times to protect a *bona fide* homestead, we shall not place a strained construction

upon evidence, nor the law applicable thereto, for the purpose of defeating an honest lien created for the benefit of defendants' privy in title, and but for which they probably would not at this time possess or enjoy any interest whatever in the land in litigation.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

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BENJAMIN HEDDENDORF V. STATE OF NEBRASKA.

FILED JANUARY 5, 1910. No. 16,202.

Criminal Law: CONFESSIONS: INSTRUCTIONS. Where the trial court in a prosecution for murder admits proof of a confession challenged by defendant as involuntary, and by instructions submits to the jury on conflicting evidence the issue thus raised, they should be directed to disregard the confession, if they find from all the evidence that it was not voluntarily made.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

*J. G. Thompson, John Everson* and *Perry, Lambe & Butler,* for plaintiff in error.

*W. T. Thompson, Attorney General,* and *George W. Ayres, contra.*

ROSE, J.

In a prosecution by the state in the district court for Harlan county, Benjamin Heddendorf, defendant, was convicted of murder in the first degree and sentenced to life imprisonment. As plaintiff in error he now presents for review the record of his conviction.

In the information and testimony William C. Dillon is described as the victim of the homicide. He was a bachelor, and lived alone on his farm north of the village of Stamford in Harlan county, and was found dead in his

house there. Circumstances indicated that, when sitting in his own home, he had been shot through a window from a position outside. A pane of glass in the window had been broken and a blanket hung over the aperture. There was a wound on the right side of Dillon's head above and back of the ear. His watch was missing and some of his pockets had the appearance of having been rifled. He was last seen alive March 17, 1909. The felony was discovered March 19, 1909. Suspicion as to the malefactors fell on two boys in the neighborhood and they were arrested March 20, 1909. George Critser was one of the boys and the convicted defendant herein was the other.

At the trial the state was permitted to prove that defendant had confessed his guilt, and it is earnestly argued that the district court erred in admitting the confession and in instructing the jury in relation to it. One of defendant's objections to the confession is that the evidence does not exclude the hypothesis that it was involuntary, and the instructions are criticised on the ground that they permitted the jury to consider the confession as competent evidence of guilt, though it was made in the presence of the county attorney under circumstances making it inadmissible. In examining these questions it will be necessary to advert to some features of the testimony. Defendant lived on a farm with his parents near the scene of the homicide. When arrested he was a boy of eighteen. His parents at the time were visiting in Iowa, and in their absence Critser was with defendant and assisted the latter in doing chores and other farm work. There was some testimony tending to show that defendant was weak-minded, and his conversation impressed one witness as that of a boy of ten or eleven. Defendant had been watching bloodhounds at work the day he was arrested, and in this connection the deputy sheriff testified: "I noticed that the Heddendorf boy seemed to be quite nervous and kept following and getting around in a position so he could keep his eye on the dogs. I had orders to keep him back." The officers and bloodhounds were at defendant's

home, and he was arrested there the same day in the absence of his parents and taken with Critser to Stamford to the offices of a real estate agent. These offices consisted of one large front room into which two small back rooms opened. Here the boys were separated, each being detained in one of the small rooms in custody of the sheriff or his deputy. According to some of the witnesses the boys were thus detained for more than two hours. The county attorney was called, and went back and forth from one of the small offices to the other through the front room. An uncle of defendant testified that the front office and porch were crowded. He also said there was a good deal of excitement, and that the sheriff kept him out of the room in which his nephew was confined. It is conceded that defendant first denied his guilt. One witness said the boy appeared to be nervous and cried before making the confession. It was on the day of his arrest, in one of the back rooms described, that the confession admitted in evidence was first made. Defendant did not have the benefit of counsel until the next day. In one instance the county attorney's version of what took place after he left the room occupied by Critser and approached defendant in the other room is as follows: "I walked in there and said, about like this: 'The other boy has wilted. It is too bad that a thing like this should happen'—and kind of sat and looked at him. He said: 'I had nothing to do with it'—something like that, and I sat there just a second or two and turned around and walked out." The statement that "the other boy has wilted" was untrue, and without knowing its falsity defendant is said to have confessed his guilt. After the county attorney went out, defendant, according to the testimony of the deputy sheriff in charge, said: "If the other boy has wilted, I will tell it all too." One witness said the first question asked by the county attorney was: "You may as well make a clean breast of it, for it will come out anyway, and it will be better for you." The same witness also testified in regard to the confession that Dr. Campbell

asked and defendant answered questions as follows: "Q. You are telling this because it will make it easier for you? A. Yes; to make it easier for me. Q. Do you know what you are doing? Is it the truth? A. I think so, but I am badly rattled."

There is proof of these conditions, incidents and circumstances, but the evidence in regard to some of them is conflicting. As they have been stated they are not intended as a summary of the testimony, but are mentioned to show the premises from which defendant makes two arguments. The first of these is that, under the stress of the events described, defendant's mind was seized with fear, and that his mental condition was such that the influence and conduct of the officers destroyed his confession as competent evidence of his guilt; and the second is that it was the duty of the court, after having admitted the confession in evidence, to instruct the jury to disregard it, if found by them to be involuntary. The admission of the confession was resisted every time it was offered, and defendant's right to a review of the rulings of the trial court was preserved by exceptions thereto. Defendant insists the confession should have been excluded under the following rule: "A promise of benefit or favor, or a threat or intimation of disfavor connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement either of hope or fear." *Heldt v. State,* 20 Neb. 492; *Ballard v. State,* 19 Neb. 609; *Snider v. State,* 56 Neb. 309.

Though the confession was admitted in evidence, the trial court did not find as a fact that it was voluntarily made. The instructions indicate that question was left to the jury, and that the court intended to adopt the procedure sanctioned by the following holdings of this court: "The preliminary examination before the court to ascertain whether or not a confession of a prisoner offered in evidence is voluntary is properly conducted in the hear-

ing of the jury. After a confession is given in evidence it is for the jury to determine from all the facts and circumstances proven on the trial, in connection with the confession, whether it was voluntary and what credit should be given it." *Shepherd v. State,* 31 Neb. 389.

Having in the present case admitted defendant's confession in evidence, the trial court instructed the jury in relation thereto as follows: "(24) The court has permitted evidence touching a confession to be introduced in this case, and it is for you to take such evidence, analyze it and weigh it, to see what is the truth of the matter; and, if you find beyond a reasonable doubt that said confession or admission was made, for what purpose, with what motive, and whether or not said confession was true. And you are instructed that, in considering the weight to be given to an alleged confession made by the defendant, you should consider all the testimony in the case up to that point, the position of the defendant at that time, his surroundings, his strength or weakness of mind, as shown by the evidence, and the hopes or fears, if any, that may have influenced the defendant, and whether or not said hopes or fears were the result of any promises or threats on the part of the sheriff, his deputy, the county attorney, or any other person.

"(25) The jury are instructed that if, from the evidence, they believe that the defendant made the confession given in evidence in this case, you should treat and consider such confession precisely as you would any other evidence or testimony; and hence, if the jury believe the whole confession to be true, you should act upon the whole as true. You may believe part of the confession and reject the balance, if you see sufficient grounds in the evidence for so doing. You are at liberty to judge of it like other evidence, in view of all the circumstances of the case as disclosed by the evidence.

"(26) The court instructs you that, where the confession of a person charged with a crime is offered in evidence, the whole of the confession offered in evidence

must be taken together; as well that part, if any, which makes in favor of the accused as that part, if any, which is unfavorable to him."

Instruction 25 was evidently taken from the report of *Furst v. State,* 31 Neb. 403, but in that case the voluntary character of the confession was free from doubt, the court in the opinion saying: "The defendant was not prompted to make the statements he did by any threat, promise, or expectation of hopes or favor. No inducement was held out to him to make an untrue statement." Neither the instructions quoted, nor any other part of the court's charge in the present case, directed the jury to disregard the confession, if found to be involuntary. Defendant was therefore deprived of the full benefit of the rule excluding involuntary confessions. It has been observed in the present case that there was at least some proof tending to show defendant's confession was within the rule stated. Having undertaken to instruct them on that subject, it was incumbent on the trial court to embody in some form in the instructions the substance of the rule that the confession, if found to be involuntary, should not be considered. With this principle left out of the instructions relating to the confession, they were erroneous in a particular affecting a substantial right of defendant in a trial where his life was at stake. In *People v. Howes,* 81 Mich. 396, the court announced the rule applicable, as follows: "Where the question whether alleged statements of a respondent to an officer were freely and voluntarily made is fairly submitted to the jury as an issue of fact, evidence of such statements is competent; but the jury should be instructed to *first* determine such preliminary issue, and, if they find that the statements were made under compulsion or duress, not to consider them in arriving at a verdict. *People v. Barker,* 60 Mich. 277." This is in harmony with a well-settled practice. *Burdge v. State,* 53 Ohio St. 512; *State v. Storms,* 113 Ia. 385; *Roesel v. State,* 62 N. J. Law, 216; *Commonwealth v. Burrough,* 162 Mass. 513; *Commonwealth v. Shew,* 190 Pa. St. 23; *Wilson v.*

*United States,* 162 U. S. 613. The error was prejudicial, since the confession, if believed, was strong proof of defendant's guilt and a material part of the state's case.

For error in the instructions, the judgment must be reversed, but other assignments will be considered no further than to suggest that some overruled challenges to jurors should have been sustained on account of opinions expressed by them on their *voir dire.*

REVERSED.

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SAMUEL R. PERRY, APPELLEE, V. H. BERGER, APPELLANT.

FILED JANUARY 5, 1910. No. 15,858.

1. **Action:** CONTRACT: PUBLIC POLICY. "An action cannot be maintained for the consideration of a contract upon an alleged performance by the plaintiff, if such contract is against public policy." *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

2. ———: ———: ———. "If such contract is fully executed the court will not disturb it, but leave the parties to abide the consequences." *Clarke v Omaha & S. W. R. Co.*, 5 Neb. 314.

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

*John H. Linderman* and *Warrington & Stewart,* for appellant.

*E. A. Cook, contra.*

FAWCETT, J.

Plaintiff alleges substantially that defendant and one George P. Lewis, agent of and representing defendant, demanded that plaintiff pay to defendant the sum of $200 "as a condition of the defendant not prosecuting the plaintiff for stealing certain cattle which the defendant, through the said George P. Lewis, alleged that the plain-

tiff had stolen from the defendant"; that plaintiff was greatly "scared" by said threat to have him arrested and prosecuted on a charge of stealing, and requested that he be given time to consult with some of his friends in reference to the demand for said money, but was met with the additional threat that, if said money was not paid at once, he would be arrested for stealing; that to avoid the threatened arrest and the humiliation growing out of the same he paid to said Lewis for defendant the sum of $200; that the charge made against him by defendant, through Lewis, was false and wholly untrue; that he had not stolen any cattle or any other property from defendant, "as was well known to the defendant"; that said money was only paid because he "was afraid of said arrest by reason of the humiliation that would be caused him thereby and supposed that the defendant would carry out said threat and cause such arrest"; that he did not owe said sum of $200 or any part thereof to defendant, and that said sum of $200 was wrongfully and illegally demanded and received by the defendant from the plaintiff to the plaintiff's damage in the sum of $200.

The answer admits the payment to defendant of the sum of $200, and alleges that the money was paid to him voluntarily by plaintiff in satisfaction of a debt then claimed by him to be due and owing by plaintiff; that plaintiff had not prior to the commencement of the action made any demand for the payment of the money; that on September 17, 1906, plaintiff obtained possession of four head of cattle, the property of defendant, without the knowledge of defendant, "and that the plaintiff concealed from the defendant; that the said cattle were then in his possession, falsely and fraudulently"; that defendant "was compelled to expend time and a large sum of money, to the extent and amount of $50, in the search for the said cattle, as the plaintiff then well knew, and yet falsely and fraudulently concealed from the defendant that the said cattle were then in his possession"; that defendant learned of plaintiff's possession of said cattle on or about October

22, 1907; that at said time plaintiff had said cattle, with others belonging to plaintiff, at Overton, and was about to ship the same to market; that defendant demanded said cattle, or payment for the same, before they "should be so shipped to market, and out of this county"; that plaintiff "thereupon offered to pay to the defendant the said sum of $200 in satisfaction of the debt owed by the plaintiff by reason of the damages suffered by the defendant by reason of the false and fraudulent concealment by the plaintiff of his possession of the said cattle of the defendant, and as the price of said cattle; that the defendant thereupon sold the same to the plaintiff, and permitted him to ship the same to market and dispose of the same, and accepted from the plaintiff the said sum of $200 so offered in payment of said damages and for the said cattle." The reply is a general denial. There was a trial to the court and a jury, which resulted in a verdict and judgment for plaintiff for the full sum claimed, and defendant appeals.

Plaintiff's own testimony precludes a recovery by him in this action. It shows that he attended a sale of stock by defendant on defendant's farm, in September, 1906; that he purchased at that sale 27 head of heifers. "Q. I will ask you to state to the jury how they were put up, whether separately or as an entire bunch? A. They were put up and sold in a bunch of 27 head in a bunch. I bought them by the head, bid them in at $14.75 a head. * * * Q. How many head of cattle did you settle for? A. Twenty-seven head. * * * Q. When you started to get the cattle, did you say anything to Mr. Berger? A. Yes; I asked him to help me drive them out. He said no, he hadn't time; that I got all the heifers there was there, all the heifers he had was put up in that bunch and sold, for me to drive them all out. Q. Did you drive out all the heifers that were there? A. I did. * * * Q. When you took them out, did you count them? A. I counted them after I got them out, drove them all out, and then counted them after I got them out. Q. Where

were you when you counted them? A. On the north side of the lot. Q. How many did you get? A. Twenty-eight. * * * Q. Were all the 28 head taken out of this one lot? A. Yes; and there was two or three taken out of the bunch of steers and drove into this lot and then drove out with the rest of them." He then testifies that, when they got about half a mile east of the house, one young heifer "left the bunch. We couldn't keep it in. I guess they were just weaning it. We tried to keep it in, but couldn't, and we let it go back." He then testifies that he got the other 27 head to his place; that he counted them next morning and there were 27 head. "Q. Did you do anything more about that heifer that went back? A. Yes. Q. What about that? A. Sold it to Mr. Galloway (father of the young man who was helping to drive the cattle). Q. Why did you sell it to Mr. Galloway? A. Well, I tried to sell it to his son when we were driving home. I offered it to him for $7. It was a small one, either $7 or $7.50. I thought it was a wild one, but I guess it proved not to be a wild one, it was just weaned. Q. Upon what theory did you sell that one when you say you had bought 27 head? A. Because I thought it belonged to me when he told me to take them all." Coming to the time he paid the $200 to defendant, he testified that Lewis first suggested the payment of money that day "to fix up with Berger. * * * Q. What did he say? A. Why, he understood I had got hold of more cattle than I was entitled to and I had better settle for them; that they would have me prosecuted and put it into the hands of the government as it was a government offense. He asked me if I hadn't got one. I told him, 'Yes; I had got one more than I bought.' He said he had proof that there was more missing; that there was four head missing, and I would stand good for all of them as long as I had owned up that I had got one; and he said Berger didn't care whether I settled or not because, if I didn't, he would put it into the hands of the government and it would cost me $1,000, and the best thing I could do was to pay his de-

mand, $200, and settle with him. Q. What reply did you make to that? A. I told him I didn't know what to do. I had simply got one. If that was the easiest way for me to get out of it I would settle, any way to make it right. Q. What did you say in reference to the statement that you had gotten four head that didn't belong to you? A. Told him I hadn't, just got one. Q. Did you say what one it was and under what circumstances you got that? A. Yes; it was a heifer. He told me to drive them all out, I had got the whole bunch. Q. When he told you you would be prosecuted, what did you say to that? A. I told him I didn't want to be prosecuted. Q. What did he say then? A. He said that would be done if I didn't pay it. * * * Q. What was the result of that conversation? What did you agree to do, if anything? A. I agreed to pay him $200 if they would settle up and keep from being arrested. Mr. Lewis said he didn't know whether that would satisfy or not, he would go and see." He then testified that he went to the bank and got the money, and went to a restaurant, where he met Lewis and Berger. "Q. When you went into the restaurant did you have any money with you? A. Yes. Q. How much? A. $200. Q. What did you do with it? A. Gave it to Mr. Lewis. Q. Where was Mr. Berger then? A. In the restaurant there by him. Q. When you gave Lewis this money, did you owe Mr. Berger any sum of money? A. No, sir. Q. Has this money or any part of it been returned to you? A. No, sir."

On cross-examination he testified: "Q. Did you see Berger from the time of the sale up to the time you met him in Overton? A. I had seen him in town, never spoke to him. Q. Had you ever had any conversation with him? A. No, sir; not that I know of. Q. Didn't you have a telephone conversation with him a couple of days after the sale? A. Next day, over the 'phone. Q. He asked you, did he not, over the 'phone if you didn't have more cattle than belonged to you? A. Yes. Q. What did you tell him? A. I told him, 'No, sir.' He wanted to know if I had a steer in the bunch, that is what he asked me. I told him,

'No,' he had better come down and look the bunch over and see." * * * "Q. Isn't it a fact that Berger wrote you a receipt, and that the first receipt he wrote you was unsatisfactory? A. Yes. Q. And didn't you tell him you wanted a receipt for 31 head of cattle? A. Yes. Q. And then he wrote you another receipt, did he? A. The number he went to write down was 28 head, and I says, 'You accused me of stealing 4 head. Put down the whole amount.' And he just wrote down the number. Q. It was all on one paper? A. Yes." The receipt was produced by plaintiff's attorney, identified and introduced in evidence, as follows: "Lexington, Neb., Oct. 22, 1907. Received from S. R. Perry, balance in full due me on 31 head cattle purchased from me Sept. 17, 1906. H. Berger." "Q. It was at your suggestion that the number 31 was put in there? A. Yes, because he accused me of stealing that many. Q. You told him in the restaurant that it was because he accused you of stealing 4 head that you wanted that put in there? A. Yes, sir." * * * "Q. When Berger telephoned you, you didn't tell him anything about having taken an extra animal, did you? A. No, sir. Q. You just simply told him there wasn't any steer down there? A. Yes, that is all he asked. Q. And you told him to come down and look over the herd? A. Yes, sir. Q. As a matter of fact, you knew there was only 27 head there at that time, did you? A. Yes, sir."

In considering the case upon plaintiff's testimony alone, we are giving him the full benefit of the findings of the jury as to three of the four head of cattle in controversy; but we do not see how that in any manner changes the result. The only difference in the eye of the law between taking one head and four is in degree. In either case the act was wrong. His evidence shows that he bought 27 head of heifers at $14.75 a head, and on the evening of the same day drove away from defendant's premises 28 head. He did not settle for the animals purchased until the next day, when he went to the clerk of the sale at the bank in Overton and paid for 27 head only. He took 27 head to

his own farm, and sold the other one and received the money therefor. He said nothing to the clerk of the sale when he settled for the cattle about having driven away one head more than he had bought and was paying for. When defendant asked him, the day after the sale, if he had any extra cattle, or, as plaintiff puts it, if he had a steer in his bunch, he answered, "No," but said nothing to defendant about having driven away 28 head instead of 27. For 13 months, or thereabouts, he concealed the fact of his having driven away more cattle than he had bought, and then did not disclose the fact to defendant until defendant and Lewis accused him of the matter at Overton on the day he paid over the money in controversy. His statement that he supposed he had a right to take away 28 head of heifers, because the defendant told him he had bought all the heifers in the lot and for him to drive them out, cannot be construed in any other light than as a mere pretense. He knew he had only bought and paid for 27 head, and when he discovered that he had 28 head in the bunch it was his duty to have immediately separated one from the bunch and put it back in the lot, or, when one broke away from the herd, to have advised defendant of that fact; but instead of doing so he sold it to the father of the young man who was helping him drive the bunch. It is evident from all this that, when defendant and Lewis called upon him at Overton, he knew he had taken something that did not belong to him and had concealed his possession of it for over a year. Then, when he was confronted with the accusation of having taken stock that he was not entitled to, he paid the money in controversy to defendant, as he himself says, for the purpose of avoiding arrest and prosecution. Such an agreement is against public policy, and cannot in any manner be countenanced, or upheld, or abrogated by the court for his benefit. In *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314, we said: "An action cannot be maintained for the consideration of a contract upon an alleged performance by the plaintiff, if such contract is against public policy. If such contract

is fully executed the court will not disturb it, but leave the parties to abide the consequences; if it is not executed the court will not lend its aid to carry it into effect." The accusation made against him by defendant and Lewis, that he had stolen cattle, or at least one animal, from defendant, was not without foundation; and it is clear from plaintiff's own testimony that the money was paid "to fix up with Berger." In other words, it was paid to avoid an arrest and prosecution for an offense which he felt he had committed. Under such circumstances he is not entitled to any relief.

As, under plaintiff's own testimony, there is no theory upon which he can ever recover in this case, the judgment of the district court is reversed and the cause remanded, with directions to that court to dismiss plaintiff's action.

REVERSED AND DISMISSED.

LETTON, J. I concur in the conclusion.

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HUBER MANUFACTURING COMPANY, APPELLANT, V. JOHN C. SILVERS ET AL., APPELLEES.

FILED JANUARY 5, 1910. No. 15,883.

Notes: JOINT MAKERS:. RELEASE. The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all.

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

*George A. Adams,* for appellant.

*Norval Bros., J. J. Thomas* and *Edwin Vail, contra.*

FAWCETT, J.

This action was commenced in the district court for Lancaster county upon five promissory notes, dated June 10, 1903, signed jointly by all three defendants. The defendants each filed a separate answer. Defendant Silvers alleged that "before this action was brought, and after the giving of the several promissory notes mentioned and described in said petition, to wit, on or about August 17, 1903, the said plaintiff for a good and valuable consideration, to wit, the purchase by this answering defendant from the said plaintiff on or about said date one sixteen-horsepower Huber traction engine, and one Huber steam thresher, and other property, released and discharged this answering defendant from the claims and cause of action set forth in its petition filed herein, and thereby this answering defendant was discharged by said plaintiff from the payment of the debts, or notes, mentioned in said petition." Further, "that the several promissory notes mentioned and described in the petition were given by the defendants herein for the purchase by these defendants from said plaintiff of one of the plaintiff's rigs, to wit, one Huber steam thresher separator; and this defendant further avers that the following is a copy of the said release heretofore mentioned and described, to wit: 'The undersigned of this order is to be released without recourse hereafter on the Co's Rig signed by Silvers, Britt and McKenney upon the approval of this order.'" Defendant further averred that he gave plaintiff, on or about August 17, 1903, a written order for the threshing outfit first above set out, and that thereafter the said order was accepted and approved by plaintiff under and in pursuance of said order given by defendant to the company; that plaintiff furnished and delivered to him the threshing outfit above mentioned; "that in pursuance of the said stipulation in said written order above set forth, and the approval thereof by said plaintiff as above set forth, this

answering defendant is released and discharged from the claims or debts sued for in the petition filed herein."

The defendants Britt and McKenney, in their separate answers, each alleged that the notes set out in plaintiff's petition were executed by the three defendants as joint makers, and that the consideration therefor was the joint obligation of all the defendants; "that on or about August 17, 1903, the plaintiff for a good and valuable consideration, and without the knowledge and acquiescence, permission or consent of this answering defendant, released and discharged the codefendant John C. Silvers from all liability on the notes set forth in plaintiff's petition and the consideration for which the same was given; that said release was absolute and unconditional, and that by reason thereof this answering defendant has been and is released and discharged from all liability upon said notes."

The reply alleged that the notes were joint and several notes, and were executed by the defendants to plaintiff for a threshing machine outfit; that on or about August 17, 1903, defendant Silvers came to plaintiff, and represented to plaintiff that he had sold his interest in said threshing outfit to his codefendants Britt and McKenney, and that they had assumed and agreed to pay the notes and debt sued upon, and at that time offered to purchase, or wanted to purchase, of plaintiff another threshing outfit; that plaintiff, relying upon what he said, and believing his statements to be true, and from his statements believing that he had sold his interest in the outfit for which the notes in suit were given, and believing that the defendants Britt and McKenney had agreed with him to assume and pay the notes in suit, "solely relying upon said representations and believing them to be true, sold to him another outfit, and in the order signed by said defendant Silvers for said outfit entered a release in the following language, to wit (the release above quoted); that thereafter the plaintiff was notified by some or all of the defendants that the defendant Silvers had not sold his in-

terest in said outfit to his codefendants herein, and that they had not assumed or agreed to pay the debt sued on herein, whereupon this plaintiff sought and has ever sought to hold all of the defendants liable for the debt sued on herein, and at once notified them that they were not released from liability because of said release secured by the defendant Silvers from this plaintiff. This plaintiff further alleges that it does not know whether said statements were true or false, and it has no means of knowing; that the defendant Silvers says they are true; that the defendants Britt and McKenney say they are not true; but this plaintiff avers and alleges that, if said statements were true, said release was valid and binding and the said defendants Britt and McKenney are liable upon the notes sued on herein; if said statements were not true, then said release was procured by and through the fraud of the said defendant Silvers, and is of no force and effect, and all of the defendants are liable on the notes herein sued upon; and the plaintiff demands that said question be in this case tried and determined as to whether or not said Silvers sold out to his codefendants herein, and whether or not they agreed and assumed to pay said debt; and, when said facts are found, that the law be pronounced upon them, and that this plaintiff have judgment, as in its petition set out, against the parties defendant herein found to be liable under the facts herein alleged."

There was a trial to the court and a jury. When plaintiff had rested, the court directed a verdict in favor of the defendants, and judgment was rendered thereon, from which plaintiff appeals.

Numerous questions of law are discussed as to what could be proved under the reply in this case, etc., but it could serve no good purpose to enter into a discussion of those questions here, for the reason that, under the undisputed evidence, there is no theory upon which plaintiff can recover. There is no dispute but that the notes in suit were signed by all of the defendants as part of the purchase price of a threshing outfit which they had jointly

bought from plaintiff; that some time thereafter, and before any of the notes in suit had matured, defendant Silvers called at plaintiff's place of business in the city of Lincoln and stated to plaintiff's agents that he had sold his interest in the threshing outfit to his cosigners, and that they had agreed to pay the notes; that plaintiff, some two or three days thereafter, sold him another threshing outfit, and in the written contract therefor unconditionally released him from all liability upon the notes in suit. Conceding every proposition of law contended for by plaintiff, it would avail plaintiff nothing, for the reason that the record is barren of proof to aid it in the application of those legal principles. The record before us fails to show whether Silvers had or had not sold his interest to the defendants Britt and McKenney. Plaintiff in its reply says that it has no means of knowing whether the statements made by Silvers are true or not; and the unfortunate thing for plaintiff is that we are left in the same condition. We have no means of telling from the record before us whether his statements were true or not. The evidence of plaintiff's agent is that the sale of the threshing outfit to Silvers was not made until some two or three days after he had called at their office and made the statements about his having sold his interest to Britt and McKenney. The sale in fact was not consummated until plaintiff sent one of its salesmen to the home of defendant Silvers to close up the deal. During this two or three days' time plaintiff made no inquiry of Britt and McKenney to ascertain whether or not the statements made by Silvers were true. They saw fit to rely entirely upon what Silvers had said; and even after plaintiff's agents learned that Silvers and Britt were having some difficulty over an accounting, so far as the record discloses, they still did not make any inquiry of either Britt or McKenney as to whether or not they had purchased Silvers' interest in the threshing outfit. On all of these important questions the record is painfully silent. We use this term advisedly; for it is with

great reluctance that we affirm a judgment which will release these defendants from a just obligation which some of them ought to pay. Common prudence, it seems to us, would have dictated to plaintiff's agents the necessity of their making inquiry of Britt and McKenney before they released Silvers. If they saw fit to refrain from making such inquiry when they had ample time to do so, and plaintiff must now suffer a loss on account thereof, the loss must be charged to their own gross neglect, and not to the well-established rule of law which prevents a recovery in this case. *Lamb v. Gregory,* 12 Neb. 506. Under the evidence offered by plaintiff there was nothing to submit to the jury, and the district court did right in directing a verdict in favor of the defendants.

The judgment of the district court is therefore

AFFIRMED.

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WILL S. GILLAM, APPELLANT, V. WALT MANN, APPELLEE.

FILED JANUARY 5, 1910. No. 15,887.

1. **Appeal**: REJECTION OF EVIDENCE: OFFER OF PROOF. Error cannot be predicated upon the refusal of the district court to permit a witness to answer a certain question, when no offer is made of the proofs which would be elicited if the answer were permitted to be made.

2. ———: CONFLICTING EVIDENCE. Where the evidence is conflicting and does not preponderate in favor of either party to such an extent as to show that the verdict of the jury is clearly wrong, the verdict will be sustained.

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

*A. W. Crites,* for appellant.

*G. T. H. Babcock, contra.*

FAWCETT, J.

This action was commenced in the county court of Dawes county upon two causes of action—the first for $12.50 for rent; and the second for damages in the sum of $95 which plaintiff claims to have suffered by reason of the breaking of a large plate glass window in the front of his store building. On the trial defendant confessed plaintiff's first cause of action, and the trial proceeded upon the second. The petition alleges that on the 3d day of July, 1907, the defendant "did wantonly, carelessly and negligently explode and discharge in said street in front of plaintiff's said building a certain large, explosive cannon cracker, containing a large quantity of gunpowder, or other explosive substance, at and near to said plate glass window, and by the force of said explosion did crack, break and destroy one of said large panes of plate glass then of the value of $95, and more." The answer denied all of the allegations in plaintiff's petition, and alleged that the plate glass window did not break and go to pieces until long after the 3d of July, and that the breaking and cracking of said plate glass window was caused by the inherent defects in said glass, or carelessness on the part of the plaintiff. The reply is a general denial. The county court entered judgment for defendant, and plaintiff appealed to the district court, where the case was tried to the court and a jury, resulting in a verdict and judgment for defendant, from which plaintiff now appeals to this court.

The only errors argued in plaintiff's brief are: (1) That the evidence is not sufficient to sustain the verdict; (2) error in sustaining defendant's objection to the question: "You may state the extent and character and use made by the people of Chadron and surrounding country of Second street, between your place and his"; (3) error in permitting defendant to show the condition of the wall of the room in the second story and over the broken window in controversy. The evidence shows that

on the evening of July 3, 1907, defendant and a number of other citizens of Chadron were celebrating in advance the coming national holiday. Defendant's place of business is almost directly across the street from the store building occupied by plaintiff. The street between the two is somewhere from 80 to 100 feet wide. Defendant and his friends were exploding cannon firecrackers in the street. They were standing upon the sidewalk in front of defendant's place of business, where they would light the crackers and then throw them out into the street, aiming, as we think the evidence fairly shows, to throw the crackers about half way across the street. One cracker seems to have been thrown farther than the others and to have landed within a few feet of the curb in front of plaintiff's store. When the cracker exploded it threw up a shower of sand and pebbles. Immediately following the explosion, and so nearly simultaneous therewith that it must have been thrown by the explosion, a pebble or some other hard substance struck the plate glass window in the front of plaintiff's store, breaking the glass, and causing several cracks which radiated in different directions from the point of impact. Within three or four days thereafter the cracks extended to the outer edges of the glass, which so weakened it that it was blown in by the wind a few days thereafter. Plaintiff was compelled to replace the glass at a cost of $95. Plaintiff testified that he saw the defendant throw the particular firecracker which caused the damage. No other witness so testified. Defendant testified frankly that he did not know whether he threw it or not. The evidence shows that there were several men throwing firecrackers at that time, and, while the testimony of plaintiff is positive that defendant threw the particular firecracker, the testimony of the other witnesses shows his position to have been such that he could easily have been mistaken upon that point. He was standing inside of his store. It was in the dusk of the evening. The testimony is conflicting as to whether or not the electric lights had been turned on

in the stores and on the street. However this may be, we think the evidence fairly shows enough uncertainty as to who threw the particular cracker which caused plaintiff's damage that we cannot say the verdict of the jury is not sustained by the evidence.

Plaintiff argues that it is not a sufficient defense for defendant to show that it is uncertain who threw the cracker which caused the damage; that "defendant and his companions were simultaneously engaged in a common object, and in the pursuit of it they inflicted the injury. This was enough to fasten a joint and several liability upon them for the damage caused by any one of their number." The trouble with this contention is that no such issue was tendered by the pleadings, nor was any request made of the court to submit any such issue to the jury. It is apparent from an examination of the record that the case was not tried on any such theory in the court below, and we think it is too late to attempt to invoke that rule here.

Plaintiff's second point, that the court erred in sustaining defendant's objection to the question above quoted, must fail, for the reason that plaintiff made no offer to prove the fact called for by the question.

As to plaintiff's third point, it appears that at one time defendant had rented the room immediately over the front of plaintiff's store. The court permitted defendant to testify that while he occupied the room the plastering was all off the northwest corner, and that it partially fell off during the time defendant occupied the room. This is the substance of defendant's testimony on that point. The purpose of this testimony evidently was to try and show that the glass had become cracked from the settling of the building; but it so utterly fails to show any defective condition of the front wall of the building, or any defect in the glass, that, regardless of its competency or incompetency, we do not see how the jury could in any manner have been influenced by its admission. There is no complaint as to the instructions of the court. The

case was fairly submitted to the jury, and we cannot disturb the verdict.

The judgment of the district court is therefore

AFFIRMED.

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ROBERT BARRETT, APPELLANT, V. F. J. RICKARD, APPELLEE.

FILED JANUARY 5, 1910. No. 16,337.

1. **Intoxicating Liquors: EXCISE BOARDS: POLICE POWER.** The excise board of the city of Lincoln, in pursuance of the provisions of section 7963, Ann. St., 1909, established the following rule: "It shall be unlawful for any railroad company, express company, or other common carrier, or agent, officer or other representative of any such common carrier, to make delivery to any person of intoxicating liquors within said city at any other point than the principal and usual place of business of said common carrier therein; and every common carrier bringing malt, spirituous or vinous liquors into said city shall be required to establish one definite place of business therein at which all deliveries of such liquors shall be made to *bona fide* consignees thereof in person only." *Held*, the establishment of the rule, so far as involved in the facts discussed in the opinion, comes within a reasonable exercise of the police power of the officers of the city.

2. ———: ———: **RULES: VALIDITY.** A rule of an excise board of the city of Lincoln will not be held to be invalid merely because it imposes restrictions upon the delivery of intoxicating liquors in the city by a common carrier or its agents that it would not be permissible to impose upon the delivery of ordinary articles of commerce.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*E. J. Murfin, T. J. Doyle* and *G. L. De Lacy,* for appellant.

*J. M. Stewart, T. F. A. Willams, C. C. Flansburg* and *L. A. Flansburg, contra.*

DEAN, J.

This is a habeas corpus proceeding brought here for review from the district court for Lancaster county. The record, in substance, discloses that on August 3, 1909, Robert Barrett, defendant, was in the employ of a firm engaged in a general drayage business at Havelock, such as the hauling for hire of goods, wares and merchandise. On that date, as such employee, he delivered a case of beer within the corporate limits of Lincoln at the residence of a purchaser who bought it from a regularly licensed dealer in malt, spirituous and vinous liquors at Havelock, a city of less than 5,000 population, and located about five miles distant from Lincoln. When the beer was delivered by the defendant, he was arrested by F. J. Rickard, chief of police of the latter city, on the ground that such delivery was in violation of rule 12 of the excise board of the city. The defendant brought this action in the district court, alleging the invalidity of rule 12, and consequent unlawful arrest. Upon the hearing the trial court denied the relief prayed for by defendant and remanded him to the custody of the law officers. From that judgment he has brought the case here for review. Rule 12 of the excise board is as follows: "It shall be unlawful for any railroad company, express company, or other common carrier, or agent, officer or other representative of any such common carrier, to make delivery to any person of intoxicating liquors within said city at any other point than the principal and usual place of business of said common carrier therein; and every common carrier bringing malt, spirituous or vinous liquors into said city shall be required to establish one definite place of business therein at which all deliveries of such liquors shall be made to *bona fide* consignees thereof in person only." The above rule was established in pursuance of the following provisions contained in section 7963, Ann. St. 1909: "The excise board shall have the exclusive control of the licensing and regulating

of the sale of malt, spirituous, vinous, or intoxicating liquors in such city, and for that purpose shall hold a public session at least once each month at the council chamber in said city, and a record of its proceedings shall be made and kept as a public record by the city clerk, who shall be clerk of said board. A majority of such board shall constitute a quorum. The excise board may license, regulate, or prohibit the selling or giving of malt, spirituous or vinous, mixed or fermented intoxicating liquors in said city, * * * and any person selling or giving away in said city any liquor of the description mentioned in this section, without first having complied with such regulations, and procured a license or permit therefor, or who shall violate any of the rules and regulations established by such excise board and governing the sale of such liquor shall on conviction thereof be fined in any sum fixed by such rule not more than two hundred dollars for each offense, and shall be committed to the city jail until such fines and costs are paid. * * * The excise board shall also make all needful rules and regulations not inconsistent with the laws of this state for the control of places at which malt, spirituous, vinous, or intoxicating liquors may be sold in said city; and all such rules and regulations, when adopted by said board and published once in a daily newspaper published and of general circulation in said city, shall have like force and effect as ordinances of said city adopted by the city council thereof, and shall be proved in like manner. The excise board when in session shall have the same power to issue subpœnas and compel the attendance of witnesses and compel them to testify concerning matter pending before them, as a justice of the peace has on an examination before him; and the president of the board or presiding member for the time being shall have the same power as such justice to administer oaths and affirmations. All subpœnas, commitments, and other processes shall be signed by the president or presiding officer for the time being of the board and countersigned by the city clerk.

The excise board shall have power and it shall be their duty to appoint a chief of police and such number of policemen and other officers as may be necessary to police the city, and protect persons and property and maintain peace and good order. * * * The mayor of the city shall be member *ex officio* of the excise board and chairman thereof."

The parties to this action entered into a stipulation containing, among others, the following: "The sole contention of the state is, and the sole question submitted in this case, that, under the provision of rule 12 of the excise board of the city of Lincoln, the defendants as common carriers were prohibited from delivering said beer, or any beer, to the residence of any citizen of Lincoln." Defendant contends that he should not be held to answer under the rule of the excise board here in question because, as he alleges, it deals solely with the subject of transportation, and not with the sale of intoxicating liquors, and he argues that the board exceeded its authority in the adoption of the rule, and that in so doing it usurped the province of the mayor and council of the city. In support of his contention he invokes the provisions of sections 7908, 8028, 8036, ch. 37, Ann. St. 1909, commonly known as the Lincoln charter, and also cites numerous authorities. Reference is likewise made in his brief to sections 7189, 7190, 7191, Ann. St. 1909, the latter sections of the statute having to do with the subject matter of transportation of intoxicating liquors. We do not believe defendant's contention can be sustained; and, with such brevity as a proper discussion of the facts and the law seem to permit, we submit the reasons for our decision.

The right of the legislature to clothe the city with power to adopt the rule in question is derived from that undefined branch of government known as the police power, which by some writers is said to bear the same relation to the municipality that the principle of self-defense bears to the individual. An analysis of the stat-

ute conferring on the excise board authority to establish rules for the purposes therein mentioned, when considered in connection with the facts in the present case, convinces us that, in the establishment of rule 12, the board was properly within the limits contemplated by the statute which created it and gave to it its powers. The court takes judicial notice of the fact that the city of Lincoln has a population of about 60,000 people, and that on the date when defendant was arrested the city did not have an open saloon for the sale of malt, spirituous and vinous liquors within its borders, the majority of its voting population having at the last preceding election declared that no license should be issued for the ensuing fiscal year for the purpose of selling such liquors within the corporate limits of the city. The court also takes judicial notice of the fact that Havelock is situated about five miles from Lincoln, and it is admitted in the record that one or more saloons in Havelock are engaged in the occupation of selling malt, spirituous and vinous liquors in pursuance of licenses regularly obtained. It is matter of common knowledge that substantial cities, of about the population of Havelock, and villages grow up and become permanently established contiguous to the larger centers of population. At times it may happen, as in the present case, that the smaller city licenses the traffic in intoxicating liquors, while the more populous city may have denied the right of such traffic. Under such circumstances, and in order that the will of the people of the city forbidding the traffic may be effective, some provisions such as those contained in rule 12 must necessarily be adopted and enforced by the excise board; otherwise the will of the citizens with respect to their affirmative action against the granting of liquor licenses might be practically set at naught by the establishment of a line of special delivery conveyances, or by other like means, whereby the proscribed commodity might be delivered everywhere throughout the city without let or hindrance as to time or place, and without any control or

the possibility of supervision by the officers of the municipality, and to such extent that the attempted control of the traffic either by the rule of the excise board or by city ordinance would be fruitless. The control of the traffic in intoxicating liquor intended for use as a beverage, and as an incident thereof the control of its transportation, comes properly within a reasonable exercise of the police power by the municipal officers. Without power vested in the city authorities to control, within reasonable limits, the local or other importation for hire of intoxicating liquors into a city, for general distribution where the traffic in intoxicants is forbidden, would be to some extent a denial of the right of the municipality to control such traffic. It would be an improper denial of self-government. The baneful effects that are attendant upon the intemperate use of intoxicating liquors have long been recognized, and in civilized communities everywhere they are deeply deplored. For this cause municipal and other governmental authorities in dealing with the traffic in intoxicants, from the moment when the finished product is pronounced by its makers as being ready for market until it is finally consumed, have been compelled for the protection of the community to impose restrictions upon every stage of its sale and its transportation, which, if applied to almost any commodity in common use, might well be held to be an unreasonable restraint of trade. In a civilized state it is idle to contend for the same liberty of trade and of transportation with respect to intoxicating liquors which are intended to be used as a beverage that is everywhere freely conceded to be a right that accompanies trading in and transporting by the usual methods, ordinary articles of commerce. The power to prevent an indiscriminate and general delivery of intoxicating liquors in a community, except in pursuance of such reasonable rules and regulations as such community may adopt, is a power that is incident and supplemental to that police power which is everywhere invoked by municipalities in the control of

the liquor traffic, and such regulation of transportation is substantially related to that subject. An exercise of the provisions of rule 12, so far as involved herein, is not the usurpation of authority, but is merely the exercise of that police power that extends to a reasonable regulation of the owner's use of his private property as distinguished from an appropriation of such property by the sovereign power.

*Munn v. Illinois,* 94 U. S. 113: "Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property."

*Chicago v. Netcher,* 183 Ill. 104, 75 Am. St. Rep. 98: "The liquor business is one peculiarly subject to the police power on account of the multitude of evils which result from it. Police regulation of that business has always been sustained, as having for its object the prevention of intemperance, pauperism and crime, and diminishing, as far as practicable, the injurious consequences to the public resulting from the business. In *Schwuchow v. City of Chicago,* 68 Ill. 444, it was said: 'This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits.'"

In *Pleuler v. State,* 11 Neb. 547, in discussing the legality of an act prohibiting "the sale of liquors within a strip of two miles around an incorporated city or village, while it may be licensed both within and without that limit," LAKE, J., speaking for the court, says: "This provision violates no command of the constitution. It is general in its application to all territory of the state falling within such description, and it is but an exercise of the police power intrusted to the legislature. It is referable to that principle which enables the legislature to prohibit liquor selling on Sundays and on days of elections, or within the vicinity of fairs, camp-meetings, and

other gatherings of the people. It is the power exerted by the legislature of Kentucky, and recognized in *Board of Trustees of Falmouth v. Watson,* 5 Bush (Ky.) 660, in the provision that persons engaged in the retail of spirituous liquors within one mile of an incorporated town must have a license to do so from the proper officers thereof, although already licensed by the county authorities under another general law of the state." *Thurlow v. Massachusetts,* 5 How. (U. S.) *504; *Fletcher v. Rhode Island,* 5 How. (U S..) *504; *Pierce v. New Hampshire,* 5 How. (U. S.) *504; *City of Grand Rapids v. Braudy,* 105 Mich. 670, 32 L. R. A. 116; *Jugenheimer v. State Journal Co.,* 81 Neb. 830; *State v. Dudgeon,* 83 Neb. 371; *People v. Draper,* 15 N. Y. 532; *Ex parte Brown,* 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743; *Hollingsworth v. Parish of Tensas,* 17 Fed. 109.

22 Am. & Eng. Ency. Law (2d ed.) 919: "The police power is inherent in the several states, and is left with them under the federal system of government, and may always be exercised by the state legislatures. * * * The police power of the states may, in the absence of any constitutional restrictions upon the subject, be delegated to the various municipalities throughout the state, to be exercised by them within the corporate limits. And indeed such delegation is necessary, for it is a well-recognized principle in government that the police requirements of a city are different from those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country."

28 Cyc. 692: "The police power of the state, being an expression of the instinct of self-preservation and protection characteristic of every living creature, is an inherent faculty and function of life, attributed to all self-governing bodies as indispensable to their healthy existence and to the public welfare. It embraces all rules and regulations for the protection of the lives, limbs, health, comfort, and quiet of persons, and the preserva-

tion and security of property. * * * After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power and therefore nondelegable, the doctrine is firmly established and now well recognized that the legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power within their boundaries; the measure of power thus conferred is subject to the legislative discretion."

*Stone v. Mississippi,* 101 U. S. 814: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals."

It will be observed the excise rule, in the present case, provides that all deliveries of intoxicants shall be made to consignees in person only. In his brief defendant urges this as an additional reason why we should hold the rule invalid. But we do not decide the point in this opinion, thus raised by him, because it is not involved in the present case, the defendant's arrest having been made because of an unlawful delivery of intoxicating liquor, and not because of a delivery to some person other than the consignee. It will also be noted this feature of the excise rule is not assigned in the stipulation of counsel as one of the questions submitted for our decision. In view of the authorities, and for the reasons given herein, we hold that the establishment of rule 12 of the excise board of the city of Lincoln is not a usurpation of authority, but, so far as the rule is involved in the facts before us, is merely a reasonable exercise of the police power conferred by the legislature.

Finding no reversible error in the record, it follows the judgment of the district court must be, and it hereby is

AFFIRMED.

JOHN HEESCH, APPELLEE, V. BENJAMIN T. SNYDER ET AL., APPELLANTS.

FILED JANUARY 20, 1910. No. 15,891.

Intoxicating Liquors: APPEAL: DISMISSAL. The supreme court may on its own motion dismiss remonstrators' appeal from a district court's order sustaining a saloon-keeper's license, where the record shows that the term for which the license was issued has expired, and that during its existence appellants made no motion to advance the case for determination.

APPEAL from the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Appeal dismissed.*

*Aaron Wall* and *Thomas Darnall,* for appellants.

*R. J. Nightingale, contra.*

PER CURIAM.

John Heesch, appellee, procured from Loup City a license to sell intoxicating liquors during the municipal year beginning in May, 1908. Benjamin T. Snyder and others were remonstrators, and, when defeated before the city council, appealed from the order granting the license to the district court, where the license was upheld. They subsequently appealed to this court, and here renew the attack made by them below on the issuance of the license. On the face of the record it appears that the period for which the license was issued has long since expired. It follows that mooted questions only are presented for consideration. *Halverstadt v. Berger,* 72 Neb. 462. As was held in *Cutcomp v. Utt,* 60 Ia. 156: "Courts are not organized to determine mere abstractions, and will refuse, on their own motion, to proceed in a cause which involves only a right which has ceased to exist." *Mills v. Green,* 159 U. S. 651; *Chicago, R. I. & P. R. Co. v. Dey,* 76 Ia. 278; *Matter of Manning,* 139 N. Y. 446; *People v. Common Council,* 82 N. Y. 575. The rule stated will be

applied herein, since the record shows that appellants made no motion in this court to advance the case for determination during the existence of the license.

APPEAL DISMISSED.

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FRANCIS W. BROWN ET AL., APPELLANTS, v. W. H. ENGLAND ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 15,775.

**Intoxicating Liquors: APPEAL: DISMISSAL.** W. applied to the excise board of the city of L. for a license to sell intoxicating liquors. The application was not made in his own interest, but for the benefit of another. The board granted the license. The remonstrators appealed to the district court, where the action of the board was reversed and the license revoked, the court finding specifically that the applicant was not the real party in interest. The excise board excepted to the judgment and appealed to this court, the purpose of the appeal being to test the validity of certain rules enacted by them. *Held*, That in the condition of the record the questions presented could not be legally examined, and the appeal is dismissed.

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

*John M. Stewart* and *T. F. A. Williams*, for appellants.

*Charles O. Whedon, contra.*

REESE, C. J.

An application was made to the excise board of the city of Lincoln, by F. J. Walton, for a license to sell intoxicating liquors "at No. 835 in building situated on lots 1, 2, 3, 4, 5, block 44, fronting on P street, in said city (referring to the city of Lincoln)." A remonstrance was filed, assigning a number of grounds why the license should not issue, among which was a denial that the applicant was acting in good faith and in his own behalf.

After a prolonged hearing, in which it appeared that the place where the proposed saloon was to be conducted was in the Lincoln hotel, of which the applicant was assistant manager, and that, in fact, the license sought was for the benefit of said hotel, owned by a corporation, the license was granted, when an appeal was taken to the district court. Upon a hearing in that court the action of the excise board in granting a license was reversed, the court finding "generally in favor of remonstrators and against the applicant; and further finds specifically that the applicant is not the real party in interest." Judgment was then entered sustaining the remonstrance, denying the petition of the applicant, reversing the action of the board in granting the license and ordering the license revoked. This judgment was rendered on the 10th day of June, 1908. On the same day Walton filed a motion for a rehearing and to set aside the judgment. On the first day of July, of the same year, this motion was overruled. On the 13th day of July, 1908, a transcript of the proceedings was filed in this court, with precipe, in which the clerk was instructed to designate "Francis W. Brown, Julius C. Harpham and Ulysses G. Powell, Excise Board of the city of Lincoln as appellants," and the remonstrators (naming them) as appellees. On the 31st day of December, 1908, another precipe was filed similar to the former one, except that F. J. Walton's name was added to those to be designated as appellants, and which was signed for him by counsel other than those who had signed the first one. A notice of appeal was also filed by him, but of which the record does not show service. On the 5th day of June, 1909, the appeal of Walton was, on motion of the remonstrators, dismissed, leaving the members of the excise board as the sole appellants. A motion to dismiss their appeal was also filed and submitted, but was overruled in order that the questions presented might be retained for further consideration. The evidence taken before the excise board, and which is preserved by the bill of exceptions, clearly shows that

Walton, the applicant, was not the party in whose interest the license was sought, and that the decision of the district court in so holding was correct. Had his appeal been taken within the time prescribed by law, that question might have served as a basis therefor, and the question have been open for reexamination; but such is not the case, and the cause fails to present any legitimate question for review. From the brief and argument presented by the excise board it is made to appear that the purpose of their appeal is to obtain a ruling on the question of the validity of certain rules enacted by them, but in the condition of this record it must be apparent that the board can have no standing in this appeal, and that the questions presented cannot be examined.

This appeal is

DISMISSED.

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WILSON E. FIELD ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 15,892.

**Adverse Possession: EVIDENCE.** Plaintiffs and their grantors cultivated a portion of Q street in front of their lots in the city of Lincoln from about the year 1876 to 1880. In 1878 the mayor and council of the city enacted an ordinance permitting the fencing of a portion of the streets for the protection of trees planted thereon. In 1880 plaintiffs constructed a fence in the street outside of trees planted and growing thereon, and maintained the fence until the commencement of this suit in 1908. In 1906 the city council, in pursuance of the provisions of the ordinance, passed a resolution directing the removal of the fence, and the city officers were about to proceed to carry out the directions when they were enjoined by plaintiffs in this action on the ground that their possession of the property was adverse during their occupancy and their title thereto was perfected by limitation. *Held*, First, that the mere cultivation of the strip of ground in front of the lots and in the street did not constitute adverse, exclusive and hostile possession, such as would set the statute in motion; and, second, that the fencing of the strip for the protection of the trees growing thereon was permissive, and not adverse.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*Burkett, Wilson & Brown,* for appellants.

*C. C. Flansburg, John M. Stewart* and *T. F. A. Williams, contra.*

REESE, C. J.

This is an action against the city of Lincoln and its officers, the street commissioner and his assistant, to enjoin them from removing certain fences claimed by the city to be in the street, and to quiet the title of plaintiffs in the property inclosed. The petition alleges title by adverse possession, and it is not claimed that plaintiffs hold the land by any grant or paper title. It is unquestionably true that the strip or portion of land lies in front of plaintiffs' lots outside the lot line and is a part of the street, unless the right of the city to cause the street to be opened its full width has been lost by the inclosure of plaintiffs and adverse holding by them for the statutory period. It is alleged that plaintiffs, Fields, became the owner of the lots abutting on the street in the year 1880, and which were lots 9, 10, 11 and 12, in block 3, of Kinney's O street addition to the city, and that they sold lots 11 and 12 to plaintiff Fossler in the year 1903. It is also alleged that the Fields became the owners of lots 7 and 8, in the same block, in 1879; that prior to the purchase by the Fields the then owners were, and for some time prior thereto had been, in adverse possession of the property in dispute; that such possession had been maintained from the date of purchase to the time of the commencement of the suit; that defendants were threatening to remove the said fences and open the street to the full width, and thereby interfere with and interrupt plaintiffs' possession. The defendants answered, denying the averments of the petition as to the adverse possession, and set up the passage of an ordinance of the city passed and ap-

proved on the 31st day of December, 1878, by which lot owners were permitted to plant trees in two rows, the outside row to be twenty feet from and outside the lot line, the inside row to be not more than two feet from and outside said line, and permitting the space to be fenced for the protection of the trees, such fence to be constructed not more than six feet from the outside row of trees. The ordinance reserved the right to order the removal of the fences at any time the council might deem the same advisable. Said ordinance remained in force until October 31, 1889, when a new ordinance was enacted similar to the former one, except that the directions for planting trees were more specific with reference to the distance the trees should be planted from the curb line, their cultivation, etc., and continued the right to maintain fences for their protection. The ordinance also gave the right to cultivate the portion of the street inclosed by the fences for two years, and thereafter plant grass seed therein. It is alleged that whatever occupancy of the street was enjoyed or had by plaintiffs and their grantors had been by the permission of the city under said ordinances; that the same was not adverse to its rights to cause the fences to be removed and the street opened its full width; that plaintiffs acquired no right or title to the property as against the city, and never at any time claimed or asserted such rights until on or about the 9th day of July, 1906; that on said day, in pursuance of the powers reserved by the ordinances above referred to, the city council duly passed a resolution ordering the removal of the fence; that the defendants, the officers enjoined, were intending to remove the same, but without in any way encroaching upon plaintiffs' real estate as described by said lots. It is also alleged that Q street, upon which the lots abut, was and is the width of 100 feet. The prayer of the answer is that plaintiffs' petition be dismissed. The reply consisted of some unimportant admissions, and denied all other averments of the answer. A trial was had in the district court, which resulted in a finding and decree in

favor of defendants and a dismissal of plaintiffs' petition. Plaintiffs appeal.

During the trial the existence of the ordinances was admitted, and they were introduced in evidence. They are preserved in the bill of exceptions and are of the tenor and effect as above stated, and therefore need not be copied here. From a perusal of the bill of exceptions, it appears that the strip or portion of the street involved in this suit was not fenced until after the passage of the ordinance, and, if such adverse possession as would ripen into a title had not been exercised prior to the passage of such ordinance and construction of the fence, the possession will have to be held as permissive only, and not adverse. The evidence is clear, both from the testimony of plaintiffs and other witnesses, that prior to the year 1880 the strip had not been inclosed, and that when the fence was built it was for the protection of the trees, which was permitted by the ordinance of 1878. It is very doubtful if the mere cultivation of such a portion of the street without inclosing it, or in some way excluding the public, could ripen into a title. In Elliott, Roads and Streets (2d ed.) sec. 883, after a somewhat lengthy discussion of the question of the barring of rights of the public by statute of limitations or adverse possession, the author, at the close of the section, says: "Even if title to a highway may be acquired by adverse possession, it is not every encroachment thereon that constitutes such possession. Setting out shade trees, making a sidewalk, fencing in a portion of the way, and the like, have been held insufficient to establish a claim by adverse possession"—citing cases from New York, California, Indiana, Michigan, Texas, Massachusetts, Wisconsin, Missouri, Iowa, Illinois and Minnesota. While this is not adopted in this state in all its parts, yet we think it is clear that to divest the public of its highways the rules governing adverse possession should be held strictly against the disseizor, and his right, if established at all, should be based upon clear proof of adverse holding for the full statutory period, and the

mere plowing and cultivation of a part of the public street in a city, without other acts or the demonstration of a purpose to hold adversely and as owner, would not set the statute in motion. But, if we are wrong in this, it is manifest that the statute had not run at the time of the construction of the fences "for the protection of the trees," as testified to, within the provision of the then existing ordinance, and could not perpetuate the adverse quality of the possession. Even if it were shown that plaintiffs and their grantors had been in exclusive possession of the strip of land prior to the passage of the ordinance in question, claiming the same "as owners," and with all the essential qualities of "adverse possession," yet no right could have been asserted as against the city, owing to the lack of the statutory time, and the passage of the ordinance and the subsequent inclosure of the land for the very purpose thereby permitted would not continue the adverse quality of the possession, and the statute would cease to run. As in the case of *Ryan v. City of Lincoln, ante,* p. 539, the plaintiffs have testified with commendable frankness as to their purpose in inclosing the ground. There seems to be little, if any, doubt but that their holdings were permissive, and that the statute did not run in their favor.

The judgment of the district court is

AFFIRMED.

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WALTER W. BARNEY ET AL., APPELLANTS, V. WALTER A. CHAMBERLAIN ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 15,900.

1. **Quieting Title:** EQUITY. A entered 160 acres of land in Lincoln county under the homestead laws of the United States. After acquiring title he executed a mortgage thereon for the sum of $400. In 1896, owing to the drought and a failure of crops, he removed from the property, failed to pay the mortgage or any

interest on the debt thereby secured, and failed to pay any taxes from the year 1895 to and including the year 1900. He never returned to the land nor saw it after his removal, neither did he seek any information as to the effect upon the title caused by his defaults. During his absence the land was sold for taxes under a void judicial sale, B, the grantee of the purchaser, taking and retaining possession under a belief that his title was perfect. In 1907, being informed that his title might be questioned, he, through an agent, discovered the original owner A, and by correspondence a contract was made by which B, the occupant of the land, was to pay $200 and receive a quitclaim deed. An unsigned deed was sent to A for execution, and with it a receipt issued by a bank and payable to his order upon delivery of the executed deed. Instead of fulfilling his contract he conveyed the land to C for the consideration of $200, and a contract for an equal division of the net profits to be realized upon the termination of the litigation to follow, and the sale of the land. C had full knowledge of the contract between A and B. Up to and pending the contract between A and B, A believed he had no title to the land, believing that he had been divested thereof by a foreclosure of the mortgage, and B believed that his title was good. A had been informed that B had a tax title to the property. At the time A left the property, and for some years thereafter, it had little, if any, market value. At the time of the negotiations and contract the value had increased from about $200 to $300 to from $2,000 to $3,200. The mortgage, though presumably barred, was unpaid, amounting at that time to about $1,000. To recover the land it would be necessary to redeem from the taxes paid by B and his grantors for the years 1895 to 1907, inclusive. *Held*, That under these circumstances the consideration of $200 for a quitclaim deed was not so small as to render the contract unconscionable, and a court of equity would enforce it.

2. ———: ———: BONA FIDE PURCHASER. *Held*, also, that C had no greater or higher equity than A would have had, and, having purchased with knowledge of B's purchase, he was bound thereby, and his suit to quiet the title must fail.

3. Vendor and Purchaser: BONA FIDE PURCHASER. "A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a *bona fide* purchaser; and if he acquires such knowledge at any time before the payment of the consideration, he will not be protected as a purchaser in good faith." *Veith v. McMurtry*, 26 Neb. 341.

4. Quieting Title: PURCHASER WITH NOTICE. "If A enters into a contract to sell land to B, and without complying with the contract sells the land to C, B may compel the purchaser to convey to

him, provided he is chargeable with notice at the time of his purchase of B's equitable title under the agreement." *Veith v. McMurtry*, 26 Neb. 341.

5. ———: ———. "A purchaser with notice is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. He takes the estate subject to the charge, and stands in the place of his vendor." *Veith v. McMurtry*, 26 Neb. 341.

6. ———: MORTGAGES: EQUITY. The title to real estate will not be quieted as against an unpaid mortgage, though apparently barred by limitation, without the payment or tender of the amount of the mortgage, with legal interest.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed as modified.*

*N. P. McDonald,* for appellants.

*Hoagland & Hoagland* and *George E. French, contra.*

REESE, C. J.

This action was commenced in the district court for Lincoln county for the purpose of quieting title to a tract of land described as the northeast quarter of section 11, township 9, range 34, in said county. The pleadings are quite voluminous, and will be stated here only so far as to give an epitome of what are deemed the essential averments.

The plaintiff alleges that he is the owner in fee and entitled to the immediate possession of the real estate above described; that on November 4, 1901, the defendant, the county of Lincoln, commenced an action in the district court for said county against George Calvin and wife, and others not necessary to be mentioned here, for the purpose of foreclosing a tax lien against the land for the taxes thereon for the years 1895 to 1900, inclusive; that service of summons was had on all the defendants in the action by publication alone, and none of them appeared therein; that a decree was rendered against all, declaring a lien for the sum of $85 taxes, and $32.98 costs, and or-

dering the land to be sold for the satisfaction of the same; that, pursuant to the said order and decree, an order of sale was issued, and the land was sold at public sale to Lincoln county, the sale confirmed, and deed made by the sheriff, bearing date July 21, 1902, which deed the county had caused to be recorded; that on November 6, 1903, the county commissioners conveyed the property to the defendant, W. A. Chamberlain, who went into possession thereof and retained the same and was in possession at the time of the commencement of this suit; that George Calvin became the owner of said property in the month of June, 1890, and continued to be such owner until the 3d day of August, 1907, when he sold and conveyed it to plaintiff; that at all times during the pendency of the suit to foreclose the tax lien the said Calvin was and has continued to be a resident of this state, his whereabouts being well known, and that no service of summons was ever made upon him, nor upon his wife, and that he had no knowledge of the pendency of the action until a short time before his conveyance to plaintiff Barney, and the commencement of this suit; that said foreclosure proceedings were had without any administrative sale of the property, and the county, at and before the commencement thereof, was not the holder of any tax sale certificates issued by the county treasurer in pursuance of any such sale; that the court by such publication of notice acquired no jurisdiction over him, nor his wife, and that the whole of said proceeding was null and void, and no title was thereby acquired by the county, and the conveyance by the county commissioners to Chamberlain was without authority, and vested no title in him; that on the first day of June, 1890, said Calvin executed a mortgage to Julia A. Thayer, but that said mortgage had become barred by the statute of limitations and constituted no lien on the premises. This is followed by an offer to redeem by paying all taxes, assessments, interest and costs thereon, including the taxes for which the foreclosure was brought, with prayer for an accounting and quieting title.

The amended answer of defendant Chamberlain admits such averments of the petition as are shown of record, consisting of the former ownership of Calvin, the foreclosure for taxes, his purchase, etc., and denies the other allegations, and specifically denies that plaintiff has, or that Calvin had, any interest in or title to the property at the time of the execution of the deed to plaintiff. It is alleged, by a cross-petition as against Julia A. Thayer, that the mortgage to her is barred by the statute of limitations, and also that it was barred by the foreclosure proceedings, and that it is extinguished, but casts a cloud upon defendant's title. As a cross-petition as against plaintiff and the Calvins, the foreclosure proceedings throughout are pleaded, which it is alleged terminated in the vesting of the title in Lincoln county, and the purchase by and conveyance to defendant vested the title to the property in him; that upon the purchase of said land he, on the 6th day of November, 1903, entered into the possession thereof, and held and still holds said possession. It is further alleged that, after his purchase and possession, some question arose as to the sufficiency of his title, and he engaged and employed one O. E. Elder, a real estate dealer of North Platte, to negotiate with and purchase from the Calvins whatever equity they might have in the premises, and that by correspondence, which is set out in the cross-petition, the said equity was by direction and approval of defendant purchased for the sum of $200, the defendant being in possession and claiming title to the property; that in pursuance of said contract of purchase defendant had deposited the price in a bank, and forwarded a deed to the Calvins for execution; that the deed was received and accepted by them, and they proceeded to execute it on a date named by them, but in violation of their contract, and with full knowledge of the same and of defendant's possession and claim of title, the plaintiff entered into a collusive and fraudulent agreement with them whereby the plaintiff was to receive and did receive the conveyance to himself, and caused it to be recorded

in the deed records of Lincoln county. The prayer is for a decree dismissing plaintiff's suit, canceling his deed, and quieting title to the property in defendant, and requiring the execution of a quitclaim deed to defendant by the Calvins. The prayer further asks for the cancelation of the mortgage held by Julia A. Thayer, and executed by the Calvins.

The Calvins also filed an answer to defendant's cross-petition, in which they admit the averments of plaintiff's petition, and deny those of defendant's answer and cross-petition not admitted. They admit the former ownership of the land, but allege that at the time of the foreclosure proceedings they were residents of Buffalo county, in this state, and had so continued to be since said time, and therefore said proceedings were void; that at the time they removed from the land, in 1896, it had practically no market value, and at the time of the alleged contract they had no knowledge of the changed conditions and increase in the value of the land, but at that time the property was worth $3,200, of which defendant had full knowledge; that at the time of the acceptance of defendant's offer of $200 they presumed, and took it for granted, that they had in some way been deprived of the title by force of the Thayer mortgage, not knowing that it had not been foreclosed, or that it was barred by the statute of limitations, neither had they knowledge of the exact nature of defendant's title, nor of the foreclosure proceedings, or that they were void, but that they were under the misapprehension that they had lost the title, and under these conditions the contract was made; that defendant had full knowledge of the facts, and the contract was obtained in fraud of plaintiff's rights; that the enforcement of said contract would be unjust, inequitable and unconscionable. The prayer is similar to that contained in plaintiff's petition. The reply of plaintiff contains the usual denial, and averment of facts similar to those contained in the answer and cross-petition of the Calvins. The county of Lincoln filed an answer to the petition, but it is not deemed necessary

to notice it further. Defendant replied to the answer and cross-petition of the Calvins, questioning its legal sufficiency, and also denying its allegations. It is not deemed necessary to notice the many motions and demurrers filed, as their consideration is not essential. Upon a trial being had, the court found specially upon all the issues in the case, but at too great length to be here set out, even in a condensed form. The history of the case is stated at length, all controverted questions being found in favor of defendant Chamberlain.

The findings of fact and evidence show, without question by either party, that Calvin homesteaded the land, made the necessary proof, and obtained a patent. He soon thereafter executed a mortgage for $400, which now belongs to Julia A. Thayer, so far as the records show. In 1896 he left the property, and has never returned to it, nor has he paid the mortgage or any of the taxes. With the exception of about one month he has resided in this state, has kept up correspondence with those living near the land, but made no effort to protect his interest therein. He assigned as his reason for leaving the land that they were "starved out," owing to the dry weather and failure of crops. In the year 1901 the county began its suit to foreclose the tax liens on the land for the years 1895 to 1900, inclusive, but without any previous administrative sale, giving notice by publication, and in no other manner. In April, 1902, a decree was rendered, finding the amount of taxes due to be $85.76, and costs $32.98. An order of sale was issued May 6, 1902, and the land was sold to Lincoln county for $134. The sale was subsequently confirmed, and sheriff's deed made to the county. On November 6, 1903, the county, by its commissioners, conveyed the land to defendant for the consideration of $142.49; he taking possession. At that time the land had practically no market value. The fact of the foreclosure was not known to Calvin at that time, nor until about the time of his conveyance to plaintiff about the 3d day of August, 1907, although he had been informed that defendant had

bought the property at tax sale. The fact that the foreclosure proceedings were void was not known to defendant until after that time. Calvin believed he had lost the land, the loss growing out of the mortgage lien which he had put on it in 1890, and on which he had paid nothing, the debt secured by it having become due in 1895. While in the possession of the land, defendant had paid the taxes as they matured for the years 1901 to 1907, inclusive, believing that his title was good. In 1907, hearing that some question had been raised as to titles in that part of the state, he applied to Mr. Elder, who was dealing in real estate and preparing abstracts of titles, to investigate the matter of his title, and who, upon examination, concluded and informed defendant that his title was probably good, but that the mortgage might give him trouble. Defendant then authorized Elder to find and negotiate with the holders of what might be outstanding interests, with a view of fortifying his title. Elder succeeded in locating Calvin, and wrote him asking what he would take for a quitclaim deed. On the 4th day of June, 1907, Calvin responded as follows: "Yours of recent date at hand, and in regard to that land I will take $200 to give a quitclaim deed. I was away from home when your letter came or I would have wrote sooner. Write soon as you get this and let me know." June 10 Elder answered that as soon as he could hear from the parties he would let Calvin know. June 16 he wrote Calvin, inclosing a quitclaim deed for execution, and saying that he had deposited the $200 in the First National Bank of North Platte, with instructions to send the money to Calvin on receipt of the deed properly executed. July 11 Calvin wrote Elder that he had been absent, was ready to make the deed, but suggested that the money be sent to the Ravenna State Bank, and asking Elder to write him letting him know what to do. He closed the letter with a postscript, saying: "I will make out the deed next week soon as I hear from you." July 13 Elder responded that he would have no objection to sending the money as suggested, but that he

had left it with the bank to be paid to Calvin, and had taken a receipt for it showing the money to be there subject to Calvin's order, and inclosed the receipt. July 18 Calvin wrote Elder: "Your letter at hand and will get deed fixed up Sat. the 20 and send it. I am very busy now harvesting and don't want to stop until I get done." About this time Calvin went to the office of plaintiff, and, as plaintiff testified, "to execute a deed that he had received from Mr. Elder. He said before he had received the deed he had received a letter from one of his neighbors near Wallace, where he used to live, telling him that the land was worth $20 an acre now, and that Mr. Chamberlain was claiming to own this land, that he had got title from a tax deed." It fully appears that plaintiff knew of the transaction between Calvin and defendant; that he suggested that before making the deed an abstract of title should be procured and the condition of the title investigated. It was agreed that he should obtain an abstract, and the Calvins left his office. The abstract was secured, and in about a week after their first visit Calvin returned. He seemed to be afraid of the effect of the sheriff's deed, needed the money, and thought he would better take the $200 then in the bank for him. We quote the following from plaintiff's testimony: "After I received the abstract Mr. Calvin came into my office, and I told him what the abstract disclosed—that there was no service upon him as he had said. I says, 'The title is no good.' I says, 'The land is worth more money.' I says, 'You ought to get more money.' He says, 'I want to get more money for it if I can.' I says, 'You ought not to sell it for any such sum.' He says, 'There is that sheriff's deed, I think I had better take the $200.' I says, 'You do not have to take the $200 from Mr. Chamberlain.' I says, 'I will tell you what I will do,' I says, 'if you need $200 in money right now, I will give you $200 cash, and I will give you one-half of all I can sell the land for over and above that.' He says, 'That is a fair proposition, I will make that deal with you.' In carrying out that

agreement he gave me a warranty deed for the property." A written contract was then entered into containing this agreement, and the Calvins executed a warranty deed to plaintiff, and returned to Elder the quitclaim deed unexecuted, also the bank's receipt for the $200. By this it appears that plaintiff made the purchase with his eyes open, and with full knowledge of Calvin's sale to defendant, and that he can have no higher or better right than Calvin would have had, if as good.

Plaintiff's principal contention, with reference to the contract between defendant and Calvin, is that there was such a great difference between the contract price of $200 and the value of the land, which the district court found to be from $2,000 to $3,200, that it would be unconscionable and against equity to enforce it, but for that reason the contract is and would be valid and enforceable. This is the main question presented. It must be admitted that, ordinarily, the position of plaintiff is correct, and, had the agreement been for the conveyance of a clear title to the property for this inadequate consideration, the court would probably refuse to assent to the decree. But that is not this case. The unpaid mortgage, though barred, was standing against the land for the sum of about $1,000, and which could not be removed as a cloud upon the title without payment. *Merriam v. Goodlett*, 36 Neb. 384. So far as appears from this record, it may be unenforceable, but it cannot be removed without payment. Calvin had practically abandoned the property in 1896, and neither he nor his family had ever returned to it or seen it after that time. He had not paid, nor attempted to pay, either the taxes or the mortgage. He supposed that his title had been extinguished. To use his own expression upon the witness stand: "I did not believe I had any title." Defendant in possession thought his title was unassailable by Calvin. There is no claim that he was guilty of any fraud, either by suppression or suggestion. He was willing to pay the $200 to prevent his title being questioned, and Calvin was willing to ac-

cept that sum and give a quitclaim deed to that which he thought he did not own. Calvin made no effort to inform himself, but, acting upon his own judgment, entered into the contract. Whether he could get any more than the $200 by dealing with plaintiff would necessarily depend upon plaintiff's success in asserting his title in a lawsuit, his success in obtaining by sale more than the $200 and all expenses, including attorney's fees and costs, and the honesty and integrity of plaintiff in reporting results after all was completed. At the suggestion and solicitation of plaintiff he consented to repudiate his contract with defendant and take his chance with plaintiff. There were no fiduciary relations existing between him and defendant. They dealt with each other at arm's length. Had defendant supposed that his title could be successfully assailed in a lawsuit he was under no legal obligation to inform Calvin. *Files v. Brown,* 59 C. C. A. 403, 124 Fed. 133. As both understood it, and as was the fact, he was selling to plaintiff his chance or possibility of succeeding in a lawsuit in which, if successful, he would have to repay to defendant the taxes paid, with interest, with the mortgage still standing against the land, and the possibility of said mortgage being enforced, for he well knew he had not paid it or any part of it. "In reference to such contracts, the element of *risk* or *hazard* is such a disturbing element in the estimation of value, that courts of equity, when inadequacy (of consideration) alone is in question, will refuse to interfere." *Pennybacker v. Laidley,* 33 W. Va. 624, 11 S. E. 39.

As we have suggested, plaintiff is certainly in no better condition than Calvin would have been had he pursued the course adopted by plaintiff. He purchased with knowledge of Calvin's contract, and therefore he is not a *bona fide* purchaser, and can be required to convey to defendant, or his deed be canceled. *Veith v. McMurtry,* 26 Neb. 341. As between plaintiff and defendant Chamberlain, the decree of the district court is right, and is affirmed. But that portion canceling the Thayer mort-

gage should not have been entered, and cannot be approved. The holder of the mortgage made no appearance, and has not appealed, and we know of no rule of law or equity by which such a decree could be entered without the party being required to redeem by the payment of the debt with legal interest. The decree must be modified to the extent of reversing that portion. As modified, it is affirmed.

AFFIRMED AS MODIFIED.

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RALPH O. URBAN, APPELLEE, V. EDWIN F. BRAILEY ET AL., APPELLANTS.*

FILED JANUARY 20, 1910. No. 16,441.

1. **Pleading:** SUFFICIENCY. "When the sufficiency of a petition is not attacked until after judgment, all reasonable intendments should be indulged in support of the judgment." *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198.
2. **Habeas Corpus:** PETITION: COPY OF PROCESS. Where the petition for habeas corpus fails to set out any warrant or order of commitment, but stated facts by which it can be reasonably inferred that the defendant had no such warrant, this will excuse the failure to set out a copy of any process.
3. ———: RETURN: COPY OF PROCESS. Where, in such case, the defendant who is charged with unlawfully restraining the plaintiff of his liberty makes his return to the writ, alleging that he holds the plaintiff for and by virtue of a process held by another person, a copy of such process should be set out in or attached to his return in order to show by what authority he restrains the plaintiff, or a sufficient reason assigned for not doing so.

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

*T. C. Hollister* and *Edgar M. Morsman, Jr.*, for appellants.

*John O. Yeiser* and *Shotwell & Shotwell, contra.*

* Rehearing denied. See opinion, 86 Neb. ——.

REESE, C. J.

This was an application to the district court for Douglas county for a writ of habeas corpus, in which Ralph O. Urban sought his discharge from imprisonment. In the petition it was alleged that the plaintiff was unlawfullly deprived of his liberty by the defendant, Brailey, in the county of Douglas, in that William Crocker pretended to hold an executive warrant for the arrest of plaintiff, and which warrant charged him with being a fugitive from "the justice of the state of Colorado"; that he was not a fugitive from justice and was not guilty of any crime under the laws of that state; that he was being held for the purpose of blackmail, the fact of the arrest growing out of a civil suit filed by him in the district court for Douglas county against C. F. Adams Company, the purpose of the criminal process and arrest being to compel him to dismiss said action; that he had resided in Douglas county to the knowledge of said C. F. Adams Company for more than three months, and had never secreted himself from them or their agents; that he had, before the present arrest, been arrested at the instance of said company and held in jail for more than three days in an attempt to compel him to pay the sum of $40 which said company falsely claimed to be due it from him and which he refused to pay, and he was thereafter released from custody; that he had not been guilty of forgery or other crime, and that he was wrongfully and unlawfully held in jail by Crocker; that he was not charged with the commission of any crime by indictment or information filed against him; that he was in poor health and his removal to Colorado would endanger his life. The writ was issued to Edwin F. Brailey, the sheriff of Douglas county, and to which he made return, stating that on the 5th day of August, 1909, a demand for the extradition of plaintiff was made in proper form upon the governor of this state by the governor of the state of Colorado, alleging that plaintiff was guilty of the crime of forgery, and that on

the 10th day of the same month the governor of this state issued his warrant authorizing the said Crocker, as the agent of the state of Colorado, to forthwith return plaintiff to said state, and said Brailey held plaintiff at the request of said agent for delivery under said warrant. No copy of the warrant was attached to or in any way made a part of the return. The cause was tried to the district court, the trial resulting in a finding that plaintiff was unlawfully and illegally restrained of his liberty, and he was ordered to be discharged. The defendant appeals.

A large volume of evidence is filed as a bill of exceptions, but as no motion for a new trial was filed in the district court we are not permitted to review the evidence submitted to the trial court (*In re Van Sciever,* 42 Neb. 772), and the only question before us is as to whether the petition states facts which should entitle plaintiff to the relief demanded, or, if the petition be held sufficient, whether the return contains facts which would justify his imprisonment. As to the latter, the statute requires that "if he (the person making the return) has the party in his custody or power, or under restraint, he shall set forth at large the authority and the true and whole cause of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained." Criminal code, sec. 371. This portion of the statute was not complied with in the return, no copy of any process being set out or attached. We find no such copy in the transcript, and, as we cannot consult the bill of exceptions, we are not legally informed as to the efficacy of the warrant referred to in the return, if any existed, and therefore said return fails to show that defendant had any authority to deprive plaintiff of his liberty.

It must be conceded that the petition is not a skillfully drawn pleading, but as it was not attacked in the district court it must receive a liberal construction here. *Merrill v. Equitable Farm & Stock Improvement Co.,* 49 Neb. 198; *Latenser v. Misner,* 56 Neb. 340. The statutes of

this state contain no direction in detail as to what shall be alleged in the petition. Section 353 of the criminal code provides, in substance, that where one is "unlawfully deprived of his or her liberty, and shall make application either by him or herself, or by any person on his or her behalf, to any one of the judges of the district court, or to any probate (county) judge, and does at the same time produce to such judge a copy of the commitment or cause of detention," it shall be the duty of the judge to forthwith allow the writ, etc. It is alleged that the plaintiff is unlawfully deprived of his liberty by the defendant, in that William Crocker pretends to hold an executive warrant, etc. It is not shown in the petition who William Crocker is, nor whom he represents. This is probably sufficient to justify the inference that defendant had no warrant at all. However, it is alleged in the return that Crocker was the agent of the state of Colorado, and that defendant held plaintiff at Crocker's request. This would furnish a sufficient excuse for not "producing" a copy of the "cause of detention" as required by the section from which the above quotation is made. There are other averments in the petition herein above shown which need not be further set out here. Crocker made no appearance in the case, and the warrant was not set out in any of the pleadings. When attacked after judgment, the petition, though informal, must be held sufficient.

It follows that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

SEDGWICK, J., not sitting.

BARNES, J., concurs on the ground of the insufficient return to the writ.

J. D. STIRES V. FIRST NATIONAL BANK OF COLUMBUS, APPELLANT; COLUMBUS STATE BANK, APPELLEE.

FILED JANUARY 20, 1910. No. 15,411.

**Former judgment of reversal (83 Neb. 193) adhered to.**

REHEARING of case reported in 83 Neb. 193. *Judgment of reversal adhered to.*

BARNES, J.

This case is before us on a rehearing. It appears that one Garrett Hulst, a merchant doing business at Columbus, Nebraska, was insolvent, and, so far as the record discloses, owed but four creditors, namely: The Hundley-Smith Dry Goods Company, $11,560.40; the First National Bank of Columbus, $7,130.50; Columbus State Bank $10,995.98; and Lucy Hulst (his mother), $12,724. The last named debt was evidenced by his promissory note, which will be hereafter called the Lucy Hulst note. The Lucy Hulst note had been indorsed by her and delivered to the Hundley-Smith Dry Goods Company as collateral security for its account against her son. She had also indorsed his notes to the First National Bank. The dry goods company was threatening bankruptcy proceedings against Garrett Hulst; and to prevent such action, to conserve his assets and to enable him to continue in business, the banks entered into the contract referred to in the pleadings, in the briefs, and in our former opinion. The negotiations originally contemplated that the banks should jointly take up the dry goods company's account, but the national bank failed to consummate the arrangement. Thereupon the state bank purchased said account, and took an assignment of all of the Hulst book accounts, and a second assignment from Lucy Hulst of her note to secure not only the dry goods company's account, but the indebtedness of Garrett Hulst to said bank. The Lucy Hulst note was turned over by the dry goods

company to the state bank The evidence, as we understand it, fails to show that the first assignment by Mrs. Hulst to the dry goods company was in any manner abrogated. The transfer of the dry goods company's account and the assignment of the Lucy Hulst note to the said bank occurred June 14, 1904. In October of that year Garrett Hulst was adjudged a bankrupt, and $3,020 in dividends were apportioned to the claim of the national bank. The state bank claimed the greater part thereof, and the receiver in bankruptcy for his own protection brought this action in the nature of an interpleader. The district court segregated all dividends accruing on the Lucy Hulst note, and directed that no part thereof should be applied to the dry goods company account. It then applied, from the assets of the bankrupt, sufficient money to liquidate said account, and distributed the remainder of said assets *pro rata* upon the claims of the banks and the Lucy Hulst note, so that there was adjudged to be paid to the national bank only $462.86. We held that this was error.

We are still of opinion that, when Garrett Hulst assented to the arrangement between his creditors, he thereby made an equitable assignment of his estate to them, with preference to the dry goods company account, and equal rights in proportion to their claim as to the other creditors. It seems clear that at that time it was not believed by the creditors that bankruptcy proceedings would be instituted, but that Hulst's debts would be liquidated in the ordinary course of business. All of the creditors expected the dry goods company account to be paid in full before any other debt would be paid. It was also understood and agreed that after the payment of that account there would remain but three creditors, to wit, the banks and Lucy Hulst, and the contract provided for the payment of their claims *pro rata*. None of the parties hereto claims any peculiar rights under the bankruptcy law, and this case should be determined ac-

cording to the terms of the contract. The bankruptcy proceedings merely gave each one of the creditors a lien on the assets of the estate, and accomplished what a court of equity would have decreed at the suit of either of the banks. The distribution therefore should be: First, the payment of all costs; second, the payment of the dry goods company account in full by (*a*) applying the money collected on the book accounts, (*b*) the dividend due on the dry goods company claim, (*c*) the dividend due on the Lucy Hulst claim, (*d*) and so much of the dividends due the banks as may be necessary for that purpose; third, to prorate the remainder of the assets on the claims of the state bank, the national bank, and Lucy Hulst, in the proportion that each bears to the aggregate of said claims and the amount to be distributed. This accords with our former opinion, 83 Neb. 193.

It is urged, however, that the state bank has, by its pleadings, repudiated the contract and cannot now claim anything thereunder. In some forms of actions this might be so, but this is a proceeding brought by the trustee in bankruptcy for the sole purpose of his own protection in distributing the assets of the bankrupt, and, no matter what the contentions of the creditors may be, he is entitled to a decree which will determine their equities and be a full protection to him as against their claims.

We are satisfied that our former judgment is right, and therefore it is adhered to.

JUDGMENT ACCORDINGLY.

MATHELDE LEUMANN ET AL., APPELLANTS, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLEE.

FILED JANUARY 20, 1910. No. 15,897.

1. **Insurance**: BENEFIT CERTIFICATE: ACTION: PETITION. In order to maintain an action to recover the indemnity provided for by a benefit certificate issued by a fraternal beneficiary association, the petition must allege that the plaintiffs are within the class of persons who could be named by the member and accepted by the association as beneficiaries under the statutes governing the association and its by-laws at the time the certificate was issued.

2. ———: ———: ———: CHANGE OF BENEFICIARIES. If recovery is sought by persons other than the beneficiary named in the certificate, they must allege facts sufficient to show a change of beneficiaries proposed by the member and assented to by the association.

3. ———: ———: ———: ———. An allegation of notice by the member to an officer of a local subordinate lodge of his desire to change his beneficiary to certain of his wife's relatives, not named in such notice, and to which no reply was made, is not sufficient to authorize such proposed, but unnamed, persons to maintain the action, unless it be alleged that such officer had power to effect the desired change or bind the defendant association in relation thereto.

4. ———: ———: ———: PETITION. Petition examined, and *held* that the facts therein stated were not sufficient to show that the deceased member actually named the plaintiffs as his beneficiaries.

5. ———: ———: ———: ———. Where recovery is sought by those not within the class of persons who could be named as beneficiaries, and their right to recover is claimed by reason of the provisions of a certificate other than the one on which the action is predicated, it is incumbent upon the plaintiffs to plead facts which would authorize their designation as beneficiaries under the terms of the former certificate and the laws by which the association was governed at the time it was issued.

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

*G. W. Berge,* for appellants.

*R. R. Horth, contra.*

BARNES, J.

Action on a fraternal benefit certificate issued by the Grand Lodge of the Ancient Order of United Workmen of Nebraska for the sum of $2,000 to one Harry C. Vanderberg, deceased. The cause was submitted to the district court on a demurrer to the petition. Defendant had judgment, and the plaintiffs have appealed.

The question presented by the record is: Did the district court err in sustaining defendant's demurrer and dismissing plaintiffs' action? The petition is too long to be copied in full in this opinion, and it is sufficient to say that it alleges, in substance, the organization and corporate existence of the defendant association under the laws of this state. It sets forth the fact that Harry C. Vanderberg joined the defendant order and became a member of Concordia Lodge No. 151 of Lincoln, Nebraska, which was and is one of the subordinate lodges of the defendant; that thereupon, and on the 15th day of March, 1894, the defendant issued to him its indemnity certificate for the sum of $2,000, in which his wife, Mathelde Vandeberg, was named as beneficiary; that on the 9th day of February, 1902, said beneficiary died, and on the 4th day of March of that year Vanderberg surrendered his certificate of indemnity, and at his request defendant issued to him a new certificate, in which his daughter Josephine was named as beneficiary. The terms of his original certificate, however, are nowhere set forth in the petition. The petition further alleges that on the 24th day of April, 1903, Josephine M. Vanderberg, the beneficiary named in the new certificate, died, and thereafter Harry C. Vanderberg had no legal heirs or relatives living which were related to him by blood, or could be named under the then existing statutes of this state as his beneficiary; that after the death of his daughter, and on the 2d day of May, 1903, Vanderberg wrote a letter to one G. R. Wolf, who it is alleged was at that time the financier of local lodge No. 151 at Lincoln, Nebraska, informing him of the death

of his daughter, and saying, among other things: "I am insured in her favor as I was previously in her mother's. Now I don't want to have my certificate changed, but have made a will in favor of my wife's relatives, but I don't want to name them, as if one dies the others get it according to my will. Please let me know if this is all right. * * * I also send one dollar for this month. My regards to all the members." To this letter, plaintiffs allege, Wolf made the following reply: "June 18, 1904. Yours received. One dollar credited on June assessment. There is a per capita assessment 75c this month. I have advanced it for you and you can send it with your July remittance. G. R. Wolf." It is further alleged that on July 18, and shortly after Vanderberg's death, Julius Adrian, one of the plaintiffs herein, paid to Wolf the July assessment of $1, and 75 cents advanced by him, as above stated. It is also alleged that Wolf was the proper official of the lodge to receive and receipt for such payments, but it is nowhere stated that Wolf had any power or authority to answer Vanderberg's inquiry, or change or authorize a change of the beneficiary named in the benefit certificate in suit. Neither is it alleged that he had authority to in any manner bind the defendant in that respect. The petition then sets out Vanderberg's so-called will, which contains the following: "Chicago, July 4, 1903. I, (H. C. Vanderberg) here my will and want my things disposed of as follows: One hundred dollars is to be given to each of the following persons, viz.: Mr. Emil Leumann, Mr. Jacob Gessner and Mr. Julius Adrian. The balance is to be equally divided between my dear mother-in-law, Mrs. Mathelde Leumann, and Mrs. Louise Gessner (my sister-in-law)." Notice of Vanderberg's death and the demand for the payment of the amount stated to be due on the certificate are set forth, together with a prayer for joint judgment in favor of the plaintiffs. To this petition the defendant demurred.

It is now contended by plaintiffs that, when Vanderberg joined the order and procured his original certificate, it

contained no limitation upon his right to name or change the beneficiary mentioned therein, and the petition contains such an allegation, but this is a mere conclusion of the pleader which seems to be derived from his construction of the statute governing mutual benefit associations which was in force at that time. An examination of that statute, however, discloses the following provision: "That any secret society or association, the management and control of which is confined to the membership of any secret society or order, heretofore organized or which may hereafter be organized, which, in addition to the benevolent and fraternal features thereof, shall also issue certificates of indemnity calling for the payment of a certain sum, known and defined, in case of the death, disability, or sickness of any of its members, to the wife, widow, orphan or orphans, or other persons dependent upon such members, shall be exempt from the provisions of chapter 25 of the Revised Statutes of 1866 of the territory (now state) of Nebraska, the same being chapter 16 of the Compiled Statutes of 1885." Laws 1887, ch. 18, sec. 1. It will thus be seen that the class of persons who could be named as beneficiaries was limited by the law then in force to practically the same persons named in the act of 1897 which now governs such associations; and it is not to be presumed that the association would violate the provisions of the law under which it existed and by virtue of which it was authorized to conduct its business. As above stated, the plaintiffs have failed to set forth any of the provisions contained in the original certificate, and have made the new certificate a part of their petition, and predicate their right to recover in this action thereon. By this new certificate, and by the law governing such associations when it was issued, and which is their charter and authority for conducting business, it is provided: "No fraternal society created or organized under the provisions of this act shall issue a beneficiary certificate of membership to any person under the age of eighteen years, nor over the age of fifty-five

years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member." Ann. St. 1909, sec. 6638. It will thus be seen that the plaintiffs have shown by the allegations of their petition that they are not within the class of persons who could be named by the deceased or accepted by the association as beneficiaries.

It is contended by the defendant that even if the plaintiffs could, under any circumstances, have been so named, the allegations of the petition are insufficient to show that they have been so designated. It is shown by the petition that Vanderberg knew what was necessary to be done in order to effect a change of the beneficiary named in his certificate. He had already procured one such change. He declined, however, to surrender the certificate and have another issued with the names of those on whom he sought to bestow his bounty inserted therein, and we are constrained to hold that mere notice to the financier of a subordinate lodge is insufficient to constitute a change of beneficiary, and the defendant grand lodge is not bound thereby. Especially is this so when there is no averment in the petition that the officer of the subordinate lodge so notified had the power or authority to bind the defendant.

Again, it can scarcely be said that the allegations of the petition are sufficient to show that the deceased actually named the plaintiffs as his beneficiaries. It will be observed that in his letter to Wolf he refused to name them, and merely indicated that he wanted the indemnity to go to his wife's relatives. An examination of his so-called will shows that the deceased had property other than the certificate in suit, and no reference is made therein to the certificate. The will contains no statement that the property which he sought to distribute among his wife's relatives was the money indemnity mentioned therein.

The petition being found defective in the foregoing

respects, the district court could render no other judgment than the one complained of.

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

AFFIRMED.

LETTON, J. Not agreeing to all points stated in the opinion, but being of the opinion that the petition does not state a cause of action, I concur in the conclusion.

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JOHN RATHJEN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 20, 1910. No. 15,861.

1. **Master and Servant**: INJURY TO SERVANT: APPEAL: CONFLICTING EVIDENCE. Since the liability of the defendant in this case rests primarily upon the question of whether or not a certain command was given by a foreman to a servant, and as to this there is a direct conflict in the evidence which has been submitted to the jury under proper instructions, this court must consider as settled by the verdict that the command was given by the foreman as plaintiff alleges.

2. ———: ———: PROXIMATE CAUSE: ASSUMPTION OF RISKS. The plaintiff, with a gang of other laborers, was engaged under the direction of a foreman in removing rails from a railroad track. The method followed was to remove the spikes upon the inside of the rail, then push or pry the rail in, and, if it had become wedged at the joint by expansion, to attempt to drive the end loose with a sledge-hammer, and, if not loosened in this manner, to push the rails in with a lever at the next joint. The undisputed evidence shows that while loosening the rails, if they had become wedged, the inside of the track is a dangerous position. The plaintiff, in ignorance that the rails were wedged, in obedience to a command of the foreman, stepped inside the rail to pry or lift the rail with a crowbar. Another workman had been directed to pry the rail at the joint. As he proceeded to do this, the rail sprang, striking plaintiff, and others, and severely injuring him. *Held*, (*a*) That the proximate cause of the injury was the negligent command to the plaintiff to place him-

self in a position which was known, or ought to have been known, to the foreman as one of danger on account of the wedging of the rail, a fact which the foreman knew, and of which the plaintiff was ignorant; (*b*) that the risk was not one of the ordinary incidents of employment assumed by the plaintiff.

3. ———: ———: INSTRUCTIONS. Since, under the issues, the liability of the railroad company is based solely upon the command given by the codefendant foreman, Olson, an instruction which directed the jury "that, if you find in favor of the plaintiff, you must find against both defendants, as you cannot find against one defendant and in favor of the other" is correct.

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

*Greene, Breckenridge & Matters,* for appellants.

*Smyth & Smith, contra.*

LETTON, J.

In June, 1906, the plaintiff, who was a track-laborer or section-hand in the employ of the defendant railway company, was engaged in the work of substituting new rails for old upon the west side of the main-line track of the railway extending between Omaha and Gibson. The work was under the general direction of one Ibson, who was road-master for that division, under whom were three section foremen, Olson, who is one of the defendants, Peters and Shimonek. The gangs ordinarily working under each foreman were assembled and worked together under the immediate direction of the three foremen and Ibson. Traffic had been stopped upon that section of track for the purpose of allowing the rails to be changed. The men began work at the Omaha end, and proceeded to draw the spikes upon the inside of the west rail going south until they reached Gibson, when they walked back toward the point of beginning for the purpose of moving the rails. Immediately before the accident Olson, with a helper, had cut the bolts from the angle-bars holding the north end of the first rail to be changed. The rail, ap-

parently on account of heat, had expanded so that its end was tightly wedged against the end of the next rail to the north. This point was near the end of a bridge, and there were guard-rails about a foot inside of the main rails opposite the joint. Olson struck the end of the rail with a maul or sledge-hammer two or three times endeavoring to drive it in, but failed to loosen it. Ibson was standing within a few feet from him at this time, both standing on the outside of the rail. So far the evidence is undisputed. Just at this moment the plaintiff came from the south where he had been pulling spikes. He states that a number of men were on the outside trying to push the rail out, and that, when he reached a point about the center of the rail which Olson had been trying to loosen, he heard Ibson say: "Hurry up, get this rail out," and that Olson said, "Some one get in and lift it up inside." That he immediately jumped inside, put a crowbar he was carrying under the rail, and just as he put his bar down the rail sprang in his direction, knocking him down and inflicting serious and permanent injuries. Another witness, named Fronk, testified that he came upon the scene about the time that Olson was cutting the bolts to the angle-bars; that after this Ibson said, "Throw her out, boys," and that some one, either Olson or Ibson, called out, "Some one get in there and lift or pry it out"; that Rathjen stepped inside to pry it out; that he took his bar and tapped the rail, and, as he tapped it, it flew out. On the other hand, Olson and Ibson both deny ordering any one to go inside. They testify that, when they found the rail was wedged, Olson told one Simpson, who was helping him to cut the bolts, to go to the next joint south and pry or push the rails in at that point. Olson says that, as Simpson started to the joint, Rathjen stepped inside, with his clawbar resting on the guard-rail pointed toward the west rail; that he told him to keep his bar out of there, "but just about the time I said, 'Look out for the bar there,' I seen the rail was moving and I jumped up, but came down too

quick." He was struck on the foot by the springing rail, bruising his instep, and breaking his toe. Ibson also testified that Olson or one of his men tried to knock the rail in with the sledge, and that he, Ibson, said, "Get some one with a bar to go to the joint ahead and shove it in, and it will come out here"; that he then stepped between the two guard-rails, and almost immediately was struck across both feet with the rail springing over the guard-rail. He did not hear Olson tell Rathjen "to get the bar out of there," nor hear Olson give any other orders than to the man to go up and shove the rail in. Both he and Olson testify that the guard-rail would have prevented the springing rail from striking them if Rathjen's bar had not been there for the rail to slide upon over the guard-rail. Ibson says: "If there was no bar in here it would be impossible for the rail to get over this guard-rail, as it would hit the guard-rail, but with a bar in here I would not have stood there for all the Burlington road." The testimony clearly shows that when a rail becomes tightly wedged against another by reason of expansion, whether caused by heat or other causes, it is apt to spring a distance of from a few inches to four or five feet when released. It is shown that both Olson and Ibson were aware of the danger from springing rails, and knew that this rail was wedged; while Rathjen testifies that he did not see the joint, and was not aware that this rail was wedged, but thought it might have been imbedded in the ties or held by a broken spike. The jury found for the plaintiff against both defendants.

The defendants first contend "that there is no evidence that by reason of intense heat the rail had expanded, and had become tightly wedged." It seems to us that one cannot read the testimony of Ibson and Olson and reach the conclusion that the rail was not expanded. Olson says that the rail was tight on account of the trains running in one direction and on account of the heat, and that he struck the end rail two or three times after the bolts were cut with a big iron sledge-hammer, but did

not get it loose from the other rail; while Ibson testifies that he knew that, if the rail was compressed at the north end, when it was released it was liable to jump, and that it would be dangerous for any one to stand inside when the rail was released from pressure.

It is next contended that the accident "was one of those unusual and unexpected events which occasionally take place and which cannot be foreseen." As to this point, we think the testimony of the defendants' witnesses clearly shows that, when a rail which is expanded until it is tightly compressed at the end is released, it is liable to spring from a few inches to as much as four or five feet, and that the inside of the track in such case is a most dangerous position. Olson testifies he has seen rails spring five or six inches or a foot at the ouside, while Ibson frankly testifies that no one can tell where they will go.

The next point made is that the risk of a rail springing or jumping, as this one did, was one of the risks of the employment in which Rathjen was engaged; that he had four years' experience in work of this character, and that he knew that the rail was apt to spring when being taken up—citing in this connection the case of *Omaha Bottling Co. v. Theiler,* 59 Neb. 257. But Rathjen testifies that he did not know the rail was wedged; that he knew it was caught, but did not know but that it was caught by being imbedded in the ties, or by a spike; that he had seen rails jump before, but only a few inches. There is no evidence to contradict him on this point, and, if the jury believed him, the doctrine of the *Omaha Bottling Company* case, quoted by defendants, that "a servant who, from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of, or inexperienced in, the particular work," is not applicable. The evidence clearly shows that Rathjen was

not aware that the rail had expanded, or that, if so, it was liable to spring so far.

It is next objected that the court erred in permitting the plaintiff and Fronk to testify as to the proper way to take out a rail wedged as this rail was. These witnesses testify that the proper way was to cut the bolts, knock the angle-bar out, and then knock the end rail out with a maul. This is exactly the method which Olson pursued. The defendants certainly could not be prejudiced by testimony showing that the plan which it tried to follow was the proper one. Further than this, the defendants met this issue by testimony to the effect that, when the rail was tightly wedged, the usual method was to force in the rail at the next joint, thereby relieving the pressure. It seems to us this matter is of little importance under the issues.

It is next contended that the court erred in permitting the witness Fronk to answer certain questions for the purpose of contradicting the evidence of the section foreman, Peters. Peters had testified that the usual method of taking the rails up was to release the angle-bars at the joint, go back about three or four feet, and push the rail out on the side where the spikes were drawn; that that was the method always used; that it had never occurred to him that the danger was any greater if the rail was wedged, than it would be if not wedged, and that it never occurred in his experience that there would be danger of its springing when it was released. On cross-examination he was asked whether, when he was removing a rail at a point near Gibson directly after the accident, he found a rail wedged at the end, and took a spike maul and hammered it until he got it loose, and if he did not then say in the presence of Fronk, "If Olson had broken that joint in that way, the old man would not have got hurt." He was also asked with reference to meeting plaintiff in January, 1907, on the railroad track near River View park, and telling him that, "If I had been there and had been removing that rail this accident never

would have happened, because I would have taken the maul and broken the joints." Defendants contend that the evidence to contradict him should not have been received for the reason "that it was not a part of the *res gestæ*. Peters was only a section foreman, and any such statement made by him does not bind the defendants or either of them." But it was admitted merely for the purpose of impeaching Peters, and not as direct testimony. We can see nothing prejudicial to the defendants in its admission.

It is also urged that the court erred in instructing the jury that, if they found in favor of the plaintiff, "You cannot find against one defendant and in favor of the other." It is said that the only evidence as to a command given by Olson was that of Rathjen himself; that Fronk did not know whether it was Ibson or Olson who spoke; and that if the command was given by Ibson, Olson should have been exonerated, even though the railway company was held liable. But the petition based the liability of the defendants upon the command of Olson, the instructions base the railway company's liability alone upon the command by Olson, and the jury were specifically instructed that, if they found that some one other than Olson gave the order and command, then the plaintiff cannot recover. The plaintiff chose to base his right to recover upon Olson's command. He staked his whole fortune upon this cast. Under such a theory, and under the issues presented, the instruction complained of is not erroneous, and was properly given. It could in nowise prejudice Olson that the railway company's liability is only predicated upon the theory of *respondeat superior*.

The refusal of the court to submit certain special findings requested by Olson is assigned as error. We have uniformly held that the submission of any such findings is entirely within the discretion of the district court. We find no abuse of this discretion in the refusal to submit these questions.

The issues in the case are simple. If the jury believed

that Olson knew that the rail was wedged, and carelessly ordered Rathjen to go inside and lift it up, and at about the same time told Simpson to go to the next joint and push it in, having knowledge that the inside of the rail while this was being done was a position of danger, and if Rathjen, in ignorance that the rail was wedged, took this dangerous position in obedience to the negligent order, and was injured in consequence, there was actionable negligence on the part of Olson and of his superior. If, on the other hand, the jury believed that Rathjen voluntarily placed himself between the rails, and was ordered out before the accident, as Olson testifies, then neither Olson nor the railway company are liable. The only material point in dispute was whether or not Olson directed Rathjen to go inside and lift. As to this there was a direct conflict in the evidence, which was a matter for the jury to determine, and with their determination of this question we are not at liberty to interfere. The witnesses were before them, and they had opportunities of determining their credibility with which we are not endowed. The case seems to have been carefully tried. The instructions were clear, definite, and concise. The damages, while large, are not complained of as being excessive, nor do we think they are, considering the injuries sustained, and the permanent defective condition of the plaintiff's leg.

We find no reversible error in the record, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JAMES L. STEWART ET AL., APPELLEES, V. WILLIAM B. RAPER ET AL., APPELLANTS.

FILED JANUARY 20, 1910. No. 15,901.

APPEAL from the district court for Pawnee county: LEANDER M. PEMBERTON, JUDGE. *Appeal dismissed.*

*Dort & Dort,* for appellants.

*Story & Story, contra.*

LETTON, J.

This action was begun in the county court, where judgment was rendered against the defendants. An appeal was attempted to be taken to the district court. The transcript, however, was not filed until more than 30 days after the rendition of the judgment. A motion was made in the district court to dismiss the appeal, for the reason that the transcript was not filed within the statutory time, and for another reason not necessary to consider. A hearing was had upon the motion to dismiss the appeal, and the motion was sustained.

The record fails to disclose that any final judgment was entered in the district court, merely showing that the court sustained the motion to dismiss the appeal. No judgment of dismissal appears, hence there is no final order here for review, and the appeal must be dismissed. However, since the point presented is simple, we will consider it.

It appears from the evidence that upon the 22d day of November, 1907, the day of the rendition of the judgment, defendants' attorney ordered a transcript of the proceedings from the county judge for the purpose of taking an appeal. Apparently through press of business, the county judge overlooked the matter, and did not prepare the transcript until on or about the 7th day of January, 1908, upon which day it was filed by him in the district court.

No other effort was made on the part of the attorney for defendants to procure the transcript than this request. The county judge testifies: "It has been our custom almost invariably to file the transcript as a matter of fact of course, whenever it is ordered. Sometimes the attorneys say, 'You will file this,' and I say, 'Yes.' I could not say positively whether they asked me to file this or not, but they did order the transcript." He further testifies that, at any time after the transcript had been ordered within the 30 days, he could have found time to have completed it.

We have repeatedly held that, "where a party free from fault or laches is prevented from having his appeal docketed in the appellate court within the statutory period solely through the neglect or failure of the proper officer to prepare the transcript of the proceedings, the law will not permit him thereby to be deprived of his appeal." *Continental Building & Loan Ass'n v. Mills,* 44 Neb. 136; *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68; *Cheney v. Buckmaster,* 29 Neb. 420. Under the statute it was the duty of the county judge, upon demand, to deliver the transcript to the appellants or their agent. He could not deliver it immediately upon the conclusion of the trial, but no request was made after a reasonable time for preparation had elapsed. It was not his duty to file the transcript with the clerk of the district court. The evidence shows that, if demand had been made for a transcript within 30 days, it could have been prepared by the county judge and delivered to the appellants or their agent, but no such demand was made. We think that the evidence fails to show that the appellants were diligent in perfecting the appeal, and that the case is ruled by *Oppenheimer v. McClay,* 30 Neb. 654.

There being no final judgment in the record, the appeal is

DISMISSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 16,399.

1. **State Railway Commission:** RULINGS: APPEAL: BURDEN OF PROOF. The legislature has authority to provide, in appeals from orders of the state railway commission, that the burden of proof should rest upon the party seeking to set aside the decision of the commissioners to show by clear and satisfactory evidence that the order is unreasonable and unjust, and that the record should be *prima facie* evidence that the order is just and reasonable.

2. ———: ———: ———: EVIDENCE. In such a case the evidence must outweigh that offered by the defendant, and it must be of the same clear and satisfactory nature as that required in other cases where presumptions of validity attach to the instrument sought to be set aside, or to the transaction sought to be declared void.

3. ———: ———: ———: COST OF IMPROVEMENT. The cost of a proposed improvement ordered by such commission is not in all cases a proper test for determining the reasonableness of such an order. It is proper to be taken into consideration, but is not controlling.

4. ———: ———: ———: INCOME ON INVESTMENT. The mere fact that the income from the expenditure at a particular point upon its line may not earn a fair return upon the capital invested at that point can only be considered in connection with the revenue from the entire operation of the road within the state at least.

5. ———: ———: ———: DISMISSAL. In such an appeal from an order to establish a station, the whole demand for both freight and passenger service must be considered, and if, taking all the circumstances into consideration, the order is not unreasonable, the appeal will be dismissed.

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

*M. A. Low, E. P. Holmes, G. L. De Lacy* and *P. E. Walker,* for appellant.

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

LETTON, J.

This is an appeal from a judgment of the district court refusing to set aside an order of the state board of railway commissioners. On August 23, 1907, a complaint was filed before the state board of railway commissioners by J. A. Beal and others against the Chicago, Rock Island & Pacific Railway Company. The substance of the complaint is that the complainants are residents and citizens of University Place, Nebraska, a city of upwards of 4,000 inhabitants, and are doing business therein; that the tracks of the defendant extend into and through said city, but that defendant has no depot or station house therein for the accommodation of passengers or for the receipt or delivery of freight; that several thousand students attend the educational institutions in said city each year; that there is a large amount of passenger traffic on this account, and that people are obliged to leave and take trains at Lincoln, and are subjected to great trouble and annoyance in getting local transportation for themselves and baggage to and from University Place. It is also alleged that there is a very large amount of freight business done to supply the needs of the population, and that this in itself is sufficient to require a depot on the line of defendant's railroad in said city. The prayer is that an order be made requiring the defendant to erect at a convenient place in said city a passenger and freight depot, to provide an agent, sidetracks and other things necessary for the proper use of such depot by the patrons of the defendant company, and for general relief.

The defendant answered, denying any jurisdiction in the railway commission. It further answered to the merits, alleging that University Place lies between Lincoln and Havelock, which are four miles apart; that the street car and transportation facilities are such that it is easier to reach Lincoln from the center of University Place than a station at any place that could be established in University Place; that it has recently constructed at a

great expense a switch some two or more miles in length from Lincoln to the center of the business district of University Place, and thereby has satisfactorily handled freight business to that point over its line; that passenger traffic arising from students does not come from the line of defendant, which has only a short line in Nebraska, so that only a small part of such traffic would come over its lines; that it is willing to furnish additional facilities as fast as the returns on business will justify; that the returns from the business in University Place, which are small, would be not greatly increased; that the expense of acquiring and constructing a station would be at least $5,000, and that "the compelling of the construction by the defendant of the transportation facilities prayed for in the petition would amount to a confiscation of its property to the extent named, * * * and would be unreasonable, unjust, and unfair in law and in fact."

A hearing was had by the state railway commission upon the issues thus raised, and, after being argued and submitted, the commission ordered that the defendant "be and the same is hereby notified and directed to erect, on or before the 1st day of July, 1908, and thereafter maintain on its road at or near a point in University Place, Nebraska, where it intersects or touches Warren avenue, a suitable station and freight house with a floor space of not less than 500 square feet, together with the necessary switch tracks and appurtenances thereto." The order further directed that an agent be provided, and schedules of rates and charges be published and put into effect. Afterwards, the railway company being dissatisfied with this order, filed a petition in the district court for Lancaster county on appeal, setting forth the particular causes of objection to the order. A large part of the petition is devoted to setting forth constitutional objections to the statute authorizing the creation of the commission, and the proceedings of which complaint is made. The further objections are made that the matter concerns interstate commerce, and that the order is, therefore, be-

yond the powers of the commission; that the complaint does not state facts sufficient to entitle the complainants to relief; that the allegations are not established by the evidence; and it is further contended that the order is unreasonable because no necessity exists for the establishment of a station at University Place. The petition prays that the order of the railway commission be vacated, and that it be enjoined from ordering the railway company to establish such station. The railway commission answered, setting forth at length the proceedings and findings of fact upon which the order was based, alleged that the facts so found are the facts in relation to the matter, and further alleged that the railway company is a common carrier engaged in intrastate transportation of both passengers and freight for hire in the state of Nebraska.

The findings as to matters of fact, so far as material here, are as follows:

"From the evidence it appears, and the commission so finds, that University Place is an incorporated town, having a population between twenty-five hundred and thirty-five hundred inhabitants; that a university enrolling several hundred students is located within its limits.

"That there is a considerable number of merchants maintaining business houses in said city, engaged in the business of shipping, buying and selling drugs, groceries, hardware, lumber, coal, general merchandise, plumbing and building supplies.

"That the main line of the defendant company passes through the northern portion of the town at a distance of about three-fourths of a mile from the center of town.

"That the nearest stations on the defendant's road, or any other steam railroad, are located at Lincoln, and Havelock, each at a distance from the center of University Place of about four miles and one and three-quarter miles, respectively.

"That the defendant company has constructed a switch track from its main line for a distance of about two miles to a point near the center of the city; that car-load freight

alone to the extent of several hundred cars a year is delivered on said switch track; that, except where competition enters into the service, a switching charge of $5 a car is added to the regular tariff rate to Lincoln, on all car-load shipments delivered on said switch track; that no 'less than car-load' shipments are received on said switch track; and that the citizens of said city are compelled to either go to Lincoln or Havelock for such shipments, thereby causing them more or less inconvenience, and entailing considerable and unnecessary extra expense and loss of time. * * *

"Furthermore, it is the opinion of this commission that the entire business of the railroad done at University Place will not only pay expenses, but indeed return a fair profit to the defendant. * * *

"We do not concur in the conclusions of counsel for defendant that the transportation facilities afforded the complainant and his fellow citizens in University Place are sufficient to satisfactorily and reasonably supply the public need."

A trial was had before the district court upon the issues thus raised, and the court found as its conclusion of fact: "That the decision of the commission appealed from is not unreasonable or unjust within the meaning of the law providing for appeals, and that appellant is not entitled to relief prayed for." The court further found, as a matter of law, that the only question for it to determine upon the appeal was "whether the order of the commission is unreasonable or unjust, and, if the order is found to be such that reasonable men might differ as to its correctness, it cannot be said to be unreasonable; in other words, that the court is not empowered to put itself in the place of the commission with power to substitute its own judgment of what is reasonable and just for the judgment of the commissioners," and dismissed the appeal at the appellant's cost. Between 20 and 30 witnesses were examined at the trial. On the part of the appellant, they were principally employees of the railway

company, and dealers in lumber, coal and building material, receiving freight mainly in car-load lots, and whose places of business were situated on or near the switch belonging to the railway company, which extends from Lincoln to University Place, a distance of over two miles. On the part of the appellees, the witnesses were mainly retail merchants in the village, and private individuals residing therein. It is unnecessary to set forth the evidence at length. It supports the findings of fact made by the railway commission hereinbefore set forth. It further tends to prove that the establishment of the station would be of considerable benefit and accommodation to persons engaged in the retail business in University Place on account of the fact that, as matters now are, freight in smaller lots than 6,000 pounds, or less than car-load lots, is not delivered upon the switch by the railway company, but can only be delivered at Lincoln or Havelock, and from either of these points must be delivered to University Place either by means of the Morris Transportation Company, a company operating a freight and express business over the lines of the Lincoln Traction Company (which is a street railway corporation, whose lines connect Lincoln and Havelock, *via* University Place), or by being hauled by drays from the respective railway stations to the point of delivery. It is also shown that passengers arriving or departing from local trains could save much time if there was a station house at or near Warren avenue, the point where the station was ordered to be erected. On the other hand, the appellant's evidence tends to show that the cost of drayage from the proposed station to the stores in the village would be but little, if any, less than is now charged for delivery from Havelock or Lincoln. It is also shown that the station at Havelock is less than a mile farther from the business center of University Place than the site of the proposed station, which is nearly $\frac{3}{4}$ of a mile from such center as it now is. It is $4\frac{1}{4}$ miles by street railway from the Chicago, Rock Island & Pacific passenger station in Lincoln to Univers-

ity Place, with fifteen-minute street car service. From the center of the business portion of University Place to the station of the company in Havelock is 1½ miles. This station is also reached by the street car lines with thirty-minute service from University Place to Havelock. At present there are no sidewalks from the business portion of University Place to the proposed site, and there are no houses within a few blocks. The testimony of the appellant's witnesses is to the effect that the cost of erecting the station, building house track and passing track, wells, stock-yards, scales, etc., would amount to nearly $18,000, and the annual maintenance cost would be nearly $5,000. It is also shown that, if the station is placed directly at the intersection of Warren avenue and the railway track, it will be in a low and wet situation, at a point where the track is curved, and it will be necessary to place the station on the outside of the curve, which will be on the side of the track farthest from the town. The merchants engaged in business involving heavy articles, such as lumber, cement, coal, etc., testify that a station is unnecessary, while the retail dealers testify that they could transact business at much less expense and receive goods more expeditiously if they could use their delivery wagons to bring goods from a station in University Place. They also testify that a local market for farm products would be built up.

The statue governing the powers of the court on this appeal is as follows: "If any railway company, common carrier, or person or persons affected thereby, shall be dissatisfied * * * with the decision of said commission with reference to any * * * order, act or regulation made or adopted by them, * * * such dissatisfied railway company, common carrier, person or persons, may file a petition, setting forth the particular cause or causes of objection to such decision, * * * or order, * * * in the district court of the county where the cause of action arose in this state, sitting as a court of equity, against said commission as defendant. * * * In all

trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the * * * orders * * * complained of are unreasonable and unjust to it or them, and the record of the decision upon said hearing before said commission, shall, when properly authenticated by said commission, be received in evidence in the trial of said cause, that said * * * order * * * is *prima facie* just and reasonable." Ann. St. 1907, sec. 10655; laws 1907, ch. 90, sec. 7. We are of the opinion that it was entirely competent for the legislature to provide that the burden of proof should rest upon the party seeking to set aside the decision of the commissioners to show by clear and satisfactory evidence that the order is unreasonable and unjust, and that the record should be *prima facie* evidence that the order is just and reasonable. It will be seen that this provision of the statute applies not only to orders or regulations made against the contentions of the railway companies or common carriers, but as well when the relief prayed for by those complaining of the carriers is by the order of the commission denied, so that there is nothing unfair or unjust to the railway companies or discriminatory against them in this provision. The party, whether complainant or defendant, against whose contention the decision of the railway commission is made has the laboring oar in the district court, regardless of whether it is a private individual or a railroad company complaining. In an ordinary action appealed to this court in which there has been a trial to a jury, it is incumbent upon the party assailing the verdict upon the ground that there is not sufficient evidence to sustain it to assume affirmatively the burden of pointing out this fact, and the established rule in such cases is that, where the evidence is conflicting, the verdict of the jury will not be disturbed if there is sufficient competent testimony to uphold it. The question in such a case is not, did the jurors draw the correct conclusions from the evidence before them? Did they give credit to witnesses

who were unworthy of credit, and disbelieve other witnesses whose evidence was more reliable, thereby reaching an erroneous conclusion?—but, was there sufficient evidence before them from which, if they believed it, the conclusion might be drawn? And so in the present case the question is not whether this court or the district court might, if the question were originally before it for its determination, make the same order as made by the railway commission, but whether the evidence before the district court shows "clearly and satisfactorily" that the order was unreasonable and unjust.

The quantum of proof required to establish the fact that the order of the commission is unreasonable is more than a mere preponderance as in an ordinary case. The evidence must outweigh that offered by the defendant, and it must be of the same clear and satisfactory nature as that required in other cases where presumptions of validity attach to the instrument sought to be set aside, or to the transaction sought to be declared void. *Bingaman v. Bingaman, ante,* p. 248; *Peterson v. Estate of Bauer,* 76 Neb. 652, 661; *Doane v. Dunham,* 64 Neb. 135; *Topping v. Jeanette,* 64 Neb. 834; *Williams v. Miles,* 68 Neb. 463, 479, 62 L. R. A. 383, 110 Am. St. Rep. 431.

In *Minneapolis, St. P. & S. St. M. R. Co. v. Railroad Commission,* 136 Wis. 146, the facts were that the Wisconsin railway commission, after a complaint and hearing, ordered the railway company to erect a platform and stop its local passenger trains at a certain point midway between two stations which were between seven and eight miles apart. On appeal to the circuit court, that court found that the order of the commission was not unreasonable and refused to vacate it. In an elaborate and learned opinion (after argument and submission and reargument) the power of the legislature to confer upon the courts authority to review the reasonableness of rules or orders of the railway commission, the scope of such review, and the true construction of the word "unreasonable" in the language of the act were fully considered. It

may be said here that the language of our statute in this respect is substantially identical with that of the Wisconsin statute. The court said: "If this court or the circuit court were by the statute in question authorized to investigate the subject anew, to put itself in the place of the commission and search for this reasonable and just rate, with power to substitute its own judgment of what is reasonable and just for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the circuit court is not to search for or disclose or declare this 'reasonable and just' rate or service, but merely to determine whether the order of the commission is 'unreasonable'—quite a different thing. * * * Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be, the order must stand. The words 'clear and satisfactory evidence' are significant, because at the time of the enactment of this statute they were used in the law of this state to describe a degree of proof greater than a preponderance of evidence, and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested. * * * We must hold that in the statute before the court the legislature used the words 'clear and satisfactory' in this sense, and intended they should describe that degree of proof necessary to establish fraud or prove mistake in a written instrument." A similar conclusion was reached by the supreme court of Oklahoma in *Atchison, T. & S. F. R. Co. v. State,* 100 Pac. (Okla.) 16, and in *Atchison, T. & S. F. R. Co. v. State,* 101 Pac. (Okla.) 262, and by the supreme court of Louisiana in *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission,* 109 La. 247.

Before the creation of the railway commission the courts of this state exerted the authority to require railway companies by mandamus to provide necessary facilities for the public. *State v. Republican Valley R. Co.,* 17

Neb. 647, 18 Neb. 512. But, unless public necessity requires, the discretion of the railroad company in establishing and maintaining its stations should not be interfered with. *Chicago & N. W. R. Co. v. State,* 74 Neb. 77. In *Chicago & A. R. Co. v. People,* 152 Ill. 230, a mandamus was sought to compel the railway company to establish a station at Upper Alton, which was refused. The facts are fully set forth in the opinion. In the case in this court first above referred to, a mandamus was issued to compel the Republican Valley Railroad Company to establish a station at Blue Springs, a town of about 1,500 people, at a point outside of the corporate limits of Blue Springs, and about a mile and a half from another station at the town of Wymore. Considering the facts in the Nebraska case, and comparing them with those in the Illinois case, we think the comparison clearly demonstrates that what might be considered just and reasonable and necessary by one court may be considered unjust and unreasonable by another. If the order to establish a station at Blue Springs under the circumstances at the time and place was just and reasonable to provide necessary facilities for the public, then we are convinced that the order establishing a station at University Place falls within that category.

The railroad company insists that the cost of constructing a station and necessary side-tracks, etc., would much exceed the pecuniary benefit derived by it from such establishment, would not justify the outlay, and would be to that extent confiscatory. The cost of the proposed improvement is not in all cases a proper test for determining the reasonableness of such an order. It is proper to be taken into consideration, but it is not controlling. It is not contended that the amount to be expended is so excessive that it will diminish the company's revenues, relatively, to any great extent. The mere fact that the income from the expenditure at that particular point upon its line may not earn a fair return upon the capital invested at that point can only be con-

sidered in connection with the revenue from the entire operation of the road within the state, at least. As said by Mr. Justice White in his opinion in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1, 26: "It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames,* 169 U. S. 466, or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criterion to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." See, also, *Wisconsin, M. & P. R. Co. v. Jacobson,* 179 U. S. 287; *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, supra.*

It is also objected that the place designated for the erection of the station is upon a curve and at a point where the track is elevated and the land is low and wet. The order, however, does not require the erection of the station exactly at the intersection of Warren avenue. It will be a sufficient compliance if it is placed at a point as near as possible to Warren avenue, consistent with the safe, necessary and proper operation of the railway, and having regard to public convenience, and the order of the commission.

Upon the whole case, the evidence convinces us that the principal ground for complaint is the lack of facilities for the reception and sending out of freight in less than carload lots, and that it is open to question whether the

necessity of a station at the point designated for the accommodation of passenger traffic alone would be enough to justify the commission in making the order. The street car facilities from University Place to the Havelock and Lincoln stations of the railway company, and the means of delivery of personal baggage, are perhaps as convenient for passengers as from many points within the corporate limits of the city of Lincoln. However, it is not the inconvenience to passengers alone, but the whole demand for both freight and passenger service that must be considered, and if, taking all the circumstances into consideration, the order is not unreasonable, we have no power to set it aside.

Under all the facts in evidence, and giving the statutory presumption proper weight, we are satisfied that the order of the commission is not unreasonable, and the judgment of the district court so finding is

AFFIRMED.

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MYRA E. BRIGGS, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED JANUARY 20, 1910. No. 15,758.

1. **Insurance:** BENEFIT ASSOCIATION: GOVERNMENT. Upon the facts discussed in the opinion, it is *held* that, at the time the edicts of the Royal Highlanders were amended in 1901 or 1905, said society did not have a representative form of government within the meaning of section 6635 *et seq.*, Ann. St. 1909.

2. ———: ———: ———. Chapter 47, laws 1897, did not by its own force amend the edicts of the Royal Highlanders so as to make its government representative in form.

OPINION on motion for rehearing of case reported in 84 Neb. 834. *Rehearing denied.*

ROOT, J.

Upon consideration of the briefs and argument in support of defendant's application for a rehearing, we have

concluded that a rehearing ought not to be granted, but that our opinion should be modified. It now appears that we inadvertently failed to make proper application of the evidence concerning the convention of defendant's executive castle in 1905. We considered a report of the committee of the whole, and not the action of the executive castle, with reference to the amendment of section 41 of the edicts. Said section was amended by the members composing that castle.

Defendant's counsel argue that section 6635, Ann. St. 1909, eliminated from the by-laws all provisions thereof repugnant to law, and by that process defendant's edicts were so modified that, when section 41 thereof was amended in 1901 and in 1905, its government was representative within the meaning of the law. We held in *Lange v. Royal Highlanders*, 75 Neb. 188, that prior to the enactment of chapter 47, laws 1897, defendant had complied with the laws of this state, and was entitled to insure its members. Chapter 47, *supra*, did not by its own force translate defendant from a corporation controlled by its officers into one subject to the will of its members as expressed through the voice of their duly accredited representatives. With the appearance of that law it beame necessary for defendant by appropriate action to so modify its by-laws as to conform to the terms of the new statute. Notwithstanding the arguments of counsel, we are still of the opinion that such an alteration had not been made prior to the amendment in 1905 of section 41 of defendant's edicts. The incorporators of the society, three in number, in the certificate required by statute prior to 1897, designated themselves as executive officers of the order or society. By-laws, designated "edicts," were adopted for the corporation, and provision made for amendments thereto by a two-thirds vote of the members of the executive castle present at any regular or special meeting thereof. The original by-laws also provide that the executive castle should be composed of its officers, standing and special committees, and

delegates elected by subordinate or tributary castles. Twelve officers should be elected by the executive castle; seven officers appointed by the elected officers, and fifteen committeemen appointed by six designated elective officers. All appointive officers and committeemen held office at the pleasure of the appointing power. The elective officers constituted one-third of the executive castle and a quorum of that body. The members of the corporation were authorized to select one delegate to represent them in the executive castle. One of the original incorporators was given authority to fill any vacant office, and only members of the executive castle were eligible to hold elective office. It is apparent that the elected officers in the executive castle were in complete control of the affairs of the society. As stated by Mr. Commissioner OLDHAM in *Lange v. Royal Highlanders, supra,* the incorporators of the association constituted an oligarchy vested with plenary power over the affairs of the corporation. This power extended not only to the business affairs, but to the succession in office of all representatives of the corporation. Chapter 47, *supra,* by its terms did not until January 1, 1898, apply to associations created before the passage of that act. Defendant's executive castle convened in June, 1897, subsequent to the date Briggs became a member of the order, and, by an amendment to the edicts, made suicide by a member a defense to an action on his certificate. December 21, 1897, a special meeting of the executive castle was held and the edicts reamended so as to exclude all reference to suicide. By virtue of the edicts, as amended in December, 1897, the composition of the executive castle remained as theretofore, except that appointive officers could not be selected until after the installation of the elective officers, which should occur immediately before the closing ceremonies. The edicts also provided that the executive castle should, subsequent to June, 1897, meet but once in four years, except in cases of emergency. In the quadrennial convention of the executive castle in 1901, nine delegates, selected by rep-

resentatives of the rank and file, participated in the deliberations, and the edicts were further amended. According to these amendments any beneficiary member of the order is eligible to membership in the executive castle, but only officers thereof, or duly accredited delegates who had participated in at least one meeting of the castle four years prior thereto, were eligible to hold any elective or appointive office therein. None other than executive committeemen who had served as members thereof were eligible to serve as most illustrious protector, chief secretary, or chief treasurer. The executive committee is first described by that name in the 1901 edicts, and is composed of the protector, secretary, treasurer and four high prudential chiefs. The edicts, as amended in 1901, further provide that the delegates to be selected by the rank and file of the order need not exceed the aggregate of officers and committeemen in the executive castle, and the edicts can only be amended by a two-thirds vote of the entire membership of that castle. They also disclose that suicide by a member shall be a complete defense to an action upon his certificate of insurance.

In 1905 defendant's executive castle again convened, and so amended the edicts as to deprive a beneficiary of a member who had committed suicide of all claims upon the order in excess of the aggregate payments made by him for the use of the mortuary fund. It is argued most strenuously that but 11, and not 13, elective officers participated in the 1905 convention, and that the 25 delegates present, by an exercise of their voting franchise, had the power to amend any edict, notwithstanding the combined opposition of all elective officers, and that our opinion is incorrect in these particulars. Our former opinion upon this point reflects the testimony of the chief secretary of the order, and is corroborated by the report of the finance committee concerning the expense of the officers and delegates in attendance in that convention, which shows that mileage and per diem were allowed for 13 officers and 25

delegates. Whether counsel are, or their witness is, correct, is not material. The elective and appointive officers, entitled by virtue of the edicts to participate in the deliberations of and to vote for or against the propositions advanced in that convention of the executive castle, owed their positions to the men who incorporated the society, and did not represent the members of the order within the meaning of the statute. Counsel argue with great earnestness and much plausibility that the so-called elective officers are representative, and that the edicts of the order, as amended in 1905, have given the Highlanders a representative form of government. For the purposes of this case we need only consider, and shall only consider, defendant's government as it existed in 1901 and in 1905, when the amendments were made to section 41 of the edicts.

It is true, as urged, that the statute does not define the words "representative form of government," but there should be no great difficulty in coming to an understanding of the law. We said in the case of *State v. Bankers Union of the World*, 71 Neb. 622, speaking through Judge SEDGWICK: "A fraternal beneficial association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, *shall be chosen by the members.*" In discussing this phase of the case Judge SEDGWICK stated: "These directors, who control the affairs of the company, must be chosen by the membership thereof, either directly or through representatives chosen by the membership for that purpose." So it will be understood that representative government does not necessarily mean democratic control in the sense that all of the members shall at a precise time individually express their will in selecting the officers and agents essential for the management of the affairs of the order, but it does imply supreme and ultimate sovereignty in the individuals constituting the units of the society. One may

imagine the reception that would have been accorded the constitution of the United States, or the fundamental law of this state, had the men who framed those documents inserted a clause therein that the people should be represented in the various branches of the government, provided they selected their representatives, or a large fraction thereof, from the membership of the constitutional convention. After a mature consideration of the record, we have no hesitation in reaffirming our former opinion in so far as it determines that in 1901, and at the time in 1905 when section 41 of defendant's edicts was amended, defendant did not have a representative form of government within the meaning of chapter 47, laws 1897. Counsel insist that to so hold means the dismemberment and destruction of a flourishing order, but we are unable to agree with them. The association was lawful in its inception, and its by-laws designated the agents and methods whereby all needful changes might be made in its edicts. Twice, in the absence of statutory limitations, that power has been exercised. Section 8, ch. 47, *supra* (Ann. St. 1909, sec. 6642), authorized defendant to continue in business, provided it complied with the statute. If it desired to continue as a going concern and receive the protection of the law, its officers should have convened the executive castle, and the officers, committeemen and delegates composing that castle by a two-thirds vote should have altered the edicts so as to clothe defendant with a representative form of government. Section 6656, Ann. St. 1909, directs that amendments made to the constitution or by-laws of a fraternal insurance society shall not take effect until a duly certified copy of the amendments shall have been filed with the auditor of public accounts. We still hold that an amendment to defendant's edicts clothing it with a representative form of government must be duly certified and filed with the auditor before representatives selected under that government may lawfully amend its edicts with respect to a beneficiary's rights.

Counsel's criticism of the third paragraph of the syllabus is not well founded. We do not thereby hold that defendant's executive castle, as constituted in 1897, could not or cannot lawfully amend the edicts of the Royal Highlanders so to give it a representative form of government.

The motion for a rehearing is

OVRRULED.

SEDGWICK, J., not sitting.

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MIKE BENAK, APPELLEE, V. PAXTON & VIERLING IRON WORKS, APPELLANT.

FILED JANUARY 20, 1910. No. 15,877.

1. **Master and Servant:** INJURY TO EMPLOYEE: VICE-PRINCIPAL. "Whether one of several employees of the same master is a vice-principal as to his co-employees, or whether all are fellow servants, is not always a question of fact, nor always a question of law. Generally it is a mixed question of law and fact, and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented." *Union P. R. Co. v. Doyle*, 50 Neb. 555.

2. ———: VICE-PRINCIPAL. If the master clothes an employee with authority to control and direct another servant, the superior servant in exercising such authority is a vice-principal to the servant under his control.

3. ———: INJURY TO EMPLOYEE: VICE-PRINCIPAL. If a perilous position assumed by a servant in performing his work is the result of a command from his superior exercising authority as vice-principal, and the subordinate is injured, the mere fact that the act which occasioned that injury was performed by such superior in the discharge of the regular duties for which he was employed by the master does not, as a matter of law, create the relation of fellow servants between the parties at the moment of injury.

4. ———: ———: CONTRIBUTORY NEGLIGENCE: ASSUMPTION OF RISK. A servant who has been induced to commence or continue to work by his master's promise to remedy dangerous conditions surrounding the servant's employment may continue his work

without being guilty of contributory negligence or assuming the risk of injury from such conditions, so long as he may reasonably expect the master's promise to be kept, unless the danger is so obvious that no reasonably prudent person would continue work under those conditions.

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

*Greene, Breckenridge & Matters,* for appellant.

*T. W. Blackburn, contra.*

ROOT, J.

This is an action for personal injuries caused by defendants' alleged negligence. Plaintiff prevailed, and defendant appeals.

1. Defendant insists that the evidence does not sustain the verdict. It is undisputed that defendant is a corporation engaged, among other things, in molding and selling iron castings. Defendant employs one general superintendent and several foremen. Particles of burned sand adhere to, and protuberances of iron appear upon, the surface of castings fresh from the molds. The castings are placed in a yard, referred to as the "scratch shop," and workmen with chisels, hammers and wire brushes remove the sand and protuberant metal. Ordinarily the castings are first brushed, and only in emergencies the laborers with chisel and hammer work on a casting while it is being brushed. At the time plaintiff was injured the men working in the scratch shop were under the control of a Mr. Winther. In Winther's absence Dan Collins, a workman, directed his fellow servants and told them what to do. Collins had 25 years' experience in chipping and smoothing castings, and had been in defendant's employ about 5 years. Plaintiff is a native of Bohemia, speaks the English language with difficulty, but can understand many simple words in that tongue. He has resided in America about 17 years, and

had worked for defendant 9 months when injured. The evidence is conflicting concerning the other facts, but giving plaintiff the benefit, which a verdict in his favor entitles him to, it may be said that while in defendant's employ he engaged in unskilled labor, but worked the greater part of the time in the scratch shop; ordinarily Winther told him what to do, but Collins had directed him in his work on various occasions. On the morning of the day in question plaintiff worked about the scratch shop under Collins' directions, and was scraping sand into a heap when ordered by Collins to brush the sand from a casting about 18 inches in height, constructed for the base of a column. Plaintiff obeyed the order, and either bent over or knelt upon the ground to perform his work. Collins was working with chisel and hammer upon the casting. A chip of iron struck plaintiff in the face and he abandoned the work, whereupon Collins said: "Come back, I will be careful." Plaintiff, believing his foreman, returned, continued brushing, and was hit upon his left eyeball by a chip or sliver of iron cut off the casting by Collins.

Upon this state of facts defendant asserts that, although Collins may have severed the chip which injured plaintiff, the former was Benak's fellow servant, the danger was incident to the employment, and was obvious to and assumed by plaintiff. Plaintiff, on the other hand, argues that Collins was a vice-principal; that his order to plaintiff to brush the casting in the first instance was defendant's command, and his promise to be careful after Benak objected and quit the work was the master's assurance, which plaintiff had a right to rely upon; that the danger was not obvious, and that Collins' negligence was defendant's negligence.

Collins' relation to Benak is an important element in this case. In *Union P. R. Co. v. Doyle*, 50 Neb. 555, we held that ordinarily it is a mixed question of law and of fact whether one of several employees of a common master is a vice-principal to, or a fellow servant of, the other

employees. The trial court in the instant case instructed the jurors that, if plaintiff had proved by a preponderance of the evidence that at and immediately prior to the accident Collins was clothed by defendant with authority to direct, govern and control plaintiff concerning the place he should work and the method of performing his labor, Collins was a vice-principal. Defendant complains of the use in this instruction of the words "and immediately prior to," but the quoted language is surplusage, and not in any manner prejudicial. The instruction is fair and states the settled law of this state. In an instructive opinion prepared by Mr. Chief Justice COBB in *Chicago, St. P., M. & O. R. Co. v. Lundstrom,* 16 Neb. 254, we held, following the supreme court of Ohio, that a superior servant of a corporation clothed by it with authority to direct and control another servant in his work is in that regard a vice-principal to, and not a fellow servant of, the subordinate servant. In *Chicago, B. & Q. R. Co. v. Sullivan,* 27 Neb. 673, we held that a car repairer vested with authority to direct and control another repairer in his work was a vice-principal, and the master was liable for the vice-principal's negligence. *Union P. R. Co. v. Doyle,* 50 Neb. 555; *New Omaha T.-H. E. L. Co. v. Baldwin,* 62 Neb. 180; *Foster v. Missouri P. R. Co.,* 115 Mo. 165, 180; *Steube v. Iron & Foundry Co.,* 85 Mo. App. 640; *Illinois Steel Co. v. Schymanowski.* 162 Ill. 447. The principle of law is humane and should be construed with reasonable liberality in the interest of the employee.

2. Defendant urges that, although Collins may have been a vice-principal to Benak, yet the latter received his injuries from a hazard incident to his employment; that Collins in chipping the casting was performing an act of service, and not of authority, and therefore defendant is not liable. The court instructed the jurors that plaintiff assumed the usual and ordinary risks incident to his employment, and, if it was an ordinary incident of the work for fragments of iron to fly, the risk of injury therefrom was assumed by him, unless he complained to his master

of the dangerous conditions under which he was directed to labor and thereafter continued to work under the master's promise to remedy the defect, and in that event he did not assume the hazard, unless the danger was so obvious that he could not by the use of ordinary care and skill pursue the work in safety. The court further instructed the jurors that, if defendant through its assistant foreman directed Benak to brush a casting which said foreman was chipping, and after commencing his work Benak called said foreman's attention to the fact that the latter's conduct was making the place dangerous to work in; that the foreman promised to keep the place reasonably safe and directed plaintiff to continue his work, and that Collins thereafter negligently performed his work so as to make the said place dangerous, plaintiff might recover, provided he had not assumed the risk and that Collins' negligence was the proximate cause of Benak's injury.

In *Sapp v. Christie Bros.*, 79 Neb. 701, 705, we held that a servant does not in every instance assume the risk of machinery and appliances, which, although dangerous, may be safely used by the exercise of reasonable care and skill, but that, if the servant is induced to commence or continue employment upon the master's promise to remedy defective appliances, the servant will not have assumed the risk, nor would he be guilty of contributory negligence by continuing to labor with the appliances for a reasonable time in anticipation of such repairs, unless the danger was so obviously imminent and immediate that no reasonably prudent person would begin or continue the work under those conditions.

In the instant case the appliances were not in themselves dangerous, nor was the place in which the work was to be performed dangerous from inherent conditions, but the danger, if any, over and above that incident to a reasonable prosecution of the work, was created by the action of the foreman, who in response to orders from defendant's office was rushing the work upon a particular cast-

ing. The evidence tends strongly to prove that in the usual course of smoothing castings there is but little danger of injury from flying fragments or iron, but if two men work at the same time upon the same side of a casting the hazard is increased many fold. Particularly would this be true of a man wielding a brush under such circumstances as surrounded plaintiff when he was injured. When it became manifest to Benak that he was liable to be injured by Collins, the subordinate servant notified his master by the statement made to the assistant foreman that the place, under the circumstances, was a dangerous one to work in, but returned upon the vice-principal's assurance that the work would be prosecuted with care. The jurors were justified in finding from the evidence that Collins should have chipped the side of the casting opposite the surface Benak was brushing. Under the circumstances, it seems to us this case is within the reason sustaining the principle announced in the cited cases. It is well settled that, if a foreman having charge of laborers directs one of them to perform his work in such a manner and under such circumstances as to subject the subordinate to great danger of injury, and he is injured thereby, the principal will be liable. *Crystal Ice Co. v. Sherlock,* 37 Neb. 19; *Norton Bros. v. Nadebok,* 190 Ill. 595; *Harsen v. Northern P. R. Co.,* 120 N. W. (Wis.) 826.

Whether defendant's liability, if any, should be ascertained by an application of the principle that the master must exercise reasonable prudence to furnish his servant a reasonably safe place to work in, the nature of the employment being considered, or whether, from a consideration of the doctrine that a vice-principal may not, in the exercise of authority delegated to him by his master, negligently place a fellow servant in peril and then negligently injure him, does not seem to us material. The peculiar facts in this case bring it within both rules, evidence relevant in support of one theory, sustains the other, and if either one is established, the master is liable.

Upon vital issues joined the evidence is conflicting, and will sustain a finding for or against either party according to findings of the triers of fact. The verdict of the jury upon those questions is conclusive upon us. The trial judge, upon the issues and the evidence, instructed the jury as succinctly, cautiously and accurately as defendant had a right to demand, and the errors assigned because of the giving and refusing to give instructions are overruled.

3. We shall not specifically mention the alleged errors committed in the admission and exclusion of testimony. All have been examined, and none of them presents serious questions for consideration. Upon the entire record, we are constrained to find that defendant was given a fair trial, and that there is sufficient evidence to sustain the verdict of the jury.

The judgment of the district court therefore is

AFFIRMED.

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JOHN W. MARICA, APPELLANT, V. LAWRENCE YOST ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 15,903.

**Intoxicating Liquors:** APPLICATION: FREEHOLDER. "One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law." *Dye v. Raser*, 79 Neb. 149.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

*France & France*, for appellant.

*Power & Meeker, contra.*

ROSE, J.

The trustees of the village of Benedict granted plaintiff a license to sell intoxicating liquors during the municipal

year beginning in 1908. Defendants were remonstrators, and from the order of the village trustees appealed to the district court, where the license was revoked. From the judgment of the district court plaintiff has appealed.

Defendants resisted the license on the ground that five of the petitioners were not *bona fide* freeholders of the village of Benedict, within the meaning of the law. If three of those thus challenged were disqualified, the village trustees, for want of a petition by thirty freeholders, were without jurisdiction to issue the license, and in that event it was properly canceled by the district court. On this issue there is proof tending to show these circumstances: One of the petitioners challenged had only lived in the village a year and a half. January 22, 1908, he bought from a saloon-keeper, who intended to become an applicant for a license, a lot in a ravine west of town for $15. There were no buildings or fences on the lot, and petitioner had not cultivated it. He did not know the boundaries, and admitted he never had any benefit from the lot except to be a petitioner. He owned no other realty. When asked on the witness stand his purpose in buying the lot, he replied: "Why, to be a freeholder." After he made his purchase the saloon-keeper who conveyed it to him accosted him on the street and asked him if the deed had been recorded. It had been intimated to him that he bought the lot with the purpose of becoming a petitioner and he did not at the time deny the imputation. After he petitioned for the license he signed and acknowledged a deed to the lot for the price of $16 and had the deed in his pocket for delivery to the purchaser, but tore it up after the remonstrance was brought to him. This is not intended as a summary of the testimony relating to his qualifications. The purpose is to show some of the circumstances of which there is proof. They indicate that petitioner was not qualified, within the meaning of the rule that "one made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder." *Cohn v. Welliver*, 84 Neb.

230; *Dye v. Raser,* 79 Neb. 149. Under the issue raised by the remonstrance the burden was on applicant to show that petitioner was a *bona fide* freeholder. *Swihart v. Hansen,* 76 Neb. 727. There was a general finding in favor of remonstrators. This included the finding that petitioner was not qualified as such, and it cannot be held under the circumstances narrated, when considered with all the proof, that the finding was without support in the evidence.

Another petitioner asserted ownership of a lot in a ravine. He bought it in February, 1908. The title came from a saloon-keeper and prospective applicant for a license, through his bartender, not long before the petition was signed. One witness said the lot had no market value, and the circumstances were such as to justify the finding of the trial court that the petitioner was not a *bona fide* freeholder within the meaning of the rule stated. Testimony relating to the qualification of another petitioner justified the trial court's finding that his residence in the village had not been established. The disqualification of the three petitioners mentioned left the village trustees without jurisdiction to issue the license, and error does not affirmatively appear in the judgment revoking it.

AFFIRMED.

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HENRY N. WIESE ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED JANUARY 20, 1910. No. 15,880.

1. **Cities: IMPROVEMENT DISTRICTS: BOUNDARIES: NOTICE.** It is the duty of a city, when creating an improvement district for a local improvement, to define the limits thereof with sufficient certainty to identify the lots or lands sought to be included therein, and to publish a statement of such limits, in the manner and for the time required by statute, prior to the levying of any assessment upon adjacent property to pay for such improvement.

2. ———: ———: ———: ———: JURISDICTION. The statutory requirements for the fixing of such limits and the publication of the same prior to the levying of any such assessment are mandatory and jurisdictional.

3. ———: SPECIAL ASSESSMENTS: COLLATERAL ATTACK. Where a special assessment for such improvement is made without a compliance with such jurisdictional requirements, such assessment is void, and may be assailed collaterally.

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

*S. L. Winters,* for appellants.

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

FAWCETT, J.

In 1905 the defendant city of South Omaha graded that part of K street in said city lying and being between the west line of Twenty-sixth street and the east line of Twenty-seventh street. Plaintiffs, who are owners of lots adjacent to that portion of K street, brought this suit in the district court for Douglas county to enjoin defendant city from collecting the special assessments attempted to be levied upon the property of plaintiffs to pay for the cost of such grading. The principal point relied upon by plaintiffs is that the defendant city, prior to advertising for bids and letting the contract for such grade, and levying such special assessments, failed to create an improvement district defining the boundaries thereof, as required by statute. Defendant contends: (1) That the statute did not require the prior ordinance creating the district to define the boundaries. (2) That even if the statute did so require, and even if it failed to definitely describe such boundaries, its failure to do so "would be a mere irregularity, and not a jurisdictional defect, which those whose property are assessed to pay for such improvement can collaterally attack." The district court found generally for plaintiffs, and perpetually enjoined defendant city from attempting to collect the special assessments levied

for such improvement, and quieted title of plaintiffs in and to the property set out in the petition.

Section 8329, Ann. St. 1907, which both sides in their briefs concede was in force at the time this improvement was made, provides: "The mayor and council may create improvement districts for the purpose of improving the streets, boulevards, alleys or other public grounds therein, by paving, repaving, macadamizing, curbing and guttering or reguttering, and grading in such manner as may be determined upon. The improvements named shall only be authorized upon the following conditions; except as in this act may be otherwise provided, to wit: The mayor and council shall order such improvements and cause them to be made in any district within the city, only when a petition on its face purporting to be signed by the owners representing the majority of the taxable feet front upon the street, alley or other public thoroughfare, or any part thereof, shall have been filed with the city clerk. Each signer to the petition shall duly acknowledge the signing and execution thereof before a notary public. A brief statement of the limits of the district, and the nature of the improvements, together with the names signed to the petition and the description of the property listed after the names shall be published in the official paper for five times. * * * None of the improvements shall be finally ordered or the contract let for the same except upon and in pursuance of such petition; nor until twenty days after the last day of publication of said petition shall have expired. At any time within twenty days after the publication of said petition or at any time before making a contract pursuant to such petition, any taxpayer within such improvement district may file with the city clerk a protest in writing," etc. Ordinance No. 1363, under which defendant city undertook to create the improvement district, is as follows: "Section 1. That improvement district No. 22, being grading district No. 69, be and the same is hereby created and established and defined as follows: All that territory included within the west line

of Twenty-sixth street and the east line of Twenty-seventh street, on each side of K street and back to the alley." The plat of the defendant city, introduced in evidence, shows that K street runs east and west, and Twenty-sixth and Twenty-seventh streets run north and south. Block 65 lies north and block 69 south of K street, so that the portion of K street which was graded is one block in length, between Twenty-sixth and Twenty-seventh streets and blocks 65 and 69. The alleys in these two blocks run north and south. There are no alleys running east and west. It will be seen, therefore, that the boundary of this improvement district, described in said ordinance as "all that territory included within the west line of Twenty-sixth street and the east line of Twenty-seventh street, on each side of K street *back to the alley*," does not describe any possible boundaries, except "on each side of K street," for the reason that there is no alley running parallel with K street, either north or south thereof. There being no alley to indicate either the north or the south boundary of the district, who could say how far the district extended in either of said directions? Did it extend one, two, three, or six lots in each direction? If the latter, then it would take in all of blocks 65 and 69; but the northern and southern termini would then be J street and L street, respectively. The owners of lots 4, 5, 8 and 9, in block 65, would have no more reason to conclude that their lots were included in the district, than would the owners of lots 1, 2, 3, 10, 11 and 12, in said block. In like manner, the owners of lots 2, 3, 10 and 11, in block 69, would have no more reason to conclude that their lots were within the district, than would the owners of lots 4, 5, 6, 7, 8, and 9, of said block. There being no way of determining, by an inspection of ordinance 1363, how far north or south of K street the district extended, how could plaintiffs or any other owners of lots lying in either direction from such street be bound by any publication in the official paper? The statutory requirement is: "A brief statement of the limits

of the district, and the nature of the improvements, * * * shall be published in the official paper for five times." It further provides: "At any time within twenty days after the publication of said petition or at any time before making a contract pursuant to such petition, any taxpayer within such improvement district may file with the city clerk a protest," etc. There being no "statement of the limits of the district," how can it be claimed that plaintiffs' lots were "within such improvement district"? It is quite clear that the legislature in calling for "a brief statement of the limits of the district" intended such a description as would apprise the owners of the lots within those limits, of the improvements which the city contemplated making, so that they could, within the time allowed, take such action as they deemed proper in the way of filing protests, etc.

Welty, Law of Assessments, sec. 297, says: "An important prinicple of law in this connection is that the district which is to be taxed with an assessment to pay for a local improvement must be accurately defined." In 1 Abbott, Municipal Corporations, sec. 342, it is said: "Where statutory or constitutional authority exists for the making of local assessments, a discretion is usually vested in the municipal authorities to divide their territory into such taxation districts for the construction of local improvements as seem advisable and the exercise of a sound discretion by them will not be interfered with by the courts. That the legislature of a state under constitutional authority may exercise the same discretion and power is axiomatic. By whatever authority the taxing district is established, however, it must be accurately defined." In *City of Tarkio v. Clark,* 186 Mo. 285, 299, the court say: "Fourth, nowhere in the record proper do the length and the *termini* of the proposed extension of First street appear, nor is the land proposed to be taken defined by metes, bounds or calls, or by maps, plats or documents called for, so that what is uncertain might be made certain by such aids. No man could locate the

extension or the land taken by aught appearing in the record proper. Under such condition of things the proceedings are void for indefiniteness (citing authorities). Proceedings taking private property for public use operate *in invitum,* in derogation of common law and common right. They are regarded as *strictissimi juris.* The power is a high and stringent one, courts inflexibly require it to be pursued strictly, and the times are such that we ought not to abate one jot or one tittle of vigilance in preserving the rights of the citizen to his property."

We think the reasoning of the authorities above cited is sound, and therefore hold: (1) That it is the duty of a city, when creating an improvement district, to define the limits thereof with sufficient certainty to identify the lots or lands sought to be included therein, and to publish a statement of such limits, in the manner and for the time required by statute, prior to the levying of any assessment upon adjacent property to pay for such improvement. (2) That the statutory requirements for the fixing of such limits and the publication of the same prior to the levying of any such assessment are mandatory and jurisdictional. (3) That, where a special assessment for such improvement is made without a compliance with such jurisdictional requirements, such assessment is void, and may be assailed collaterally. That a court of equity will enjoin the collection of a void tax or special assessment, is well settled in this state. *Touzalin v. City of Omaha,* 25 Neb. 817; *Bellevue Improvement Co. v. Village of Bellevue,* 39 Neb. 876; *Chicago, B. & Q. R. Co. v. Cass County,* 51 Neb. 369.

The judgment of the district court is

AFFIRMED.

# DICK MCLANAHAN, APPELLANT, V. CHARLES M. CHAMBERLAIN ET AL., APPELLEES.

FILED JANUARY 20, 1910. No. 15,859.

1. **Mortgage on Homestead: DELIVERY.** A mortgage upon the homestead, executed by husband and wife upon agreement to secure certain claims of the mortgagee and left with the wife by the husband, who thereupon absconded, may be delivered by the wife, notwithstanding certain instructions to the wife by the husband as to conditions of delivery had not been complied with by her, the mortgagee not being aware of such instructions, and receiving the same in good faith as a compliance with the agreement to give such security.

2. **Mortgages: COLLATERAL SECURITIES.** Upon the facts stated in the opinion, it is *held* that the mortgage in question was not given in settlement of the plaintiff's claims, but as security collateral thereto.

3. **Statute of Frauds.** The execution and delivery of a note and mortgage to secure the debt of another is sufficient compliance with the statute of frauds.

4. **Mortgage on Homestead: CONSIDERATION: EVIDENCE.** C., being cashier of a bank in which there was a deposit in the name of the wife of M., agreed with M. that, if the deposit was allowed to remain in the bank, he, C., would secure M. and his wife against all loss. Upon this agreement the deposit was allowed to remain in the bank, and C. and his wife executed a mortgage upon their homestead to M. as mortgagee pursuant to said agreement. Soon afterwards the bank failed. *Held*, That the mortgage is a valid security for said deposit and the same constitutes a good consideration therefor.

5. **Statutes: REPEAL BY IMPLICATION.** Whether section 5053, Ann. St. 1909, is repealed by implication by the married women's act of 1871 (laws 1871, p. 68), *quære*.

6. **Executors and Administrators: DEFENSE BY ADMINISTRATRIX.** When an administratrix has recovered a judgment in favor of her intestate's estate, and she is made defendant as such administratrix in an action involving the validity of the judgment and the priority of the lien, she may defend the action for all persons interested, notwithstanding that she has married after recovering the judgment.

7. **Homestead: LIENS: PRIORITIES.** A mortgage executed and delivered before the lien of a judgment has attached to the excess

value of homestead property is superior to that lien, but the homestead exemption is $2,000 over and above all liens prior to the judgment; and, if the mortgage is subsequent to the lien of the judgment, that lien is not affected by the mortgage. The judgment creditor is entitled to excess value of the property over the homestead right, subject only to such liens as are prior to his judgment.

8. Appeal: BILL OF EXCEPTIONS. A document offered in evidence and excluded by the court should, at the request of the party offering it, be incorporated in the bill of exceptions. In no other manner can the ruling of the court thereon be presented to this court for review.

9. Judgment: PROCESS: RETURN. The return of a summons that it was served by leaving at defendant's "last known place of residence," etc., is defective, and a judgment rendered on such service is void.

10. Mortgages: FORECLOSURE: EVIDENCE. In an action to foreclose a real estate mortgage there must be some proof that there has been no action at law upon the indebtedness, or that such action, if any, has terminated without collection; but the ordinary rules in regard to proving a negative apply.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed in part and reversed in part.*

*S. P. Davidson,* for appellant.

*E. B. Quackenbush, Hugh La Master, J. C. Moore* and *F. L. Dinsmore, contra.*

SEDGWICK, J.

On the 14th day of October, 1908, the plaintiff began this action in the district court for Johnson county to foreclose a real estate mortgage upon certain lands in that county, executed by the defendants Charles M. Chamberlain and Edith R. Chamberlain, husband and wife. The remaining defendants were made parties because of claiming some interests in the real estate, which the plaintiff alleged were inferior to the lien of his mortgage. James A. McPherrin, at his own request, was afterwards made party, and also alleged two mortgages

upon the same premises, and, alleging some mistakes in one of the mortgages, asked to have the same reformed. Various questions are presented and discussed as to priority of liens and validity of some of the judgments pleaded, but the principal controversy is as to plaintiff's mortgage and the judgment claim of the defendant Florence M. Dew. As against the plaintiff's mortgage it is alleged by the defendant Chamberlain that it was without consideration, and was never delivered by him to the plaintiff. The judgment creditors alleged that the premises involved were worth at least $4,000, being $2,000 above the amount of the admitted homestead exemption, and that at the time the note and mortgage were given the defendant Charles M. Chamberlain was the cashier of the Chamberlain Banking House, which was then doing a banking business in said county and had been so doing for some years prior thereto; that the said banking house was about to go into the hands of the state banking board, and that on the 20th day of August, 1902, the said Charles M. Chamberlain was about to abscond and leave the country in order to avoid the payment of his debts, and in order to avoid his liabilities as cashier of said banking house, all of which was well known to the plaintiff herein; and that on said day the plaintiff and said Charles M. Chamberlain combined and conspired together to hinder and defraud the creditors of said Chamberlain, and in furtherance of their said wrongful and unlawful design the said Charles M. Chamberlain made and executed said note and mortgage as described in the petition, wholly without consideration, and the same was received by the plaintiff for the purpose and with the intent of hindering and delaying the creditors of the said Charles M. Chamberlain.

To the answer of Charles M. Chamberlain the plaintiff replied that, in a former action pending in the same court, in which the National Bank of Commerce was plaintiff and the said Charles M. Chamberlain was defendant, and said Edith R. Chamberlain, as intervener,

was made defendant, the said defendants, in order to defend against the lien of the National Bank of Commerce, set up that the plaintiff's mortgage herein sued upon was a valid lien upon the property involved in this suit, and that they were entitled to hold as exempt all of said property over and above the amount of plaintiff's mortgage and the taxes upon said property as their homestead, and that it was so adjudged in the said former action, and that the judgment and proceedings in that suit now barred said defendants from denying the validity of the plaintiff's mortgage.

Upon the trial the court found that the only consideration for the plaintiff's mortgage was a claim of $154.29, for goods sold by the plaintiff to the defendant Charles M. Chamberlain, and that the mortgage was fraudulent and void as to creditors. The mortgages of the defendant McPherrin were foreclosed as prayed, and the court found that the judgment of the National Bank of Commerce was dormant and not a lien, and that the defendant Dew had a valid judgment, amounting then to $7,254.11, which was a valid lien upon the premises, subject to the homestead interest of the defendant Chamberlain and the respective liens of plaintiff and defendant McPherrin, and that the value of the property was $3,500; that the judgments against Charles M. Chamberlain were first liens "upon said homestead premises of the defendants Charles M. Chamberlain and Edith R. Chamberlain, after their said homestead right of $2,000 has been taken from said premises," and "that out of the $2,000 homestead right there shall be first paid" the plaintiff's claim, as found by the court, and the McPherrin mortgages. And, "after the payment of the said sums to the said plaintiff and the defendant James A. McPherrin, the balance of the said $2,000 right of the defendants Chamberlain shall be paid to the said Charles M. and Edith R. Chamberlain." The plaintiff and the defendant Charles M. Chamberlain have appealed to this court.

At the time that the note and mortgage were executed, and for some time prior thereto, the plaintiff was engaged in mercantile business in the city of Tecumseh, in Johnson county, and the defendant Charles M. Chamberlain was owing him for goods sold in an amount found by the court to be the sole consideration for the mortgage. The plaintiff's wife, who was possessed of property in her own right, had money upon deposit in the Chamberlain Banking House, a corporation doing banking business, of which defendant Charles M. Chamberlain was cashier. The amount of this deposit was at that time $761.83, which it appears had been so on deposit for some time. The plaintiff testifies that some days before the mortgage was given he spoke to Mr. Chamberlain about taking the money deposited in the bank in Mrs. McLanahan's name and making some loans. Mr. Chamberlain did not want the money taken out of the bank, and he offered to sell Mr. McLanahan some securities which the bank had, and when Mr. McLanahan declined to buy the securities Mr. Chamberlain told him that he would not lose anything by leaving the money in the bank. And in another part of his testimony Mr. McLanahan says: "Mr. Chamberlain told me to leave the money in the bank, that he would secure me against any loss that might occur at any time." Soon after these conversations Mr. and Mrs. Chamberlain executed the mortgage. It was upon the homestead in which they were both interested. It was in the hands of Mrs. Chamberlain, and was by her delivered to Mr. McLanahan. Mr. Chamberlain testifies that his instructions were not to deliver it until Mr. True, who was employed in the bank, directed it to be done, and it appears that Mr. True never directed such delivery. But Mrs. Chamberlain herself had some authority in the premises, and Mr. Chamberlain having left it with her for delivery, without making any condition so far as Mr. McLanahan knew, he might receive it from her as a compliance with the agreement to secure his claims, and Mr. Chamberlain ought not to be allowed to question the delivery

five or six years later, in view of the circumstances surrounding the transaction, which cannot be enumerated here. Evidence of delivery is in any view of the case sufficient to support the finding of the trial court.

We have already indicated that the trial court found that the mortgage was valid as between the parties, but was fraudulent and void as to creditors, and also found a partial failure of consideration, it appearing to be the opinion of the trial court that the mortgage was invalid as a security for the bank deposit which was in Mrs. McLanahan's name. Owing to the numerous conflicting claims of the parties and the disconnected condition of the evidence, we have found it necessary to devote unusual care to the consideration of these two points in the findings of the court, and we are constrained to say that we are unable to find in the evidence a basis for the conclusion of the court thereon. We cannot find that the note and mortgage were given in settlement of the account of Mr. McLanahan or of the deposit in the name of his wife. The evidence in regard to the consideration for the mortgage is to be found in the testimony of Mr. Chamberlain and Mr. McLanahan. The mortgage was given on one year's time, without interest, and Mr. Chamberlain does not give any other reason for executing the mortgage or any explanation of the purpose for which it was executed than that testified to by Mr. McLanahan. He denies that he authorized its delivery, but he does not deny that he executed it for the purpose of securing these two claims. The two claims, together with interest, would amount, at the time of the maturity of the mortgage, to very nearly the amount of the mortgage. There is a small variance, whether the interest be computed at the rate of 7 per cent. or 8 per cent. In the one case the claim would amount to a little more than the mortgage, and in the other to a little less. The variance in the amount is sufficient, however, to indicate that the mortgage was not given in settlement of the claims, but rather to secure them, and Mr. McLanahan's testimony is en-

tirely to that effect. He says: "The mortgage was handed to us against anything we might have there," and explains this to mean any claim that he and his wife might have against Chamberlain or the bank. And again he says: "They offered to secure me, which they did, and I accepted it and considered my claim good." Again he testified: "That is what I mean to say, he would secure me against any other loss. Q. You mean any other deposit of your wife's? A. No; against any business I might do there. Q. It was a blanket security for something that was going to happen in the future? A. It might be. Q. It didn't cover your wife's account at all? A. I think it covered everything we had there. Q. So far as any talk you had with Mr. Chamberlain there that day at the barn it didn't cover that deposit, because that deposit wasn't mentioned, as you told me before? A. It didn't cover that only."

There is much said in the evidence and also in the briefs in regard to the statute of frauds. It seems to have been thought by some that the promise by Mr. Chamberlain made to Mr. McLanahan to secure the deposit in the bank in the name of Mrs. McLanahan was a promise to answer for the default of others and must be in writing, but the note and mortgage themselves constitute a sufficient writing for this purpose. The evidence given by the parties upon this point does not go to the form or sufficiency of the writing, but to the consideration, which may always be inquired into; and we do not see how the statute of frauds has any application to this question. There is not much evidence as to any distinction between the property and estate of Mr. McLanahan and that of his wife. He testified that he deposited this money in this bank in his wife's name because he had money deposited in another bank in his own name, and he wanted to keep the accounts with the two banks separate. The evidence shows that he acted in all respects for his wife, so far as she was interested, and there is no other evidence on this point. It was this particular deposit that Mr. Chamberlain was

anxious to retain in the bank, and after his promise to secure it he did retain it. By leaving this deposit in the bank, Mr. and Mrs. McLanahan would have lost it substantially but for the security. We think that the trial court should have found from this evidence that this mortgage was a valid security for both of these claims.

The finding that this mortgage was fraudulent and void as against the creditors, so far as we can see, is equally unsupported by the evidence. The claims of Mr. and Mrs. McLanahan were in good faith. This is not questioned by any one. The mortgage which was received by them was security, and, as we have already seen, was substantially equal to the amount of their claims. The difference, if any, depended upon the rate of interest computed, and would in any event be insufficient to furnish a badge of fraud. This mortgage was made and recorded before the date of the Dew judgment, and we are unable to see upon what theory it should be paid out of the homestead exemption. The homestead law is to be liberally construed to furnish a home for Mrs. Chamberlain and her children, and it has been many times determined that the homestead exemption against a judgment is to be allowed over and above all liens that are prior to the judgment. A mortgage executed and delivered after the lien of a judgment had attached would of course be subject to that lien. The judgment lien is upon the excess value of the property over and above the $2,000 homestead right and prior liens. Such a judgment lien cannot be diminished or affected by subsequent liens, whether by judgment or conveyance.

The date of the judgment of the defendant Florence M. Dew was May 11, 1903, more than five and one-half years before the commencement of this action. The defendant Chamberlain has made reply to her answer herein, in which he seeks to have her judgment set aside for alleged irregularities in obtaining the same. These irregularities consist mostly in alleged errors of the court in the trial of the former action, and neglect of counsel employed by

Mr. Chamberlain therein. We recognize the necessity of limiting the discussion in this opinion, already too long, and without determining as to the availability of such a defense in an action of this kind, or reviewing the somewhat voluminous evidence offered, we find that the evidence supports the conclusions of the trial court in regard to the facts involved.

The defendant Florence M. Dew was the widow of Robert L. Butler, deceased, and as such was duly appointed administratrix. She was married again after the recovery of the judgment and before the commencement of this action. Section 5053, Ann. St. 1909, provides: "When an unmarried woman who is administratrix alone, or jointly with another person, shall marry, her marriage shall extinguish her authority as administratrix." It is now insisted that her authority as administratrix having been extinguished by her subsequent marriage, she could not in this action defend the lien of the judgment which she had recovered. The statute quoted was section 13, ch. VII of the "Act providing for the settlement of the estates of decedents," etc. Laws 1860-1861, p. 85. The act of 1871 (laws 1871, p. 68) was a general act removing the disabilities of married women, and of course repeals all former acts upon that subject inconsistent therewith. In *Omaha H. R. Co. v. Doolittle,* 7 Neb. 481, the court said: "In *Pope v. Hooper,* 6 Neb. 178, 187, it is held that the act of 1871 wholly removed the common law disability of married women." Section 17 of the code was also enacted prior to the law of 1871. That statute assumed that married women could not maintain an action in the courts, and provided that the statute of limitations should not apply to married women. In *Murphy v. Evans City Steam Laundry Co.,* 58 Neb. 593, it was held that this provision was repealed by implication by the act of 1871. By the same reasoning it would seem that by the present statutes a married woman can act as administratrix. At all events, Mrs. Dew was qualified to defend in this case the judgment which as such administratrix she had ob-

tained. *Schroeder v. Superior Court,* 70 Cal. 343; *McMillan v. Hayward,* 94 Cal. 357; *Buckley v. Buckley,* 16 Nev. 180. It is also insisted that her attorneys, under the contract for their services in procuring it, had an interest in the judgment. No lien was filed nor any assignment executed. Execution upon this judgment must of course have been taken in the name of the judgment creditor, and she was the proper party to assert the validity and lien of the judgment in behalf of all parties interested.

This was the first judgment lien as found by the court. It was entered May 11, 1903. It was subject to plaintiff's mortgage and could not affect the lien of that mortgage. Plaintiff's mortgage should therefore be collected out of the excess value of the property over the $2,000 homestead right, if such excess was sufficient for that purpose; if not sufficient, the homestead would be liable for the deficiency. The McPherrin mortgages were both subject to this judgment and could not affect the lien thereof.

The excess value of the property over the $2,000 homestead right should be applied, first, to payment of the costs herein; second, to the satisfaction of plaintiff's mortgage; third, to the satisfaction of the Dew judgment; and, fourth, upon the McPherrin mortgages. After so applying the proceeds not exempt, the remainder of the plaintiff's mortgage and the McPherrin mortgages should be satisfied out of the homestead exemption, the balance of the homestead exemption to be paid to Mr. and Mrs. Chamberlain.

As already suggested, the plaintiff's claims were not surrendered or extinguished by the giving of the mortgage as security therefor. He should therefore recover the amount of his original claims as fixed by the trial court, with interest thereon at 7 per cent. per annum.

It does not appear to be necessary to discuss the effect of the former litigation as barring the defendants' right to question the validity of plaintiff's mortgage.

We cannot extend this opinion for an exhaustive discussion of the numerous questions raised as to the admis-

sion and exclusion of evidence, and supposed irregularities upon the trial. We do not find any errors affecting the merits of the controversy, further than above stated, requiring any action on the part of this court. Some of the matters complained of may be briefly mentioned.

To prove the signatures to the note the plaintiff called Mr. Chamberlain, who of course was an interested witness, and, after he had asked him as to these signatures, the witness' counsel desired to cross-examine the witness as to the delivery of the note and mortgage and the circumstances surrounding the giving of the securities. The court did not exceed his discretion in refusing to allow this cross-examination. The court excluded the written contract as to attorney fees in obtaining the Dew judgment, and refused to order a copy of the contract so excluded to be furnished for use in making the bill of exceptions. Of course counsel should be allowed to make the contract so offered a part of his bill of exceptions. In no other way could he present the ruling thereon to this court for review. This deficiency could have been supplied upon the settlement of the bill, and counsel should have then insisted upon his rights in that regard. In the view of the case which we have already expressed, this contract could not affect the results of this controversy.

Some of the judgments against Mr. Chamberlain are attacked on the ground that no summons was served on defendant and no appearance made. Service was made by copy of summons, and the first objection is that the service was not at the usual place of residence of defendant. The defendant had left the state and his whereabouts were unknown. His wife and minor children continued to reside in the dwelling in Tecumseh where defendant had resided with them previous to his hasty departure. There is no evidence that he made any attempt to remove his family or to acquire any other residence for himself. The presumption that his residence is with his family is so strong as to overcome this objection, and the trial

court was right in holding that the home of his family was to be regarded in law as his residence.

The return on the summons in the case of John Ward, receiver for the Chamberlain Banking House, in which judgment was entered January 7, 1903, for $706.50, states that it was served by leaving "at his *last* known place of residence a true and certified copy," etc. In *Ruby v. Pierce,* 74 Neb. 754, the syllabus is as follows: "An officer's return to a summons, showing service by leaving at the 'last' usual place of residence of the defendant, does not show a compliance with the statute authorizing service by leaving a copy at the usual residence of the defendant, and a judgment based thereon is void for want of jurisdiction," and the opinion is to the same effect. Although this holding would to the writer appear to be somewhat technical, yet it must be considered as settling the law of this state upon that question. The original process in an action at law is the foundation of all future proceedings in the case. If the service is made in compliance with the statutes, the defendant is bound to take notice of everything that is done in the case thereafter. The statute is simple, and there is no reason for excusing the officer from complying with it. The service in this case is a much further departure from the method prescribed by the statute than was the service in the case just cited. The officer must *know* the usual place of residence of the defendant or he cannot serve the summons by a copy left thereat. In this case he certified that he left the copy at the last place which he knew to be the residence of the defendant. He does not say, nor are there any words in the return that indicate, that he left the copy of the summons at the place of residence of the defendant at the time of the service. In fact, the implication from the return is that the place where he left the copy was not the residence of the defendant at that time. Under the holding in *Ruby v. Pierce, supra,* the judgment rendered on such a service is absolutely void.

The judgment rendered in an action between the same

parties on the 10th day of December, 1903, is not subject to the same criticism. The return of the summons shows a legal service. The finding of the trial court as to validity of this lien is amply supported.

It was also objected that the plaintiff did not prove that there had been "no action at law to recover his claim." The petition contained the allegation; and we think the evidence in the record is sufficient to put the defendant upon proof of the affirmative of the proposition which he maintains.

The decree of the district court is reversed as to the issues tendered by the plaintiff, and as to priority of the liens of McPherrin's mortgages and of the Dew judgment and the judgments of John Ward, receiver, and the cause is remanded, with instructions to allow amendments and take further evidence, if necessary, in accordance with this opinion, and in all other matters the decree of the district court is affirmed. The costs of this appeal will be taxed, one-half against the plaintiff and one-half against the defendants Charles M. and Edith R. Chamberlain.

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2. It is the duty of the board of regents of the university to maintain experimental stations as required by chs. 143, 144, laws 1909. *State v. Whitmore* ..... 566

**Constitutional Law.** See ELECTIONS, 1. MUNICIPAL CORPORATIONS, 4, 11. STATUTES. TAXATION, 3, 4.

1. Secs. 1, 10, ch. 53, laws 1909, providing that candidates for judicial or educational offices shall not be nominated, indorsed, recommended, or criticised by any political party, convention or primary, *held* to violate sec. 5 of the bill of rights, declaring that "every person may freely speak, write, and publish on all subjects," and sec. 19, guaranteeing the right of assembly and petition. *State v. Junkin*... 1

2. A political convention *held* an assemblage within sec. 19 of the bill of rights, guaranteeing that the right to assemble to consult for the common good shall never be abridged. *State v. Junkin* ..... 1

3. Statutes fixing maximum rates which common carriers may charge as compensation for their services are presumed to be constitutional. *State v. Adams Express Co.*. 25

4. The burden is on one who challenges the validity of a statute to show that it clearly contravenes some provision of the constitution. *State v. Adams Express Co*..... 25

5. An act of the legislature fixing maximum rates for express companies will not be held unconstitutional as being unreasonable and confiscatory, where the companies have not fully disclosed their receipts and disbursements. *State v. Adams Express Co.* ..... 25

6. A court of equity should not hold unconstitutional an act of the legislature fixing maximum rates for express companies before a fair trial has been made of continuing business under the act. *State v. Adams Express Co*..... 25

7. Where it appears from the evidence that express rates are not confiscatory, but afford express companies at least some profit, the courts will not interfere, but will require a party complaining to apply for relief to the tribunal provided by statute with power to increase rates. *State v. Adams Express Co.* ..... 25

**Constitutional Law**—*Concluded.*

8. A statute will not be declared unconstitutional on the ground that it provides drastic penalties for its violation, unless the penalty clause was the inducement for its passage, and, with that clause eliminated, the remainder of the act is incomplete. *State v. Adams Express Co*..... 25
9. In passing on the validity of ch. 121, laws 1907, permitting pupils residing in districts having no high school privileges to attend schools in other districts on payment by the home district of 75 cents a week for each pupil, it will not be assumed without pleading or proof that the tuition will fall below or exceed the cost of educating a nonresident pupil. *Wilkinson v. Lord* ..... 136
10. The title of an act declaring a legislative purpose to provide a four-year course of free high school instruction for pupils residing in districts where that privilege is denied is broad enough to cover taxation for the purpose stated, and legislation to prevent school districts from defeating the act by refusing to vote taxes. *Wilkinson v. Lord*..... 136
11. A litigant who is not prejudiced by the enforcement of a statute cannot question its constitutionality. *Cram v. Chicago, B. & Q. R. Co*..... 586

**Contempt.**

1. Where a contempt is committed in the presence of the court, notice to the offender is not usually essential before punishment. *In re Dunn* ..... 606
2. Where a contempt consists of offensive language, it is immaterial whether it be spoken openly or presented to the court in a written or printed argument. *In re Dunn*.. 606
3. Incorporating scandalous or insulting matter in a brief on rehearing is contempt in open court. *In re Dunn*..... 606
4. Where matter incorporated in a brief on rehearing is contemptuous, disavowal of an intent to commit a contempt is not a justification. *In re Dunn*..... 606
5. The power to punish for contempt is inherent in courts having common law jurisdiction, without expressed statutory authority. *In re Dunn* ..... 606
6. Contemptuous language in a brief on rehearing, for which an attorney contumaciously refuses to atone, *held* to justify revoking his authority to practice until he complies with the reasonable requirements of the court. *In re Dunn*.... 606
7. Under a citation to an attorney to show cause why he "should not be dealt with for contempt on account of language contained in" a brief on rehearing, the supreme court has jurisdiction to indefinitely suspend him from practice. *In re Dunn* ..... 606

**Contempt**—*Concluded.*

8. Language used in a brief *held* to require the court to take notice of it and apply a disciplinary penalty. *In re Dunn*.. 606

9. Suspension of attorney from practice *held* not a permanent disbarment or a suspension for a definite time, but until he made proper amends for contemptuous language used in a brief. *In re Dunn* ..... 606

**Contracts.** See ACTION, 2, 3.

1. Contract providing that the seller of a lumber yard will not engage in the business in the locality for a definite period, *held* not void on its face as against public policy or in violation of sec. 1, ch. 91*a*, Comp. St. 1901. *Engles v. Morgenstern* ..... ..... ..... 51

2. The right to rescind a contract for fraud must be promptly exercised upon discovery of the ground therefor. *Arnold v. Dowd* ..... ..... 108

3. The commissioner of public lands and buildings has no power to bind the state by a contract in conflict with the statutes. *Stanser v. Cather* ..... 305

**Corporations.** See TAXATION, 5, 6.

**Costs.**

An offer to confess judgment after action brought relieves defendant from costs and interest accruing thereafter without paying the money to the clerk of the court. *Security State Bank v. Waterloo Lodge*..... 255

**Counties and County Officers.**

1. County commissioners possess not only the powers expressly conferred by statute, but such as are requisite to enable them to discharge their official duties. *Berryman v. Schalander* ..... ..... ..... 281

2. The county board may allow the county attorney necessary expenses incurred in investigating and prosecuting criminal cases, and in defending cases against the county. *Berryman v. Schalander* ..... 281

**Courts.**

1. A county court has no authority to adjudicate between the surviving husband of a testatrix and her devisees concerning his right to an estate by the curtesy. *Higgins v. Vandeveer* ..... ..... ..... 89

2. A county court has jurisdiction to require an executor to deliver to a surviving husband lands in Nebraska. *Higgins v. Vandeveer* ..... ..... ..... 89

3. A county court, or the district court on appeal, is without power to decide whether the husband has an estate by the

**Courts**—*Concluded.*
curtesy in land situated in a sister state, or to direct that he recover possession thereof. *Higgins v. Vandeveer*..... 89
4. Where jurisdiction depends upon a question of law, no finding of the court in disregard of statutory provisions will give it jurisdiction. *Radil v. Sawyer*..... 235
5. The test of jurisdiction is whether the tribunal had the power to enter upon the inquiry, not whether its methods were regular, its findings right, or its conclusions in accord with law. *Radil v. Sawyer*..... 235
6. Only questions involved in matters of actual litigation before the court will be entertained or judicially determined. *State v. Gipson* ..... 285

**Criminal Law.** See INTOXICATING LIQUORS, 1. PERJURY. RAPE.
1. A joint assignment in a motion for a new trial criticising a group of instructions will be overruled unless all the instructions are erroneous. *Liniger v. State*..... 98
2. The trial court in its discretion may overrule a request for a new trial based on newly discovered evidence which was obtainable before verdict. *Liniger v. State*..... 98
3. In a prosecution for selling intoxicating liquors to a minor, *held* not reversible error to instruct that defendant was responsible for the acts of his servants, where the record clearly shows he was not prejudiced by it. *Seele v. State*.. 109
4. In a prosecution for selling intoxicating liquors to a minor, it is no defense that accused acted in ignorance of the minor's age and without intent to violate the law. *Seele v. State* ..... 109
5. Where the trial court by proper instructions submitted to the jury the credibility of all the witnesses who testified, there was no error in refusing an instruction referring alone to the credibility of one of them. *Seele v. State*.... 109
6. On cross-examination, a ruling refusing to strike an answer to a question not objected to will not be reversed except for an abuse of discretion. *Seele v. State*..... 109
7. On examination, error in overruling an objection to a question is not a ground of reversal, where the answer is favorable to the complainant and in no way prejudices his rights. *Seele v. State* ..... 109
8. A finding on a question of fact, where the evidence is conflicting, will not be reviewed. *Jones v. State*..... 185
9. Where evidence, though conflicting, is sufficient to sustain the verdict, it will not be set aside. *Thompson v. State*.... 244
10. Conflicting statements by a witness at different times are

Criminal Law—*Concluded.*
matters for the jury in determining his credibility, and not for the court. *Thompson v. State*..... 244
11. It is not error to refuse an instruction substantially covered by one given. *Thompson v. State* ..... 244
12. Where the evidence shows that the accused is guilty of the offense charged or not guilty of any offense, an instruction on a lower degree of crime included in the offense is not required. *Thompson v. State* ..... 244
13. Sec. 14, ch. 50, Comp. St. 1909, making a saloon-keeper who sells liquor after 8 o'clock P. M. and before 7 o'clock A. M. liable to a fine and forfeiture of license, *held* not to provide unusual punishment, and valid. *Dinuzzo v. State*.... 351
14. Evidence *held* to show an unlawful sale of whiskey. *Skiles v. State* ..... 401
15. An instruction that certain facts, if proved beyond a reasonable doubt, would constitute the offense charged, *held* not erroneous. *Skiles v. State* ..... 401
16. Failure to number consecutively the instructions *held* not reversible error if no exception was taken. *Skiles v. State*, 401
17. In misdemeanors there are no accessories. *Skiles v. State*.. 401
18. Where accused testified in his own behalf, *held* proper to instruct the jury that in determining his credibility they may consider his interest in the result. *Holmes v. State*.. 506
19. Where accused was a witness, *held* error to charge that in general a witness who is interested will not be as honest, candid and fair as one who is not. *Holmes v. State*..... 506
20. Where the court assesses a fine in a misdemeanor case, it may order defendant committed to jail until the fine and costs are satisfied; but, where no such order is made, the clerk can issue execution to the sheriff to collect by levy, and, for want of chattels, to commit defendant to jail until the fine and costs are paid or discharged. *Luther v. State*.. 674
21. Where the court in a prosecution for murder admits proof of a confession challenged by defendant as involuntary, and submits the question to the jury on conflicting evidence, they should be directed to disregard it, if they find it was not voluntarily made. *Heddendorf v. State*..... 747

Damages. See EMINENT DOMAIN, 8. LANDLORD AND TENANT, 6, 8.
1. Verdict of $12,750, which included medical attendance, *held* not excessive. *Hoskovec v. Omaha Street R. Co*..... 295
2. Measure of damages for failure to deliver grain *held* to be the difference between the contract price and the value at place of shipment at time for delivery. *Carter v. Roberts*.. 480

**Deeds.**

1. Finding that there was no delivery of a deed *held* proper. *McGuire v. Clark* ..... 102
2. A deed, except of the homestead, *held* valid between the parties, though not acknowledged nor witnessed. *Wilson v. Wilson* ..... 167
3. Evidence *held* to sustain finding of delivery of deed to grantee. *Wilson v. Wilson* ..... 167

**Depositions.**

An exception to a deposition for defect in notice cannot be considered unless made in writing and filed before trial. *Yearsley v. Blake* ..... 736

**Dismissal.**

A plaintiff may, as a matter of right, under sec. 430 of the code, dismiss his action without prejudice at any time before final submission. *Snyder v. Collier*..... 552

**Ejectment.**

In ejectment, where the evidence showed that possession of defendant, though for more than ten years, was under license from plaintiff's grantors, sufficiency of proof of plaintiff's ownership *held* immaterial. *Gilman v. Irwin*.. 486

**Election of Remedies.** See EMINENT DOMAIN, 7.

**Elections.** See QUO WARRANTO.

1. Sec. 3, ch. 53, laws 1909, limiting names of candidates for judicial and educational offices to nominees by petitions containing 5,000 names each, not more than 500 of which shall be from one county, *held* to violate sec. 22 of the bill of rights, declaring that elections shall be free. *State v. Junkin* ..... 1
2. Where a new remedy is provided by statute for an existing right, and it neither denies nor is incompatible with an existing remedy, the new remedy is cumulative. *State v. Cosgrave* ..... 187
3. The right to contest the election of a city officer of Lincoln before the council under an ordinance and the right given by the general election law to contest such election in the county court are cumulative. *State v. Cosgrave*.... 187
4. In a proceeding by an elector under sec. 5715, Ann. St. 1907, to contest the validity of an election, the special statute invoked must authorize such elector to maintain the proceeding in his own name, or it will be dismissed. *Barnes v. City of Lincoln* ..... 494

**Eminent Domain.**

1. A petitioner in *ad quod damnum* proceedings in the construction of a dam does not by a judgment in his favor and

Eminent Domain—*Concluded.*
payment of damages acquire a perpetual right to flow lands of upper riparian owners, but a privilege which may be lost by abandonment or nonuser. *Gross v. Jones*..... 77

2. Where right of flowage of lands is acquired by *ad quod damnum* proceedings, possession and use alone will not vest any title or right other than acquired in such proceedings. *Gross v. Jones* ..... 77

3. Whether there has been a nonuser of a privilege acquired by condemnation proceedings for such time as will amount to an abandonment of the right of flowage is one of fact, to be determined upon the evidence in each case. *Gross v. Jones* ..... ..... ..... 77

4. A finding that the owner of a mill site had abandoned his right to flow lands of upper riparian owners *held* justified. *Gross v. Jones* ..... 77

5. Public authorities cannot take land for a highway without assessing and paying damages to the owner or providing therefor. *Johnson v. Peterson* ..... 83

6. A landowner may enjoin a road overseer from entering his land to prepare a highway thereon until his damages for its appropriation have been ascertained, and payment made or provided therefor. *Johnson v. Peterson*..... 83

7. Defense of want of jurisdiction in condemnation proceedings *held* not such an election of remedies as would prevent a landowner from litigating on appeal the amount of damages. *Beckman v. Lincoln & N. W. R. Co*..... 228

8. In proceedings to condemn land for railroad right of way, the landowner is entitled to compensation for the land taken, and damages for diminution in value of the residue. *Beckman v. Lincoln & N. W. R. Co*..... 228

9. In determining whether and how much the part of a farm not taken for railroad right of way is depreciated, *held* proper to consider liability of stock being killed, and danger from fire. *Beckman v. Lincoln & N. W. R. Co*..... 228

10. Giving of an instruction as to interest on damages in condemnation proceedings *held* not to require a reversal. *Beckman v. Lincoln & N. W. R. Co*..... 228

Equity.
1. An undelivered deed signed by the donee of a power who was ignorant of her rights and privileges will be canceled in an equitable suit involving a construction of the will creating the power, and of the rights of all devisees and legatees named therein. *Loosing v. Loosing*..... 66

Equity—*Concluded.*

2. A cross-suit must be germane to the original bill. *Higgins v. Vandeveer* ..... 89

3. The statute of limitations is no defense as against an equity in favor of defendant in a suit to quiet title. *Bank of Alma v. Hamilton* ..... 441

4. Consideration of $200 for a quitclaim deed to certain land *held* not so small as to render a contract therefor unconscionable, and that a court of equity would enforce it. *Barney v. Chamberlain* ..... 785

Estoppel. See BROKERS, 3.

Evidence. See APPEAL AND ERROR. BASTARDY. BILLS AND NOTES, 2. CRIMINAL LAW. DEPOSITIONS. HABEAS CORPUS, 4. RAILROADS. TRIAL.

1. In an action on a note by the payee, parol evidence *held* admissible to show the purpose for which it was executed. *Davis v. Sterns* ..... 121

2. Parol evidence *held* admissible to show want of consideration in a note. *Davis v. Sterns*..... 121

3. While a preponderance of evidence is all that is required in a civil case, what constitutes a preponderance may vary according to circumstances. *Bingaman v. Bingaman*..... 248

4. Where the evidence is conflicting, the jury may consider all proved physical facts and conditions attending the main fact. *Hoskovec v. Omaha Street R. Co*..... 295

5. The jury are not bound by the number of witnesses if convinced the truth is shown by the party producing the smaller number. *Hoskovec v. Omaha Street R. Co*..... 295

6. A certificate of public officer that his books show certain facts is not competent evidence of entries therein. *Sampson v. Northwestern Nat. Life. Ins. Co*..... 319

7. Evidence of a quarrelsome and contentious disposition must be as to general reputation, and not specific acts. *Trousil v. Bayer* ..... 431

Executors and Administrators.

1. Where the testator does not repose special confidence in the executor, a power to sell real estate passes to the administrator with the will annexed. *In re Estate of Manning* ..... 60

2. Where the widow during administration is in the state hospital for insane, and maintained by the state, it is within the discretion of the county court not to allow her anything for support. *In re Estate of Manning* ..... 60

3. The widow is entitled, under subd. 1, sec. 176, ch. 23, Comp.

**Executors and Administrators**—*Concluded.*

St. 1905, to the chattels therein specified, and also to $200 in cash from her husband's estate, and such property is not assets of the estate. *In re Estate of Manning*..... 60

4. Under sec. 176, ch. 23, Comp. St. 1907, the allowance to the surviving wife or husband vests in the survivor, as well when such survivor takes under the will of decedent as when the decedent died intestate. *In re Estate of O'Shea*.. 156

5. Under sec. 176, ch. 23, Comp. St. 1905, before the amendment of 1907, the surviving spouse, or, if there were no surviving spouse, the heir, was entitled to the specific articles described therein, whether the deceased died testate or intestate. *In re Estate of Leavitt*..... 521
*In re Estate of O'Shea*..... 521

6. In an action to recover from an estate for decedent's board, lodging, care, and medical attendance, and for board of deceased's wife and child, evidence *held* to sustain verdict for plaintiff. *Yearsley v. Blake*..... 736

7. Where an administratrix recovered a judgment in favor of the estate, and is made defendant in an action involving its validity and the priority of the lien, she may defend for all persons interested, notwithstanding she married after recovering the judgment. *McLanahan v. Chamberlain*..... 850

**Fines.** See CRIMINAL LAW, 20.

**Fraud.**

False representations in sale of newspaper *held* material to the purchase, and such as the buyer had a right to rely on. *Berge v. Eager* ..... 425

**Gaming.**

1. A contract to operate in stocks to be adjusted according to the difference in the market value thereof *held* a gambling transaction. *Ives v. Boyce* ..... 324

2. Transactions in a "bucket-shop" *held* not "a game of hazard," and a telegraph wire, blackboard and ticker not a "gaming device" under sec. 214 of the criminal code. *Ives v. Boyce* ..... ..... 324

**Guardian and Ward.**

1. Final settlement of a guardian with his ward after attaining his majority, where the guardian has made full disclosures of his acts and the ward has accepted his distributive share of the estate, *held* a ratification of the guardian's acts. *Borcher v. McGuire* ..... 646

2. Receipt by a ward of proceeds of sale of his land in partition on final settlement with his guardian *held* a ratification of such sale. *Borcher v. McGuire*... ..... 646

**Habeas Corpus.**

1. Neither a county court nor the judge thereof has authority to issue a writ of habeas corpus to an adjoining county for an infant, not a resident of the county, to determine whether its custodian shall be deprived of its custody. *Johnson v. Terry* ..... 267
2. Where a county court has acted in excess of its jurisdiction in depriving a father of his child's custody, and the father sues out a writ of habeas corpus in the district court to recover the child, and respondents plead sufficient facts to authorize the court, under art. II, ch. 20, Comp. St. 1909, to divest the parent of such custody, it is the duty of the district court to speedily try the issues and make an order which is for the best interests of the child. *Johnson v. Terry* ..... 267
3. Where a final order in habeas corpus has been entered awarding a father the custody of his child, the court, in a subsequent proceeding between the same parties should only consider facts occurring since the former judgment. *Johnson v. Terry* ..... 267
4. In habeas corpus by a dipsomaniac to secure a release from an asylum, his unsupported oral testimony that he had not been given a hearing is insufficient to overthrow recitals of warrant of commitment. *McCartney v. Hay*..... 655
5. Where a petition for habeas corpus states facts by which it can be inferred that defendant had no warrant, it will excuse failure to set out a copy. *Urban v. Brailey*..... 796
6. Where defendant in habeas corpus makes return that he holds plaintiff under process held by another, a copy of such process should be set out, or reason assigned for not doing so. *Urban v. Brailey* ..... 796

**Highways.**

Township officers have authority to remove culverts in a grade and close the opening, thus preventing the flow of water through and destroying the grade. *Boyd v. Galloway Flour Mill & Elevator Co.* ..... 292

**Homestead.** See MORTGAGES, 4, 8.

1. Neither husband nor wife can abandon the homestead and thereafter convey it to the exclusion of the homestead right of an insane spouse. *In re Estate of Manning*..... 60
2. A mortgage on a homestead executed and delivered before a judgment is superior to the judgment lien. *McLanahan v. Chamberlain* ..... 850
3. The lien of a judgment is not affected by a subsequent mortgage. *McLanahan v. Chamberlain*..... 850

Homestead—*Concluded.*

4. A judgment creditor is entitled to excess value of the property over the homestead right, subject only to prior liens. *McLanahan v. Chamberlain* ..... 850

Homicide. See CRIMINAL LAW, 21.

Injunction. See MUNICIPAL CORPORATIONS, 12.

1. Perpetually enjoining the reconstruction of a dam *held* error, and that the injunction should continue only until the right is established by *ad quod damnum* proceedings and the payment of damages. *Gross v. Jones*..... 77
2. Injunction will not lie to prevent performance of political duties by a village board, in the absence of fraud or irreparable injury for which neither a law action nor appeal will afford an adequate remedy. *Vogel v. Rawley*..... 600
3. Injunction cannot be employed as a punishment for acts already committed. *Vogel v. Rawley*..... 600
4. Injunction will not lie to control the discretion of a village board in granting a liquor license. *Vogel v. Rawley*..... 600

Insane Persons.

1. It is the duty of a guardian *ad litem* of an insane defendant to guard the rights of his ward; but the court will protect the incompetent irrespective of the conduct of the guardian. *In re Estate of Manning* ..... 60
2. Where a decree has been entered against an insane defendant through perjury or fraud, such defendant may proceed at any time in equity to impeach such decree and defend, and need not wait until his incompetency is removed. *Wirth v. Weigand* ..... 115
3. Allegations of a petition to vacate a decree *held* sufficient to show capacity of a guardian to sue. *Wirth v. Weigand*.... 115
4. Petition to vacate a decree for fraud *held* to state a cause of action. *Wirth v. Weigand* ..... 115

Insurance.

1. Beneficial association *held* not to have a representative form of government under sec. 6635 *et seq.*, Ann. St. 1909. *Briggs v. Royal Highlanders* ..... 830
2. Ch. 47, laws 1897, *held* not by its own force to amend the edicts of a beneficial association so as to make its government representative in form. *Briggs v. Royal Highlanders*, 830
3. Only those interested in an insurance contract can enforce it. *Bassett v. Farmers & Merchants Ins. Co*..... 85
4. In 1906 a husband by virtue of the marital relation alone had no insurable interest in his wife's real estate. *Bassett v. Farmers & Merchants Ins. Co*..... 85

**Insurance**—*Concluded.*

5. In an action on an accident policy, an instruction that plaintiff could recover if death resulted proximately from the accident, though other causes accelerated, "or, even being added, resulted in death," *held* erroneous. *Ward v. Ætna Life Ins. Co.* ..... 471
6. In an action on an accident insurance policy, an instruction that plaintiff could recover if death resulted from the accident and other causes, *held* erroneous. *Ward v. Ætna Life Ins. Co.* ..... 471
7. To support an action on a benefit certificate, the petition must allege that plaintiffs are persons who could be named as beneficiaries. *Leumann v. Grand Lodge, A. O. U. W.*.... 803
8. Where recovery is sought by persons other than the beneficiary named in the certificate of a benefit association, they must plead a change of beneficiaries assented to by the association. *Leumann v. Grand Lodge, A. O. U. W.*..... 803
9. Allegation of notice to officer of subordinate lodge of change of beneficiary, to which no reply was made, *held* insufficient to authorize such beneficiary to maintain action without alleging that such officer had power to bind the association. *Leumann v. Grand Lodge, A. O. U. W.*..... 803
10. Petition *held* insufficient to show that insured named plaintiffs as his beneficiaries. *Leumann v. Grand Lodge, A. O. U. W.* ..... 803
11. Where recovery is sought on a certificate other than the one on which the action is predicated, plaintiffs must plead facts authorizing their designation as beneficiaries under the former certificate. *Leumann v. Grand Lodge, A. O. U. W.*, 803

**Interest.** See COSTS.

1. Equity will not seek reasons to permit a creditor to recover interest where by his own conduct he has lost the right thereto. *Security State Bank v. Waterloo Lodge*..... 255
2. A judgment on a verdict bears interest from the date of its rendition. *Tobler v. Union Stock Yards Co*..... 413
3. Mistake of clerk in computation of interest in a judgment should be corrected by motion, and is not ground for reversal. *Tobler v. Union Stock Yards Co*..... 413

**Intoxicating Liquors.** See CRIMINAL LAW, 3-7, 13-17. INJUNCTION, 4. STATUTES, 6, 7.

1. In a prosecution for selling and keeping for sale intoxicating liquors, a search-warrant under which defendant's premises were searched and liquors seized is not admissible as independent evidence, where it recites that complainant, who was not a witness at the trial, stated under oath that defendant was guilty. *McCabe v. State*..... 278

**Intoxicating Liquors**—*Concluded.*

2. Application for license *held* not signed by a majority of the resident freeholders of a village. *White v. McCullough*, 490

3. The supreme court may on its own motion dismiss an appeal from an order granting a liquor license, where the record shows that the term of the license has expired, and no motion was made to advance the case. *Heesch v. Snyder*, 778

4. Provision of a rule of the excise board of Lincoln, pursuant to sec. 7963, Ann. St. 1909, as to delivery of liquors by carriers, *held* a reasonable exercise of the police power. *Barrett v. Rickard* ..... 769

5. Rule of excise board of Lincoln as to delivery of liquors by carriers *held* not invalid because of restrictions that would not be permissible as to ordinary articles of commerce. *Barrett v. Rickard* ..... 769

6. Validity of certain rules of the excise board of city of Lincoln *held* not presented by the record. *Brown v. England* ..... 779

7. One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law. *Marica v. Yost* ..... 842

**Judgment.** See COSTS. INTEREST, 2. REPLEVIN. TAXATION, 1.

1. Limitations *held* not to present a bar to the power of a court to clear its records of unauthorized entries. *Higgins v. Vandeveer* ..... 89

2. A party against whom a judgment void in part is directed can have the void part expunged from the records. *Higgins v. Vandeveer* ..... 89

3. A void judgment may be impeached in any action, direct or collateral. *Radil v. Sawyer*..... 235

4. A district court in which the transcript of a judgment of another district court has been filed is without authority to revive the judgment under sec. 473 of the code. *Case Threshing Machine Co. v. Edmisten*..... 272

5. Judgment on service of summons by leaving at defendant's "last known place of residence," is void. *McLanahan v. Chamberlain* ..... 850

**Jury.**

1. Appellant cannot complain of a statement of a juror in the jury room, where he made substantially the same statement on his *voir dire* examination, and there is no showing that appellant could not have excluded him. *Beckman v. Lincoln & N. W. R. Co*..... 228

**Jury**—*Concluded.*

2. A juror drawn for three weeks' service in the district court who serves during that period can recover for all the days of such term, Sundays excepted, unless excused by the court. *Spalding v. Douglas County* ..... 265

**Justice of the Peace.**

1. The right to review final orders of justices of the peace and other inferior tribunals still exists, notwithstanding the repeal of sec. 584 of the code. *Engles v. Morgenstern*..... 51
2. The district court cannot obtain jurisdiction to reverse a justice's judgment after six months from its rendition by issuing a *nunc pro tunc* summons in error. *Radil v. Sawyer*, 235
3. To give the district court jurisdiction of a proceeding in error to reverse a judgment of a justice, plaintiff must file a transcript and petition in error, and cause summons in error to issue within six months from rendition of judgment. *Radil v. Sawyer* ..... 235

**Landlord and Tenant.** See PLEADING, 8.

1. To maintain an action for rent, the relation of landlord and tenant must have existed. *Cavett v. Graham*..... 152
2. A subsequent purchaser with knowledge that an occupant claims a contract for the purchase of the land is bound by its terms. *Harper v. Runner* ..... 343
3. Provision in lease granting lessee an option to purchase during the term is supported by the consideration paid for the lease, and cannot be revoked during the term. *Harper v. Runner* ..... 343
4. Provision in lease giving lessee an option to purchase *held* not destroyed by demand for abstract, and that deed be delivered and price paid at lessee's residence. *Harper v. Runner* ..... 343
5. Leniency of a landlord in not insisting on prompt payment of rent *held* not a waiver of his right to forfeiture of lease for its nonpayment. *O'Connor v. Timmermann*..... 422
6. In an action for injury to personalty for failure of landlord to repair, the difference in its value before and after the injury is not the proper measure of damages. *Caves v. Bartek* ..... 511
7. Where a landlord volunteers to make repairs, he will be liable to a tenant injured in consequence of their being negligently made. *Carlon v. City Savings Bank*..... 659
8. Where the evidence showed permanent injuries, *held* not error to instruct that plaintiff could recover for physical pain and mental suffering endured, or which it is reasonably certain she will endure in the future. *Carlon v. City Savings Bank* ..... 659

**Licenses.** See TAXATION, 5, 6.

**Limitation of Actions.** See EQUITY, 3. JUDGMENT, 1.

Limitations do not run against an action for money had and received, brought to recover a payment under a land contract, until the contract has been terminated. *Thiele v. Carey* ..... 454

**Mandamus.** See APPEAL AND ERROR, 32.

**Marriage.**

1. In an action to annul a marriage for fraud, the burden is on plaintiff to establish the fraud. *Kutch v. Kutch*..... 702
2. Evidence *held* insufficient to sustain judgment of annulment of marriage. *Kutch v. Kutch* ..... 702

**Master and Servant.** See APPEAL AND ERROR, 22.

1. Workmen unloading a railroad car under the direction of a common overseer, *held* fellow servants, and the master held not liable for an injury to one of them caused by another's negligence. *Westlake v. Murphy* ..... 45
2. A servant assumes ordinary risks of his employment, and is bound to take notice of the operation of the familiar laws of gravitation. *Westlake v. Murphy*..... 45
3. An air pump while being unloaded from a railroad car *held* not an appliance within the rule requiring the master to exercise reasonable care to furnish his servants reasonably safe appliances. *Westlake v. Murphy* ..... 45
4. A servant does not assume the risk from an unsafe place to work unless he knows or by reasonable care ought to know of its unsafe condition. *Tarnoski v. Cudahy Packing Co.*. 147
5. Assumption of risk not ordinarily incident to the service is an affirmative defense, the burden of establishing which rests on defendant. *Tarnoski v. Cudahy Packing Co*..... 147
6. Employee of telephone company directed by his master to fasten a cable to an overhead messenger wire, *held* justified in relying on an ordinance forbidding maintenance of electric light or power wires within five feet of telephone wires. *Olson v. Nebraska Telephone Co*..... 331
7. Notice to telephone employee that it is his duty to inspect poles, cross-arms and wires *held* not to relieve the company from its duty to furnish a reasonably safe place in which to work. *Olson v. Nebraska Telephone Co*..... 331
8. Knowledge of the increased hazard in the location of a structure in dangerous proximity to a railroad track *held* not to be imputed to an employee because he was aware of its existence, and whether he actually had or was chargeable with such knowledge and thereby assumed the risk *held* questions for the jury. *Tobler v. Union Stock Yards Co*.... 413

**Master and Servant**—*Concluded.*

9. An employee may assume that his employer has used due care to provide reasonably safe appliances. *Tobler v. Union Stock Yards Co* ..... 413

10. Evidence in an action for injury to a railroad employee *held* insufficient to support material allegations of petition. *Langenfeld v. Union P. R. Co* ..... 527

11. Where liability of a master rests primarily on the question as to a command by a foreman to a servant, and the evidence is conflicting, the verdict will not be set aside. *Rathjen v. Chicago, B. & Q. R. Co* ..... 808

12. The proximate cause of an injury to a railroad employee *held* to have been the negligent command by defendant's foreman to plaintiff to place himself in a position of danger. *Rathjen v. Chicago, B. & Q. R. Co* ..... 808

13. Risk resulting in injury to employee *held* not one of the ordinary incidents of employment assumed. *Rathjen v. Chicago, B. & Q. R. Co* ..... 808

14. In an action against a railroad company and its foreman for personal injuries, where liability of the company was based solely on a command by the foreman, an instruction that, if the jury found for plaintiff, they must find against both defendants, *held* proper. *Rathjen v. Chicago, B. & Q. R. Co.* ..... 808

15. Whether one of several employees is a vice-principal is a mixed question of law and fact. *Benak v. Paxton & Vierling Iron Works* ..... 836

16. An employee with authority to control and direct other employees is a vice-principal. *Benak v. Paxton & Vierling Iron Works* ..... 836

17. That an act which occasioned an injury to a subordinate was performed by a superior in the discharge of his regular duties does not, as a matter of law, create the relation of fellow servants between them at the moment of injury. *Benak v. Paxton & Vierling Iron Works* ..... 836

18. A servant induced to continue work by his master's promise to remedy dangerous conditions surrounding the employment may continue without being guilty of contributory negligence or assuming the risk of such conditions, unless the danger is so obvious that a reasonably prudent person would not continue. *Benak v. Paxton & Vierling Iron Works,* 836

**Mortgages.**

1. Tender of the exact sum due on a mortgage on the "law day" discharges the lien, and thereafter the only liability is on the note. *Security State Bank v. Waterloo Lodge* ..... 255

Mortgages—*Concluded.*

2. Where a mortgagee assigns the mortgage as collateral and receives payment, but fails to turn it over to the assignee, the landowner who made the payment with constructive notice of the assignment cannot defeat foreclosure on the ground that the assignee is estopped to deny mortgagee's agency, without proving the agency. *Bettle v. Tiedgen*.... 276
3. Mortgagees are bound to exercise reasonable diligence to ascertain whether a trustee has power to mortgage. *Snyder v. Collier* ..... 552
4. A mortgage to secure money to purchase real estate at sheriff's sale is a purchase money mortgage, valid against a claim of homestead. *Peterson v. Fisher*..... 745
5. Mortgage by cashier of bank and wife *held* a valid security for a deposit and that the deposit constitutes a good consideration therefor. *McLanahan v. Chamberlain*..... 850
6. Mortgage *held* not given in settlement of certain claims, but as collateral. *McLanahan v. Chamberlain*..... 850
7. On foreclosure of mortgage there must be some proof of no action at law upon the indebtedness, or that such action, if any, has terminated without collection; but the rule as to proving a negative applies. *McLanahan v. Chamberlain*.. 850
8. Delivery of mortgage on homestead by the wife contrary to certain instructions of the husband, who had absconded, *held* a good delivery. *McLanahan v. Chamberlain*..... 850

**Municipal Corporations.** See ELECTIONS, 3.

1. An ordinance in pursuance of a power granted to a municipality has the force of an act of the legislature, and is construed as if it were a special statute on the same subject. *State v. Cosgrave* ..... 187
2. An act of the legislature giving a city power to decide contested elections *held* not to make the city council the sole judge of the election of its own members. *State v. Cosgrave*, 187
3. The power to prescribe the conditions on which territory may be detached from a city is legislative. *Winkler v. City of Hastings* ..... 212
4. Where legislative power to detach territory from a city has been delegated to the mayor and council, an appeal from the refusal to disconnect tracts cannot be made the means of transferring such power to the district court. *Winkler v. City of Hastings* ..... 212
5. The name of a corporate owner of real estate subject to an assessment may be affixed by its president to a remonstrance against repavement. *Chan v. City of South Omaha*, 434

**Municipal Corporations**—*Concluded.*

6. That a remonstrant to repavement signed by his initial only *held* not to defeat his remonstrance. *Chan v. City of South Omaha* ..... 434

7. The word "owner" in subd. XVI, sec. 110, ch. 20, laws 1905, providing that repavement cannot be made over protest of the owners of 50 per cent. of the foot frontage, *held* to include a personal representative and a guardian in possession, also a surviving spouse and a tenant in common. *Chan v. City of South Omaha* ..... 434

8. Equity will not interfere with the enforcement of an ordinance fixing water rates before a fair trial, unless they are clearly confiscatory. *McCook Waterworks Co. v. City of McCook* ..... 677

9. Rates fixed by ordinance for furnishing water to a city are presumed to be reasonable. *McCook Waterworks Co. v. City of McCook* ..... 677

10. A corporation furnishing water to a city must disclose the value of its property and its earnings and expenses, when it assails as confiscatory rates fixed by ordinance. *McCook Waterworks Co. v. City of McCook* ..... 677

11. Sec. 250, ch. 12*a*, Comp. St. 1909, authorizing metropolitan cities to reassess void special assessments levied under the charter of 1897, *held* not void as class legislation. *Gardiner v. City of Omaha* ..... 681

12. Injunction will not lie to enjoin the passage of an alleged unauthorized resolution or ordinance. *Chicago, R. I. & P. R. Co. v. City of Lincoln* ..... 733

13. To create an improvement district under sec. 8329, Ann. St. 1907, a city must define the limits thereof and publish them. *Wiese v. City of South Omaha* ..... 844

14. The statutory requirements for fixing and publishing the limits of an improvement district prior to levying an assessment are mandatory and jurisdictional. *Wiese v. City of South Omaha* ..... 844

15. Where a special assessment for an improvement is made without compliance with jurisdictional requirements, it is void, and may be assailed collaterally. *Wiese v. City of South Omaha* ..... 844

**Negligence.**

1. To constitute actionable negligence, there must be a duty on defendant to protect plaintiff from injury, a failure to discharge that duty, and resulting injury. *Langenfeld v. Union P. R. Co.* ..... 527

2. Petition for actionable negligence must allege duty of de-

Negligence—*Concluded.*
fendant, failure to discharge the same, and injury therefrom. *Langenfeld v. Union P. R. Co*..... 527
3. Seller *held* not liable for injuries from petroleum sold to be used for dipping cattle. *Miller v. Raymond*..... 543

New Trial. See APPEAL AND ERROR, 6, 25, 31, 32. CRIMINAL LAW, 1, 2.
1. To justify a new trial for newly discovered evidence, it must be material and not cumulative, and it must appear that applicant used diligence. *Rieger v. Schaible*..... 221
2. A new trial will not be granted for newly discovered evidence, where not produced at the trial because forgotten. *Rieger v. Schaible* ..... 221
3. A new trial for newly discovered evidence will not be granted, unless diligence is shown. *Andrews v. Hastings*.. 548
4. A motion for a new trial for newly discovered evidence is addressed to the discretion of the court, and will not be overruled unless a clear abuse of discretion is shown. *Christensen v. Omaha & C. B. Street R. Co*..... 694

Parent and Child. See HABEAS CORPUS, 1-3.

Partition.
1. Decree of partition and order appointing referees *held* interlocutory and not appealable. *Sewall v. Whiton*..... 478
2. Where plaintiff's title is denied in partition, the proceedings will be suspended to give him an opportunity to try his title at law. *Sewall v. Whiton*..... 478
3. Practice on appeal in partition pointed out. *Sewall v. Whiton* ..... ..... ..... 478

Perjury.
1. To support conviction of perjury, the false testimony must be as to a material matter. *Shevalier v. State*..... 366
2. False testimony as to collateral matter will not support conviction of perjury. *Shevalier v. State*..... 366
3. Evidence *held* immaterial to the proceeding in which given. *Shevalier v. State* ..... 366

Pleading. See CARRIERS, 6, 7. EQUITY, 2. HABEAS CORPUS, 5, 6. INSANE PERSONS, 3, 4. INSURANCE, 7-11. NEGLIGENCE, 2. STATUTE OF FRAUDS, 1.
1. In a suit to vacate certain orders construing a will to the effect that a surviving husband is entitled to an estate by the curtesy, and revoking in part the will and its probate, a cross-bill *held* not germane to the petition. *Higgins v. Vandeveer* ..... ..... ..... 89

**Pleading**—*Concluded.*

2. Pleadings *held* to state an action on a contract for commissions, and not for a breach thereof. *Duval v. Advance Thresher Co.* ..... 181
3. A litigant who stands on a general demurrer to a pleading admits all material facts well pleaded. *Spalding v. Douglas County* ..... ..... 265
4. Filing an amended answer *held* a waiver of any error in sustaining a demurrer to the original answer. *Papillion Times Printing Co. v. Sarpy County*..... 397
5. Petition *held* to state a cause of action for money had and received. *Thiele v. Carey* ..... 454
6. If defendant desires affirmative relief, he should plead the ultimate facts to support his contention; but, if they are pleaded by plaintiff, affirmative judgment may be sustained. *Snyder v. Collier* ..... 522
7. If plaintiff's petition is prepared and verified by his attorney, the court should permit the withdrawal of an erroneous statement therein on terms before judgment. *Snyder v. Collier* ..... 552
8. In an action on a written contract to pay rent, if the petition is sufficient, plaintiff may recover on a *quantum meruit*. *Stoddard v. Baker* ..... 729
9. Where a petition is not attacked until after judgment, it will be liberally construed. *Urban v. Brailey*..... 796

**Powers.**

1. Where there is a power to appoint and no gift in default of appointment, the law will imply a gift to the objects of the power. *Loosing v. Loosing* ..... 66
2. Where the donee of a power is given discretion in making appointments, it will not be controlled by the courts provided a substantial gift is made to each object of the power. *Loosing v. Loosing* ..... 66
3. Should the donee die without having exercised a power of appointment, the court cannot exercise the discretion vested in the donee, but will divide the property equally among the beneficiaries of the power. *Loosing v. Loosing*..... 66
4. Will construed and testator's widow *held* to take a power in trust for the benefit of their children. *Loosing v. Loosing* ..... 66

**Public Lands.**

1. Lessee of school land *held* not entitled after expiration of his lease to a voice in the selection of appraisers called to revalue it, and to renew the lease he must proceed under sec. 19, ch. 74, laws 1883. *Stanser v. Cather*..... 305

Public Lands—*Concluded.*

2. After a lessee of school land has allowed his lease to expire without application to renew it, the only rights preserved to him are that he need not compete for a contract, and the rate of rental will remain as in his original contract, based on a new appraisement. *Stanser v. Cather*..... 305

3. A lease of school land executed after the enactment of ch. 74, laws 1883, does not entitle the lessee to a voice in the selection of appraisers to revalue the land, though such provision is in the lease. *Stanser v. Cather*..... 305

**Quieting Title.**

1. In a suit to quiet title as against a sale for taxes under a void decree, an offer to pay such sum as the court may find due on any lien for taxes paid is a sufficient tender. *Humphrey v. Hays* ..... 239

2. Evidence in suit to quiet title *held* to justify a finding that defendant's interest in the land was not pledged for payment of a certain note. *Bank of Alma v. Hamilton*..... 441

3. Evidence *held* not to support suit to quiet title. *Barney v. Chamberlain* ..... ..... ..... 785

4. The title to real estate will not be quieted as against an unpaid mortgage, though apparently barred by limitation, without payment or tender of the amount with interest. *Barney v. Chamberlain* ..... 785

**Quo Warranto.**

Under the constitution and laws of this state, the remedy by contest of an election and *quo warranto* are cumulative. *State v. Cosgrave* ..... 187

**Railroads.**

1. The legislature has authority to provide that, on appeals from orders of the state railway commission, the burden shall be on the party seeking to set aside the commissioners' decision to show that the order is unreasonable, and that the record shall be *prima facie* evidence that it is reasonable. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission* ..... 818

2. To set aside an order of the state railway commission, the evidence must be as clear and satisfactory as in other cases where presumptions of validity attach. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*..... 818

3. The cost of a proposed improvement ordered by the state railway commission is not in all cases a proper test of the reasonableness of the order. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission* ..... 813

**Railroads**—*Concluded.*

4. The reasonableness of an order of the state railway commission to maintain a station at a particular point on a railroad will be considered in connection with the revenue from the entire road within the state. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission* ..... 813

5. On appeal from an order of the state railway commission establishing a station, the demand for both freight and passenger service must be considered, and if, so considered, the order is not unreasonable, the appeal will be dismissed. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission* ..... ..... ..... 813

**Rape.**

1. Penetration may be proved by circumstantial evidence. *Cook v. State* ..... 57

2. On a trial for rape, *held* error to instruct that complaint made recently after the offense is a corroborating circumstance. *Henderson v. State* ..... 444

3. To support conviction of rape, where defendant denies committing the offense, the prosecutrix must be corroborated as to the main fact. *Henderson v. State* ..... 444

4. In a prosecution for rape, it is competent to show in corroboration that, recently after the offense, prosecutrix made complaint. *Henderson v. State* ..... 444

**Release.** See BILLS AND NOTES, 3.

**Replevin.**

1. Judgment in replevin is not inconsistent with assertion of right of possession by the defeated party under changed conditions. *Pennington County Bank v. Bauman*..... 226

2. Judgment in replevin for defendant solely on the ground that the petition does not state a cause of action is not a bar to a subsequent action. *Pennington County Bank v. Bauman* ..... ..... ..... 226

**Sales.** See DAMAGES, 2.

1. Provision in grain contract that, if the grain was not shipped within specified time, the contract would be held open until shipment was made or it was closed by the bidder, *held* to give buyer reasonable time, after expiration of period named, in which to close the contract. *Carter v. Roberts* ..... 480

2. Buyer of grain, on seller's failure to deliver, *held* under no obligation to purchase in the markets to which the grain was to be consigned. *Carter v. Roberts*..... 480

3. Place of delivery of grain *held* to be on track at point of shipment. *Carter v. Roberts* ..... 480

**Schools and School Districts.** See CONSTITUTIONAL LAW, 9, 10.

In directing the county superintendent of public instruction to furnish the county clerk with data for a levy, when a school district refuses to vote taxes for free high school purposes, the free high school act of 1907 does not delegate to the superintendent a taxing power committed exclusively to school districts under sec. 6, art. IX of the constitution. *Wilkinson v. Lord* ..... 136

**Specific Performance.** See EQUITY, 4.

1. Specific performance is not a matter of right, but rests in the sound discretion of the court. *Loosing v. Loosing*.... 66
2. Where it is shown that an aged and illiterate woman signed a contract for the distribution of her late husband's estate in violation of the terms of his will, and in ignorance of her legal rights, specific performance of the contract will be denied. *Loosing v. Loosing* ..... 66
3. An oral agreement that plaintiff shall share in testator's estate will be specifically enforced where the evidence is clear and plaintiff has fully performed. *Hespin v. Wendeln*, 172
4. Evidence *held* to sustain decree for specific performance of oral agreement that plaintiff should share in the estate of testator. *Hespin v. Wendeln* ..... 172
5. A suit for specific performance is addressed to the sound discretion of the court. *Sennett v. Melville*..... 209
6. Where the owner repudiates his contract for sale of land, formal tender is not a condition precedent to a suit for specific performance. *Harper v. Runner* ..... 343
7. Specific performance of a contract for the sale of land rests largely in the discretion of the court. *Furse v. Lambert* ..... 739
8. Where A contracted to sell land to B, and thereafter sold it to C, who has notice of A's rights, B may compel C to convey to him. *Barney v. Chamberlain* ..... 785

**State Railway Commission.** See RAILROADS.

**Statute of Frauds.**

1. Petition in action for breach of contract for sale of chattels, which alleges facts from which it is inferable that defendant received and accepted as owner part of the property sold, *held* not demurrable. *McMillan v. Heaps*..... 535
2. To satisfy the statute of frauds, the seller must deliver part of the chattels with intent to vest the buyer with right of possession. *McMillan v. Heaps*..... 535
3. Any act of a buyer from which it may be inferred that his possession of chattels is that of owner presents a question

**Statute of Frauds**—*Concluded.*
for the jury as to his intention of thus accepting the property. *McMillan v. Heaps* ..... 535

4. Receipt and acceptance of personalty which satisfies the statute of frauds will not be invalidated by a subsequent return to the seller, where he does not consent to a rescission of the contract. *McMillan v. Heaps* ..... 535
5. Correspondence by landowner with a broker *held* sufficient evidence of broker's agency to satisfy the statute of frauds. *Furse v. Lambert* ..... 739
6. Where a broker has written authority to sell his principal's land, a subsequent oral modification of the price does not render the altered contract obnoxious to the statute of frauds. *Furse v. Lambert* ..... 739
7. The execution and delivery of note and mortgage to secure the debt of another is sufficient compliance with the statute of frauds. *McLanahan v. Chamberlain*..... 850

**Statutes.** See CONSTITUTIONAL LAW.

1. Where it appears on the face of a legislative act that an inducement for its passage was a void provision, the entire act falls. *State v. Junkin* ..... 1
2. Where valid and invalid parts of a legislative act cannot be separated, no part thereof can be enforced. *State v. Junkin,* 1
3. The free high school act of 1907 (laws 1907, ch. 121) is an independent act, and its validity must be tested by the rule that changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates are not forbidden by sec. 11, art. III of the constitution, relating to the amendment of statutes. *Wilkinson v. Lord* ..... 136
4. To determine the meaning of the language of an act, it is proper to examine the course of legislation upon the same general subject. *State v. Cosgrave* ..... 187
5. If a remedy provided by a special act is not incompatible with one provided by an earlier and more general law, both may stand. *State v. Cosgrave* ..... 187
6. Ch. 82, laws 1909, amending sec. 14, ch. 50, Comp. St. 1907, and making it unlawful to sell liquors after 8 o'clock P. M. and before 7 o'clock A. M., *held* germane to the amended statute, and not to violate sec. 11, art. III of the constitution, requiring the subject of an act to be clearly expressed in its title. *Dinuzzo v. State* ..... 351
7. In enacting ch. 82, laws 1909, an act amending sec. 14, ch. 50, Comp. St. 1907, the legislature did not amend other la[illegible]legating to municipalities the power to regulate the

**Statutes**—*Concluded.*
liquor traffic within sec. 11, art. III of the constitution, providing that no law shall be amended unless the new act contain the section or sections amended. *Dinuzzo v. State,* 351

8. The title of ch. 78, laws 1881, "An act to establish a system of public instruction," *held* broad enough to cover the entire subject, and whatever might have been originally made a part of that law may be ingrafted upon it by amendment. *State v. Majors* ..... 375

9. Provisions of ch. 125, laws 1909, relating to the qualifications and appointment of members of the normal board of education, *held* germane to the subject of sec. 1, subd. XIII, as contained in ch. 78, laws 1881, establishing a system of public instruction. *State v. Majors* ..... 375

10. Ch. 125, laws 1909, *held* to violate sec. 11, art. III of the constitution, in that it amends and by implication repeals sec. 22, subd. XIII, ch. 79, Comp. St. 1907, and does not contain the section as amended, nor purport to repeal it. *State v. Majors* ..... 375

11. Separate acts cannot be amended by an act purporting to amend one of them. *State v. Majors*..... 375

12. The legislature will be presumed to contemplate the legal effect of language employed in a statute. *Cram v. Chicago, B. & Q. R. Co.* ..... 586

**Street Railways.** See DAMAGES, 1.
Evidence in action for personal injuries *held* to sustain verdict for defendant. *Christensen v. Omaha & C. B. Street R. Co.* ..... 694

**Taxation.** See QUIETING TITLE, 1.

1. A decree foreclosing a tax lien on service by publication, where the owner is a resident, is void, and may be attacked in a suit to redeem. *Humphrey v. Hays*..... 239
*Herman v. Barth* ..... 722

2. Redemption from a void tax foreclosure should be allowed upon payment of the tax lien and taxes subsequently paid, with interest, and the value of improvements. *Humphrey v. Hays* ..... 239

3. The taxing power vested in the legislature is limited only by the constitution. *Mercantile Incorporating Co. v. Junkin,* 561

4. The maxim, "*Expressio unius est exclusio alterius,*" does not apply in the construction of constitutional provisions regulating the taxing power of the legislature. *Mercantile Incorporating Co. v. Junkin* ..... 561

5. The grant of a charter to a corporation does not exempt it from an occupation tax. *Mercantile Incorporating Co. v. Junkin* ..... 561

**Taxation**—*Concluded.*

6. Ch. 25, laws 1909, providing for the levy of an occupation tax on corporations, *held* not violative of sec. 1, art. IX of the constitution. *Mercantile Incorporating Co. v. Junkin*.. 561

7. An action to redeem from a tax lien may be maintained against the purchaser under a void decree and those claiming under him. *Herman v. Barth* ..... 722

**Tender.** See QUIETING TITLE, 1, 4.

Where a creditor prevents payment by wrongfully refusing to accept the amount due when tendered, the debtor is entitled to a reasonable opportunity to comply with a subsequent demand. *Security State Bank v. Waterloo Lodge*.... 255

**Trial.** See APPEAL AND ERROR. CRIMINAL LAW. INSURANCE, 6. LANDLORD AND TENANT, 8. MASTER AND SERVANT, 8. STATUTE OF FRAUDS, 3.

1. Where the evidence on a material issue is conflicting, *held* error to direct a verdict. *Tarnoski v. Cudahy Packing Co.* ..... 147

2. Where both parties request the court to direct a verdict, they waive the right to trial by jury. *Dorsey v. Wellman*.. 262

3. The giving or refusal of cautionary instructions *held* to some extent in the discretion of the presiding judge. *Hoskovec v. Omaha Street R. Co*..... 295

4. Refusal to instruct that the jury should not be influenced by the fact that the plaintiff was an individual or the defendant a corporation, *held* not error. *Hoskovec v. Omaha Street R. Co.* ..... 295

5. An instruction that, if a witness had knowingly sworn falsely, the jury might disregard his testimony, except as corroborated, *held* not prejudicially erroneous. *State v. O'Rourke* ..... 639

6. Where the court has properly instructed on all the issues, it is not error to refuse additional instructions. *Carlon v. City Savings Bank* ..... 659

7. The giving of an unnecessary or inappropriate instruction is not ground for reversal where not prejudicial to the complaining party. *Carlon v. City Savings Bank* ..... 659

8. Where an action for broker's commission was tried on the theory that a written contract was the basis of the action, *held* proper to instruct the jury with reference thereto. *Myers v. Moore* ..... 715

9. Where the evidence is conflicting, the weight to be given to that of any witness is for the jury. *Myers v. Moore*.... 715

10. Questions of fact on conflicting evidence are for the jury. *Hoskovec v. Omaha Street R. Co*..... 295

**Trusts.** See MORTGAGES, 3. VENDOR AND PURCHASER, 4.

**Variance.** See APPEAL AND ERROR, 44, 45.

**Vendor and Purchaser.**

1. A written offer to buy or to sell real estate does not become binding until accepted unconditionally. *Sennett v. Melville* ..... 209
2. Where one is induced by fraud to purchase land, and with full knowledge of the facts treats it as his own, he thereby ratifies the transaction. *Hammond v. Patterson*..... 362
3. In an action on notes for the price of land, *held* error to refuse plaintiff relief if defendant's answer admits there is some indebtedness. *Hammond v. Patterson*..... 362
4. The word "trustee" following the name of a grantee in a deed is notice sufficient to put those dealing with him concerning the property on inquiry as to the trust. *Snyder v. Collier* ..... 552
5. A purchaser with notice stands in the place of his vendor. *Barney v. Chamberlain* ..... 785
6. One purchasing land with knowledge that another has a contract of purchase thereof is not a *bona fide* purchaser. *Barney v. Chamberlain* ..... 785

**Waters.** See INJUNCTION, 1. MUNICIPAL CORPORATIONS, 8-10.

1. Right of flowage of lands may be acquired by uninterrupted adverse possession and user. *Gross v. Jones*..... 77
2. One who constructs on vacant lands of the United States works of irrigation, and secures the approval of the state board of irrigation, has a vested right under secs. 2339, 2340, Rev. St. U. S. *Rasmussen v. Blust* ..... 198
3. Where irrigation improvements are made with the consent of an entryman on lands of the United States, and the entryman thereafter relinquishes his entry or it is canceled, and such improvements are in actual use with the approval of the state board of irrigation, a subsequent entryman takes subject to a right of way for the ditches and the use of the land covered by reservoir. *Rasmussen v. Blust* ..... 198
4. The failure of an irrigator to file a map in the land office and to secure the approval of the secretary of the interior *held* not to destroy the privileges protected by secs. 2339, 2340, Rev. St. U. S. *Rasmussen v. Blust*..... 198
5. A deed by an entryman, before final receipt, of a right of way over, and the privilege of constructing a reservoir on, his lands, will not vest the grantee with any right against a subsequent entry, unless the grantee, before the last entry, has constructed such improvement and is using it

**Waters**—*Concluded.*
under such circumstances as to entitle him to protection under the laws of the state. *Rasmussen v. Blust*..... 198
6. Water flowing in a well-defined watercourse may not, except under the power of eminent domain, be diverted on lands of an adjoining proprietor. *Kane v. Bowden*..... 347
7. A person may not, except under the power of eminent domain, discharge surface waters through an artificial ditch in unusual quantities on lands of an adjacent owner. *Kane v. Bowden* ..... 347
8. Order of county board establishing boundaries of irrigation district under sec. 2, art. III, ch. 93*a*, Comp St. 1903, *held* conclusive as to the lands included therein being benefited, but not as to whether such lands cannot from some natural cause be irrigated. *Sowerwine v. Central Irrigation District* ..... 687
9. After an irrigation district has been organized, the statutory procedure under ch. 93*a*, Comp. St. 1903, for detaching lands, other than those which cannot from some natural cause be irrigated, is exclusive. *Sowerwine v. Central Irrigation District* ..... 687
10. Where a landowner seeks to have land detached from an irrigation district, he must show that from some natural cause it is nonirrigable or expressly exempt by statute. *Sowerwine v. Central Irrigation District* ..... 687

**Wills.** See PLEADING, 1. POWERS.
1. Provision in a will prior to the enactment of ch. 49, laws 1907 (Ann. St. 1907, sec. 4901 *et seq.*), *held* to give the widow the net income for life from one-third of the estate. *In re Estate of Manning* ..... 60
2. Where an executor is directed to divide the estate and to do so necessitates a sale of real property, a power of sale held thereby given the executor. *In re Estate of Manning*, 60
3. Prior to the enactment of ch. 49, laws 1907, the widow of a testator did not have the right by electing to take under the law, and not under the will, to inherit his personal property as though he had died intestate. *In re Estate of Manning* ..... 60
4. A devise to a person generally or indefinitely with a power of disposition carries the fee. *Loosing v. Loosing*.. 66
5. Where there is a devise of a life estate only with power to dispose of the remainder to described individuals, the express limitation for life will control the power and prevent it from enlarging the life estate to a fee. *Loosing v. Loosing* ..... 66

**Wills**—*Concluded.*

6. While subsequent provisions in a will will not take from an estate in fee simple qualities inseparable from it, they may operate to define the estate given, and show that what without them would be a fee was intended to be a lesser estate; but, if the entire will shows the estate first granted was intended to be a fee, subsequent clauses restricting alienation are inoperative. *Loosing v. Loosing*..... 66
7. A district court on appeal from the county court has power to construe a will, but neither court has jurisdiction to revoke in part the probate of a will. *Higgins v. Vandeveer*.. 89
8. In giving effect to a bequest, the entire will should be examined to ascertain the intent of testator. *Fauber v. Keim*, 217
9. A legatee by exercising an option to take testator's land at its appraised value, *held* not to have obligated himself to pay more than the appraisement. *Fauber v. Keim*..... 217
10. Bequest *held* a charge on certain realty. *Fauber v. Keim*.. 217
11. If possible without violating well-settled rules of law, effect must be given to every word in a will. *Schnitter v. McManaman* ..... 337
12. Executory devise of real estate after the death of the first taker without issue, *held* to mean a definite failure of issue. *Schnitter v. McManaman* ..... 337
13. Though subsequent provisions in a will will not prevail to cut down an estate in fee simple, they may operate to define the estate devised, and show that what without them would be a fee was intended to be an inferior estate. *Schnitter v. McManaman* ..... 337
14. Provision in a will *held* to vest in testator's son a base fee, and that on the son's death the testator's daughter took an estate in fee simple. *Schnitter v. McManaman*..... 337

**Witnesses.** See BASTARDY, 3.

Cross-examination must be confined to matters stated by the witness on direct examination, and to questions tending to affect his accuracy or credibility. *Citizens Bank v. Warfield* ..... 328