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STATE, EX REL. GERTRUDE JORDAN, RELATOR, V. ERNEST B. QUIBLE, RESPONDENT.

FILED MARCH 28, 1910. No. 16,530.

County Officers: ELIGIBILITY. A woman may be eligible to the office of county treasurer.

ORIGINAL application for a writ of mandamus to compel respondent to turn over to relator the records, etc., of the office of county treasurer. *Writ allowed.*

F. M. Walcott and *F. M. Tyrrell,* for relator.

Charles A. Robbins, D. J. Flaherty and *E. D. Clarke, contra.*

ROSE, J.

This is an original application to this court for a peremptory writ of mandamus commanding respondent to turn over to relator the property, money, books, records and papers belonging to the office of county treasurer of Cherry county, Nebraska. At the general election November 2, 1909, relator, who is a woman, and respondent, who was county treasurer at the time, were rival candidates for that office. He received 683 votes and she received 925, a majority of 242 in her favor. The canvassing board so found and issued to her a certificate of election. At the proper time she took the necessary oath, gave an official bond, which the county board approved, and made a demand on respondent for possession of the office. He declined to vacate, and this suit followed. Relator is 30 years of age. For more than ten years she has been a citizen of the United States and a citizen and resident of Cherry county, Nebraska. For seven years prior to June 1, 1909, she was the duly appointed and acting deputy county treasurer of Cherry county. January 5, 1910, respondent took the oath of office and tendered to

the county board an official bond for the term beginning January 6, 1910. The bond, however, was rejected. That relator is a woman is shown on the face of her application, and the other facts stated are established by stipulation of the parties.

Respondent resists the writ on the ground of relator's ineligibility. He argues that a county treasurer of Cherry county must be an elector thereof, and that relator does not possess that qualification, since she is not a male person within the meaning of the following provision of the constitution: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector. First, citizens of the United States. Second, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election." Const., art. VII, sec. 1. Neither this section nor any other provision of the constitution or statutes declares that a woman shall be ineligible to hold the office of county treasurer. No constitutional or statutory provision inconsistent with the right of a woman to hold that office has been found. A familiar legislative enactment, however, adopts "so much of the common law of England as is applicable and not inconsistent" with the federal and state constitutions and the statutes of this state. This court in its early history announced that the common law thus adopted permitted women to hold offices administrative in character, the duties of which they were competent to discharge. *State v. Cones,* 15 Neb. 444. The office of county treasurer is administrative in character. The duties thereof are in no way incompatible with the incumbency of a woman who is competent to fill the office. The record shows that relator performed the duties of deputy county treasurer of Cherry county for seven years. With knowledge of her past services in that capacity, she

was chosen by the electors in a contest with respondent who was performing the duties of county treasurer at the time of the election. Under the statutes of this state she is competent to make contracts and to bind herself by her official bond.

In support of the argument that a county treasurer must be an elector, respondent has cited *State v. McMillen*, 23 Neb. 385. The controversy therein involved the title to the office of county treasurer of Dawes county. For that office Richards received a majority of the votes cast at the election November 3, 1885. At that time he had not been a resident or citizen of the state six months, and for that reason it was held he was ineligible to election under the constitutional provision quoted and section 64, ch. 26, Comp. St., providing for the contest of an incumbent's election, where he was not eligible to the office. The right of a woman to hold such an office was not considered. The office-holding privilege conferred upon a woman by the common law was not presented or decided. In these respects the case cited by respondent is distinguishable from the present one.

Ineligibility or disability on part of relator does not appear in the record. She has shown a legal title to the office of county treasurer of Cherry county, and the writ will be allowed as prayed.

WRIT ALLOWED.

LETTON, J., concurring in the conclusion.

While I doubt the correctness of the implication that at common law a public office of like character to that of county treasurer could be held by a woman (*Beresford-Hope v. Lady Sandhurst*, 23 L. R. Q. B. Div. (Eng.) 79; *De Souza v. Cobden*, 1 L. R. Q. B. Div. (Eng.) 687), still I concur in the conclusion.

There is a radical difference between conditions in England and Nebraska. Within a little more than half a century a wilderness has been redeemed by a people who, while basing their government and institutions upon the

great principles of the common law, have not followed its minor doctrines with slavish adherence.

Neither constitution nor statute preventing, women have for many years creditably occupied official positions in county affairs in this state apparently by common consent. As deputies they have been county treasurers and county clerks, and as principals county superintendents of schools. To take the position now that they are ineligible or do not possess the necessary qualifications would be to turn back the clock, and to say that common experience and common sense must yield to ancient custom in another country. Under the changed conditions, I think the common law, in so far as it might prevent a woman from holding county offices of a ministerial nature, is not applicable here.

FAWCETT, J., dissenting.

I am totally unable to concur in either the reasoning or conclusion of the majority opinion. With the political proposition of the right of women to vote and hold office I have no quarrel; but neither by the constitution nor by statutory enactment are they given the right to do either, except as to school offices. If their political rights are to be thus extended, it should be done by legislative, and not by judicial legislation. If a woman may be elected county treasurer, she may be elected governor of the state. There is no more constitutional or statutory inhibition of the one than of the other. Can we arbitrarily say that she has sufficient capacity for the former, but not for the latter? Neither the framers of the constitution nor the legislature has said so, and I am unable to discover how we became endowed with such occult powers. It is the candid opinion of the writer that there are many women in the state who would make more efficient governors than some men who have filled that honorable office in the past. I do not think the common law has any application to the case at bar. Our constitution has declared who shall be electors, and to my mind it is an absurdity to hold that

any person can be elected to an office for which he or she is not eligible to vote at the election. Such a construction, in my judgment, does violence to the plain spirit of the constitution. Age and residence for the statutory period are not sufficient. An alien might be of sufficient age, have resided in the state for a generation, and be possessed of unusual ability, and yet no one would contend that he could be elected to the office in question. Why not? Neither the constitution nor the statute expressly forbids. *State v. Cones,* 15 Neb. 444, cited in the majority opinion, is an authority against it. In that case, this court, speaking through MAXWELL, J., based its decision upon the following ground: "The statute merely permits women possessing the necessary qualifications to have a voice in the choice of school officers, selection of teachers, and general management of schools. And being entitled to vote, they are also entitled to act as trustees." In the case at bar, if the statute permitted women to vote for the selection of county officers, I would cheerfully hold, as stated by Mr. Justice MAXWELL, that, being entitled to vote, they are entitled to be elected to the office for which they may vote. The writ should be denied.

VICTORIA SCOTT ET AL., APPELLANTS, V. JOSEPH MICEK ET AL., APPELLEES.

FILED MARCH 28, 1910. No. 15,950.

1. **Witnesses:** COMPETENCY. Testimony of defendant Joseph Micek, examined and set out in the opinion, *held* not within the inhibition of the provisions of section 329 of the code.
2. **Cancelation of Instruments:** EVIDENCE. Evidence examined and set out in the opinion, *held* amply sufficient to sustain the findings and decree of the district court.

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

W. N. Hensley and *Sullivan, Reeder & Lightner,* for appellants.

McAllister & Cornelius, contra.

FAWCETT, J.

Plaintiffs, as children and heirs of Mary Micek, deceased, brought suit in the district court for Platte county to cancel two deeds to outlot number 3 in the city of Columbus, and from a decree dismissing their suit they prosecute this appeal.

The petition alleges that Mary Micek died intestate, in Platt county, on or about February 24, 1903, leaving plaintiffs as her children and only heirs at law; that defendant Joseph Micek is their father; that at the time of her death their mother was the owner and in possession of said lot and had been in possession thereof for three years prior to her decease; that on or about October 1, 1900, the said Mary Micek entered into a contract with the defendant Paprocki, whereby said defendant agreed to sell and convey said lot to her for the sum of $300, to be paid in monthly payments, conveyance to be made upon final payment; that said Mary Micek made all of the payments to defendant Paprocki, and within a day or so after making the final payment, and before a deed was executed and delivered to her, she died; that no administration was was ever had on her estate; that she left no debts; that within a few weeks after the death of said Mary Micek, defendant Joseph Micek intermarried with the defendant Tekla Micek, who at said time was a widow with a large family of children by a former marriage; that shortly after the marriage of defendants Joseph and Tekla Micek they entered into a conspiracy with the defendant Paprocki to cheat and defraud plaintiffs out of their inheritance from their said mother, and as a result thereof said Paprocki and his wife executed a deed for said lot to defendant Joseph Micek, without any consideration whatever, in fraud of plaintiff's right; that all of said parties

at said time had full notice and knowledge that plaintiffs were the equitable owners of said property, and were entitled to a conveyance thereof; that on or about May 1, 1908, the defendants Joseph and Tekla Micek, in furtherance of their fraudulent scheme, executed and delivered a deed of said lot to the defendants Jacob and Mary Chilocha, for the express consideration of $1,200, "but plaintiffs charge on information and belief that no consideration whatever was paid for said conveyance; that the defendants Jacob and Mary Chilocha had full notice and knowledge of plaintiffs' rights to said property, and that said conveyance is colorable only and was made for the purpose of eventually vesting the title in the defendant Tekla Micek"; that the said deeds from defendant Paprocki to defendant Joseph Micek and from the defendants Joseph and Tekla Micek to the defendants Jacob and Mary Chilocha have all been recorded in the office of the county clerk of Platte county, and cloud plaintiffs' title to said land. Plaintiffs pray that both of said deeds be canceled of record, and that plaintiffs be decreed to be the owner of said land, and for general relief.

Defendants Joseph and Tekla Micek for their separate answer admit the death of Mary Micek and the relationship of the parties, and deny all other allegations in plaintiffs' petition. They further allege that defendant Joseph Micek furnished the money to pay for said lot; that he was also the owner of outlots 1 and 2, and was in possession of all of said outlots; that in May, 1908, he sold said outlots 1, 2 and 3 to the defendants Jacob and Mary Chilocha for the sum of $1,200, "as he had a legal right to do."

Defendants Jacob and Mary Chilocha for their separate answer alleged that they have no knowledge or information whereon to form a belief as to the matters stated in plaintiffs' petition, and therefore deny each and every allegation therein contained. They especially deny plaintiffs' allegations in relation to their purchase of the lot from defendant Joseph Micek, and allege the fact to be

"that said defendants purchased outlots one, two and three to the city of Columbus, Neb., from the defendant Joseph Micek, paying a full consideration therefor, for their own use and benefit, and without any knowledge that the plaintiffs had any interest therein."

Defendant Paprocki for his separate answer denies each and every allegation in plaintiffs' petition. The replies to the separate answers of the defendants Micek and the defendants Chilocha are general denials. The court found the issues generally in favor of the defendants, and "further finds that defendant Joseph Micek is a competent witness in this cause as to all testimony given by him on the trial thereof, and that his evidence should be and is considered by the court."

But two questions are seriously pressed for consideration on this appeal: (1) Was defendant Joseph Micek a competent witness under section 329 of the code? (2) Does the evidence sustain the findings and decree of the court?

The main testimony offered by plaintiffs was given by plaintiff Victoria Scott, a married daughter of the deceased. She testified that their mother died in February, 1903; that she made the last payment upon the property in her bedroom while "she was lying sick in bed", and that "she died shortly after making this last payment." On cross-examination, however, she fixes the date of this last payment in the month of October prior to her mother's death. She also testified that after her mother's death her father on a number of occasions said that he had no right to sell the lot in controversy, that it would be for the children after his death; but on cross-examination, when asked if she did not know that he was offering it for sale, prior to the time he sold it, she answered: "He used to speak about selling it, but he never sold it. He said it was worth more; that they only offered him so and so much for it." When asked on direct examination where her mother got the money to pay for the lot, she answered: "Well, she had grain, she sold grain for it, and she had a

hired girl and she took in washing, she and this lady did, and she had another woman there, and she raised hogs and potatoes, and she saved all her money and paid for it. She paid some of it before she got sick by taking in washing, and afterwards she took in cattle for pasture, and she got quite a bit of money that way, and they raised a lot of hogs and calves and such as that, and she saved every dollar." On cross-examination she was asked where her mother got the grain she sold to raise money. "A. She owned land. Q. Where? A. Why, down here by the B. & M. bridge there was one 80 acres and down here by the river. Q. Wasn't that land in your father's name? A. That didn't cut any figure. She paid the hired help to work the land, and my brother worked it. Q. That land was in your father's name? A. It was in Mr. Schwarz's name. He had the papers to that land. Q. Was that land not sold for a debt of your father's, finally? A. Father sold it after mother died. I guess he had a right to it."

Some attempt was made by the testimony of plaintiff Frank Micek to prove notice to the Chilochas, before they obtained the deed, of the interest which plaintiffs were claiming in the land. The deed from the Miceks to the Chilochas was made and delivered in the office of Becher, Hockenberger & Chambers, in the city of Columbus. Frank testifies that he went into the office at the time his father and stepmother and the Chilochas were there; that they were all in the front room; that he called Mr. Hockenberger into a little closet and told him "to not make any deal with my father; that he had no right to sell that land; and then he took him over to Mr. Chambers, and he told him that the deed was made in my father's name and we couldn't do anything, so I didn't say any more." He gives it as his judgment that the Chilochas must have heard the conversation. The deal was consummated, however, and the deed made, Frank signing as a witness to its execution.

Defendant Joseph Micek testified that he bought the

lot in question, agreeing to pay therefor the sum of $325, and $25 for the fence, making a total of $350; that he paid $100 down; that defendant Paprocki furnished the balance of the money and took a deed to the property, and that he subsequently paid the balance of the purchase price to Paprocki. He denies the testimony of Mrs. Scott as to his saying that he could not sell the land, and testifies that he had been talking about selling it for six months before he finally made the sale; that he told his children that he was going to sell it, and they never objected to his doing so; that he was in possession of the land all the time from the time he first paid the $100 until he sold it to the Chilochas; that he kept up the fences; that he made all the payments that were made and also paid for the fence; that Mary Micek never paid any of her money on that property. He also produced and introduced in evidence a receipt from Paprocki for the last $225, dated April 26, 1902. When asked why he did not receive a deed after the final payment of $225 until after the death of his wife, he answered that "time was flying away and he just kept putting it off." He testifies that he earned the $225 with his team working on the Burlington and Union Pacific railroads; and that he is still the owner of the two notes for $500 each, given him by the Chilochas as part payment for the lots.

Defendant Paprocki, called as a witness by plaintiffs, testified that, when the payments were made to him from time to time, Joseph and Mary Micek were both present; that they never did anything but what they both knew about. He was asked this question, through an interpreter: "Q. How does it come that you made the deed to Joe Micek after Mary's death, when Mary had paid the money?" To which he answered that he "was keeping that deed; that deed was ready for him, but there was something like $3 that was held back, and he didn't give that deed; that was the interest, the $3; * * * that was after the death of Mrs. Micek. He says that she was sick for nearly a year, and there was no one inquiring for the

deed." He further testified that "Mrs. Micek was the one that paid him the money, but they were always both there. He says that Micek never carried any money with him; the old lady always carried the money."

Mr. Chilocha testified that he bought the three lots from Joseph Micek for $1,200; that he paid him $200 in cash and gave him two notes aggregating $1,000, one due in six months, and the other in one year; that at the time he purchased the property he did not know that the plaintiffs claimed any right in it; that he saw Frank Micek in the office the day they bought the property, but that he did not hear what he said to Mr. Hockenberger at that time. He says: "I swear positively I did not hear what business he had there." Mrs. Chilocha testified that she saw Frank Micek in the office at the time they obtained the deed from Micek, but that she did not hear anything that Frank said to Mr. Hockenberger.

Without further reviewing the evidence in detail, we think it conclusively establishes these facts: That Joseph and Mary Micek, with their children, were living together, using the lot in controversy, together with outlots 1 and 2, as their homestead; that Mrs. Micek was the custodian of the family fund; that whenever they transacted business the husband and wife went together, and that when payments were to be made Mary would produce the money out of this fund, but always with the sanction, if not under the express direction, of the husband; that the grain and other farm products which were sold were raised upon the land, the title to which was in Joseph; that the proceeds of Joseph's earnings with his team, working on the grades of the railroad companies referred to, went into the family fund. That this fund was subject to Joseph's control there can be no doubt. That Mary ever earned any of the money that went to pay for the lot is not established by any satisfactory testimony. Mrs. Scott and one of the sons testified in a general way that she earned the money and made the payments, but they did not specify any amount that she ever

raised, nor the amount of any payment she ever made, except the one item of about $30 which Mrs. Scott says she paid in October, 1902. This testimony we think is strongly controverted by the receipt offered in evidence which shows that the final payment, except a small balance of $3 for interest, was made in April, 1902, six months prior to the time Mrs. Scott says her mother made the final payment of $30. If Joseph was a competent witness to testify to the facts above set out, there can be no question as to the correctness of the court's findings. That he was a competent witness to testify to those facts is clear. He does not attempt to testify to any conversation or transaction had with his wife during her lifetime. His entire testimony is as to transactions had with Paprocki and other third parties, so that there is nothing to bring him or his testimony within the provisions of section 329 of the code. A consideration of the authorities cited by counsel for plaintiffs upon that point would be fruitless. It is also unnecessary to consider the question as to whether the defendants Chilocha sufficiently pleaded the defense that they were *bona fide* purchasers. If Joseph Micek purchased the property in controversy and paid for it out of his own money, he was entitled to convey it in any manner and to whomsoever he saw fit.

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

AFFIRMED.

LETTON, J., not sitting.

PERU PLOW & IMPLEMENT COMPANY, APPELLANT, V. JOHNSON BROTHERS ET AL., APPELLEES.

FILED MARCH 28, 1910. No. 15,930.

1. Contracts: CONSTRUCTION: QUESTION FOR COURT. The proper construction of a written contract is a question of law to be determined as such by the court.

2. ———: ———: LIABILITY. A contract made with a jobber for the purchase of wagons of a special character, which provides that they are to be taken by the purchaser on board the cars at the factory of a third party engaged in the manufacture of wagons, the contract allowing sufficient time for the manufacture of the same, and providing that a duplicate of the contract should be sent to the manufacturer, should be construed as a contract for the manufacture of the articles purchased, and upon the completion and delivery as provided in the contract, the purchasers are liable for the purchase price.

3. **Sales:** ACTION FOR PRICE: DISMISSAL. When the contract of purchase provides that payment for a part of the articles purchased shall be on six months' time and for the remainder on 60 days' time, an action for the purchase price begun within 60 days from delivery under the contract is premature, and should be dismissed without prejudice to another action for the purchase price.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

Lewis C. Paulson and *Flickinger Brothers,* for appellant.

J. L. McPheely and *Adams & Adams, contra.*

SEDGWICK, J.

On the 9th day of April, 1907, these defendants, who were in business at Wilcox, Nebraska, made a contract with the plaintiff whereby the defendants ordered specified wagons and boxes at an agreed price to be delivered on board the cars at Lansing, Michigan, on August 1, "or as soon thereafter as possible." By the terms of the contract the wagons were to have specially made boxes with the purchasers' names stenciled thereon, and on the face of the contract was indorsed the words "duplicate to factory." The plaintiff was known by the defendants to be a dealer in wagons, with its place of business at Council Bluffs, Iowa, so that it was understood between the parties that the wagons were to be manufactured at Lansing, Michigan, and delivered to the defendants on board the cars at that place. The petition alleged the making of

the contract, and set the same out in full, and asked for judgment for the amount of the purchase price. The contract contained this provision: "This order shall not be countermanded except on payment of 20 per cent. of the invoice price of said order as liquidated damages." The contract was signed "Johnson Brothers", and it was alleged that the defendants D. C. Johnson and O. M. Johnson are copartners, doing business at Wilcox, Nebraska, under the firm name and style of Johnson Brothers. The action was against them in their firm name, and also against them individually, naming them by the initials of their first names instead of their full names. No objection was made to this in the proceedings. The answer admitted the contract as alleged, and denied "that any part of the purchase price as alleged by said contract was due on October 11, 1907, the time of the commencement of this action." It also alleged that on the 26th of July, 1907, the defendants countermanded the order, and that the plaintiff received the countermand before the shipment of the wagons. The answer admits that the defendants refused to receive the wagons and alleges the countermand of the order as a reason for so doing, and alleges that after the commencement of the action the plaintiff took possession of the wagons and extras and "shipped the same back to its factory or some other point for its own use and benefit." The reply was a general denial.

It will be seen that by the terms of the contract the defendants agreed that the order should not be countermanded except upon the condition that they pay 20 per cent. of the amount of the purchase price. A duplicate of the order was left with the defendants, but in their correspondence they say that it has been mislaid, and they insist that in their prior contracts for the purchase of wagons they had reserved the right to countermand the order "conditioned upon the failure of crops", and allege that the crops in their vicinity had failed during that season and that they could not sell the wagons, and urge this as a reason for not receiving them. In this contention

the defendants were in error, as the contract contained no such condition.

On the 29th day of July of that year the defendants wrote the plaintiff as follows: "Do not ship the Lansing wagons yet that we have ordered of you. We have plenty of wagons yet, and will let you know when to ship them." To this letter the defendants answered on August 5 that their order was placed with the factory to go forward August 1; that it was to be loaded in a car with another shipment, and that it would be impossible to stop it. The letter concluded with the statement: "We are writing the factory in regard to it today, but if the car has left the factory we hope you will accept them." Immediately upon the receipt of this letter the defendants wrote to plaintiff that the understanding was, when they gave the order, that "it was not to be shipped until we needed them." In this the defendants were also in error, as the contract was that the wagons should be shipped August 1, or as soon thereafter as possible, which would mean, of course, as soon as reasonably practicable under conditions that might then exist. In this letter the defendants also requested the plaintiff to stop the wagons at Council Bluffs, "for it is impossible for us to use these wagons now." They also say the wagon trade is small, and that they have carried wagons over from the preceding year, and that it would be foolish for them to have more wagons shipped now. The letter closes with the statement: "We will take the wagons when we need them, but we cannot possible use them now." Several other letters passed between the parties, all with the same import. The defendants declined to take the wagons because of the failure of crops and small demand for wagons. They felt that they did not need them then in their trade. The plaintiff insisted that it had procured the wagons to be manufactured under the special contract with the defendants, and that the plaintiff would be compelled to take them from the factory, and for these reasons could not release the defendants from the obligations of their contract. The

wagons were actually delivered by the Lansing company to the defendants on board the cars at Lansing, Michigan, on the 12th day of August, and in due course arrived at Wilcox on the 23d day of August.

A jury was waived, and the case was tried by the court. After the plaintiff had introduced its evidence and rested, the defendants moved the court to require the plaintiff "to elect and declare to the court upon what right he seeks to recover, whether on the contract, suing for the whole, claiming the contract to have been performed on their part, or whether he is suing for damages for a breach of the contract." The plaintiff's attorney then stated that the action "is one for damages for breach of the contract." He then made some other statements more or less conflicting, as to what the plaintiff claimed, and then said: "Our contention is that the measure of damages in this case is the amount of the goods, with interest, plus freight, the storage, demurrage and other elements which we have shown to exist, as set forth in the amendment which we endeavored to file in this case, and which we, rather than continue this case, did not file, and we would like leave at this time to amend our petition in the following particular: Instead of claiming damages $593 and interest, we ask leave to amend by inserting in place thereof $750 in the prayer of our petition, with interest." He then said that there were so many different decisions and rules that he could not further state, only "we are here claiming everything from the breach of that contract up to this time." The court then sustained the defendants' motion to require the plaintiff to elect, and the plaintiff excepted to the ruling. The plaintiff then elected in these words: "We do not propose to waive the claim that the damages which we are to recover do not include the purchase price of these wagons and fixtures, with interest, as well as the additional claims of freight, demurrage, etc., which we have shown by the testimony." There was an amendment filed to the petition which seems to have been at about this stage of the proceedings. In this amendment, which

purports to be supplemental and additional to the original petition and to state "matter and facts arising subsequent thereto", it is alleged that the wagons remained at Wilcox subject to the defendants' orders until the 11th day of November, 1907, "when, for the purpose of saving expenses and charges of storage, this plaintiff had the same reshipped to Council Bluffs, Iowa, and stored in its warehouse there, where they are at the present time, and always have been subject to the order and direction of these defendants." It also added the charges of freight on the wagons from Lansing, Michigan, to Wilcox, Nebraska, $90.60, and the freight from Wilcox, Nebraska, to Council Bluffs, Iowa, $52.05, and there was inserted a claim for $5.25 for additional goods sold on July 26, not included in the contract. The defendants were of course liable for the freight charges on the wagons from Lansing, Michigan, to Wilcox, since by the terms of their contract they were to receive them on board the cars at Lansing. The addition of the doubtful claim of freight from Wilcox to Council Bluffs and the additional item of $5.25 would not constitute such allegation of a cause of action for damages inconsistent with the claim for the purchase price of the wagons as to form a basis for requiring the plaintiff to elect between two causes of action. The fact that the plaintiff may have offered evidence that was incompetent under the allegations of its petition, or insisted on the trial upon damages that were inconsistent with the cause of action set out in the pleadings, would not furnish grounds to compel an election. Such evidence should, upon objection, have been excluded on the ground that there was no issue tendered by the pleadings that would justify its admission.

The court found that the defendants had countermanded the order, but this finding was erroneous for two reasons: They had contracted not to countermand the order without paying to the defendants the damages which such countermand would occasion, and the correspondence

shows conclusively that the defendants never attempted to countermand the order until after the delivery of the goods. The court found the general issue in favor of the plaintiff, but entered judgment for nominal damages only. Upon such finding the court should have allowed the plaintiff at least the contract price of the wagons, which would include the purchase price, with interest, and, upon proof of the payment of the freight by the plaintiff, would also include the freight charges from Lansing, Michigan, to Wilcox, Nebraska.

The contract provides for payment for the main part of the purchase upon six months' time, and for a discount, if paid sooner. The extras were purchased upon 60 days' time, as provided in the contract. This action was brought within 60 days after the delivery of the property on board the cars at Lansing, Michigan. It was prematurely brought, and for this reason should have been dismissed.

The judgment of the district court is reversed and the cause remanded, with instructions to dismiss the case without prejudice to a new action, and at the costs of the plaintiff.

REVERSED.

HARVEY J. CLARENCE ET AL., APPELLEES, V. ALONZO CUNNINGHAM ET AL., APPELLANTS.

FILED MARCH 28, 1910. No. 15,940.

1. **Taxation**: VOID DECREE: CONSTRUCTIVE SERVICE. In a personal action to foreclose a tax lien against the owner of the fee, who is a resident of the state upon whom personal service can be made within the state, service by publication only is void.
2. ———: ———: REDEMPTION. When a decree foreclosing a tax lien is set aside as void for want of service, the owner of the fee should be allowed to redeem from the tax liens as though no such decree had been entered.

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

P. W. Scott and *Charles W Meeker,* for appellants.

John C. Watson, contra.

SEDGWICK, J.

The Western Land Company purchased the land involved in this suit at the treasurer's tax sale, and afterwards began an action in the district court for Chase county to foreclose the lien. Henry Clarence, who was then the owner of the land, and his wife were made defendants, and also the county of Chase. The county filed a cross-petition setting up its lien for subsequent taxes, and such proceedings were had in the action that in April, 1900, a decree was entered foreclosing the tax lien of the plaintiff in that action, and of the defendant, the county of Chase. A sale was had on this decree, and the defendants claim under that sale. The plaintiffs are the heirs of the said Henry Clarence, and brought this action to redeem from the said sale. It was conceded that Henry Clarence at the time the said foreclosure proceedings were brought was a resident of this state, and that no service was made upon him except service by publication. On the trial of the case the district court held that this service was void. This holding was right, under the well-established rule in this state. *Humphrey v. Hays,* 85 Neb. 239; *Herman v. Barth,* 85 Neb. 722, and cases cited.

The court entered a decree allowing the plaintiffs to redeem upon the payment of the amount paid by the Western Land Company to the county treasurer at the tax sale, and the subsequent taxes paid by the Western Land Company and Alonzo Cunningham, who was the purchaser at the foreclosure sale, and subsequent taxes paid by those claiming under him, together with interest on the sums so paid at 12 per cent. per annum. It is contended by the defendants that the court should require the plaintiffs to pay the amount of the purchase price paid under the foreclosure proceedings, together with interest thereon at

12 per cent. per annum from the date of the sheriff's sale under the foreclosure. The difference in computation would be about $70. In *Butler v. Libe,* 81 Neb. 740, it is said: "Redemption may be made upon the payment to the purchaser of the amount of his bid, with 12 per cent. interest thereon to the time of such redemption, together with the amount of subsequent taxes paid by defendant, with interest thereon at the rate borne by such subsequent taxes under the statute." In that case there was no administrative sale. The action was brought by the county to foreclose the lien for taxes. The service was regular and the decree of foreclosure was valid. The owner of the land was allowed to redeem under the constitutional provision allowing redemption within two years after a sale for taxes. It was held that this provision applied to judicial sales as well as administrative sales. The defendant was allowed to redeem from the judicial sale, but was required to pay the amount paid by the purchaser at that sale, with interest thereon. It is not necessary to re-examine the question there decided, since in the case at bar the judicial sale was void, and the redemption is from the treasurer's tax sale. In such case the rule applied by the district court in this case is the correct one.

The judgment of the district court is

AFFIRMED.

GAGE COUNTY, APPELLANT, V. W. W. WRIGHT, APPELLEE.

FILED MARCH 28, 1910. No. 15,954.

1. **County Officers:** APPOINTMENT OF ASSISTANTS. Under chapter 35, laws 1901, county treasurers of counties having more than 25,000 inhabitants and less than 60,000 were authorized to employ deputies and assistants whose combined salaries should not amount to more than $2,400.

2. ———: ———: RATIFICATION: LIABILITY OF SURETIES. If the last proviso of the act applied to counties of the above named class, which is not decided, the action of the treasurer in appointing

such assistants might be ratified by the county board after their services had been rendered and had been paid for by the treasurer; and the county board, having with full knowledge of the facts allowed the treasurer in their settlement with him the sum so paid out not exceeding $2,400, the county cannot recover the same in an action on his bond.

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

F. O. McGirr and *Menzo W. Terry,* for appellant.

Sackett & Brewster, contra.

SEDGWICK, J.

The defendant Wright held the office of treasurer of Gage county for the two years' term ending on the 7th of January, 1904. Each year of this term he retained, in addition to his own salary, and paid out to his deputies and assistants $2,400. This action was brought upon his official bond to recover a part of the money so paid out by him, which it was claimed was in excess of the amount allowed by law to be so paid. The question presented depends upon the construction of the act of the legislature of 1901 regulating the fees of county officers. Laws 1901, ch. 35. That act provides that, when the fees of the county treasurer exceed $2,000 a year, such excess shall be paid into the county treasury. There are several provisos added to the section. The first is that in counties having over 25,000 inhabitants the county treasurer shall receive $3,000 per annum, and shall be furnished by the county commissioners the necessary clerks or assistants, whose combined salaries shall not exceed the sum of $2,400 per annum. The second proviso is "that, if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred ($700) dollars per year for each of such

deputies or assistants, except in counties having a population over sixty thousand (60,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board," and the section concludes with the following words: "but in no instance shall such officer receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service, unless the same be actually paid to such deputy for his services; and provided further, that neither of the officers above named shall have any deputy or assistant unless the board of county commissioners shall, upon application, have found the same necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are each to receive."

Gage county has a population of more than 25,000 and less than 60,000. The county insists that the second proviso limited the amount to be paid to each assistant to $700. The contention of the defendant is that the case comes within the first proviso, which justifies the expenditure of $2,400 for clerks and assistants. The county further contends that the county commissioners did not upon application find that the clerks and assistants were necessary, and did not prescribe the number of deputies or assistants, as contemplated by the last proviso of the act, and that for that reason the payment of these fees by the county treasurer was illegal. The cause was tried by the judge without a jury, who found that $50 of the money so paid out was not properly authorized by the county commissioners, and required the treasurer to refund that amount to the county, with interest, and found the other issues in favor of the defendant.

One of the first rules for the construction of statutes is that the court will give effect to all parts of the statute if practicable. If the language of the second proviso is to be taken literally, there is a substantial conflict between

that part of the act and the first proviso. We think that a more reasonable construction of the second proviso is that it was intended to apply to the smaller counties of the state not included in the first proviso. Counties of more than 25,000 inhabitants having been already provided for, it was thought that it might happen in some of the smaller counties that the duties of the officers mentioned would be such as to require one or more assistants or deputies. In such case the treasurer might apply to the county board for assistants, who might allow them and prescribe the number of deputies or assistants and fix their compensation, which of course could not be more than $700 each in the smaller counties.

The legislature of 1907 recognized the apparent uncertainty of the statute, and again amended the law by inserting some more definite provisions. Among others so inserted, is the provision that in counties having over 25,000 and less than 60,000 inhabitants the treasurer shall be furnished one deputy or chief clerk with a salary of $1,400; a clerk with a salary of $1,000, and another clerk with a salary of $600, increasing the amount that may be expended for assistants to the county treasurer in counties of this class to $3,000. If we say that by the act of 1901 all counties are divided into classes with reference to the work of the county treasurer, and that in those of one class having over 25,000 and under 60,000 inhabitants the treasurer is allowed assistants, whose combined salaries may be $2,400, and in all counties having 25,000 or less the rule of the second proviso obtains, we shall give effect to both the provisos, and with that construction the act is, in that respect at least, consistent with itself.

The second contention of the county is that the last proviso of the act applies to all counties, and that in this case the county board did not find that the assistants employed by the county treasurer were necessary, and did not prescribe the number of deputies or assistants, nor the time for which they might be employed, nor the compensation that each should receive. The trial court found that

the county by its settlement with the treasurer upon full knowledge on the part of the board that the treasurer had employed assistants, and had paid them salaries which together amounted to the full sum of $2,400, ratified the act of the county treasurer in employing these assistants, which was a substantial compliance with the statute in that regard. We think that if it must be held that this last proviso of the statute applies to counties having more than 25,000 inhabitants, which seems doubtful, and which we do not find it necessary to decide, the trial court was right in holding that the action of the county board was a ratification of the employment of these assistants by the county treasurer. It is a general rule that public officers may ratify such acts as they could have authorized, and we see no reason for refusing to apply that rule in this case. The record shows that the treasurer appeared before the county board and explained to them the work of the office, and that the members of the board knew what assistants were being employed and what services they were rendering, and that the action of the treasurer was within the provisions of the statute, and afterwards, after the services were rendered and the employees had been paid by the treasurer, the board approved of his actions, and we see no reason why the county should not be bound by this action of the board.

In this view of the law, the judgment of the district court is correct, and is

AFFIRMED.

JOSEPH KOVARIK, APPELLANT, V. SALINE COUNTY, APPELLEE.

FILED APRIL 9, 1910. No. 15,813.

1. **Bridges: DUTY IN MAINTAINING.** "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper ac-

commodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated." *Seyfer v. County of Otoe*, 66 Neb. 566.

2. ———: PRESUMPTION. "A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has a right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated." *City of Central City v. Marquis*, 75 Neb. 233.

3. ———: ———. The sufficiency and state of repair of bridges upon public highways referred to in section 117, ch. 78, Comp. St. 1909, must be applied to the uses to which a bridge is ordinarily exposed prior to and at the time of the accident by which it may be claimed injury to person or property was suffered. It should be sufficient to meet the present ordinary necessities of the public.

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

Bartos & Bartos and *Hall, Woods & Pound,* for appellant.

Ralph D. Brown and *Glenn N. Venrick, contra.*

REESE, C. J.

This action was instituted in the district court for Saline county for the purpose of recovering the value of a traction steam engine and threshing machine which were practically destroyed by the breaking and falling of a bridge across Blue river in said county. A bridge, known as a "King Iron Bridge", was constructed across said river in 1891, the same being composed of material taken from another location where it had served as a similar bridge from 1876 until its removal to the location where the alleged accident occurred. The suit is for the value of the property destroyed by and in the wreck. The defendant filed its answer traversing the averments of the petition in all matters not admitted, and presented a counterclaim for the damages arising from the injury to the bridge in question. Suitable replies were filed, and the

issues were fully made up. It is not deemed necessary to further notice the pleadings, as they appear to have been well and properly formed and contain all necessary issues for a case of the kind. A jury trial was had which resulted in a verdict in favor of defendant upon the demand of plaintiff and in favor of plaintiff upon the cross-demand of defendant, which was, in effect, that neither party was guilty of negligence or had any cause of action against the other. Plaintiff appeals.

A large volume of evidence is presented in the bill of exceptions and which is conflicting in many important particulars. It is disclosed that plaintiff was the owner of a 16 horse power traction engine and threshing machine of the combined weight of from 25,000 to 30,000 pounds, and that he attempted to cross the bridge in question with his outfit, when the bridge went down, destroying the machinery—or nearly so—and injuring the bridge structure to such an extent as to render many parts of it practically worthless. The span of the bridge was 90 feet and was what is known as a "rainbow truss." Plaintiff testified that he pulled up on to the edge of the bridge far enough to cause the front wheels of the thresher to pass over the caps of the bridge at that end to prevent it from running backward off the approach, then slackened the speed of the engine and uncoupled the thresher by drawing the pin which held it to the engine, for the purpose of leaving the thresher to be drawn across by a team after the engine had passed over, when the bridge gave way, precipitating him and the engine to the river some 18 or 20 feet below, followed by the thresher. This appears to have been the custom of the owners of threshing outfits, where the strength and stability of bridges were not known to be ample, and where the approach was so steep as to render the pulling of the thresher on to the bridge with a team impracticable. It is claimed by the county that the circumstances and conditions appearing after the wreck, taken in connection with statements alleged to have been made by plaintiff after the accident, show that

the thresher was not uncoupled from the engine, and that plaintiff attempted to cross with the two machines coupled together, and thereby negligently imposed a greater strain upon the bridge than it could support. There was evidence tending to show that, at the time the bridge was originally constructed in 1876 and removed in 1891, the method of transportation of heavy loads over highways and bridges of the county was with lighter appliances than during the year 1907, when the accident occurred; that there were heavier engines and threshers in use in 1907 than plaintiff's, some engines being of the capacity of 26 horse power. It is contended by defendant that if the bridge was of sufficient strength in 1891 to support the heaviest loads then in common use, and that as repaired in 1906 it was continued to be of that strength and capacity, the county had performed its whole duty to the public, and could not be held for accidents occurring by reason of the common use of heavier loads, so increased after the original construction of the bridge, and in support of that theory refers to the evidence which, with practical unanimity, shows that at that time (1876 and 1891) the traction engines in common use were 6, 8 and 10 horse power, and therefore much lighter than those which came into common use at a later date. As to the strength and capacity of the bridge to sustain loads, in addition to its own weight, with safety, there was also a conflict. One engineer, who examined it soon after the accident and took measurements of many of its parts, condemned the bridge in very positive terms, while other witnesses who had had experience as contractors and builders, and who showed expert knowledge, deemed it sufficient.

Complaint is made by plaintiff of the eighth instruction given to the jury by the court upon its own motion: It is as follows: "A county cannot be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge from which injury and damages occur to the person using it is a latent defect, not discernible

from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examinations have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent and undiscovered defects. Nor are counties bound, when constructing bridges, to anticipate uses not then known and existing, which are not within the ordinary experience at the time of the building of the bridge. So, in repairing said bridges, the counties have performed their whole legal duty when they have put them in as good condition of strength and soundness as will make them as secure as new bridges of the same kind and plan."

The principal objection is made to the closing portion of the instruction, wherein the jury were told: "Nor are counties bound, when constructing bridges, to anticipate uses not then known and existing, which are not within the ordinary experience at the time of the building of the bridge. So, in repairing said bridges, the counties have performed their whole legal duty when they have put them in as good condition of strength and soundness as will make them as secure as new bridges of the same kind and plan." There can be no reasonable doubt but that the obligation of a county in connection with its bridges is a continuing, and, in some degree, a shifting one. Section 117, ch. 78, Comp. St. 1909, provides: "If special damage happens to any person, his team, carriage, or other property by means of *insufficiency, or want of* repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county", etc. This section clearly imposes upon the counties of the state the duty of maintaining the sufficiency, as well as the repairs, of their bridges; and in *Seyfer v. County of Otoe,* 66 Neb. 566, it was held, and is stated in the syllabus, that, "in constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for

what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated." In *City of Central City v. Marquis*, 75 Neb. 233, at pages 240, 241, the commissioner in writing the opinion says: "The evidence shows conclusively that the use of traction engines on the highways in that locality had been common for some years. Therefore the use of the bridge in moving such engines was one which might have been fairly anticipated by the defendant and for which it was bound to provide."

The sufficiency and state of repair referred to in the section, as above quoted, must, of necessity, refer to the uses to which a bridge is exposed at and about the time of the happening of the accident. Any other conclusion would admit of the construction of a bridge sufficient for present necessities, but which would be clearly inadequate 50 or 75 years thereafter. The evidence tended to show that the usual "life" of a bridge of the class to which the one in question belonged is from 50 to 75 years. The plan of this bridge was adopted in 1876, and the iron framework constructed at that time. At that date the country in Saline county was but slightly developed, and was, to all intents and purposes, a new country. In the more than 30 years intervening between that time and the date of the accident in 1907, the country had been brought under a high state of cultivation, and the burdens imposed upon bridges on the public highways have fully kept pace with improvements and the changes in the method of transportation. At the time of the original construction of the bridge the appliances used in transportation are shown to have been comparatively light. The fact that the bridge was removed in 1891 and placed in the position where the accident occurred, or repaired in 1906, can make no difference as to defendant's liability. The whole question as to the sufficiency of the bridge to meet the usual and ordinary demands of the public must be measured by what those demands were at and prior to

the date of its fall. It is true that the county cannot be held liable for the negligence of persons injured, or whose property may be damaged or destroyed, or for accidents occurring from unusual and unreasonable burdens upon its bridges, but its duties and obligations must keep pace with the reasonable necessities of the public. If it is true, as claimed by plaintiff, that engines and threshing outfits of the size and weight of his were in common use and were of necessity removed from place to place over and along the highways and across streams and bridges, the burden was upon the county to provide suitable highways and bridges to the same extent as if they had been in common use at the time the bridge was constructed or repaired. The fact that a bridge of a certain design and plan was at one time suitable and sufficient for the demands of the public is not conclusive proof that it will continue so, notwithstanding the change of requirements of the public at a later date. The evidence tended to show a change in the size and weight of traction engines in common use some years before the accident occurred. The obligation of the county to maintain the "sufficiency" of the bridge would have to be measured thereby, in the absence of negligence on the part of the person suffering damage. In the syllabus to *City of Central City v. Marquis, supra,* it is said: "A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has the right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated." We are of the opinion that the court erred in giving the part of the instruction to which reference is made. If the contention of plaintiff is correct, that engines of the size and weight of his were in common use at and for any reasonable time before the accident, it was the duty of the county to see to it that the bridge was capable of meeting any ordinary demand. We deem this a reasonable rule, and, while contrary decisions are cited

by defendant, it is well supported by authority. *Anderson v. City of St. Cloud*, 79 Minn. 88; *Yordy v. Marshall County*, 80 Ia. 465; *Schlensig v. Monona County*, 126 Ia. 625; *Perry v. Clarke County*, 120 Ia. 96; *Commissioners v. Coffman*, 60 Ohio St. 527. We do not mean by this to announce an inflexible rule that it is the duty of the county to provide safe passage for extraordinary heavy loads at each and all of its bridges across streams. It might be, in counties where bridge burdens are heavy, as with defendant, that with safe bridges at reasonable distances apart, and suitable notices of warning conspicuously posted at others giving their capacity when not considered sufficient for loads exceeding a certain weight, the requirements of the law might be met. That question, however, is not involved in this case and is not decided.

As we have seen, the bridge was repaired to some extent in 1906. Plaintiff requested the court to give the following instruction to the jury: "In maintaining a bridge for public use, the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unreasonably heavy loads; but it is only required to provide for what may be fairly anticipated for the proper accommodation of the public at large, in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the county should have fairly anticipated the use of traction engines in the community at the time it was repaired is for you to determine from the evidence before you." This instruction was refused. We think it a fair statement of the law and should have been given; at least, it was as favorable to defendant as it was in anywise entitled to or could reasonably have expected.

A number of other alleged errors are presented by plaintiff, but it is believed that they need not be considered as they will probably not arise upon another trial.

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

REVERSED.

STATE, EX REL. CHRISTIAN HANSEN, APPELLEE, V. F. L. CARRICO, APPELLANT.

FILED APRIL 9, 1910. No. 15,985.

1. **Process.** "All process shall run in the name of 'The State of Nebraska.'" Const. art. VI, sec. 24.
2. ———. "The style of all process shall be, 'The State of Nebraska, ——— county.' It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it issued." Code, sec. 880.
3. ———. "All writs and orders for provisional remedies and process of every kind, shall be issued by the clerks of the several courts." Code, sec. 883.
4. **Mandamus:** ISSUANCE OF WRIT. The provisions of section 650 of the code, requiring that the allowance of the writ of mandamus must be indorsed on said writ signed by a judge of the court granting it, does not authorize the judge to issue the writ, either alternative or peremptory. The order allowing the writ to issue is the extent of his power. It is for the clerk of the district court of the county where the suit is pending to issue the writ, authenticated by the seal of the court.
5. ———: ———. A writ of mandamus cannot be legally issued until the petition therefor is filed in the office of the clerk of the district court and the writ allowed by the judge.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed and dismissed.*

F. L. Carriço and *Lewis C. Paulson,* for appellant.

M. D. King, contra.

REESE, C. J.

This is an appeal from the district court for Kearney county. On the 14th day of September, 1908, relator presented to the Honorable Harry S. Dungan, the judge of the district court of the tenth judicial district, in the city of Bloomington, in Franklin county, a motion, petition and affidavit by which a peremptory writ of mandamus was sought against the defendant, the county judge

of Kearney county, requiring him to change the record of the date of a judgment rendered by him against relator. It was alleged in the petition that on a date not named one Christian Peterson commenced an action against relator and another to recover an amount claimed to be due for merchandise alleged to have been sold the defendants in said action; that the summons was duly served, and on the date therein named (August 24) the parties appeared, the cause was tried, submitted and taken under advisement by defendant until the 26th day of August, 1908, at the hour of 10 o'clock A. M.; that on said date (August 26) the defendant was absent from his office, and, as relator was informed and believed, "was absent from Kearney county, Nebraska, and nothing was done on said date relative to said cause"; that nothing was done in said cause until on or about the 2d day of September, 1908, and that on or after said day, the exact date being unknown to relator, defendant entered the judgment against relator for the sum of $24.60, and costs, but dated the entry thereof back to August 26, the date to which the cause had been taken under advisement; that at the date of the actual entry of the judgment defendant lost jurisdiction of the cause and had no authority to render such judgment; that on the 8th day of September, 1908, relator, believing that the judgment had been rendered September 3d, filed his bond for appeal, which was duly approved and filed by defendant, but that owing to the judgment having been dated August 26, the time for appeal having expired, relator would be deprived of his right of appeal. Averments of demand and refusal were made. The prayer was that a peremptory writ issue commanding defendant to change the date of the judgment upon his docket. The petition was sworn to by relator's attorney, and therewith was presented an affidavit by the same person, reciting substantially the same facts. A paper, designated "alternative writ", was issued by the district judge, reciting that the cause came on for hearing at chambers in

the city of Bloomington, and a number of special findings were set out in numerical order up to and including number 12, which it is hardly deemed necessary to notice, except, perhaps, number 10, wherein it is found that the county judge (defendant) had lost jurisdiction over said cause at the time the purported judgment was rendered, and that said judgment is void, the concluding paragraph being as follows: "Wherefore it is ordered by this court that the defendant herein, the county judge of said county, at once correct his records to conform with the facts herein stated, to wit, that the said judgment be entered of record as of September 3d, 1908, or that he show cause on or before September 17, 1908, why he should refuse so to do." This was signed by the judge alone. The papers were returned to Minden, to or by whom is not shown, and a copy of these findings was served upon defendant, and thereafter the papers were filed in the office of the clerk of the district court. Upon the date set as return day, defendant made a special appearance objecting to the legality of the proceedings upon various grounds; one being that as no action was pending in the district court at the time of the application for the writ to the judge, or its issuance, nor yet at the time of the service of the copy upon defendant, the proceedings detailed were void. The objections were overruled and an order for a peremptory mandamus was directed to issue, and a paper issued similar to the first order, but closing with the words, "Wherefore it is ordered by this court that the defendant herein, the county judge of said county, at once correct his records to conform with the facts herein stated, to wit, that said judgment be entered of record as of September 3d, 1908", and which was signed by the judge, and not by the clerk, nor under the seal of the court. There does not appear to have been any order, citation or other paper signed or issued by the clerk, nor does the order issued run in the name of the state.

It is provided by section 880 of the code that "the style of all process shall be, 'The State of Nebraska, ———,

county.' It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it issued." By section 883 it is provided that "all writs and orders for provisional remedies and process of every kind, shall be issued by the clerks of the several courts. Before they shall be issued, a precipe shall be filed with the clerk, demanding the same; which precipe shall be for the direction of the clerk, and not material to the papers in the case after the issuing of such writ or process." It is also provided by section 24, art. VI of the constitution, that "all process shall run in the name of 'The State of Nebraska.'"

An examination of the process issued in this case shows that every provision of these sections has been violated, or, to say the least, ignored. Section 650 of the code provides: "The allowance of the writ (of mandamus) must be indorsed thereon signed by a judge of the court granting it, and the writ must be served personally upon the defendant. If the defendant duly served neglect to return the same, he shall be proceeded against, as for a contempt." While this section does not permit the issuance and service of the writ until it is allowed and granted "by a judge of the court granting it", yet we know of no statute authorizing the judge to *issue* the writ, either alternative or peremptory, without the seal of the court, as was done in this case. The petition should have been filed with the clerk, and the writ allowed by the judge issued by the clerk, and then served upon the defendant. The course of procedure is plainly given by the constitution and statutes, and should be followed. The effect of other irregularities need not be noticed.

We are compelled, therefore, to hold the whole proceeding in the district court void. The judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

WILLIAM J. MANSFIELD, APPELLANT, V. DAVID P. KILGORE ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 15,938.

Mortgages: FORECLOSURE: REDEMPTION: ESTOPPEL. Where a junior mortgagee is made a party to an action to foreclose prior mortgages by the name in which he has accepted his security, is served by publication of summons in that name, has actual notice of the pendency of the foreclosure proceedings, makes full investigation and thereby ascertains the value of the mortgaged premises, satisfies himself that his security is valueless, abandons it, loses his mortgage notes, makes no defense, presents no application to open the decree, with full knowledge that prospective purchasers will bid at the foreclosure sale and invest their money in the purchase of the mortgaged premises, and fails in any manner to assert his rights therein, he should, after the lapse of more than five years thereafter, be estopped from maintaining an action against the purchaser at the judicial sale, or those claiming under him, to redeem from the prior incumbrances and foreclose his mortgage.

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

Matt Miller, for appellant.

Aldrich & Fuller, contra.

BARNES, J.

Action by a junior mortgagee to redeem certain real estate from prior mortgages and for a foreclosure. Defendants had judgment, and the plaintiff has appealed.

The facts are not in dispute, and it appears from the record that on the 21st day of September, 1896, one David P. Kilgore, who theretofore had been, and then was, the owner of the southeast quarter of section 23, township 15 north, of range 1 east, in Butler county, Nebraska, together with his wife, executed and delivered to the plaintiff, William J. Mansfield, a mortgage on said premises to secure the payment of a promissory note for the sum

of $1,032, due on the 21st day of September, 1900, with certain coupon interest notes attached for $61 each, payable on the 21st day of September of each year, successively, from and after the date of the execution of the mortgage, to and including the year 1900; that theretofore Kilgore had executed certain other mortgages on the same land as follows: One to Fayette L. Rounds for $1,000, covering the south 80; one to Ira Davenport for $800 upon the north 80; one to Dwight Carey for $1,400, and one to George P. Sheesley for $250 upon the entire quarter section; that in the year 1897 Rounds instituted foreclosure proceedings making the plaintiff and all other lien-holders parties thereto. Cross-petitions in that action were filed by Davenport and Carey, and service was had upon the plaintiff, as W. J. Mansfield, by publication. A decree of foreclosure was entered upon Carey's cross-petition, in which the court found and declared the priority of liens and the amounts due thereon, the plaintiff herein being decreed to be the fifth lien-holder. In 1898 the premises were sold under the decree to C. H. Aldrich, trustee, for one Helen T. Campbell, and the purchase price was absorbed by the four prior liens. In 1901 Helen T. Campbell sold and conveyed the premises of the defendant, Louis Henfling, who is the present owner, who went into possession and has made valuable improvements thereon. In the foreclosure proceedings above mentioned, plaintiff Mansfield, as above stated, was served by publication, he being a nonresident of this state. It appears, however, that he had actual notice of the proceedings, and before any decree was rendered therein he wrote to one S. H. Steele, an attorney at David City, and asked him to ascertain the exact nature and extent of all the liens on the premises and the order of their priority. Steele made this examination, and wrote a letter to the plaintiff, in which he gave in detail all of the proceedings, the amounts and order of priority of the respective liens, how service was obtained on each of the defendants, including himself, and the then status of the case. At that time Kilgore was in default

of his payments to plaintiff, and a cause of action had accrued upon his mortgage. The plaintiff, on receiving this information, paid the attorney his fee and gave the matter no further attention. Thereafter he continued to sustain business relations with Kilgore, who was his tenant, and dealt with a resident agent in Butler county for several years after the termination of the foreclosure proceedings. In 1902 he sold an adjoining piece of land which he owned to the defendant Henfling, who, as above stated, had bought the Kilgore land from Helen T. Campbell. However, he neglected to commence foreclosure proceedings until all the coupon interest notes except one were barred by the statute of limitations. He never attempted to collect them, or secure the payment of the principal note, and never made any application to open the decree in the foreclosure case. In fact, he took no action in the premises whatever until the commencement of this suit in November, 1905. Upon this state of the facts, the district court found that plaintiff was guilty of laches, and dismissed his action for want of equity.

Plaintiff assails the decree of the district court upon two grounds: First, that the court, in the original foreclosure proceedings, acquired no jurisdiction over him, because, as he alleges, his true name is William James Mansfield, and therefore he is not bound by the decree in that case; second, that he was not guilty of laches, as found by the district court, because he commenced this action for the foreclosure of his mortgage well within the time provided by the statute of limitations.

Considering the first question, it may be said that the district court adopted plaintiff's theory that he was not bound by the decree of the foreclosure, and a majority of this court are of the same opinion.

Plaintiff's second contention is not without strong support in the authorities, many of which hold that one cannot be held guilty of laches in instituting judicial proceedings if they are commenced within the period of the statutory limitations. While this is true, still one may

be guilty of such conduct as will amount to at least an equitable estoppel, and we think the facts of this case bring the plaintiff well within that rule. The record discloses beyond question that plaintiff's mortgage constituted a fifth lien upon the premises in question; that when the decree was rendered in the Rounds foreclosure proceeding the value of the land was insufficient to satisfy the four prior liens; that the proceedings in that case were regular, with the single exception that the plaintiff herein was made a defendant in that suit by the name of W. J. Mansfield in place of William James Mansfield, which he now contends is his true name. That plaintiff had actual notice of the pendency of that action is frankly conceded by his counsel. It is not contended that the land when sold under the decree in that case brought less than its actual value. It is also shown that the proceeds of the sale, when applied to the payment of the four prior liens, not only failed to satisfy them, but left a deficiency thereon; that with full knowledge of those facts defendant abandoned any attempt to enforce his mortgage lien or collect his mortgage debt, and it is now conceded that but for the recent unusual and unprecedented rise in the value of real estate in Butler county he would never have commenced this action. It thus appears that plaintiff abandoned his security, and it is shown that he has lost the notes which were secured by the mortgage in question. It further appears that having full knowledge of the pendency of the foreclosure proceedings, and well knowing that the land embraced in his mortgage would be offered at the foreclosure sale, wherein the public would be expected to purchase it upon the faith and credit of such proceedings, he took no steps whatever to assert his lien, either at that time or until long after the defendant Henfling had purchased and paid full value therefor, and had made valuable and lasting improvements thereon. We are therefore of opinion that by reason of the abandonment of his security, and his subsequent conduct, the plaintiff is now estopped

from attempting to assert his mortgage lien, as against the purchaser at judicial sale or those claiming under him. *Gillespie v. Sawyer,* 15 Neb. 536; *Lydick v. Gill,* 68 Neb. 273, 281; *Bausman v. Kelley,* 38 Minn. 197, 8 Am. St. Rep. 661.

It is contended by the plaintiff, however, that the defendants have not pleaded an estoppel, and therefore they are not entitled to a decree upon that ground. It is true that the answer is somewhat informal, and the word estoppel may not be found therein, still all of the facts constituting such a defense are set forth in the answer, and in our opinion it is sufficient to sustain a decree upon that ground.

For the foregoing reasons, we are of opinion that the judgment of the district court was right; and the fact that a wrong reason was given for the decision does not warrant us in reversing it. The judgment of the district court is therefore

AFFIRMED.

OTILA PRUSA ET AL., AND ANTON SEDA, ADMINISTRATOR, APPELLEES, V. FRANK J. EVERETT ET AL., APPELLANTS.

FILED APRIL 9, 1910. No. 15,943.

1. **Attorney and Client:** PURCHASE OF CLIENT'S INTERESTS: SUIT TO RECOVER: EVIDENCE. In an action against attorneys at law for the recovery of money obtained by the purchase and sale of property belonging to the estate of a deceased person, at a public sale ordered by the probate court, there being no evidence of actual fraud, it is incumbent upon the plaintiff to prove, by a preponderance of the evidence, that at the time the transaction complained of occurred the relation of attorney and client existed between the representatives of the estate and the attorneys, or one of them.

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

APPEAL from the district court for Colfax county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

John C. Martin, George W. Ayres and *E. L. King,* for appellants.

James A. Grimison, contra.

BARNES, J.

Action on behalf of the minor heirs of Anton Prusa, deceased, by their guardian to recover a sum of money from the defendants as a trust fund belonging to their father's estate, and alleged to have been obtained by the defendants by conspiracy and fraud while acting as attorneys for the executrix of the last will and testament of their deceased father. The plaintiff had judgment, and the defendants have appealed.

This is a second appeal in this case. The former appeal was from a judgment of the district court sustaining a demurrer to plaintiffs' petition and dismissing the action. The hearing in this court resulted in a reversal of that judgment, and the cause was remanded to the district court for further proceedings. *Prusa v. Everett,* 78 Neb. 251. Upon the return of the mandate to the district court for Colfax county the defendants filed separate answers denying the allegations of the petition, and set up certain facts as to the nature of the transaction complained of, by way of a defense thereto. The plaintiffs replied, and a trial was had which resulted in the judgment which is here for review.

The record contains several assignments of error, but they are all embraced and may be considered in the one contention that the judgment is not sustained by the evidence.

In order to recover under the pleadings in this case, it was incumbent upon the plaintiffs to prove, by a preponderance of the evidence, that at the time certain notes given by Joseph Prusa to his brother Anton were purchased by defendant Everett, defendants were doing business as partners, and as such were attorneys for the ex-

ecutrix of the estate of Anton Prusa, deceased, or that they conspired together, while one of them was so employed, to obtain the notes in question wrongfully and in fraud of the plaintiffs' rights.

A careful reading of the record discloses the following state of facts: On the 23d day of April, 1902, in Colfax county, Nebraska, Anton Prusa died testate. At the time of his death he was the owner and holder of three notes executed by his brother, Joseph Prusa, for the sum of $1,000 each; that Joseph Prusa died on the 15th day of November, 1899, leaving an estate of the value of about $16,000; that no effort had been made by Anton Prusa during his lifetime to collect these notes; that before the death of Anton the estate of his brother Joseph Prusa had been administered; that he had not filed the notes above mentioned as a claim against the estate, and they were barred by an order of the county court entered after due and legal notice for filing claims against that estate had expired; that Mary M. Prusa, the widow of Anton Prusa, and the executrix of his estate, had declined to proceed in any manner against the estate of Joseph Prusa to collect the money due on said notes; that in December, 1902, by the advice of one Joseph Svoboda, who was her cousin, and who had been acting for her and assisting her in the settlement of her deceased husband's estate, she applied to the defendant, George W. Wertz, for advice as to that matter; that at that time Wertz was doing a law business at Schuyler, Nebraska; that Svoboda went to the office of Wertz, where he found the defendant Everett, and was informed by him that he was not connected with the defendant Wertz, and was not his partner in the law business, and was not doing business with him in any way, and that he would have to wait until Wertz, who was then absent from the office, returned; that shortly afterwards Wertz came in and was consulted by Svoboda in regard to the collection of the notes; that Wertz took the matter under advisement, and a short time thereafter went to the residence of the executrix and ad-

vised her that in his opinion the county court was without jurisdiction to make the order barring claims in the matter of the estate of Joseph Prusa; that the administration of said estate could be set aside upon application to the county court, and the notes in question could be proved and allowed as claims against that estate. Wertz also advised her to take such action, and prepared a petition for that purpose, but she refused to sign it or allow the action to be taken, although she was fully advised of all of the facts and of the opinion of Wertz upon the law of the case. It further appears, however, that the executrix, on the 12th day of February, 1903, applied to the county court of Colfax county for an order for the disposition of the notes; that Wertz, as her attorney, advised the court as to the facts regarding a defect in the publication of the notice for the presentation of claims against the Joseph Prusa estate, and his view of the lack of jurisdiction of the court to make the order; that, after fully considering the matter, the county court ordered the notes in question sold at public auction; that due notice was given of the time and place at which the notes would be offered at public sale, and on the 20th day of February, 1903, they were sold to the defendant Frank J. Everett for $1,025, which he paid from his own private funds by a check on a bank at Schuyler. The check thereupon was delivered to Wertz, and was by him turned over to the administratrix, and the money collected thereon went into the funds of the estate. The sale was reported to the county court, but, as the death of Mary M. Prusa occurred shortly thereafter, it was never acted upon or approved. It further appears that the defendant Wertz, on the 17th day of April, 1903, bought a half interest in the notes in question from the defendant Everett; that thereafter application was made to open the administration of the estate of Joseph Prusa and allow the notes as claims against said estate. The county court set aside the original administration, and, while an appeal from that order was pending, the widow of Joseph

Prusa took up the notes in question, or purchased them, for $2,600, which was paid to the defendants on October 20, 1903, and on November 18, 1905, the plaintiffs herein sued defendants to recover therefor the sum of $1,575, and interest from October 20, 1903.

Upon the question of partnership between the defendants as attorneys at law, the plaintiff introduced certain exhibits signed Everett & Wertz with a rubber stamp, and from which, without explanation, it would appear that Everett and Wertz had been the attorneys for the executrix in the matter of the settlement of her deceased husband's estate; that Wertz had been transacting business and signing papers in the name, or by the name, of Everett & Wertz. It appears, however, that when Svoboda, who, as above stated, was acting for the executrix, called upon defendant Wertz to ascertain whether or not the notes in question were collectible, he found defendant Everett in the office, and what occurred there was stated by Svoboda, in substance, as follows: I commenced telling him my case, and Mr. Frank J. Everett told me he had nothing to do with the office, that he had disposed of his business to Wertz, and that I would have to see Wertz. I went out and came back again, I think in the afternoon, and I found Mr. Wertz in the office, but Mr. Everett was not in the office at that time, and I talked to Wertz as to my mission and about collecting the notes, and he said he would look the matter up and see if they could be collected. Afterwards he reported, just in what shape I cannot remember, but, if I remember right, it was in regard to there being a certain defect in the closing of the other Prusa estate in regard to the newspaper publication, and he thought the notes could be collected. He further testified that he told the executrix that Mr. Wertz had advised that the notes could be collected; that Wertz drew a petition to open the administration of the Joseph Prusa estate; that he took it down to the executrix for her signature, and that she refused to sign the petition.

The defendant Everett testified that Svoboda came to

the office of the defendant Wertz in Schuyler to see about the collection of the notes in question; that he was in the office at the time, and that Wertz was absent. He said: "I told Svoboda that I had no further business in the law line, and that he would have to take his business to Mr. Wertz; that Mr. Wertz was not in at that time, and that he could wait until he came in, or come back again." His testimony as to his business relations with defendant Wertz was, in substance, that some time in the year 1899 he employed Wertz to assist him in his office; that he was then carrying on a law and real estate business in Schuyler; that his arrangement with Wertz was, that he was to come into the office and was to receive a salary for his services; that he paid him $800 for the first year and for the second year, and until the employment expired he paid him $1,000 a year; that their arrangement ceased about the first or second of June, 1902; that no partnership ever existed between himself and Wertz; that Wertz worked on a salary for him, and received no share of the profits of the business, and was in no way responsible for any of its losses; that he received a salary compensation for the services rendered by him during the entire time exclusively; that at the time he severed his connection with Wertz in June, 1902, and arranged to move to Kearney, he made no business arrangement with Wertz, and in no way authorized him to use his name in connection with any legal business whatever; that he never talked with Wertz upon that subject; that he never received any compensation for services rendered in a legal capacity by the defendant Wertz; that after he had purchased the notes in question he left them with Wertz for collection, because he was going away, and as an inducement to Wertz to proceed with their collection he offered to sell him a half interest in the notes; that the offer was accepted, and in that manner Wertz became interested in the transaction.

Defendant Wertz testified that he was associated with defendant Everett for something over three years; that

he was paid during the first year a salary of $800; that for the second year, and the other portion of the time he was employed by Everett, he received $1,000 a year; that about the 1st of June, 1902, he bought Everett out; that he was not associated with him as a partner, and had no share in the earnings of the office, and was not responsible for any losses in connection with the business; that his salary was not contingent upon the amount of business done, but was absolute and was payable monthly; that since the 2d of June, 1902, he had not been associated with defendant Everett in any way in the law business; that in December of that year Mr. Svoboda came to his office and said that he had some notes belonging to the estate of Anton Prusa which had been given by Joseph Prusa in his lifetime; that the estate of Joseph Prusa had been administered and the administrator discharged, and he wanted to know if there was anything that could be done to collect the notes, and said that Mr. Phelps was handling the matter. Wertz further testified as follows: "I told him I would look the matter up; that if the estate of Joseph Prusa was administered correctly it would be a bar to the collection of the notes, but that I would look into the matter." He further stated that he subsequently advised that, by reason of an irregularity in the publication of a notice in the matter of the Joseph Prusa estate, the probate court had no right to close it up; that it was his judgment that it could be opened up, and the notes could be held as a claim upon the estate; that he went to see the executrix, Mary M. Prusa, at Svoboda's request, and talked with her in the presence of her father and mother about the condition of the Joseph Prusa estate; that he told her that an action could be brought against the estate asking to have the probate order set aside and for leave to file the notes against the estate. She finally said if it did not cost too much that he should start the case. That he drew up the papers and sent them to her to be signed, and later received word that she refused, and that they wished to settle the matter among them-

selves; that he then took up the notes and gave them to the executrix in the presence of her father; that he did not see them again until they were sold on the 20th day of February to the defendant Everett; that he never advised the executor that the notes were uncollectible, but repeatedly told her he thought they could be collected; that he explained the entire matter to her as fully as he himself understood it in the presence of Svoboda; that he did not bid on the notes at the sale, and that he was not interested directly or indirectly in their purchase by defendant Everett; that he received the check from Everett for the purchase price of the notes and turned it over or assigned it to the executrix; that at the time he purchased a half interest in the notes from the defendant Everett he had been paid his fees for his services to the estate, and had no further interest in or connection with it whatever; that after he purchased a half interest in the notes he prepared a petition on behalf of himself and Everett to set aside the probate proceedings in the settlement of the estate of Joseph Prusa, and obtained an order from the county judge granting the prayer of his petition; that thereupon the parties settled with him, nd that he, together with Everett, received as a consideration for the notes the sum of $2,600.

The testimony of defendants was not disputed by any one. Neither was their veracity or credibility questioned, except by way of innuendo or suspicion, and their evidence was corroborated to some extent by the plaintiffs' witnesses. While it may be said that some of the transactions naturally excite suspicion, still the suspicious circumstances are not sufficient in themselves to overthrow the positive and uncontradicted testimony of the defendants and their witnesses. We therefore find that the plaintiffs have failed to establish a partnership relation between the defendants at the time the transactions which are complained of occurred, or that a conspiracy existed between them to unjustly or unlawfully despoil the estate

of Joseph Prusa, and deprive the plaintiffs of any of their rights, or of their interest therein.

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

REVERSED.

REESE, C. J., having been of counsel for plaintiff, took no part in the decision.

KATE HINCKLEY, APPELLANT, V. CHARLES D. JEWETT, APPELLEE.

FILED APRIL 9, 1910. No. 15,971.

1. **Appeal:** EVIDENCE: HARMLESS ERROR. The admission of incompetent or immaterial testimony furnishes no ground for the reversal of a judgment if it is not prejudicial to the rights of the complaining party.
2. **Marriage:** HEARSAY EVIDENCE. Hearsay evidence, such as the general understanding and talk in the community in which the parties reside, cannot be received to establish a contract to marry.
3. **Instructions** examined, their substance set out in the opinion, and *held* to have been properly given.
4. **New Trial:** CONFLICTING EVIDENCE. A conflict of evidence, however great, is not of itself a sufficient basis for a motion for a new trial upon the ground of accident or surprise.

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

Greene & Greene, for appellant.

George W. Berge and *Meier & Meier, contra.*

BARNES, J.

This action was based on an alleged breach of promise of marriage. It was tried to a jury in the district court

for Lancaster county. Defendant had the verdict and judgment, and the plaintiff has appealed.

So far as the issues are concerned, the plaintiff's petition was in the ordinary and approved form in such cases, while the answer was in effect a general denial.

Plaintiff assigns error in the admission of oral evidence of the contents of a certain letter alleged to have been written and mailed by the defendant to the plaintiff from Waverly, Nebraska, to her Lincoln address. It is contended that no sufficient foundation was laid to authorize the court to receive this testimony. The evidence upon that point was, in substance, that defendant addressed the letter to the plaintiff at Lincoln, Nebraska; that he thought it was put in the mail box at the farm, or in the mail at Waverly, either by himself or some member of his family: the defendant being unable to remember whether he mailed it or gave it to some member of the family to mail. It is also contended that the testimony fails to disclose that any stamp was placed upon the letter, or, as a matter of fact, that it was ever deposited for carriage in the United States mail. We find that there is no necessity for determining the sufficiency of the foundation for the introduction of the contents of the letter, for an examination of the record discloses that its contents, as stated by the defendant, favored the plaintiff's contention, and was of no assistance to the defense. So far as we are able to ascertain from the bill of exceptions, the statement of the contents of the letter was as follows: "Waverly, Neb., May —, 1906. Miss Kate Hinckley, Lincoln, Neb. Dear Girl: I am enjoying the cool fresh air of the country and am getting rested. I will not be in for a while, or very soon. C. D. Jewett."

It thus appears that this evidence could not have been prejudicial to the rights of the plaintiff. Indeed, the familiar manner in which the defendant addressed her might have caused the jury to believe that a promise of marriage existed between them, and therefore it tended

to support her theory of the case. It has been frequently held that the reception of incompetent evidence where of such character that it could not in any view of the case be prejudicial to the rights of the complaining party, affords no ground for a new trial. On this point it is further contended by the plaintiff that the defendant, without any proper foundation being laid therefor, testified to the contents of other letters he had written to her, and that she had written to him. We have carefully read the bill of exceptions and are unable to find any evidence of the contents of any letters alleged to have passed between the parties other than the one above set forth, and for the foregoing reasons, the plaintiff's contention on this point cannot be sustained.

It is also contended that the court erred in excluding the evidence of certain witnesses offered by the plaintiff to the effect that it was the understanding in the community, and in the society in which the parties moved, that the plaintiff was going back east to get married, and that such was the general talk at the time she went from Lincoln to visit her sister at Pontiac, Michigan. No authorities are cited in support of this contention, and this evidence would seem to come under the general and well-known rule excluding hearsay testimony.

It is also insisted that, from the beginning of the cross-examination of the plaintiff to its conclusion, the rules with reference to such an examination were violated by counsel with the sanction of the court. We have carefully read the evidence, and cannot agree with counsel upon this proposition. The cross-examination seems to have been conducted in an orderly and seemly manner, without any attempt to humiliate or embarrass the plaintiff, but with the view to bring out the truth in regard to the relations which had existed between the parties to the action.

It is further claimed that the plaintiff, from the beginning to the end of the trial, was subjected to constant insults and humiliation at the hands of counsel for the

defendant, and that her witnesses received no better treatment, and therefore counsel for the defendant was guilty of such improper conduct as would require us to grant a new trial. We cannot agree with counsel upon this point. On the other hand, it seems to us that counsel for the defendant conducted himself in a seemly manner, and that his treatment of the plaintiff and her witnesses is not deserving of criticism. In fact, the trial appears to have been conducted in an orderly and proper manner, and this contention must therefore be overruled.

Plaintiff complains of the second paragraph of the court's instructions to the jury, which reads as follows: "You are instructed that to constitute a contract to marry there must be a meeting of the minds of the contracting parties; that is, there must be an offer on the part of one and an acceptance on the part of the other. Such contract may be unspoken or unwritten, but enough must appear to show that the minds of the parties met, and fix the fact that the parties are to marry as clearly as if put in formal words of offer and acceptance." No authorities are cited in support of the plaintiff's criticism upon this instruction, and to our mind it fairly states the law upon that point.

Error is also assigned for the giving of the sixth and eighth paragraphs of the instructions. By the sixth instruction the jury were told, in substance, that the defendant in his answer had made no allegations charging the plaintiff with previous loose conduct; that, in the absence of allegations to the contrary, the law presumes the parties to a marriage contract have each satisfied themselves in regard to the other's character; that any evidence upon this point should only be considered for the purpose of determining the question as to whether or not the parties entered into an agreement to marry. This instruction is severely criticised by the plaintiff for the reason that there was no evidence introduced on the trial on which it could be based. It is true that the record contains no evidence of meretricious conduct on the part

of the plaintiff, but the defendant testified to certain transactions from which the jury might assume that he never promised to marry her, and it was proper for the court to state to the jury that such evidence could only be considered for that purpose.

By the eighth instruction the jury were told that evidence had been admitted from both the plaintiff and the defendant showing their relationships and the facts and circumstances concerning the same; that the evidence bearing upon the question as to whether or not the plaintiff entertained other suitors and had relationships with other men, during the time she claims to have been engaged to the defendant, should only be considered by them as bearing upon the question whether or not she then had a marriage engagement with the defendant as alleged, and it is insisted that there was no evidence upon which to base this instruction. We do not so understand the record. While it is not claimed that the plaintiff ever had any meretricious relationships with other men, still there is evidence in the record which tends to show that she had other company, at least to some extent, and therefore the instruction was a proper one. In any event, it cannot be claimed that either of these instructions could in any manner prejudice the plaintiff's rights.

Finally, it is contended that the plaintiff should have been granted a new trial on account of accident and surprise. It is argued that a litigant has a right to expect that his adversary will not testify falsely concerning any matter about which there is no room for an honest mistake, and it is insisted that the defendant in this case wilfully testified falsely, and that a new trial should be granted for that reason. As we read the record, there is very little conflict in the evidence. The parties agreed upon nearly everything which occurred during the time that the defendant was paying his attentions to the plaintiff. The only real disagreement between them was upon the main question as to whether or not the defendant ever promised to marry the plaintiff. Upon this point it was

to be expected that the parties would disagree, and by his answer the defendant had given notice to the plaintiff that he would testify that no promise of marriage ever existed between them, and the fact that he did so testify is no reason for granting a new trial. It seems clear that this case was fairly tried; that it was conducted in a seemly and orderly manner; that the only question in the case was one for the determination of the jury, and that question was fairly submitted to them, and under well-established rules we are bound by their verdict.

The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

JOSEPH KAVAN ET AL., APPELLEES, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED APRIL 9, 1910. No. 15,989.

1. **Cities: STREET IMPROVEMENTS: DAMAGES.** Where two contiguous city lots are used and treated by the owner as one property, in estimating his damages occasioned by lowering the grade of an adjoining street, the injury to the entire property should be considered on an appeal from the award of the board of appraisers, notwithstanding the appraisers have included only one of such lots in their report.

2. ———: ———: ———: **APPEAL: WAIVER.** Where a lot owner takes an appeal from the award of the board of appraisers appointed to assess his damages occasioned by the grading of a street adjacent to his city lots, he waives all objections as to the invalidity or irregularity of the proceedings of the city council in making the improvement of which he complains.

3. ———: ———: ———: **SPECIAL BENEFITS.** Under the provisions of the South Omaha city charter, a lot owner is entitled to recover the damages occasioned by the grading of a street in such a manner as to lower it many feet below the natural surface of his lot; and, in estimating the amount of his recovery, special benefits to the property by reason of the improvement, if any, should be set off against the damages he has sustained thereby.

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

S. L. Winters, W. C. Lambert and *J. J. Breen,* for appellant.

A. H. Murdock and *W. W. Slabaugh, contra.*

BARNES, J.

This was an appeal to the district court for Douglas county from the finding of the board of appraisers assessing the damages to certain lots in the city of South Omaha, caused by grading S street in said city. The appellant in the district court, who will be called the plaintiff, had judgment, and the city, hereafter called the defendant, has brought the case here by appeal.

It appears that in the year 1906 the city council of South Omaha determined to bring S street, and the approaches thereto, to the grade established by an ordinance of the city known as ordinance No. 370, and created a district for that purpose extending from Eighteenth to Twenty-fourth streets. Appraisers were appointed under the provisions of section 8347, Ann. St. 1907, who qualified, served notice on the property owners within the district, met in pursuance of said notice, and made and filed a written appraisement, setting forth their findings with reference to the amount of damages, with the city clerk, which was duly presented to, and confirmed by, the city council.

The plaintiff, Joseph Kavan, is the owner of lots 23 and 24, block 6, Brown Park addition to the city of South Omaha, situated at the southeast corner of the intersection of S and Twenty-third streets; S street running east and west, and Twenty-third north and south. Lot 24 abuts on S street, and both lots 23 and 24 face Twenty-third street. It appears that the appraisers in making their report found no damage as to lot 24, and made no finding whatever as to lot 23. The plaintiff, being dissatisfied

with the report, obtained a transcript of the proceedings, filed his bond, and perfected an appeal to the district court from the award complained of. After perfecting his appeal the street was brought to grade, and the plaintiff filed an amended petition setting forth that fact. He also alleged therein that ordinance No. 370, providing for the grading of the street in question, was not legally passed, and that the grading was therefore done without authority or jurisdiction on the part of the city, and this allegation is denied by the defendant.

It further appears that at the time South Omaha was incorporated as a village the plaintiff bought lots 23 and 24 above described; that shortly after he purchased them he erected eight small cottages on the two lots, and made other improvements, as alleged in his petition. It appears that up to that time the city had never in any manner worked the street in question, or assumed any jurisdiction over it. Plaintiff's houses were the first ones built in the addition, and at the time they were constructed the corner lot was some $2\frac{1}{2}$ feet above the street as now graded, while on the opposite side of the same street it was from 12 to 14 feet above the present grade. That when plaintiff made his improvements he did so with reference to the natural surface of the ground immediately south of, and on the same side of, the street; that at that time the street was not traveled or used at all. The plaintiff alleged in his petition that he and one Matilda Palik were the owners of the property, and had been for 18 years or more. Thereafter such proceedings were had that the action as to plaintiff Palik was dismissed, and the trial was conducted solely with reference to the rights of the plaintiff Kavan. Plaintiff alleged, and introduced evidence tending to show, that the lots in question were used together as one tract or a single lot, and the jury were allowed to consider the damages to both lots, and returned a verdict accordingly.

Defendant's first contention is that the district court had no jurisdiction to determine the damages, if any, which had accrued to lot 23 by reason of the improvement.

It clearly appears that the plaintiff purchased both lots at the same time, and they were conveyed to him by one deed; that he has improved and used them as a single tract; that they are now incapable of separation, for the houses constructed thereon face on both S and Twenty-third streets; that those facing on S street extend across lot 24 onto lot 23, and therefore the lots should be considered as a single tract of land for the purpose of ascertaining the damages which plaintiff has sustained by reason of the street improvement in question. In *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, it was held: "Where several contiguous town lots are used and treated by the owner as one property, in estimating his damages occasioned by the appropriation by a railroad company of one of such lots and parts of two others for its right of way, the injury to the entire property should be considered, although the petition filed by the railroad company for the appointment of commissioners only describes the lots across which the road is located."

In *Atchison & N. R. Co. v. Forney*, 35 Neb. 607: "A railroad company built its track along an alley and across S street in the town of R. at an elevation of 20 feet above the level of the ground, upon trestle-work, the benches of the foundation of which rest mostly in the alley, but extending onto the lots adjacent thereto and in the street, being about 20 feet apart. It condemned 25 feet of lots 15 and 16 in block 5 next to the said alley for right of way. An appeal was taken from the award of damages to the district court, where judgment was rendered in favor of F., the owner of the lots. *Held*, That the construction of the track is a direct injury to the property, for which the owner was entitled to recover damage in the condemnation proceeding."

In *Union Elevator Co. v. Kansas City Suburban Belt R. Co.*, 135 Mo. 353, 36 S. W. 1071, it was said: "Where three blocks are used in connection with an elevator for one common purpose, and as one property, and the elevator cannot be successfully conducted without the use of all

the blocks, two of which are used for storing cars, in estimating the damages for the appropriation of a portion of one block for a railway right of way, it is proper to compute the damages to the property as a whole, although the blocks are separated by streets across which the owner of the blocks has laid tracks without the permission of the city authorities. *Cook v. Boone Suburban Electric R. Co.*, 122 Ia. 437, was a case where a railroad company attempted to condemn private property for railroad purposes, describing only that portion of a farm which was north of another railroad previously constructed across it from east to west, and it was held that that fact could not deprive the owner of the farm on her appeal from the award of the sheriff's jury of her right to establish a recovery of damages to her entire farm, when in fact such northern portion was a part of the whole. In view of the foregoing authorities, we are of opinion that the district court did not err in permitting the jury to consider the damages to both of plaintiff's lots.

It appears that the trial court was of opinion that ordinance No. 370 was illegally passed, and that therefore the proceedings relating to the grading of S street and the appointment of the appraisers to assess the plaintiff's damages were illegal and void, and upon that theory instructed the jury as follows: "You are instructed that as the defendant failed to follow the law in its attempt to establish a grade for S street, on which plaintiff's property abuts, its grading of said street in front of plaintiff's property in the year 1907 was wrongful, and for such reasons special benefits to said property by reason of such grading, if any did exist, cannot be considered by you in determining the value of the said property immediately after the said grading of said street." This instruction is complained of by the defendant, and it is contended that the plaintiff having availed himself of the right to appeal from the finding and award of the board of appraisers, and by so doing having invoked the jurisdiction of the district court to determine the amount of

his damages caused by the improvement in question, is estopped to question the validity of those proceedings. In other words, that the plaintiff, having appealed from the award of the board of appraisers, must be held to have waived all antecedent defects, and is estopped from availing himself of any irregularities therein. In *Davis v. Commissioners,* 28 Neb. 837, it was held: "Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road." In *Trester v. Missouri P. R. Co.,* 33 Neb. 171, it was said: "Where a landowner takes an appeal from the award of commissioners, appointed to assess damages for right of way, he waives all objection as to notice and that the appraisers were not properly sworn." In *Gutschow v. Washington County,* 74 Neb. 794, it was held: "When a person files a claim for damages to his premises caused by the location of a proposed drainage ditch, he thereby waives objection to any irregularities in the proceedings to establish the same." Indeed, it may be said that, if the proceedings of the city council by virtue of which S street was graded were illegal and void, then the trial court obtained no jurisdiction by the plaintiff's appeal, and his action should have been dismissed. If the whole proceeding in relation to the grading of S street was void, then plaintiff's only remedy was to proceed against the city for damages by an action in tort; but, if the proceedings possessed sufficient vitality to enable the plaintiff to invoke jurisdiction of the district court by appeal from the award of the board of appraisers, then the district court obtained jurisdiction, and by his appeal he has waived all objections which he might have taken as to their regularity. If the proceedings were void, and plaintiff's action had been one of tort, then the instruction complained of might not have been erroneous. But in this case we are unable to see how the district court could entertain jurisdiction of the appeal from the award of the board of appraisers by virtue of section 8347, Ann. St.

1907, and ignore its provisions to the effect that the appraisers shall appraise and award the damages caused by the improvement, setting off against such damages the special benefits which may accrue by reason thereof. We are therefore of opinion that the instruction complained of was erroneous, and entitles the defendant to a new trial.

Finally, it is claimed by the defendant that a city lot-owner who improves his property before street grades are established, with regard to the natural surface of the ground, is bound to take notice that in improving the streets and rendering them suitable for public travel they will be brought to such a grade as the council may subsequently establish, and he cannot recover damages caused by such an improvement. When the plaintiff purchased his lots, the platted street in question ran along the side of the hill or elevation on which they were situated, and he knew that the road or street would not be left in that condition, that it would at least be leveled from side to side; but he could not anticipate what grade would be finally established therefor, and he might expect that if substantial changes were made from the natural grade for the benefit of the public, and his property was damaged thereby, the public would make good such damage. To hold that he could not recover damages therefor would amount to a nullification of that section of our constitution which provides: "That the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21. We are therefore of opinion that the plaintiff in this case is entitled to recover the damages he has actually sustained, less the special benefits to his property, if any, by reason of the street improvement in question.

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

REVERSED.

GUSTAV DRINGMAN ET AL., APPELLANTS, V. JOHN KEITH, APPELLEE.

FILED APRIL 9, 1910. No. 15,918.

1. **Limitation of Actions: SETTING ASIDE DEED: DURESS.** The cloud upon a title to real estate created by a recorded deed which was obtained by duress is a continuing one while the plaintiff retains possession of the land, and the right of action for its removal is also continuous in such case. *Batty v. City of Hastings*, 63 Neb. 26.

2. ———: ———. Such an action may be brought at any time within four years after the defendant has taken possession of the land claiming title thereto under such deed.

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

Hoagland & Hoagland, for appellants.

Wilcox & Halligan, contra.

LETTON, J.

This was an action to set aside a deed to certain land in Lincoln county. The plaintiffs, Gustav Dringman and Hattie V. Dringman, are husband and wife. The petition, in substance, alleges that the instrument, although in form a deed, was executed by Gustav Dringman to secure the payment of certain money furnished him by the defendant John Keith upon the day he made final homestead proof upon the land. It further alleges that Mrs. Dringman was not present when the deed was signed by her husband; that the premises were the family homestead; that she refused to sign the same when it was presented to her by an agent of the plaintiff; that a few days afterwards the defendant procured a person to represent to her that he was a United States marshal, and that unless she signed the deed her husband would be arrested and imprisoned by him for fraud in connection

with the final proof; and that, believing this was true, and in order to procure her husband's release, she signed the deed, but did not acknowledge it. The plaintiffs also offer to repay the amount of money received by Dringman, with interest, and ask an accounting as to rents and profits. The answer amounts to a general denial of duress in procuring the deed, a plea of special payment of $25 to Hattie V. Dringman as a further consideration to induce her to sign the deed, and pleas of ratification and of the statute of limitations. The allegations of new matter are denied by the reply.

The findings of the district court are as follows: "The court being fully advised in the premises, on the issues joined, finds for the defendant John Keith, and against the plaintiffs, Gustav Dringman and Hattie V. Dringman. The court further finds that the cause of action set forth in plaintiff's petition for fraud and duress is barred by the statute of limitations of this state." We set forth the findings in full for the reason that the plaintiffs strenuously maintain that there is no general finding for the defendant, and that the sole finding of the court is that the action is barred by the statute of limitations. We do not so understand the findings. Strictly speaking, two causes of action are joined in the petition; one by the husband to redeem from the lien created by the deed which he alleges is in fact a mortgage, the other by the wife to set aside a conveyance which she alleges was signed by her under duress, and which was never acknowledged, which facts, if true, render the whole instrument void as regards the homestead. We take the findings to mean that, on the issue as to whether the instrument was a deed or a mortgage, the court finds for the defendant that it was a deed, and as to the issue of duress finds that the wife's cause of action is barred by the statute.

Upon a consideration of the evidence, we are satisfied that the husband intended to sell the land at the time he executed the conveyance, and that the instrument as to him is a deed. Upon the question as to whether the wife

acknowledged the deed, we think the evidence preponderates in favor of the defendant. But upon the question of whether her signature was procured by fraud and duress, we are not so clear. There is no testimony in the record to contradict that of the Dringmans upon this point, and that there are several circumstances which tend to corroborate it. There is no dispute but that after her husband had been arrested and was in charge of the deputy United States marshal under a charge preferred by the defendant for fraud in making his final proof, the officer accompanied or took Dringman to his home upon the land. The plaintiff and his wife both testify that while there the officer intimated to her that, unless she signed the deed, her husband would be detained in custody and prosecuted for this offense. It is also shown that the notary, who testifies he took her acknowledgment, took pains to insert in the acknowledgment that she acknowledged the instrument "to be her voluntary act and deed *without coercion* for the purpose therein expressed." It is true that he explains this by saying that he inserted this language because she had refused to acknowledge the deed a few days before when he had gone to her home at defendant's request for the purpose of obtaining her acknowledgment.

The deputy marshal was not called as a witness, nor was his evidence taken by deposition, although the record seems to indicate that he is a resident of this state. The defendant's account of the transaction is that after Dringman had been arrested and brought to Sutherland, which was the nearest town to the farm, Mr. Walling, the deputy marshal, told him that Dringman had requested to be allowed to go and talk with his wife; that the next day, when the marshal came to North Platte without Dringman, he asked him what this meant, and the marshal told him that Mrs. Dringman was a hard-working woman with two little children, dependent upon her husband for support; that she was going up to sign the deed, but thought she ought to have a little money

out of it herself; that "he (the marshal) says: You go and pay her $25 and let her sign the deed, and we will drop this. He says: I will tell you what I will do. I will let them have my actual expenses, and you give me $5, and we will drop this." That he gave him the $5, and went to Sutherland and left the $25 in the bank for Mrs. Dringman. He further testifies that he had no knowledge, either from Dringman or the marshal, that they were going to Mrs. Dringman's home for the purpose of getting her to sign this deed.

The Dringmans remained upon the land for nearly four years after this transaction, Dringman working for the defendant once or twice for several weeks at a time during this period, but defendant finally told them to move off, which they did without resistance.

The view we take as to the testimony of the Dringmans upon other matters in evidence makes us reluctant to set aside the deed upon their testimony alone, and we are of opinion that both parties should have an opportunity to produce such further evidence as may be accessible. The absence of the deputy marshal is a circumstance which may be counted as in their favor. We think the preponderance of the evidence upon this point as it now stands is with the plaintiffs.

It is earnestly contended that the district court was right in holding that the right of action is barred. Plaintiffs contend that the action is one to redeem from a mortgage, and that the ten-year period applies; but the trial court found that the deed was not a mortgage, and, since we agree with this conclusion, that question is not in the case. It may be noted that it is not upon this ground, but upon the ground of fraud and duress, it is found the action is barred. The court evidently was of the opinion that the action to set aside the deed for alleged duress in obtaining the wife's signature, and because it was not acknowledged by her, was an action brought for relief on the ground of fraud, under section 12 of the code, and therefore must be brought within

four years. We think a better classification would be to regard it as an action for an injury to the rights of the plaintiff not arising on contract, which under section 12 of the code may be brought at any time within four years from its accrual; or, perhaps, as one to recover the title or possession of real estate under section 6. Whether it comes within the latter class, we leave undetermined. The decisions in this state are not harmonious as to whether the four-year or the ten-year statute applies in like cases, and a lengthy investigation of the decisions in other states shows that on this point they are irreconcilable.

The action is, in respect to the deed alleged to have been obtained by duress, one to remove a cloud from the title to the property and to quiet the title in the plaintiffs. The rule is "that a statute of limitations should not be applied to cases not clearly within its provisions." 25 Cyc. 990, and cases cited. The act complained of was not, strictly speaking, fraudulent, but it was an injury to the plaintiffs' property rights which did not arise upon contract. The Dringmans remained in possession of the land until driven off by the defendant in May, 1903, when he took possession, and has held it ever since. This action was begun in April, 1907. They might have brought an action to remove the cloud and quiet their title at any time while in possession, because the cloud occasioned by the recording of the deed was a continuing one. *Batty v. City of Hastings,* 63 Neb. 26; *Payne v. Anderson,* 80 Neb. 216. In *Batty v. City of Hastings, supra,* it is said: "Where a plaintiff out of possession brings the statutory action to quiet title, it is undoubtedly true that the statute begins to run from the time when defendant's possession became adverse. * * * A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud re-

mains." A cause of action to set aside the deed accrued as soon as the plaintiffs were dispossessed. This action was brought within four years from the time the defendant took possession of the land and is within the statute, whether we apply the four-year limitation or the ten-year limitation on actions to recover the title or possession of real property.

We think the learned district judge erred in applying a four-year limitation from the time the deed was made or recorded. It may be possible for the defendant to furnish additional evidence with respect to the conversations had by the deputy marshal with Mrs. Dringman when she testifies that she was unduly influenced and coerced. For this reason, the case will be reversed and remanded for further proceedings, instead of rendering a decree upon the facts in evidence.

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

REVERSED.

REESE, C. J., and SEDGWICK, J. We think decree should be entered for plaintiffs in this court.

FRANK DARLING, APPELLANT, V. ZAIDEE M. MCBRIDE ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 15,924.

Injunction: DISSOLUTION: DAMAGES: ATTORNEY'S FEES. The necessary and reasonable expenses for attorney's fees incurred in procuring the dissolution of an injunction wrongfully issued are recoverable as an element of damages. But when the right to an injunction is ancillary, and not the main issue in the case, such damages are limited to the expenses incurred in securing the dissolution, as distinguished from the expenses incurred in the trial of the principal issues involved. *Trester v. Pike*, 60 Neb. 510.

APPEAL from the district court for Boone county: JAMES R. HANNA, JUDGE. *Reversed with directions.*

H. C. Vail, for appellant.

Frank D. Williams, contra.

LETTON, J.

This is an action upon an injunction bond. The bond was given by the defendant in this case in an injunction proceeding which was ancillary to an action for divorce brought by her against plaintiff herein. At the time the action for divorce was begun, plaintiff, who was then the husband of the defendant Zaidee M. Darling, now Zaidee M. McBride, had advertised for sale a large amount of personal property. In her petition for divorce Mrs. Darling alleged that certain specified chattels thus advertised were her individual property, and that other articles were the property of defendant, and that he had withdrawn from deposit in a bank certain money received by him from the sale of property belonging to her. She prayed for a divorce, for alimony, and that the defendant be enjoined from selling any part of the personal property or disposing of the funds until the further order of the court. A temporary order of injunction was issued upon the giving of the bond sued upon in this action. Afterwards it was agreed that the property should be sold at public auction and the proceeds held by one Goodrich subject to the order of the court. A motion was made to vacate the temporary injunction, which was sustained as to a portion of the property, and it was ordered that the proceeds of the remainder remain in the hands of Mr. Goodrich until a hearing was had as to the ownership. Upon the final hearing of the case the court found that the plaintiff was entitled to a divorce, found further that she was entitled to the sum of $250, the proceeds of the sale of certain hogs, allowed her this as alimony, and dissolved the injunction in all other respects. Afterwards

this action was brought upon the bond to recover attorney's fees for services in procuring the dissolution of the injunction, and for damages for depriving the plaintiff of the use of the proceeds of the sale. The court found generally for defendant and dismissed the action.

The testimony shows that the plaintiff paid the sum of $50 to his attorney as a fee for services in obtaining a dissolution of the temporary injunction as to most of the property, and for trying the respective rights of the parties to the remaining property at the final hearing. The plaintiff further testifies that, on account of the injunction tying up his money, he was unable to complete a contract for the purchase of 160 acres of land in Frontier county, and that he lost the use of the proceeds of the sale from February 25 to August 30, 1907; that if he had obtained the land it would have been worth about $700 to him, and that the interest upon the money aside from the land transaction would be worth 10 per cent. The anticipated profits upon his proposed speculation in land cannot be taken as the measure of damages, and under the circumstances we do not feel justified in saying that the plaintiff was entitled to interest upon the proceeds of the sale. The main controversy here is as to the right to recover attorney's fees. On the one hand, the plaintiff asserts that when injunctive relief is granted as ancillary to the main issue in a case, and the defendant moves to dissolve the temporary injunction and expends money for attorney's fees in this behalf, it is recoverable in an action upon the injunction bond if he is successful, while the defendant insists that in such a case such fees are not recoverable. The defendant relies upon the cases of *Cunningham v. Finch,* 63 Neb. 189, *Estate of Barr v. Post,* 4 Neb. (Unof.) 32, and *Leonard v. Capital Ins. Co.,* 101 Ia. 482.

Cunningham v. Finch was a case where the owners of a farm brought an action to enjoin waste. A temporary injunction was issued. A motion to dissolve this was overruled, and upon final trial judgment was rendered finding for the defendants. The defendants then sued and recov-

ered a judgment upon the injunction bond for attorney's fees in defending the action. The district court proceeded upon the theory that the defendants were entitled to recover all the damages and expenses which they had incurred, not limiting the recovery of fees merely to those paid out for dissolving the injunction. This court held this was error, and quoted the opinion in *Trester v. Pike,* 60 Neb. 510, where it is held: "It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees for the trial of a case are proper to be allowed as damages caused by an injunction wrongfully issued"—and the judgment of the district court was reversed.

In *Barr v. Post, supra,* the injunction proceedings were only ancillary to the main action, and the court held, following *Cunningham v. Finch, supra,* and *First Nat. Bank v. Hockett,* 2 Neb. (Unof.) 512, that the recovery of counsel fees for *the trial of a case* will not be allowed as an element of damages for an injunction wrongfully obtained if the injunction proceedings be only ancillary to the main case.

The plaintiff, in support of his contention that in such cases attorney's fees for securing the dissolution of a temporary injunction are proper elements of damage, cites *Jameson v. Bartlett,* 63 Neb. 638, *First Nat. Bank v. Hockett, supra,* and *Trester v. Pike, supra.*

Trester v. Pike was an action in the nature of a creditor's bill to set aside certain transfers of real estate, in which an ancillary restraining order was issued. Upon the final hearing the action was dismissed, the court finding that there was no equity in the bill. In an action upon the injunction bond, damages were recovered for services of the attorney in trying the action. This was held to be error, and the court said, "The necessary and reasonable expenses for attorney's fees expended or incurred in resisting an order of injunction wrongfully issued, or procuring the dissolution thereof, are recoverable as an element of damages. But when the right to an

injunction is not the main issue of the case, such damages are limited to the expenses incurred in securing the dissolution of the injunction, as distinguished from the expenses incurred in the trial of the principal issues involved. *Kittle v. De Lamater,* 7 Neb. 70; *Raymond Bros. v. Green & Co.,* 12 Neb. 215; *Gyger v. Courtney,* 59 Neb. 555; *Mitchell v. Hawley,* 79 Cal. 301; *Newton v. Russell,* 87 N. Y. 527. It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorney's fees for the trial of the case are proper to be allowed as damages caused by an injunction wrongfully issued. 1 Beach, Injunctions, sec. 206; *Andrews v. Glenville Woolen Co.,* 50 N. Y. 282." This case is followed in the *Jameson* case, *supra.* It is therein said: "The rule established by a multitude of decisions is that expenses necessarily incurred in obtaining a dissolution of the injunction may be recovered in an action on the bond, and that reasonable counsel fees are to be regarded as part of such expenses. But it is equally well settled that expenses paid or incurred for professional services in defending the main action are not ordinarily damages which the obligee of the bond has sustained by reason of the injunction."

The distinction between the cases cited by plaintiff and defendant is clear, and they are not inconsistent with each other. The plaintiff is entitled to recover the amount which he expended for attorney's fees in procuring the dissolution of the temporary order of injunction, but not for trying the divorce case. The fee of $50 paid by him is shown to be a reasonable fee for the services rendered. The fact that the injunction was not dissolved as to a small portion of the property in controversy is not material. We think the district court was justified in refusing to allow any other damages.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment for the plaintiff for the sum of $50.

REVERSED.

SEDGWICK, J., dissenting.

The defendants in their answer set out the proceedings in the divorce case in full, and insist that the matters attempted to be litigated in this suit were adjudicated in the divorce suit. This is the entire defense relied upon. The case was tried in the court where the divorce suit was determined. The jury was waived, and the trial court found for the defendants. The majority opinion ignores the real issue tried in the lower court, and treats the case as though it were solely a controversy over the amount of attorney's fees that might be recovered. Some of the courts hold that in an ordinary action in equity upon dissolving an injunction the court should enforce the payment of damages caused by the injunction. This is the rule in the federal courts. *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed. 107. It is the rule in some of the states, in the absence of a statute, and in several of the states it is made the rule by express statute. In England it is discretionary with the court. Whatever the rule may be in ordinary actions in equity, I think there can be no doubt of the correctness of the judgment of the trial court in this case.

In the original petition for divorce, which was upon the ground of cruelty, the property owned by the husband and wife is described in full, and it is alleged that the husband is attempting to dispose of property that belongs to the wife, as well as his own property, so as to prevent the judgment of the court, in regard to the property rights of the parties, being enforced. A temporary injunction was allowed restraining the husband from disposing of the property while the action was pending. Upon the granting of this injunction the bond was given upon which this action was brought. The action was tried by the court upon a stipulation of facts from which it appears that after the injunction had been granted in the divorce suit the parties to that suit entered into a stipulation concerning the property, which included all of the property

affected by the injunction. The stipulation was that all of the property affected by the injunction, except some cattle that were conceded to be the property of the plaintiff in that suit, should be sold at public auction at a specified time and place, and the proceeds thereof placed in the hands of one Goodrich, clerk of the sale, and held by him subject to the order of the district court, "as though the property had not been sold, neither the plaintiff nor the defendant waiving any of their rights in this case." After the property had been sold pursuant to this stipulation, the money being in the hands of Goodrich, a motion was filed to vacate the injunction upon two grounds: First, that the petition does not state facts sufficient to authorize it; and, second, that the facts stated in the petition were untrue. Several weeks afterwards the court made an order dissolving the injunction as to the property of the defendant in that suit, but in the order and as a part of the same order it was recited: "It appearing to the court that the property mentioned in the petition has been sold and that the proceeds of said sale are in the hands of C. C. Goodrich"; and the court thereupon ordered that the said proceeds remain in the hands of Goodrich "until hearing be had by court as to the ownership of same, and as to whom the same may belong." This was in reality not an order dissolving the injunction in any respect. The effect of the order was to continue the injunction as it was originally made until the final trial of the case. The proceeds of all the property were in the hands of Goodrich, as a result of the sale at the time the order was made, and by force of the order remained in his hands until the case was tried. The district court, and as I think rightly, considered that it was its duty to determine all of the property rights of the parties upon the final trial. Immediately after this order was made the defendant in that case filed a motion for an order requiring Mr. Goodrich "to pay Frank Darling, defendant", the proceeds of the sale of his personal property, describing particularly all of the property that

it was claimed belonged to the defendant in that suit. This motion was never passed upon by the court, except as the whole matter was decided in the final decree.

By the final judgment the court gave to the plaintiff Zaidee Darling $250 "from money in the hands of C. C. Goodrich", being a portion of her personal property in lieu of alimony, so that by final decree of the court all of the property of the defendant and a considerable portion of the property claimed by the plaintiff was given to the defendant. The final decree contained these words: "That the injunction heretofore granted herein as to all the other money in the hands of C. C. Goodrich, except the aforesaid sum of $250, is hereby dissolved, set aside and vacated."

It seems to me that there can be no doubt that in this final distribution of the personal property it was the duty of the court to take into consideration all matters arising out of the litigation in that case in favor of one of the parties and against the other, and if the defendant was entitled to attorney's fees for services rendered in the action, such claim must have been taken into consideration by the court in finally adjusting the rights of the parties. The district court so considered it, and rendered, in this action upon the bond, a judgment in favor of the defendants. I do not think that the majority opinion determines or considers the matter adjudicated by the district court, and I think that it follows from the foregoing considerations that the judgment of the district court in this case is correct and should be affirmed.

FAWCETT, J., concurs in this dissent.

REESE, C. J., concurring in part in dissent by SEDGWICK, J.

I believe the judgment of the district court should be affirmed, but am not certain that I fully agree with Judge SEDGWICK in all his conclusions. I am persuaded that the stipulation of the parties placing the money realized

from the sale in the hands of Mr. Goodrich was, in effect, a final disposition of the whole injunction matter. The money was never in the possession of Mr. Goodrich by virtue of the injunction, but by reason of the mutual agreement of the parties to the suit. This stipulation had the double effect of both recognizing the validity of, and at the same time dissolving, the injunction—taking the matter out of the hands of the court, so far as the retention and custody of the fund was concerned, and the assumption of the full control thereof by the parties. The stipulation of facts upon which this case was tried recites: "In pursuance of said stipulation the property was sold and the proceeds thereof were placed in the hands of C. C. Goodrich and held by him as provided in said stipulation." As the stipulation referred to included all that was bound by the injunction, the office and powers of the injunction were at an end. I think the record shows beyond doubt that the injunction was not wrongfully issued, and that a reasonable construction of the record sustains this view. As said in the majority opinion: "Upon the final hearing of the case the court found that the plaintiff was entitled to a divorce, found further that she was entitled to the sum of $250, the proceeds of the sale of certain hogs, allowed her this as alimony, and dissolved the injunction in all other respects." While it is true, as I have said, that by the stipulation the power of the injunction was at an end, and the sale was allowed to proceed, yet, by the stipulation the money in the hands of Goodrich was still, but by virtue of the stipulation, within the jurisdiction and subject to the control of the court. If we say the order of the court distributing the money was by virtue of the injunction, which it was not, yet we would have to hold that the injunction was rightfully issued in so far as the allowance made to the wife from the fund was concerned. The dissolution of the injunction was more of form than substance. It had served its purpose, the case was disposed of on its merits, and the proceedings were at an end. The fund had been held

subject to distribution upon the entry of the final decree. This was done, and the injunction had long before spent its force in holding the interest of the wife in the property until the entry of the stipulation.

IN RE ESTATE OF WILLIAM ROBERTSON.

E. L. HOLYOKE, EXECUTOR, APPELLANT, V. JOHN S. BISHOP, GUARDIAN AD LITEM, ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 15,977.

1. **Homestead**: COUNTY COURT: JURISDICTION. The county court has jurisdiction to appoint appraisers and to set aside a homestead to a widow. *Guthman v. Guthman*, 18 Neb. 98.
2. ———: RIGHTS OF SURVIVING SPOUSE. Where a woman, while living with her husband and children upon certain real estate as the family homestead, became insane, and remained in that condition until after her husband's death, her husband had no power to divest her of her interest in the homestead, by will.
3. ———: RIGHTS OF EXECUTOR. An executor is not entitled to the possession of a homestead as against a surviving spouse.
4. **Guardian ad Litem**: POWERS. A guardian *ad litem* is a special guardian appointed solely for the purpose of carrying on litigation and preserving the interests of his ward in matters pending before the courts. He has no right to the possession of the real property of his ward or to the rents and profits therefrom.

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

Samuel J. Tuttle and *Talbot & Allen*, for appellant.

John S. Bishop and *A. S. Tibbets, contra.*

LETTON, J.

William Robertson died testate in 1904. His will devised a certain lot in Lincoln to his wife. Before her

husband's death Mrs. Robertson was adjudged to be insane; she is still in that condition, and is an inmate of the state insane hospital. John S. Bishop was appointed guardian *ad litem* of the widow by the county court. He filed an application in that court praying that he might be directed to elect on behalf of the widow whether to receive this provision of the will or to have assigned to her her dower interest in the real estate and the provisions made for her by statute. On a hearing the court found that the widow was insane and incompetent to elect for herself, and ordered the guardian *ad litem* to elect on her behalf whether to accept or renounce the provisions of the will. He reported that the real estate left the widow by the will was not owned by the testator at the time of his death, and elected for her to renounce the provisions of the will and to be endowed of the lands of her husband. He afterwards filed a petition setting forth the marriage, the birth of children, and the names and residence of the heirs; that while the family were living on lots 8 and 9 in block 164, original plat of the city of Lincoln, as a homestead, the wife became insane, and that the deceased at the time of his death owned the homestead, an interest in certain lands in Lancaster county, Nebraska, and in the state of Florida; and the widow's right to dower has not been disputed. He prays that the court will assign to the widow her life estate in the homestead not exceeding in amount two lots, or in value $2,000. and further prays for the assignment of dower. After due notice a hearing was had upon this petition, and three appraisers appointed, who, after taking oath and appraising the property, valued the same at less than $2,000, and set the same apart as a homestead. The executor appeared and objected to the report, setting out that the homestead was worth more than $2,000; was not occupied as a homestead by the widow at the time of testator's death; because it leaves nothing for the minor heirs as contemplated by the will; and upon other grounds unnecessary to mention.

After a hearing the court found for the petitioner and confirmed the proceedings. It ordered that the widow have possession of the homestead during her natural life, and that the three minor heirs of William Robertson share with her in the rents, issues and profits of the homestead during their minority. It was also adjudged that the minors should receive the sum of $10 a month from the rents, issues and profits of the homestead for their maintenance until further order. An appeal was taken from these orders to the district court. In the district court, upon the same issues, the objections of the executor were overruled, the order of the county court confirming the report of the appraisers and setting apart the homestead to the widow was affirmed, the order giving to the minor heirs a share in the rents, issues and profits of the homestead was reversed, and it was ordered that the guardian *ad litem* have the possession of the property as the homestead of the widow. From this judgment the executor has appealed.

The case was tried in the district court upon documentary evidence and a stipulation of facts. The stipulation of facts is too lengthy to set forth in full; but, in substance, it states that when the widow was adjudged insane she and her husband occupied the premises as a homestead with their children, eight in number, all of whom are now of age; that she is now 64 years of age; that after she was adjudged insane the deceased lived on the premises with one Florence Conway, and by her had three children, Benjamin, Florence, and Ruth, who are the minors adjudged to be entitled to a share of the rents from the homestead, and who were born there; that after Robertson's death these children were placed in the home for the friendless at Toledo, Ohio, where they now are; that the widow's absence from the property was occasioned by her insanity and her being placed in the hospital for the insane at Lincoln; and that the three minor children never lived with her. A copy of the will is in the record, which shows that three-fourths of the real estate of the

deceased was bequeathed to these minor children, and in a certain contingency the whole of it. In the will they are recognized as the children of the deceased and spoken of as "my minor children."

A number of objections were raised at the hearing to the jurisdiction of the county court and the district court, and to some matters of practice. We believe it unnecessary to consider these points, since the prior decisions of this court have practically settled the matter in controversy. In *Guthman v. Guthman,* 18 Neb. 98, it was held that the county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and the settlement of estates. In *Cooley v. Jansen,* 54 Neb. 33, it is held that "the right of an administrator to possession of the real estate of which his decedent died seized arises from its being subject to payment of debts of the decedent and is not of force relative to a homestead." In that case the facts were that the widow and children executed a lease of the homestead and their lessee had again sublet it. The administrator took possession, leased the land, and instituted injunction proceedings to restrain the sublessee of the widow and heirs from interfering with the possession and occupancy of his tenant. In the opinion it is said: "The land in suit descended to the wife and heirs shorn of any liability for the debts of the deceased, and the administrator had no right of possession or other right thereto or therein, and could not make an effective lease of it; hence could not maintain this suit."

In the case at bar, upon Robertson's death the homestead, not exceeding two lots in extent or $2,000 in value, vested at once "in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." Ann. St. 1907, sec. 6291; *Schuyler v. Hanna,* 31 Neb. 307; *Finders v. Bodle,* 58 Neb. 57; *Hobson v. Huxtable,* 79 Neb. 340. He could not take this right away from her by will without her consent. *Na-*

tional Bank of Commerce v. Chamberlain, 72 Neb. 469. Her insanity could make no difference. *Weatherington v. Smith*, 77 Neb. 363. The minor heirs, either as devisees in the will or as legitimatized children, were not entitled to participate with the widow in the possession of, or in the rents and profits arising from, the homestead. They were not members of her family, and had no possessory interest in the property until her death. The executor has shown no title to or right or interest in the premises, and the widow alone is entitled to possession of the same during her natural life. *Tindall v. Peterson*, 71 Neb. 160; *Brandon v. Jensen*, 74 Neb. 569; *In re Hadsall*, 82 Neb. 587; *Durland v. Seiler*, 27 Neb. 33. Whether the court itself, as appellant insists, or the guardian *ad litem*, as he contends, is entitled to elect is not material. The county court properly set apart the homestead to the widow, but erred in requiring a portion of the income from the same to be paid to the minor children. The district court properly reversed this part of the decree, but the judgment of that court was erroneous in that it ordered the possession of the real estate to be given to a guardian *ad litem*. A guardian *ad litem* is a special guardian appointed solely for the purpose of carrying on litigation and preserving the interests of his ward in matters pending before the courts. He has no right to the possession of the real property of his ward or to the rents and profits therefrom. He gives no bond and has only special duties. For the purpose of taking care of the estate a general guardian should be appointed.

The judgment of the district court is therefore affirmed in all respects, save as to awarding the possession of the property to the guardian *ad litem*, and the cause is remanded, with directions to modify the judgment in accordance with this opinion. Costs taxed to appellant.

JUDGMENT ACCORDINGLY.

FAWCETT, J., not sitting.

A. H. WINDER, APPELLANT, V. MARY J. WINDER, APPELLEE.

FILED APRIL 9, 1910. No. 15,979.

1. **Judgment:** VACATING DURING TERM. The district court has power to set aside a judgment or decree during the term at which it was rendered, if satisfied that it has been procured by fraud or collusion, or if it believes that its former conclusion was erroneous.

2. ———: ———: PRESUMPTIONS. On the 15th day of May a written order was filed adjourning the district court for Madison county from May 18, 1908, which was the day at which the May term had at the beginning of the year been designated to begin, to May 20 at 1 o'clock P. M., and on that day a written order signed by the judge was made adjourning the May term from May 20 to May 21. On May 20 a hearing was had upon a motion to vacate a decree of divorce rendered during the February term. Since the record does not indicate the hour of the proceedings, regularity must be presumed, and the hearing and order will be held to have been had and made during the February term as the record recites.

3. **Divorce:** COLLUSION: VACATING DECREE. Where parties to a divorce proceeding agree that material evidence shall be suppressed, and that the actual facts in the case shall be concealed from the court for the purpose of procuring a decree which would not otherwise be granted to the complainant, such action is collusive in nature, and a court is warranted in setting aside a decree thus procured.

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

Mapes & Hazen, for appellant.

John W. Cooper, contra.

LETTON, J.

In January, 1908, the plaintiff began an action for divorce against his wife in the district court for Madison county. On February 10, 1908, a decree was entered in favor of the plaintiff granting an absolute divorce. On April 6, 1908, a motion to set aside the decree was filed

by the defendant, accompanied by an affidavit in support of the motion. Notice was served on April 20 that on May 18, 1908, the defendant would call the motion to vacate the decree for hearing. Objections were filed to the vacation of the decree, and the defendant filed a supplemental answer to the petition. The record recites that on the 20th day of May, 1908, "the same being a judicial day of the February, 1908, term of the district court holden within and for Madison county, Nebraska," the motion was argued and submitted to the court, and the court overruled the same. The record then recites that, it further appearing to the court from the evidence introduced on the hearing of the motion that the petition in this case was filed by collusion between plaintiff and the defendant, it was ordered by the court on its own motion that the decree of divorce and judgment for alimony is hereby set aside, and that the cause be dismissed at the cost of plaintiff. From this order the plaintiff appeals.

The certificate of the clerk of the district court recites that the February, 1908, term of the district court was begun on the 10th day of February, 1908, and adjourned from day to day and from time to time until the 20th day of May, 1908, when said term of court was adjourned *sine die;* and that the May, A. D., 1908, term was begun on the 21st day of May, 1908.

The appellant contends that the court had no jurisdiction to set aside the decree, for the reason that the term of court at which it was rendered had passed. The record shows that at the beginning of the year 1908, in conformity with the requirements of the statute, the district judge designated February 10, 1908, as the day upon which the February term of the district court for Madison county should begin, and May 18, 1908, as the time at which the May term should begin. On the 15th day of May there was filed with the clerk of the district court a written order dated at Wayne, Nebraska, and signed by the judge, adjourning the court from May 18, 1908, to May 20, 1908, at 1 o'clock P. M., and on the 20th day of

May a written order signed by the judge was entered adjourning the May, 1908, term of the district court from May 20, 1908, to May 21, 1908. The motion to open and vacate the decree of divorce was filed in April during the February term of court. Before the hearing, by written order as provided by section 4741 Ann. St. 1909, the May term was adjourned from May 18 to May 20, at 1 o'clock P. M. This was within the power of the court, and will be presumed to have been done upon sufficient reason. *Parrott v. Wolcott,* 75 Neb. 530; *Russell v. State,* 77 Neb. 519.

The court entered upon the hearing of this motion upon the 20th of May. On that day the May term was again adjourned by written order until the 21st. The record does not indicate the hour at which the hearing began, and, in the absence of proof, regularity must be presumed. The judgment in this case, if made before 1 o'clock P. M. on May 20, was made before the time to which the first order adjourned the May term; if made after 1 o'clock, we must presume it was made after the second order adjourning the term until the 21st. In either event, it was made before the May term began, and must have been made, as the record recites, on a day of the February term. This being the case, the court had power to set aside the decree during the term, if satisfied that it had been obtained by fraud or collusion; or if it believed that its former conclusion was erroneous. *Bradley v. Slater,* 55 Neb. 334; *Colby v. Maw,* 1 Neb. (Unof.) 478.

Does the evidence justify the finding of the district court that the decree had been obtained by collusion. The plaintiff and his wife were married in 1891. Four children, the oldest being 14 years of age and the youngest 2 years old at the time of the divorce, were the fruit of their union. The family had resided in Norfolk, Nebraska, for over ten years, when in April, 1905, Mr. Winder purchased a house in Boulder, Colorado, and occupied the same with

his wife and family from that time until September or October, 1907. His occupation was that of traveling salesman, although he owned an interest in an incorporated boot and shoe business in Norfolk. After the family moved to Colorado Winder continued to spend a large part of his time in Norfolk, and to vote there, and was interested in the business the same as before. When in town he occupied a room in the house in which the family had formerly lived, and into which house one Haley and his wife, Laura S. Haley, had moved.

In September, 1907, he filed a petition for divorce against the defendant in the district court in Denver, Colorado, alleging extreme cruelty. An answer was filed to this petition, and application made for suit money, alimony, and counsel fees, but before a hearing was had, on the 11th day of October, 1907, he dismissed the case. In the latter part of December, 1908, Mrs. Winder consulted Mr. Tyler, an attorney at Madison, Nebraska, with a view to beginning an action for separate maintenance. In a casual conversation between Mr. Mapes, the plaintiff's attorney, and Mr. Tyler in December, 1907, it was disclosed that Mr. Winder had recently consulted Mapes as to a divorce, and that Mrs. Winder had consulted Tyler. This led to a number of conferences between the attorneys and consultation by them with their clients with reference to the matter of alimony, the custody of the children, and the distribution of the property, and, as Mr. Tyler testifies, "It was later arranged and understood that Mr. Winder should make application for divorce, we insisting on terms as to alimony and the disposition of the property and maintenance and education of the children." After an understanding was reached as to these matters and the same had been explained to Mrs. Winder by her counsel, a petition was filed on January 16, 1907, containing substantially the allegations of the Denver petition as to extreme cruelty. A summons was issued, service accepted by Mrs. Winder, and a general denial filed on the same day, which was February 10, the first day of

the February term of the district court. A hearing was immediately had, Winder and one Reid testifying, and the divorce was granted and alimony and custody of the children decreed as had been agreed upon by the parties. Mrs. Winder was present in Madison, but did not attend the trial.

We cannot in the limits of this opinion relate all the facts disclosed by the record. In a lengthy affidavit Mrs. Winder says, among other things, that at this time and for a long time previously she had been in poor health, weak, nervous, and easily influenced; that Winder always had a very strong influence over her, and that by reason of this influence he persuaded her to refrain from making any defense to his petition for divorce. A letter is in evidence from Mrs. Winder to Mr. Tyler, dated January 16, the day the petition was filed, asking with reference to the security agreed upon, and in this letter she states: "Please to not mention to Mr. Mapes that my father said this, as I promised Mr. Winder I would not tell him." In another letter written to her children in Chicago she says: "Now, I am going to give your father a divorce, and he is to support you children," etc. Mrs. Winder's affidavit further states that the decree was obtained through fraud and deception practiced upon the court and the affiant; that the grounds alleged were false and untrue; that it was procured by false and perjured testimony; that, instead of she being cruel to the plaintiff, he had been for a long time guilty of extreme cruelty toward her. She sets forth a number of specific acts constituting, if true, such extreme cruelty as to warrant a decree of divorce to her instead of to her husband, as well as a general charge of improper conduct with Mrs. Haley. She states that after he began to room at the house of Mrs. Haley he systematically schemed to annoy, harass, and torment her, and insisted and urged upon her that she should seek and obtain a divorce and separation; that while in Colorado he repeatedly urged her to obtain a divorce there, and that upon her refusal to do so he began

the divorce suit in Colorado; that after she came back to Nebraska the plaintiff, knowing her ignorance and inexperience and her frail mental and physical condition, urged and persuaded her to permit him to obtain the decree of divorce in this case without making any resistance; that she did not understand the import of the divorce proceedings, had not heard or read the petition until after the decree, and that she did not understand her rights or she would have been present at the hearing and heard in her own defense. An affidavit also appears of a physician in Chicago to the effect that from November 12 to December 13, 1907 he treated her professionally; that she was in such a nervous and physical condition that she was susceptible of being easily influenced, and that in his opinion this condition has existed for several years.

Winder testifies that early in December he saw Mrs. Winder in Norfolk just before he spoke to Mr. Mapes about the matter. He denies that he tried to induce her to allow him to get a divorce, or that he saw her again until after the decree. He testifies that he has paid her $300 and taken care of the three children in Chicago, and denies the specific allegations of cruelty in Mrs. Winder's affidavit. He denies that he ever suggested divorce, and says that she suggested it several times. He testifies that after Mrs. Winder had an operation performed in a Denver hospital in the fall of 1907 he told her he would give her $75 a month out of the store—"Take this $75 and spend it on yourself, and let me and my business alone, and don't bother me any more, and when you get ready for a divorce you can get it." It is also shown that on March 24, six weeks after the rendition of the decree, Mrs. Haley, who in the meantime had procured a divorce from her husband, and Winder were married at Superior, Wisconsin.

It is our opinion from the evidence that Mrs. Winder's property rights were amply protected by her counsel, and that in the adjustment of the property and custody of the

children Mr. Tyler acted with a proper regard to the interests of his client, and obtained a settlement in all probability more advantageous to her, considering the extent of Mr. Winder's estate, than she would have received at the hands of the court, if she had succeeded in an action for separate maintenance. We are also convinced that her rights were fully explained to her by Mr. Tyler and that she was in nowise deceived or misled by him. The correspondence in evidence between her and her attorney does not tend to substantiate, but rather contradicts, the statements in her affidavit as to her weak mental condition at the time. A reasonable conclusion would seem to be that Winder was infatuated with Mrs. Haley, and desired a divorce so that he could marry her; that he endeavored to get rid of Mrs. Winder by the divorce proceedings in Colorado, but, not succeeding as easily as he had anticipated, he took up the attempt again in Nebraska; that, when he discovered through his attorney that Mrs. Winder desired a separation, he attempted to buy his peace by surrendering a large portion of his property; that Mrs. Winder agreed to the plan and was cognizant of the proceedings. All this was concealed from the district judge, and, when it became apparent to him through evidence taken on the motion to set aside the decree, he naturally and properly felt that the court had been deceived and imposed upon, and that he would not have rendered such a decree had all the facts in the case been produced in evidence before him at the time. We are of opinion that he was justified in finding as he did. There can be no doubt but that where parties to a divorce proceeding agree that material evidence shall be suppressed, and that the actual facts in the case shall be concealed from the court for the purpose of procuring a decree which would not otherwise be granted to the complainant, such action is collusive in nature, and a court is warranted in setting aside a decree thus procured. 2 Bishop, Marriage, Divorce and Separation, sec. 697-701; *Beard v. Beard,* 65 Cal. 354, 4 Pac. 229; 14 Cyc. p. 647,

subd. 3*c*, and cases cited in note. Section 5331, Ann. St. 1909, provides: "No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent." This statute has been rigidly enforced whenever its provisions have been involved. *Wilde v. Wilde*, 37 Neb. 891; *Cummins v. Cummins*, 47 Neb. 872; *Davis v. Hinman*, 73 Neb. 850. Proper regard for the dignity and respect due to the court requires that it should emphatically frown upon such agreements. This is more especially so in divorce cases, where the public constitutes a third party. The preservation of the family, upon which our whole social fabric rests, and the welfare of innocent children require that the bonds of matrimony shall not be set aside by an agreement between the parties.

If, when the true facts are disclosed, the court is satisfied that it was deceived and misled in rendering the decree, it has full power to set the same aside at the same term of court, and under certain conditions, even at a subsequent term. *Wisdom v. Wisdom*, 24 Neb. 551; *Olmstead v. Olmstead*, 41 Minn. 297; *Bomsta v. Johnson*, 38 Minn. 230.

We have little reluctance because of the new marriage. Apparently Mrs. Haley and Winder were *in pari delicto*, and neither party is entitled to particular favor or protection from the court.

The district court was justified in setting aside the decree, dismissing the case, and leaving the parties where it found them. Its judgment, therefore, is

AFFIRMED.

BARNES, J., not sitting.

FRANK TRISKA ET AL., APPELLANTS, V. THEODORE H. MILLER ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 15,814.

1. **Judgment: RES JUDICATA.** A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. *Slater v. Skirving*, 51 Neb. 108.

2. ———: ———. A fact or right in issue determined specifically or generally by the decree of the court cannot be again litigated by the parties to that suit, over the winning party's objections, without a modification or vacation of that decree.

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

Bartos & Bartos, for appellants.

Ralph D. Brown, Glenn N. Venrick, Hastings & Ireland and *J. H. Grimm & Son, contra.*

ROOT, J.

This is an action in equity to cancel certain conveyances, judgments and proceedings, for an accounting, and to quiet in the plaintiffs title to a tract of land. The defendants prevailed, and the plaintiffs appeal.

The plaintiffs are husband and wife and natives of Bohemia. January 21, 1897, the plaintiff Frank Triska owned the land in controversy, and it was encumbered by six mortgages given to secure his debts aggregating about $8,000. The defendant Miller at that time was a second mortgagee. Triska's creditors were pressing him for payment, and on the day last named he conveyed all of said real estate to Mr. Archibald S. Sands, an attorney at law and son of Robert Sands, a mortgagee. At the same time Triska gave Sands a mortgage upon certain chattels.

Sands, in consideration of said deed and mortgage, gave Triska credit for $80 on the note payable to Robert Sands, and February 1 executed a lease to Triska for 80 acres of said land for one year. January 29, 1897, Sands conveyed 160 acres of said land to Mrs. Porter, his stenographer, and the succeeding day she and her husband conveyed the real estate to Frank J. Hayek. The same day Sands conveyed the remaining 80 acres to Hayek. February 1, 1897, the defendant Miller commenced an action in the district court to foreclose his mortgage. He did not make the senior mortgagees parties, but did implead, and caused process to be served upon, the Triskas and the junior lienors, including the Blue Valley Bank. The Triskas made default, but the junior mortgagees filed separate answers and cross-petitions. May 11, 1897, the district court entered a decree finding the amount due from the Triskas to the mortgagees, and foreclosed their mortgages. The land was sold in the spring of 1898 at sheriff's sale, and was purchased by Miller, subject to the first mortgages, for a little less than the amount of his lien and the costs of the foreclosure. Counsel, in the name of Triska, objected to confirmation, and thereafter appealed to this court from an adverse ruling on said objections. Triska testifies that he did not authorize the attorneys to represent him, but he executed and filed a bond to supersede the order of confirmation pending his appeal to this court. The appeal was dismissed in 1902. In the meantime the plaintiffs occupied the 80 acres leased to Frank Triska by Sands. Sands and Miller testify that Triska leased the 80 acres from Miller for 1898, and the proof is unquestioned that subsequently, until this case was tried, Frank Triska, Jr., leased the land from Miller, but his father and mother, the plaintiffs herein, have at all times occupied said 80 acres, which constituted the family homestead. The plaintiff Frank Triska denies ever signing a lease for any of the farm or renting any part thereof from Mr. Miller.

July 15, 1898, Hayek conveyed said land to the defend-

ant Miller, and on August 5, 1898, Archibald S. Sands, also conveyed said real estate to Miller. The expressed consideration in the deed made by Sands to Mrs. Porter is $5,000. The proof indicates the consideration was a credit for an undisclosed amount on an account between Sands and Mrs. Porter's husband. The consideration in the deeds to and from Hayek and from Sands was nominal.

April 24, 1900, for a sufficient and valuable consideration, the defendant Miller conveyed 80 acres of said land to the defendant Wynand, and another 80-acre tract to the defendant Kaura. June 2, 1900, the plaintiffs herein commenced an action in equity in the district court against Miller, Archibald S. Sands, Joseph Kaura and John Wynand, and their respective spouses, all of whom are defendants herein. In that suit the Triskas allege that Miller and Sands conspired to secure title to said land by fraud; that, in pursuance of said conspiracy, Sands for himself and for Miller agreed with the Triskas that, if they would convey said land to Sands, he would hold it for their benefit, apply the profits derived therefrom upon the liens, secure extensions of the mortgages as they became due, and at the end of five years, if not sooner, reconvey said real estate to the Triskas; that Sands agreed to reduce his contract to writing if they would sign a deed; that Sands induced them not to defend the Miller foreclosure by stating that he would protect their interest therein; that they signed all documents presented to them by Sands, but without any knowledge of the contents of such papers, and in all things they relied upon Sands. They further charged that Sands failed to carry out his contract, but conveyed the land without consideration, and that all persons dealing with said title had knowledge and notice of their interest therein. They prayed for an accounting, for a cancelation of the various conveyances affecting their title to said land, and for equitable relief. The defendant Miller answered the petition, denied all allegations of fraud, and pleaded the foreclosure proceed-

ings in bar. The Triskas by way of replication denied the authority of any attorney to represent them in the foreclosure suit, and charged that whatever documents were signed by them in that suit were executed upon the false and fraudulent representations of Miller and his counsel that thereby the Triskas would be protected against the machinations of Sands.

December 15, 1900, the district court, upon the evidence, found generally in favor of the defendants and dismissed the plaintiffs' petition. An appeal was prosecuted to this court, and the decree of the district court affirmed October 9, 1902. *Triska v. Miller,* 3 Neb. (Unof.) 463.

February 17, 1906, Theodore H. Miller, one of the defendants herein, prosecuted an action in ejectment in the district court against the plaintiffs herein and their son to recover possession of the 80 acres of said land to which Miller retained title. In that suit the Triskas pleaded that the foreclosure proceedings were null and void, because the district judge before whom said cause was tried was a stockholder in and a director of the Blue Valley Bank, and therefore disqualified from making any orders in said action. Miller replied that said judge, although a stockholder in and a director of the said bank, was not interested in the event of said suit, and also pleaded in bar the decree in the suit in equity theretofore prosecuted by the Triskas. Some other facts were pleaded by way of estoppel. March 24, 1906, the district court found in Miller's favor, and awarded him a writ of ouster. The Triskas thereupon appealed to this court, and at the January term, 1907, the judgment of the district court was affirmed, without an examination of the merits, because the appellants had failed to brief their case.

In the instant case the proceedings and judgments in the foreclosure suit, in the action in equity and in the ejectment action, are pleaded in bar to the plaintiffs' petition. The court heard evidence upon the merits, as well as upon the pleas in bar. The finding is general in favor of the defendants, so that the record does not disclose

whether the decree is based upon the merits or upon the judgments referred to, but if the evidence sustains any defense pleaded the decree should be affirmed.

The plaintiffs assert that the aforementioned judgments will not defeat the instant suit because the disqualification of the district judge was not in issue or determined in any of said actions, whereas "in the present suit the disqualification of the trial judge is the chief ground on which relief is asked." Counsel present an exhaustive and well-reasoned brief upon the subject of the alleged disqualification of the district judge, but we do not think it is necessary to determine that point. Before the action to foreclose the mortgages was commenced the plaintiffs had conveyed their equity of redemption in the land in controversy to Sands. That title is now vested in Miller and his grantees. Conceding, for the sake of the argument, that every order made in the foreclosure proceedings was absolutely void, and we do not so decide, still, if the conveyance to Sands is valid, the judgment appealed from must be affirmed.

Counsel assail with great vigor the transaction culminating in said conveyance and the subsequent conveyances whereby Miller received the Sands title. We shall not follow that argument because it comes too late. The judgment entered December 15, 1900, in the suit of *Triska v. Miller,* has closed the door to inquiry into that subject. The substance of the issue litigated in that case was the alleged fraud of Miller and Sands and the validity of the title conveyed by the foreclosure proceedings. The plaintiffs' claim in the instant case is identical with that advanced by them in the former one, and the parties are the same. In the former suit the judgment was upon the merits, and it constitutes an absolute bar to this action. *Slater v. Skirving,* 51 Neb. 108; *Lowe v. Prospect Hill Cemetery Ass'n,* 75 Neb. 85; *Martin v. Roney,* 41 Ohio St. 141; *Cromwell v. County of Sac,* 94 U. S. 351. No one should be twice vexed for the same cause of action, and the principle of *res judicata* includes not only the things

determined in the former suit, but also any other matter properly involved, which might have been raised and determined therein. *Slater v. Skirving, supra; State v. Broatch,* 68 Neb. 687; *Stockton v. Ford,* 18 How. (U. S.) 418; *Rogers v. Higgins,* 57 Ill. 244; *Des Moines & Ft. D. R. Co. v. Bullard,* 89 Ia. 749; 2 Black, Judgments (2d ed.) sec. 731.

In reply to Miller's defense in the former suit that the foreclosure proceedings conveyed the Triskas' equity of redemption, they could have replied that said proceedings were void if such is the fact, and, having failed to do so, are now estopped to make that defense to avoid the force of that judgment. From whatever angle we view the judgment rendered in the former suit prosecuted by the Triskas, it must be held a bar to the present action. Whether the judgment is based upon a denial of the Triskas' contention that the deed to Sands was not absolute, but was obtained by fraud, or is supported by a finding that the Triskas' title was deraigned by the Miller foreclosure, the instant case must fail. The court must have decided one or both of those defenses because none other was presented in the answer.

The plaintiffs assert they did not know, until after the termination of their former action, that the judge presiding in the foreclosure proceedings was disqualified, but there is no proof before us of that fact, if it exists. That defense was known and pleaded in the ejectment suit, and determined in Miller's favor. Whether that decision is sound or otherwise, it adjudicates that claim of right adverse to the plaintiffs, and cannot be successfully controverted in this action. *Hanson v. Hanson,* 64 Neb. 506.

The judgment of the district court is right, and is

AFFIRMED.

H. J. BACKES, APPELLANT, V. NEILS MADSEN, APPELLEE.

FILED APRIL 9, 1910. No. 15,966.

Appeal: EVIDENCE. Where conflicting evidence has been fairly submitted to a jury in an action at law, the verdict will not be set aside as contrary to the evidence, if there is sufficient evidence to sustain it, even though this court upon a consideration of all of the evidence might have reached a different conclusion.

APPEAL from the district court for Greely county: JAMES R. HANNA, JUDGE. *Affirmed.*

Sullivan, Reeder & Lightner, T. J. Howard and *R. P. Drake,* for appellant.

J. R. Swain and *J. E. Kavanaugh, contra.*

ROOT, J.

This is an action for the contract price of fruit trees which plaintiff alleges he sold and delivered to the defendant. The defendant prevailed, and the plaintiff appeals.

1. The jury were instructed: "You are instructed you will consider solely the one question of whether or not the defendant, Madsen, accepted or made use of the trees, or any portion thereof, mentioned in the contract attached to plaintiff's petition, after they were left at his place by the plaintiff in October of 1906. If he did so accept, or at any time thereafter exercise dominion or control over said trees, or any portion thereof, by covering them up for protection during the winter, or in any manner treating them as his own, then your finding and verdict should be for the plaintiff; but, if he did not make use of any of said trees, or exercise any dominion or control over them, then your finding and verdict should be for the defendant." This instruction substantially follows instruction numbered 4, requested by the plaintiff. The plaintiff insists that the verdict is not supported by sufficient evidence and

is contrary to said instruction. The evidence discloses that the defendant sought to countermand his order and rescind his contract, but the plaintiff refused to acknowledge the defendant's right so to do, and on a Sunday in October, 1906, deposited the trees referred to on the defendant's private roadway within about 20 feet of the latter's house, although the defendant refused to accept the trees, and stated that he would not transact any business on Sunday. The succeeding day the defendant went to the plaintiff's place of business, tendered the contract price, and demanded the trees, but plaintiff's agent insisted that they had been delivered, and ordered the defendant to leave the premises. Trees, evidently the ones left at the defendant's place on Sunday, were noticed by witnesses shortly thereafter in a neighbor's cornfield about 50 yards from the defendant's house. Thereafter the trees disappeared. Madsen's daughter, 15 years of age, took some of the trees from the cornfield and gave them to Mrs. Howels, a neighbor, but the testimony is undisputed that she did so voluntarily, without her parents' knowledge. The plaintiff and some of his witnesses testified that the following season they found some of the trees planted at different points upon the defendant's farm, and exhibited four labels taken by them from the trees to corroborate their testimony. The testimony of these witnesses is denied or explained by the testimony of the defendant and that of his family, corroborated in some particulars by the testimony of disinterested witnesses. Upon rebuttal the plaintiff called two witnesses who testified they saw Madsen's minor sons take the trees out of the cornfield and place them in trenches in Madsen's garden, where the trees remained until the following spring.

The plaintiff's counsel assert that this testimony is uncontradicted, and demonstrates that the verdict does not respond to the evidence, but is the creature of passion and prejudice. The testimony should have been produced in chief. Whether the defendant and his witnesses were present at the time Mrs. Jones and her son testified, the record

does not disclose, but it may be presumed they were. It is true that the defendant did not testify in surrebuttal, but his testimony in chief is emphatic and direct that none of the trees in question were, to his knowledge or with his consent, planted upon his farm, and that he had not touched the trees, and directed his children not to handle them. Mrs. Madsen and her children also testified that none of the trees were planted upon the defendant's farm, so that the testimony of the witnesses given in rebuttal is in effect, if not in terms, contradicted by the defendant's testimony and that of his witnesses. We do not say we would hold upon the record, if we were to try the case anew, that the preponderance of the evidence is with the defendant, but we are not vested by the constitution or the statute with the power to ignore the verdict of a jury in an action at law, and retry the questions of fact involved, without reference to the jury's finding. In so far as the evidence conflicts, it is a question of the credibility of the witnesses, and that question is for the jury to determine. If the jury believed the defendant and his witnesses, the verdict is supported by the evidence. *Nichols & Shepard Co. v. Steinkraus,* 83 Neb. 1; *Crocker v. Steidl,* 82 Neb. 850.

2. Instructions numbered 6, 8 and 9, given by the court, are criticised, but we think the plaintiff has no substantial ground for his complaint. These instructions deal with some particularity with a description of the acts, which, if committed by the defendant or the members of his family, would, in the judgment of the court, have constituted an acceptance of the trees.

Upon the entire record, we find no reversible error, and the judgment of the district court, therefore, is

AFFIRMED.

FRANK E. PATTERSON, APPELLEE, V. CASPER MIKKELSON, APPELLANT.

FILED APRIL 9, 1910. No. 15,969.

1. **Contracts:** EVIDENCE. Uncontradicted evidence, to the effect that an unusual and unreasonable contract was made, should not ordinarily be rejected, but, if the evidence upon this point is so conflicting that the truth cannot be clearly perceived, the unreasonableness or absurdity of the alleged contract may be a controlling factor in determining its existence.

2. **Vendor and Purchaser:** RESCISSION: EVIDENCE. The evidence in this case examined in the opinion, and *held* insufficient to sustain the judgment of the district court.

3. ———: LAND CONTRACTS: STRICT FORECLOSURE. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. An application of that character is addressed to the sound legal discretion of the court, and should be granted where it would be inequitable to refuse it, but in doing so the court should give the party in default a reasonable time to avoid the bar of foreclosure by performing the contract.

APPEAL from the district court for Seward county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

Norval Bros., for appellant.

J. J. Thomas, J. D. Purinton and *Edwin Vail, contra.*

ROOT, J.

This action is prosecuted by the vendee in an executory contract for the sale of real estate to cancel said contract and recover money paid thereon. The plaintiff prevailed, and the defendant appeals.

The plaintiff, among other things, in substance, alleges in his petition that in October, 1907, the written contract in question was executed, and contemporaneous therewith, as a consideration and an inducement therefor, the defendant orally promised and agreed to procure for the plaintiff a lease for crop rent of an 80-acre tract

of land owned by the defendant's father "for a period of time sufficient to enable the plaintiff to make the payments provided for in said exhibit A (the written contract)." The plaintiff further avers that the defendant failed and refused to procure, and the elder Mikkelson refused to execute, said lease. The defendant admits executing the written contract, concedes that he agreed to procure a lease from his father for the plaintiff's benefit, denies that the lease was to extend beyond one year, and alleges it was procured in accordance with the agreement. The defendant alleges performance and a tender on his part, and prays for equitable relief. The reply is a general denial. The court found generally in favor of the plaintiff and entered judgment in his favor for $895.

Something is said in the briefs concerning the validity of the oral agreement, but the parties have treated the written contract as incomplete, and for the purposes of this case we shall consider the oral agreement as part of the contract between the parties.

A consideration of the evidence fails to satisfy us that the contract pleaded in the petition is established by the proof. The sale was negotiated by a Mr. Coleman, a broker, acting for the defendant. The plaintiff testifies that before the contract was made he informed Coleman that, unless he (Patterson) could secure the use of an additional 80 acres of land owned by the defendant's father, the witness could not pay for the defendant's farm and would not agree to purchase it; that Coleman said he thought he could secure Patterson a lease for said land "as long as I wanted it if I farmed it right"; that subsequently the defendant and Patterson inspected the defendant's farm and the 80 acres owned by the defendant's father, but nothing was said at that time about the lease; that at the time the contract was signed the witness stated that, if he could not secure the use of the elder Mikkelson's land, he (Patterson) would not agree to purchase the defendant's farm. He further testifies: "So

they told me they would draw up the lease for one year, for this year, and next fall they would draw up a lease for the entire year, and so on, * * * and that there was no question but that I could have it as long as I wanted it if I farmed it right; and they drawed up the lease for one year." The plaintiff insists that, if he had not received assurance that he should have the use of the elder Mikkelson's 80-acre tract, he would not have entered into the written contract. J. L. Mikkelson, the defendant's father, had orally leased his 80 acres of land to his son Andrew for the succeeding year. At the time the contract in suit was signed, a contract of lease was prepared for the father's 80, granting the use thereof to the plaintiff for one year from the succeeding March, for one-third of the crops to be grown thereon during the term, and Andrew Mikkelson, for a consideration paid partly by the plaintiff and in part by the defendant, sold his interest in the wheat growing upon said land to the plaintiff. The contract was subsequently delivered to J. L. Mikkelson, and signed by him some time thereafter, but not delivered to the plaintiff.

The defendant testifies: "I told him (Patterson) he could have it (the J. L. Mikkelson tract) one year if he could buy Andy out, * * * and I told him if he farmed it good he could probably have it longer, as Andy was going to quit farming." The defendant denies making any other representation to, or contract with, the plaintiff concerning the elder Mikkelson's land. Mr. Coleman corroborates the defendant, and there is other evidence in the record to sustain him in his version of the transaction. There is also evidence tending to sustain the plaintiff's testimony, and proof of contradictory statements made by the defendant and by Mr. Coleman. The plaintiff's statement seems unreasonable to us. According to him no time was fixed within which he was to have the use of the J. L. Mikkelson land other than until the deferred payment of $7,800 should be paid, five years at least and possibly a decade. Patterson does not say that

the defendant represented that he had any authority to bind his father to make a lease for an indefinite period, and an agreement of the character testified to by the plaintiff is unusual, to say the least.

The defendant's statement that he agreed to secure the land for Patterson for a year, and that he said to the plaintiff, if the latter farmed the land well, he probably would have the use of it beyond the year, seems reasonable and more in accordance with common experience. It does not necessarily follow that the contract was not made because it is contrary to common experience. Instances of poor judgment, lack of common sense, and departures from the ordinary and usual frequently are testified to in the courts. But, where the evidence is so conflicting that the truth cannot be clearly perceived, the unreasonableness or absurdity of what is claimed to have been the conduct of the parties may be of controlling importance. *Hartley's Appeal*, 103 Pa. St. 23; *Daggers v. Van Dyck*, 37 N. J. Eq. 130. The burden is on the plaintiff to make out his case by a preponderance of the evidence. In our judgment he has failed to produce sufficient evidence to justify us in affirming the judgment of the district court.

The plaintiff has paid less than one-eighth of the purchase price of the land, has refused to complete his contract, does not ask permission to do so, and has delivered possession of the farm to the defendant. Under the circumstances we think the defendant is entitled to a decree of strict foreclosure of his contract. *Harrington v. Birdsall*, 38 Neb. 176. Since the decree was rendered in the the district court, interest has accumulated on the money paid to the defendant, upon the unpaid purchase price, and equities in the way of rents and taxes should be adjusted. All of these matters should be considered upon a retrial. Although the plaintiff has refused to perform, the parties are in a court of equity, and we think he should be given an opportunity to make deferred payments of principal and accrued interest, to give security

for the $6,800 to be represented by his note, and should have a reasonable time, not to exceed 90 days after decree, to perform.

The judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CROSS & JOHNSTON, APPELLANTS, V. SAMUEL M. EYERLEY ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 15,986.

1. **Mechanics' Liens:** TIME OF FILING: EVIDENCE. "When more than four months intervene between items of an account for material furnished a mechanic's lien will not attach for the items preceding the hiatus, unless it is made to appear by competent evidence that all the items were furnished pursuant to one contract." *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207.

2. ———: AUTHORITY OF TENANT. A tenant cannot, without the authority, expressed or implied, of the landlord, charge the leased premises with a lien for material used in repairing a building thereon.

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

Lewis C. Paulson, for appellants.

Adams & Adams, contra.

ROOT, J.

This is an action to foreclose an alleged mechanic's lien. The plaintiffs had judgment for $1.75, and appeal to this court.

In July, 1907, one Taylor purchased the real estate described in this action. The defendant Eyerley was Taylor's tenant. In June, 1907, the barn upon said premises burned. Taylor and Eyerley then agreed that Eyerley should purchase material for, and Taylor construct, a new

barn, and the rent accruing for the use of the premises should be applied by Eyerley for the money advanced by him for said material. Thereafter Eyerley procured lumber from the plaintiffs. The barn was completed July 11. Subsequently, about November 1, Eyerley complained to Taylor concerning the cellar under the house on said premises, and Taylor agreed to furnish brick to be used in constructing a wall for the cellar, if Eyerley would perform the labor. Taylor purchased brick, and subsequently the wall was built in December. In November the defendant Maria Burr purchased the property from Taylor, and agreed to sell it to Eyerley. About that time Taylor and Eyerley settled their accounts, and a balance of $40 due the latter was paid by Taylor. Mrs. Burr received $65 from Eyerley on the real estate contract. About January 1, 1908, Eyerley disappeared, and, so far as the record discloses, has not been heard from since that time.

To establish plaintiff's lien, their manager, Mr. Trumbull, testifies that in June Eyerley told him that he (Eyerley) wanted material to build a barn and repair the kitchen in the house on the lot described in the petition; that witness informed Eyerley he might have the material, and when the barn was constructed and the repairs were completed he should settle for material furnished. Trumbull further testifies that the material for the barn was duly delivered; that Eyerley on the 12th of December, 1907, procured a barrel of lime, and stated he was through with the repairs, and the account was then cast up. Eyerley was not produced, nor his testimony procured. Mr. Trumbull, on direct examination, testifies that part of the lumber was furnished for the barn as late as November, but it is clearly shown that the barn was completed as early as July 12. Trumbull also testifies that Eyerley paid him about $10 in November, and said he was not through repairing yet, and that when Eyerley called for the lime in December he stated he was through with the repairs and would soon settle his bill. For five months after that structure was finished no ma-

terial was furnished Eyerley for any purpose, and no attempt was made to collect the bill or file a claim for a lien. Since more than four months intervened between the date the last material was furnished for the barn and the date the barrel of lime was delivered, there can be no recovery for the lumber unless it and the lime were furnished under one and the same contract. *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207.

Taylor only authorized Eyerley to procure material for the barn. No authority was granted the tenant to purchase any material for repairs, or to improve the house, and it was beyond Eyerley's power to bind Taylor's interest for material not authorized by the landlord to be procured and used upon the premises. *Moore v. Vaughn*, 42 Neb. 696; *Stevens v. Burnham*, 62 Neb. 672. In November, when Taylor parted with his title to the lot, plaintiffs' lien for the lumber had not been perfected, and the statute had barred the right to perfect that lien. In December Eyerley had acquired an interest in the premises by virtue of Mrs. Burr's agreement to sell it to him. He could then bind that interest for the value of the lime furnished to repair the house. The district court evidently so held by decreeing a lien for said lime. Taylor did not deceive the plaintiffs, nor did he give Eyerley ostensible authority to purchase any material other than the lumber. Trumbull testifies he was depending upon the lot to make his employers secure for the material furnished. The statute gives the materialman a lien for material furnished the owner of real estate, or his agent, for the construction of buildings, or appurtenances thereon, but it does not give a lien for any and all material used for that purpose, irrespective of the authority, expressed or implied, vested in the purchaser to procure that material at the expense of the owner of the lot.

Independently of the findings of the district court, we find that the plaintiffs have not sustained the burden cast upon them by the answer of the defendants, and the judgment of the district court is

AFFIRMED.

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

FILED APRIL 9, 1910. No. 15,851.

1. **Crops** planted by an intruder, so long as they remain unsevered, are regarded as the property of the owner of the land.
2. **Agency** cannot be proved by mere acts or declarations of an alleged agent not brought home to the principal.
3. **Principal and Agent**: PROOF OF AGENCY. In proving the authority of an agent for the purpose of binding the principal by the former's transaction, there must be evidence of the agency at that time.
4. ———: ———: PRESUMPTION OF CONTINUANCE OF AGENCY. The presumption that the relation of principal and agent continues, when once established, may be overcome by proof that the alleged agent had no authority as such.
5. **Replevin**: DIRECTING VERDICT. In replevin it is not error to direct a verdict for defendant, where the evidence is insufficient to sustain a judgment in favor of plaintiff.

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

Perry & Lambe, for appellant.

Morlan, Ritchie & Wolff, contra.

ROSE, J.

Plaintiff replevied from defendants three stacks of rye. The answer to his petition 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. At the trial below witnesses testified on both sides of the case. In obedience to a peremptory instruction at the close of the testimony, the jury rendered a verdict in favor of defendants. The value of the property was fixed at $45, and defendants' damage by

* See former opinion, 85 Neb. 571.

reason of the detention at $17.85. From a judgment on the verdict plaintiff appeals.

At a former session an order of affirmance was entered without deciding the main questions presented by the appeal. *Warner v. Sohn,* 85 Neb. 571. This regrettable action resulted from the writer's failure to observe an exception to the peremptory instruction of the trial court. When attention was directed to the oversight by a motion for a rehearing, the affirmance was promptly vacated and the appeal resubmitted on its merits. Plaintiff's statement of his case, with references to the record omitted, is as follows: "In the spring of 1901 Warner rented a tract of land near the village of Arapahoe, of the owner, William Hall, through his agent. The agreement between the plaintiff and the agent was that the former should give as rent for the use of the land one-third of the crop raised that season. In the fall of the same year the plaintiff again went to this agent to rent the land for another season, at which time the same agreement was again entered into, the defendants verbally agreeing to pay as rent one-third of the crop. Pursuant to this agreement the plaintiff seeded the tract to rye in the fall of 1901, and continued in exclusive, unobstructed and peaceable possession of the same until the latter part of June, 1902. On the 31st day of March, 1902, the defendants herein purchased this tract of land from the owner and moved into the buildings thereon. After the defendants moved upon the land the plaintiff testified that he made an oral agreement with the defendants for the division of the rye, after which agreement the defendants fenced off one-third of the rye and pastured the same. The plaintiff, when the two-thirds of rye not fenced became ripe, during the latter part of June, 1902, employed one Carter to harvest the same for him. This Carter did; but, when Warner entered the land to remove the rye, the defendants repudiated their former agreement and refused to permit the plaintiff to remove the grain already severed from the land, but forcibly seized the severed grain and retained

possession thereof after the plaintiff had demanded possession of the same. This action in replevin was brought to recover possession of that which the plaintiff contends he lost through this unlawful action of the defendants. On the trial in the district court the judge sustained a motion by the defendants' attorney to direct a verdict for the defendants, wholly disregarding all the testimony in the case. The plaintiff contends that, when the defendants moved on the land, the plaintiff went to the defendants and informed them that he had the ground rented of the prior owner for one-third of the crop of rye, and that the parties herein then entered into an agreement for the division of crop, ratifying the agreement with the former owner, and thereupon the defendants Sohn fenced off one-third the tract of rye as their agreed rent share, and used the same for pasture. The question for consideration is the correctness of the court's ruling, under these circumstances, in usurping the functions of the jury."

The questions presented are stated by plaintiff in his brief as follows: "There were but two questions involved in this case. These questions are not difficult to conjecture. The first is: Did the plaintiff have any right to enter upon the land in question? And, second: Were the stacks of rye in question the sole property of the plaintiff so that he could maintain replevin therefor? In other words, did the plaintiff make a *prima facie* case by his own evidence of his right to the land and a division of the rent?"

It thus appears by plaintiff's own statement of his case that the first question presented is: "Did the plaintiff have any right to enter upon the land?" In answering this inquiry, it is important to observe that plaintiff says William Hall was owner of the land, and that through his agent plaintiff had rented it in the spring of 1901, agreeing to give the owner one-third of the crop *for that season.* That season necessarily ended in the fall of 1901, because plaintiff further says: "In the fall of the same year the plaintiff *again* went to this agent to rent the land *for another*

season." The latter season included the period from the time of sowing the rye in the fall of 1901 until the crop was harvested in 1902. Plaintiff was not a tenant from year to year, therefore, but was a cropper for a single season. He took this position in the trial court, and assumed the burden of proving that he procured from Hall in the fall of 1901 authority to take possession of the rye-field for the purpose of cropping it during the ensuing season. Plaintiff did not live on the land in 1901, or at any subsequent time, and his right to enter thereon, so far as this suit is concerned, must be found in authority obtained in the fall of that year. There is no pretense that he procured from Hall directly either a written lease or an oral agreement. Consequently it was incumbent on plaintiff, in making a *prima facie* case, to prove that an agent having authority from Hall gave him permission in the fall of 1901 to crop the rye-field. Without such proof his case would be controlled by the doctrine that crops planted by an intruder, so long as they remain unsevered, are regarded as the property of the owner of the land. *Baker v. McInturff*, 49 Mo. App. 505; *Freeman v. McLennan*, 26 Kan. 151. Plaintiff undertook to supply the necessary proof by showing that W. S. Morlan, as agent for Hall, authorized I. H. Dempsey to look after the land, and that the latter permitted plaintiff to crop it. Plaintiff testified that he first sowed the land in 1901, raising a crop of millet in the spring of that year; that he knew who had been acting as agent for the land; that Dempsey had been acting in that capacity; that plaintiff went to Dempsey and asked him about the leasing of the land, and that the latter gave plaintiff the right to farm it on condition that the owner should have one-third of the crop; that, after the making of the arrangement described, plaintiff sowed the rye; that Dempsey "was acting as sub-agent for Mr. Morlan, that is, for Mr. Hall"; that plaintiff had written to Morlan about renting the land, and had been referred to Dempsey, but that the letter could not be produced; that in the fall of 1901 plaintiff again went

to Dempsey, told him he wanted to sow the rye, asked permission to crop the land for another year, and was told by Dempsey to go ahead and put in the crop.

On his direct examination this is the substance of that part of the testimony on the issue as to Dempsey's agency. It contains no proof whatever that in the fall of 1901 Dempsey, as the agent of Hall, had authority to give plaintiff permission to crop the land. If Dempsey's agency to lease Hall's land is shown by the proof summarized, the testimony on that subject related alone to the previous cropping season. It is true that plaintiff testified he was told by Dempsey in the fall of 1901 to go ahead and crop the land, but there is no proof he was then Hall's agent. Agency cannot be proved by mere acts or declarations of an alleged agent not brought home to the principal. *Blanke Tea & Coffee Co. v. Rees Printing Co.*, 70 Neb. 510; *Fitzgerald v. Kimball Bros. Co.*, 76 Neb. 236; *Norberg v. Plummer*, 58 Neb. 410; *Anheuser-Bush Brewing Ass'n v. Murray*, 47 Neb. 627; *Richardson & Boynton Co. v. School District*, 45 Neb. 777; *Burke v. Frye*, 44 Neb. 223. Plaintiff traced no leasing authority from Hall to Morlan or Dempsey, or from Morlan to Dempsey, in the fall of 1901. There is no proof that Morlan at that time had authority to make Dempsey the agent of Hall, or that the latter ever had knowledge of any act or declaration of Dempsey. On plaintiff's direct examination, therefore, there was no evidence adduced to show that Dempsey had authority in the fall of 1901 to lease the land to plaintiff. In proving authority of an agent for the purpose of binding the principal by the former's transaction, there must be evidence of the agency at that time. *Rowell v. Klein*, 44 Ind. 290.

On re-direct examination, however, plaintiff was asked how he came to inquire of Morlan about renting the land, and answered: "Well, I knew Mr. Morlan was the agent for the land." But he undertook to state the source of such knowledge, and in that way limited his testimony thereto. In doing so, he said that he had previously rented

the same property from and paid the rental to Morlan; that the contents of Morlan's letter was: "Mr. Dempsey is acting or is looking after the Hall property for me." In reference to this letter and to Dempsey's agency, plaintiff was asked: "Now, when you went to Dempsey, what, if anything, was said with reference to this letter, about his acting as agent?" This question was answered: "Mr. Dempsey said that he was looking after the Hall property for Mr. Morlan." The substance of the proof of Dempsey's agency has been stated in a light as favorable to plaintiff as the testimony will warrant. A critical examination of the bill of exceptions shows that Morlan's letter related to Dempsey's agency before plaintiff cropped the land in the spring of 1901. The existence of such an agency in the fall of that year was not proved. When plaintiff rested his case, he was not entitled to the benefit of the presumption that Dempsey's agency, even if established in the spring of 1901, was presumed to continue. This conclusion is deducible from the following propositions: There was no testimony that Dempsey was Hall's agent for any purpose in the fall of 1901. Any presumption of that fact was overcome by the direct and positive testimony of Dempsey himself that he had no authority at that time to lease Hall's land. The evidence is wholly insufficient to sustain a finding that plaintiff had a right either to enter upon the land for the purpose of sowing rye or to harvest the crop, and the trial court no doubt proceeded under the familiar rule that there is no error in directing a verdict for defendant, where the evidence is insufficient to sustain a judgment in favor of plaintiff. *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556.

Defendants bought the Hall land and moved onto it in the spring of 1902, after plaintiff sowed the rye and before the crop was harvested, and it is insisted that in the meantime they ratified the lease and fenced off and pastured their share of the crop. On this issue plaintiff testified he saw defendants moving in, had a conversation with Sohn, and was informed they had purchased the place; that he

informed Sohn of his having rented the land; that there was not much said about it; and that plaintiff was to give one-third of the crop as rental. "After this conversation," inquired his counsel, "what, if any, steps did Mr. Sohn take to divide the crop off, if you know?" Plaintiff answered: "Why, he fenced off one part of the field." Plaintiff further stated in this connection that Sohn fenced off "about two acres, maybe two and a half acres"; that the amount thus fenced was about one-third of the field, which Sohn pastured; and that plaintiff first learned that defendants claimed the other two-thirds about the time of harvesting. On cross-examination, however, plaintiff stated that he had never made any arrangement with defendants about fencing the rye or in regard to the location of the fence. On this subject he was asked by counsel for defendants: "Then, from the time that Sohn first moved there, until you replevied the rye, you don't remember of having any talk with him about dividing the rye, or anything of that kind?" "No," replied plaintiff, "I just simply supposed by his fencing off that part of it that he meant to take that part of it as his rent." He said further that he never talked to Sohn about it, and never made any proposition about dividing it, as far as he remembered. This falls far short of proving a ratification of the lease or a division of the crop. On these issues the evidence would not sustain a verdict in favor of plaintiff, and there was no error in the peremptory instruction.

It is equally clear that plaintiff cannot recover under the rule that an intruder who sows and cultivates grain may be entitled to the crop, where he remains in possession until he harvests it. Plaintiff conceded, when testifying, that defendants fenced and pastured a portion of the rye when it was growing, forcibly ejected him, when he entered upon the land to harvest the crop, and gathered and stacked the sheaves. Having failed to show any right to enter upon the land in the fall of 1901, or to harvest the crop in the summer of 1902, there was no error in directing a verdict in favor of defendants. The con-

clusion reached on the first question presented eliminates the second, namely: "Were the stacks of rye in question the sole property of the plaintiff, so that he could maintain replevin therefor?"

AFFIRMED.

SEDGWICK, J., not having heard the argument, took no part in the decision.

REESE, C. J., dissenting.

I find it impossible for me to consent to, or join in, the opinion of the majority in this case, and will, very briefly, state my reasons. I think the decision is founded entirely upon a wrong basis. I do not think plaintiff can be justly denounced as an intruder, a trespasser, or an interloper. A fair statement of the evidence on the part of plaintiff would be that in the spring of 1901 he was given the use of the land to seed in millet for a rental of one-third of the crop. Later, and in the fall, he applied to the person who had been acting as the agent of the landowner for the right to sow the ground in rye. He was informed that the property was for sale; but I think a fair construction of the evidence submitted by him tends strongly to prove that he was given the right, but with the reservation that, should the land be sold, he would pay the rental, which was agreed to be one-third, to the purchaser; that he plowed and planted the field in rye, and his right to do so was never questioned. Defendant resided near-by, and evidently knew of plaintiff's possession, which was in no sense wrongful, and the raising of the crop by him. In the spring of 1902 defendant, with full knowledge of plaintiff's possession and labor, purchased the land and removed into the buildings thereon. Little was said between them as to the rights of the parties, except that plaintiff informed defendant that he was to pay one-third of the crop as rental, and requested defendant to keep his cow from pasturing on the rye. Doubtless acting upon the suggestion of plaintiff that the rental was to be one-

third of the crop, defendant constructed a fence by which he took in and inclosed about one-third of the rye, and subsequently made use of the inclosed portion of the ground for his own purposes. When the crop growing on the other two-thirds of the land had matured, plaintiff procured and paid a third party to harvest the standing rye. He accompanied his employee to the land for the purpose of starting the work, when he was met by defendant, assaulted, knocked down and kicked, and ordered to leave the premises, or that, in case of his failure, defendant would kill him. He was compelled to leave. After the rye was cut defendant took possession of it, shocked and stacked it, and assumed absolute control over it. Plaintiff then replevied the rye.

The defendant, Ephraim Sohn, who had been the aggressor in committing the assault and forcing plaintiff to leave the premises, was not called as a witness, and offered no denial of any of plaintiff's testimony. He appears to have tried his cause in the form of brute force and violence, and offered no explanation of, nor excuse for, his conduct. The main issue presented by defendant was as to the authority of the person who had theretofore been looking after the landowner's interest, the owner being a nonresident, and from whom plaintiff claimed he had received permission to crop the land, to grant the permission claimed. On cross-examination the person referred to, being interrogated upon the subject, testified as follows: "Q. And didn't you say to Mr. Warner, 'If you want to take your chances, you can go ahead and put some rye on that land?' A. No, sir. Q. You didn't say anything of that kind and substance? A. He says, 'I am going to put it in rye anyway', and I says, 'If you do, the ground will draw one-third, no matter who owns it.' Q. And you gave him to understand that if he put that into crop he would have to pay one-third rent? A. I told him that is what he would have to do. Q. Whether Hall kept it or whether Hall sold it? A. That it didn't make any difference who got it. * * * Q. Now, you say that

what you did was for Mr. Morlan? A. Yes, sir. Q. And you had his authority? A. Yes, sir."

While it is true that this evidence cannot be considered upon the question as to whether the case should have been submitted to the jury, instead of being taken away from them by the instruction directing the verdict, yet it might, possibly, be considered for the purpose of arriving at a conclusion as to the good faith of plaintiff in the cultivation of the land. That he did act in good faith, believing he would be protected and permitted to reap the crop unmolested, I have not the shadow of doubt, although it must be conceded that he relied upon the honesty of those with whom he dealt to a greater degree than the sequel seems to have justified.

I have examined all the evidence, and cannot find a single justification for the action of the district court, nor for the affirmance of its judgment in this. That the issues should have been submitted to the jury is, to my mind, beyond question, and that by the judgment of the district court plaintiff has been unjustly deprived of his property through agencies of force and fraud is equally clear.

CHARLES S. OLMSTEAD, APPELLEE, V. CITY OF RED CLOUD, APPELLANT.

FILED APRIL 9, 1910. No. 15,936.

1. **Evidence**: JUDICIAL NOTICE. In the trial of an action against a city to recover damages for personal injuries, the trial court may take judicial notice of the class of cities to which defendant belongs and of the laws by which it is governed.

2. Trial: WITHDRAWAL OF ISSUE BY INSTRUCTION. Where there is no testimony on an issue raised by the pleadings, it may be withdrawn from the jury by an instruction.

3. ———: FAILURE TO REQUEST INSTRUCTION. By neglecting to request instructions on a particular subject, defendant may waive the right to urge error on account of the trial court's failure to instruct the jury thereon.

4. Damages: INSTRUCTIONS. As copied at length in the opinion, an instruction relating to plaintiff's right of recovery for pain and suffering *held* not prejudicial to defendant.

5. Appeal: EVIDENCE: REVIEW. A ruling on the admissibility of testimony to which there was no objection is not reviewable.

6. ———: ———: ———. Error cannot be predicated on the admission of testimony identical with that already admitted without objection.

7. ———: ———: ———. Nonprejudicial error in a ruling on the admission of evidence is not sufficient ground for setting aside a judgment.

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

L. H. Blackledge, for appellant.

E. U. Overman and *J. S. Gilham, contra.*

ROSE, J.

In the city of Red Cloud, on the night of October 20, 1906, plaintiff fell down an open, unlighted stairway leading from a public sidewalk in a street to the basement of a private building and was severely injured. He subsequently sued the city for resulting damages for personal injuries on account of its negligence and recovered a verdict for $2,000. From a judgment in his favor for that sum defendant has appealed.

Plaintiff alleged in his petition that defendant was a city of the second class having less than 5,000 inhabitants, but at the trial did not adduce proof in support of that allegation. In addition to a general denial, the answer stated that defendant was a municipal corporation, but did not state the class of cities to which it belonged. The court gave an instruction which permitted plaintiff to recover without proof that defendant was a city of the second class having less than 5,000 inhabitants and without proof that he filed his claim with the city clerk before

bringing suit. Defendant complains of this instruction, and its objections are summarized in its brief as follows: "This instruction was prejudicially erroneous because it assumed that the admission in the answer that the defendant was a municipal corporation relieved the plaintiff from the necessity of proving that the defendant city belonged to the class, or was of the population, alleged, and withdrew that issue, made by the pleadings and material in the case, from the jury. It was erroneous, also, because it omitted all question of notice, either actual or constructive, of the defect complained of."

The points are not well taken, for the following reasons: Proof that Red Cloud was a city of the second class having a population of less than 5,000 was unnecessary. The trial court was at liberty to take judicial notice of that fact and to frame its instructions to conform thereto. *Hornberger v. State*, 47 Neb. 40; *Union P. R. Co. v. Montgomery*, 49 Neb. 429. When plaintiff was injured, defendant's charter did not require him to file his claim with the city clerk, or give the city notice of his injuries, as a condition of his right to maintain his suit. Other statutes containing such requirements did not apply to the city of Red Cloud. Proof of actual notice of the dangerous stairway in the sidewalk was not essential to plaintiff's right to recover damages, because there was undisputed evidence that such a condition had existed for a length of time sufficient to charge the city with notice. *City of Lincoln v. Smith*, 28 Neb. 762.

Complaint is also made because the trial court failed to instruct the jury as to the burden of proof, the weight of evidence, and the credibility of witnesses. Defendant is not entitled to a reversal on this ground, for these reasons: After stating the issues raised by the material allegations of the pleadings, the trial court instructed the jury that the burden of proof was on plaintiff to convince them, by a fair preponderance of all the evidence, of the truth of every material allegation in his petition, before he could recover. Plaintiff's witnesses were not im-

peached nor their testimony contradicted. Defendant did not request instructions on those subjects, and there is nothing in the record to indicate that the jury took a wrong view of the law in relation to them. Under such circumstances it will be presumed defendant was willing to have the case submitted to the jury without such instructions, and it is now too late for complaint. *Sanford v. Craig,* 52 Neb. 483.

Error is also assigned in the giving of the following instruction: "The defendant in its answer alleges that the plaintiff was guilty of contributory negligence, in this: That plaintiff at the time of the injury was in an intoxicated condition, and that the injury was caused by reason of the condition of the plaintiff, and not being the result of any fault or negligence on the part of the defendant city. The defendant has offered no evidence in support of this allegation of its answer, and you will not consider it in arriving at your verdict." In the argument this instruction is challenged because it withdrew from the consideration of the jury the issue as to plaintiff's intoxication and consequent negligence. The instruction was properly given. The record contains no evidence whatever that plaintiff was intoxicated when injured, or at any other time, or that he ever drank intoxicating liquors of any kind.

Another argument is directed to assigned errors in the following instruction: "If you find from the evidence and these instructions that the plaintiff is entitled to recover, it will then be your duty to find and ascertain from the evidence the amount to which he is entitled. You should carefully consider all of the evidence as to the nature, character, and extent of the injury, and the result, whether the disability, if any, resulting from the injury was permanent or temporary, its extent, either total or partial. If any permanent disability, you should consider plaintiff's age, his reasonable expectance of life, how much money he could earn before the injury, and how much, if any, he could earn after the injury, with his reduced

capacity, if any there was on account of the injury received, remembering no reduction of capacity on any other account is to be considered by you, and allow him a reasonable compensation for any loss of time and capacity resulting from the injury. You are further instructed that you should also allow him for pain and suffering. The law lays down no rule for estimating his damages on account of pain and suffering, but leaves it to your sound discretion and judgment. You should also allow him for any moneys paid or contracted to be paid for the services of physicians or medicines, if any such is shown."

This instruction was evidently taken from a charge approved in *City of Lincoln v. Holmes*, 20 Neb. 39. The language now criticised is as follows: "You are further instructed that you should allow him for pain and suffering. The law lays down no rule for estimating his damages on account of pain and suffering, but leaves it to your sound discretion and judgment." It is argued that this language puts no restriction on the amount of plaintiff's recovery, and that the instruction does not even limit the jury to the damages claimed by plaintiff in his petition. The trial court in other parts of the charge directed the jury, in substance, that plaintiff claimed damages in the sum of $2,000 on account of pain and suffering, and that his entire claim was $4,025; that he could only recover the amount of actual damage sustained, if any, as compensation for the injury received; that they must ascertain from the evidence the amount to which he is entitled; that the amount of damage on account of pain and suffering was left to their sound discretion and judgment. The damage, as found by the jury, was less than half of plaintiff's claim. For these reasons, defendant was not prejudiced by the instruction criticised.

Other assignments of error relate to rulings of the trial court in admitting evidence. Over defendant's objection, one witness was permitted to testify that plaintiff "was a good hand when he lived in Iowa." It is unnecessary

to inquire into the admissibility of this evidence, for the reason that other witnesses had already testified without objection that plaintiff had been a good hand. Attention is also directed to testimony showing that plaintiff was the head of a family, that he had six children, and that he earned his living for himself and family by days' work. The admissibility of this testimony will not be considered, because it was received without objection. In testifying to the extent of an injury to one of plaintiff's arms, a physician said: "Well, where he had to do lots of lifting with that arm and heavy work with that arm, I should think it would injure it to some extent, probably 50 per cent. Of course that is just an estimate." This testimony is assailed in connection with one of the instructions criticised, but it was admitted without objection, and for that reason will not be reviewed.

The action of the trial court in overruling an objection to the following question, which had been propounded to a physician who testified as a witness for plaintiff, is also criticised as erroneous: "Now, from an examination of this patient, and from having treated him from time to time, and from your experience as a physician, what would you say as to whether the patient will entirely recover from the injury, or as to whether it is, or may be, a permanent injury to his hearing, and to his ear generally?" The argument seems to be that the question invites the witness to speculate on the future result of the injury, and *Carlile v. Bentley,* 81 Neb. 715, is cited to sustain defendant's position. Whether defendant was prejudiced by the ruling on the objection to this question depends upon the answer, which is as follows: "Why, my opinion is that he has got a condition there that may last for some time—indefinitely; possibly during life. That would be my idea, although I think the condition is amenable to treatment. I should think it could be somewhat improved if he would take a course of treatment; but it would be impossible for me to tell just what the result would be. It might be very bad. He might lose

the hearing in the right ear altogether, but possibly by rigid treatment it could be repaired somewhat, but I don't think he will ever hear as well as he could; that is, normally." In *Carlile v. Bentley*, 81 Neb. 715, an erroneous ruling permitted a physician to answer this question: "Doctor, I will ask you if, in your opinion, that wound was such an injury as a permanent injury might result from?" It was answered: "Yes; all that class of injuries might make a permanent injury." The answer was limited to what might result. In the present case the differences are obvious. What is said of the future effect of the injury is modified by the frank statement: "It would be impossible for me to tell just what the result would be." Though the witness said plaintiff "might lose the hearing in the right ear altogether," the answer closes with what amounts to an expression of the opinion that plaintiff will never hear as well as he could before the injury. The present effect on plaintiff's hearing had already been shown by other proofs, including the results of actual tests. The verdict does not appear to be excessive, and there is abundant evidence to support it. On a record showing these conditions, it is not considered that defendant was prejudiced by the answer quoted from the testimony of the physician, without regard to the correctness of the ruling of the trial court.

Defendant has not pointed out a prejudicial error, and the judgment will be

AFFIRMED.

IN RE ESTATE OF JOHN GRAFF.

JOHN WARD, RECEIVER, APPELLEE, V. HETTIE GRAFF ET AL., APPELLANTS.

FILED APRIL 9, 1910. No. 15,942.

1. **Executors and Administrators:** APPOINTMENT: AFFIRMANCE IN DISTRICT COURT. An appeal from a county court's order granting letters of administration may be taken to the district court and tried *de novo;* and in such a case an affirmance may be entered, where the order from which the appeal is taken is found to be the proper one and free from error.
2. ———: ———: JURISDICTION: FAILURE TO SIGN PETITION. Failure of petitioner to sign his petition for letters of administration does not prevent the county court from acquiring jurisdiction to appoint an administrator.
3. ———: ———: FAILURE TO SIGN PETITION: REVIEW. An objection that plaintiff did not sign his petition cannot be made for the first time in an appellate court.
4. **Pleading:** SIGNING. A plaintiff who signs a verification following his petition, and states therein that "petitioner has read the foregoing petition and knows the contents thereof, and that the matters and facts therein set forth are true as he verily believes", sufficiently complies with the statutory provision that "every pleading in a court of record must be subscribed by the party, or his attorney." Code, sec. 112.
5. **Receivers:** RESIGNATION: NEW APPOINTMENT: NOTICE. A district court having jurisdiction over the receivership of an insolvent state bank may without notice accept the resignation of the receiver and appoint his successor.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

L. C. Chapman, for appellants.

Hugh La Master, S. P. Davidson and *Jay C. Moore, contra.*

ROSE, J.

John Ward, receiver of the Chamberlain Banking House, filed in the county court of Johnson county, April

11, 1907, a petition for the appointment of an administrator for the estate of John Graff, deceased. These facts were pleaded: Graff died February 7, 1907, and at the time owed the Chamberlain Banking House $2,219, an indebtedness still unpaid. He had been a resident of Johnson county, and left therein an estate of $12,000, consisting of both personal property and real estate. No will was found, and it was believed he died intestate. The name, age, residence and relationship of the next of kin were also stated. The widow and a daughter of Graff, defendants herein, resisted the application, but their objections were overruled, and from an order granting letters of administration they appealed to the district court, where the judgment of the county court was affirmed. From the judgment of affirmance they have appealed to this court.

The first assignment of error relates to the form and substance of the judgment rendered by the district court. That part material to the inquiry here is as follows: "This cause came on for trial, both parties, appellants and appellee, being in court, whereupon the cause was submitted to the court without a jury. After hearing the evidence offered by all the parties, the court finds generally for appellee and against appellants. Appellants except. Therefore it is considered, decreed and adjudged by the court that appellant's appeal herein be, and the same is hereby, dismissed and the judgment of the county court in all things is affirmed."

Defendants complain of the dismissal of the appeal, and argue that there should have been a trial *de novo* and a formal judgment in the district court on the issues raised by the pleadings. The evidence and findings show there was a trial in conformity with the rule that an appeal from a county court's order granting letters of administration may be taken to the district court and tried *de novo*. *In re Miller*, 32 Neb. 480. While the form of the judgment is not above criticism, it contains a general finding in favor of plaintiff and an affirmance of the order grant-

ing letters of administration. The county court, in making the order from which the appeal was taken, acted within its jurisdiction. It is in that court that the final judgment rendered on appeal in the district court must be carried into effect. Comp. St. 1909, ch. 20, art. I, sec. 48; *Williams v. Miles*, 73 Neb. 193; *Estate of Bennett v. Taylor*, 4 Neb. (Unof.) 800. In such a case an affirmance is proper, where the judgment of the county court is free from error and the one which should have been rendered. The dismissal should have been omitted, but its insertion in the journal entry will not prevent the county court from carrying its own judgment into effect upon receiving from the appellant court a certificate of affirmance. If the order of the county court was properly upheld, the dismissal of the appeal was equivalent to an affirmance. *Bell v. Walker*, 54 Neb. 222. If the general finding in favor of plaintiff was correct, defendants lost no right by the dismissal and are not entitled to a reversal on that ground.

That the petition filed in the county court was not signed by petitioner or by his attorney is also urged as a ground of reversal. The petition on which the case was tried in the district court is not defective in that particular, but the objection is that the petition in the county court does not comply with the statute, which declares: "Every pleading in a court of record must be subscribed by the party, or his attorney." Code, sec. 112. The petition in the county court was not signed by plaintiff's attorney. Neither was the name of the petitioner signed in the usual place, but he did sign a verification below his petition, and that fact is attested by a notary's jurat. The verification states that "petitioner has read the foregoing petition and knows the contents thereof, and that the matters and facts therein set forth are true as he verily believes." For a numer of reasons the objection of defendants is without merit here. The failure to sign the petition at the customary place did not prevent the county court from acquiring jurisdiction. *Fritz v. Barnes*, 6 Neb.

435; *In re Miller*, 32 Neb. 480; *Hershiser v. Delone & Co.*, 24 Neb. 380; *Northup v. Bathrick*, 80 Neb. 36; *Harrison v. Wright*, 1 N. Y. St. Rep. 736. There is nothing in the bill of exceptions to show that defendants made their objection in the county court. In the absence of a record showing that an objection was made in the court of original jurisdiction, a waiver of the defect will be presumed in the appellate court. In any event, plaintiff's verification of the petition was a sufficient compliance with the statute. *Zollicoffer v. Briggs*, 3 Rob. (La.) 236; *Barrett v. Josylnn*, 29 N. Y. Supp. 1070; *Harrison v. Wright*, 1 N. Y. St. Rep. 736; *Johnson v. Johnson*, 1 Walk. Ch. (Mich.) *309. In the latter case the court said: "The petition was not signed by the petitioner, but it was verified by her affidavit at the foot of the petition, which affidavit was signed by her, and in which she stated she had read the petition, knew the contents thereof, and that it was true. This was a sufficient signing of the petition, or recognition of it as her own act, to answer the requirement of the statute."

Defendants further complain that letters of administration should not have been issued, because, as they view the record, there was no proof that Graff was a debtor of plaintiff, or that he left property in Johnson county. There is evidence that an unpaid note signed by Graff was held by plaintiff, and that at the time of Graff's death a list of personal property stood on the county assessment rolls in his name.

Under another assignment of error it is contended that the appointment of John Ward as receiver of the Chamberlain Banking House was void, on the ground it was made without notice, and that therefore he had no authority to apply for letters of administration. A copy of the order containing his appointment appears in the record. It was made by the district court for Johnson county, and shows that Ward was appointed to fill a vacancy caused by the resignation of a former receiver. If the original order appointing a receiver was valid, and

its validity has not been questioned, the property and affairs of the Chamberlain Banking House were under the control of the district court when Ward was appointed. This being true, the court on its own motion and without notice had authority to accept the resignation of the acting receiver and appoint a successor. *Nichol v. Murphy*, 145 Mich. 424.

There is no error in the record, and the judgment is

AFFIRMED.

FRED OSSENKOP V. STATE OF NEBRASKA.

FILED APRIL 9, 1910. No. 16,138.

1. **Indictment and Information:** INDORSEMENT OF WITNESSES. In requiring the names of the state's witnesses to be indorsed on an information charging a criminal offense, the main purpose of the law is to give accused notice of the identity of the witnesses who are to testify against him.

2. **Criminal Law:** REBUTTAL EVIDENCE: INDORSEMENT OF WITNESSES ON INFORMATION. In a criminal prosecution, rebuttal testimony on behalf of the state may be given by witnesses whose names were not indorsed on the information.

3. ———: TRIAL: POSTPONEMENT. Record for review *held* not to show that the trial court abused its discretion in refusing a postponement sought by defendant on the ground that the state indorsed names of additional witnesses on the information against him, where the last indorsement of the names of witnesses who testified in chief was made nine days before the trial, though defendant's motion was supported by an affidavit stating that his counsel was too busy in the trial of other cases to investigate the character of the additional witnesses.

4. ———: ———: ———. After the state had made its case in chief in a criminal prosecution, an order postponing the trial until four of defendant's witnesses were released from quarantine, or for a period of 21 days, *held* not erroneous, where the order was made on motion of defendant for a continuance until the next term of court, or for a postponement until the release of the quarantine, there being nothing in the record to show that the trial was resumed when the quarantine was in force.

5. ———: REFUSAL OF CONTINUANCE. An order overruling a motion by defendant for a continuance in a criminal case will not be reversed on a record which fails to show that he was prejudiced by the order, or that in making it the trial court abused its discretion.

6. ———: DENIAL OF CHANGE OF VENUE: REVIEW. Where there has been no abuse of discretion on part of the trial court in denying a change of venue, its ruling will not be disturbed.

7. ———: OPENING STATEMENT: HARMLESS ERROR. In the opening statement of counsel for the state in a criminal prosecution, the narration in good faith of facts which are not subsequently proved, or which are inadmissible under the rules of evidence, is not reversible error, where the record shows defendant is in nowise prejudiced.

8. ———: SEPARATION OF JURY: REVIEW. After the state had made its case in chief in a prosecution for murder in the second degree, an order permitting the jury, upon being admonished, to separate for the period of 21 days during a postponement allowed on the ground that four of defendant's witnesses had been quarantined on account of smallpox, *held* not an abuse of discretion or reversible error, where the record failed to show misconduct on the part of any juror or prejudice to defendant.

9. Witnesses: PHYSICIANS: CONFIDENTIAL COMMUNICATIONS. The purpose of section 333 of the code, in providing that a physician shall not be allowed to testify to confidential communications, is to prevent the improper disclosure of secrets or facts learned by means of the confidential relation between physician and patient.

10. ———: ———: ———. Where defendant in a prosecution for murder employs a physician to examine the body of his victim and report conditions, the physician, by reason of such employment, is not excused from testifying to the results of his investigation, when called as a witness on behalf of the state.

11. Criminal Law: EVIDENCE. Where it was not shown in a prosecution for murder that the victim of the homicide had been under the influence of liquor, there was no error in sustaining an objection to the following question propounded to a witness for defendant: "When under the influence of liquor, what was his disposition as to being quarrelsome or otherwise"?

12. ———: ———: REVIEW. In reviewing the proceedings in a criminal prosecution, a conviction will not be set aside for nonprejudicial rulings in admitting or in rejecting evidence.

13. ———: INSTRUCTIONS. Instruction relating to declarations made by defendant after an assault resulting in a homicide *held* not erroneous.

ERROR to the district court for Cass County: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering, for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for Cass county, Fred Ossenkop, defendant, was convicted of manslaughter and sentenced to serve a term of ten years in the penitentiary. As plaintiff in error he now presents for review the record of his conviction.

1. The first ruling challenged as erroneous permitted the county attorney to indorse on the information the names of a number of witnesses without granting a continuance. The information was filed November 23, 1908, and at the time bore the names of 19 witnesses for the state. With permission of the court, the names of additional witnesses were indorsed on the information as follows: January 19, 1909, five; January 25, 1909, six; February 2, 1909, three. The case was called for trial February 4, 1909. Defendant does not seriously complain because the state was permitted to indorse on the information the names of the additional witnesses, but insists the time to investigate their character and their knowledge of the facts was wholly insufficient. He contends further that he did not have time enough to prepare for the trial or to meet their proofs with testimony in his own behalf, and that his sole counsel was too busy in other cases to make the necessary investigation or to inquire into the antecedents of the state's witnesses. The statute requiring names of witnesses to be indorsed on the information is as follows: "All informations shall be filed during term,

in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." Criminal code, sec. 579.

In the manner stated in this law, defendant is entitled to know the names of the witnesses who are to testify against him, and the giving of this information is the main purpose of the statute. *Reed v. State,* 75 Neb. 509. Of course, a trial court cannot deprive accused of the benefit of this statutory right by an abuse of discretion which prevents a reasonable postponement to enable him to meet material testimony of witnesses whose names were indorsed on the information immediately preceding the trial. *Rauschkolb v. State,* 46 Neb. 658. In the present case, was there an abuse of discretion in refusing to grant a continuance? The witnesses whose names were indorsed on the information February 2, 1909, did not testify when the state was making its case in chief, nor until the trial had been postponed for 21 days. Rebuttal testimony on behalf of the state may be given by witnesses whose names were not indorsed on the information. *Clements v. State,* 80 Neb. 313. Whether they testified in rebuttal is therefore not material to this inquiry. For these reasons, the indorsement of three names two days before the time set for trial did not make the order denying the continuance prejudicially erroneous. It appears from facts already stated that after the indorsement of six names, January 25, 1909, defendant had until February 4, 1909, for investigation and preparation. It is not affirmatively shown that the time was too short, or that the court in refusing to grant an extension or to postpone the trial abused its discretion. The skill and vigor of the defense, when considered with the entire record, refute

defendant's argument on this point. That counsel was too busy in other cases to investigate the character of the state's witnesses and the nature of their testimony, under the circumstances disclosed, does not require a different conclusion. *Dunn v. People,* 109 Ill. 635.

2. Complaint is also made because the district court, four days after the commencement of the trial, refused to continue the case until the next term of court. The motion for the continuance was based on the ground that four of defendant's witnesses, on account of smallpox, were quarantined at the time by the state board of health. Defendant's motion was in the alternative form, and contained a request for a continuance until the next term of court or for a postponement until the release of the quarantine. The court denied the continuance until the next term of court, but formally sustained the motion to postpone the case until the release of the quarantine, or until March 2, 1909, a period of 21 days. This order was not made, however, until a physician, under authority of the court, had reported the existence of smallpox and expressed the opinion it would be unsafe to release the quarantine in less than ten days. The record does not show when the quarantine was released, but does show that the trial proceeded at the appointed time, and that three of the quarantined witnesses testified on behalf of defendant. For the purpose of showing error, it will not be presumed that the court forced defendant into the trial when his witnesses were detained by quarantine, or proceeded when the quarantine was in force. Error must affirmatively appear on the face of the record. Presumptions are in favor of the regularity of judicial proceedings. The postponement having been granted in substantial compliance with the terms of the motion made by defendant, he cannot make the order the basis of a reversal on a record which fails to show that the trial was resumed before the quarantine was released, or that there was reason for further postponement.

3. In response to a subpœna, Wesley Knight appeared

as a witness for defendant February 8, 1909, but did not testify. During the intermission he went to Cuba, and on account of his absence defendant asked for a continuance, which was denied March 2, 1909. This ruling is also assigned as error. The motion was supported by an affidavit, in which defendant undertook to state the nature of the testimony Knight would give, if present. It does not appear from the affidavit that he witnessed the homicide, or that he was present at the time, or that he knew any fact immediately connected with that event. The facts recited in the affidavit relate principally to the friendly relations between defendant and Byrnes, the victim of the homicide; to their having jointly rented a hall for a dance at Walton; to their never having quarreled; and to the reputation of defendant as a peaceable and law-abiding citizen. As to these matters, other witnesses testified on behalf of defendant; and, while it was stated in the affidavit that all of the facts mentioned therein could only be proved by the absent witness, Knight, the following is the only enumerated fact of which defendant offered no proof at the trial: "Byrnes was a man of ungovernable temper, and when under the influence of liquor was quite quarrelsome." The record contains no proof that Byrnes was under the influence of liquor, and the affidavit does not state that Knight alone could testify Byrnes had an ungovernable temper. It will not be presumed, on review, that this fact could only be shown by the absent witness, especially since many of the witnesses in testifying stated they had known Byrnes during the greater part of his life. It does not affirmatively appear, therefore, that there was an abuse of discretion in overruling the motion. *Burgo v. State,* 26 Neb. 639; *Dunn v. People,* 109 Ill. 635.

4. The next assignment is: A motion by defendant for a change of venue was erroneously overruled. He argues that it was impossible to have a fair and impartial trial in Cass county for the following reasons: Four murders had been committed therein within a period of four months

prior to the trial. These crimes were subjects of universal conversation, and the details were published in the newspapers. The public mind was inflamed. The excitement was intense. There was undue haste in the prosecution. Affidavits presenting these grounds for a change of venue were filed by defendant in support of the motion, but the state resisted the application by a greater number of affidavits denying the existence of the passion and prejudice on which the motion was based. The application was directed to the trial court's discretion, and only an abuse thereof would justify an interference with the ruling below. *Sweet v. State,* 75 Neb. 263; *Jahnke v. State,* 68 Neb. 154; *Goldsberry v. State,* 66 Neb. 312; *Argabright v. State,* 62 Neb. 402; *Welsh v. State,* 60 Neb. 101; *Stoppert v. Nierle,* 45 Neb. 105; *Olive v. State,* 11 Neb. 3. On the face of the affidavits, an abuse of discretion on part of the trial court in denying a change of venue is not shown. Furthermore, passion and prejudice against defendant are not reflected in the verdict, when it is considered in the light of the record. Defendant was charged with murder in the second degree. The testimony on behalf of the state would sustain a verdict of guilty as thus charged. Under the instructions of the court, the jury were at liberty to find defendant guilty of murder in the second degree or of manslaughter. The penalties for each felony were explained to the jury by the trial court. Knowing the instructions permitted a verdict which might result in a life sentence, they returned a verdict under which the trial court could have imposed a sentence of one year only. In this view of the proceedings, the conduct of the jury does not indicate that they were influenced by passion or prejudice, but furnishes a reason for upholding the trial court in overruling defendant's motion for a change of venue. In this respect the record does not show an abuse of discretion.

5. The homicide occurred at the town of Eagle, September 16, 1908, in the evening, after a picnic at that place.

In the opening statement to the jury, counsel for the state made use of the following language: "We will show that the deputy marshal, who was in the saloon in the town of Eagle in the pursuit of his duty as an officer, was compelled to leave the place by the defendant; that the bartender in the saloon was told by the defendant, at a time a fight was going on that he wanted to stop, that he would kill him if he came around the bar." The failure of the trial court to sustain an objection to this statement is made the basis of another assignment of error. The statutory authority under which counsel for the state proceeded is as follows: "After the jury has been impaneled and sworn, the trial shall proceed in the following order: First. The counsel for the state must state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it." Criminal code, sec. 478. Pursuant to this direction of the criminal code, counsel attempted to state the evidence by which he expected to prove the charge against defendant. Was the ruling of the court reversible error? The answer must be in the negative. Bad faith on part of the prosecution in making the statement is not shown. It was not made by a witness under oath. The jury understood from the instructions that a verdict of guilty could be based on evidence alone. The statement was obviously directed to the question of malice, which is an essential element of murder in the second degree, and counsel was no doubt convinced that the facts mentioned were provable in making the state's case in chief. The statement did not prejudice defendant, because the jury found him guilty of manslaughter, a felony containing no element of malice. That the statement was not prejudicially erroneous is supported by abundant authority. Statements made in good faith, though not subsequently proved, and statements of unprovable facts are not necessarily prejudicial to defendant. *People v. Gleason*, 127 Cal. 323; *People v. Lewis*, 124 Cal. 551; *People v. Searcey*, 121 Cal. 1; *Reynolds v. State*, 147 Ind. 3; *State v. Todd*, 110 Ia. 631; *State v. Allen*, 100 Ia. 7; *State v.*

Tippet, 94 Ia. 646; *State v. Meshek,* 61 Ia. 316; *People v. Fowler,* 104 Mich. 449. In opening statements to juries, the improper rehearsal of facts not provable under the rules of evidence sometimes resulted in reversing judgments, but it is unnecessary to discuss or cite cases so holding, as they are not applicable to the record in the case at bar.

6. At the beginning of the trial the sheriff was directed to keep the jury together; but after the state had made its case in chief the trial court allowed them to separate for a period of 21 days, and this is the ruling most vehemently assailed. That the court had power to change its ruling for a sufficient reason is too plain for argument. The authority of the court to permit a jury to separate during the trial in a criminal case is recognized by the following provisions of the criminal code: "If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on the subject of the trial, or to listen to any conversation on the subject, and that it is their duty not to form or express an opinion thereon until the cause is finally submitted to them." Criminal code, sec. 484. Notwithstanding this statute, it is insisted error is shown by the separation alone, and that prejudice should be presumed from the fact that the jurors were permitted to mingle with their neighbors for a period of 21 days, when the public mind was inflamed by the reports of other homicides. The statute recognizing the authority of the trial court to permit the jury to separate has been the subject of discussion by this court in a number of cases. In *St. Louis v. State,* 8 Neb. 405, 413, Judge LAKE used the following language: "While it is the usual and perhaps the better practice in most capital cases thus to keep the jury together, there is no provision of our criminal code requiring it to be done. On the contrary, section 484 expressly provides for such separations up to the time when the case is finally submitted; and whether they shall

be permitted or not in any given case is left to the discretion of the presiding judge." The same view was expressed in *Walrath v. State,* 8 Neb. 80, 92, and in *Langford v. State,* 32 Neb. 782. This is not a capital case, but the reasons for keeping the jury together still exist, and the practice has not been changed by the statute, except where the court, for reasons which are deemed sufficient, permits a separation. That it is within the discretion of the trial court to allow the jury to separate is shown by the cases cited.

A conviction may be set aside, however, where there has been an abuse of discretion, or where the record shows that defendant has been prejudiced. Does the record present either of these contingencies? In the midst of the trial, some of defendant's witnesses were quarantined on account of smallpox. A physician appointed by the court reported that it would be unsafe to release the quarantine in less than ten days. It would naturally occur to the court that free communication with the quarantined witnesses for a few days more might be important to defendant. A proper regard for defendant's rights would suggest a reasonable postponement, and the time was fixed at 21 days. To keep the jury together during all that time would be a hardship which could only be justified by necessity. Whether the occasion for that course existed was a question for the determination of the trial court. From the bench it was stated that some of defendant's witnesses had been quarantined on account of smallpox, and the jury were permitted to separate after having been admonished as follows: "Upon this ground a necessity has arisen for a continuance of the case, or rather a postponement for about 20 days until the quarantine can be removed. You appreciate the gravity of the situation. You have been kept together until now, but under the circumstances of the case the court deems it best to allow you to separate. It is the duty of the court to admonish you as to your duty upon separation. As I have heretofore said, you are not to discuss the matter

between yourselves nor with any person else. You must refrain from coming to any conclusion upon the evidence until all of the evidence is before you. This is your duty as jurors. You may be annoyed by thoughtless persons talking to you about the case, but to protect yourselves you must state positively, if any such occasions arise, to the people or the persons, that they must not talk to you about the case. I think you appreciate what your duties are and the responsibility resting upon your shoulders. Keep in mind always the admonitions of the court until you return here again on the morning of March 2, 1909, at 9 o'clock. You will now be excused to go to your homes." That any juror disregarded this admonition of the court is not suggested by the record. The sufficiency of the evidence to sustain the judgment is not questioned in this court. The conduct of the jurors has not been impeached either in the record brought here by defendant or in the argument of counsel. There is nothing to show that any member of the jury was subjected to improper influences during the intermission. For reasons already stated in discussing another assignment of error, the verdict bears evidence that the jury were not prejudiced against defendant or improperly influenced from any source during their separation. In allowing them to separate, neither abuse of discretion on part of the trial court nor prejudice to defendant is shown by the record. It follows that this assignment of error must be overruled.

7. Complaint is also made because a witness for the state was permitted to testify that a brother of defendant exclaimed: "Now give it to him." The information contained the charge that defendant killed Byrnes by striknig and kicking him. The version of the state's witnesses is, in substance, as follows: Defendant was the aggressor. He and Byrnes clinched on a sidewalk 2½ feet above the ground, struggled for a moment, went off the sidewalk together, lit on their feet, and immediately fell with Byrnes underneath. When they were on the ground defendant struck Byrnes in the face two or three times,

got up, and repeatedly kicked him on the head. Dissolution followed within a few minutes. The story of defendant's witnesses is: Byrnes was the assailant. He and defendant clinched on the sidewalk, struggled for an instant, and fell together from the sidewalk to the ground below. Immediately defendant struck Byrnes two or three times in the face, and got up, but did not kick him. Defendant's explanation is that Byrnes was killed by striking the ground in his fall from the sidewalk. An eyewitness for the state was permitted to testify that defendant's brother, who was only a few feet away, exclaimed, after defendant struck Byrnes: "Now give it to him!" The admission of this testimony is the error assigned. Regardless of its admissibility, it does not require a reversal. Defendant was a witness in his own behalf, and testified on direct examination that he struck Byrnes two or three times when the latter was on the ground. Having admitted that he thus struck the blows, he was not prejudiced by the proof of his brother's direction.

8. Another argument is directed to the proposition that the trial court erred in permitting a physician to testify on behalf of the state to facts obtained by him when in the employ of defendant in a professional and confidential capacity. After the homicide defendant employed the physician to examine the body of the deceased person and to report the result. Later the same physician was selected by the state to make a *post mortem* examination. He performed the service, and testified at the trial to the conditions disclosed. Defendant contends that knowledge of all of the facts to which the physician testified was obtained as a result of confidential communications properly entrusted to him by defendant. The point is that the physician's testimony was admitted in evidence in violation of the following provision of statute: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly entrusted to him in his professional ca-

pacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Code, sec. 333. As applied to physicians, the purpose of the statute is to prevent the improper disclosure of secrets or facts learned by means of the confidential relation. The relation protected is that of physician and patient. Outside of that relation the parties are on an equal footing, where the rule of the statute and the reasons of public policy on which it is founded do not follow. In considering the statute this court, in an opinion by Chief Justice NORVAL, said: "The mere fact that a communication is made to a person who is a lawyer, a doctor or a priest, does not of itself make such communication privileged. To have that effect, it must have been made in confidence of the relation and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser." *Hills v. State,* 61 Neb. 589, 595. The same view is expressed in *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39. In the present case the physician was not employed to examine or treat defendant or any member of his family. The relation of physician and patient did not exist between them. The exhumed body contained no secrets which could be kept within the exclusive knowledge of defendant and the physician. The means of ascertaining the condition of the body was equally within the reach of defendant and the state. The court was entitled to know the truth. In addition, there is testimony showing the physician stated to defendant at the time of his employment that he would make his statement to the county attorney also. The purpose of the statute is to protect patients from objectionable disclosures, but it was never intended to shield defendant in his present position. Consequently the ruling of the trial court in admitting the physician's testimony must be approved.

9. Referring to Byrnes, the victim of the homicide, a witness for defendant was asked: "When under the influence of liquor, what was his disposition as to being

quarrelsome or otherwise?" Complaint is made because the witness was not permitted to answer this question. The ruling of the trial court was justified by the fact that there was no proof that Byrnes was under the influence of liquor. Other rulings on evidence are challenged, but do not contain reversible error. Some of them were correct. Others were not prejudicial, if erroneous. Defendant admitted on the witness stand that he struck Byrnes two or three times. The jury, however, did not find him guilty of any crime containing the element of malice, and he was not prejudiced by rulings relating to evidence on that subject.

10. A lengthy instruction containing the following language is criticised as erroneous: "You may also deduce the purpose or design of the defendant from his declarations, if any he made, at the time of the killing of said Byrnes, but in considering the declarations of the defendant, made at the time of the alleged killing of Byrnes detailed by the witnesses on the stand, you should sift the evidence carefully, and critically examine the circumstances under which they were uttered and heard and detailed. The declarations made by the defendant at the time, when aggravated by passion and excitement, if they were, may or may not have much weight attached to them." Defendant criticises this instruction because he made no declarations, and because it submitted to the jury an issue on which there was no evidence. The criticism is unmerited. A witness, after describing defendant's acts of violence, testified to his having said: "You got enough?" or, "Have you got enough?" The instruction was favorable to defendant, and its tendency was to caution the jury against giving too much weight to such declarations.

Other instructions are also criticised, but attention has not been directed to any prejudicial error therein. All questions presented by the brief of defendant or argued by his counsel at the bar have been considered. The result is that he has been unable to point out any error requiring a reversal, and the judgment against him is

AFFIRMED.

MARGERY H. SMULLIN ET AL., APPELLANTS, V. IDA M. WHARTON ET AL., APPELLEES.

FILED APRIL 9, 1910. No. 16,430.

1. **Wills**: CONSTRUCTION. Where a testator in his will devises specific realty to his wife, bequeaths all his personalty to her absolutely and unconditionally, and devises the rest and residue of his estate to a trustee, with directions to give her during her lifetime the income therefrom and the proceeds of any sales made pursuant to her written directions, and at her death to distribute what is remaining of the trust estate among testator's collateral relatives, the words "rest and residue", in absence of language showing a contrary intention, mean the estate remaining after payment of charges, debts and particular legacies, including the payment of any statutory allowance fixed by the county court for the temporary maintenance of the widow and received by her for that purpose.

2. ———: SUIT FOR AN ACCOUNTING: PLEADING: ESTOPPEL. Where a petition in a suit to require the widow of a testator to account to his brothers and sisters according to an oral promise to divide among them annually, after deducting her living expenses, the income of an estate which passed to a trustee under a residuary clause in his will, alleged that she received from the estate $12,000 a year and that $5,000 a year was sufficient for her support, answers denying these allegations and containing admissions that she had received from the income of the trust estate part of a statutory allowance fixed by the county court for her temporary maintenance did not preclude her, as a matter of law, from subsequently asserting that she should not be charged in the accounting with the sum thus received.

3. **Appeal**: MANDATE: CONSTRUCTION. Where the district court, in proceeding under a mandate to try an issue defined by the supreme court, determines the issue in harmony with the law and facts, the mandate, upon a subsequent appeal, will not be so construed as to make the decree erroneous.

4. **Wills**: SUIT FOR AN ACCOUNTING: ESTOPPEL. In an accounting between an estate which passed to a trustee under the residuary clause of a will and testator's wife who was the principal beneficiary of the trust, where the trial court was directed by mandate of the supreme court to charge her with sums received by her out of the trust estate, a rejected demand by her at a former trial for a decree for the amount due her under the will, less sums paid to her from the trust estate by order of the county

court for temporary maintenance, does not estop her from asserting, as a matter of law, that such payments were not chargeable to her, because they were expenses paid out of the income from the realty of which the testator died seized, as distinguished from the residue which passed into the trust estate; the record showing that the facts and law were equally within the knowledge of both parties, that plaintiffs were not misled, and that they did not change their position or withhold any proofs by reason of such conduct.

5. **Appeal:** REMAND: ESTOPPEL: PLEADING. A statement or admission made in a brief filed in the supreme court, to be available as an estoppel in the district court after the case has been remanded for further proceedings, must be pleaded and proved.

6. **Judgment:** INTEREST. In an accounting between an estate which passed to a trustee under the residuary clause of a will and testator's wife who was the principal beneficiary of the trust, a decree for the balance due her is a decree for the payment of money, and draws interest from the date of rendition at the rate of 7 per cent. per annum. Comp. St. 1909, ch. 44, sec. 3.

7. **Wills:** ACCOUNTING: CREDITS. In an accounting between a trust estate consisting of realty which passed to the trustee under the residuary clause of a will and testator's wife who was the principal beneficiary and entitled to receive from the trust estate an annual allowance of $5,400, she may be credited with the net proceeds of personalty bequeathed to her, where they were mingled with the income from the realty and used for the benefit of the trust estate by a special administrator when the will was being contested, she having been charged, on equitable grounds, with a sum received by her from the real estate of which testator died seized.

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

John C. Cowin, James H. McIntosh and *Francis A. Brogan,* for appellants.

W. W. Morsman, contra.

ROSE, J.

This appeal presents one phase of a protracted controversy over the residuary estate of George H. Boggs, who died without issue June 1, 1895, leaving a will through

which he gave his wife, Ida M. Boggs, now Ida M. Wharton, all of his personalty, the home property, and a lot in Omaha. The rest and residue of his estate was devised to Harry A. Westerfield, trustee, who was directed to pay to testator's wife during her lifetime the income therefrom and the proceeds of any sales made pursuant to her written directions, and at her death to distribute the remainder of the trust estate among testator's brothers and sisters and the children of any deceased brother or sister. When the will was offered for probate, it was contested by the collateral relatives described. The contest resulted in a judgment probating it and in the affirmance of that decision. *Boggs v. Boggs,* 62 Neb. 274. Later the contestants brought a suit in equity in the district court for Douglas county to establish and enforce a constructive trust for their benefit, with Mrs. Wharton as trustee *ex maleficio,* and to require her to account as such according to the terms of an oral promise to testator to divide among them annually the net income of the trust estate, after deducting her living expenses. John C. Wharton, the present husband of Ida M. Wharton, succeeded Westerfield as trustee, and was joined with her as a defendant. The suit, after a trial, was dismissed, and upon plaintiffs' appeal to this court it was held that the amount of any surplus liable to be divided among the plaintiffs was so uncertain and indefinite that a court of equity would not attempt to establish or administer such a trust. *Smullin v. Wharton,* 73 Neb. 667.

This position, however, was abandoned on rehearing. A constructive trust was subsequently declared in an opinion by Chief Justice HOLCOMB, and the following conclusion was reached: "The case is remanded, with directions to the district court to take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life

upon the income of the trust estate devised to Westerfield, and upon the *corpus* thereof if the income is insufficient, and according to the conditions of said trust; second, to charge the said appellee as trustee in trust, to pay and distribute annually all such surplus income from the trust estate, if any there be after providing for the maintenance of the appellee as aforesaid, and such gifts to charitable purposes as she may desire to make from time to time, not exceeding $10,000 in all, to the brothers and sisters of the testator, share and share alike, the issue of deceased brothers and sisters, if any such issue, to take the share of the deceased parent; third, for such other accounting and decree as may be necessary to carry fully into effect the provisions of the constructive trust declared to exist, and of the trust declared by the will in Westerfield, and according to the views expressed in the opinion by Chief Justice HOLCOMB, and of this opinion." *Smullin v. Wharton*, 73 Neb. 705.

The district court, after the case reappeared there for further proceedings, allowed Mrs. Wharton, by a decree rendered June 1, 1908, to retain for her maintenance and support $5,400 a year, beginning January 1, 1908. From the allowance thus made she appealed to this court, insisting it should begin at the death of testator, June 1, 1895, instead of January 1, 1908. This contention was sustained, though part of the decree of June 1, 1908, was not disturbed. *Smullin v. Wharton*, 83 Neb. 328. In again remanding the case for further proceedings these directions were given: "The judgment of the district court, as to the questions herein reviewed and set aside, is reversed and the cause is remanded, with directions to said court to enter a supplemental decree requiring the trustee to pay to the defendant, Ida M. Wharton, out of the trust estate, a sum equal to the sum of $5,400, per annum, from June 1, 1895, to January 1, 1908, less such sums as have been heretofore paid to or received by her out of the trust estate, as established by the facts found and set forth in the decree of said court, and that all

taxable costs of the last trial and of this appeal be taxed to the trust estate to be paid by the trustee. * * * The only matter now left for an accounting is as to the amount received by defendant out of the trust estate since the death of Mr. Boggs to be charged up against the $5,400 per annum to which she is entitled. To our minds the findings of the district court are not entirely specific upon this point, but, should it be so held by that court, or should the court be able to arrive at a satisfactory conclusion from the evidence offered upon the trial, which is not before us, no accounting will be necessary; if not, it will have to be made." *Smullin v. Wharton,* 83 Neb. 346.

In the further proceedings thus directed by this court, the trial court supplemented the decree of June 1, 1908, by the following findings and judgment:

"1. That Harry A. Westerfield, as special administrator, collected from the income of the real estate of which the testator died seized the sum of $27,653.15, and expended therefrom, for taxes and repairs and other expenses of maintaining the said property, the sum of $9,194.83, leaving the net yield from the income of the said real estate the sum of $18,458.32.

"2. That said Harry A. Westerfield, as special administrator, converted the personal property which passed under the will, and which is described in finding numbered 3 in said decree of June 1, 1908, as of the value of $10,000, and received therefrom the sum of $7,949.78, and expended in the process of collecting and reducing the same to money the sum of $201.73, leaving the net yield from the personal estate the sum of $7,748.05.

"3. That the amounts received by Harry A. Westerfield, as special administrator, and set forth in the two preceding findings, were mingled by him, as stated in the fifth finding of said decree of June 1, 1908, and out of the same he paid to the defendant, Ida M. Wharton, the sum of $20,700 on account of her allowance as widow, and paid to himself, for his services in reducing the per-

sonal property to money and collecting the same, the sum of $794.97, and for the expense of collecting the income of the real estate and for his services in caring for the said estate, the sum of $2,259.93, making a total retained by him for his services of $3,054.90, and paid for the expenses of erecting a monument upon the grave of George H. Boggs, deceased, the sum of $1,400. That the said special administrator paid to Irving F. Baxter, administrator with the will annexed, the sum of $1,051.47, that being the amount remaining in his hands after the foregoing disbursements. Upon the foregoing findings of fact and the findings of fact made in the decree of June 1, 1908, the court adopts the following conclusions of law, to wit:

"(*a*) The devise to Westerfield, trustee, as set forth in the will, being the devise of the 'rest and residue' of the estate of which the testator died seized, the gift of personal property to the defendant Ida M. Wharton, was exempt from the allowance made to her by the county court and from all debts and expense of administration; but she is not entitled to have the amount of said legacy, which was expended by the special administrator aforesaid, now set off against the sums charged to her in this accounting as partial payments of the annunity of $5,400, to which ruling the plaintiffs except, and to the refusal to allow such set-off the defendant Ida M. Wharton excepts.

"(*b*) The 'rest and residue' of the estate, which passed into and constituted the trust estate under the devise to Westerfield, trustee, was that which remained after payment of the allowance made by the county court to the widow, and all debts, specific legacies and expense of administration; and no part of the sum of $20,700, paid to the said Ida M. Wharton, as aforesaid, was paid out of the trust estate, to which the plaintiffs except.

"(*c*) The only sums which have been paid to or received by the said Ida M. Wharton out of the trust estate are specially found and set forth in the findings of fact made by the court in said decree of June 1, 1908, and

numbered 6 and 7, to wit: Total paid by H. A. Westerfield, as trustee, $7,893.71, and total paid by J. C. Wharton, as trustee, $4,182.50, making the aggregate sum of $12,076.21; and there is now due the said Ida M. Wharton for arrears of the annuity of $5,400, during the period from June 1, 1895, to January 1, 1908, the sum of $55,873.79, to which plaintiffs except.

"It is therefore considered, ordered and decreed by the court that the defendant John C. Wharton, trustee of the express trust created by the will of George H. Boggs, deceased, and his successors in trust, pay to the said Ida M. Wharton out of the trust estate, the sum of $55,873.79, with interest thereon at the rate of 7 per cent. per annum from the date of this decree, in addition to the sums heretofore decreed to be paid to her, and in satisfaction of the sums due to her annually from the date of the death of the testator of January 1, 1908, as determined by the judgment and the mandate of the supreme court in this cause, to which the plaintiffs except."

The record shows that Mrs. Wharton received funds during three periods of the litigation as follows: From the time the will was offered for probate until the contest ended in 1902 Westerfield was in charge of the trust estate as special administrator, and, under an order of the county court allowing the widow $300 a month, paid her from mingled funds derived from both personalty and realty the sum of $20,700, a portion of the total allowance. During the period from 1902, after the will had been probated, until Westerfield retired as trustee in 1905, he paid her as the net income from the realty the sum of $7,893.71. From the date John C. Wharton became trustee until January 1, 1908, he paid her as net proceeds of the income from the realty the sum of $4,182.50. It is obvious from an examination of the decree now presented for review that the district court in the accounting credited Mrs. Wharton with $5,400 a year from June 1, 1895, to January 1, 1908, a period of 12 years and 7 months, or a total of $67,950; that she was charged

with two of the items named, one for $7,893.71, and the other for $4,182.50, both amounting to $12,076.21; and that the balance in her favor as established by the decree is the difference between the total credit of $67,950 and the total charge of $12,076.21 or $55,873.79. The trial court, however, refused to deduct from her maintenance fund of $67,950 any part of the item of $20,700. Plaintiffs argue that there was included therein and chargeable to her the sum of $16,198.39 derived alone from the realty, and in segregating it they refer to the first finding to establish the fact that the net income from the realty during the time Westerfield acted as special administrator was $18,458.32. They also refer to the third finding to show that during the same period the expense of collecting the income from the realty and the compensation of the special administrator amounted to $2,259.93. They insist that the difference between these sums, or $16,198.39, was received by Mrs. Wharton from the real estate, and that she should have been charged therewith. The reason for the contrary ruling of the trial court is found in the following conclusion of law copied from the decree assailed by plaintiffs: "The 'rest and residue' of the estate, which passed into and constituted the trust estate under the devise to Westerfield, trustee, was that which remained after payment of the allowance made by the county court to the widow, and all debts, specific legacies and expense of administration; and no part of the sum of $20,700, paid to the said Ida M. Wharton, as aforesaid, was paid out of the trust estate." This conclusion of law, which resulted in the failure "to charge to Mrs. Wharton the sum of $16,198.39, received by her out of the rent of the real estate devised to the trustee, during the period before the probate of the will," is the first error assigned.

1. The direction of this court to the trial court was to require the trustee to pay to Mrs. Wharton *"out of the trust estate,* a sum equal to the sum of $5,400, per annum, from June 1, 1895, to January 1, 1908, less such

sums as have been heretofore paid to or received by her *out of the trust estate.*" What went into the trust estate depends on the will, which, after giving absolutely certain real and all personal property to testator's wife, contains the following provisions:

"I give, devise and bequeath to Harry A. Westerfield, of Omaha, Nebraska, as trustee, all of the rest and residue of my estate, of whatsoever nature and kind, to be held by him in trust, upon the following trusts: (1) To pay out of the same all the expenses of maintaining the same and administering the said trust. (2) To deposit in bank to the credit of my said wife during her life, for her own use, all the net rents, issues and profits thereof, such deposits to be made daily as said rents, issues and profits are received and collected. (3) On the request in writing at any time or times of my said wife to sell any part thereof and to deliver to her, for her own use absolutely the proceeds of such sale, or otherwise invest the same in the name of said trustee and for the purposes herein specified, as she may direct. (4) Upon the decease of my said wife my said trustee shall without unnecessary delay, divide whatever of my said estate shall then be remaining in this trust equally, share and share alike, between my brothers and sisters. In case of the death of any of them before such division, leaving issue, such issue shall take the deceased parent's share."

What passed into the trust estate under this devise was the "rest and residue" of testator's estate, as that term is used in the will. In that sense the residue is the portion left after the payment of charges, liabilities and particular legacies. *Phelps v. Robbins,* 40 Conn. 250; *Collin's Appeal,* 148 Pa. St. 139, 23 Atl. 1108. The county court's monthly allowance of $300, a portion of which the widow received, was not a part of the rest and residue within the meaning of the residuary clause of the will, and was therefore not taken out of the trust estate. *Crew v. Pratt,* 119 Cal. 131. It was an expense of administra-

tion, and not a part of the residue. Nothing in the will indicates a contrary intention on the part of testator. It follows that, on the face of the mandate containing the direction of this court, the trial court did not err in holding that no part of the $20,700 received by Mrs. Wharton was paid out of the trust estate.

2. Plaintiffs argue that the judgment is not within the pleadings, and that defendants have conceded in their answers that the net rents collected by Westerfield, as special administrator, and paid over to Mrs. Wharton as part of the county court's allowance, should be charged against her. One of the averments upon which plaintiffs rely to sustain this contention is as follows: "That during the period of administration the said Westerfield paid to the defendant, Ida M. Wharton, on account of her allowance as widow, the total sum of $20,700, covering the sum of $300 a month, commencing June 1, 1895, and continuing to the 31st day of January, 1900; but for the remaining period of 13 months, from February 1, 1900, to March 22, 1902, the said Westerfield failed to pay said allowance of $300 a month, and no part of the income from the trust estate which accrued during the term commencing with the death of the testator and continuing to March 22, 1902, was paid to the said Ida M. Wharton, excepting as some portion of her allowance may have been paid out of such income."

The answers contain other admissions of a similar nature; but it should be observed in construing them that Mrs. Wharton was a defendant in a suit in equity to charge her as a trustee *ex maleficio*. It was alleged in the petition that she had received from the estate $12,000 a year, and that $5,000 a year was sufficient for her support. She denied these averments, and in addition undertook to state by way of admissions the sources, dates and amounts of her receipts. An examination of the answers, however, fails to disclose an admission that any sum received from any source should be charged to her. There is nothing in the record to show that plaintiffs

withheld any proofs on account of these admissions, or that the material facts were not shown by the evidence. When the litigation had been in progress for years, this court, after a trial *de novo* upon a record containing the pleadings, defined the issue which resulted in the decree now assailed. In the opinion the undetermined question is stated as follows: "The only matter now left for an accounting is as to the amount received by defendant out of the trust estate since the death of Mr. Boggs to be charged up against the $5,400 per annum to which she is entitled." *Smullin v. Wharton,* 83 Neb. 346. By formal mandate this remaining issue was referred to the district court, with directions "to enter a supplemental decree requiring the trustee to pay to the defendant, Ida M. Wharton, out of the trust estate, a sum equal to the sum of $5,400, per annum, from June 1, 1895, to January 1, 1908, less such sums as have been heretofore paid to or received by her out of the trust estate." *Smullin v. Wharton,* 83 Neb. 346. For the purpose of complying with this direction the trial court was referred to its own findings and to the evidence already taken, with permission to take further testimony, if necessary. That items involved in the accounting were to be considered was perfectly understood by plaintiffs. If the trial court looked beyond the issue defined by this court to construe answers previously filed, the decree shows that the construction adopted preserved the legal rights of Mrs. Wharton under the residuary clause of the duly probated will of testator. By this construction the trial court was left free to require plaintiffs to do equity according to the maxims invoked by them in calling their adversary to account. In these respects the rulings of the trial court will be approved.

3. Another point argued is stated as follows: "The mandate should be construed as it was intended. The meaning of the words, 'trust estate', in the mandate, is the real estate in question, whether considered before or after it came into the possession of the trustee." The pur-

pose for which the cause was remanded has already been shown. That purpose was stated in the mandate. It was construed below according to its technical import, if anything was left open for construction. In that light, error does not appear in the holding that no part of the $20,700 received by Mrs. Wharton was paid out of the trust estate. The mandate was not violated. If the decree entered was the one demanded by the law and facts, it was not made erroneous by the trial court's construction, and should not be made so by the same process on appeal. It is manifest that this assignment can only be made the basis of a reversal, if at all, when considered with some infirmity in the judgment itself.

4. The decree is also challenged on the ground that Mrs. Wharton is estopped by her conduct in this litigation from denying that the sum in dispute should be deducted from her allowance. In presenting one branch of this question, it is asserted that she admitted in court by motion that a part of the item of $20,700 received by her was derived from real estate which would pass to the trustee under the terms of the will. Plaintiffs in their brief say: "After the district court had completed the accounting and had ascertained the facts incorporated in the decree of June 1, 1908, the defendant, Ida M. Wharton, presented a motion to the lower court, and caused it and the refusal of the court to grant it to be incorporated into the decree. A part of the motion is as follows: 'And thereupon, on the facts above found, the defendants demand that the court decree the trustee, and his successors in trust, to pay to the defendant, Ida M. Wharton, out of the trust estate the sum of $5,400 for each year, ending on the first day of June, commencing June 1, 1895, that being the date of the death of the testator, less the sum which, during the year, was paid to her from the trust estate by Harry A. Westerfield while acting as special administrator, or while acting as trustee under the express trust, or by John C. Wharton while acting as

trustee, with interest on the difference thus found at the rate of 7 per cent. per annum.' "

This demand was made after 13 years of litigation. According to plaintiffs' statement, it was made after the district court had completed the accounting and ascertained the facts incorporated in the decree of June 1, 1908. It is perfectly apparent, therefore, that the demand or admissions were not intended to disclose or concede additional facts. It was intended as an assertion of a legal or equitable right arising from facts already before the court. Both the facts and the law applicable were equally within the knowledge of plaintiffs and defendants. There is no intimation anywhere that plaintiffs were misled, or that they changed their attitude or position in any respect, or that they were prevented from asserting any right by reason of the language appearing in the demand quoted. Fraud is not even suggested. No inequitable or illegal relief was procured by the admissions. When acquiescence by plaintiffs would have concluded defendants, plaintiffs refused to be bound by the conduct which they assert is now binding on defendants. Plaintiffs' hostility as litigants was unabated. They did not terminate the litigation by consenting to the decree demanded by their adversary. Neither the demand for judgment nor the admissions influenced the district court. The decree ignored the demand and did not respond to the admissions. When the cause was remanded, the distinction between a devise of the real estate and a general devise of the rest and residue was directly presented to the court for the first time by defendants. The question was within the issue. The relief sought and obtained by plaintiffs required them to do equity. On a record presenting such a situation, there was nothing to prevent Mrs. Wharton from changing her position in a matter of law, or from asserting her legal and equitable rights under the residuary clause of testator's will. In view of the entire history of this case, the conduct mentioned did not constitute an estoppel.

5. It is further argued that Mrs. Wharton by other conduct in the course of the litigation is estopped to deny that the amount in controversy should be deducted from her allowance. This estoppel is based on statements or arguments found in the briefs of her counsel on former hearings in this court. In considering this question, it will be necessary to readvert to the issue which resulted in the decree. The mandate of this court directed the district court "to enter a supplemental decree requiring the trustee to pay to the defendant, Ida M. Wharton, out of the trust estate, a sum equal to the sum of $5,400, per annum, from June 1, 1895, to January 1, 1908, less such sums as have been heretofore paid to or received by her out of the trust estate." The trial court was referred to its own findings and to the evidence already taken, with permission to hear additional proofs, if necessary. No question of estoppel was suggested by the mandate. On the issue defined by this court, Mrs. Wharton asserted her rights as matter of law on facts already established. If plaintiffs controverted those rights on the ground that she was estopped from asserting them on account of statements made by counsel in her briefs in this court, why were the facts not pleaded and proved? The record contains no such pleading or proof. Is the decree of the trial court to be set aside because of undisclosed facts constituting an estoppel? Is proof of such facts to be considered for the first time in the appellate court? These questions are answered in the negative by a fundamental principle of appellate procedure which prevents reviewing courts from considering evidence not submitted to the trial court and which was not available to that tribunal. The conclusion is that the decree cannot be set aside on this ground.

6. Another assignment of error relates to interest on the decree at the rate of 7 per cent. per annum. The decree directs the trustee to pay to Mrs. Wharton out of the trust estate the sum of $55,873.79. It is unmistakably a decree for the payment of money, and interest is

controlled by the following provision of statute: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." Comp. St. 1909, ch. 44, sec. 3. In allowing interest the district court properly applied the statute. No error of which plaintiffs may justly complain has been found in the record.

7. On cross-appeal Mrs. Wharton insists the district court erred in refusing to allow her a credit of $6,696.58 for proceeds of personal property bequeathed to her. The bequest on which this credit rests precedes the residuary clause in the will, and is as follows: "I give and bequeath to my said wife, absolutely and unconditionally, all the personal property of whatever nature of which I may die seized and possessed, including notes, mortgages, stocks, bonds, city or county warrants, certificates of deposit, cash on hand or in bank, mining stock, uncollected rents, bills receivable, and in fact all personal property of whatever kind or wheresoever located, which I may possess at the time of my death." This bequest gave the legatee, Mrs. Wharton, absolutely and unconditionally all the personal property of which testator died seized. *Smullin v. Wharton,* 73 Neb. 667, 705. The probating of the will, however, was resisted by plaintiffs for nearly seven years. In consequence, the legatee, Mrs. Wharton, never obtained possession of her legacy. Instead, Westerfield, as special administrator, converted it into money, mingled the proceeds with the income from the real estate, and, with the exception of $1,051.47, expended the mingled funds in the course of the special administration. By the second finding quoted in the statement of the case it is established that the sum of the net proceeds realized from the personalty was $7,748.05. Out of the funds with which these proceeds had been mingled the sum of $1,051.47 was turned over to the administrator with the will annexed, leaving $6,696.58, for which Mrs. Wharton received no credit in the accounting. This item was de-

rived from the personalty bequeathed to her absolutely and unconditionally. Was she entitled to this credit? It has been held already that the property which passed into the trust estate under the devise to Westerfield as trustee was what was left after payment of charges, expenses of administration and particular legacies. If this holding is correct, proceeds of the personalty amounting to $6,696.58 were wrongfully appropriated to the payment of obligations from which Mrs. Wharton and her bequest had been exempted by the will. The effect of the ruling of the district court in refusing to allow credit for this item was to deprive her of her legacy to that extent and to sanction the enhancement of the trust estate by the conversion of her private property. The accounting is between Mrs. Wharton and the trust estate. On equitable grounds the trial court, as prayed by plaintiffs, deducted from the permanent maintenance fund of $67,950, allowed her under the will and established by decree, the sum of $7,893.71 which had been paid to her out of the real estate of which testator died seized. Under such circumstances equity by means of a credit of $6,696.58 will restore that sum to her from the trust estate which was wrongfully enhanced at her expense.

The reason for the contrary holding of the trial court is not stated in the findings; but plaintiffs justify the refusal to credit Mrs. Wharton with the net proceeds of her legacy on the ground that the personal estate is a primary fund for the payment of debts and legacies. In support of this doctrine reference is made by plaintiffs to sections 67, 68, 93, ch. 23, Comp. St. 1909, and also to the recent case of *Schade v. Connor,* 84 Neb. 51, where the following language is quoted by this court from *Sutherland v. Harrison,* 86 Ill. 363: "In the administration of assets the personal estate is a natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted before the real estate can be made liable, and it will not be exonerated by a charge on the real estate, unless there be express words, or a

plain intent, in the will, to make such exoneration." This rule was made inapplicable to the present inquiry by the terms of testator's will and the following provisions of section 155, ch. 23, Comp. St. 1909: "The estate, real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises and legacies, and the persons to whom they shall be made, may be exempted, if it shall appear to the court necessary in order to carry into effect the intention of the testator, if there shall be other sufficient estate."

The rejected credit of $6,696.58 should have been allowed and added to $55,873.79, the amount of the decree. For the purpose of correcting this error, the judgment of the district court is reversed, at the costs of plaintiffs, and the cause remanded to the district court, with directions to enter a decree directing John C. Wharton, trustee of the express trust created by the will of George H. Boggs, deceased, and his successors in trust, to pay to Ida M. Wharton out of the trust estate the sum of $62,570.37, with interest from August 9, 1909.

REVERSED WITH DIRECTIONS.

SEDGWICK, J., not having heard the argument, took no part in the decision.

ROOT, J., dissenting.

I cannot, for the reasons hereinafter stated, concur in the opinion of the majority in this case. The record is replete with proof that, until the last hearing in the district court, the litigants treated all of the estate referred to in the fifth paragraph of Mr. Boggs' will as the rest and residue of the estate. The transcripts filed in this court disclose that Mr. Boggs died June 1, 1895; that Westerfield acted as special administrator until he quali-

fied as trustee March 22, 1902; that the probate court allowed Mrs. Wharton $300 a month for her support pending the settlement of said estate, and that she received from the estate up to March 22, 1902, $20,700, and no more. There was, therefore, due her March 22, 1902, upon the order to pay $300 a month, $3,600. With these facts uncontradicted in the record, at the time the judgment of the district court was reversed and the cause remanded in 1909, upon the last preceding appeal, the district court was directed to render a judgment in Mrs. Wharton's favor at the rate of $5,400 per annum from June 1, 1895, and to deduct therefrom such sums as she may have received from the trust estate. The amount Mrs. Wharton had received from the estate subsequent to March 22, 1902, was set out in the transcript. If, as counsel for Mrs. Wharton argue and the majority opinion holds, the trust estate consists of the rest and residue of the Boggs' estate, and that rest and residue can have no legal existence until all claims against the estate, including the widow's allowance, as well as the costs of administration, are paid, it was demonstrated beyond controversy that the rest and residue did not exist and could not be ascertained March 22, 1902, nor at any time intermediate that date and the submission of the cause in this court, because at no time had Mrs. Wharton been paid the aggregate of her annual allowance since the death of Mr. Boggs. At no stage of the litigation has she asserted that the money paid to her subsequent to March 22, 1902, was not paid out of the trust estate. Her counsel concedes that charge was proper, and the majority opinion places its seal of approval thereon. The writer hereof confesses that he cannot understand how the resignation of Westerfield as administrator and his qualification as trustee can transmute the property described in the fifth paragraph of the will into a "rest and residue" or trust estate, and yet that resignation and qualification seems to be the only basis upon which the judgment of the district court can be affirmed. There is, it seems to me, but

one reasonable and logical construction to be given the opinions and judgments of this court in the case at bar, and that is, the rest and residue of the estate of Mr. Boggs is that part of his estate described in the fifth paragraph of his will, and that Mrs. Wharton should be charged against her annual allowance all sums she may have received from that part of her late husband's estate since June 1, 1895. The findings of the district court now disclose that amount to be $16,198.39. That sum should have been charged against Mrs. Wharton by the district court, and, it having failed to do so, the judgment now before us should be modified to that extent.

It seems to me that the argument concerning Mrs. Wharton's right to her widow's allowance in addition to the support provided for in the will, and in reference to the fund out of which there should be paid the expense of administering the estate, is immaterial and irrelevant at this stage of the case, and was likewise immaterial in the district court. This cause has never been remanded generally, but in each instance the judgment and mandate directed the district court to determine a particular issue or to do and perform definitely described acts. The cause was last remanded with instructions to the district court to enter judgment in Mrs. Wharton's favor for $5,400 per annum since Mr. Boggs' death; less such sums as she may have received from the trust estate. No other subjects were before that court for adjudication. In attempting to adjudicate any other fact or right, it would review and revise the judgment of this court. Not only did the judgment of this court dispose of all things presented hostile thereto, but it foreclosed as well every argument and proposition that might have been presented or interposed to mitigate or mould that judgment. *West v. Brashear,* 14 Pet. (U. S.) *51; *Sibbald v. United States,* 12 Pet. (U. S.) *48; *Hill v. Hoover,* 9 Wis. 12; *Pierce v. Kneeland,* 9 Wis. 19, 25; *Piper v. Sawyer,* 78 Minn. 221. So it seems to me this court adjudged and determined that whatever rents and profits of the estate described in the fifth para-

graph of Mr. Boggs' will have been paid to Mrs. Wharton were paid to her out of the trust estate; that to affirm so much of the judgment of the district court as failed to apply any part of those rents is to ignore our former judgment and concede to the district court the right to review the final judgments of this court.

What has been said applies with redoubled force to so much of the opinion of the majority as grants Mrs. Wharton relief upon her cross-appeal. The subject matter of that appeal is foreign to the things referred to in the mandate of this court, and was not before the district court at the last hearing.

LETTON, J., concurs in this dissent.

ALBERT BROWN, APPELLANT, V. DANIEL BUCKLEY, APPELLEE.

FILED APRIL 9, 1910. No. 15,965.

Intoxicating Liquors: APPEAL: DISMISSAL. "The supreme court may on its own motion dismiss remonstrator's 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 appellant made no motion to advance the case for determination." *Heesch v. Snyder*, 85 Neb. 778.

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

J. B. Dunn and *N. T. Gadd*, for appellant.

W. D. Oldham and *R. E. Brega, contra.*

FAWCETT, J.

Daniel Buckley, appellee, applied to the board of trustees of the village of Oconto for a license to sell intoxicating liquors during the municipal year beginning in May,

1908. The village board granted the license. Remonstrator appealed to the district court for Custer county, which court on May 13, 1908, confirmed the action of the village board, and dismissed remonstrator's action. Remonstrator appeals. The transcript on appeal was filed in this court November 11, 1908. No motion to advance the case was ever filed in this court. It therefore appears that the period for which the license was issued has long since expired and that remonstrator's appeal now presents nothing but moot questions. Following the rule announced in *Hcesch v. Snyder,* 85 Neb. 778, and in harmony with the authorities there cited, remonstrator's appeal is

DISMISSED.

LULU TAYLOR V. C. LAWRENCE STULL, APPELLANT; BYRON CLARK, APPELLEE.

FILED APRIL 9, 1910. No. 16,459.

1. **Appeal:** LAW OF CASE. The determination of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and ordinarily will not be reexamined in a subsequent appellate proceeding.

2. **Bastards:** JUDGMENT: ENFORCEMENT. The provision of the statute which requires a reputed father to give security to perform the order of the court, and the further provision that, in case he neglect or refuse to give such security and pay the costs of prosecution, he shall be committed to the jail of the county, to remain till he shall comply with the order of the court, are cumulative remedies, and the plaintiff in a bastardy suit is not limited thereby in the use of all the means to which resort may be made to enforce the payment of judgments in ordinary cases.

3. ———: ———: ———. And in such a case, where the defendant is in default of payment of any instalment due under the judgment of the court, said judgment, as to such past due instalment, may be enforced by execution, as in other cases.

4. ———: ———: MODIFICATION. A judgment in bastardy proceedings, requiring the defendant to pay for maintenance a given sum at stated periods, is subject to the future order of the court

discontinuing the payments, upon a showing that maintenance is no longer necessary.

5. ———: ORDER FOR CARE AND CUSTODY: EFFECT. The fact that by proceedings under the statute the care and custody of a bastard child shall by order of the court be awarded to some third person, or to a children's home, for the purpose of providing such child with a suitable home where it may be educated, clothed and properly brought up, is immaterial when it further appears that said child has not been actually taken into the custody of such third person or children's home, but has at all times remained with the mother.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering and *A. N. Sullivan,* for appellant.

Byron Clark and *W. A. Robertson, contra.*

FAWCETT, J.

This is the second time this case has been before us. Our former opinion, reported in 79 Neb. 295, contains such a full and accurate statement of the case that none further need be made. On retrial in the district court a decree was entered establishing the attorney's lien of Byron Clark, intervener, in the sum of $485, with interest from September 10, 1901, and awarding intervener an execution therefor. From this decree defendant appeals.

We will consider defendant's points in the order in which they appear in his brief. His first point is a repetition of his contention at the former hearing that "in a bastardy proceeding an attorney's lien should not be allowed to exist." This point was decided adversely to defendant on the former hearing, and no good reason has been advanced why it should be again considered.

The second point is: "The court had no power to direct execution against the property of the appellant." This we think is the only real question for consideration. As stated in the former opinion, the judgment as originally

entered against defendant was in the sum of $1,800. This judgment defendant attempted to compromise with the plaintiff, Taylor, on September 10, 1901, by the payment of $1,000. This settlement was set aside, and on December 4, 1901, the district court entered an order that the said sum of $1,000 be applied upon the original judgment; that there still remained of said judgment unpaid $800, and ordered defendant to give a new bond for $1,600, conditioned for the payment of said remaining $800 and costs; requiring payments to be made to the clerk of the court for the benefit of plaintiff, and finding that said payments should begin June 1, 1905, and continue at the rate of $15 a month, payable quarterly thereafter until the full sum of $800 should be paid. It is admitted that this order of the court has never been appealed from, and it must therefore be treated as a final determination of the amount of the payments still to be made by defendant and of the time when such payments should begin. It is also admitted that no part of the said $800 has been paid by defendant. The decree appealed from in the matter at bar was entered January 25, 1909. It thus appears that at the time of entering such decree defendant was in default of the quarterly payments of the monthly allowance for three years and seven months. The amount actually due from defendant to plaintiff would therefore be considerably in excess of the amount of intervener's lien. It is contended by defendant that "nowhere in the (bastardy) act, or by any interpretation of it by this or any other court, can it be collected or enforced by execution. The act provides that upon a conviction the court shall adjudge the amount to be paid, which may be enforced by imprisonment, or by the execution of a bond for the performance of the judgment. This remedy is conclusive, adequate and certain. Such a bond has been given, and if there are any payments unpaid the remedy is by a suit upon the bond, and not by an execution against the appellant or his property." In this contention we are unable to concur. While we concede that decisions may be found sustaining de-

fendant's contention, we think both reason and the weight of authority are against him.

In *Commonwealth v. Snyder,* 4 Pa. C. C. R. 261, an application was made to set aside a *fi. fa.* issued to compel the payment of a fine, costs of prosecution, and lying in expenses, etc., under a decree of the court, upon the alleged ground that "there is no authority to issue said writ." After discussing several general acts of the assembly, the opinion states: "Under these several acts of assembly, it seems to us the power of the court of quarter sessions to award process to collect the fines, etc., by writ of *fi. fa.* cannot be questioned. This is the appropriate writ coming down to us from the common law by which to levy and collect any debt that may be due either the commonwealth or an individual. * * * If defense had been taken upon the ground that the fine, costs, and debt had been paid, we would then have made provisions for some issue in which the question of payment could have been determined. It was, however, admitted upon the argument and not denied by the defendant, that nothing had been paid. So that the only defense left to the defendant is the technical one referred to herein. This defense comes with bad grace from one whose whole duty should have been to provide support for his own offspring, even though he may repudiate the mother who gave it birth. Until better reasons are shown, we will hold this father to the slight duty imposed upon him by the decree of the quarter sessions. We therefore hereby approve and confirm the issuing of said writ of *fi. fa.,* with same effect as if the former decree had been formally written out and entered upon record, which, though an oversight, was neglected to be done prior to the issuing of the writ, but which writ was issued upon the direction of the court. And we further dismiss the rule to set aside the *fi. fa.* at the costs of the defendant."

In *McLaughlin v. Whitten,* 32 Me. 21, the court say: "If the mother should recover judgment after the liberation of the father of the child from the imprisonment

caused by his neglect to provide the bonds, according to the order, she is not limited by the statute, giving her the remedy, in the use of all the means to which resort may be made to enforce the payment of judgments in ordinary cases."

In *Lessee of Darby v. Carson,* 9 Ohio, 149, in considering a statute exactly like ours, the court, in the syllabus, say: "Such order may be enforced by execution as in other cases, the security given under the act being resorted to only in case of the inability of the defendant." In the opinion, on page 151, the court say: "But it is said, the security by bond in these cases takes the place of execution, and that the only remedy upon the judgment, is upon the bond. This by no means follows. We think the bond and security only intended as a resort, after an ineffectual attempt to obtain satisfaction by execution. This is analogous to our general policy to subject the security only in case of the inability of the principal debtor." This holding of the Ohio court is so squarely in point and appeals to us as so sound in reasoning that we shall not pursue the authorities further.

As stated by the supreme court of Maine in *McLaughlin v. Whitten, supra,* we think that plaintiff, or intervener, who for the purpose of this case stands in her shoes, "is not limited by the statute, giving her the remedy, in the use of all the means to which resort may be made to enforce the payment of judgments in ordinary cases", the speediest of which, when the judgment debtor is a man of property, is well known to be the writ of execution. We therefore hold that the trial court did not err in awarding intervener an execution for the amount of his lien, the record showing that there was then actually due and unpaid from the defendant to the plaintiff more than sufficient to satisfy the same. While there may be some question as to the correctness of that part of the judgment of the court which provided that, in the event the amount then due should not be sufficient to pay the lien, execution

should issue for subsequent payments as they respectively became due, until the lien of intervener is paid in full, that matter is immaterial here, as there was then past due and unpaid sufficient to satisfy it.

Defendant's third point is: "The attorney's lien cannot attach to the judgment because the same has been fully satisfied and abated." This contention is entirely without support in the record. It is admitted that defendant has not paid any portion of the $800, but defendant contends that on December 14, 1905, proceedings were had under the statutes of this state, and on behalf of the state, against plaintiff Lulu Taylor for the custody not only of the son Ira, for the support of whom the original judgment was entered, but also for three other children of plaintiff (all of whom the evidence shows were the illegitimate children of defendant), which resulted in a judgment that said children "shall forthwith be placed in the hands of the Nebraska Children's Home Society of Omaha, Nebraska, for the purpose and to the end that suitable homes may be found for said children, where said children may be educated, clothed and properly brought up." Authorities are cited and an able discussion made in the brief that this proceeding absolved both plaintiff and defendant from all obligations to support and maintain these illegitimate children. This whole argument must fail, for the reason that the child, Ira, has never been taken into custody by the society under the judgment above referred to, but, so far as the record shows, has at all times remained with his mother, except for the period of a month or two prior to the time this suit was heard on June 13, 1908. Upon that point the defendant testified as follows: "Q. What is this boy's name over whom the suit was had here? A. Ira. Q. How old is he? A. Going on fifteen. Q. Where has he been in the last year or two? A. He has been at my place most of the time. Q. You may state what he is doing there. A. He is farming. He came out there last spring. Before that he was living here in town. Q. You may state if he is earning wages now, and, if so, how much?

A. He is; he is getting $12 a month. He has been getting that ever since this spring." This testimony was given on June 13, and if the boy came there "this spring", it is apparent that he had not been with the defendant to exceed two or three months. But even if he had been with defendant for a considerable portion or all of the time after the judgment of the court entered December 4, 1901, that would not absolve defendant from liability to pay the amount of the judgment.

In *Directors of the Poor v. Dungan,* 64 Pa. St. 402, the court say: "It having become a public charge by his default, and the condition of the bond being broken, and the sentence of the court disobeyed, what claim has he to demand a new contract and impose new terms? He does not propose to satisfy the condition of the bond by payment or a deposit of a sum equivalent to the requirements of the sentence, but merely to make a new arrangement. Now, clearly it is not for him to dictate the terms of his responsibility, they have already been fixed by the judgment of the court. Although the putative father, no responsibility rests on him beyond the consequences of his conviction, and that is but for a limited period. The child is *nullius filius.* A duty has been imposed upon him by law, which he is to perform *sub modo,* and no reciprocal right springs out of such duty. This being so, having none as father, he is without remedy. The sentence of the court was inflicted upon him as a punishment and with a view to indemnification; neither it nor the conviction gave him any right of control, nor did either give the child any rights beyond what are specified."

If anything had occurred which should excuse defendant from making further payments, as required by the judgment, his release could only be obtained by a further order of the court. That the court has power, upon a proper showing, to make such an order cannot be doubted. *State v. Eichmiller,* 35 Minn. 240.

In any view of this case, we think the judgment of the district court is right and should be affirmed. The pro-

vision of the statute which requires a reputed father to give security to perform the order of the court, and the further provision that, in case he neglect or refuse to give such security and pay the costs of prosecution, he be committed to the jail of the county to remain until he shall comply with the order of the court, should be regarded as cumulative remedies. The judgment of the court required the defendant to pay a certain definite sum of money to plaintiff, and we think the court has full power, where it is made to appear that the defendant is in default in the payment of any instalment so ordered to be paid, to award execution therefor. The money for the support of the child is the important consideration. The mother, as in the present case, may be in dire need. To fail to pay the instalments when due might cause suffering, not only to the partner of defendant's shame, but to their innocent offspring. Imprisonment in the county jail might not bring the money speedily. The bad blood engendered by the bastardy proceeding might make the defendant obstinate. He might choose to lie in jail for an indefinite period rather than pay the money. A suit upon the bond would not speedily bring the money. The law's delays are such that the mother and child might die of starvation before such a case could be reduced to a judgment and execution thereon be obtained. Bonds are at best uncertain security. To deprive the court in cases of this kind of the power to award execution for the enforcement of its judgment would deprive it of its only effective and speedy method of providing for the immediate needs of the unfortunate woman and her still more unfortunate child. We are not willing to so hold.

The judgment of the district court is

AFFIRMED.

ROOT, J., not sitting

JAMES A. STONE, APPELLEE, V. MARY C. SNELL ET AL., APPELLANTS.

FILED APRIL 9, 1910. No. 15,830.

1. **Election of Remedies.** If one who is entitled to rent from the occupant of real estate prosecutes an action of forcible entry and detainer and other actions hostile to the possession of the occupant, and fails in said actions, this will not constitute such an election of remedies as to defeat his subsequent claim for rent. He is not precluded from resorting to a remedy which the law gives him because he has attempted to avail himself of one to which he was not entitled.

2. **Vendor and Purchaser:** CONVEYANCE: RENTS. A sale and conveyance of real estate transfers all of the interest of the grantor in the land, including rents not then accrued.

3. **Judgment:** SET-OFF. A court of equity may in its discretion allow a set-off of a claim against a judgment upon the ground of the insolvency of the judgment creditor.

4. **Landlord and Tenant:** ACTION FOR RENT: SET-OFF. An unsuccessful attempt to evict a tenant by a landlord will not defeat his claim for rent, although damages caused by wilful interference with the rights of a tenant may reduce his liability for rent.

5. **Appeal:** DAMAGES: REVIEW. When a claim for damages has been disallowed by the judgment of the trial court, it is the duty of the party appealing therefrom to point out in his brief the evidence in the record, if any, supporting his claim and from which the amount of alleged damages can be computed.

6. **Judgment:** SET-OFF. In an action in equity to set off a claim of plaintiff against a judgment, the lien of attorney for services in procuring the judgment will not be allowed to reduce the amount of the set-off, if the judgment is sufficient to satisfy both the set-off and the attorney's lien.

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

J. R. Swain, John E. Kavanaugh and *T. J. Doyle,* for appellants.

J. A. Price, G. W. Scott and *H. C. Vail, contra.*

SEDGWICK, J.

In March, 1902, one Godkin was the owner of a tract of land in Greeley county, and then leased the same to this defendant, Mary C. Snell, for a term of one year for the agreed rental of $200. Before that time there had been negotiations between Mr. Stone, the plaintiff herein, and Mr. Godkin in regard to the purchase of the land by Mr. Stone. These negotiations finally resulted in the sale of the land to Mr. Stone and a conveyance thereof pursuant to said sale. At the time of the lease to Mrs. Snell the negotiations between Mr. Stone and Mr. Godkin had proceeded so far that Mr. Stone claimed that his right to the land was prior to Mrs. Snell's lease, and afterwards Mr. Stone began an action of forcible entry and detainer against Mrs. Snell to recover the possession of the premises. He was defeated in that action and appealed to the district court, and was again defeated. He also instituted against Mrs. Snell an action in the district court for Greeley county, in which he attempted to enjoin her from using the land and from interfering with his right to the use of the land. In this action he was also unsuccessful. Mrs. Snell farmed the land for that season, and when the crops were matured Mr. Stone began an action of replevin against her to recover the crops. This action was afterwards appealed to the district court, and tried there, and judgment was rendered against Mr. Stone for a return of the property replevied, and, in case a return could not be had, for the value of the property and for damages amounting to $479.35. Upon Mr. Stone's appeal to this court that judgment was affirmed. *Stone v. Snell,* 77 Neb. 441. Afterwards Mrs. Snell applied to the clerk of the district court for Greeley county for an execution upon the judgment, and Mr. Stone brought this action against her and the clerk of the court, the object being to set off his claim for rent of the premises for the year that Mrs. Snell occupied the same, under her lease with Godkin, against the judgment, and to re-

strain the issuing of an execution until such set-off could be accomplished. The attorneys of Mrs. Snell answer in this action, alleging that they were entitled to liens upon the judgment for services rendered by them to Mrs. Snell in obtaining the same and other services. The amount of these liens as claimed exceeded the amount of the judgment. The attorneys asked that their liens might be allowed to the exclusion of Mr. Stone's claim of set-off against the judgment. Upon the trial the district court found in favor of the plaintiff, allowed the defendant's set-off, as claimed, determined the amount due to the respective attorneys, and allowed the same against that part of the judgment of Mrs. Snell in excess of the set-off allowed the plaintiff. From this judgment of the district court the defendant Mrs. Snell has appealed to this court.

1. The defendant claims that the forcible entry and detainer suit and the replevin and injunction suits are inconsistent with the plaintiff's claim of rent, and that by prosecuting those suits the plaintiff has elected his remedy, and is now estopped to claim rent for the premises. The result of the prior litigation was to determine that Mrs. Snell's lease gave her a right of possession during its continuance which was superior to the claim of Mr. Stone, and that he therefore had no right in the premises which he could assert against the lease of Mrs. Snell. This being the case, it has been adjudicated that Mr. Stone attempted to avail himself of a supposed remedy to which he was not entitled. Such a mistake is not an election of remedies. "One is not precluded from resorting to a remedy which the law gives because he has attempted to avail himself of one to which he was not entitled." *State v. Bank of Commerce,* 61 Neb. 22. *Pekin Plow Co. v. Wilson,* 66 Neb. 115; *Turner v. Grimes,* 75 Neb. 412.

2. It is next contended by the defendant that the purchase of the real estate by Mr. Stone and the conveyance to him did not assign Mr. Godkin's interest in the lease with Mrs. Snell. This contention also has been deter-

mined against the defendant by the former decisions of this court. In *Eiscley v. Spooner,* 23 Neb. 470, it was held that a deed of real estate conveys all the interest of the grantor in the land, including rents not then accrued.

3. It is also urged by the defendant that the plaintiff's claim for rent "could in no event become the subject of equitable set-off." The reason given is that it was "unliquidated, and not reduced to judgment." The lease fixed the amount of the rent at $200 for the term. In this state it has been frequently held that if a defendant holds claims against the plaintiff arising upon contract, and on which he could have maintained an action against the plaintiff at the time of the commencement of the suit against him, he may set off the same against the plaintiff's claim. *Wilbur v. Jeep,* 37 Neb. 604. The quotation in that case from *Simpson v. Jennings,* 15 Neb. 671, probably restricted the right of set-off unnecessarily. Even though the defendant's claim against the plaintiff is barred by the statute of limitations, he may still use it as a set-off if both claims have existed at the same time. By section 106 of the code such "demands must be deemed compensated, so far as they equal each other." *Fish v. Sundahl,* 82 Neb. 541. In the case at bar defendant's judgment and plaintiff's claim for rent stipulated in the lease existed at the same time. They were both upon contract. Either party could have maintained an action on his claim. *Wilbur v. Jeep, supra.* If defendant had begun an action on her judgment, there would be no doubt of the right to set off the liquidated claim arising upon contract of lease. It is alleged in the petition that the defendant is wholly insolvent. There was evidence to suport this allegation, and no other evidence was offered. This is the ground urged as the basis for equitable set-off. It has been frequently decided by this court that "the insolvency of a party against whom a set-off is claimed is a sufficient ground for a court of chancery to decree such set-off in cases not provided for by statute." *Thrall v. Omaha Hotel Co.,* 5 Neb. 295. It is clear that

the court was right in allowing this set-off against the judgment. *Wilbur v. Jeep, supra; Richardson v. Doty*, 44 Neb. 73; *Commercial State Bank v. Ketchum*, 1 Neb. (Unof.) 454. The case last cited is very similar to the case at bar. Set-off may be allowed in the discretion of the court even when the demands are not liquidated. In this case the judgment was for the value of crops raised upon the land during the term for which the rental, which was set off against the judgment, accrued.

4. It is next contended that, "Stone having evicted the tenant from the premises during the term of the lease and this being admitted, he could not restrain or sue for rent." The record does not show that defendant was evicted. So far as we can discover, Mrs. Snell was successful in her litigation with Mr. Stone until the present action.

5. It is claimed that the damages sustained by Mrs. Snell by reason of Stone's interfering with her possession exceeds the amount of rent stipulated in the lease. If Stone wilfully interfered with the free use of the premises and caused damages to the tenant thereby, it would seem reasonable that such damages should so far reduce his claim for rent. The defendant alleged such damages in her answer, but she has not in her briefs referred to any evidence supporting those allegations. Upon the trial the parties stipulated that the bill of exceptions and records in other cases should be considered by the court, and it appears that an indiscriminate mass of papers was offered in evidence. There is nothing in the brief to indicate that defendant's attorneys have looked through this collection to ascertain whether there is anything to show how much Mrs. Snell's rights under the lease suffered by these acts of plaintiff, and we have not seen any evidence from which her alleged damages can be computed.

6. The defendant insists that the claims for attorneys' services were prior to the plaintiff's right of set-off and that therefore the amount allowed the attorneys by the court should have been deducted from the plaintiff's set-

off. The amount of the attorneys' liens so fixed by the court was within the amount still remaining on the defendant's judgment after allowing the plaintiff's set-off as claimed. Therefore the decree of the court allowing the set-off does not interefere with the liens of the attorneys.

We have found no error in the record requiring a reversal of the decree of the district court, and it is therefore

AFFIRMED.

MARIA GUGLER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 9, 1910. No. 15,958.

1. **Trial**: INSTRUCTIONS: PREPONDERANCE OF EVIDENCE. When several witnesses contradict one witness as to a material fact, and the court in its instructions tells the jury that "by a preponderance of evidence is not necessarily meant the greater number of witnesses testifying on one side or the other, nor to any given fact or set of facts", and the court also attempts to recite in its instructions the matters properly to be considered in determining the preponderance of the evidence, such instructions should be complete and embrace all matters disclosed by the evidence that ought to be so considered by the jury.

2. ———: ———. It is not error to refuse an instruction that is so indefinite that it might be reasonably understood by the jury to mean that they should consider the number of witnesses called by a party in a trial in determining the facts as to which they testify.

3. **Street Railways**: INJURY TO PASSENGER: EXPERT EVIDENCE. In an action for damages for personal injury, there being evidence tending to prove that negligence of the defendant caused the plaintiff to fall upon the pavement, it is not error requiring a reversal of the judgment to permit a qualified physician, who has shown himself competent as an expert, to testify that a fall upon the pavement could have caused the injuries from which he found the plaintiff suffering upon examination after the accident, the defendant having an opportunity to cross-examine such witness as to whether in his opinion the fall was the cause of the injuries.

4. Trial: EVIDENCE: REFUSAL TO STRIKE. When a witness gives a proper but incomplete answer to a proper question, it is not error to refuse to strike out such answer.

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

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

Weaver & Giller, contra.

SEDGWICK, J.

The plaintiff in attempting to alight from one of defendant's cars was thrown to the ground and injured, and brought this action to recover damages which she says she sustained from such injury. In her petition the plaintiff alleged that while she was in the act of alighting from the car, and before she had sufficient time to do so, the car was suddenly and immediately started forward by the defendant, and that plaintiff was "thereby jerked, thrown, and dragged down from said car to and upon the pavement." The answer denied these allegations of the plaintiff, and alleged that after the car had passed a certain street the "plaintiff arose from her seat and stepped hurriedly to the running board", and that the motorman immediately reduced the speed of the car "for a stop at the next street intersection", and that the conductor of the car "called to the plaintiff several times to wait until the car stopped, * * * but that plaintiff wilfully, recklessly and negligently jumped from the said moving car to the street" before the car had reached its stopping place. The case was tried to a jury, and there was a verdict for the plaintiff, from which the defendant appeals.

1. The most important question in the case arises from the refusal of the court to give to the jury instruction No. 5 asked by the defendant. The plaintiff, who appears not to have been familiar with the English language, gave her evidence through an interpreter, and in some respects it may be said to be somewhat disconnected; but, taken alto-

gether, her story is reasonable and consistent. She testifies that while she was attempting to alight from the car, after it had come to a full stop, the car was suddenly started, and that this sudden starting of the car was the cause of her falling to the ground and sustaining the injury complained of. The defendant produced five witnesses, besides the conductor of the car, who testified positively that the plaintiff started to leave the car while the car was in motion, and that the conductor and some of the passengers warned her several times not to alight from the car until it had stopped, and that she paid no attention to these warnings and stepped from the car to the ground before the car was stopped, and so was thrown down and injured. The court on its own motion instructed the jury as follows: No. 7. "By a preponderance of evidence, as used in these instructions, is not necessarily meant the greater number of witnesses testifying on one side or the other, nor to any given fact or set of facts, but by this term is meant rather the weight of evidence, that which on the whole, when fully, fairly and impartially considered by the jury, produces the stronger impression upon the minds of the jury and is more convincing as to its truth when weighed against the evidence in opposition thereto." The defendant requested the court to give to the jury the following instruction: No. 5. "You are instructed that the testimony of witnesses who appear to you to be fair, truthful, and honest should not be disregarded; and you are further instructed that, when any of the witnesses called by one party have had the means and opportunity of knowing and observing the facts about which they testify, equal to that of the witnesses called by the other party, and are of equal or greater credibility, it is proper for you in such cases to take into account and consider the number of such witnesses in determining the facts about which they testify." The court refused to give this instruction, and the defendant excepted. The instruction given by the court is the usual instruction in such cases, and, indeed, it is not criticised by the defendant

as being in itself incorrect, but it is insisted that it was not complete, and that under the circumstances in this case, and in the condition of this evidence, it was misleading to the jury, so that the refusal to further explain the meaning of the court as requested by the defendant was erroneous and prejudicial to the rights of the defendant. Of course, in considering the probable effect of any given instruction, it is necessary to consider the entire charge of the court, that is, the instructions are to be considered and construed together. In this case the court gave the further instruction which is usual and generally approved, as follows: No. 8. "You are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each and all of them. In determining the weight to be given to the testimony of the several witnesses, the jury should take into consideration their interest or lack of interest, if any, in the result of the suit; their apparent fairness, bias, or prejudice, if any such appears; their conduct and demeanor while testifying; their distinctness of recollection; their opportunities for seeing and knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them; and all the evidence, facts and circumstances proved tending to corroborate or contradict such witnesses, if any such appear. In so far as there may be a conflict in the evidence, it is your duty to reconcile it if you can; or, if you cannot, then to determine which is true and which is untrue, and to give such weight to the testimony of any witness as you may deem it entitled to under all the circumstances of the case." The plaintiff insists that these two instructions, the one following the other and virtually regarded as one instruction, need no further explanation, and that there can be no necessity under any circumstances of anything further upon the matters covered by these two instructions.

In *Hoskovec v. Omaha Street R. Co.*, 80 Neb. 784, the court, after giving, on its own motion, an instruction substantially equivalent to instruction No. 8, given by the

court in this case, gave, at the request of the defendant, an instruction defining the burden of proof which devolved upon the plaintiff, and followed that instruction with instruction No. 5, as follows: "While it is true that the weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides, yet it is proper for you to take into account and consider in determining any matter in controversy the number of witnesses giving testimony, and you should not arbitrarily reject the testimony of any witness without just cause." And it was held that, under the circumstances in that case, the giving of this instruction was erroneous. In discussing the question so presented the court, through Mr. Commissioner Calkins, said: "When the jury was told that it was entitled, in weighing the testimony of any witness, to consider the extent to which it was corroborated by other witnesses, the defendant was given all the advantage to which it was entitled by the preponderance in number of its witnesses. * * * We are satisfied that the instruction should not have been given without the jury's attention being again called to the caution contained in instruction numbered 3, given by the court on its own motion." We have no doubt that the conclusion in that case was correct, and that the instruction criticised was not properly given. Coupled as it was with the instruction immediately preceding, it gave altogether too much emphasis to the "number of witnesses giving testimony." It left the matter so indefinite that the jury might have understood that the instruction referred to the whole number of witnesses giving testimony in the case. We are not entirely satisfied with the expression first quoted above from that opinion. When the court undertakes to enumerate to the jury the matters that should be considered in determining the preponderance of the testimony, it should include all of the essential elements to be considered in that connection. The extent to which a witness is corroborated should be considered in weighing the testimony of that witness, but it is still more important

that the testimony of all the witnesses should be considered together in determining upon which side of the given proposition is the preponderance of the testimony.

It will be noticed that instruction No. 7, given by the court in this case, calls the attention of the jury to the fact that upon a certain issue in the case a greater number of witnesses has testified upon the one side than upon the other, and tells them that it is not necessary for them to believe the greater number rather than the smaller number. This is, of course, true, and is a correct statement of the law; but it is in the interest of one party to the litigation and against the interest of the other, and, no doubt, the instruction would be more satisfactory if it presented fully and correctly the interest of both parties in the matter so called to the attention of the jury; that is, when any subject embraced in the evidence is brought to the attention of the jury and its effect upon one of the parties explained, it is desirable, and generally thought to be necessary, to explain fully its effects upon either side of the issue to which it relates. The thought that two or three witnesses are better than one is not new. "At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death." Deut. xvii, 6. And hundreds of years later, but nearly 2,000 years ago, this thought is repeated by the greatest of all lawgivers: "But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii, 16. Can it be doubted that to remind the jury that many witnesses have contradicted one witness upon a vital issue in the case, and tell them that it is not necessary that they believe the many rather than the one, is but a partial statement of an important matter? It is better to fail to instruct upon a particular feature of the evidence, rather than to give an imperfect and partial analysis of it.

In *Northern P. R. Co. v. Holmes,* 3 Wash. Ty. 543, 18

Pac. 76, the court considered the following instruction which was given by the trial court: "If, however, the witnesses who testify differently to the same facts are all of them of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the other evidence, and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses"—and concluded that the giving of the instruction was not prejudicially erroneous, although as an abstract proposition it was thought the instruction might be conceded to be erroneous. The fault of the instruction is that it omitted many things that the jury might consider together with the things enumerated, including the number of witnesses. Surely, when several witnesses testify differently as to some material fact, the jury, in determining the preponderance of the evidence on the issue so controverted should consider all of the matters recited by the court in the eighth instruction quoted above, and all of the facts and circumstances disclosed by the evidence bearing upon the point in dispute, as well as the number of witnesses agreeing in their testimony as to the fact controverted.

Instruction No. 5, tendered by defendant, cannot be regarded as a model to be followed in such case. It tells the jury that, if "any of the witnesses called by one party" have had the means and opportunity of knowing, etc., the jury should consider the number of such witnesses; that is, if the witnesses called by one party will compare favorably with the witnesses of the other party in the matters enumerated, then you should take into consideration the number that each party has called in the case in determining the facts about which they testify. This is not an accurate statement of the law and might have misled the jury. The court, therefore, did not err in refusing this instruction.

2. The plaintiff's physician was called as a witness in her behalf, and, having described her physical condition

after the accident in question, plaintiff's counsel asked him the following question: "Q. In your opinion, could this condition be brought about by the falling from the street car by Mrs. Gugler upon the pavement?" This question was objected to. The objection was overruled, and the witness answered: "It could." The defendant insists that this was prejudicial error. The ground of objection is: "To say that they (the injuries) *could* be so produced is dealing with the mere possibility, or remote conjecture." It is true that the answer is not very conclusive, and, unless it is shown by the evidence that the injuries sustained were in fact caused by the accident complained of, they should not be considered in estimating the plaintiff's damages. So far as making the plaintiff's case is concerned, the question and answer might be considered preliminary. It is for the jury to say upon all of the evidence how far the injuries which the plaintiff complained of were caused by the accident in question. The physician was not cross-examined as to the probability that these injuries were the result of the accident. The question was properly submitted to the jury in the instructions, and, in determining whether the injuries were the result of the accident, it was competent for the jury to know that they were of such a nature as might be caused by such an accident, and to determine from all of the evidence in the case whether and to what extent the accident in question caused the physical condition described by the physician. Neither party questioned the physician further as to his opinion of the cause of the conditions which he described, and we cannot say that the defendant was prejudiced by the evidence complained of.

3. The physician was also asked by plaintiff's counsel: "Q. Now, doctor, as to the condition she has been in since this accident occurred, what do you say as to this condition being permanent or simply a temporary condition?" The question was objected to, but the witness was allowed

to answer, and said: "It may be permanent." A motion to strike out this answer was overruled, and the defendant excepted. It will, of course, be conceded that the question itself was a proper one, and the most that can be said in criticism of the answer is that it is incomplete. The physician might have given his opinion as to whether it would or would not be permanent, and either party might have obtained a more definite answer from the witness.

In *Carlile v. Bentley,* 81 Neb. 715, which is relied upon by defendant as holding that such a question and answer are incompetent, the question was: "Doctor, I will ask you if, in your opinion, that wound was such an injury as a permanent injury might result from"? And the answer was: "Yes; all that class of injuries might make a permanent injury." It was held that the question was an improper one. The answer was a complete answer to an improper question, while in the case that we are considering the question was a proper one, and the answer incomplete. The witness was not cross-examined nor required by the defendant to complete his answer. The verdict was not large, considering the injury sustained, and we cannot find that this ruling of the court required a reversal of the judgment.

The plaintiff made unsuccessful efforts to signal the conductor to stop the car, and had been carried by the place where she wished to alight. It appears that she was somewhat confused and may be mistaken in her testimony. The evidence tending to show that she had neglected the usual precautions as to her own safety is quite strong. All of these questions, however, are for the jury, and we cannot say that the verdict is wholly unsupported.

The judgment of the district court is

AFFIRMED.

LETTON, J., not having heard the argument, took no part in the decision.

MYRA E. BRIGGS, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED APRIL 23, 1910. No. 15,758.

APPLICATION to modify opinions in case reported in 84 Neb. 834, and 85 Neb. 830. *Application allowed in part.*

PER CURIAM.

The defendant has requested us to modify the opinions heretofore filed in this case, so as to decide that the 1905 amendments to the defendant's edicts gave it a representative form of government; to withdraw from the opinion, written by Judge ROOT, the reference to the qualifications necessary to render members eligible to hold the three principal offices of the order, and to define with more particularity the term, "a representative form of government."

The opinions heretofore filed decide the only issue before the court, viz., that, so far as the plaintiff is concerned, the society at the time it acted was not qualified to amend its edicts with reference to her rights. The only other persons clothed with any right to question the form of the defendant's government, are the state and such beneficiaries as may be prejudiced by the defendant's amended edicts. Neither the state nor any beneficiary other than the plaintiff is before the court in this action, and we are without power to render a judgment that will foreclose inquiry into said subject should the question be presented in other litigation. We should and shall remain unprejudiced to determine that issue if presented in legal form. Nothing we have said in any opinion filed in this case should be taken as a determination that the defendant does not at the present time have a representative form of government, or as suggesting in the remotest degree that the defendant's affairs are not being administered with the strictest fidelity by the representatives of said society.

The first paragraph of the motion is denied. The criticisms above referred to were unnecessary, and are withdrawn.

The term, "A representative form of government," we believe to have been correctly and accurately defined in *Lang v. Royal Highlanders*, 75 Neb. 196, and in our former opinions in this case, so that the concluding paragraph of the motion is overruled.

JUDGMENT ACCORDINGLY.

DELIA PALMER, APPELLEE, V. LOYAL MYSTIC LEGION OF AMERICA, APPELLANT.

FILED APRIL 23, 1910. No. 15,973.

1. **Insurance**: ACTION ON BENEFIT CERTIFICATE: DEFENSES. In an action based upon a beneficiary certificate of membership issued April 4, 1895, it is *held* that the act of April 8, 1897 (Comp. St. 1909, ch. 43, sec. 94; laws 1897, ch. 47), prohibiting the acceptance of members of over the age of 55 years, cannot furnish a defense, the contract having been made prior to the passage of the act.

2. ———: ———: EVIDENCE: REPRESENTATIONS AS TO AGE. The evidence as to the age of the member at the time of his admission into defendant association is examined, and briefly referred to in the opinion, and it is found that there was sufficient to sustain the verdict of the jury that no misrepresentation as to the age of the member was made to defendant prior to or at the time of his admission to membership.

3. ———: ———: INTEREST. The by-laws of defendant, in force at the time of the death of the member, provided that payment should be made to the beneficiary within 90 days after the proof of death, but fixed no time within which the proof should be made. *Held*, That a reasonable time should be allowed within which to make such proof, which is held in this case to be 30 days, and that interest should not be computed upon the amount of the certificate until the expiration of 120 days after the death of the member, the proof having been made.

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

Tibbets, Morey & Fuller, for appellant.

J. W. James, contra.

REESE, C. J.

This action was commenced in the district court for Adams county for the recovery of the sum of $2,000, and interest, alleged to be due plaintiff as the beneficiary under a certificate of membership issued to John A. Bard on the 4th day of April, 1895, who died on the 28th day of June, 1905. The petition is in the usual and approved form, and alleges facts deemed essential to enable plaintiff to recover the amount named in the certificate of membership. The answer of defendant, aside from certain formal averments as to the purpose and character of its organization as a fraternal beneficiary association without insurance, etc., sets out certain articles and sections of its by-laws, by which, and in connection with section 94, ch. 43, Comp. St. 1909, the acceptance of members of over the age of 55 years is prohibited. It is then averred that the said John A. Bard made application to become a member of defendant on the 3d day of April, 1895, and in which he falsely, fraudulently, knowingly, and with intent to deceive, cheat and defraud defendant, represented his age to be 49 years; that he was born on the 13th day of August, 1847, while in truth and in fact he was at said time over the age of 55 years; that defendant, relying upon his said representations and warranties, admitted him to membership without any knowledge on the part of defendant of the fraud so perpetrated by him, and that by reason thereof, and by force of law of the state and defendant's by-laws, the said certificate of membership was, and had at all times been, null and void, of no force or effect. The answer also contains a general denial. Plaintiff filed a reply denying the allegations of the answer.

With the exception of the issue presented by the answer, as above, the principal facts were stipulated and agreed

upon, and which included the organization of defendant, the enactment of the by-laws attached to and made a part of the stipulation, the application for membership attached, the certificate also attached, that plaintiff is the beneficiary, a niece of said Bard, that Bard had, during his lifetime, paid all assessments and dues required by the laws, rules and regulations of the association, that the $2,000 demanded by plaintiff had not been paid, that prior to the commencement of the suit defendant had offered to pay plaintiff the amount of all dues, taxes and assessments paid by Bard during his lifetime, but which plaintiff had refused to accept, and that the said John A. Bard, to whom the beneficiary certificate was issued, died on the 20th (28th) day of June, 1905; thus practically leaving but the one question for litigation and submission to the jury. The jury returned a verdict in favor of plaintiff for the full amount claimed. A motion for a new trial was filed by defendant, which was overruled and judgment rendered. Defendant appeals.

A number of witnesses were called by each party upon the question of the age of Bard when he became a member of defendant association; defendant seeking to prove that he was over the age of 55 years, plaintiff contending that he was not. The contention of defendant is based largely upon the provisions of section 94, ch. 43, Comp. St. 1909 (Ann. St. 1909, sec. 6638), which is: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificate of membership to any person under the age of eighteen years, nor over the age of fifty-five years." The difficulty which we encounter is that the section referred to did not take effect until two years after the issuance of the certificate to Bard, and we are unable to see how it could affect the contract made two years prior to its enactment. But, in any event, the act also provides in section 92, ch. 43, Comp. St. 1909 (Ann. St. 1909, sec. 6636; laws 1897, ch. 47, sec. 2), that it shall have no effect upon certificates issued prior to January 1, 1898. The act of 1895, which placed the age

limit at 65 years, did not take effect until July, 1895, which was three months after the certificate was issued. We hold therefore that neither act could have the effect of invalidating the certificate. The constitution and by-laws of defendant were introduced in evidence, each containing a similar provision. The volume presented is the "Revision of 1898," proclaimed by the "Supreme Worthy Counselor" to be the constitution and by-laws by which "the order shall be governed on and after March 15, A. D. 1898." It is stipulated, however, that they were in "full force and effect at the time of the issuance of the certificate mentioned in plaintiff's petition, at the time he (the deceased) made his application for membership, and at the time of the death of the alleged member," and, were it not for the stipulation, the provisions of those instruments could not be held applicable to the case.

Upon the issue of the age of Bard at the time he became a member of defendant the case was made to depend almost exclusively, each party presenting an array of witnesses. Defendant examined by deposition a number of members of the family, consisting of brothers and sisters, all of advanced age, but none of them could state the exact age of deceased. None were aware of the existence of any family record giving the dates of birth of the members of the family. During the trial a Bible was presented by plaintiff containing entries of the dates of the birth of many members of the family, including that of deceased. The book in question showed upon its title page that it was published in 1835, while some of the entries date back as far as 1800. Evidence was introduced, and not contradicted, that all the entries were made by the father of deceased, who is shown to have died about the year 1895. The entries appear to have been made at one time and by the same hand. There are a number of erasures and changes apparent, and, among them, in the date of the birth of deceased. There is no record of marriages or deaths. The sole record is as to births. The page was probably transcribed from some other record by one not in the habit of

writing, and whose educational advantages had been limited. This is illustrated in the entry of the birth of the writer himself, which is put down as "July 13 18001." Experts were called as to the appearance of the changes in the record of the birth of the deceased and his sister, Lucinda E. Bard, his senior, and some, if not all, of them testified that the changes appear to have been made a long time prior to the trial, and with the same ink as the other entries, and, in the opinion of some, by the same hand. The witness producing the Bible testified that it was found some months prior to the trial stored away among a lot of cast-off relics and household effects of a brother of deceased. The witness, who was a son-in-law of a relative of deceased, testified that it was in his father's house in Sterling "stored away with some things there, after mother died." No light was thrown upon the history of the book except that it was found as above stated, the entries written by the father of deceased in his lifetime, the changes, apparently in his handwriting, made with the same ink as the other entries, and, as thus supported by the experts, the business men of the city of Hastings, it was admitted in evidence, taken and inspected by the jury, over the objections and exceptions of defendant; and the ruling admitting it is now assigned for error.

The court instructed the jury specially on this part of the evidence, instruction numbered 7, given by the court upon its own motion, being as follows: "The plaintiff has offered in evidence a family Bible, purporting to contain a record of the age of the insured, John A. Bard, which record, it appears, has been altered. The court instructs you that the burden of proof is upon the plaintiff to satisfactorily explain such alteration, and you should consider, from all the evidence, whether the plaintiff has satisfactorily explained such alteration, and give said record such credit and weight as evidence in the case as you deem it justly entitled to." By this instruction the whole matter of the authenicity of the record was left to the jury, and we think correctly.

A number of witnesses, citizens of Hastings, who had been intimately acquainted with deceased in his lifetime, testified as to his age, their testimony being based in some instances upon daily associations, and conversations had with him as to his age, all agreeing that his age was approximately that given by him in his application for membership in defendant. In support of the defense, witnesses of advanced age in New York testified to their association with deceased in his youthful days, and, by comparison with their own ages, gave it as their belief that in April, 1895, he must have been more than 55 years of age. Evidence was also presented from the records of a local lodge of the masonic fraternity at Schuyler Lake, New York, that deceased became a member of that lodge, having been "initiated Dec. 31st, 1862, was passed to the Fellow Craft deg. Jany. 28, 1863, was raised to the Master Mason's deg. March 6, 1863. He was a farmer and 26 years old, and resided in the town of Exeter, Otsego Co., N. Y." This is shown to be a correct synopsis, if not a copy, of the records of that lodge. If we assume that no mistake was made in the statement of his exact age at that time, and that that record is conclusive, deceased was from 57 to 59 years of age at the time he became a member of defendant, according to his nearest birthday at the time of his entrance into each organization. In his application to defendant for membership deceased, in April, 1895, gave his age as 49 years, stating that he was born August 13, 1847. If the date of his birth was correctly given, his age was as represented to defendant. This, however, does not correspond with the entry in the Bible presented, as that, as it appears, is August 13, 1845. Without further reference to the evidence upon the one point in issue, we can only say the whole mass of contradictory evidence was left to the solution of the jury for their decision with proper instructions thereon, and, leaving aside our own convictions, or what our own conclusions would have been, the finding of the jury must be sustained.

Complaint is made of the action of the court in refusing

to give instructions to the jury asked by the defendant. They were based upon the erroneous theory that the act of the legislature above referred to was in force at the time deceased became a member of defendant, and were properly refused, both upon the ground that they did not correctly state the law, and that they (though erroneous) were, in substance, given upon the court's own motion. The same may be said as to the contention that the verdict is contrary to instructions numbered 2, 3 and 6, given by the court upon its own motion. These instructions were in line with the contention of defendant upon the issue of the age of John A. Bard at the time he became a member of defendant, and were, of course, erroneous. But they were given in support of defendant's contention. They ought not to have been given, but the question submitted by them was decided adversely to defendant upon conflicting evidence, and there was no such error as worked prejudice to defendant.

However, suppose we are wrong in what we have said as to the law. Let it be conceded that the answer presented a complete defense, still there was sufficient presented by plaintiff as to the age of Bard to sustain the verdict, and the jury's finding upon the facts must be held conclusive. If the evidence was competent at all and entitled to be submitted to the jury, the duties of the court were at an end, so far as the evidence was concerned, and the jury were the sole judges of the weight and probative force with which it should be credited. There was ample evidence to sustain a finding that at the time Bard became a member of defendant he was not over 55 years of age. As to whether that evidence should be believed or not was a matter with which the court had nothing to do. It was for the jury alone.

The court instructed the jury that, in case their finding was in favor of plaintiff, they should assess the amount of her recovery in the sum of $2,000, "with interest thereon at 7 per cent. per annum," without fixing a date or event from which the interest should be computed. The jury re-

turned a verdict for $2,405.10, which included interest at 7 per cent. from the date of the death of Bard. It is contended by defendant that interest should not have been computed from that date, but that, if interest should be computed at all, it could only be from the date when suit could be brought, which by the by-laws, it is asserted, fixes 90 days after the receipt of proofs before the certificate became collectible, and that until that time no interest should be charged. With this contention we are inclined to agree, notwithstanding the denial of any liability of defendant. In *Dary v. Providence Police Ass'n* (1905), 27 R. I. 377, the court, in discussing the question of interest, say: "But a beneficial association ought not to be treated as a delinquent debtor before demand made upon it, followed by its refusal or neglect. While demand was unnecessary in the circumstances of the case for the purpose of keeping the claim alive, it was necessary for the purpose of creating the relation of debtor and creditor." Cited in Hardy, Fraternal Society Law (1907 ed.), 856. See, also, *Knights of Pythias v. Allen,* 104 Tenn. 623, and 29 Cyc. 255.

It is alleged in the petition and agreed in the stipulation that after the death of Bard proof of such death was duly made, but no date is given, and we can find nothing upon the subject in the bill of exceptions. Defendant's by-laws, in force at the time of the death of Bard, provide that the amount named in the benefit certificate is to be paid "within 90 days after proper proof of death of said member is furnished," etc., but we are unable to find anything fixing the time within which the proof is to be made. It being conceded that the proof was duly made, we may assume that it was made immediately after the death of the member, or within 30 days thereafter. This would allow defendant 90 days thereafter in which to make payment, or 120 days after the death. Bard died June 28, 1905. Interest would begin to accumulate October 28 of that year, at the rate of 7 per cent. per annum. The verdict was returned May 12, 1908. The interest on $2,000 would be

$355.45, which added to the principal makes $2,355.45, which should have been the amount of the verdict and judgment, the judgment to draw interest at the same rate from the date of its rendition.

The judgment of the district court will be reversed and the case remanded for further proceedings, unless the plaintiff file a remittitur from the judgment of $49.65. If such remittitur is filed within 30 days, the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

MARY HELEN UHLICH, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED APRIL 23, 1910. No. 16,013.

Appeal: CONFLICTING EVIDENCE: AFFIRMANCE. Where the sole question involved is one of fact upon conflicting evidence, and there is sufficient to sustain the verdict, the judgment will be affirmed.

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

James E. Kelby, Halleck F. Rose, Frank E. Bishop and *Byron Clark*, for appellant.

George W. Berge, contra.

REESE, C. J.

This action was commenced in the district court for Lancaster county by plaintiff, as the administratrix of the estate of August Uhlich, deceased, against the defendant for damages resulting from the death of said August Uhlich caused by the alleged negligence of defendant. Briefly stated, it is alleged that deceased was in the employ of defendant as general foreman in its repair shops in its track yards in the city of Lincoln, and in which serv-

ice he had been engaged for a number of years; that upon the completion of his day's work on the 2d day of March, 1906, he started to leave the yards, crossing defendant's tracks, when, without any negligence or want of care on his part, he was negligently run over and killed by one of defendant's engines which was being operated at a dangerous rate of speed without warning, lights, bell or whistle. The names of the surviving widow and children of deceased are given, and damages in the sum of $5,000 for loss of means of support are asked, with prayer for judgment following in the usual form. Defendant filed its amended answer, admitting the death of deceased by accident on or about the date named in the petition, but alleging contributory negligence on his part, the assumption of the risk by him in his employment, and a denial of any fault or negligence on the part of defendant. It is further alleged that in the year 1889 defendant and its employees organized an association known as the "Burlington Voluntary Relief Department" of defendant, by which those who became members agreed upon the amount to be paid in case of sickness, accident, or death; that the deceased became, and continued to the time of his death, a member thereof, designating his wife, plaintiff herein, as the beneficiary of his contract of membership; and that it was provided in said contract that the receipt by the beneficiary of the amount thereby agreed to be paid should work a release of the defendant from all other claims and demands based upon the sickness, injury, or death of the member. The provisions of the contract are fully set out in the answer, but need not be here restated. It is further alleged that, subsequent to the death of said Uhlich, the plaintiff herein brought suit upon the certificate of membership, and recovered judgment and accepted and received the sum of $600, the full amount due thereon, and which, by the terms of said certificate and membership, was a full and complete satisfaction of all claims arising from said death, and a bar to the prosecution of this action. A general denial of all unadmitted facts was entered, with

prayer for judgment for costs. The amended reply contained a general denial of the unadmitted facts pleaded in the amended answer, admitted the recovery in plaintiff's individual capacity of the amount due her from the said "Burlington Voluntary Relief Department," but alleged that the receipt thereof did not relieve defendant from the results of its own negligence, that in any event the children of deceased could not be prejudiced thereby, and the action of plaintiff in her individual capacity could not bar the rights of said children. A jury trial was had which resulted in the return of a verdict in favor of plaintiff for $2,000, for which amount judgment was entered. A motion for a new trial was filed and overruled. Defendant appeals.

The family of deceased consisted of his wife (plaintiff) and five children, making in all six members. In the instruction to the jury the court directed that if, under the evidence and instructions, the finding was in favor of plaintiff the jury should ascertain the amount of damages proved, deduct one-sixth therefrom, and return a verdict for the remainder. In view of the pleadings and evidence, it is assumed that the directed deduction of one-sixth from the amount agreed upon by the jury was for the purpose of depriving plaintiff of any part or share in the verdict or judgment, owing to the fact of her having collected the amount due on the certificate of membership in the relief association. The instruction gives us no light upon this point. Such, however, was stated upon the argument to be the fact, and, as neither party has referred to the subject in the printed briefs, we accept it as the theory upon which the case was tried, viz., that the widow was to receive no consideration in arriving at the amount of the verdict. The evidence, while voluminous, is not as satisfying on some features of the case as might be desired. There was evidence tending to prove that deceased had been engaged in the service in which he was employed at the time of his death for over 20 years; that it was the known custom of the many employees within the track

yards to leave their work at the end of a day's service, and cross the tracks to and in the direction of their homes, and at or near the point where deceased lost his life there was a beaten track or pathway along which many followed; that between 5 and 6 o'clock P. M. of the day on which the accident occurred, the evening being cold, with a high north wind and snow falling, deceased put on his overcoat, turned up the collar, put on his cap, turning down the ear protectors, and started for his home, in a general way following the usual traveled route; that soon thereafter he was seen for an instant as he passed under an engine, and his mangled remains were left upon the track after the engine had passed over him. No one witnessed the accident. There is no proof as to just how it occurred, and, unless seeking to cross the track in front of the engine, if he did so try, and unless the wearing of his collar and cap, as above stated, were, or might be thought to be, acts of negligence, there was perhaps no act of his that might suggest a want of care upon his part. Upon this phase of the case the court instructed the jury, in substance, that, where there were no eyewitnesses to the accident, "the law, because the natural instincts and habits of the ordinary person will ordinarily cause him to preserve himself from danger, will presume that at the time he was exercising due care and caution, and was not negligent. This is a presumption of fact only, and prevails only in so far as the facts and circumstances of the case do not show to the contrary." The evidence as to the manner in which deceased wore his coat collar and cap was also submitted with proper instructions. The question of the negligence of the deceased, under all the facts and circumstances proved, was one for the jury.

It was claimed upon the trial that it was the duty of defendant to maintain a guard or flagman at the place where employees were in the habit of crossing the tracks in leaving the yards at the close of the day's service; that the engine was being run at a dangerous rate of speed at the time of the accident; that there was no headlight burning

upon the engine; that no bell was rung nor whistle sounded to warn those crossing the track of the approaching engine; and that those facts might properly be considered by the jury in arriving at a solution of the question of the want of care on the part of defendant, but the court, by its instructions, withdrew all those matters from the consideration of the jury, except as to whether the bell was rung. Of these instructions it is apparent defendant had no cause for complaint. There was a conflict of evidence as to the condition of the engine bell at and before the time of the killing of deceased. The bell was so constructed as to be revolved upon its axis by the use of compressed air. There was evidence tending to prove that the appliances for ringing were not at all times reliable, and that the bell would cease its revolutions at unexpected times, and at other times it would revolve around upon its axis with such speed as to prevent any sound being made. Upon this part of the case there was a sharp conflict in the evidence, not so much as to the condition of the appliances, as to the effect of the revolutions of the bell. There was some evidence tending to show that the bell was being rung as the engine was passing through the yards, running at a speed from five to ten miles an hour, while, upon the other hand, it was claimed by witnesses that the bell did not ring and could not be depended upon to ring at all, and that the appliances for ringing had been in their defective condition for some considerable time before the accident, and had so continued until the following day, when it was inspected. This condition it was claimed was fully known to the agents and employees of defendant having it in charge. While the evidence upon this point was conflicting, yet there was sufficient to support a finding of the jury either way. Upon this feature of the case the court gave the following instruction: "It follows from the law which I have given you that the sole charge of negligence upon the part of defendant made by the plaintiff to which you should direct your attention is the one wherein the plaintiff charges that the defendant negligently failed to have the

bell ringing upon the engine at the time it ran over the deceased. If you find that the defendant was negligent in this particular, and that as a proximate result of such negligence Mr. Uhlich was run over by the engine, then you should direct your attention as to whether or not Mr. Uhlich was at the time guilty of contributory negligence upon his part, about which you are hereinafter instructed, the burden of proof being upon the plaintiff to prove by a preponderance of the evidence that at the time of the accident the bell upon the engine was not ringing; that the defendant was guilty of negligence in its failure to have the said bell ringing at the time; that as a proximate result of such negligence Mr. Uhlich was killed; that plaintiff has sustained injury by reason of his death, as alleged in the petition, and the amount of damages sustained thereby, when the plaintiff has shown these facts, she would be entitled to recover at your hands, unless the evidence also shows that Mr. Uhlich, deceased, was guilty of contributory negligence upon his part, such negligence being also a proximate cause of the injury received; the burden of the proof being upon defendant to prove by a preponderance of evidence that the said Uhlich was guilty of such contributory negligence. If, however, the plaintiff's own testimony should show such negligence upon the part of Uhlich, then no burden would be upon the defendant to prove the same." We are unable to discover wherein this instruction did not submit the question involved to the jury in as favorable a light as defendant was entitled to, and the verdict thereon will have to be accepted as final.

We have read all the instructions with care, and are persuaded that every right of defendant was carefully protected and guarded, and that there is no ground for contention on its part that the instructions, as a whole, were not, at least, fair. We are unable to find anything in the record of the evidence by which we can say that, as a matter of law, the deceased was, or was not, guilty of contribu-

tory negligence, or that, as a matter of law, defendant was, or was not, guilty of negligence. The whole question was therefore left to the decision of the jury, where it belonged.

The briefs presented by the parties cover an able and exhaustive collation of authorities upon the questions of law contended for, but, as we view the case, the verdict of the jury necessarily depended upon their conclusion as to the weight of the evidence submitted. There is no contention that the court erred, as against defendant, by any instruction given, nor in the refusal to give any instruction asked for by it.

We are unable to detect any prejudicial error which requires a reversal of the judgment of the district court. It is therefore

AFFIRMED.

CHARLES RISEMAN, APPELLANT, V. HAYDEN BROTHERS, APPELLEE.

FILED APRIL 23, 1910. No. 16,019.

Personal Injuries: EVIDENCE: REVIEW. Action by plaintiff against defendant for damages resulting from personal injuries caused by a fall upon the sidewalk by reason of plaintiff having stepped upon a hidden tomato which slipped under his foot, causing the accident. An ordinance of the city of Omaha, in which the accident occurred, making it unlawful for any person to throw or leave upon the sidewalk of the city any straw, rubbish, or other refuse was introduced in evidence, but there was no evidence that defendant had violated any provision of the ordinance, or was in any way responsible for the presence of the tomato upon the sidewalk. *Held*, That the verdict and judgment in favor of defendant should be affirmed.

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

Weaver & Giller, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This action was commenced in the district court for Douglas county. Plaintiff's claim is founded upon personal injuries alleged to have been caused by the negligence of the defendant. It is averred in the petition that Hayden Brothers is a corporation organized under the laws of the state of Nebraska, the business being the operation and carrying on of a department store, in the city of Omaha; that one entrance to the grocery department, which is in the basement, is by means of an elevator between the sidewalk and the store building, by the use of which the groceries, fruits and vegetables purchased and sold are carried to and from the rooms of the department, and in making such transfer the merchandise is conveyed to and from the delivery wagons across the sidewalk; that in violation of an ordinance, set out in the petition, defendant negligently allowed and permitted the sidewalk at and near the said elevator to become littered with straw and other substances, and "carelessly and negligently permitted a piece of green tomato to be and remain on the sidewalk underneath the hay, straw and refuse so negligently permitted by defendant to be and remain upon said sidewalk"; that plaintiff in passing on and along said sidewalk, as was his right, and without negligence on his part, stepped upon some hay or straw which had been allowed to accumulate, and that said green tomato, being under said straw, was not seen, nor was its presence known by plaintiff, until by reason of his weight upon said straw and tomato the tomato was crushed and slipped under plaintiff, and he was thrown upon the sidewalk, receiving severe and painful injuries, to his damage, etc. Defendant answered, admitting its corporate existence and that it was engaged in business as alleged, denying other allegations, and setting out at some length the method by which its goods and wares were transported into and from its place of business across the sidewalk in question, but

which need not be further referred to. The reply is a general denial. A jury trial was had, resulting in a verdict and judgment in favor of defendant, and from which plaintiff appeals.

The ordinance referred to is as follows: "Section 24. It is hereby declared unlawful for any person to throw, drop, place or sweep upon any sidewalk along any paved street or alley in the city of Omaha, or to throw, drop, place or leave in any gutter of any paved street or alley in the city of Omaha, or to throw, drop, leave or place upon the pavement of any street or alley of the city of Omaha any papers, sweepings, straw, filth or rubbish of any kind or description, or to throw, place or leave upon any sidewalk, gutter or street in the city of Omaha any dead rat, or other dead animal, or anything which may cause a litter or nuisance; and any person doing any such unlawful act, and any firm, company or corporation owning or occupying any store, office or other building in the city of Omaha who shall authorize, permit or allow any sweepings, paper, rubbish or other thing herein specified to be thrown, placed or left upon any paved street or alley or upon any sidewalk or in any gutter of any paved street shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) dollars for each and every offense. And it is hereby further declared unlawful for any person, firm, company or corporation to sweep or authorize or permit to be swept in front of his or its premises any sidewalk in front of any store, office building or other business building along any paved street in the city of Omaha between the hours of 8 o'clock A. M. and 10 o'clock P. M., and any person so sweeping or authorizing or allowing such sweeping of any such sidewalk between said hours of 8 o'clock A. M. and 10 o'clock P. M. shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding ten ($10) dollars; provided, however, that the foregoing provision relating to sweeping sidewalks shall not apply to sweeping any snow which may fall upon

or accumulate thereon." Thomas, Revised Ordinances of the City of Omaha, ch. 54, sec. 24.

The evidence discloses, without contradiction, that plaintiff, at or about the place referred to, slipped and fell upon the public sidewalk and received a very severe, painful and, perhaps, permanent injury. There seeems to be no doubt about this; and it is quite well established that his fall was caused by stepping upon a green tomato which was crushed and, under his weight, slipped upon the walk, and that the injury resulted from the fall. For the purposes of this case, we may assume, but without deciding, that the ordinance in question was violated by someone, that its violation imposed a liability upon the guilty party, the proof of which might be considered evidence of negligence; that plaintiff's injury occurred adjacent to defendant's place of business, and near where it received and sent out its merchandise, and yet plaintiff could not recover, owing to the fact that the evidence failed to show that the tomato was left upon the sidewalk by defendant or any of its employees. We have searched the bill of exceptions throughout and are unable to find such proof. It may be that the fact that the tomato was upon the sidewalk in front of defendant's place of business, and near the place of receiving and sending out its fruits and vegetables, might be considered with other evidence as a circumstance, if unexplained, in support of the claim that it was placed or allowed to remain there by defendant or its employees. Yet, in view of the fact that the sidewalk was along one of the principal streets of the city, that very near the spot where plaintiff fell other dealers in the same character of goods were engaged in business, and that the sidewalk was in common and continual use of the pedestrian public, defendant could not, upon those facts alone, be held to have violated the ordinance. The burden rested upon plaintiff to establish by a preponderance of the evidence that defendant had been guilty of some act, or had failed to discharge some duty, which resulted in plaintiff's injury. The accident was a very unfortunate one for plaintiff, but

the fact of the injury, alone, without proof that defendant was in some way responsible for it, would not permit a recovery or justify a judgment against it. Defendant may have been guilty of wrong and proof of such guilt out of reach of plaintiff, yet that could not alter the legal result.

Complaint is made of two instructions given the jury, but as plaintiff could not recover in any event, for want of sufficient evidence to sustain a verdict, no good purpose could be subserved by examining them.

The judgment of the district court is

AFFIRMED.

ADOLPH WEILER ET AL., APPELLEES, V. E. H. FISCHER ET AL., APPELLANTS.

FILED APRIL 23, 1910. No. 16,006.

1. **Intoxicating Liquors:** APPLICATION FOR LICENSE: APPEAL: PARTIES. The provisions of chapter 50, Comp. St. 1909, entitled "Liquors", do not constitute the petitioners who sign an application for a license to sell intoxicating liquors either proper or necessary parties to an appeal to the district court from an order of the licensing board granting or refusing such license.

2. ———: ———: ———: COSTS. Where, on an appeal to the district court from an order granting such license, the signers to applicant's petition are not, as a matter of fact, made parties in any way thereto, and enter no appearance therein, the district court is without jurisdiction to order the costs of the proceedings taxed against them.

3. ———: ———: ———: ———: RELIEF IN EQUITY. Where the district court without jurisdiction has made such an order, it is not necessary for the persons affected thereby to make an application to that court to retax the costs. In such case they may maintain a suit in equity to enjoin the enforcement of the void order and remove the apparent cloud cast thereby upon the title to their real estate.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

W. W. Wilson and *T. F. A. Williams,* for appellants.

Pitzer & Hayward, contra.

BARNES, J.

Suit in equity to enjoin the collection of a cost bill ordered by the district court for Otoe county to be taxed against the persons who signed the petition of an applicant for a license to sell malt, spirituous and vinous liquors, under the provisions of chapter 50, Comp. St. 1909, entitled "Liquors", commonly called the "Slocumb Law." The district court overruled a demurrer to the plaintiffs' petition and rendered a judgment thereon for the relief prayed, and the defendants have appealed.

It appears that the defendants elected to stand upon their demurrer to the plaintiff's petition and refused to further plead, so the only question for our determination is the sufficiency of the petition to entitle the plaintiffs to the relief prayed for. The petition will not be quoted in full. It is sufficient to say that it is alleged, in substance, therein that upon the 25th day of April, 1907, one Bernard Carls filed with the proper authorities of the village of Dunbar, in Otoe county, Nebraska, his petition for a license to sell intoxicating liquors for the ensuing year; that the plaintiffs signed his petition, and declared thereby that Bernard Carls, who made application for a license to sell malt, spirituous and vinous liquors, possessed the statutory qualifications, and asked for the issuance of a license to him, according to the law in such cases made and provided; that the applicant, Carls, caused the statutory notice to be published, filed the proof of publication, together with his bond, and deposited his check for the license money with the village board; that the defendants signed a remonstrance to the issuance of the license prayed for, and a hearing was had before the village board, at which time the applicant and the defendants herein appeared, and were represented by

counsel; that plaintiffs did not appear, and were not represented either by counsel or in person in the proceedings taken therein; that at the conclusion of the hearing, and upon May 22, 1907, the village board made its record in the case, overruling the remonstrance and sustaining the applicant's petition, and thereupon ordered that a license to sell malt, spirituous and vinous liquors should be granted to Bernard Carls; that those of the defendants who remonstrated to the issuance of the license filed a notice of appeal, entitled: "In the matter of the application of Bernard Carls for license to sell malt, spirituous and vinous liquors." The notice of appeal was directed to the chairman and board of trustees, to the village clerk, and to the applicant, and by it exception was taken to the granting of license to said applicant. That the appeal was perfected and the remonstrators caused the same to be docketed in the district court for Otoe county under the following title: "In the matter of the application of Bernard Carls for a license to sell malt, spirituous and vinous liquors"; that in the hearing upon the appeal in the district court the applicant, the board of the village of Dunbar, and the remonstrators alone appeared, and were represented by counsel; that none of the plaintiffs herein entered any appearance, nor were they represented by counsel, nor did they take any part in the proceedings in the district court; that on the submission of the case in that court the order of the village board was reversed and the applicant's license was ordered canceled; and thereafter, and on the 1st day of July, 1907, the court made the following order: "Now on this 1st day of July, 1907, it being a day of the May, 1907, term of said court, the parties herein being in court by their respective attorneys, this cause is called for trial, and now the court, having examined all of the evidence herein and listened to the argument of counsel, finds the issues in this case in favor of the remonstrators and against the applicant and petitioners, the action of the village board of the village of Dunbar in granting a

liquor license to Bernard Carls is vacated and set aside, and it is ordered and adjudged that the costs of this case be taxed to the petitioners. The court finds specially, in addition to the general findings, that there was not the required number of *bona fide* resident freeholders on the petition, to all of which said petitioners and said applicant Bernard Carls except, and 40 days from the rising of the court are given to prepare and serve a bill of exceptions, bond fixed at double the costs. And now on this 2d day of July, 1907, this cause coming on further to be heard on the motion for a new trial filed herein, the court on consideration thereof overruled the same, to which applicant and petitioners except"—that on the 2d day of July, 1907, the term of the district court adjourned without day; that prior to the time of the adjournment of court the plaintiffs herein had no knowledge of the entry of any order which in any way affected them; that the plaintiffs had employed no counsel, and no one was present in court who had any authority to bind them by any agreement, or in any manner whatever, and that the court was without jurisdiction to make any order or render any judgment against them; that, pursuant to said order, the clerk taxed the costs incurred in the district court upon appeal, and also all costs incurred at the hearing before the village board, to the plaintiffs; that the costs so taxed included one item of $262.50 for the bill of exceptions ordered by the remonstrators, and other costs, such as docket and witness fees, aggregating the sum of $432.20, no single item of which was actually incurred by the plaintiffs. It was further alleged that the defendants were demanding the issuance of execution by the defendant, the clerk of the district court, to be delivered to the defendant sheriff for collection from the property of the plaintiffs; that the clerk and sheriff were proceeding to comply with the demands of the defendants; that the plaintiffs are property owners and freeholders of Otoe county; that by reason of the said order directing the clerk to tax said costs to them, and the

entry so made by him, an apparent lien or charge is created against their property, which is a cloud upon their title to the same. The petition concluded with a prayer for the cancelation of that portion of the pretended judgment which directed the taxation of costs against them, that it be held to be void as against them, and not in any way a lien or charge against their property; that the defendants be enjoined from attempting to collect the said costs from or out of their property, and for general equitable relief.

It is contended by the defendants that the proceeding to obtain the license in question was instituted by the plaintiffs; that the litigation was carried on by them, or that they had in law become parties to the proceeding in the district court, and that therefore the order of the court directing the clerk to tax all of the costs made in that court and before the village board to them was not void, but was the proper order to be made in such a proceeding. There is thus presented for our determination the question as to whether the persons who merely sign the petition of an applicant for license to sell malt, spirituous and vinous liquors under the provisions of the Slocumb law, who take no further part and have no further interest in the subsequent proceeding, are either proper or necessary parties, and whether the plaintiffs in this case were made parties on the appeal to the district court. It must be conceded that unless the petitioners were in fact, or as a matter of law, parties to the appeal, the district court was without jurisdiction to order the costs taxed to them.

A proceeding to obtain a license to sell malt, spirituous and vinous liquors is a special proceeding, and is regulated wholly by chapter 50 of the Compiled Statutes. It is provided in that chapter that such a license may be issued by the licensing board, whether it be the county commissioners of a county or the mayor and council of an incorporated city or village, if deemed expedient upon the application by petition of a majority of the resident

freeholders of the town, if the county is under township organization, and, if not under township organization, by a majority of the resident freeholders of the precinct where the sale of such liquor is proposed to take place, and, in case of an incorporated city or village, by a majority of the resident freeholders of the ward, setting forth that the applicant is a man of respectable character and standing and a resident of the state, and praying that a license may be issued to him. The law further provides that, after the filing of such a petition by the applicant, no action shall be taken thereon until at least two weeks' notice has been given, and after such notice, if there be no objections in writing made and filed to the issuance of the license, and all of the other provisions of chapter 50 have been complied with, it may be granted. It is further provided that if there be any objections, protest or remonstrance filed in the office where the application is made against the issuance of the license, and if it shall be satisfactorily proved that the applicant for the license has been guilty of the violation of any of the provisions of that chapter within the space of one year, or if any former license granted to the applicant shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license. Section 4, ch. 50, provides: "On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses who shall have the same compensation, as now provided by law in the district court, to be paid by the party calling said witnesses. The testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party feels himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court and such appeal shall be decided by the judge of such court upon said evidence alone."

It thus appears that the right of appeal is accorded to

none but a party interested, and it seems clear to us that the petitioners are not interested parties within the meaning of the statute. One of the main purposes of the Slocumb law was to establish local option in the matter of the license and sale of intoxicating liquors. Hence, it requires, in some cases, a majority of the resident freeholders of the governmental subdivision in which license is to be granted to sign the applicant's petition, while in other subdivisions it requires a petition signed by at least 30 of its resident freeholders, as an expression of local sentiment, and to confer jurisdiction upon the licensing board to act upon the application. The mere signing of the petition does not constitute the petitioners applicants, in the sense of the word as used in the statutes. As soon as the petition is filed, the signers have no further interest in the matter, and the proceeding from thenceforth is one between the applicant and the objectors, if any, to his application. If objection is filed and the statements in the petition are denied, the burden is upon the applicant, not the petitioners, to prove by competent evidence that his application is signed by the required number of qualified petitioners, and, if he fails to do so, the license must be refused. *Brown v. Lutz,* 36 Neb. 527; *Brinkworth v. Shembeck,* 77 Neb. 71. In order to authorize the issuance of a license, it must also appear that the applicant is the real party in interest. *In re Application of Krug,* 72 Neb. 576. In *In re Thompsen,* 84 Neb. 67, it was said: "Must the petitioners have personal knowledge that the applicant is a man of respectable character and standing in the community? Four only of the petitioners were acquainted with the applicant. The statute does not require the petitioners to have such knowledge. If the allegation in the petition with reference to character is not denied, the excise board will generally accept that statement as true; if traversed, the applicant, and not the petitioners, must make the proof."

Again, it can hardly be contended that, if the applicant upon an adverse ruling by the licensing board should

decline to appeal, the petitioners would have that right, and thus compel the issuance of a license to one who no longer desires to procure it. So we are of opinion that ordinarily the petitioners are neither proper nor necessary parties to any of the proceedings subsequent to signing the petition of the applicant. In so holding we have not overlooked our former decisions, which hold that a member of the licensing board who signs the applicant's petition is disqualified to vote on the question of granting the license. We again approve of what is said in those opinions, but we are all agreed that the foundation for the rule there announced is not that the signing of the application makes the signers parties to the proceedings within the meaning of the statute; but, by becoming a petitioner, a member of the board disqualified himself to pass upon the merits of his own petition.

It is alleged in the plaintiffs' petition that they were not made parties to the appeal, and that the title in the district court was: "In the matter of the application of Bernard Carls to sell malt, spirituous and vinous liquors" —that the notice of appeal was directed to the chairman and board of trustees, to the village clerk of the village of Dunbar, and to the applicant; that plaintiffs had no notice of the matter of the appeal, and had no knowledge that any order was entered against them by the district court for Otoe county until after the adjournment of the term at which the appeal was heard. These allegations were admitted by the demurrer of the defendants, and so it clearly appears that the plaintiffs herein were not in fact made parties to the proceeding in the district court. It is also alleged, and is admitted by the demurrer, that they took no part in such proceedings; that no appearance was ever entered for them in that court, and for these reasons, if for no other, the district court was without jurisdiction to make any order which would bind them in that proceeding. We are therefore of opinion that so much of the order of the district court as directed the clerk to tax the costs of the appeal, of the bill of ex-

ceptions, and of the hearing before the licensing board, to the petitioners was absolutely void.

It is further contended by the defendants that plaintiffs have mistaken their remedy; that they should have applied to the district court for a retaxation of the costs; that, having failed to do so, they cannot maintain the present action. If the district court, as above stated, was without jurisdiction to make the order taxing the costs to the petitioners, the plaintiffs herein, such an application was not necessary on their part as a protection to their rights. If they had made such an application, no doubt the defendants would contend that, by so doing, they gave the district court jurisdiction. Without determining that question, it is sufficient to say that they were not required to take any steps in that proceeding by which it could be claimed they had entered an appearance and submitted to the jurisdiction of the district court. The order being void as to them, they could safely ignore it, and by a proper proceeding enjoin its enforcement. The petition herein sets forth that, although the order is void, it is an apparent lien or cloud upon the title to their real estate, and that the defendants are proceeding to wrongfully subject plaintiffs' property to the payment of the costs mentioned in said order. This is sufficient to confer jurisdiction upon a court of equity to grant the relief prayed for.

We are therefore of opinon that the plaintiffs' petition stated a cause of action; that the demurrer thereto was properly sustained; that the judgment of the district court was right, and it is therefore

AFFIRMED.

TRINIDAD ASPHALT MANUFACTURING COMPANY, APPELLEE, v. BUCKSTAFF BROTHERS MANUFACTURING COMPANY, APPELLANT.

FILED APRIL 23, 1910. No. 16,009.

1. **Executory Contract:** BREACH: DAMAGES. "Where a contract is executory, one party has the legal right to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damage as will compensate the other party for being stopped in the performance of his part at that stage in the execution of the contract." *Backes v. Schlick*, 82 Neb. 289.

2. **Sales:** NONACCEPTANCE: DAMAGES. Where a buyer wrongfully neglects or refuses to accept and pay for goods under an executory contract for sale, the seller may maintain an action against him for damages, and the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the breach of the contract. Ordinarily it is the difference between the contract price and the market price at the time and place where the goods ought to have been accepted.

3. **Depositions:** FILING: NEGLECT OF CLERK. Where a deposition has been actually delivered to the clerk of the district court for filing a sufficient length of time before the trial, the fact that the clerk failed to place a filing mark upon the wrapper could not deprive the party filing of the right to use the deposition.

4. **Sales:** COUNTERMAND: WAIVER. Where, after a buyer had countermanded an order for goods, the seller refused to recognize the countermand and delivered the goods according to contract, and the buyer, when notified by the carrier, went to the station and took a portion of the goods for the purpose of testing the same, he thereby treated the contract as still being in force, and waived the countermand; his action being inconsistent with his contention that the contract was not then in effect.

5. ———: NONACCEPTANCE: ACTION FOR PRICE: INSTRUCTIONS. Where the seller in an executory contract for the sale of goods which were delivered to a carrier for the buyer receives notice that the buyer will not accept the goods, and, notwithstanding such notice, brings an action against the buyer for goods sold and delivered, it is error to instruct the jury that, if they find for plaintiff, he is entitled to recover the purchase price of the goods, since the allegations of the petition as to sale and delivery and the proof do not agree.

6. ———: ———: REMEDY. Where title to goods has not passed, and where the contract is executory, the only remedy of the seller, where the buyer refuses to accept the goods, is to sue for his damages for breach of the contract.

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

Charles O. Whedon, for appellant.

Robert S. Mockett, contra.

LETTON, J.

This action was brought to recover the sum of $215, with interest, alleged to be due upon a written contract for the manufacture of roofing. Omitting unessential details, the contract is as follows: "Date 1-19-05. No. ———. Trinidad Asphalt Mfg. Co., St. Louis, Mo. Please ship Buckstaff Bros. Mfg. Co. When April 1st 05 at Lincoln, Neb. Terms 30 days, 2% 10 days; via ———. Delivered F. O. B. St. Louis. 100 rolls 5 ply Shellap roofing, per roll, $2.15. This order is not subject to cancelation. Salesman, J. C. Hitzman. (Signed) Buckstaff Bros. Mfg. Co."

The petition avers that at the time of taking the order the vendee was notified by the salesman that the sales of this particular grade of roofing were so small that it was not carried in stock. It further alleges that, after the contract was entered into for the sale of the roofing, it was manufactured by the plaintiff, and was shipped according to the contract, but that defendant refuses to pay the amount due.

The answer admits that the vendee ordered the roofing at the price specified in the petition, but alleges that it relied upon certain material representations as to the quality of the roofing; that a short time afterwards it ascertained that these representations were false, and that on the 15th of March, 1905, it countermanded the order, notified the vendor not to deliver the roofing, and

that it would not receive it; and further alleges that it has never received or accepted the same.

The evidence shows that the roofing was ordered in January to be delivered upon the 1st of April; that the order was distinctly and positively countermanded by letter on March 15; that on April 1 the vendor delivered the roofing to the Chicago, Burlington & Quincy Railway Company, a common carrier at St. Louis, Missouri, according to the contract; and that the roofing was delivered at the station of the carrier in Lincoln, Nebraska, soon afterwards. Except as to the quality of the roofing, the only material fact disputed is whether or not the salesman told the purchaser at the time of the order that the goods were not kept in stock, but were manufactured as ordered. Mr. Buckstaff testifies he was told the goods were in stock and could be shipped any time, but that he told the plaintiff's agent that he could not use it until April 1, while the salesman testifies he said this grade was only made up when ordered.

The principal question presented by the briefs is whether the plaintiff is entitled to sue upon the contract and recover the purchase price of the goods sold, when the vendee specifically countermanded the order before delivery, and notified the vendor that it would not accept the same. The plaintiff contends that this is a contract for goods to be specially manufactured for the buyer, while defendant considers it an ordinary executory contract for the sale of goods. Taking the position of the plaintiff as disclosed by the evidence on its behalf, the roofing ordered was one of its usual grades, made up according to certain fixed specifications, and sold as an ordinary article of trade to any person who desired to purchase. There was no special condition or requirement in the order. It was for an article, a sample of which had been shown to the buyer, and as to which it was a matter of indifference to him whether it was then on hand or had to be manufactured. It was made up before the

countermand, so that the situation at that time was the same as if the goods had been in stock, save perhaps with regard to the marketable quality of goods of such nature. The case was similar to an order for lumber, still in the tree, or for flour, yet unground, or hops, still ungathered, or shingles, not sawed at the time the order was given, but countermanded after manufactured, and before the time for delivery. Where goods have been ordered from a manufacturer, and during the process of manufacture, or before the order has been made up, the order is canceled; or where goods have been ordered from a wholesaler, and before the goods are delivered, either to the carrier or to the purchaser, the buyer directly countermands the order, and notifies the seller that he will not comply with the contract nor accept the goods, the law is well settled by prior adjudications in this court, as well as by many decisions of other courts in England and in this country, that the purchaser under such an executory contract of sale may always countermand or cancel his order by a direct declaration to that effect to the vendor, although he thereby makes himself liable to respond in damages to the other party for whatever loss he has suffered by reason of the countermand having been given at that time, or at that stage in the progress of the execution of the contract. The remedy of the injured party is an action for a breach of the contract, and not one upon the contract for goods sold, or for labor and materials. 2 Mechem, Sales, sec. 1092. Mr. Mechem cites cases showing that, in many jurisdictions, "he is entitled to pursue his remedy at once, the direction of the defendant not to proceed being equivalent, for this purpose, to an absolute physical prevention by the defendant", though other courts hold that he must await the time for delivery or completion of the contract. See note 4 to section 1089, 2 Mechem, Sales.

In this state this rule was first announced in *Funke v. Allen,* 54 Neb. 407, overruling a dictum in *Lincoln Shoe Mfg. Co. v. Sheldon,* 44 Neb. 279. The rule in the *Funke*

case has been followed in *Western Union Telegraph Co. v. Nye & Schneider Co.*, 70 Neb. 251, 259; *Murphy Co. v. Exchange Nat. Bank*, 76 Neb. 573; *Backes v. Schlick*, 82 Neb. 289; *Hixon Map Co. v. Nebraska Post Co.*, 5 Neb. (Unof.) 388. The case in this state most nearly conforming in its facts to the instant case is *Murphy Co. v. Exchange Nat. Bank, supra.* In this case an order had been given by a bank for 250 calendars and calendar tubes to be delivered on or about December 1. The order was countermanded in April, but the seller refused to abide by it, and the goods were shipped and refused. An action was brought for the contract price. It was held that the vendor had a right of action for damages for breach of the contract, but not a right of action upon the contract for the agreed price of the goods. A similar condition existed in *Hixon Map Co. v. Nebraska Post Co., supra.* That this is the general rule is established by the following cases in other jurisdictions. *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80; *Rochm v. Horst*, 178 U. S. 1; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264. See, also, cases cited in *Funke v. Allen, supra.*

A case from another state, almost identical with this in principle, is *Unexcelled Fire-works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. Rep. 788, where a quantity of fire-works had been ordered early in the year from the manufacturer. After the goods were made up, but before shipment, the order was countermanded, but the goods were shipped as ordered. Defendant refused to receive them from the carrier, and plaintiff stored them subject to defendant's order. The action was on the contract to recover the price, but the court held that the action could not be for the price, but for special damages for the refusal to receive the goods. 2 Mechem, Sales, secs. 1689, 1699-1703; also, note c. to *Todd v. Gamble*, 52 L. R. A. 246 (148 N. Y. 342). That this is the generally accepted rule is evidenced by section 50 of the English statute codifying the law relating to the sale of goods, ch. 71, pt. v, 56 and 57 Victoria, which is as follows:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

There being no dispute in the evidence as to the countermand, we are of opinion that the fifth instruction to the jury that, "if you find from the evidence that said goods were specially manufactured for defendant, and that they had been manufactured prior to the time that defendant countermanded the order, then plaintiff is entitled to recover herein the amount sued for," unless they found false representations had been made to defendant and relied upon, was erroneous, not being in harmony with these settled principles.

Defendant next contends that the court erred in overruling its objections to the reading of the deposition of J. G. Hitzman, for the reason that it had not been filed one day before the trial. Testimony was taken with reference to the fact of filing, and it was shown that the deposition had been delivered to the clerk of the district court and the filing stamp placed upon the outside of the envelope upon the 28th day of April, and that the trial was begun on the 1st of May. The mere fact that the clerk omitted to place a filing mark upon the inner wrapper is not material. If the deposition was actually filed in the clerk's office on the 28th of April, the plaintiff could not be deprived of the right to use it merely on account of the failure of the clerk to mark the date of the filing. We think the court was justified in allowing the

deposition to be read. *State v. Board of Commissioners*, 60 Neb. 566; *Watkins v. Bugge*, 56 Neb. 615.

Shortly after being notified by the railroad company that the goods had arrived, Mr. Buckstaff went to the railroad station, opened a roll, cut off a piece, took it to his office and tested it by holding it before an open fire with a thermometer; and he testified that, when the thermometer registered 112 degrees, the shells on the roofing commenced to slide off. Plaintiff contends that this conduct was inconsistent with the countermand, and was an acceptance of the goods. The court on this branch of the case gave the following instruction, which is assigned as error: "It appears that the defendant, after writing the letter to plaintiff countermanding the order for the goods in controversy, went to the railroad station where the 100 rolls of five-ply shellap roofing was, and took a piece of said roofing and made a test thereupon. It is for you to say from the evidence whether the defendant, by so doing, exercised ownership over the property in controversy, and, if it did, then you are instructed that such an act would be inconsistent with its claim that it had countermanded the order."

Generally a buyer under an executory contract has a right to a reasonable opportunity to inspect the goods before acceptance, and more especially when the sale was made on representation and by sample, as seems to have been the fact in this case, and for that purpose he has the right to unpack and, if necessary, use a small portion for the purpose of a test. 2 Mechem, Sales, sec. 1378. But this right arises by virtue of the contract, and one who has countermanded his order and broken the contract has no such right. Any act of his which indicates that he still retains an interest in the goods is inconsistent with the idea that he has entirely abrogated the contract. It was open to the buyer to change his mind when the seller declined to cancel the order and gave him the opportunity to accept the goods by delivering them to the carrier and sending them to Lincoln. If he desired he could still

withdraw his countermand, and any act of his consistent with the view that he considered the contract still in force would have a bearing upon the question of whether he had withdrawn or waived the countermand. The instruction, as we view the case, was really too favorable to the defendant. *Cream City Glass Co. v. Friedlander*, 84 Wis. 53. As a matter of law, we think the defendant recognized the contract as still existing by taking a sample of the goods to test, and thereby the previous countermand was waived. The rights of the parties then became the same as if the countermand had never been attempted. In a sale made in this manner, the seller was bound to allow the buyer a reasonable opportunity to examine the goods when they arrived, for the purpose of ascertaining whether they conformed to the sample, and this examination did not constitute an acceptance. *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831; Sale of Goods Act, *supra*, sec. 34; 2 Mechem, Sales, secs. 1375, 1377. The delivery of the goods to the carrier under the contract was a receipt by the buyer, but did not constitute an acceptance. The right of inspection still remained. Benjamin, Sales (6th ed.) secs. 695, 703. When the buyer decided, either rightly or wrongly, that the goods were not according to contract, and refused to accept and pay for them, then the contract was broken, and the seller's action was for damages for nonacceptance. The measure of damages is, in such case, the same as if the order had been countermanded at that stage. *Unexcelled Fire-works Co. v. Polites*, *supra*; *Pittsburgh, C. & St. L. R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; 2 Mechem, Sales, sec. 1375.

The evidence does not show what was the final disposition of the goods, or that the plaintiff has suffered any damage whatever by defendant's refusal to accept them. The right of action is for damages, and not for the purchase price, and the allegations of the petition and the proof offered do not agree. *Backes v. Schlick*, 82 Neb. 289.

This being so, the instruction as to the amount of recovery, if the jury found for the plaintiff, was prejudicial, and the judgment must be reversed, with leave to plaintiff to amend its petition, if it so desires, to correspond with the facts.

REVERSED.

FAWCETT, J., not sitting.

MARY E. MCNAMARA, APPELLEE, V. WILLIAM C. MCNAMARA, APPELLANT.

FILED APRIL 23, 1910. No. 16,017.

1. **Constitutional Law: DUE PROCESS OF LAW: DIVORCE: STRIKING ANSWER.** An order of court in a divorce suit, striking out the answer of the defendant as to the dissolution of the marriage relation, and refusing to allow him to defend, except as to the amount of alimony, on account of his failure to comply with a previous order for the payment of temporary alimony, violates the constitutional right of the defendant to due process of law, and is erroneous.

2. **Cases Distinguished.** *Reed v. Reed*, 70 Neb. 779, and *Brasch v. Brasch*, 50 Neb. 73, distinguished.

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

R. R. Dickson, for appellant.

D. H. Sullivan, *M. F. Harrington* and *R. E. Evans*, *contra.*

LETTON, J.

This was an action for divorce and alimony. The plaintiff succeeded in the court below, and the defendant has appealed. The plaintiff and defendant were married in June, 1900. At that time the plaintiff, who was then Mary E. McAllaster, was 18 years of age, while the de-

fendant, who had been previously married, had reached the age of 49 years. After the marriage they lived upon a farm in Plymouth county, Iowa, until early in the year 1905, when they removed to a ranch of 2,000 acres in Brown county, Nebraska, and there resided until January, 1906, when the plaintiff with her four children returned to the residence of her father in Dakota county, Nebraska, where she has since resided.

The petition alleges a number of specific acts of cruelty on the part of the husband extending over a period of years, alleges, in substance, that the defendant is the owner of over 2,000 acres of land, worth about $25,000, and that he is also the owner of personal property, worth about $14,000. The answer admits the marriage, denies that the plaintiff was a resident of Dakota county when she began the suit, and denies the specific acts of cruelty alleged. The reply is, in substance, a general denial. An application for alimony *pendente lite* was made, upon which a hearing was had and an order made by the court requiring defendant to pay as temporary alimony $200 on or before the 21st day of January, 1907, and $200 on the first of each month thereafter during the pendency of the action. Defendant failing to comply with this order, on the 4th of December, 1907, a motion was filed by the plaintiff to strike so much of defendant's answer as states a defense to the application for divorce, and to prohibit him from further defending, because he has disregarded the order of the court relative to temporary alimony. The defendant filed objections to the motion, alleging inability to comply with the order, and that he had a constitutional right to defend. A hearing was had, the court entered an order requiring the defendant to pay $300 for the use of the plaintiff in carrying on and prosecuting the suit, and, in default of payment of that sum, the defendant's answer as to divorce to be stricken, but his answer as to alimony to stand. Defendant failing to make this payment, another motion was filed to strike the answer, and to prohibit the defendant from further defending that part of

the action relating to the granting of a divorce, because the order of the court relative to the suit money and counsel fees had been disobeyed. The defendant then filed an affidavit that, since the last order was made, "he has made every effort to borrow and raise said sum and has been absolutely unable to procure said sum, that he therefore objects to his answer being stricken." A hearing was had, and the journal recites: "And said motion was submitted to the court on the evidence heretofore offered, the affidavit of defendant this day filed, and the admission of the defendant that since December 19, 1907, he has offered to pay into court said sum of $300, provided the sum would be accepted in full for all suit money." The motion was sustained and the answer stricken. When the case came on for trial, counsel for defendant, under the instructions of the court, took little, if any, part in the trial of the issues as to cruelty, though participating fully in the trial of the issues relating to the value of defendant's property and the allowance of alimony and suit money. A decree was finally entered granting plaintiff an absolute divorce and the custody of the children, finding that the defendant was possessed of real and personal property of the net value of $20,000, awarding the plaintiff the sum of $3,000 permanent alimony, and requiring the payment of $600 a year for the maintenance of the children until the further order of the court.

The question of vital importance, as the case stands, is whether or not the court was acting within its authority in sustaining the motion to strike defendant's answer and refusing to permit him to defend as to the issue of divorce. The plaintiff insists that under the rule announced in *Brasch v. Brasch*, 50 Neb. 73, and *Reed v. Reed*, 70 Neb. 779, there can be no question that the action of the court was warranted and proper. The defendant contends that, under section 3 of the bill of rights (const., art. I), providing that "no person shall be deprived of life, liberty, or property without due process of law", and section 13, that

"all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay", he was entitled to be heard in his defense, and that the right to defend cannot be denied him on account of his failure to pay suit money as ordered. He further contends that this case may be distinguished from the cases mentioned; that, having shown by his affidavit that he was unable to comply with the order of the court, he should have been permitted to make his defense, quoting the language of the opinion in the *Reed* case that, "if he had complied with this order, or if he had shown to a reasonable certainty that he was unable to comply with it, no doubt the court would have permitted him to try his case instead of dismissing it without a hearing."

Defendant's counsel insists that the doctrine announced in the cases mentioned is erroneous. He relies with great confidence upon the opinion in the case of *Hovey v. Elliott*, 167 U. S. 409. This opinion, written by Mr. Justice White, shows an exhaustive examination by the learned writer of the powers of chancery courts to enforce obedience to an order made in the progress of a suit, by denying the right of defense to the disobedient party. In that case, which was not a divorce suit, the defendant's answer was stricken from the files and a decree *pro confesso* rendered on account of defendant's failure to comply with an order of the court. The supreme court held, in substance, that, while matters of favor or of grace might be refused to a litigant for a failure to comply with orders made in a case, still a denial of the right to defend on account of disobedience to an order in the case was a denial of due processs of law, and that a judgment for the plaintiff *pro confesso* in such a case was rendered without jurisdiction and might be collaterally attacked. In *Bennett v. Bennett*, 208 U. S. 505, this distinction is made, and it is held that, where an Oklahoma statute gave the court power, "in its discretion, and upon such terms as may be

just," to allow an answer to be filed after the time limited by statute, it was within its power to make the payment of the sum fixed by an order for temporary alimony a condition precedent to the allowance of the filing of defendant's answer in the divorce suit after default, and that such an order was not in violation of the constitutional provision invoked in *Hovey v. Elliott, supra.* The ruling in *Hovey v. Elliott* is in accordance with the great weight of authority. *Bachelor v. Bachelor,* 30 Wash. 639, 71 Pac. 193; *Gordon v. Gordon,* 141 Ill. 160, 21 L. R. A. 387; *McMakin v. McMakin,* 68 Mo. App. 57; *Johnson v. Superior Court,* 63 Cal. 578; *Foley v. Foley,* 120 Cal. 33, 52 Pac. 122; *Baily v. Baily,* 69 Ia. 77; *Allen v. Allen,* 72 Ia. 502; *Trough v. Trough,* 59 W. Va. 464, 4 L. R. A. n. s. 1185; *Cason v. Cason,* 15 Ga. 405; *Dwelly v. Dwelly,* 46 Me. 377.

The contrary view is held in a few states, New York being the most notable. The leading case in that state is *Walker v. Walker,* 82 N. Y. 260. But the opinion in this case is critically examined by Mr. Justice White in his opinion in *Hovey v. Elliott,* 167 U. S. 409, and it is clearly shown that the New York court proceeded upon a mistaken view as to the prior practice in the courts of English chancery. Both Nelson, in his latest work upon divorce (2 Nelson, Divorce and Separation, sec. 861), and Bishop take this view. Speaking of certain cases from New York, Arkansas, and California, cited in the note to section 1095, 2 Bishop, Marriage, Divorce and Separation, holding that privileges may be withdrawn for failure to comply with an order of the court, Mr. Bishop says: "Possibly some of the cases under these heads have gone too far. The interest of the public, while not prejudiced by what delays the cause or ends it without trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit."

It has been pointed out by the supreme courts of Mis-

souri, Illinois, and West Virginia that the public interest is involved in divorce proceedings to such extent that it is deemed a *quasi*-party, and that if a defense to a divorce suit is suppressed and a marriage dissolved upon the application of one party, supported by evidence which is not permitted to be contradicted or disputed, even though countervailing evidence is alleged to be in existence, the public is deprived of its rights to preserve the marriage relation, and that is done which is clearly against public policy. The arguments in support of the principle here adopted have been so fully and ably set forth in the opinions of other courts in the cases above cited that it is unnecessary to do more than merely refer the reader of this opinion to where they may be found. Nor do we consider this court committed to a contrary doctrine by any previous decisions. The statement in *Brasch v. Brasch,* 50 Neb. 73, that whether a husband may be required to pay his wife suit money and expenses, "as a condition precedent to the right of the husband to further prosecute or defend, are matters within the discretion of the district court," is pure dictum so far as the right to defend is concerned, the question not being presented or involved in the case. In *Reed v. Reed,* 70 Neb. 779, the point decided was that a plaintiff husband in a divorce case may be required to pay his wife the sum allowed to her for her support and counsel fees to enable her to make a proper defense, as a condition precedent to the right to further prosecute the action. This is a different question from that presented in this case, and the rule announced is not in conflict with the doctrine of *Hovey v. Elliott, supra.* In fact, in that case it is said that such a question is not involved in the suit. Reed voluntarily went into court and asked for relief; he owed the duty of support to his wife, and it was depriving him of no constitutional right to require him to perform that duty as long as he was able to perform it. As pointed out in the opinion, if he had been unable to comply with the

order, the court, no doubt, would have permitted him to proceed.

We cannot speculate here upon whether the defendant may succeed or fail in establishing his defense upon a new trial. The essential point is that he has been deprived of that which the constitution grants to him. As is well said in *Trough v. Trough*, 59 W. Va. 464: "The case involved the dearest rights of the defendant, wife, marriage rights, children, property, personal character, rights of person and property. What had the payment of this money as temporary alimony to do with the merits of the controversy touching those all important and inestimable rights?" With much earnestness and ability counsel insist that to hold that plaintiff in default of a pleading may be allowed to file the same upon compliance with an order of the court which he has theretofore disobeyed, and to hold that one in default of performance of an order of court is entitled to defend a suit against him, "is playing with logic and making courts a farce." But the ground for the first holding is usually, as in the *Bennett* case, based upon a statute, and the party in default has been accorded his constitutional right to appear and defend under proper regulations as to time and place, while, in the latter case, his constitutional right to defend is not afforded him. It would, no doubt, make proceedings in court more speedy and certain if a court could make and execute its own decrees without regard to constitutional limitations, but such an arbitrary assumption of power would be unwarranted, and would, no doubt, be strongly criticised by the eminent counsel for defendant. We are of opinion that the striking of defendant's answer from the files and the refusal to allow him to produce evidence in his own defense deprived him of a constitutional right and omitted from the proceedings "an essential element of due process of law", and we are further of opinion that a judgment based upon such proceedings should be reversed.

As to the order for temporary alimony, we see no rea-

son for disturbing this. It is the duty of defendant to support his wife and children; and, while the sum awarded seems large in view of the evidence produced upon the trial as to the value of defendant's property, its amount may be considered and taken into account if upon a full and final hearing the court should be convinced that a divorce and permanent alimony should be granted in the case.

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

REVERSED.

JAMES CURTIS PURDY V. STATE OF NEBRASKA.

FILED APRIL 23, 1910. No. 16,553.

1. **Adultery**: ELEMENTS OF CRIME. In a prosecution under the statute for unlawful cohabitation with a married woman, the fact that the woman is married is an essential element of the crime charged.

2. ———: EVIDENCE OF MARRIAGE. Where a person is accused of unlawful cohabitation with a married woman, and it appears that there had been a prior marriage between her alleged husband and another woman in 1887, a few years before the time of her alleged mariage in 1890, the burden is upon the state to prove that the bonds of the first marriage were dissolved either by death or divorce before the second marriage took place.

3. ———: ———. In such a case it is prejudicial error to refuse to permit the defendant to prove that the first wife was alive at the time of the alleged second marriage and that she is still the lawful wife of the alleged husband.

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

J. S. Le Hew and *Ritchie & Wolff,* for plaintiff in error.

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

LETTON, J.

The plaintiff in error was convicted of unlawful cohabitation with one Nancy J. Lane, who it is alleged in the indictment is a married woman, the lawful wife of William H. Lane. The principal errors allaged relate to the exclusion of testimony for the defense.

William H. Lane testified that he was the husband of Nancy J. Lane; that they were married in Blackhawk, Colorado, in 1890, and that they had resided together as husband and wife from that time until the 5th day of December, 1909. Upon cross-examination he testified that before he married Nancy J. Lane he was married to Mattie Clayton in Iowa in 1887. He was then asked whether Mattie Clayton was still living, and whether he lived with her after he was married to her. Objections to these questions as not being proper cross-examination were sustained. The accused then offered to prove by cross-examination of this witness that "Mattie Clayton is still living, and is still the lawful wife of the witness on the stand, and that the Nancy J. Lane described in the information is not his wife, as claimed by him in his testimony." He also offered to prove that at the time Lane claims to have been married to Nancy Lane he was the lawful husband of Mattie Clayton. Objections were made to these offers, which were sustained. The state then proved circumstances tending to establish the cohabitation of the defendant and Nancy J. Lane in this state. At the conclusion of its evidence the state moved to strike out the testimony of the witness Lane on cross-examination to the effect that he had been married to Mattie Clayton in Iowa in 1887, which motion was sustained. The defendant then called Mr. Lane as his witness, and propounded questions seeking to elicit the fact that he had been married to Mattie Clayton before he married Nancy J. Lane; that Mattie Clayton was still living; and that from and after the year 1887 he and Mattie Clayton lived and cohabited together as husband and wife, and so

held themselves out to the world. Objections were made to all questions of this nature, which were sustained and exceptions taken. The defendant then offered to prove that William J. Lane and Mattie Clayton in 1887, in the state of Iowa, "were duly married in accordance with the laws of the state of Iowa, and thereafter lived together as man and wife, and held themselves out to the world as man and wife, and have ever since remained as man and wife, and that said Mattie Clayton is still living, and that the claimed marriage of the witness with Nancy J. Lane described in the information was wholly void by reason of this former marriage, which has been existing between said William J. Lane and the said Mattie Clayton from the time of said marriage in the year of 1887 to the present time", and made other offers of proof of the fact that Lane was a married man at the time he testifies he was married the second time. These offers were rejected and the evidence excluded.

We are at a loss to understand upon what ground this testimony was excluded. Under the charge in the information, the fact that Nancy J. Lane was a married woman, the wife of William J. Lane, was a material element of the crime charged necessary to be proved. If at the time Lane attempted to marry her he had been married to Mattie Clayton, and they have "ever since remained as man and wife", then Nancy J. Lane never became his wife, and the crime charged was not established. We think this case is governed by the case of *Reynolds v. State*, 58 Neb. 49. In that case Reynolds was indicted for bigamy in marrying one Jennie Ford in Montana in 1895, and one Elsie J. Caulk in Nebraska in 1897. The defense was that the Montana marriage was void, for the reason that both the contracting parties were married at the time. Jennie Ford testified for the state as to her marriage to Reynolds. She also testified that she had formerly been married to one Purman, and that she had obtained a divorce from him in 1893. It was also shown that her only knowledge of this divorce was derived from a

letter written to her by some person in Kansas City. The attorney general in that case contended that the law would presume, in favor of the innocence of Jennie Ford, that Purman was dead at the time she contracted the marriage with Reynolds. His successor now contends on like grounds that it will be presumed in this case that Lane was free from matrimonial ties at the time he married Nancy. In that case the court said: "The better opinion seems to be that there is in such case no absolute and inflexible presumption, but that the question is to be determined by the jury from all the facts in the case." It seems to us that this must be the rule; that in a criminal case facts must always outweigh presumptions, and that the plaintiff in error was entitled to prove by Lane or by any other competent witness that at the time of the alleged marriage in Colorado Lane was a married man, and therefore incompetent to enter into the marriage relation. 1 Bishop, Marriage, Divorce and Separation, sec. 959.

It is argued, however, that he should further have offered to prove that no decree of divorce had been rendered dissolving the marriage relation between Lane and Mattie Clayton. But this burden was not upon him. When Lane testified that he had been married to Mattie Clayton, the state should have gone further and proved by competent evidence that on account of this relationship having been dissolved, either by death or divorce, he was competent to contract a matrimonial alliance at the time of the ceremony in Colorado. *Reynolds v. State, supra.* When the state procured the withdrawal from the jury of Lane's testimony that he had been married before, then the defendant below was certainly entitled to prove the existence of the marriage relation between Lane and Mattie Clayton as a part of his defense. The facts should have been permitted to go to the jury, and it was for them to determine from the evidence whether or not Nancy J. Lane was a married woman at the time of the alleged cohabitation with the defendant.

Plaintiff in error requested an instruction to the effect that, if the jury found that Lane had been married prior to his claimed marriage to Nancy J., and that the former wife was living at that time, then this claimed marriage was void, unless they found beyond a reasonable doubt that Lane had been lawfully divorced from his former wife. It was not error to refuse this instruction as the evidence stood, because the testimony upon which it was based had been excluded; but, had such evidence been in the case, it would have been prejudicial error to refuse to give it. We are of the same opinion as to the refusal to give instruction No. 12, to the effect that, if the jury found that "William H. Lane had been married previous to the marriage he claimed to have had with Nancy J. Lane, then, in the absence of evidence to the contrary, the law presumes this wife was still living, and was still his wife at the time of the claimed marriage with Nancy J. Lane." Lane testified he was married to Mattie Clayton in 1887, and was married to Nancy J. Lane in 1890. There is no presumption of death in this short interval. We think the accused has been deprived of his right to produce evidence material in his defense.

The judgment of the district court is therefore

REVERSED.

MAGGIE WALLENBURG, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 23, 1910. No. 15,879.

1. **Railroads: INJURY AT CROSSING: DUTY OF PEDESTRIAN.** It is the duty of a pedestrian upon a highway in approaching a railway crossing to look and listen for moving trains before attempting to cross the railway, but, if he does so, he is not necessarily negligent because he did not look at the most advantageous point, and where, if he had taken heed, he probably would have seen an oncoming train and avoided injury.

2. **Instructions** not applicable to the evidence should not be given, although they may state correct, abstract principles of law.

3. Appeal: VERDICT: SPECIAL FINDINGS. Where special findings of a jury can be reconciled with a general verdict and the relevant evidence in the record, the verdict will control.

4. Case Distinguished: *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, and 61 Neb. 530, distinguished.

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

James W. Orr and *B. P. Waggener*, for appellant.

McCoy & Olmsted, contra.

ROOT, J.

This is an action for personal injuries caused by the defendant's alleged negligence. The plaintiff prevailed, and the defendant appeals.

1. The defendant introduced no evidence, but insists the testimony conclusively establishes plaintiff's contributory negligence. The plaintiff was injured by one of the defendant's locomotives at the intersection of its railway and Thirtieth street in a sparsely settled neighborhood in the outskirts of the city of Omaha. The street upon which the accident occurred is paved, runs north and south, and is frequently used by the public. The railway approaches the street on a curve from the southwest, and is about 18 inches above the surface of the street at said intersection. South of the track and west of the street earth has been taken from the defendant's right of way to construct an embankment, so that the railway grade is elevated from six to ten feet above the bottom of the borrow-pits, a short distance west of the street, and thence southwest several hundred feet. At the time the plaintiff was injured, August 14, 1905, there were weeds from six to nine feet in height in the borrow-pits, and smaller weeds upon the sides of the fill to within four feet of the railway, but this vegetation could in no manner obscure a pedestrian's view of a train approaching from the southwest. There are trees within the defendant's right of way west of the

highway, so that 50 feet south of the railway an oncoming train may be seen a distance of only 200 feet southwest of the crossing. Thirty-six feet south of the south rail a train is visible 400 feet distant, and 7 feet south of the track a train may be noticed 575 feet to the southwest. The railway grade is about 1 per cent., and declines toward the east and northeast. On the west side of the street a wooden sidewalk 82 feet in length extends to within 16 feet of defendant's main line, and the intervening footway is a cinder walk. At the time the plaintiff was injured she weighed 218 pounds, enjoyed good eyesight and hearing, and was in no manner distracted or confused. The train with which she collided consisted of a locomotive and from 7 to 14 freight cars. It was coasting down grade at an estimated speed of from 35 to 50 miles an hour, and no warning by way of sounding a whistle, ringing a bell, or otherwise, was given of its approach.

The sixth instruction given by the court on its own motion reflects the testimony concerning plaintiff's conduct, and will advise the reader concerning the law of the case upon this phase of the suit: "You are instructed that the plaintiff has alleged in her petition, and has given evidence tending to show, that on the morning of the accident in question, and just prior to its occurrence, she was walking north on the sidewalk on the west side of Thirtieth street, proceeding in the direction of the railway in question; that at a point on said sidewalk from 35 to 37 feet south of the center of defendant's track on said crossing she looked and listened for approaching trains on defendant's road, but neither saw nor heard any. You are likewise instructed that the undisputed evidence, as well as the admissions of counsel for both parties in open court, established conclusively the following facts: (*a*) That at the point last above stated where plaintiff claims she looked and listened for approaching trains, the same being from 35 to 37 feet south of the center of defendant's track, plaintiff had a clear, unob-

structed view of defendant's track to the southwestward for a distance of 400 feet. (*b*) That the clear, unobstructed view of defendant's track in the direction named increased in proportion as the plaintiff proceeded northward, and that at a point three or four feet south of defendant's track, as it entered upon said crossing, there was a clear and unobstructed view of defendant's track to the southwestward 600 feet. (*c*) That plaintiff did not look again for approaching trains after the occasion above referred to (at a point from 35 to 37 feet south of defendant's track), but proceeded north until she had stepped upon, or was about to step upon, defendant's track at said crossing, when she collided with, or was struck by, defendant's engine attached to a freight train coming from the southwestward, and was injured. And it is now for you to say, under these admitted facts and all the other evidence in the case, and these instructions, whether or not plaintiff was guilty of contributory negligence as the same has been above defined to you. To aid you in determining this question, you are also at liberty to take into consideration the situation of the crossing, the general surroundings and conditions in the immediate vicinity of the same and southwestward along and adjacent to defendant's track, as disclosed by the evidence, the manner in and the speed with which the trains of defendant were accustomed to being run or operated at and near that point, if such appears from the evidence, and all other attendant facts and circumstances bearing on the question, as shown by the evidence, including in your consideration the knowledge or lack of knowledge of said plaintiff as to these matters. And in this connection you are further instructed that, on the one hand, plaintiff was bound to know that a railroad crossing is a dangerous place, and that she should approach it accordingly, having in view such dangers as a person of ordinary prudence would have reason to apprehend; and that, on the other hand, she was not required to anticipate, in view of the public character of the crossing in question that an

approaching train of the defendant would proceed at an unusual or dangerous rate of speed at that point, and that it would give such warning of its approach, by sounding of whistle or ringing of bell, as the law required. Having then in view all of the foregoing conditions, and the evidence, probably a fair test to the solution of the point in question is, estimating the distance at which the track seemed to be clear when plaintiff claimed to have observed the same as above stated, the time it would take a train to travel that distance, proceeding at a reasonable rate of speed, considering the nature of the locality, and the time it would require the plaintiff to cross the track in safety, proceeding northward from the point from which she observed defendant's track as above stated, would a person of ordinary care and prudence, under the same circumstances, have considered it safe to cross, without again looking for approaching trains? In other words, was her act in this respect, in view of all of the conditions, facts and circumstances in the case, as shown by the evidence, such as ordinarily would have been taken by a prudent person. If it was, then it might fairly be said that the plaintiff was not guilty of contributory negligence; but if you should find, from a preponderance of the evidence, that it was not, and that such act directly contributed to the accident in question, then it might fairly be said that plaintiff was guilty of contributory negligence, and, in that event, she cannot recover in this action."

Section 10579 *et seq.*, Ann. St. 1909, command a railway company to give notice of the approach of its trains to public crossings, by sounding a whistle or ringing a bell, commencing at least 80 rods from the highway and continuing the warning until the train shall have crossed the road or street. Failure to give this warning does not in itself establish the carrier's negligence, but may be evidence tending to prove that fact. The proof in this case justified a finding that defendant was negligent in failing to give the highway warning, and that such negligence was the proximate cause of plaintiff's injury.

The next inquiry concerns the plaintiff's negligence. Contributory negligence is but an inference to be deduced from primary facts. Individual minds frequently differ radically in drawing the conclusion of negligence from admitted or established facts, and the judgment of a layman not infrequently is as sound as the logic of a judge upon the subject. The questions of negligence and contributory negligence are therefore as likely to be wisely solved by a jury as by a court, and ordinarily should be committed to the tribunal provided by law for ascertaining litigated facts. In the instant case the primary facts upon the issue of plaintiff's contributory negligence are undisputed, and the rule to be applied is well settled in Nebraska. If from those facts different minds may honestly conclude that plaintiff was guilty of negligence which proximately contributed to her injury, or that she was free therefrom, the jury, and not the court, should draw the inference and find the secondary fact. *Atchison & N. R. Co. v. Bailey,* 11 Neb. 332; *American Water-Works Co. v. Dougherty,* 37 Neb. 373; *Omaha Street R. Co. v. Lochneisen,* 40 Neb. 37; *Chicago, B. & Q. R. Co. v. Pollard,* 53 Neb. 730; *Schwanenfeldt v. Chicago, B. & Q. R. Co.,* 80 Neb. 790.

The defendant argues that the plaintiff had a clear view of the railway track many feet west of the crossing; that if she had looked westward at any time before stepping upon the track she would have seen the train, and is guilty of contributory negligence because she did not look at a time when her sense of sight would have been an effective means to warn her of her peril. Decisions in point to sustain the proposition have been cited, but they do not appeal to us as sound. The rule seems harsh, and practically compels the individual to insure his own safety. In *Omaha, N. & B. H. R. Co. v. O'Donnell,* 22 Neb. 475, we held that ordinarily the question of contributory negligence in cases like the one at bar is for the jury. In that case, if the injured traveler had looked subsequent to his first and second observations and while yet in a place of

safety, he could have seen the approaching train, but we held that his default did not, as a matter of law, convict him of contributory negligence. In *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, we held that it is the duty of a traveler upon the public highway to look and listen while advancing toward a railway crossing, and if he fails to do so he will be guilty of negligence barring a recovery, even though the carrier was negligent in operating the train with which he collided. In that case the man in control of a team drove onto a railway crossing without looking or listening, and had not looked or listened while traveling 40 rods just before coming to said crossing.

In *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, the plaintiff, a section hand, had been injured by a locomotive following a gravel train; he stepped off the railway and down an embankment; before returning to work, and while at the foot of the grade, he looked in the direction from whence the passing train had come, but could not see the aproaching engine because of an intervening wing fence; thereafter he did not look, although he had been warned by his superior to do so before stepping onto the track, and we held he was guilty of contributory negligence as a matter of law. The case is reported on a second appeal in 61 Neb. 530, and a statement in the first paragraph of the syllabus might, if considered apart from the facts disclosed in the opinion, lead an indifferent observer astray. It must be remembered that Yost had violated a positive order of his employer made to secure the servant's safety. It is competent for a railway company to make a rule of that nature to govern the conduct of its employees, but it has no such control over the public. The power to compel a pedestrian to take so extreme a precaution under all circumstances is vested in the legislature, and it has not spoken upon this subject. The court did not hold nor intend to hold in the *Yost* case that all pedestrians, without regard to surrounding circumstances, must, just before stepping onto a railway, look for trains, or in default thereof be convicted of con-

tributory negligence as a matter of law. The facts in the *Yost* case clearly distinguish it from the case at bar and all other crossing cases reported in this jurisdiction. It does not rule the instant case, and should not be considered as authority in suits between a railway company and persons not in its employ.

At the time the first appeal in the *Yost* case was determined, the opinion in *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730, was on file, and no attempt was made to repudiate the principles of law announced in the *Pollard* case. The facts in that case are that Pollard was driving along the highway and over a railway crossing. His attention was challenged by a pillar of smoke to the east which he thought indicated the presence of a train. Turning from a consideration of the smoke just as his wagon was upon the crossing, he observed a train approaching from the opposite direction. It was held that the jury should say whether he was negligent or not. Mr. Chief Justice HARRISON, speaking for the court, said: "It was not for the trial court, and is not for this court, to determine and say as a matter of law just at what exact point in the plaintiff's approach to the railroad he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose. The question was, did he, under his surroundings and all the circumstances, observe the care which ordinarily would have been taken by a prudent person?"

The plaintiff had crossed defendant's railway at Thirtieth street several times before the accident. She testifies that she was accustomed when traveling from the south to stop about 35 feet from the track and look southwest for trains; that at times she had waited for trains to pass before attempting to cross, and in her judgment an observation made at said point would advise her of an approaching train so that she could protect herself; that on the day she was injured, after looking east and west at her usual point of observation, she heard no sounds to

indicate an oncoming train, thought it was safe to cross, and continued to listen for and to think about the train, but was giving attention to her walking. She was heavy, and it behooved her to notice the path she was traveling. Mrs. Wallenburg insists she did not hear or see the defendant's train until it collided with her. The evidence is uncontradicted that the defendant's train was being operated at a rapid and an unusual rate of speed, and that the highway warning was not given as it approached the crossing in question. Mrs. Wallenburg had traveled about half way between the southern line of the defendant's right of way and its track, at the time she last looked for a train, and it does not seem to us, as a matter of law, she should be charged with the duty of anticipating that the defendant would negligently operate its train without warning the public by sounding the locomotive whistle or ringing the bell. The law does not arbitrarily and invariably fix the distance at which the plaintiff should have commenced to look and listen, so long as she did so at a sufficient distance to enable her to discover the approach of a train and avoid injury by the exercise of reasonable and ordinary care, and whether she did exercise that care, under the circumstances of this case, is a question for the jury, and not for this court, to determine. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790; *Moore v. Chicago, St. P. & K. C. R. Co.*, 102 Ia. 595; *Nichols v. Chicago, B. & Q. R. Co.*, 44 Colo. 501, 98 Pac. 808; *Boyd v. St. Louis S. W. R. Co.*, 101 Tex. 411, 108 S. W. 813; *Farrell v. Erie R. Co.*, 138 Fed. 28; *Oldenburg v. New York C. & H. R. R. Co.*, 124 N. Y. 414; *Greany v. Long Island R. Co.*, 101 N. Y. 419; *Bonnell v. Delaware, L. & W. R. Co.*, 39 N. J. Law, 189. While we might not have found the facts as did the jury, the trial court properly submitted the issues to the triers of fact, and in our opinion there is sufficient evidence to uphold the verdict.

2. Instruction numbered 4, requested by defendant, was properly refused. The first proposition of law therein stated will apply to some cases, but not the instant one,

and the closing paragraph is a command that the jury shall find for defendant. Instruction numbered 5, requested by defendant, does not correctly state the law. In so far as defendant complains because the jury were not told in so many words that a pedestrian in approaching a railway crossing should look each way for trains, it may be said that the court in the fifth paragraph of its charge said: "It was likewise the duty of the plaintiff before going upon the track of defendant to look and listen for the approach of an engine or train, and to observe such reasonable precaution before attempting to cross the track as an ordinarily prudent man, under the same or like circumstances, would have observed." There is nothing in the record tending to prove that plaintiff looked to the east, and not to the west; but the proof is that she looked in the direction of the approaching train, so that the failure of the court to use the word "each", or its equivalent, in its instructions did not prejudice defendant.

Instruction numbered 8, requested by defendant, was properly refused. It is not applicable to the evidence. Instruction numbered 11, requested by defendant, may be correct as an abstract principle of law, but in the light of the evidence adduced was unnecessary. The evidence does not tend to support the last clear chance doctrine, and the court's instructions did not present any phase of that theory to the jury, hence it was proper to refuse the instruction last referred to. Instruction numbered 13, requested by defendant, purports to state the evidence in some particulars. It is not entirely accurate, is argumentative, and was properly refused. Instruction numbered 16, requested by defendant, states a rule of law in conflict with that announced in *Chicago, B. & Q. R. Co. v. Pollard, supra,* and invades the province of the jury. The special findings do not control the general verdict. The situation in this case upon the point considered is very much like the one created in *Kafka v. Union Stock Yards Co.,* 78 Neb. 140.

3. The recovery is moderate, the nature and extent of plaintiff's injuries considered. There is no suggestion in the brief that errors were committed in admitting or rejecting evidence, and the charge to the jury is fair and dispassionate.

The judgment of the district court, therefore, is

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in the majority opinion in this case, for the reason that to my mind the undisputed facts show such gross contributory negligence on the part of the plaintiff as should prevent a recovery. The effect of this opinion is to overrule *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627; *Guthrie v. Missouri P. R. Co.*, 51 Neb. 746; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730; *Brady v. Chicago, St. P., M. & O. R. Co.*, 59 Neb. 233, and many other cases. By our judgment we make a railroad company an absolute insurer of the safety of pedestrians at its grade crossings.

I am of opinion that we should hold, in this case, that the plaintiff's conduct in not looking or listening for the approach of the defendant's train for the distance of 35 feet while approaching the crossing where the accident occurred, and by deliberately stepping onto the railroad track in front of the oncoming train, and at the instant it reached the crossing where there was an unobstructed view of the track, in the direction from which the train approached, of from 400 to 500 feet, should be held to be contributory negligence, as a matter of law.

The judgment of the trial court should be reversed and the cause dismissed.

STATE, EX REL. JOHN W. MCDONALD, APPELLEE, V. J. C. FARRINGTON ET AL., APPELLANTS.

FILED APRIL 23, 1910. No. 15,974.

1. **Mandamus.** A mandamus proceeding in Nebraska is an action at law.
2. **Appeal:** MOTION FOR NEW TRIAL. In an action at law the defeated party will not be heard to complain on appeal that the judgment is not supported by the evidence, if he does not raise that question in the district court by a motion for a new trial.
3. ———: REMAND. Where a cause is reversed and remanded by this court, with a direction to the district court to enter a judgment as prayed for in the petition, the trial court has no discretion, but must render a judgment in conformity with the mandate.
4. **Former Adjudication.** The right of the relator herein to a writ of mandamus was adjudicated by the opinion and judgment rendered on the former appeal of this case, and reported in *State v. Farrington*, 80 Neb. 628.

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

Edwin D. Crites and *J. E. Porter,* for appellants.

S. L. Geisthardt, contra.

ROOT, J.

John W. McDonald, the relator, applied to the district court for Dawes county for a writ of mandamus commanding the respondents, the county commissioners and the county clerk of said county, to include in their estimate and levy of taxes an amount sufficient to pay relator's claims against the county, together with interest thereon, but not to exceed the aggregate amount limited by law for such estimate and levy. A demurrer to the application was sustained, and an appeal was prosecuted to this court by the relator. February 6, 1908, the judgment of the district court was reversed and the cause remanded, "with directions to issue the writ as prayed."

State v. Farrington, 80 Neb. 628. In the district court, subsequent to said reversal, the relator submitted the mandate of this court, and the respondents introduced proof of the total valuation of real and personal property in said county in 1907, of the estimate of expenses made by the commissioners for the year 1908, and of the condition of the general fund of the county on June 1, 1908. Thereupon the court ascertained the amount due the relator from Dawes county, together with the interest thereon, and found that the respondents could levy a two-mill tax for the benefit of the relator in addition to a tax sufficient to pay the ordinary expenses of the county. The court then commanded the board to reconvene, revise its estimate for 1908 so as to include relator's claims, at the proper time to levy taxes as aforesaid, thereafter to issue for relator warrants to the amount of 85 per cent. of the two-mill levy, and further ordered that the individuals succeeding the respondents in office in each year following 1908 should take like steps until the relator's claims, with interest, should be paid. The respondents excepted to that part of the judgment directing the payment of interest, and the district court allowed a supersedeas to stay the part of the judgment excepted to. The respondents appeal.

1. The respondents argue that the court erred in directing them to revise the estimate made during their January, 1908, meeting. They admit such a revision would not make the levy void, but say they may be held personally liable for the two-mill levy. The opinion and judgment of this court directed the district court to enter the order in this respect. That opinion was filed February 6, 1908, no application was made by respondents for a rehearing or to modify the judgment or opinion, and the argument is presented too late for our consideration.

The respondents contend that our opinion conflicts with the opinion announced in *County of Custer v. Chicago, B. & Q. R. Co.*, 62 Neb. 657. The controlling facts

in the cited case and those in the case at bar are not the same. In *County of Custer v. Chicago, B. & Q. R. Co., supra,* the commissioners of Custer county had levied a tax of 9 mills for general purposes, the limit fixed by law. Comp. St. 1895, ch. 77, art. I, sec. 77. The county had failed to pay certain claims allowed against its general fund in preceding years, and the county attorney, under the direction of its commissioners, had on behalf of the county confessed judgments in favor of the unpaid claimants. In addition to said nine-mill levy, the county commissioners levied a tax of 4½ mills to create a judgment fund to pay these judgments. In a suit brought to recover back taxes paid under protest, it was held that said judgments were void, that the claims upon which the judgments were based were charges against the general fund and could not be made the basis for a special levy which would in effect increase the levy for general purposes to more than 9 mills on the dollar. No such question was involved in the former appeal or is apparent upon the present appeal of the instant case. It did not appear from the petition, nor does the record before us disclose, that the respondents were requested, or have been directed, to levy a tax for the purpose of satisfying the claims involved herein, in addition to 9 mills on the dollar for general purposes. The relator's claims should have been included within the estimate and levy for general purposes, in so far as such action might be taken without seriously interfering with the revenue necessary for the payment of the county's current expenses. No more was sought by the relator. No more has been granted, so far as we are advised, by the direction of this court or the judgment of the district court. So long as the aggregate of the levies for general purposes and for the payment of the relator's claims do not exceed 9 mills on the dollar, it is immaterial that the amount to be paid the relator is expressed by a two-mill levy.

2. Counsel has presented an instructive argument at the bar and in his brief in support of his contention that

the relator is not entitled to a writ of mandamus because his claims have not been reduced to judgment, and that the county is not liable for interest upon the claims allowed by the county commissioners, but not represented by valid and registered warrants. These questions were directly involved in the former appeal and determined against the respondents. It is suggested that at the former hearing the question of interest was not argued at the bar or in the briefs by counsel for the relator. The question, however, was presented in the relator's application for a writ. The opinion filed specifically holds that the relator is entitled to interest, the mandate directs the district court to issue a writ according to the prayer of the relator's petition, and he specifically prays for interest. The respondents evidently were satisfied with the opinion, the judgment and the mandate, because they did not ask for a rehearing, nor for a modification of the opinion, judgment or mandate. Counsel for relator contends that the relator's right to a writ commanding the respondents and their successors in office to provide funds for the payment of his claims, with interest, has been adjudicated and forever set at rest, whereas the respondents' counsel asserts that the district court erred in following the mandate of this court, that we should re-examine the questions involved in the disposition of the former appeal of the case, and correct manifest error committed therein. The law as announced in an earlier appeal of a case to this court has generally been respected and adhered to by us in subsequent proceedings in that litigation, although we have not refused to correct a palpable error where the cause was remanded generally, or the issue was or the facts were different on the subsequent hearing from those presented at the time the first appeal was determined, but we have never changed position upon a second appeal where the cause has been remanded with directions. The correct rule is announced in the opinion of Mr. Commissioner IRVINE in *City of Hastings v. Foxworthy,* 45 Neb. 676; that is to say, if a judgment of a

lower court is reversed and the cause is remanded generally, the appellate court, upon a second appeal, may re-examine the law and correct an error committed in the first opinion; but, if the cause was first remanded with directions to the inferior court to enter a specific judgment, that court has no discretion, but must obey the mandate. Otherwise the *nisi prius* court would exercise appellate jurisdiction in reversing and correcting the judgment of the supreme court. The superior court, having at a preceding term settled and adjudicated a right claimed and demanded by a litigant, is without power at a subsequent term to vacate and modify its judgment for the sole reason that it fell into error in announcing the law and directing a judgment conformable thereto. The erroneous decision may be overruled and disregarded in subsequent litigation between other parties, but between parties to the suit and their privies it is the law and measures their rights and duties.

When the district court for Dawes county received the mandate of this court commanding specific action, it could not lawfully refuse to award a writ in favor of the relator. To that extent its discretion was at an end. *State v. Dickinson,* 63 Neb. 869; *Washington Bridge Co. v. Stewart,* 3 How. (U. S.) 413; *West v. Brashear,* 14 Pet. (U. S.) *51; *Groves v. Sentell,* 66 Fed. 179, 13 C. C. A. 386; *Fortenberry v. Frazier,* 5 Ark. 200; *Smalley v. Miller,* 71 Ia. 90; *Tourville v. Wabash R. Co.,* 148 Mo. 614; *Piper v. Sawyer,* 78 Minn. 221; *Patten Paper Co. v. Green Bay & Mississippi Canal Co.,* 93 Wis. 283; *Remington v. Eastern R. Co.,* 109 Wis. 154. We conclude, therefore, that not only was the district court compelled to issue a writ, but that we ought not to re-examine and review the law applicable to the questions involved in the former appeal and necessarily determined by our opinion and judgment.

3. Counsel argue that the district court did not have authority to control the discretion of the respondents in

levying taxes, because they have the unquestioned right to levy taxes and expend the revenue arising therefrom to the extent of 15 mills on the dollar valuation for current expenses of the county, and for the construction and repair of roads and bridges. We are referred to *Young v. Lane*, 43 Neb. 812, and *State v. Sheldon*, 53 Neb. 365. While the cited authorities were not mentioned in the briefs filed in the former appeal of this case, nor the point mentioned in the opinion, the principle was necessarily involved in the judgment, and can no more be relitigated upon this second appeal than can the other questions above referred to. *Groves v. Scntell, supra.* There is also a substantial difference between the facts in the cited cases and those involved in the case at bar. In *State v. Sheldon, supra*, the annual levy had been made before the commissioners were requested to provide revenue to pay the relator's judgment, and in *Young v. Lane, supra*, it was held that the statute authorizing county authorities to levy a tax for the soldier's relief fund was permissive, and not mandatory. Application was not made to the court for a writ until subsequent to the annual levy. Those cases were not intended to, and did not, overrule *Wessell v. Weir*, 33 Neb. 35, wherein we issued a writ commanding the county commissioners of Saline county to include in their estimate, and make provision in their annual levy to pay for, certain claims allowed against the county general fund. The same principle was applied to a school district in *State v. Gardner*, 79 Neb. 101.

It may fairly be said that the courts will intervene to do justice between an honest creditor of a county, whose claims have been allowed, and the county as represented by its commissioners, and will compel those representatives to do something in reason to provide payment for at least a part of such claims from the resources of the county. The opinion rendered on the former appeal permitted the district court to exercise a sound discretion in determining the part of the annual revenue that might

be applied upon the relator's claims without unnecessarily hampering the county officers in discharging their duties to the public. The court, therefore, has acted in accordance with the law, as well as in conformity with the direction of this court.

The question of the sufficiency of the evidence to support the exercise of the discretion entrusted to the district court by our mandate is not before us, for the reason that a motion for a new trial was not filed in the district court. A mandamus proceeding is an action at law. *State v. Lancaster County*, 13 Neb. 223; *State v. Affholder*, 44 Neb. 497. A motion for a new trial was therefore necessary to entitle the respondents to question in this court the sufficiency of the evidence below to sustain the one question of fact above referred to. *Hake v. Woolner*, 55 Neb. 471; *Wollam v. Brandt & Shipman*, 56 Neb. 527.

Upon a consideration of the entire record, we find no reversible error, and the judgment of the district court is therefore

AFFIRMED.

J. P. LEININGER LUMBER COMPANY ET AL., APPELLEES, V. LILLIAN DEWEY, APPELLANT.

FILED APRIL 23, 1910. No. 16,000.

1. **Divorce**: SUBSEQUENT CONTRACT OF MARRIAGE. Prior to the enactment of chapter 45, laws 1909, it was competent for a divorced person to enter into a contract, within six months of the entry of his decree of divorce, to marry subsequent to six months after the rendition of that decree.

2. **Fraudulent Conveyances**: MARRIAGE SETTLEMENT. Marriage, in contemplation of law, is a valuable consideration sufficient to sustain an antenuptial settlement and conveyance of property as against the creditors of the grantor, although such settlement and conveyance was made by him with intent to defraud his creditors, unless that intent is known to the grantee, or she has notice thereof at or before the time of the settlement.

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

Albert & Wagner, for appellant.

A. M. Post and *J. J. Sullivan, contra.*

ROOT, J.

In this action to foreclose a mechanic's lien, the defendant Lillian Dewey asserted title to the land as against the defendant Columbus State Bank by virtue of an antenuptial settlement and conveyance. The defendant bank claimed title by virtue of a judicial sale of said real estate as the property of George Dewey, husband of the defendant Lillian Dewey. The bank prevailed, and Lillian Dewey appeals.

The evidence is somewhat meager, but it appears therefrom that prior to 1905 the defendant George Dewey was married to a woman other than Lillian Russell, his present wife. Before commencing suit for a divorce from his first wife, George Dewey had an understanding with Miss Russell that he should procure a divorce, make a financial provision for her, and they should become man and wife, but no specific contract was entered into. On the 14th of June, 1905, George Dewey was divorced in an action, wherein, we infer from the record, he was plaintiff. July 10, 1905. George Dewey and Lillian Russell executed a written contract, wherein and whereby they agreed to marry within six months. He settled $5,000 upon her, and agreed that, if he was unable to pay the money, he would convey to her, in satisfaction of said settlement, the land in dispute in this action and a certain lot. Miss Russell, on her part, agreed to accept said settlement in full satisfaction of all claims she might otherwise have upon his estate. September 27, 1905, Dewey executed a deed, in the presence of an attesting witness, conveying said land to Miss Russell. The deed was not acknowledged, but was recorded September 30, 1905. One year thereafter Dewey made a second deed to his wife, duly acknowledged, for the purpose of correcting the defect in the former conveyance. December 20,

1905, the defendants Dewey were duly married, and from thence hitherto have lived together as man and wife. In April, 1905, George Dewey borrowed $1,700 from the defendant Columbus State Bank, and about that time became further indebted to it as the indorser of a note. July 10, 1905, the defendant George Dewey owed his co-defendant, the Columbus State Bank, nearly $2,000. He also owed about $500 to other creditors, and his property, other than that referred to in the marriage settlement, was of the value of about $1,000. In March, 1906, the defendant bank commenced an action, aided by attachment, in the district court for Platte county against the defendant George Dewey, and recovered judgment in June of that year for $1,066. Subsequently the land conveyed to Mrs. Dewey was sold by order of court as the property of George Dewey, and was purchased by said bank. The bank's cashier testifies that Mr. Dewey stated the transfer to Lillian Russell, later Mrs. Dewey, was for the purpose of preventing the first Mrs. Dewey recovering alimony, but subsequently the land had been reconveyed. George Dewey denies making any such statement. Mr. and Mrs. Dewey testify in the most positive terms that at the time the deed was executed, and at all times prior thereto, she was in absolute ignorance of his financial condition, and that the settlement was made for the sole purpose of providing for Mrs. Dewey and in consideration of their marriage.

Counsel for Mrs. Dewey argues that the marriage settlement and the deed made in conformity thereto vest her with a title superior to the claims of her husband's creditors. Counsel for the defendant bank insists that George Dewey in July, 1905, was incompetent to enter into a contract to marry or to make a marriage settlement; that his preceding oral agreement was against public policy, without consideration, and tainted the written contract, and for six months subsequent to the entry of his decree of divorce George Dewey's status was that of a married man.

The statute in force at the time the transactions herein considered occurred is as follows: "It shall be unlawful for any person who shall obtain a decree of divorce to marry again during the time allowed by law for commencing proceedings in error or by appeal for the reversal of such decree, and in case such proceedings shall be instituted, it shall be unlawful for the defendant in error or appellee to marry again during the pendency of such proceedings, and a violation of this act shall subject the party violating it to all the penalties of other cases of bigamy."

"No proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only questions of alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced unless within six months after the rendition of such decree, or in case the person entitled to such proceedings is an infant, a person of unsound mind, within six months, exclusive of the time of such disability." Ann. St. 1907, secs. 5369, 5370.

It goes without saying that no contact, oral or written, made by George Dewey, while a married man, to marry Lillian Russell should be recognized as the foundation for any right. It is also clear that for six months subsequent to the time George Dewey procured his divorce he could not enter into the marriage relation so as to give Lillian Russell, or any woman other than his first spouse, a lawful status as his wife. But the statute did not prohibit Mr. Dewey from entering into a contract to marry six months after his divorce was granted. If he had the right to marry after December 14, 1905, he had the right, subsequent to his divorce, to agree to marry when permitted by statute to do so. The agreement was not to violate the law, but to perform a lawful act. The authorities upon this proposition are not numerous, but, so far as we are advised, are uniform and sustain the fore-

going propositions. *Buelna v. Ryan,* 139 Cal. 630; *Cooper v. Bower,* 96 Pac. (Kan.) 59, 794.

We have examined the cases cited by counsel for the bank, but do not find them in point. In every instance the contract was made during the time at least one of the parties thereto was married to another person. Counsel for the bank cites, and possibly the trial court was influenced by, *Eaton v. Eaton,* 66 Neb. 676. Some of the statements made by the learned author of that opinion tend to support the contention of the bank in this case, but a consideration of the entire opinion will convince the reader that those statements were unnecessary for the determination of the question involved in that case and do not bind the court. In the cited case the plaintiff, within six months of the time she was divorced from her first husband, married the defendant. She cohabited with him for a year, and then prosecuted an action for a divorce. Her second husband alleged in his answer that said marriage was void, and asked that it be so decreed. The district court found for the defendant and entered a decree according to his prayer. This court held the plaintiff's second marriage was void, but that the conduct of the parties, subsequent to six months after the plaintiff secured her divorce from her first husband, gave the litigants the status of man and wife. The argument of our former chief justice did not commit us to the position that, for six months after a decree of divorce is rendered, the parties to such an action continue to be man and wife, with all the consequences attending that relation. The possibilities of such a status are grave, involving, among other things, the law controlling the descent of property, and we are of opinion the legislature did not, prior to 1909, intend that an absolute decree of divorce should be construed by the courts to be interlocutory. The judgment provided for by the statute (Ann. St. 1909, sec. 5369) prior to the enactment of chapter 45, laws 1909, severs the marital relation, but, like any other judgment, is subject to review and reversal by any pro-

ceedings known to the law. To prevent divorced couples marrying within the time provided by law for an appeal, the prohibition against reentering the marriage relation was imposed by the legislature, for a violation of that mandate, suitable punishment was provided, and the law will refuse to enforce any contract entered into in defiance of the statute. The legislature not having prohibited a divorced person from entering into a contract, within six months of his divorce, to marry six months thereafter, the contract was not illegal. Marriage in contemplation of law is a valuable consideration sufficient to sustain a conveyance or settlement of property, as against the creditors of the grantor, even if made by him with the intent to defraud his creditors, unless that intent is known to the grantee or she has notice of that fact before the contract is executed. *Tolman v. Ward,* 86 Me. 303; *Boggess v. Richards, Adm'r,* 39 W. Va. 567; *Nance v. Nance,* 84 Ala. 375; *Sterry v. Arden,* 1 Johns. Ch. (N. Y.) *261; *Bunnel v. Witherow,* 29 Ind. 123; *Prewit v. Wilson,* 103 U. S. 22; *Campion v. Cotton,* 17 Ves., Jr. (Eng.) *264, 34 Eng. Reprint, 102; 20 Cyc. 504.

The evidence, as heretofore stated, is insufficient to charge Mrs. Dewey with knowledge or notice of any fraudulent intent her husband may have had in transferring the land in question to her, and for that reason the judgment of the district court must be reversed. The other matters referred to in the bank's brief are not deemed of sufficient importance to justify extending this opinion by specific reference thereto.

The judgment of the district court upon the issues joined between Lillian Dewey and the Columbus State Bank is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

DOROTHY L. MCAULIFFE, APPELLANT, V. ALFRED B. NOYCE, APPELLEE.

FILED APRIL 23, 1910. No. 15,957.

Cities: DEFECTIVE SIDEWALKS: LIABILITY OF ABUTTING OWNER: PETITION. Under sections 120, 121, ch. 12*a*, Comp. St. 1907, empowering the mayor and council of the city of Omaha to repair sidewalks with "such material and in such manner as they deem necessary", and making owners of abutting property liable for all damages occasioned by their failure to keep adjacent sidewalks in repair, a petition to recover from an abutting owner damages for personal injuries resulting from his failure to repair an adjacent sidewalk *held* demurrable, where it did not allege that the city in notifying defendant to make repairs indicated the manner of making them or the kind of materials to be used.

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

James C. Kinsler, for appellant.

William Baird & Sons, contra.

ROSE, J.

Plaintiff in her petition states that at 9:30 o'clock P. M., July 8, 1907, she stepped in a hole in a dangerous, wooden sidewalk in front of a lot owned by defendant in the city of Omaha, and as a result sustained personal injuries to the extent of $1,999.99, through the negligence of defendant in failing to repair the sidewalk within 20 days after he had been notified by the city to do so. The trial court sustained a demurrer to her petition, and from a dismissal of her suit she has appealed.

The sufficiency of the petition is the only question presented. Plaintiff seeks to hold defendant liable for damages under the following statutory provision, which was part of the Omaha charter at the time of the injury: "Where the owner or owners of abutting property fail to keep in repair the sidewalk adjacent thereto they shall

be liable for all damages or injuries occasioned or recovered by reason of the defective or dangerous condition of such sidewalk." Comp. St. 1907, ch. 12*a*, sec. 121. One of the grounds on which defendant resists liability under this provision is that he was not properly notified by the city to repair the walk, there being nothing in the notice pleaded to indicate the manner of making repairs or the kind of materials to be used. Plaintiff's allegations as to notice are: "That on the 30th day of April, A. D. 1907, the city of Omaha, Nebraska, having authority so to do, by resolution number 1713, ordered and directed the defendant to repair said sidewalk; that said resolution and order were published as required by law, and a notice of such order and resolution was mailed to defendant by registered letter, and receipt therefor was returned to the city clerk of said city of Omaha, signed by George G. Wallace, defendant's agent, then in charge of said lot and the buildings thereon."

The nature and extent of the repairs required and the manner of making them are not stated in the notice. The kind of materials to be used is not mentioned. Plaintiff did not set out in her petition or attach to it a copy of the resolution. Was the notice pleaded sufficient to require defendant to repair the sidewalk at the peril of becoming liable for all damages resulting from his failure to do so, and of subjecting his property to a lien for the cost of any repairs which the city might subsequently make? The fee of the street is in the city, and the sidewalk is part of the street. *Davis v. City of Omaha,* 47 Neb. 836. It is the duty of the city to keep its sidewalks in repair and in a safe condition for public use. *City of Lincoln v. Jancsch,* 63 Neb. 707; *Tewksbury v. City of Lincoln,* 84 Neb. 571. It was not relieved of that duty by the enactment requiring owners of abutting property to repair adjacent sidewalks. The charter in force at the time of the accident declared: "The mayor and city council shall have power to construct or repair sidewalks along any street or part thereof of such material and in

such manner as they deem necessary, and to assess the cost thereof upon abutting property." Comp. St. 1907, ch. 12*a*, sec. 120.

The section containing the provision upon which plaintiff relies is as follows: "Where the grade of any street or part of a street has not been established, or where a street has not been worked or filled to the established grade, or where a street has been graded but does not conform to the established grade, the owners of lots or lands abutting on such street shall only be required to construct or repair such sidewalks along such streets with brick, macadam or such other material, except stone or artificial stone, as the mayor and council may direct. No wooden sidewalks shall be constructed by the city and the cost thereof assessed upon the abutting property, except where the mayor and council may deem it inadvisable to build permanent sidewalk and shall by concurrent resolution order such wooden walk to be constructed. Before any sidewalk shall be constructed or repaired by this city the owner or owners of the lots or lands to be assessed shall be given notice to construct or repair such sidewalk and shall have twenty days after the giving of such notice within which to construct or repair the same. Such notice shall be served or published as directed by ordinance and if such notice be by publication it shall be sufficient to address such notice to its owner generally. The city clerk shall give an additional notice by registered letter directed to the last known address of such owners or their agents, but the failure to give such additional notice shall not invalidate such proceedings or the special assessment for such sidewalk. In case the owner or owners shall fail to construct or repair such sidewalk as directed the city may construct or repair said walk and assess the cost thereof upon the abutting property. Sidewalks constructed under the provisions of this act shall not exceed four feet in width except when constructed upon streets conforming to the established grade. Where the owner or owners of abutting property fail to keep in

repair the sidewalk adjacent thereto they shall be liable for all damages or injuries occasioned or recovered by reason of the defective or dangerous condition of such sidewalk." Comp. St. 1907, ch. 12*a*, sec. 121.

Under the law, therefore, the city owns and controls the sidewalk space, and the mayor and council have power "to construct or repair sidewalks along any street or part thereof *of such material and in such manner as they deem necessary.*" The occasion for making repairs, the extent thereof, and the kind of materials to be used are matters committed to the mayor and council. "Before any sidewalk shall be constructed or repaired by this city," says the charter, "the owner or owners of the lots or lands to be assessed shall be given notice to construct or repair such sidewalk and shall have twenty days after the giving of such notice within which to construct or repair the same." The adjacent owner has not been given authority to determine the extent of the repairs, the manner of making them, or the kind of materials necessary. On the other hand, the mayor and council have power to construct or repair walks with "such material and in such manner as they deem necessary." The legislature left these matters in the hands of city officers. That authority has not been divided between them and private individuals. As to materials and manner of making repairs, both power and responsibility rest on public officers. This was clearly the intention of the legislature. In no other way could uniformity in materials and construction be expected. The kind of materials and manner of making repairs being within the exclusive control of the mayor and council, a notice involving such serious consequences as liability of a lot owner for injuries to persons using the adjacent sidewalk and for liens for repairs should contain sufficient information to enable him to perform the duties imposed by statute. If he should assume to exercise his own judgment in selecting materials and in making repairs, there would be no certainty that the city officers would not interfere, or that his work would

not be condemned. When all provisions of the charter are considered, a lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries. Statutes of like import have been thus construed. *City of Lincoln v. Janesch*, 63 Neb. 707; *Martinovich v. Wooley*, 128 Cal. 141. The kind of materials to be used and the manner of making repairs should be indicated in the notice. Reasons for this conclusion are found in the following language approved by this court in *City of Lincoln v. Janesch*, 63 Neb. 707: "The lot owner has no choice as to the kind of repairs. It is very evident that the kind of repairs to be made, and the material to be used, are under the control of the street superintendent. If a lot owner proceeds of his own motion to repair, the street superintendent may stop him, compel him to change or remove what he has done, and require him to repair differently. Surely, if the lot owner must repair of his own motion, and owes that duty to every passer-by, on pain of damages for injuries, he ought to know definitely what he is to do. He can hardly owe a definite duty when he has no means of knowing how to discharge it." *Toutloff v. City of Green Bay*, 91 Wis. 490.

The notice pleaded by plaintiff was insufficient in the respects stated, and for that reason the demurrer to her petition was properly sustained.

AFFIRMED.

CHARLES FAIST, APPELLEE, V. HERMAN DAHL, APPELLANT.

FILED APRIL 23, 1910. No. 16,008.

1. Contracts: CONSIDERATION: ENFORCEMENT. Where one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated.

2. Appeal: VERDICT: PRESUMPTIONS. "Where a cause is submitted to a jury upon conflicting testimony, there being no objection to the instructions of the court, and the verdict is consistent with the line of testimony presented by one of the parties to the suit, an appellate court will presume that the jury adopted the line of testimony with which their verdict corresponds." *Cooper & Co. v. Hall*, 22 Neb. 168.

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

George W. Wertz, for appellant.

F. W. Button, contra.

FAWCETT, J.

On November 22, 1906, plaintiff and defendant entered into a written contract as follows:

"CONTRACT.

"This agreement made and entered into this 22d day of November, 1906, by and between Herman H. Dahl, party of the first part, and Chas. Faist of North Bend, Neb., party of the second part, witnesseth: Party of the first part hereby agrees to sell and transfer to party of the second part the west hundred (100) feet of block fifteen (15) lot ten (10) located in Rogers, Colfax Co., Nebr., as platted and recorded in clerk office of Colfax Co., together with all improvements and appurtenances thereon: a certain stock of liquor, in the buildings on said premises, together with all shelvings, fixtures, etc., connected therewith, and use of liscence for balance of 1906 year under power of attorney and bond.

"Party of the second part hereby agrees to pay party of the first part in consideration of the sale above mentioned cash as follows: The sum of twenty-seven hundred eighty five ($2,785.00) dollars payable as follows: Five hundred ($500.00) dollars cash this day and date, and the balance twenty two hundred eighty five ($2,285.00) dollars on January first, 1907. Said party of the second

party further agrees to pay first party on or before the 1st day of January, 1907, in consideration of above sale, cash for all stock of liquor of said first party, on said premises in accordance with invoice made by parties hereto on Jan. 1st, 1907.

"It is further understood and agreed by the parties hereto, that first party retains all his book accounts of what ever kind, said party of the first part to transfer all running insurance, on date of possession.

"It is further agreed by the parties hereto, that first party give possession on January 1st, 1907, and all transfers be made at that time, party of the second party to make final and all payment on same date, together with power of attorney for balance of party of the first parts unexpired liscence, and surety bonds for the sum of five thousand ($5000.00) dollars from the date of possession to expiration of liscence term of first party.

"It is further understood and agreed that if said second party shall fail, without fault of first party, to keep his agreements, herein made, said second party shall forfeit the sum of payment, made this day and date, to party of the first part.

"It is further understood this sale is absolute.

"In witness whereof, parties hereto have fixed their hands, this 22d day of November, 1906. (Signed) Herman H. Dahl, Chas. Faist. Witness: P. Jacobsen."

The petition alleges substantially that at the time of signing said contract plaintiff paid the $500 cash therein stipulated for, and on January 1, 1907, offered to pay defendant the balance in cash, as per the contract, and demanded a deed to said real estate, at the same time asking defendant to remain in possession of the premises for a few days until plaintiff could take possession, which defendant agreed to do, defendant then stating that plaintiff could keep his money until he, plaintiff, was ready to take possession; that on January 4 plaintiff again offered defendant the money as per contract, and demanded a deed to said real estate, "whereupon defendant stated to

plaintiff that he would not accept said money and would not give plaintiff a deed to said real estate, and would not sell to him at all"; that plaintiff then demanded a return of the $500, which defendant refused; that plaintiff has fully performed all the conditions of the contract on his part, but that defendant has committed a breach and has wholly refused and failed to perform the conditions thereof on his part; that plaintiff has been damaged in the sum of $500, for which amount he prays judgment.

For answer defendant alleges, substantially, that the petition does not state facts sufficient to constitute a cause of action; that the contract upon which plaintiff's action is based "is not capable of enforcement, for the reason that the same is illegal, contrary to public policy, and of such a nature that no relief can be rendered thereunder, in that it includes an attempt to transfer the license and use, and the right to use a liquor license, from the party to whom the same was issued to another party, without legal process, and without the legal formalities required by law, which attempt was participated in by the plaintiff herein, and because the consideration named in said contract is indivisible, so that the legal portion thereof cannot be separated from the part which is illegal, and the whole of said contract is void and not enforceable for any purpose"; admits the execution of the contract set out in plaintiff's petition, and the receipt of the $500 thereunder, but denies each and every other allegation in plaintiff's petition contained. The reply is a general denial. There was a verdict for plaintiff for $500, and from a judgment thereon defendant appeals.

The grounds upon which defendant insists there should be a reversal of the judgment are: (1) That the court erred in overruling his motion for new trial. (2) That the court erred in admitting in evidence the contract over objection of appellant. (3) That the pleadings will not support the judgment and verdict. (4) That the evidence will not support the judgment. Defendant's first

assignment is included in the other three. The second and third assignments will be considered together. This brings us to a consideration of the contract. If any part of the consideration is illegal and against public policy, and such illegal part is so interwoven with the part that is legal that it cannot be distinguished and separated therefrom, then, of course, it was error to admit the contract in evidence, and the petition based thereon would not support the judgment. But we do not so construe the contract. We think the contract covers two separate and distinct agreements. The first to convey the lot, together with all improvements and appurtenances thereon; the second to transfer certain articles of personal property. This, we think, is made clear by the portion of the contract which provides: "Party of the second part hereby agrees to pay party of the first part in consideration of the sale above mentioned cash as follows: The sum of twenty seven hundred eighty five ($2785.00) dollars payable as follows: five hundred ($500.00) dollars cash this day and date, and the balance twenty two hundred eighty five ($2285.00) dollars on January first 1907. Said party of the second part further agrees to pay first party on or before the 1st day of January, 1907, in consideration for above sale, cash for all stock of liquors of said first party, on said premises in accordance with invoice made by parties hereto on Jan. 1st, 1907."

Even if the agreement to transfer to plaintiff or to give him the right to use defendant's unexpired license were illegal—which question was not tried in the court below—there was nothing illegal in the contract agreeing to sell to plaintiff the lot, together with the building thereon, and the shelving, saloon furniture and fixtures. For the consideration of $2,785 defendant was to sell and transfer to plaintiff all these articles, and on January 1, 1907, was also to sell to him the stock of liquors then on hand, for their value as then invoiced, which would constitute the consideration for such sale; and we think the

only reasonable construction to be given to the contract is that any agreement to transfer or give the right to use the license in question must be held to be connected and associated with the transfer of the liquors to be sold thereunder. The contract, therefore, was divisible in two respects, viz.: The property which defendant was selling was divided into two classes, the first class being the lot, together with the building and all of the improvements and appurtenances; the second, distinctly separated from the first by a colon in the contract, being the stock of liquors, together with the shelving and fixtures connected therewith, and the use of the license for the balance of the year. Whether the consideration of $2,785 covered the first class and also the shelving and fixtures in the second class is immaterial for the reason that there was nothing illegal in attempting to sell any of those articles. It seems clear to us that the $2,785 was the agreed consideration for the property which defendant had a legal right to sell and which plaintiff had a legal right to purchase; and that the use of the license was an incident to the sale of the liquors, the consideration for the sale of which had not yet been fixed.

We therefore hold that the contract was divisible, and that the $2,785 constituted the consideration for the lot, together with its improvements and appurtenances, and was not in any manner connected with that part of the contract relating to the stock of liquors or saloon license. Indeed, this seems to be the theory upon which the case was tried and submitted to the jury in the court below. On the trial, no reference was made by either party to the license feature of the contract. Plaintiff and defendant and defendant's witness Jackebson all three testified that the offers and counter-offers of January 1 and 5 were in relation to the real estate. It is evident from this that the parties themselves considered the $2,785 as being the consideration for the real estate, and that the matters pertaining to the saloon were to be the subject of subsequent ascertainment and settlement.

By instruction numbered 4 the court told the jury: "If the jury believe from the evidence that the plaintiff on the 1st and 5th days of January, 1907, or either of said dates, offered to pay the balance of said purchase money for said lot in compliance with the terms of said contract, and was willing and offered at said times to comply therewith, and that he was prevented from so doing by defendant refusing to perform his part of said contract and make a conveyance of said premises described in said petition, then your verdict in this case should be for the plaintiff." The giving of this instruction was alleged as error in the motion for new trial, but the assignment was abandoned in this court. The district court having thus eliminated the license issue, and defendant having acquiesced therein by failing to assign error here, we must treat that question as out of the case. It follows from this that the district court did not err in admitting the contract in evidence, and that the petition is sufficient to support the judgment and verdict.

The fourth assignment, "that the evidence will not support the judgment," is not discussed in defendant's brief, and would not be availing if discussed. The record shows that the testimony of the witnesses was in sharp conflict. Plaintiff testifies that on the 1st day of January he went to defendant, and offered to pay him the balance of the purchase price and demanded a deed for the property; that he requested defendant to continue in possession for a few days until he could get ready to take possession; that defendant agreed to do so, and said that he, plaintiff, could pay the balance of the consideration when he took possession; that he again went to defendant five days later, and offered to pay the balance of the consideration and demanded a deed; that defendant then refused to make a deed and refused to consummate the deal. This is squarely contradicted by defendant, who testified in his own behalf. To some little extent defendant is corroborated by the witness Jackebson, who drew the contract, and in whose presence the transaction of January

1· is testified to have occurred. The veracity of these witnesses and the weight to be given their testimony were questions for the jury. The case was submitted to the jury on an instruction which is not claimed in the brief to have been erroneous. We think the trial court properly construed the contract in its instructions, and that the verdict of the jury is not only supported by the evidence, but is in the line of simple and exact justice.

The judgment of the district court is therefore

AFFIRMED.

LANCASTER COUNTY, APPELLEE, V. MARY FITZGERALD ET AL.; FRANK D. EAGER, APPELLANT.

FILED APRIL 23, 1910. No. 16,011.

1. **Appeal**: LAW OF CASE. A decision of this court on a former appeal of a question of law presented by the record is thereafter the law of the case.
2. **Evidence** examined and referred to in the opinion, *held* sufficient to sustain the judgment of the district court.
3. **Appeal in Equity**: FINDINGS: REVIEW. "In a suit in equity, where the court makes special findings, and omits therefrom some fact, conclusively established by the evidence essential to the decree, such fact, on appeal to this court, will be treated as though found by the court." *Lynch v. Egan*, 67 Neb. 541.

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

J. C. McNerney and *R. D. Stearns*, for appellant.

F. M. Tyrrell, Charles E. Matson and *W. T. Stevens, contra.*

FAWCETT, J.

This case is here for the second time. Our former opinion (74 Neb. 433) contains a sufficient statement of the pleadings and facts. On the second trial in the dis-

trict court, plaintiff's suit was dismissed as to intervener Benjamin F. Knight, treasurer, and also as to all of the defendants except appellant Frank D. Eager. Judgment was entered in favor of the plaintiff, county of Lancaster, against defendant Eager for $544.11, and execution awarded. Defendant appeals.

The assignments of error set out and argued in defendant's brief are: "(1) The court had no jurisdiction of the subject matter of the action. (2) The judgment is not supported by the evidence and is contrary to the evidence. (3) The findings of the court do not support the judgment. (4) The judgment is contrary to law."

The first and fourth assignments were decided adversely to defendant on the former hearing. We there held that plaintiff's petition stated a cause of action for waste, and that a county may maintain a suit to restrain waste. The theory upon which defendant contends the court has no jurisdiction is that this is a suit for the collection of taxes, and that, the statute having pointed out an efficient and summary mode for the collection of taxes, that method is exclusive. Defendant's proposition of law is sound enough, but it is not applicable here, as this is not, in a strict sense, a proceeding to collect taxes. It was commenced as a suit in equity to restrain the commission of waste, the commission of which, if not enjoined, would make the collection of the tax impossible. After the suit was commenced, and a restraining order had been issued to prevent the commission of the waste, defendant obtained the execution of the stipulation and vacation of the restraining order as set out in our former opinion, and thereupon proceeded to remove the building; and if he is now permitted to prevail in this suit, plaintiff will be left without property of sufficient value from which to collect its past due and unpaid taxes. It goes without saying that defendant should not be permitted to thus escape, unless the court is powerless to prevent. This being a suit in equity, the court will extend its arm to its full length in an effort to prevent such an injustice.

Defendant's second assignment, that the judgment is not supported by the evidence, is clearly without merit. The restraining order was vacated on the strength of defendant's stipulation. Defendant's agreement, when he obtained the vacation of the restraining order, was that if it should finally be decreed that the taxes in controversy were a lien upon the building and material taken therefrom by defendant, and that the plaintiff had a right to enjoin the removal of said building, he would pay the amount of such taxes, not exceeding the value of said building. The evidence overwhelmingly establishes the fact that the building was worth not less than $1,500, and some witnesses place its value at much more than that. The amount of the taxes is shown by the undisputed evidence to be $589.24. The amount of the judgment is $544.11. These figures speak for themselves, and render discussion unnecessary to demonstrate that the judgment is fully sustained by the evidence.

The third assignment, that the findings of the court do not support the judgment, has a little more merit, but not much. No request was made for special findings, but the court on its own motion found specially as to some of the facts. The court first made a general finding in favor of the plaintiff and against the defendant. In the special findings, the court first finds that the taxes were properly levied and assessed for the years set out in plaintiff's petition, being from 1892 to 1901, inclusive. The second finding is that during all of said years there was upon the lots described in plaintiff's petition a large, two-story brick building, which was affixed to the realty and made a part thereof, and that the taxes levied upon said property included taxation upon said building as an improvement. Third. That defendant Eager purchased the building and commenced to tear the same down, intending to remove it from the premises, with full notice and actual knowledge of the lien of said taxes. Fourth. That the restraining order referred to was allowed. Fifth. The entering into the stipulation. Sixth. That, in pursuance

of the stipulation, defendant Eager entered into the bond called for therein, and that, "in pursuance to said stipulation and bond, the court entered an order dissolving said restraining order." Seventh. That at the commencement of this action plaintiff was entitled to an injunction restraining the removal of the building. Eighth. "That there is now due said plaintiff from defendant Frank D. Eager, in consideration of the said stipulation heretofore described herein, the sum of $544.11, for which amount with interest thereon at the rate of 10 per cent. per annum from this date until paid, together with the costs of his action, the said plaintiff is entitled to judgment." Ninth. That intervener has no interest in the action, and his petition should be dismissed. Tenth. That the cause should be dismissed as to all of the defendants other than defendant Eager. On such general and special findings, the court entered judgment for $544.11, and awarded execution therefor.

In support of his contention that the findings of the court do not support the judgment, it is argued that there was no finding that the county had sustained any damage or loss by reason of the removal of the building. The agreement in the stipulation was not to pay any damage plaintiff might sustain by reason of the removal of the building. It was: "Shall pay the amount of said taxes to the plaintiff county not exceeding the value of said building." Under this stipulation, we think all that the plaintiff was required to prove was that the restraining order was rightfully issued, the amount of the taxes, and that they were a lien upon the building as well as upon the lots. These facts are fully established by the evidence, and are fully covered by the general finding of the court and fairly covered by the special findings. If it be said that the special findings do not specifically state the amount of the taxes, or the value of the building, the decree would still be good under the rule announced in *Lynch v. Egan*, 67 Neb. 541, wherein we held: "In a suit in equity, where the court makes special findings, and

omits therefrom some fact, conclusively established by the evidence essential to the decree, such fact, on appeal to this court, will be treated as though found by the court."

The general finding was sufficient to support the judgment. No special findings were requested by either side. In *Moody v. Arthur*, 16 Kan. 419, 429, Mr. Justice Brewer, after disposing of another branch of the case, uses this language: "This really disposes of the case, for, in respect to the second question, it may be said that no special findings of fact were demanded, and that, while the court does find specially certain facts, it prefaces them with a general finding that 'the allegations, all and singular, contained in the answer of the said defendants are true' —so that, whether the facts specially mentioned in the findings are of themselves sufficient to support the decree is practically immaterial, the court having covered all with a general finding."

Viewed from any standpoint, defendant's appeal is without merit. The judgment of the district court is

AFFIRMED.

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

FILED APRIL 23, 1910. No. 15,961.

1. **Boundaries: ESTABLISHMENT: PLEADING: ANSWER.** In an action in which the location of the division line between the real estate of the respective parties is in issue, an allegation in the answer that a surveyor located the line, and that the plaintiff has ever since such location acquiesced in the line as located, and that defendant built his fence on said line and improved his land "up to said line as the boundary between them, and has so continued ever since," does not state a defense, without the allegation that the parties agreed upon the line so located as the boundary line, or that the same was so located not less than ten years prior to the commencement of the action.

2. ———: ———. In determining the boundaries of land depending upon the true center of a section line, and various surveys by different surveyors disagree as to the true center, the survey that takes the section corners connected by said line as the basis of the survey, those corners being then found by the monuments of the government survey, will control, rather than a survey made later when the government monuments are not found, and the necessary section corners are found by measurements from distant monuments. When monuments fixed by the government survey can be found they will control as to the location of the section corners.

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

Morlan, Ritchie & Wolff, for appellant.

Perry, Lambe & Butler, contra.

SEDGWICK, J.

The question involved in this case is as to the location of the division line between the lands of the plaintiff and those of the defendant. The plaintiff owned and occupied the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and lots 5 and 6, and the defendant the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 32, township 4 N., range 24 W., in Furnas county. The plaintiff alleged that he was the owner and entitled to the possession of the tract of land in controversy, being 1 chain and 75 links in width at north end, and 55 links in width at south end, and being a part of lot 6, adjoining defendant's land immediately west and along the west end thereof, and that the defendant wrongfully detained the possession from him. For answer the defendant denied generally the allegation of the plaintiff, and alleged that in April, 1894, there was a dispute between the plaintiff and defendant as to the boundary line between their lands, and that the county surveyor, then acting for the plaintiff and defendant, "made an actual survey of said lands, both paying the expenses thereof, and on said last mentioned survey said surveyor located said road and line between plaintiff and defendant about four rods east of

its former location. On the completion of said survey the plaintiff built his fence on the west side and the defendant on the east side of said highway so located by said surveyor last mentioned, and improved their respective lands up to said highway as the boundary between them, and have so continued ever since." As this action was begun on the 22d day of August, 1903, which was within ten years of the time of the alleged location of the boundary line by the county surveyor, it may be questionable whether this part of the answer stated a defense (it fails to allege either an agreement as to the division line or adverse possession for ten years), but it was so treated by the court, and is now so treated by the parties. Upon the trial in the district court the jury found a verdict in favor of the plaintiff, and the defendant has appealed to this court.

1. The first matter discussed in the brief of the defendant is the location of the line by the county surveyor, as alleged in his answer, and as to the acquiescence of the defendant in the supposed boundary so established. We do not find any reply in the record, but the case appears to have been tried as though the allegations of the answer were denied. It seems to be agreed by all parties that as late as the spring of 1894 the true location of the division line was in dispute, and that at that time the county surveyor, Phoebus, made the survey upon which the defendant relies. The defendant testifies that while he was working upon the land near the supposed line, in the spring of 1894, the plaintiff complained that the defendant was working on his, the plaintiff's, land, and that the true line was farther east than where the defendant was at work, and that there was a somewhat strenuous dispute between them; that the plaintiff became very earnest and very positive, and that finally he, the defendant, proposed that they have the land surveyed by the county surveyor; that the plaintiff consented to this, and that the county surveyor made the survey accordingly and located the true line; that thereupon he, the defendant,

called attention of the plaintiff to the line as located by the surveyor and that the plaintiff said that he was satisfied with it. This evidence appears to be relied upon as establishing an agreement between the plaintiff and the defendant to adopt the line so found by the surveyor as a division line between them, and the parties have introduced considerable evidence as to whether or not the plaintiff, after this survey, continued to recognize this as the true line. The plaintiff, however, positively denied that he ever consented to recognize the line then located as the division line. He testified that he told the defendant at the time that the survey was not right and that the line should be much farther east. There is no doubt that, when there is a dispute in regard to the true location of an uncertain line of division, the parties may settle that dispute and fix the boundary line by agreement. A parol agreement, if afterwards acquiesced in and acted upon, is sufficient for that purpose, although the possession of the land to the line so fixed may not have been for the full statutory period. The most that can be said for the defendant's contention is that the evidence upon this point was quite conflicting and presented an issue for the determination of the jury.

2. It appears to be contended in defendant's brief that the evidence is not sufficient to support the verdict of the jury as to the location of the true boundary line. It appears that there were four different surveys made involving the location of the line in dispute. The first in 1880 by Mr. Hasty, who was then county surveyor of Furnas county, the second in 1883 by Mr. Hill, the county surveyor at that time, the third in 1894 by Mr. Phoebus, then county surveyor, and the fourth in 1900 by Mr. Hasty who was again county surveyor. There were other surveys at different times that had more or less relation to section 32 or some part thereof. The plaintiff claims that the surveys made by Mr. Hasty were correct, and the defendant relies upon the surveys made by Hill and Phoebus. The central line of the section running north

and south, as established by the Hasty survey, forms the east boundary of the tract in dispute, and that line, as established by the Phoebus survey, forms the western boundary of the land in dispute. All parties agree as to the location of the south quarter corner of section 32. All these surveys in determining the location of the north quarter corner of the section run west from the northeast corner of the section. To find this northeast corner of the section the Phoebus survey, following Mr. Hill, started from the southeast corner of the section and ran a line north, and found, as he says, by measurement indicated by the Hill survey the markings of the northeast corner of the section made by Mr. Hill. He then ran a line west between sections 32 and 29, locating the quarter corner by the Hill measurements. None of these measurements of the north line of the section seems to correspond with those made by the government survey in 1871. The Hasty surveys make this line 1 chain longer, and the Phoebus survey 1.63 chains. The north quarter corner established by the Phoebus survey is seven or eight rods farther west than that established by the Hasty survey. This discrepancy in locating the north quarter corner of the section is the cause of this litigation. Mr. Hasty in making his survey started at the northeast corner of the section. He testified that at his first survey in 1880 he found the mounds and pits of the government survey at this corner of the section distinctly marked, and in this he is well supported by at least two witnesses who assisted him in making the survey, and by other witnesses. He also found the northwest corner of the section and located the north quarter corner by dividing equally the distance between the two corners. The deposition of Mr. Anselmo B. Smith was taken by the plaintiff and used upon the trial. He has had many years experience in practical surveying and was considered by all parties to this litigation to be entirely competent and thoroughly qualified in his profession. He testifies that in 1879 or 1880 he surveyed for the location of the town

of Cambridge, which is located immediately north of the section 32, and that in doing so he ascertained the true location of the northeast corner of section 32, and then found the government mounds and pits plainly marked. Again, a few days before his evidence was taken in 1905, upon examination of the surveys that had been made, he considered the corner as located by the Hasty survey to be the correct corner, and an addition to the town of Cambridge was by him laid out with reference to the corner so located.

We think this evidence fully supports the finding of the jury, which must have been that the corner as established by the Hasty survey is the true northeast corner of section 32. It follows that in the Hill survey and the Phoebus survey there was a mistake in the location of the northeast corner of this section, which resulted in a mistake in locating the north and south center line. Indeed, the evidence is so strong and so satisfactory upon this point that it is doubtful whether any other verdict than that returned in this case could be allowed to stand.

3. Several instructions given by the court are objected to, and complaint is made of the refusal to give certain instructions asked by defendant. These suggestions are not much discussed or insisted upon in the brief, and we do not find any errors in the instructions.

Some of the methods pursued by counsel in the introduction of evidence are more or less confusing; but, if we have succeeded in getting a correct understanding of the record, the parties have had a fair trial and the verdict is supported by the evidence.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM MOSHER, APPELLANT, V. AUGUST HUWALDT ET AL., APPELLEES.

FILED APRIL 23, 1910. No. 15,993.

1. **Courts:** QUESTIONS OF PRACTICE: STARE DECISIS. This court is not ordinarily bound by the construction put upon statutes by former opinions, if such construction is dictum only, being unnecessary to the determination of the case then before the court, but when such construction involves a question of practice only, and has been for more than 19 years followed by the trial courts, and indirectly several times approved by this court, it will be followed until changed by the lawmakers.

2. ———: VENUE: COMMENCEMENT OF ACTION. The former decisions of this court, construing section 60 of the code to mean that an action under that section can be begun only in the county where the defendants or some one of the defendants resides or is present in the county at the time of the commencement of the action, are adhered to, and in such case the action is deemed to be commenced as to the defendant so served at the date of the summons which is served upon him in the county in which the action is begun.

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

Wilbur F. Bryant and *George W. Wiltse*, for appellant.

W. W. Quivey and *C. B. Willey, contra.*

SEDGWICK, J.

On the 30th day of January, 1908, the plaintiff filed his petition in the district court for Cedar county, and on the 3d day of February, 1908, procured a summons to be issued thereon against the defendant directed to the sheriff of Cedar county. The defendants were both residents of Pierce county, and were not in Cedar county on the day the summons was issued, but afterwards, on the 14th day of February, following, the summons was duly served by the sheriff of Cedar county, and within that county, upon one of the defendants. The other defend-

ant was not served. Ten days later the defendants jointly filed a special appearance. In this they allege that they were at all times since January 1, 1908, residents of Pierce county, and objected to the jurisdiction of the court for the reason that "neither of the said defendants were in Cedar county on February 3, 1908, the date of the commencement of this action, nor were they at said time residents of said county." The court sustained the objection and dismissed the case, and the plaintiff has appealed.

The plaintiff has furnished us a vigorous though not very extensive brief. He refers to no authorities from other jurisdictions, but bases his contention entirely upon the construction of the statute, which is as follows: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned." Code, sec. 60. This section of the code seems to have been borrowed from the code of Ohio, and that court has several times considered it, but never, so far as we have observed, has construed it with reference to the precise point here presented. In *Osborn v. Lidy,* 51 Ohio St. 90, that court said: "The chapter of the civil code on the venue of actions prescribes reasonable and convenient rules with respect to the places where actions may be prosecuted, which, like other provisions of the code, must be construed liberally, with a view of advancing the remedies it affords." Construing the statute liberally with a view of advancing the remedies it affords, as suggested by that court, the writer would have hesitated to hold the service in question insufficient, if it were a matter of first impression.

Section 62 of the code provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Section 19 provides: "An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him." An action is begun, so far as anything

on the part of the plaintiff is necessary, when the petition is filed and summons is issued thereon. He may begin his action in any county where the defendant "may be summoned." If he begins his action and the defendant is in fact regularly served with summons in the county where the action is begun, it would seem that a liberal construction of the statute with a view to furnish him a remedy might lead to the conclusion that he had begun his action in the county where the defendant "may be summoned." No doubt in many cases this might result in hardship to defendant. Petitions might be filed in several counties and summons issued with the purpose of serving the defendant whenever he might happen to go into any one of the counties. And so the defendant would be compelled to defend at a place distant from his home where it might be inconvenient for him and his witnesses. But this condition is not wholly remedied by the construction that the trial court has put upon the statute. The defendant may still be sued in a county distant from his home. Perhaps a more just practice is furnished by providing for the place of trial instead of limiting the place of beginning the action, as in New York, and other states. The matter is, of course, peculiarly within the discretion of the legislature, and the province of the courts is to ascertain the meaning of the legislature. The question here considered has been many times discussed by this court.

The plaintiff insists that it has never been before this court so as to be necessarily determined. In *Coffman v. Brandhoeffer,* 33 Neb. 279, it was said in the opinion: "Clearly the meaning of section 60 is that actions like this, if not instituted in the county where the defendant resides, must be begun in the county where the defendant actually is, and the summons must be served upon him while in the county. The suit cannot be commenced before he enters the county." In that case the defendant resided in Keith county, and the suit was begun in Douglas county. Attachment was also issued when the peti-

tion was filed. At the time the petition was filed a suit was pending in Keith county upon the same cause of action. It does not appear from the opinion that the Douglas county summons was ever served upon the defendant. The action therefore was not begun "in the county where the defendant may be summoned", and it is said in the opinion that "the purpose of the motion filed by the defendant was to quash the attachment." It seems that it was not necessary in that case to say that the action "must be begun in the county where the defendant actually is, and the summons must be served upon him while in the county." The decision would have been the same if the construction of the statute had been that "the action must be begun in the county where the defendant actually is or where he can be actually served."

The statute in question was next discussed in *Hougland v. Wilcox*, 42 Neb. 138. In that action, also, an attachment was issued, and it was begun in the district court for Douglas county. No service was had upon the defendant in that county, but the summons from Douglas county was served upon the defendant in Kearney county, the county of his residence. An objection was made to the jurisdiction of the court, and upon that objection the court quashed "the service of process." The court discussed somewhat at length the question whether the issuing and levy of the writ of attachment upon sufficient grounds gave the court jurisdiction of the action so that summons might have been sent to another county for service, and the action of the trial court in quashing the service was sustained. That this was the sole point really determined is clear from the conclusion of the opinion: "We are satisfied that the lower court was right in holding that the commencement of the action by attachment, or the fact that a writ of attachment had been obtained in the action in Douglas county, was not sufficient to authorize the issuance of the summons to Kearney county and its service on defendant, that such service

was invalid and ineffective, and there was no error committed in quashing the service." And in another part of the opinion the court said that this was the only question presented for consideration. The point stated in the second paragraph of the syllabus is therefore dictum only.

For these reasons, the plaintiff has strenuously insisted in his brief that these cases are not to be regarded as precedents determining the question which he now presents. While there is much force in the argument so presented, we do not feel at liberty to consider the question an open one. The question is purely one of practice, and, while the construction contended for by the defendant may sometimes be of much importance to litigants, yet there are no doubt serious considerations that may be urged upon both sides of the question. Such questions of practice should be well settled and definitely understood by the profession and the public generally. The cases above discussed have been several times referred to in the opinions of this court as determining the question now before us. In *Davis v. Ballard*, 38 Neb. 830, Mr. Commissioner IRVINE recognized *Coffman v. Brandhoeffer, supra*, as authority upon this point, and after stating the holding of the court in that case the commissioner says: "In other words, it cannot be said that an action is properly begun when a petition is filed and summons issued without the present ability to proceed and serve the summons. To permit a contrary course would allow the plaintiff to select his forum, issue summons after summons, and lie in wait for a chance coming of the defendant. It would open a door to fraud upon the jurisdiction of the court." And in *Hanna v. Emerson, Talcott & Co.*, 45 Neb. 708, Chief Justice NORVAL cites *Coffman v. Brandhoeffer, supra*, with approval; so that not only the bar of the state, but this court also, has regarded the matter as settled for nearly 20 years, and during that time the legislature has been many times in session and has taken no action to change the construction of the statute, which

has been so long acquiesced in. Under these circumstances it would perhaps have been rash to have expected the trial court to have sustained the service in this case.

We think the judgment of the district court is right, and it is therefore

AFFIRMED.

DAVID A. MEESE, APPELLEE, V. CHARLES D. NIXON, APPELLANT.

FILED APRIL 23, 1910. No. 16,005.

Statute of Frauds: INTEREST IN LAND. A contract by which two men agree together to construct a ditch upon the land of a third party is not a contract for an interest in land, and is not within the third section of the statute of frauds.

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

Kelligar & Ferneau, for appellant.

H. A. Lambert and *J. S. McCarty, contra.*

SEDGWICK, J.

It is said in the brief that this case was begun in the county court and appealed to the district court. The petition in the district court alleged that the plaintiff and defendant entered into a verbal agreement to construct a ditch on the land of the plaintiff's wife, and that they, the plaintiff and defendant, employed one Moore to construct the ditch, and agreed to pay him $1 a rod for the same; that Mr. Moore constructed the ditch accordingly, and that the liability of the plaintiff and defendant to Moore therefor was $120; that the defendant neglected to pay his share to Moore, and that the plaintiff was compelled to pay the whole amount, and asked to recover one-half of the amount, $60 and interest thereon. the answer contained a general denial, and also con-

tained the allegation that the contract sued upon "is wholly void under the statute of frauds." The reason given in the answer is that it is a contract for an easement upon real estate, which must be in writing to be valid.

There is no assignment of errors in the brief, as the statute requires, but the brief cites the section of the statute of frauds which provides: "No estate or interest in lands, other than leases for a term not exceeding one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Comp. St. 1909, ch. 32, sec. 3. It is argued that the contract sued upon is within this section. This is the only point presented or discussed in the brief. *Schultz v. Huffman,* 127 Mich. 276, is the case relied upon by the defendant. It is said in the brief that it is a parallel case and the facts are similar, and that the law of that case should be applied here. The opinion in that case states the cause of action as set up in justice court in these words: "The plaintiff declared verbally on common counts in assumpsit, especially on a certain (verbal) contract, according to which the said defendant promised and agreed to pay said plaintiff $15 for the privilege of draining certain lands of said defendant into and through a drain owned and constructed by said plaintiff." The thing contracted for in that case was the privilege of draining through a drain belonging to another. Such a privilege would, of course, constitute an easement through the land. If this defendant was to have the right to drain his land through this ditch after it was constructed, that right was not provided for in the contract sued upon. If he had such a contract it was entirely separate from this one, and must have been with the owner of the land, and not with this plaintiff. It is substantially conceded

in the brief that, so far as the cause of action, as stated in the petition, is concerned, there is no room for the defendant's contention, but it appears to be insisted that the evidence shows that the contract in fact was for an easement upon real estate. This, of course, amounts to a contention that the evidence will not support the allegation of the petition. There does not appear to be very much ground for this contention. The evidence relied upon is quoted in the brief. It is a part of the cross-examination of the plaintiff. In this cross-examination the plaintiff was asked what the defendant was "to get out of this ditch", and he answered: "He was to get as much benefit as I was." In answer to similar questions the witness said that the defendant was to have the right to drain water through the ditch, and he was asked: "Now, was that the reason why he was agreeing with you, as you claim, to construct this ditch?"—and he answered: "Well, I don't know what his object was in helping to put this ditch in if it was not for his own benefit." He also testified that the defendant was going to do it for the benefit of his land, to drain his bottom land, etc. This evidence upon the cross-examination was merely an explanation of what the plaintiff supposed was the defendant's motive in entering into the contract; but, if the defendant entered into the contract, it makes no difference what his motive was in doing so. The contract as alleged and proved did not of itself entitle the defendant to any easement upon the lands of another. The plaintiff and defendant agreed together to construct a ditch upon the land of a third party, and agreed to pay the expenses thereby incurred, and that seems to be the whole of the contract. Upon this theory the court tried the case and instructed the jury, and the verdict is a fair response to the evidence.

The judgment of the district court is

AFFIRMED.

JOSEPH P. MOOR, TRUSTEE, APPELLANT, V. MOSES H. KECK ET AL., APPELLEES.

FILED MAY 2, 1910. No. 15,998.

REHEARING of case reported in 84 Neb. 550. *Reversed with directions.*

PER CURIAM.

The facts in this case are substantially the same as in the case of *Hotchkiss v. Keck*, 84 Neb. 545. It is therefore ordered that our former judgment in this case (84 Neb. 550) be vacated and set aside; that the judgment of the district court be reversed and the cause remanded, with instructions to make the injunction perpetual, as prayed in plaintiff's petition.

REVERSED.

OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. CHARLIE H. MCGREW ET AL., APPELLEES; DAVID L. FAIR ET AL., APPELLANTS.

FILED MAY 5, 1910. No. 15,976.

1. **Mortgages:** FORECLOSURE: MISTAKE: RELIEF. A was the owner of four adjacent and adjoining lots in a platted addition to a city, their numbers being 13, 14, 15 and 16, of the value of $50 each. There were 24 lots in the half block, numbered from 1 to 24, consecutively. He attempted to construct a dwelling-house on lots 15 and 16, and to aid in such construction borrowed money from B, and to secure the payment of the same executed a mortgage on lots 15 and 16. By the mistake of both A and B the house was built upon lots 17 and 18, to which A had no title. Later C, a stranger, removed to and settled in the city, and, upon being informed by both A and B that the house was located upon lots 15 and 16, purchased said lots 15 and 16, paying $950 therefor. $700 of the purchase price was paid to B in satisfaction of his mortgage thereon, and the remainder of the purchase price to A. A then executed a mortgage to B on lots 13 and 14 for the pur-

pose of constructing a house thereon. He partly completed the house, when it was discovered that it stood on lots 15 and 16, which lots belonged to C, when he abandoned the same, and C took possession, and B commenced suit to foreclose his mortgage on lots 13 and 14 and the house on lots 15 and 16. It is *held* that as the mistake originated with A and B, and C purchased relying on their representations, and had paid full value for lots 15 and 16 with the improvements thereon, the major portion of the purchase price having been paid to B, B was not entitled to any relief as against C.

2. Mechanics' Liens. "A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved, or his authorized agents, and such principal contractor, and the right thereto is based upon contract and for the purpose of securing debts due thereunder." *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80.

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

George A. Adams, for apellants.

Wilmer B. Comstock, *T. J. Doyle* and *G. L. De Lacy*, *contra.*

REESE, C. J.

It is difficult to conceive of a more complicated and involved case than this. The chronological order of events deemed material to the consideration of this case, as drawn from the statements contained in the briefs and made upon the arguments, appears to be about as follows: On and prior to the 25th day of June, 1906, the McGrews were the owners of lots 13, 14, 15 and 16, in block 1, in Woods and Kelly's first addition to College View, all of which were vacant. That block is composed of 48 lots, 24 of which, numbering from 1 to 24, inclusive, are upon the north side of the block fronting on Prospect street, the other 24 fronting to the south. On the 5th of March, 1906, the McGrews executed a mortgage to plaintiff on lots 15 and 16 of said block to secure the payment of the sum of $700, and thereafter erected a dwelling-house upon

said lots, as they then supposed, but which was by mistake erected on lots 17 and 18, to which they had no title. On the 25th day of June, 1906, they sold and conveyed by warranty deed lots 15 and 16 to defendants Fairs for the expressed consideration of $1,050, all parties believing that the conveyance included the dwelling-house which was supposed to be on said lots, the deed being recorded June 29, 1906. The Fairs took possession of the house, and later paid the $700 mortgage to plaintiff. On the 14th day of August, 1906, the McGrews executed to plaintiff another mortgage on lots 13 and 14 to secure the sum of $800, which is the mortgage the foreclosure of which is sought in this action. The McGrews constructed a dwelling-house and barn upon those lots, as they supposed, but by another mistake placed the same upon lots 15 and 16, the title to which were in the Fairs. Defendant Sullivan, under a contract with the McGrews, furnished material to the said McGrews for the construction of this house and barn, and later, on November 28, 1906, filed his statement for a mechanic's lien on lots 13, 14, 15 and 16, amounting to the sum of $481.45. After this second house was about completed McGrew, discovering the mistake he had made, called upon the Fairs, and informed them of the fact and agreed that he would procure the title to lots 17 and 18, upon which the house stood, and the Fairs could then reconvey the title to lots 15 and 16 to him. Later on he informed the Fairs that he could not obtain such title. It seems that McGrew's brother had purchased the lots. As to the good faith or fraud on the part of the McGrews in this purchase by the brother we now have nothing to do. Upon the discovery of the mistake, Fair took counsel with a reputable attorney as to his rights, and was advised that as he was the owner of lots 15 and 16, his title being of record, he should take possession of his lots and the improvements thereon, which he did, and abandoned his possession of lots 17 and 18. The house on lots 15 and 16 not having been quite completed, Sullivan removed his unused material, and

furnished no more. Fair furnished material, finished the work at an expense of $200, and retained his possession. Lots 13 and 14, upon which no improvements have been made, and which are yet vacant, are of little value, not sufficient to meet the demands of any defendant.

Upon the discovery of the errors and mistakes above enumerated, plaintiff, the building and loan association, instituted this action for the foreclosure of its mortgage, making the McGrews, Fairs, and Sullivan parties defendant. The McGrews did not answer or otherwise plead, and default was entered against them. The pleadings are quite lengthy and voluminous, and the transcript is padded to an unnecessary extent, the original and amended pleadings being set out at length. Transcripts could be very much diminished in size and volume, as well as in costs, if counsel would guard against the inclusion of unnecessary files and papers, by giving specific directions to the clerk as to what should be certified. The averments of plaintiff's amended petition (substituted for the original) contain the facts of the execution of its note and mortgage, according to the usual form of pleading in suits for foreclosure, setting out a copy of the mortgage, showing it to be upon lots 13 and 14, and further alleges that defendants McGrews were at the time of the execution of the note and mortgage the owners and in possession of lots 13 and 14, and in possession and occupancy of lots 15 and 16, and had commenced the erection and construction of a dwelling-house on lots 15 and 16, and that at that time the McGrews represented that the money then borrowed, and to secure which the mortgage was given, was for the erection of the dwelling-house on lots 13 and 14, and, plaintiff believing that said improvements were being constructed upon said lots, accepted the mortgage thereon; that the parties to the mortgage were mutually mistaken as to the location of said improvements, and, instead of being upon lots 13 and 14, they were upon lots 15 and 16, and that the money so furnished by plaintiff was to be, and was, used in the

construction of said improvements. The facts herein above stated as to the mistakes of the McGrews and the Fairs as to the location of the house on lots 17 and 18, as well as to lots 15 and 16, are alleged, and need not be herein restated. Further allegations are that during all of the time in which the house was being constructed on lots 15 and 16 the Fairs had full knowledge of what was being done, and were using and occupying lots 17 and 18 and the dwelling-house thereon, asserting ownership thereof, and they also knew that the improvements being made were made with and by the use of the money furnished by plaintiff for that purpose, but gave no notice of any claim of title or ownership of said lots 15 and 16; that they paid nothing toward the construction of the improvements; that after the completion of said dwelling-house they, with knowledge of all the facts, took possession and asserted ownership, claiming the property to be free and clear of the lien of plaintiff's mortgage. It is alleged that by reason of the then known mistakes, the silence of the Fairs, and the expenditure of the money furnished by plaintiff in the improvements, the Fairs are estopped to assert any right to or interest in said buildings or the lots on which they stand. Practically the same facts are made to apply to the claim of Sullivan for the enforcement of his mechanic's lien, and it is alleged that it had been agreed by and between plaintiff and Sullivan that plaintiff's lien should be considered, and was, prior to the lien of said Sullivan, if any existed; that lots 13 and 14 are of no value; that the McGrews and Fairs are insolvent, and the only means for the collection of the money due plaintiff is by the application of the property in question to the payment thereof. The prayer is for a reformation of the mortgage, by causing it to include lots 15 and 16 with the improvements thereon, and that it be foreclosed as to lots 13 and 14, 15 and 16, and for general relief.

Defendant Sullivan filed his answer and cross-petition, in which the averments of the petition as against the other defendants are, in the main, admitted, closing with

a general denial of all facts not admitted. By the cross-petition it is alleged that about the 8th day of September, 1906, the answering defendant, Sullivan, and the McGrews entered into a contract by which the said Sullivan agreed to furnish to the McGrews lumber, lime and other building material for the erection of a dwelling-house on lots 13, 14, 15 and 16, block 1, in the addition referred to, and in pursuance of said contract he did furnish building material for said improvements to said McGrews to the extent and amount of $681.45, all of which was used in the construction of the dwelling-house on lots 15 and 16; that at said time the said McGrews were in the undisputed and exclusive possession of said lots 15 and 16, claiming to be the owners thereof, and were the owners in fee of lots 13 and 14 "and said lots 15 and 16." The filing of the statement and claim in the proper county offices is alleged, and it is averred that the sum of $481.45 is still due, with interest, and that at the time of the making of said contract all of said lots were vacant and unimproved. The facts of the alleged mistakes of the defendants McGrews and Fairs, and the taking possession of lots 17 and 18 by the Fairs, are set out, practically as hereinbefore stated, together with the alleged knowledge of the Fairs that the improvements for which defendant Sullivan furnished the material were being made on lots 15 and 16, their acquiescence in the construction of the improvements, and the alleged fact that the Fairs paid nothing for the house before taking possession, and it is averred that the Fairs are now estopped to claim said property, or to deny or controvert the claim for the value of the material furnished. The prayer is for judgment against the McGrews and the Fairs for the sum of $481.45, with interest; that the premises be ordered to be sold; and, should the court determine that lots 15 and 16 should not be sold under the decree, then and in that event that the court order the house to be sold, with authority for the purchaser to move it from the lots where it stands; that the mechanic's lien be declared the first lien upon the

premises, and the equities of the defendants therein be foreclosed, and for general relief. A copy of the account is attached to the cross-petition.

The defendants, David L. Fair and Ruth A. Fair, his wife, for their answer to the amended petition of plaintiff, admit the corporate character of plaintiff, and that the note and mortgage were made by McGrew and wife, but deny that plaintiff furnished McGrew the full sum of $800, the amount named in the mortgage, or that that amount is due thereon, and require strict proof thereof. They deny that either the ownership or possession of lots 15 and 16 was in the McGrews from or after the 29th of June, 1906, when their deed of the 25th of that same month was recorded, and allege that from that date they have ever been and now are the owners of said lots, and also deny that they ever were the owners of lots 17 and 18, or that they in any way purchased either of them or that the defendants McGrews ever owned them. They allege the fact of the existence of the $700 note and mortgage of March 5, 1906, and that as a part of the purchase price of lots 15 and 16 they paid the same on the 26th day of June, 1906, and received a receipt, release and satisfaction of the same, and that the release was recorded in the proper records of the county on the 29th day of June, 1906, and that at the time of the payment plaintiff knew that they had purchased said lots, were the owners thereof, and were paying said note and mortgage as a part of the consideration and purchase price thereof. The facts of the mistakes in the location of the buildings, as hereinbefore stated, are set out at length, and it is averred that the McGrews represented to them that the house on lots 17 and 18 was on lots 15 and 16, which representations were relied upon, they not knowing the lines of said lots; that when the McGrews discovered that the said house was on lots 17 and 18, instead of on lots 15 and 16, said McGrews had partially erected a house on lots 15 and 16, believing they had erected it on lots 13 and 14, and they then refused to complete the house on lots 15 and 16,

and turned it over to defendants Fairs, when the latter took possession, and Sullivan at once removed all unused and unattached material from said lots, and defendants Fairs were compelled to and did furnish the necessary material to complete the same at an expenditure of over $200 in labor and material, and they have ever since been in the actual and peaceable occupancy thereof. There is a general denial of unadmitted allegations of the petition, and a special denial of any right to or lien of any character upon said lots 15 and 16 in favor of plaintiff, and it is alleged that, by plaintiff having accepted the money from defendants in payment of its prior mortgage on said lots 15 and 16, it is now estopped to claim any rights as against said lots 15 and 16, or the buildings thereon. The prayer is for a dismissal of said petition, for recovery of costs, and for general relief.

Plaintiff, for reply to the answer of the Fairs, submitted a general denial of allegations not admitted, admitted the execution by the McGrews of the first mortgage on lots 15 and 16, but avers that it was given to secure the payment of money furnished by plaintiff to said McGrews for the erection and construction of the dwelling-house erected by them on lots 17 and 18. The averments of the mistake of the McGrews in the location of that house are repeated, and it is alleged that, when the McGrews sold the house on said lots 17 and 18 to the Fairs, the Fairs assumed and agreed to pay the debt as a part of the purchase price thereof, all parties believing that said house was located on lots 15 and 16, the property included in and bound by said mortgage. The Fairs, for their answer to the cross-petition of Sullivan, deny generally all unadmitted facts, and specifically deny that Sullivan furnished any lumber or material of any kind or under any contract to be placed in the building on lots 15 and 16, and deny the existence of any lien thereon in favor of Sullivan. Substantially the same facts as to the mistakes in the location of the buildings, the purchase and conveyance to them of lots 15 and 16, the recording of their deed

on the 29th day of June, 1906, and their continued and uninterrupted ownership of the property are averred, but need not be repeated here. It is alleged that Sullivan became aware of the error in the construction of the house on lots 15 and 16, instead of on lots 13 and 14 as was intended by him and the McGrews; that the house was unoccupied, and portions of the material had been furnished upon the ground, but not used; that Sullivan removed all thereof, and left the building unprovided with material, and they (the Fairs) were compelled to expend the sum of $200 for material and labor in the completion of the house; that at that time the said Sullivan had not filed any mechanic's lien on said property, and during the whole time he was furnishing said material he well knew that the Fairs were the owners of lots 15 and 16, they having bought and paid the full consideration of $950 for them; that their deed was upon record since the 29th day of June, previous to any contract between the McGrews and Sullivan to furnish material for the construction of a house on lots 13 and 14, and said Sullivan had no power or right to contract with the McGrews, or any one, for the purpose of erecting a house on lots 15 and 16; that the answering defendants are the owners in fee of said lots 15 and 16 and in possession thereof, and that Sullivan can have no lien thereon. Other averments, being in effect but repetitions of those in the other pleadings herein stated, need not further noticed. The reply of Sullivan to the answer of the Fairs is of great length, and practically covers the same ground as the reply of plaintiff, but more in detail. In reply to the averment in the Fairs' answer that, upon the discovery of the mistake as to the location of the buildings, the McGrews refused to complete the building on lots 15 and 16 and abandoned the same, turning the possession over to the Fairs, it is averred that it was "not in the power of said McGrews to turn over to the said Fairs the unfinished building located and situated on lots 15 and 16, with the material furnished for the erection of the same, under the circum-

stances stated in said answer, being unpaid and a lien existing on said building therefor, without first paying for said material, and it was not in the power of said McGrews or said Fairs to divert the lien created by the statute, and perfected by filing the same, as was done by defendant in this case, and when the said Fairs took possession of said premises and the said building they took possession thereof subject to said lien, ratified the purchase of said lumber and the existence of said lien, and assumed the payment of same." An estoppel is pleaded against the Fairs, and a general denial follows.

The cause was tried to the court, and extended findings of facts and decree were entered sustaining the validity of the mortgage of plaintiff and the mechanic's lien in favor of defendant Sullivan. It is ordered by the decree that, unless the defendants pay the several amounts found due (to plaintiff $700, and to defendant Sullivan $453.45, each with interest), the plaintiff is authorized to enter upon lots 15 and 16 with necessary assistance and remove the dwelling-house, with the foundation walls and cellar walls, and place the same on lots 13 and 14 in as near the identical situation as it now occupies on lots 15 and 16 as possible, with cellar and all walls as now existing on lots 15 and 16, and that after said removal the defendants' equity of redemption be foreclosed as to lots 13 and 14, and that an order of sale issue for the sale of said lots, and that they be sold and the proceeds be applied, first, to pay plaintiff $700, with accruing interest, together with the money necessarily expended in the removal of the house, foundation and cellar walls; second, to pay defendant Sullivan $453.45, with accruing interest; third, to pay the Fairs the sum of $200, with accruing interest. We find no provision in the decree for the payment of the costs of the foreclosure proceedings, nor for the restoration of defendants' lots to their former condition, by filling the cellar or other excavations made in the improvments by the McGrews, which would appear to be in harmony with the idea of placing the parties in the position

they would have been had the McGrews and plaintiff made no mistakes. In those respects the decree seems to be deficient.

The cause has been extensively briefed by the parties to the suit, each brief showing commendable and careful research, and the citation of many cases and authorities in support of the various claims. We will find it impossible to review the authorities cited, owing to their great number, and will have to be content with the statement of the facts, in part above detailed, followed with our view of the principles of equity to be applied.

It is shown by the evidence contained in the bill of exceptions that the defendants, the Fairs, removed and settled in the city of College View in April, 1906, being before that time strangers and having no knowledge as to the platting or subdivision thereof. Prior to their arrival defendants McGrews had executed a mortgage to plaintiff on lots 15 and 16, block 1 of the addition referred to, and had constructed, or were then constructing, the dwelling-house thereon, as was supposed, but which was in fact, constructed on lots 17 and 18, to which the McGrews had no title. This was the joint mistake of plaintiff and the McGrews, and for which the Fairs were in no way responsible, nor had they in any way entered into or in any sense been a party thereto. Mr. Fair testified that both plaintiff and McGrew represented to him that the house was situated on lots 15 and 16. Acting upon such representations and in the belief that the representations so made were true, he purchased lots 15 and 16 for the sum of $950. The purchase was made on June 25, 1906. The naked, unimproved lots (15 and 16) were of the value of $100. A warranty deed was executed by the McGrews to the Fairs on that date, conveying lots 15 and 16, for the expressed consideration of $1,050. Plaintiff then held a mortgage on 15 and 16 given to secure the sum of $700, bearing date March 5, 1906, which the Fairs had assumed and agreed to pay, and did pay to plaintiff, thereby clearing the title to lots 15 and 16, they not know-

ing of the mistake made by plaintiff and the McGrews. The remainder of the purchase price they paid to the McGrews. Plaintiff executed a release of the mortgage on the 26th day of June, 1906. Upon the purchase of lots 15 and 16, the Fairs, by their tenants, the McGrews, took possession of the house and lots 17 and 18, believing, as informed by plaintiff and McGrew, that their true numbers were 15 and 16. By the payment of plaintiff's mortgage and the money paid to the McGrews, the Fairs paid the full purchase price of lots 15 and 16 and the house on lots 17 and 18 so placed by the mistake of the McGrews and plaintiff. While it appears that no fraud was intended by either the plaintiff or the McGrews, yet it must be conceded that there was such a want of care upon their part as to amount to neglect in the selection of the lots upon which the house should be erected. It is also apparent that all the Fairs received for the $950 or $1,050 paid by them to plaintiff and the McGrews was the title to lots 15 and 16, of the value of $100. On the 14th of August, following, the McGrews executed their mortgage on lots 13 and 14 to secure the sum of $800. With this the Fairs had nothing to do. That plaintiff and the McGrews were mistaken as to the exact location of those lots may be conceded, and which might easily have been corrected by consulting the plat and survey, and by a short time devoted to measurements, must also be conceded, but for this the Fairs were in no sense responsible or in any way blameworthy. True, they were laboring under the same mistake as to the location of the lots owned by the McGrews, yet that mistake on their part was caused, as Mr. Fair testified without contradiction, by the misrepresentation of the plaintiff and the McGrews. During the latter part of the summer or fall of 1906, the McGrews undertook to construct a dwelling-house on lots 13 and 14, being the same lots upon which they executed the mortgage of August 14 of that year to plaintiff, but by mistake placed it upon the lots (15 and 16) owned by the

Fairs. Of the construction of that house the Fairs had full knowledge, and Mr. Fair was employed by McGrew to labor on the excavation of the cellar, or possibly the construction of the foundation wall. As we read the evidence, he worked for the McGrews a fraction over one day. It is claimed by this he lost some right, but we cannot conceive such to be the case, as he was still laboring under the false impression and information created and given by plaintiff and the McGrews. When the house was well nigh completed, the Fairs took possession, claiming it as their own under the deed of conveyance made to them the previous June for that identical property, and for which, in its then condition, he had paid the full purchase price. Within a few days prior to that time McGrew had discovered the mistakes which he had made as to the location of the houses, and his absolute want of title to the lots on which the first house stood, and had notified the Fairs that he would abandon the house on lots 15 and 16, owned by the Fairs, in its unfinished condition. Upon the discovery by the Fairs, then for the first time, that they had no title to lots 17 and 18, they abandoned all claim to that property and took possession of lots 15 and 16, when plaintiff brought this suit to foreclose its mortgage on lots 13 and 14 and have the same decreed to include the house on the Fairs' lots 15 and 16. If the decree stands as entered by the district court, the Fairs will not only be deprived of the house for which they have paid full value to plaintiff and the McGrews, but the property will be taxed with the costs and expenses of the preparation of lots 13 and 14 for the reception of the house, and the removal of the house thereon, but the money they have expended in the completion of the house is relegated to the third lien thereon, which means a complete loss, and their own lots will be left with an open cellar excavation, necessarily injured by the removal of the walls and the house therefrom, and plaintiff will have recovered from the Fairs the full amount of its mortgages, leaving the Fairs but their vacant lots, all made

possible by the original errors and mistakes of plaintiff and the McGrews, to say nothing of their negligence in the inception and continuance of the transactions. True, the Fairs could pay the amount of the decree, and thus prevent the wresting from them of the property by plaintiff, and save the costs and expenses of the excavation and walling of the cellar on lots 13 and 14; but, if they did so, they would be required to pay not only the $700 of the decree, but the $950 paid for the property in the beginning, making a total of $1,650, $1,400 of which would be received by plaintiff from the Fairs for property for which they were indebted in the beginning in the sum of $950, all caused in the first instance by the fault of plaintiff and McGrew, as above outlined.

While agreeing with plaintiff's counsel that it is within the province of courts of equity to correct mutual mistakes in furtherance of justice, and administer the remedy according to the very right of the thing, we are wholly unable to see where or how the decree in this case can be said to meet the demands of equity. In any event, should this mortgage be foreclosed, common fairness and justice would say that, as a condition precedent thereto, plaintiff should be required to refund to the Fairs the money received from them in payment of its first mortgage, which was paid upon the representation by plaintiff that they were receiving that for which it was so paid. However, as we view the case, plaintiff is entitled to have its mortgage foreclosed on lots 13 and 14, and is entitled to no relief as against the Fairs. We must not forget that this is not a case where any mistake has been made by a scrivener or person preparing or forming any written instrument. All deeds and mortgages have been drawn just as the parties to them intended. The mistakes are as to the location of the properties, the correct descriptions of which have been stated in the writings, and therefore the law of the reformation of contracts or writings can have no application.

We are next to consider the rights of defendant Sul-

livan in his efforts to foreclose the mechanic's lien set up by him in his cross-petition. The statement of his lien, filed in the office of the register of deeds November 28, 1906, after the discovery of the mistake as to the location of the building, is for "work, labor, skill and material, done and performed and furnished by Dan Sullivan for the said Charles H. McGrew, David L. Fair and Ruth A. Fair under a verbal contract for the erection of a dwelling-house and barn on the following lot, piece or parcel of land, to wit, lots 13, 14, 15 and 16, in block 1," etc. The first item charged in the account is dated September 8, which was prior to the construction of the house, and long before the discovery of the mistake in the correct numbers of the lots. The bill was verified on the 27th of November, 1906. The deed conveying from the McGrews to Fairs lots 15 and 16 was recorded in the proper records of Lancaster county from and after the 29th day of June, 1906, thus giving Sullivan constructive notice of the Fairs' ownership. There is no claim in the evidence that the material was furnished by virtue of or under any contract with either of the Fairs, although so to be inferred from the affidavit attached to the statement of the account, but it clearly appears that such was not the case. The statute (Comp. St. 1909, ch. 54, art. I, sec. 1) as applicable to this case provides that, if any person shall furnish any material for the erection of any house by virtue of a contract, expressed or implied, with the owner thereof or his agents, he shall have a lien to secure the payment of the same upon such house and the lot or land upon which the same shall stand. There is no written contract in the record, and the averment of the cross-petition is that defendant "entered into an oral contract with the defendants, Charlie H. McGrew and Edna I. McGrew", to furnish building material, etc., and there is nothing in the evidence tending to prove in any way that any contract or agreement to furnish the material was had with the Fairs. The material was delivered upon lots 15 and 16, owned by the Fairs, and the

building was constructed to near completion with the knowledge of the Fairs that it was being constructed upon the ground where it was situated, but without their knowledge that that spot was upon lots 15 and 16 owned by them. At that time they were laboring under the belief that the correct numbers of the lots were 13 and 14, owned by the McGrews, and that they, the Fairs, were in possession of lots 15 and 16, but which were in fact lots 17 and 18. We readily concede that in a proper case a mechanic's lien may attach to a building alone where the soil upon which it stands may belong to another. *Pickens v. Plattsmouth Land & Investment Co.,* 31 Neb. 585; *Shull v. Best,* 4 Neb. (Unof.) 212, and other cases which might be cited, but the question now before us is whether the facts here presented come within the principles involved in those cases. The Fairs were misinformed by the McGrews and plaintiff. Their deed to lots 15 and 16 was upon record. Sullivan, if misinformed at all, was also deceived by McGrew, so that upon the question of mistake Sullivan and the Fairs stand on practically the same footing. As we have said, it is clear that there were no contractual relations between Sullivan and the Fairs. There was no "contract or agreement, expressed or implied, with the owner thereof or his agents," as required by the statute, upon which a lien could be based or that would give it any vitality. Nor can we see that the silence of the Fairs, laboring under the honest mistake as they were, could have the effect of either a ratification or estoppel.

In *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80, the real estate upon which a dwelling-house was erected belonged to a married woman. The contract for furnishing the material for the construction of the dwelling-house was made with her husband. The building was erected with the knowledge of the wife, and after its completion she, with her husband, occupied it as the family residence. In an opinion written by Judge HOLCOMB it was held that there was no proof that the husband acted as the agent

of the wife, nor did her knowledge of the construction of the building or her occupancy of it after its completion constitute a ratification of the husband's acts as her agent, and a right to a lien was denied. Quoting from the opinion it is said: "A mechanic's lien in favor of a principal contractor, therefore, grows out of the contractual relations between the owner of the property improved, or his or her authorized agents, and such principal contractor, and the right thereto, is based upon contract and for the purpose of securing debts due thereunder." The writer of that opinion quotes with approval the following from *Copeland v. Kehoe & Ramsey*, 67 Ala. 594: "A builder's or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar, particular, special remedy given by statute, founded and circumscribed by the terms of its creation, and the courts are powerless to take it up where the statute may leave it, and extend it to meet the facts and circumstances, which they may believe present a case of equal merit, or a necessity of the same kind, as the cases or necessities for which the statute provides."

There having been no semblance of a contract between Sullivan and the Fairs for furnishing the material used in the construction of the house, and there being no higher equities in favor of Sullivan than the Fairs, it is believed that Sullivan is not entitled to a lien, but must depend upon his judgment against the McGrews for the payment of his claim.

The decree of the district court is reversed and the cause remanded, with directions to dismiss the suit as to the defendants David L. Fair and Ruth A. Fair and Dan Sullivan, and to enter a decree of foreclosure in favor of plaintiff and against Charlie H. McGrew and Edna I. McGrew, foreclosing plaintiff's mortgage on lots 13 and 14 in block 1 of Woods and Kelly's first addition to College View, and such further proceedings as may be necessary to conform to this opinion.

REVERSED.

REGNAR AABEL V. STATE OF NEBRASKA.

FILED MAY 5, 1910. No. 16,466.

1. **Jury:** SPECIAL VENIRE. "The provisions of section 465*a* of the criminal code are not exclusive but are to be construed in connection with section 664 of the civil code." *Barney v. State*, 49 Neb. 515.

2. **Larceny.** Where a clerk is hired to sell goods in the store of his employer, the employer remaining in possession, but occasionally absent from the store, and the clerk with criminal intent removes and appropriates to his own use a portion of the goods, the crime is larceny, and not embezzlement. In order to constitute such appropriation embezzlement, the goods must have come into his "possession or care, by virtue of such employment," as provided by section 121 of the criminal code.

3. **Criminal Law:** NEW TRIAL: MISCONDUCT AT TRIAL: PRESUMPTIONS. In order to constitute reprehensible misconduct in open court of persons not connected officially with a criminal prosecution sufficient grounds for a new trial of one against whom a verdict of guilty has been returned, there must be some showing of facts tending to establish prejudice to the accused, the presumption being that the presiding judge has taken such action with reference to the contempt as will fully protect all the rights of the party on trial.

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

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

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

REESE, C. J.

An information was filed in the district court for Harlan county charging plaintiff in error, together with Charles O'Brien and Virgil Woolrige, with the crime of grand larceny, by stealing, taking and carrying away certain goods and merchandise of the value of $500 of the personal property of T. M. Logan, committed in said

county on the first day of January, 1909. A trial was had which resulted in a verdict of the jury finding plaintiff in error guilty, and fixing the value of the goods stolen at $250. A motion for a new trial was filed by plaintiff in error and overruled, and sentence of five years in the state penitentiary and judgment for the payment of the costs imposed upon him. He brings error to this court.

1. Before entering upon the trial plaintiff in error filed his affidavit setting out, among other things, the demand of the state for separate trials of the three parties accused; the placing of O'Brien upon trial first; the submission of the evidence to the jury; that during said trial the name of plaintiff in error "was continually before said jury in connection with said cause, and that by reason thereof said jury has become disqualified to try his case; that most all of the other members of said jury so impaneled and not sitting in said cause were present during the greater part of the trial of the said Charles O'Brien and heard the testimony relating to this affiant's case; that, by reason thereof, they, the said jury, have already prejudged this defendant's case and are disqualified to sit in the trial of said cause. Wherefore this defendant objects to going to trial in said cause before said jury, and moves the court for a continuance of said cause to the next term of the district court." This affidavit was filed November 5, 1909, and on the same day an entry was made in the journal of the court, reciting the fact of the separate trials, the arraignment, and entry of a plea of not guilty for plaintiff in error, and which entry contains the following:

"And now on this 5th day of November, 1909, at the hour of 10 o'clock A. M., this cause coming on for hearing on the affidavit of the said defendant for a continuance of this cause to the next term of this court and his objections to being put upon trial at this time, the court, being fully advised in the premises, is satisfied that the regular panel of jurors are competent to sit in this cause,

and that the said regular panel and bystanders have not become incompetent to sit as jurors in this cause by reason of having heard the evidence in the case of *State v. Charles O'Brien,* the said Charles O'Brien having been charged together with this defendant in the same information with the commission of said crime, therefore the court does overrule said motion and objection, to which ruling the defendant excepts.

"And now, at the hour of 10:30 o'clock A. M., of said day, the defendant and his said counsel being present in court, so that there would be no delay in said cause, and to assist the sheriff by securing the attendance of competent talesmen, the court directed the sheriff to summon 25 good and lawful men from the body of the county as talesmen, and no objections being made thereto by the defendant or his attorneys. Now on this day, at the hour of 11:30 o'clock, counsel for the defendant appears and excepts to the order of the court requiring the sheriff to summon said talesmen. Said exception being taken after the sheriff had departed to comply with the said order."

To the former portion of the above order it is shown that plaintiff in error then excepted, but we are not inclined to the belief that the unexplained delay of one hour was a waiver of the exception to the latter part thereof, and we will treat the whole as duly excepted to.

The question of law here presented is as to what was the statutory duty of the court in dealing with the condition then existing. It might, however, throw some light upon the subject to refer to an affidavit of one of the counsel for the defense filed in support of the motion for a new trial, which, after reciting the facts of the trial of O'Brien, states that the county attorney, upon the return of the verdict in O'Brien's case, demanded the immediate trial of plaintiff in error; the filing of the affidavit above referred to asking for the continuance of the cause on account of the disqualification of the jurors, owing to the fact that the evidence in the one trial would be the same as in the other; the fact that the other members of the

panel had been present and heard the evidence introduced, and in which trial plaintiff in error's name had been used constantly; that the jurors of the regular panel had already prejudged the case of plaintiff in error. The affidavit continues: "That, thereupon, the judge of said court asked the members of the regular panel, who had not sat upon the trial of the O'Brien case, and who had been present and heard the testimony or any other part thereof, or the argument of counsel, to stand up, whereupon seven other members of the regular panel, in addition to those who sat upon the trial of the O'Brien case, stood up and indicated to the court that they had been present and heard the testimony and argument of counsel, material testimony in relation to this defendant's case, whereupon, without any further testimony before the court other than the affidavit of this defendant, and the expression of opinion and disqualification by the other members of the regular panel present, the court overruled the objection of the defendant to being placed upon trial before said jury and overruled his motion for a continuance." The record also shows that on the same day (November 5) the judge issued a special venire, as follows: "The State of Nebraska, County of Harlan, ss.: To any constable or the sheriff of said county: You are hereby commanded to summon 25 good and lawful men from the body of the county to appear in the district court in said county, on the 5th day of Nov., A. D. 1909, at 9 o'clock, standard time, in the A. Noon, to serve as jurors in a case pending before me, then and there to be tried; and this they shall in no wise omit. And have you then and there this writ, with your doings thereon. Given under my hand this 5 day of Nov., A. D. 1909. Harry S. Dungan, Judge." To this the sheriff made return that, as therein commanded, he had summoned 25 men, giving their names, from the body of the county. Those men were held as talesmen from which to fill the panel of the trial jury.

It is insisted by plaintiff in error that the court should

have proceeded under section 465*a* of the criminal code. That section is as follows: "That when two or more persons shall have been charged together in the same indictment or information with a crime, and one or more shall have demanded a separate trial, and had the same, and when the court shall be satisfied, by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent because of having heard the evidence, to sit in further causes in the same indictment or information, then it shall be lawful for the court to require the clerk of the court to write the names of sixty electors of the county wherein said cause is being tried, each upon a separate slip of paper, and place the same in a box, and after the same shall have been thoroughly mixed, to draw therefrom such a number as in the opinion of the court will be sufficient from which to select a jury to hear said cause, and the electors whose names are so drawn shall be summoned by the sheriff to forthwith appear before the court, and after having been examined, such as are found competent and shall have no lawful excuse for not serving as jurors shall constitute a special venire from which the court shall proceed to have a jury, impaneled for the trial of the cause, and the court may repeat the exercise of this power until all the parties charged in the same indictment or information shall have been tried."

The section appears to have been enacted specially to meet cases of this kind, but it is claimed by the state that the court was not bound to follow the provisions of the section of the criminal code, above quoted, but that a compliance with section 664 of the civil code would be sufficient, and cites *Fanton v. State,* 50 Neb. 351; *Barney v. State,* 49 Neb. 515, and *Welsh v. State,* 60 Neb. 101.

Section 664 of the civil code provides, in substance, that when no jury is summoned, or when all jurors summoned do not appear, or when for any cause there is no panel of jurors, or the panel is not complete, the court may

order the sheriff to summon competent jurors to serve on the panel. In the case now under consideration there was a full panel of jurors, but substantially all had been rendered incompetent to serve upon the trial of plaintiff in error by reason of having heard the same evidence as presented in the trial of O'Brien. It is the opinion of the writer hereof that the provisions of section 465*a* of the criminal code should have been followed. There are many reasons why those beneficent provisions of the statute should have been adopted as the guide to the trial court, and were there no prior decisions holding its provisions "permissive," instead of mandatory, I should hold, unhesitatingly, that its provisions are mandatory and should have been followed. I concede that the cases cited are not directly in point, as the circumstances in each differed from the present case, yet the reasoning in all, and the construction applied to the two sections, seem to be binding upon us as the settled law, and should be followed.

In *Barney v. State, supra,* the panel of jurors was discharged, for the reason that it was irregularly drawn, which left the court without a jury, and the provisions of section 664 of the civil code were followed, and the special venire was issued. Subsequently, when it was discovered that the members of the panel were disqualified by having heard the evidence in the trial of Barney's codefendant, the panel was again discharged, and, the court being without a jury, a new venire was issued for a third jury. In these respects that case differed from this, and the provisions of the civil code (section 664) were held to have been properly applied. We held that the provisions of section 465*a* were not exclusive; that the method provided by the civil code "applies to criminal cases, except as otherwise provided"; that by reason of the use of the words "it shall be lawful", in section 465*a*, "the language of the section is not mandatory, it is simply permissive"; the conclusion being that "the two sections are not conflicting, the language of the later act is not man-

datory, and we hold that the provisions of section 465*a* are not exclusive, and that the court acted neither illegally nor in abuse of its discretion in proceeding under the former section instead of the latter." In *Fanton v. State, supra,* a companion case to the one above referred to, the rules announced in *Barney v. State* were distinctly stated and followed.

Welsh v. State, supra, was where there was no jury previously summoned for the special term at which the accused was to be tried. The court ordered a special venire under section 664 of the civil code. That action was approved, and we think correctly, as the conditions were such as were provided for by section 664 of the civil code, and not by section 465*a* of the criminal code.

Barber v. State, 75 Neb. 543, was where the facts were somewhat similar to those in the present case, except that the court discharged the jury panel because subsequent cases were to be tried upon facts testified to by witnesses in previous trials during the term, and which disqualified the jurors from sitting in the case about to be tried, instead of holding the regular panel, as was done in this case, and ordering a special venire under section 664 of the civil code. The question was presented, as here, when we said: "It is contended that the new venire should have been summoned under the provisions of section 465*a* of the criminal code. This contention has been considered and passed upon by this court adversely to the position of the defendant in the cases of *Barney v. State,* 49 Neb. 515, and *Fanton v. State,* 50 Neb. 351. With the rule established in these cases we are satisfied, and see no reason for disturbing the same."

Those cases seem to close the door of inquiry, and the contention of plaintiff in error cannot be sustained. We cannot see that the case of *Pflueger v. State,* 46 Neb. 493, sheds any light upon this question.

2. The evidence shows that plaintiff in error was a clerk for Mr. Logan in a store owned by Logan; that he carried a key to the store, opened and swept out in the morning,

and closed the door in the evening; that he assisted in making sales, and when necessity therefor arose, on account of the absence of Mr. Logan, purchased groceries in keeping up the stock. Mr. Logan was in the store the greater portion of the time, although at times absent, and his wife also gave her attention to the business of the store, so that plaintiff in error appears to have been in the exclusive possession of the store at no time, but had access to all its parts and to all the goods kept for sale in the course of trade. It was while thus employed that he is charged with stealing the goods. From the evidence there seems to be no doubt of his having taken and assisted in taking them from the store and secreted them in other places.

At the close of the evidence plaintiff in error asked the court to instruct the jury to return a verdict finding him not guilty, for the reason that the evidence was not sufficient to sustain the charge of larceny, but tends to show that, if any crime was committed by him, it was not larceny, but embezzlement. The court refused to give this instruction. The same contention was presented in another instruction to the same effect, but submitting the facts to the jury with the direction that, if they found the facts to be practically as testified to, the crime, if any, would be embezzlement, and not larceny. This instruction was also refused, and the action of the court is assigned for error. In this we all agree the court did not err. The provisions of section 121 of the criminal code, defining the crime of embezzlement, as applicable to this case, is to the effect that if any clerk, agent, servant, etc., shall embezzle or convert to his own use, or fraudulently make away with any goods of his employer "which shall come into his or her possession or care, by virtue of such employment," such person, upon conviction, shall be punished as provided in the section.

Plaintiff in error was one of several clerks in the store. He was furnished with a key to the front door of the building, opened and closed the store morning and even-

ing, and was authorized to replenish the grocery department of the business by the purchase of groceries when necessary, in the absence of the proprietor, but the store and goods were at all times in the "possession" of the owner. It is true that in a sense plaintiff in error was the custodian of the store during the absence of the proprietor and his wife, and perhaps the other clerks, but we find no proof in the record which tends to show that either the store or goods were at any time in his possession.

A case somewhat similar to this is reported in *People v. Belden,* 37 Cal. 51. In that case the accused was in the employ of McComb, the owner of a livery stable. Belden was employed by the month, and when the owner was not present he had charge of the stable, and was directed to let the horses out to persons applying for them in the absence of the owner. Belden usually slept in the stable, and was left in charge on the night the horses, alleged to have been stolen, were taken by him. He was convicted of the larceny, and appealed to the supreme court, contending that the crime was not larceny, but embezzlement. The court in the opinion say: "The question, therefore, upon the solution of which this appeal depends is, in whose possession were the horses while in the livery stable of McComb? To this question the evidence does not give a doubtful or equivocal answer. It was not a case of joint or mixed possession of McComb and the defendant. McComb had the possession of the horses while he was at the stable, and it cannot, upon any theory consistent with reason, be said that the possession changed whenever he was absent from the stable for an hour or a day. The defendant occupied only the relation of servant to McComb, and, although he had labor and duties to perform in respect to the horses, he was not entrusted with them, in the sense of the statute." The judgment of conviction was affirmed. The same question was presented in *People v. Wood,* 2 Park. Cr. Rep. (N. Y.) 22, where the accused was convicted. Also in *Powell v. State,* 34 Ark. 693, and

it was held: "The possession of the servant is that of the master. The former has a mere custody. If he appropriates the property of the master to his own use, with intent to steal, it is larceny at common law." This was followed and approved in *Atterberry v. State,* 56 Ark. 515. See, also, 15 Cyc. 493; 25 Cyc. 31.

3. Our attention is called to what is shown to be the misconduct of a witness, by the name of Morrison, who was guilty of improper conduct during the trial, showing a "pernicious activity" throughout the whole proceeding, and, finally, making an effort to assault counsel for plaintiff in error who was addressing the jury, and from which a high degree of commotion and excitement was aroused, when one of the regular panel of jurors, but not sitting in this case, arose and made improper remarks. It is strongly insisted that this conduct and the accompanying disturbance had a terrifying effect upon the jury to the prejudice of plaintiff in error. It was, of course, within the power and duty of the presiding judge to have corrected any evil effects which might have followed as the result of those demonstrations. The proof of the conduct of those two persons is made by affidavit in support of the motion for a new trial, but nothing is shown as to the action of the court in the way of the protection of its own dignity or the enforcement of the law by the punishment of the contempt. We cannot presume that the presiding judge was asleep, or that he had not the moral courage to maintain the dignity of the court and inflict upon both parties the punishment their conduct so justly merited. So far as is shown, the culprits may have been at once confined in the county jail, where they belonged, and heavy fines imposed. There is nothing, aside from the opinion of counsel who made the affidavits, showing prejudice to plaintiff in error. The facts constituting the prejudice should have been made to appear of record. So far as is shown, the turbulent scene referred to may have had the opposite effect upon the jury. It is to be regretted that no showing was made by the county attorney

or others connected with the court as to what may have been done by the court to counteract any evil effects which might have followed the demonstration. All presumptions and intendments are in favor of the due, prompt and effective action of the court, and we cannot say from the meager evidence before us that the result was to the prejudice of plaintiff in error.

It is said in the brief presented on behalf of plaintiff in error that "the defendant is a young man and of a good family. No suspicion of wrong-doing had ever attached to his name before," and it is insisted that the punishment imposed is excessive. We have been unable to find anything in the record as to the family relations of plaintiff in error or his age. The proprietor of the store, his employer, testified that he was a "good clerk," and that his habits were good prior to his acts out of which the prosecution arose. The jury found the value of the stolen goods to be $250, which we may assume to be their true value. The punishment imposed was imprisonment in the state penitentiary for the period of five years, to which is added the judgment for costs. When we consider that the more enlightened modern thought, the holdings and decisions of courts, the teachings of penologists, eminent in their profession, have now fully adopted the humane and beneficent rule that the infliction of penalties for violations of the criminal laws are to be considered as in no sense a punishment, but rather for the reformation of the wayward and the protection of society, and that the spirit of vengeance has departed from criminal procedure, we are persuaded that so long a sentence, for the act proved, cannot be justified.

The sentence pronounced by the district court will therefore be modified and the term of imprisonment fixed at two years, the judgment for costs to stand as entered. As thus modified the judgment of the district court will be, and is, affirmed, and the costs of this court will be taxed to plaintiff in error.

AFFIRMED AS MODIFIED.

FLAVIA WATTERS, ADMINISTRATRIX, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MAY 5, 1910. No. 15,994.

1. **Appeal:** LAW OF CASE. A decision of this court on a former appeal of a question presented by the record is thereafter the law of the case; and when the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point. *Mead v. Taschuck*, 57 Neb. 615.

2. ———: DAMAGES: INSTRUCTIONS. Where damages are sought to be recovered for two causes, for one of which the defendant may be responsible, while for the other he is clearly not responsible, it is reversible error to submit both causes to the jury; and where in such case a general verdict is returned for the plaintiff, a new trial should be awarded.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine*, for appellant.

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

BARNES, J.

This is the second appeal in this case. The action was one to recover damages for the alleged negligence of the defendant in constructing and maintaining a stairway from the Eleventh street viaduct to Leavenworth street in the defendant city, which it is claimed caused the death of plaintiff's intestate.

The question presented for our consideration upon the former appeal was one of negligent construction, and it was there said: "Where a city in the erection of a public work exercises reasonable care and judgment, and adopts plans approved and recommended by engineers having all the knowledge that skill and experience in such work would naturally give them, it should not be held liable

in damages on account of an alleged defect in the plan, unless the construction is so manifestly dangerous that all reasonable minds must agree that it was unsafe." *Watters v. City of Omaha*, 76 Neb. 855.

It appeared upon that hearing that the plans and specifications for the improvement in question were submitted by contractors, and the one adopted had the approval of Andrew Rosewater, city engineer of the defendant; and, also, of the chief engineer of the Burlington railroad; the chairman of the board of public works of the defendant, at one time chief engineer of the Union Pacific Railroad Company; and of another engineer, who had occupied a similar position. They were all of recognized and known ability, and eminent as civil engineers. They recommended the adoption and approval of the plans by the board of public works, and, acting upon their advice and recommendations, the plans were adopted by the board, and afterwards approved by the city council, and the viaduct was constructed according to those plans and specifications. A rehearing was granted upon the application of the plaintiff, and a second opinion was written, which will be found in 76 Neb. 859. It was there further said: "The improvement of which the stairway in question is a part is of such a character that it could be planned and constructed only by men of peculiar skill and knowledge in that line. The city authorities therefore were compelled to employ experts to plan and construct it. In doing so they did precisely what a man of ordinary care and prudence would have done in like circumstances. Where, then, is the point of departure from the course of conduct such a man would have pursued? Is it in the adoption of the plan? They had employed men skilled in their profession to prepare it. Had they not a right to rely on the superior judgment and skill of such men? Would not a man of ordinary care and prudence have done so in like circumstances, unless the plan was so obviously defective that there could be no difference of opinion among reasonable men with respect to it?"

We adhered to our former opinion by which the judgment of the district court was reversed and the case remanded for a new trial. At such trial the plaintiff had the verdict and judgment, and the defendant has again appealed. The record herein discloses that the evidence was the same upon the question of construction, and especially with regard to the adoption of the plans and specifications for the improvement, as it was upon the first trial. In fact, a careful reading of the bill of exceptions discloses that the plans and specifications for the construction of the Eleventh street viaduct, including the stairway in question and the railing thereof, were recommended by the board of public works and adopted by the mayor and city council of the defendant city; that the improvement was constructed in accordance with such plans and specifications, and in full compliance therewith. Therefore our declaration upon this question should have been held by the district court to be the law of the case, and the question of construction having been thus settled should not have been submitted to the jury. *Mead v. Tzschuck*, 57 Neb. 615.

It appears, however, that the question of construction was not only submitted to the jury, but they were allowed by the trial court to visit the viaduct for the purpose of viewing its construction, and this too, notwithstanding the fact that the stairway, from the top of which the plaintiff's intestate fell and was killed, had been removed and was no longer a part of the improvement. It is true that there were other stairways leading from the viaduct at other points to the street below, but the one in question had been removed prior to the date of the last trial.

It is contended by the plaintiff that the defendant city failed to prove that the plans and specifications for the construction of the improvement had been adopted by the city council. The record of the proceedings of the council in relation to that matter not only established that fact, but Mr. Rosewater, who was the city engineer at the time the viaduct was constructed, testified as follows:

"Q. Then, these printed specifications here, appearing as a part of the contract, you may state whether those are the specifications that were prepared for the construction of the Eleventh street viaduct? A. Yes, sir. Q. And the specifications that governed the construction? A. Yes, sir, they are. * * * Q. Can you, by referring to this paper (counsel hands paper to witness), and also to their explanation of their plan, refresh your recollection as to whether it was plan A, B, or C that was adopted? A. Yes; I can recall that it was the plan A that was adopted with certain modifications. Q. Mr. Rosewater, I call your attention to the paper marked exhibit 7 SS, and ask you to state what that is (handing paper to witness). A. This is a section—a plan of the Manly and Cooper railing which was submitted and was approved by the engineers and the board for the Eleventh street viaduct. Q. What portion of the viaduct? A. For the stairways on the viaduct. Q. Calling your attention to the face of the blue print, does it show the stairway? A. Yes, sir. Q. And the railing on the stairway? A. Yes, sir. Q. You may state if you are familiar with the stairway and railing that was constructed on the Eleventh street viaduct at the time. A. I am. Q. You may state whether or not the railing and stairway that was constructed on the Eleventh street viaduct was according to the plan as shown on the blue print that you have in your hands. A. Yes, sir. Q. You may state if you recognize this signature here of Mr. J. E. House—the words 'Approved. Board of Public Works. J. E. House, Chairman.' A. Yes, sir. Q. You may state whether that is the signature of J. E. House, chairman of the board. A. Yes, sir; that is his signature." The witness also testified that the plans and specifications in question were adopted by the city council. No evidence whatever was introduced upon this subject by the plaintiff, and we are unable to understand the contention that is now made that the plans and specifications upon which the stairway and railing in question were constructed were not approved and adopted by the

mayor and city council of the defendant city. It therefore seems clear to us that the district court erred in submitting the question of negligent construction to the jury.

Again, to entitle plaintiff to recover on the ground of negligent or improper construction, it was incumbent upon her to establish such negligence by a preponderance of the evidence. After a careful reading of the bill of exceptions, we are constrained to say that she failed to meet that requirement. Her expert witnesses appear to have had no experience in the construction of viaducts and stairways. They were unable, from observation, to give the dimensions or height of the stair railing in question. It is true that they testified as to the height of standard railings used in such construction, which was on an average of about 39 inches. It appears from a diagram of the railing in question, found in the bill of exceptions, that at the heel of the tread or step it was 3 feet and 3 inches high. At the middle of the step it was 2 feet 11¼ inches high, while at the front edge of the step it was 2 feet 7½ inches in height. It thus appears that the railing in question was of the standard pattern and height. The defendant's witnesses, who had examined stairways in many public buildings, testified that the railings thereon were practically of the same height as the one in question. In fact, no witness has testified that the construction was in fact an improper or faulty one. Therefore, it cannot be said that it was such "that all reasonable minds must agree that it was unsafe." The record, therefore, affords no excuse for submitting that question to the jury.

Considering the question of the defective condition of the steps: It is extremely doubtful if plaintiff's evidence was sufficient to sustain a verdict upon that ground. It is true the plaintiff, some days after the happening of the accident—the number of days not being given—examined the top steps of the stairway in question, and her testimony was, in substance, as follows: Well, this is about the way I saw it. All the edge was worn off. The step was kind of slanting toward the front edge of the step,

and it was wet and slippery, and it was splintered up, and the grains of the timber or boards that it was made of—edges of the grain—kind of loosened up about where he fell from, but not exactly. The step, the second and third step, were all about the same—two or three steps there together. A witness of the name of Mame Heron testified that she saw Watters fall over the railing; that he looked like he was on the third step; that a few days after the accident she examined the steps, and they were not sound; that the third step was broken, and that a piece of wood was lying on the other step where it broke off; that this was on the south side of the stairs, but the evidence discloses that Watters fell over the north railing, and not from the south side of the steps. This same witness, however, testified upon a former occasion that she did not see the man until he was over the railing; that her attention was called to him by another girl, a companion of hers; that she was, at the time of the accident, watching for the approach of trains, while her companion was looking at the viaduct. She also testified, upon the last trial, that she saw Watters turn onto the stairway from the viaduct, step down three steps, stop and look over the railing, then she saw his knees bend, and finally he plunged over the railing. Several witnesses for the defendant, who seem to have no interest in the result of the trial, testified that they examined the step, as a matter of curiosity, immediately after the accident happened; that they were in good, safe and serviceable condition; that they were not unsound or rotten; and that the third step was not split or splintered up, and no piece had been broken off from it. Conceding, however, that the condition of the step was a matter for the consideration of the jury, still there is no evidence from which it can be determined, with any reasonable certainty, that the deceased fell from the third step of the stairway, or that the condition of any of the steps near the top of the viaduct caused his fall. His own statement, when he became conscious after striking the ground, as to what caused

him to fall was that he "slipped." It would, therefore, seem clear that the cause of the accident must always remain a mere matter of conjecture.

It is contended by the plaintiff that this was a proper question for the jury, and therefore the judgment must be affirmed. While, on the other hand, the defendant contends that where damages are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, it is reversible error to submit both causes for the determination of the jury. We think this contention is well founded, for it is impossible to determine upon which of the two grounds the jury based their verdict. As above stated, the plaintiff was not entitled to recover upon the ground of negligent construction; but, that question having been submitted to the jury, it is not only probable but reasonably certain, in view of the want of competent evidence to prove a defective condition of the steps at the time of the accident, or that such condition in any way contributed to the injury complained of, that negligent construction was the ground upon which they based their general verdict. With this condition confronting us, it is our duty to grant the defendant a new trial.

It is contended, however, by the plaintiff that, because the defendant requested the trial court to instruct upon that point, it is now estopped to complain of the submission of that question to the jury. The record discloses that defendant demurred to the plaintiff's evidence upon that point, and asked to have it excluded. Defendant also requested the court to direct the jury to return a verdict in its favor, at the close of all of the evidence, and asked the trial court to direct the jury to make special findings on that matter. All of which requests were refused. Having been thus compelled to submit that question to the jury, defendant is not estopped to question such submission. *Sorensen v. Sorensen,* 68 Neb. 509.

For the foregoing reasons, the judgment of the district

court is reversed and the cause is remanded for further proceedings.

REVERSED.

REESE, C. J., dissents.

MARY K. OSGOOD, APPELLANT, V. MORTY SHEA, APPELLEE.

FILED MAY 5, 1910. No. 16,025.

1. Statute of Frauds: LEASES: TERMINATION. By section 5, ch. 32, Comp. St. 1909, commonly called the "Statute of Frauds," a parol lease of real estate for three years is valid for one year only, and is void as to the remainder of the term. Where no equitable considerations have intervened, it may be terminated by either party at the end of the year by giving notice of his intention to do so within that period.
2. ———: ———: POSSESSION. Possession by the tenant for the first year of the term, in the absence of equitable considerations, is not such part performance as will avoid the provisions of the statute.

APPEAL from the district court for Johnson county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

Daniel F. Osgood and *Tibbets & Anderson,* for appellant.

Jay C. Moore, Hugh La Master and *S. P. Davidson, contra.*

BARNES, J.

Action for the alleged forcible detention of real estate. On the trial in the district court the defendant had the verdict and judgment, and the plaintiff has appealed.

The pleadings consisted of a petition in the usual form, and the answer was not guilty. It appears, without dispute, that the defendant took possession of an eighty-acre tract of land situated in Johnson county, Nebraska, owned

by the plaintiff, under a verbal lease, for the period of three years. Plaintiff claims that by the terms of the lease it was provided that, if she should sell the farm, the defendant would vacate and surrender possession at the end of the then current year. Both the plaintiff and her husband testified positively that the lease was verbal, and was for a period of three years; that it contained the conditions that, in case she should sell the land, she could terminate the lease, and the defendant agreed thereby to vacate the premises at the end of the then current year. Of course, defendant's plea of not guilty put that matter in issue, but his testimony upon that point was evasive and unsatisfactory. It appears beyond question that plaintiff made a *bona fide* sale of the land during the first year of the term, and notified the defendant of that fact, and at the same time demanded possession at the end of that year and as soon as he could remove his crops; that defendant went into possession in October, 1906, and was notified of the sale of the farm on or about the 1st of September, 1907; that he removed his crops about December 1 of that year, and that on December 16, 1907, the plaintiff served him with a written notice to quit on or before January 1, 1908. Defendant refused to vacate, and thereupon this action was commenced. It also appears that after receiving notice of the sale, and after plaintiff requested him to vacate the premises, all of which occurred about September 1, as above stated, defendant commenced to sow some wheat upon part of the land, but the plaintiff immediately commanded him to desist. At the close of the evidence plaintiff requested the court to instruct the jury that the lease in question was void under the statute of frauds, and that she was entitled to recover possession of the premises at the termination of the first year, it being contended that the lease was good for one year only. This request was denied; and, upon the theory that possession for the first year took the agreement out of the statute of frauds, the court instructed the jury, upon his own motion, as follows: Instruction No. 2. "It is admitted

by both parties that a lease of said premises was made by the plaintiff to the defendant, and that defendant entered into possession of said premises under said lease and farmed the same. The difference between the parties arises over the question as to whether the lease was to be for three years, with the privilege on the part of the plaintiff to sell the premises at any time during the lease, and the defendant in such case to give possession at the end of the year as soon as the crops were moved from said land, as claimed by the plaintiff; or whether the lease was for three years absolutely, without any condition of sale, as claimed by the defendant." Instruction No. 4. "If, on the other hand, you find from the evidence that the lease was for three years absolutely, without any provision for sale by plaintiff during said lease, or that plaintiff never notified defendant that she had sold said land and wanted possession thereof, then your verdict should be that the defendant is not guilty." Error is assigned for the giving of these instructions.

It was apparently the opinion of the trial court that this case should be ruled by *Dewey & Stone v. Payne & Co.*, 19 Neb. 540. In this we think the district court was mistaken. That was an action for the recovery of rent where there was a verbal assignment of a written lease for a period of more than one year. It appears that the defendant took possession under the parol assignment and held it from the 12th day of October until the 9th day of March in the following year, when he vacated and refused to pay rent for the remainder of the year, and it was held that he was liable for the rent, whether he occupied the premises or not, because he had entered into possession under his agreement to pay rent, and had continued such possession beyond the expiration of the first year, and that thereafter he was not in a position to question the validity of his agreement.

It has been frequently held that a parol lease of real estate for several years is only valid for one year. *Friedhoff & Co. v. Smith*, 13 Neb. 5. The part performance in

the case at bar can only be referred to or based upon the term of one year. In other words, the performance was wholly and entirely within the first year, and for which there was a valid lease. The law distinctly and clearly declares such a lease valid for the first year of the term, and void as to any excess of time. Therefore defendant's possession, as shown by the record in this case, cannot in any way relate to or avail him with reference to the remaining two years of the lease, which was clearly void. The defendant went into posesssion of the premises under the three years' oral lease in the fore part of October, 1906, and plaintiff within one year of that time, and about the 1st of September, 1907, informed him that he must surrender the possession of the premises at the end of that year. Therefore defendant's entry upon the second year of the lease was without the consent of, and against the express objection of, the plaintiff. In other words, the oral lease for the last two years was revoked and rescinded by the landlord while the tenant was still holding under a valid lease for one year, and before any part of the remaining two years had been entered upon. We are therefore of opinion that the plaintiff could refuse to be bound by the invalid portion of the lease, and the court erred in giving the instructions above quoted.

Several other questions are discussed in the plaintiff's brief; but, for the error above mentioned, she is entitled to a reversal of the judgment, and it is unnecessary to consider them.

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

REVERSED.

ELLSWORTH E. ARTERBURN, APPELLANT, V. BENJAMIN BEARD ET AL., APPELLEES.

FILED MAY 5, 1910. No. 15,944.

1. **Vendor and Purchaser:** EASEMENTS. One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate.

2. **Licenses:** IRRIGATION. A parol license to enter land and construct a dam and ditches to be used for irrigation purposes, after it has been acted upon by the expenditure of money and labor and used for years without objection, is irrevocable.

3. **Mortgages:** SUBSEQUENT EASEMENT: FORECLOSURE SALE: TITLE OF PURCHASER. Where a mortgage on lands has been executed prior to the grant of an easement by the mortgagor without the mortgagee's knowledge and consent, the easement is junior and inferior to the mortgage lien, and when the mortgage is foreclosed and the grantees of the easement are properly brought into the suit, a purchaser at the foreclosure sale becomes vested with the complete title to the land as it stood when the mortgage was executed.

4. ———: FORECLOSURE SALE: TITLE OF PURCHASER. "A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action." *Hart v. Beardsley*, 67 Neb. 145.

5. **Vendor and Purchaser:** EASEMENTS: SUBSEQUENT PURCHASER: DAMAGES. Where parties, who have been divested by foreclosure proceedings of their title to certain easements of flowage and the right to maintain a dam and ditches for irrigation purposes, continue to maintain and operate them for more than two years thereafter, claiming title thereto, a subsequent purchaser with notice of the burden takes the land charged with the easement, and the right to damages does not pass to such subsequent purchaser.

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

Morlan, Ritchie & Wolff, for appellant.

C. W. Meeker and *P. W. Scott, contra.*

LETTON, J.

The plaintiff is the owner of a ranch in Chase county consisting of over 2,000 acres of land, the title to the several tracts of which it is composed he acquired in 1902, 1903 and 1904. The Frenchman river runs through a portion of the land. At the time the plaintiff became the owner of the premises a dam was in existence across the river at a point near the S. E. corner of the S. E. ¼ of section 11, township 6, range 41, which created a pond extending over a portion of that quarter section and over a portion of the S. W. ¼ of section 12, covering in all about 40 acres. From this pond two irrigation ditches ran, one on the north side and the other on the south side of the river; the south ditch running through a portion of sections 13 and 14.

This action was brought against the defendants, who claim to be the owners of certain water rights and to be entitled to maintain and operate the dam and irrigation ditches over the plaintiff's lands. The petition is long and involved, but, in substance, it alleges that the defendants maintain and operate the ditches and dam without legal right or authority; that they have cut the fences of plaintiff's hog pasture, and have fenced along each side of the south ditch, excluding the plaintiff from the river and depriving him of the use of its waters for watering his hogs; that they threaten to destroy the fences that plaintiff has built or may hereafter build across said ditch, and that they refuse to build any bridges or crossings, and threaten to make it impossible for him to pass from one part of his ranch to the other. It denies that they ever instituted condemnation proceedings for the purpose of appropriating the water, or the land for ditches and reservoir, and alleges that defendants threaten by force to maintain the dam and ditches. The prayer is for an injunction to restrain the threatened trespasses, for an accounting of the damages already sustained, and that defendants be adjudged to have no right or interest in or to the plaintiff's lands.

The answer pleads ownership of the ditches and dam; that defendants had permission and authority to construct, maintain, and operate the dam and ditches; that they were constructed in 1894, and that defendants have ever since been in the open, adverse, and continuous possession of the same and the lands necessarily used in the operation of the same, and that the right of action, if any, is now barred by the statute of limitations.

The reply alleges that the lands on which the dam and ditches were built were mortgaged at the time of their erection, and that the mortgages were foreclosed, and all right and title of defendants were barred and foreclosed.

The evidence shows that in December, 1894, and early in 1895, when the defendants erected the dam and excavated the ditches, they received permission to do so either by parol or in writing from the several owners of the lands over which the dam and ditches were constructed, or from persons purporting to be their agents, and that considerations of divers kinds were given for these rights. After obtaining license or permission to enter, the defendants incurred much expense and performed a great deal of labor in the erection of the dam and the excavation of the ditches; the dam constructed being about 300 or 400 feet long, 15 or 20 feet wide at the top, and 20 feet high at the highest point, and the ditches several miles in length. When the plaintiff purchased the lands, they were in full possession of the irrigation system, maintaining the same and operating it during the crop season. The plaintiff was familiar with the locality and knew of the existence and use of this irrigation system at the time he bought the land. He was, therefore, charged with notice of the easement claimed by the defendants. The estate that he purchased was servient to this easement, and he bought subject thereto. *McLure v. Koen,* 25 Colo. 284; *Snowden v. Wilas,* 19 Ind. 10, 81 Am. Dec. 370; *Cook v. Chicago, B. & Q. R. Co.,* 40 Ia. 451; *Franklin v. Pollard Mill Co.,* 88 Ala. 318; *Hodgson v. Jeffries,* 52 Ind. 334;

Stephens v. Benson, 19 Ind. 367; *Znamanacek v. Jelinek*, 69 Neb. 110.

The contention of plaintiff, that the defendants have no valid title either by grant or condemnation proceedings, we think cannot be sustained. As to the tracts over which they were given a parol license by the owners to construct their system, when they expended their time and money in the construction of the dam, ditches, flumes, etc., the contract was complete when the work had been performed, and as long as kept up the license was irrevocable. *Gilmore v. Armstrong*, 48 Neb. 92; *Johnson v. Sherman County I., W. P & I. Co.*, 71 Neb. 452. While as to the lands over which there is no proof that the actual owner gave permission, and as to which it is shown the defendants took actual possession under a claim of right and over which they have operated for twenty years, the statute of limitations fully protects them against the plaintiff's claim. For these reasons, the plaintiff, when he bought the land, took it charged with the easements then held by the defendants, and their title as against him on that account is perfect.

The foregoing considerations apply as to defendants' rights over all of the land except two tracts. One of these, the S. E. $\frac{1}{4}$ of section 11, upon which the larger part of the dam and most of the pond is situated, was owned in 1888 by one William C. Gilham. On December 15 of that year he executed a mortgage to the Sullivan Savings Institution to secure a loan. The other tract, described as the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 11, which is traversed by one of the ditches, was in 1888 owned by Jasper W. Toothacre. On April 24, 1888, Toothacre executed a mortgage to Carlos C. Burr to secure the payment of a note. These mortgages were soon afterwards filed for record. On the 8th of December, 1894, the defendants Benjamin Beard and Eli Maranville, together with one Martin Overtree, posted notice of appropriation of the waters of the Frenchman river under the act approved March 24, 1889, at the place of diversion on the Gilham tract, and this

notice was on the 15th of December, 1894, duly filed with the county clerk of Chase county. The interest of Martin Overtree was afterwards purchased by the defendant Logan Maranville. The right to occupy the land with the dam and pond was purchased from one Young, who was then the owner of the equity in the land, but, so far as the record shows, nothing was paid to the mortgagee. Work was begun by the defendants in December, 1894, the dam and ditches were completed in the spring of 1895, and the system has been in constant use ever since. Default being made, separate actions were brought to foreclose these mortgages. In the Toothacre case it was specifically alleged that the defendants, naming them, claimed a strip under a right of way deed. In the Gilham case general allegations were made as to their claim. Personal service was had upon the defendants in each case and a decree of foreclosure rendered. The Toothacre land was sold under the decree and the sale confirmed. In this case also personal service was had, default taken, and a decree of foreclosure rendered. The property was sold and the sale confirmed.

Plaintiff derives his title to these two tracts through the purchasers at the foreclosure sale. He now insists that by virtue of these proceedings all right, title, and interest of defendants to the tracts went to the purchaser at the foreclosure sale, and passed to him by mesne conveyances, and that he is, therefore, entitled to an injunction to restrain their entering thereupon and maintaining and operating the dam and ditch. This contention raises an interesting question. When in 1894 and 1895 defendants procured the right of way over these tracts, they had constructive notice of the existence of the mortgages and that whatever right they acquired in the premises was subject to the liens created thereby. It is clear that by the foreclosure proceedings all the rights which they had acquired from the mortgagors pass (under the code, sec. 853) to the purchaser at the foreclosure sale. *Young v.*

Brand, 15 Neb. 601; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Hart v. Beardsley*, 67 Neb. 145; *Watson v. Grand Rapids & I. R. Co.*, 91 Mich. 198. It is equally clear that the appropriation of the waters of the Frenchman river which they had made under the irrigation statute was in nowise affected by the foreclosure proceedings. It gave them an independent right to the use of the water, derived from the state, and not from an individual.

The sheriff's deed to the purchaser of the Gilham tract was executed on the 2d day of January, 1900, and to the Toothacre tract the deed was executed December 28, 1899. The purchaser of the former tract retained the title until September 26, 1902, and of the latter until October 14, 1902. The evidence shows that, after these purchasers became vested with the title to the property, the defendants continued to operate the dam and ditches in like manner as before. Whatever right they owned had been divested, and whatever use and appropriation they made of these lands would have entitled the owners at that time to compensation, to damages ascertained by condemnation proceedings, or to an action for damages for the continuing trespass. The defendants were in full possession of the easement, had appropriated it to a *quasi*-public use, and had been in the undisturbed possession of it for over two years and a half when the plaintiff purchased an interest in the premises. This being so, he took the property with notice of the easement, and did not purchase the right of action, which belonged to the former owner, and which did not pass by the deed. The case is the same as where a railroad has, without consent or authority of the owner, appropriated land and built its road, and the owner sells the land. In such case the purchaser takes the land subject to the easement, and the former owner does not part with his right of action for the unlawful taking. These principles are well established. *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444; *Stratton v. Omaha & R. V. R. Co.*, 37 Neb. 477; *Buckwalter v. Atchison, T. & S. F. R. Co.*, 64 Kan. 403, 67 Pac. 831; *Kakeldy v. Columbia & P. S. R. Co.*,

37 Wash. 675, 80 Pac. 205. In *Roberts v. Northern P. R. Co.*, 158 U. S. 1, it is said: "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

In addition to these considerations, from the time the plaintiff bought the lands until shortly before the beginning of the suit be recognized the right of the defendants to the maintenance of the dam and the use of the ditches, stood by and saw them working on the ditches and dam without objection.

As to plaintiff's complaint of the cutting of his fences, and depriving him of the right to water his stock, the evidence does not bear out the sweeping allegations in his petition. The principal trouble seems to have grown from the fact that he extended the fences of his hog pasture across the ditch so as to make it impossible for the defendants to enter the same for the purpose of cleaning it or keeping it free from obstructions without removing these fences at the point of crossing. The defendants at their own cost built fences on each side of the ditch through the hog lot, and made a bridge or crossing so that his hogs might reach the water of the river from all points of the pasture. This they had a right to do. There can be no doubt that the existence of these ditches upon the plaintiff's land interferes with the convenient operation of his ranch and inconveniences him in the passage of his teams and live stock from one portion of the land to the other, but these inconveniences were all patent and visible at the time he bought, and he cannot now be relieved from the annoyance caused thereby.

We think the evidence does not bear out the allegations

of the petition as to interference with plaintiff's riparian rights in the river. A number of errors are assigned, but, in the view we take of the legal principles applicable to the undisputed evidence, their consideration is unnecessary.

The judgment of the district court is

AFFIRMED.

LUTHER P. DWINELL, APPELLANT, V. FRANK WATKINS ET AL., APPELLEES.

FILED MAY 5, 1910. No. 16,027.

Mortgages: FORECLOSURE: MISREPRESENTATIONS: RELIEF. Where certain personal property was exchanged for real estate, and a note and mortgage upon the land was given to cover the excess in value of the real over the personal property, the note and mortgage will be canceled and set aside in the hands of the original payee, when it appears in an action to foreclose the mortgage that the property was of equal value at the time of the exchange, and that the mortgagors, who were ignorant of land values and had so informed the other party, had been deceived and misled as to the value and quality of the land by the owner of the land and by their agent, who, in fact, was also acting for the owner, but which fact was unknown to them.

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

T. T. Bell, for appellant.

Frank J. Taylor and *Hall, Woods & Pound, contra.*

LETTON, J.

This action was brought to foreclose a mortgage given to secure a note for $3,500. Defendants admit the execution of the note and mortgage, but in a cross-petition which in substance alleges that the note and mortgage were fraudulently obtained, and there was no consideration for their execution and delivery, pray for their can-

celation, and that their title be quieted to the premises described.

The evidence shows that the defendants lived in Lincoln; that Bertha Watkins was engaged in keeping a rooming and boarding house, and that Frank Watkins, her husband, was engaged in the grocery business, and had formerly been a stage carpenter; that he had no knowledge of the value of the land in Howard county, and no experience as to the quality or productivity of soil; that Mrs. Watkins was desirous of disposing of the rooming house, and that about April 1, 1905, one Loman was employed by her as an agent or broker for the purpose of finding a purchaser for the property. Soon afterwards Loman, who was an old acquaintance and friend of the plaintiff Dwinell, informed Mrs. Watkins that Dwinell had 240 acres of land in Howard county which he desired to dispose of, and which he might exchange for the furniture. In company with Loman, Mr. Watkins went to Grand Island by rail, and from there was driven out to see the land, upon which the plaintiff with his family resided. They arrived at the farm about noon on Sunday, and, after taking dinner with the family, Watkins spent about an hour in looking over the land with Dwinell and Loman. This was about the middle of April, and no crops were then growing. They returned to Lincoln the same day. Watkins testifies that he made no inquiries of any one as to the value or quality of the land except Dwinell and Loman; that he told them he knew nothing about the quality or value of land himself, and that he should rely upon what they told him; that Dwinell told him the land was worth $6,500, said it was all good tillable land; that there were only 85 acres under cultivation, but it could all be cultivated; and that Loman also told him the land was worth $6,500. He testifies that on the way home he suggested to Loman that they stop in St. Paul and make some inquiries with regard to the land, but that Loman told him that he was well acquainted with the land, that it was worth the money, and

he would have no trouble at all. It appears that Loman had participated in making the sale to Dwinell some years before, and that he had the land for sale as Dwinell's agent before the time he was employed by Watkins; but both Mr. and Mrs. Watkins testify that they were not aware that Loman was acting as agent for Dwinell. Some of this testimony is contradicted by Dwinell and Loman; but Dwinell admits he said the land was worth $6,500, and that it could all be ploughed except 45 or 50 acres. Loman testifies that Watkins knew he was acting for both parties. Another witness says Loman told him, in speaking of this transaction, that Dwinell's price was $5,200, but they had inflated it to $6,500; and that he also said the land was so sandy it should be shown either when covered with snow or just after a rain, when the soil would appear dark. The preponderance of the evidence shows that the fair market value of the land at the time of the transaction was about $10 or $12 an acre, that it is mostly sandy and gravelly, and that only a small portion of it is susceptible of cultivation. The district court found specifically that, by reason of the fraudulent representations of the plaintiff and his agent Loman, the defendants were induced to purchase the premises for $6,500, and deliver the note and mortgage for $3,500; that the land was reasonably worth from $2,400 to $3,000 at the time, and that the furniture delivered to plaintiff was of the same or greater value than the land; that the defendants sustained damages to an amount equal to the amount of the note and mortgage; that they are entitled to have the same allowed as a counter-claim; and found further that there is nothing due from them upon the mortgage and note, and that they are entitled to have the mortgage canceled and discharged of record. A decree was entered accordingly.

The plaintiff concedes in his brief that the evidence would justify the court in finding the land was worth in cash from $10 to $12.50 an acre at the time of the trade, and that the furniture was worth $2,800 to $3,000, and

that the land was sandy and generally a poor grade of farm land. But he contends that no fraud has been shown; that when parties are negotiating for property which they are afforded an opportunity to examine, and which they do examine, each has the right to exalt the value of his property and depreciate the value of the other's, and that such assertions of value do not amount to fraudulent representations. He also contends that both parties knew that Loman was the agent of both, hence there was no deception as to his relation to the parties. On the other hand, the defendants contend that the representations of Dwinell and Loman as to the condition, quality, and value of the land were statements of fact made to Watkins after he informed them that he knew nothing about the quality or value of the land, and that he would rely upon their representations; that Loman, while acting ostensibly as his agent, fraudulently dissuaded him from making inquiries, and that if he had known that Loman was acting for Dwinell he would not have relied upon his statements, and would have made other investigations.

The law is so well settled in this state upon every point involved that the only question here is one of fact. *Wiruth v. Lashmett,* 82 Neb. 375; *Olcott v. Bolton,* 50 Neb. 779; *Foley v. Holtry,* 43 Neb. 133; *Perry v. Rogers,* 62 Neb. 898. See, also, 20 Cyc. p. 54, subd. 3; p. 60, subd. 6.

We have considered the evidence, and have arrived at the same conclusion as to agency, concealment, and representations as did the trial court. The land and the furniture were about of the same value at the time they were exchanged, and the defendants should be relieved from the fraud to the extent of their obligation evidenced by the note and mortgage. The findings and decree are just, and are

AFFIRMED.

FRANK WARD, APPELLANT, V. WILLIAM WARD ET AL., APPELLEES.

FILED MAY 5, 1910. No. 15,953.

1. **Deeds**: CANCELATION: MENTAL CAPACITY. Mental incapacity to execute a deed is not established by proof that the grantor was eccentric, quick-tempered, profane, advanced in years, and in a degree influenced to make the conveyance by prejudice against a son, stepson and his wife, where it further appears that he knew the value of property generally, exercised good judgment in purchasing merchandise for himself and family, remembered the exact amount of his financial obligations, and paid them promptly, deliberately determined for himself the disposition he desired to make of his property and carried out his purpose by executing the deed in question.

2. ———: DELIVERY. Where the delivery of a deed is in issue, proof that the grantor admitted he had delivered the instrument, and thereafter he commenced an action to cancel it for reasons other than nondelivery, justifies a finding that the instrument was delivered.

3. ———: FRAUD: PARENT AND CHILD: PRESUMPTIONS. A presumption of fraud or undue influence does not arise solely by reason of the fact that a deed from a parent to his child was voluntary.

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

J. L. Kaley, for appellant.

J. C. Robinson and *T. E. Brady, contra.*

ROOT, J.

This is an action in equity to cancel a deed made by John Ward, the plaintiff's father, to the defendant William Ward, another son of the deceased. The defendant prevailed, and the plaintiff appeals.

John Ward, the litigants' common ancestor, was a parsimonious, quick-tempered, odd-appearing, eccentric, illiterate old man. He was a firm believer in the efficacy of outspoken prayer, but prone to lapse into profanity if ir-

ritated or annoyed. In 1887 John Ward's first wife died. Two sons survived her, the plaintiff, 14 years of age, and the defendant William Ward, 22 years of age. John Ward emancipated his son Frank at this time, and from thenceforward this son did not contribute to his father's support or estate, but became improvident and dissipated. William Ward, after he became 16 years of age, and until his mother's death, performed most of the labor on his father's farm and thereafter contributed to that parent's support. After his first wife died John Ward moved to Dunlap, Iowa, and again married, but did not dwell in harmony with his wife. He became extremely exacting concerning his household expenses, charged his wife with extravagance, and their family life was so discordant that she secured a divorce from him. Subsequently Ward and his second wife remarried, and thereafter he commenced, but did not prosecute to a conclusion, an action for a divorce. John Ward's charges against his wife seem to have been without foundation, but he continued his vindictive, unreasonable course toward her, so far as the record discloses, during the remainder of his life. Ward frequently announced that his wife should not receive any of his estate, for the alleged reason that her son by a former marriage and her other relatives would induce her to transfer the property to them and would squander it.

1. The plaintiff contends that his father in 1899, the year the deed in question was executed, was of unsound mind and mentally incompetent to execute a deed. During the trial of this case two witnesses testified that John Ward would become bewildered and unable to find his residence in Dunlap. His widow, her relatives, and other witnesses of evident intelligence, testified that in 1899, and up to the time of his death, he was insane. A much greater array of witnesses, including physicians who had treated John Ward for minor infirmities, his comrades in a G. A. R. post, merchants with whom he dealt, members of his church, and intimate acquaintances who had known him and observed his conduct for from

10 to 25 years, testified that while he was eccentric, quick-tempered, and at times profane, he was during said period blessed with a retentive memory, was exacting and shrewd in matters touching his financial interests, and was competent to transact business. In 1897 John Ward conveyed his Dunlap property, which was worth but $300, to his son William, subject to a life estate reserved to Mrs. John Ward. The record does not disclose whether this was a voluntary conveyance, but such an inference may be drawn from the evidence. In 1899, while William Ward was in the United States army in Cuba, he sent his father money at different times, and their relations at all times seem to have been pleasant and friendly. In April of that year John Ward requested an attorney to prepare a deed conveying the land in controversy to his son William. The instrument was prepared by the scrivener, and signed and acknowledged by the grantor, but remained in the attorney's custody until June of that year. During this month William called upon his father, and shortly thereafter the deed appeared in the son's possession. At all times thereafter William controlled the land and claimed to own it. At the time this instrument passed into William's custody his father was living apart from his wife, and John Ward's landlord testifies to a conversation between William and his father, wherein the son insisted the deed should be delivered to him, and promised as a consideration for the land to furnish his father support and to give him a suit of clothes. William denies making these statements, and there is evidence in the record discrediting the landlord's testimony to such a degree that we are not inclined to give it much credence. Subsequently John Ward remained for a time in Dunlap, then boarded with a niece in South Omaha, thereafter lived for a time in the soldiers' home in Milford, then removed to a like institution in Leavenworth, and from thence went, or was taken, to Washington, D. C., where he departed this life in 1904, insane, so one witness testifies. In 1901 John Ward commenced an

action in Cedar county to set aside said deed, for the alleged reason that it was executed in consideration of support which the grantee had withheld. Seven months thereafter the plaintiff in that action dismissed his suit. The record is replete with evidence concerning John Ward's declarations; some of them admissions against interest, others self-serving in character, but all of this testimony was received without objection and will be considered in determining the issues joined.

From this evidence it appears that John Ward said on one occasion that he made the deed to "beat" his wife, and now Will was trying to "beat" his father; that he intended to recover his land if he had to shoot his son to secure it. Other witnesses testify to the grantor's repeated statements that Will had been a good boy, had given his earnings to and had cared for his father, was prudent in money matters, and he intended William should have the farm because he would care for it, whereas Frank was dissipated and would squander it. The court refused to permit William to testify concerning money paid or other consideration moving from him to his father, but there are many facts and circumstances testified to by other witnesses tending strongly to prove that William had contributed to his father's support both before and after the deed was made. The plaintiff challenges the competency of two physicians to testify for the defendant, but, excluding their testimony, there is sufficient evidence in the record to satisfy us that John Ward, in 1899, knew and understood the nature and quality of, and was competent to make, the instrument assailed. After said deed was executed the defendant William Ward, for a consideration satisfactory to Mrs. Ward, secured a deed from her for the land in dispute, and she is not complaining because her husband conveyed the real estate to his son.

2. The contention that the evidence does not establish a delivery of the deed is not well taken. The plaintiff's witness, Cane, states that John Ward told him he had

given the deed to his son, and the suit commenced in 1901 to annul that instrument recognizes the delivery of the deed.

3. It is further argued that the deed was the result of undue influence exerted by the grantee upon his father. The record is barren of any evidence tending to show that William Ward coerced his father to execute the deed. The proof will not sustain a finding of undue influence within the meaning of the law. *Latham v. Schaal,* 25 Neb. 535; *Boggs v. Boggs,* 62 Neb. 274.

4. Finally it is urged, with great learning and force, that since the conveyance was voluntary, unfair to the grantor and to the plaintiff, and was made under suspicious circumstances, it ought not to be permitted to stand. In *Gibson v. Hammang,* 63 Neb. 349, we held the mere relation of parent and child in a deed wherein the parent was grantor did not raise a presumption of fraud or undue influence. See, also, *Chambers v. Brady,* 100 Ia. 622; *Mallow v. Walker,* 115 Ia. 238; *Millican v. Millican,* 24 Tex. 426. In *Gibson v. Hammang, supra,* we further held that where a voluntary conveyance of property from a parent to a child is unjust to the other children, is an unreasonable disposition of the donor's property, and the circumstances surrounding the execution of the instrument suggest fraud and undue influence, the transaction should be closely scrutinized; that the donee in such a case should assume the burden of proving that the conveyance was the result of the grantor's deliberate, unhampered judgment free from all improper influences on the part of the grantee. In the cited case, the grantee importuned her mother to make the deed, insisted upon its execution, and the suit to annul the conveyance was prosecuted by the grantor. In the case at bar, the grantor upon his own motion, without any suggestion from the grantee, while the latter was thousands of miles distant, conceived the idea of making the deed, and the conveyance was prepared by one of John Ward's disinterested personal friends. Doubtless John Ward was im-

pelled to make the deed by his antipathy to his wife and her relatives, but one has a right to follow the inclinations of his heart in the distribution of his property as well as in the other affairs of life, and the courts, in the absence of fraud or imposition, will not ordinarily interfere at the suit of an heir, not a creditor of the grantor, to thwart that disposition. *Mackall v. Mackall,* 135 U. S. 167. The conveyance did not strip the grantor of his financial resources, because he was paid a pension of $17 a month. Independently of his discontinued suit to set aside the deed and his declarations made after the deed was delivered, there is no evidence to justify an inference that he was not satisfied with the transaction. In considering the commencement of the suit, we take into consideration evidence to the effect that John Ward was litigious, inclined to institute suits and before the day of trial to dismiss them, and it is not improbable that, had William paid his father the value of the land in consideration of the conveyance, the old gentleman would have expressed dissatisfaction with the deal and have commenced a suit to recover the farm. If John Ward were pressing this suit, a different question would be presented from the one under consideration. In the instant case there are equities in favor of the defendant William Ward arising from the fact that the plaintiff was emancipated when 14 years of age, and never, so far as the record discloses, thereafter contributed a penny to his father's support or in any manner ministered to that parent's comfort, mental or otherwise; whereas the defendant William Ward toiled for his parents until he was 22 years of age, and thereafter contributed to his father's support and maintenance. As stated by Judge Green in *Simon v. Simon,* 163 Pa. St. 292: "Equity will, upon proper occasion, intervene and set aside voluntarily executed deeds and other instruments, yet the power to do so is of an exceedingly delicate character, not to be lightly exercised, and only to be invoked when the manifest justice of the case requires it." See, also, *Carney v.*

Carney, 196 Pa. St. 34; *Millican v. Millican*, *supra*; *Wessell v. Rathjohn*, 89 N. Car. 377; *Dickerson v. Evans*, 84 Ill. 451. Upon the entire record, we are of opinion that the manifest justice of this case dictates that the deed of John Ward should be upheld.

The judgment of the district court, therefore, is

AFFIRMED.

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

FILED MAY 5, 1910. No. 16,024.

1. **Pleading:** DAMAGES. The pleader in an action to recover unliquidated damages must state in his petition facts sufficient to warrant the conclusion that the defendant's alleged wrongful acts were the proximate cause of the damages demanded.
2. ——: ——. And this rule applies whether the action is upon contract or sounds in tort.

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

George A. Adams, for appellant.

Greene & Greene and *Berge, Morning & Ledwith*, *contra.*

ROOT, J.

This is the second appearance of this case in this court. The issues joined by the original pleadings are accurately described in the opinion written on the former appeal, and reported in 77 Neb. 552. We shall not restate the issues, but refer the reader to that opinion. After the cause was remanded the plaintiff filed an amended petition, wherein he charged in substance that the defendant at the time he entered into the contract pleaded in the petition did not intend to perform his obligation, but designed to involve the plaintiff in financial ruin, and to cheat and defraud him out of his farm; that

in pursuance of said scheme the defendant fraudulently and corruptly committed the acts alleged in the original petition; that by reason of the premises the plaintiff was unable to borrow money to pay the legitimate incumbrance upon his farm or to redeem it from sheriff's sale, and the defendant purchased it for about one-half of its actual value, to the plaintiff's damage, etc. Upon the defendant's motion the court struck from the amended petition all allegations of fraud, thereafter sustained a general demurrer to said pleading and dimissed the action. Plaintiff appeals.

The plaintiff argues that the statement in our former opinion, "There is no contention by plaintiff that defendant contemplated fraud at the inception of the agreement", justifies him in assuming that, if such an allegation had appeared in the original petition, the judgment would not have been reversed. No such an inference should be drawn from the opinion. The principle of law controlling the reversal is correctly stated in the syllabus, and properly applied in the opinion to the facts and pleadings in the case. The only item of damages referred to in either petition pertains exclusively to the alleged difference between the market value of the plaintiff's farm and the price paid therefor by the defendant at sheriff's sale. The proximate cause of the sheriff's sale was the plaintiff's failure to pay his lawful debts. The defendant's conduct in asserting a lien in excess of the amount due him and his failure to satisfy the Hartwick mortgage did not increase that indebtedness; nor, after the amount actually due the defendant had been ascertained in the foreclosure proceedings, did the defendant's antecedent wrongful acts prevent the plaintiff borrowing money to liquidate the lawful liens against his farm, nor from selling his equity of redemption if it had a market value. The rule of law announced in the former opinion applies to actions sounding in tort, as well as to those upon contract. *Fiala v. Ainsworth*, 63 Neb. 1; *Karbach v. Fogel*, 63 Neb. 601. The amendments to the petition did

not authorize the court to render judgment in the plaintiff's favor upon the sole item of damages therein referred to, and for that reason the court committed no error in sustaining the motion and the demurrer.

The judgment of the district court, therefore, is

AFFIRMED.

JOHN A. ANDERSON ET AL., APPELLANTS, V. JOHN O. NELSON ET AL., APPELLEES.

FILED MAY 5, 1910. No. 16,030.

1. **Highways:** DEDICATION: EVIDENCE. The fact that a landowner dedicated a portion of his land for highway purposes may be established by parol evidence concerning his declarations and conduct.

2. ———: PETITION. A petition praying for the location of a public road, addressed to county commissioners in 1888, although silent concerning the width of the highway, should be construed to request a road 66 feet wide.

APPEAL from the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

G. W. Scott, for appellants.

J. P. Boler, T. J. Howard and *J. R. Swain, contra.*

ROOT, J.

This is an action to restrain a road overseer and the county commissioners of Greeley county from removing a fence and from interfering with the plaintiffs in the possession and use of a strip of land. The defendants prevailed, and the plaintiffs appeal.

In 1888 one Lindwall owned the north half of section 7, in township 18 north, range 10, in Greeley county; his buildings and cultivated fields were on the east two-thirds, and his market town was located immediately west, of his farm. The public traveled along the section line be-

tween said section and section 6, but the way was rough and difficult for a distance of about 120 rods east from the northwest corner of section 7. In 1888 Lindwall joined with 29 other electors of the county in a petition to the county commissioners to open a road along said section line. The petition was granted after a commissioner, appointed by the county clerk, reported in favor of the proposed highway. There is no proof that notice was given to file claims for damages or that any such claims were filed. The proof shows that Lindwall stated repeatedly, while owner of the land, that he had given the public a road on the north side of his farm; he was active in securing funds by subscription to pay for improving the way, and requested his tenant to work thereon. Lindwall constructed a pasture fence from a point in the west line of his land, two rods south of the northwest corner of the section, east 120 rods, but the proof does not fix the date of such construction. In 1893 he constructed a fence the remaining 200 rods east, but only one rod south of the section line, for the purpose of protecting a cultivated field. At that time Lindwall stated that the 120 rods of fence was too far south and he intended to move it, but he made no change. In 1897, after Lindwall parted with his title to the farm, he stated that he had donated a strip of land one rod in width for 200 rods, and two rods in width for the 120 rods. The defendants do not contend, nor is there any evidence to sustain an assertion, that Lindwall was paid for the land in dispute, or for any other land within the boundaries of the highway, so that the right of the public to enjoy the easement contended for must rest upon a dedication by that landowner. There is no evidence to prove a dedication by deed. Since Lindwall's testimony was not produced, we must weigh his declarations and acts in the light of the circumstances surrounding him at the time, in order to arrive at a just conclusion.

A dedication may be established by parol evidence,

State v. Otoe County, 6 Neb. 129; *Rathman v. Norenberg*, 21 Neb. 467. The record and the briefs of the parties leave no doubt in the mind that Lindwall dedicated a way over his land to the public, and we have only to determine the acreage dedicated. We take judicial notice that ordinary farm land situated in Greeley county was not of great value in 1888. The statute (Comp. St. 1887, ch. 78, sec. 2) provided: "All public roads shall have a width of sixty-six feet." The county authorities were powerless at that time to open or locate a public highway less than 66 feet wide. Therefore, when Lindwall petitioned and urged the county commissioners of Greeley county to open the road in question, he asked for a road four rods in width, two rods of which road he knew would be taken from his farm, and his gift of four acres of land to secure that road did not involve a sacrifice as compared with the benefits bestowed by reason of the construction of a direct highway between his farm buildings and his market town. The fact that the petition is silent concerning the width of the road is immaterial; the law fixed that width. *Watson v. Crowsore*, 93 Ind. 220; *State v. Hogue*, 71 Wis. 384. It is true that by petitioning for the road Lindwall did not waive the right to demand compensation for his land taken for highway purposes, nor would his failure to file a claim for damages in itself excuse the authorities from condemning that land and paying him therefor, but the fact that he did not make such a claim should be taken into consideration in connection with his interest in the road, his declarations and his conduct, in determining whether he dedicated the land in controversy for road purposes. It is improbable that the county commissioners would have located the road had not Lindwall dedicated the land in controversy. The plaintiffs are contending for a situation contrary to the common experience of mankind, and in insisting upon the exception should present satisfactory evidence to overcome the presumption against them.

Upon the entire record, notwithstanding the state-

ments made by Lindwall years after the dedication, indicating an intention on his part to yield but one rod in width for public use, and the fact that he constructed a fence to conform to those declarations, we are constrained to find the dedication was for a road of uniform width. The plaintiffs, when they purchased the land, were charged with notice that a highway worked by the public authorities had been traveled many years along the section line, and with the further knowledge that public roads in Nebraska at that time were four rods in width. We are of opinion that they are in no better position than Lindwall would be were he prosecuting this action.

After a mature consideration of the evidence, we find that the judgment of the district court is right, and it is

AFFIRMED.

HORTON S. CALLAND, APPELLANT, V. JOHN P. WAGNER, APPELLEE.

FILED MAY 5, 1910. No. 16,033.

1. **Justice of the Peace:** ENTRY OF JUDGMENT. A justice of the peace, in a case tried without the assistance of a jury, where property has not been attached or the defendant arrested, must render judgment within four days after the close of the trial, and in computing time, under section 1002 of the code, he should include the day of trial and the day of judgment.

2. **Cases Distinguished.** *Keeley Institute v. Riggs*, 5 Neb. (Unof.) 612, and *People's Building, Loan & Savings Ass'n v. Cook*, 63 Neb. 437, distinguished.

APPEAL from the district court for Gage county: JOHN B. RAPER, JUDGE. *Reversed.*

R. W. Sabin, for appellant.

A. E. Howard, Price & Abbott and *Rinaker & Kidd, contra.*

ROOT, J.

The plaintiff in 1907 contested an application made by the defendant in justice court in Gage county to revive a dormant judgment. The trial concluded November 30, and the cause was taken under advisement by the justice until December 4, upon which day he entered an order of revivor. The plaintiff prosecuted proceedings in error to the district court, and the order made by the justice was affirmed. The plaintiff appeals.

1. The plaintiff contends that the justice did not have jurisdiction to enter an order of revivor on December 4, because the preceding day was the last day within which he could lawfully act in the case. Section 1002 of the code is as follows: "Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached; in other cases it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive." The defendant contends that the word "thereafter" refers to the day of trial, and argues that the four days did not commence to run in the instant case until the first day after the last day of trial. The plaintiff asserts that the word refers to the trial, and not to the day of trial, and insists that the last three words of the section, "both days inclusive", indicate the legislative will that the day of trial and the day of judgment should be included in the computation. Section 895 of the code provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." The defendant insists this section must be considered in connection with section 1002, *supra*, and that jointly considered they support his position. Section 895, *supra*, is general in its application, and does not control where there is a special

provision in a statute directing the method of computing time. *State v. Dewey,* 73 Neb. 396. The provisions of section 1002, *supra,* while peculiar, are definite. The last three words of the statute were employed by the legislature for some purpose, and they can only be given effect by including the day of trial, as well as the day of judgment, in computing time. The statute is identical with the written law of Ohio and of Kansas upon the same subject. The precise point involved in this case does not seem to have been decided in Ohio, but in Kansas it was involved and determined in *Stewart v. Waite,* 19 Kan. 218. The opinion in that case was written by Judge Brewer, and the court holds that the day of trial and the day of judgment should be included in computing time. We have not been cited to any case, construing a like statute, holding contrary to *Stewart v. Waite, supra,* nor have we in the brief time allotted to the case at bar found a contrary decision. We are of opinion that the contention of the plaintiff must be sustained. The justice, therefore, committed reversible error in withholding his judgment until December 4, and the district court erred in sustaining the judgment of the justice of the peace.

2. The precise point determined in the instant case has not been heretofore decided in this court, although it has been incidentally discussed. In *Keeley Institute v. Riggs,* 5 Neb. (Unof.) 612, Mr. Commissioner KIRKPATRICK states that the statute will be satisfied "if judgment is rendered within four days from the final submission of the cause or matter pending before the justice." The language is somewhat ambiguous, but is not necessarily in conflict with our conclusion. In *Keeley Institute v. Riggs, supra,* the parties appeared and contested the case the third day before the entry of the order complained of, so that the point involved in the case at bar was not decided.

In *People's Building, Loan & Saving Ass'n v. Cook,* 63 Neb. 437, it was assumed by both parties that the justice had entered his judgment within the time fixed by section 1002 of the code, but it was argued that said official, by a

misleading statement, induced the defendant to believe the judgment had been entered one day later than the day of judgment, and the defendant, relying on that statement, filed his bond one day too late. The statements in the opinion in the cited case must be considered in connection with the issues involved and decided therein, and the principle of law presented in the instant case was not decided in the cited case.

The other subjects discussed in the defendant's brief have received consideration, but do not control this case, and will not be further mentioned.

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

REVERSED.

STATE, EX REL. WILFRED E. VOSS, RELATOR, V. MARY V. QUINN, RESPONDENT.

FILED MAY 5, 1910. No. 16,536.

1. **Mandamus**: TITLE TO OFFICE. Title to an office will not be tried in a mandamus proceeding. *State v. Hyland*, 75 Neb. 767.

2. **Mandamus** will lie to compel an officer whose term has expired to deliver to his successor, who holds the certificate of election and has duly qualified by taking the oath of office and by filing his official bond which has been duly approved, the books, papers, money and other property belonging to said office, and possession of the room set apart in the court house for the use of such officer. Such a *prima facie* right to the office will support the writ, although the respondent alleges the relator was not eligible to the office at the time of the election. *State v. Hyland*, 75 Neb. 767.

3. **Courts**: JURISDICTION. The advice of the state superintendent of public instruction contrary to the principles of law announced by this court in a litigated case will not vest a litigant in another and similar case with any right, or oust this court of jurisdiction to hear and determine mandamus proceedings to compel a person who has been holding the office of county superintendent of public instruction, but whose term of office has expired, to deliver to her successor in office the property pertaining thereto, and the

possession of the room provided by the county for the use of that officer.

ORIGINAL application for a writ of mandamus to require respondent to deliver to relator the records, etc., of the office of county superintendent of public instruction of Dakota county. *Writ allowed.*

Robert E. Evans, for relator.

John V. Pearson, contra.

ROOT, J.

This is an original application for a writ of mandamus to compel the respondent to deliver to the relator all of the books, papers, records, moneys and other property belonging to the office of county superintendent of public instruction of Dakota county, and to forthwith vacate the room in the court house of said county set apart for the use of the county superintendent, and deliver possession thereof to the relator.

In November, 1909, the relator was elected county superintendent of Dakota county, and the canvassing board issued to him a certificate of election. He thereupon took the oath of office, and executed a lawful bond which was duly approved. Relator then demanded possession of the aforesaid room and property. The respondent refused to comply with the demand, and alleges in justification of her conduct that the relator at the time he was elected, in 1909, did not hold a teacher's first grade certificate. It appears that the relator held such a certificate in 1909, but the certificate expired October 20. Prior thereto he took a teacher's examination before the county superintendent of Thurston county, and completed the examination October 16. As provided by law, the questions propounded to him and his answers thereto were transmitted to the state superintendent of public instruction. November 6, four days after the day of election, the state superintendent certified to the county superin-

tendent of Thurston county the result and grades of said examination, and November 25 said county superintendent issued to relator a teacher's first grade certificate. The respondent has qualified as a hold-over officer, and is recognized by the state superintendent as the incumbent of said office. The last named fact is the only one to differentiate the instant case from *State v. Hyland*, 75 Neb. 767, wherein we issued a writ of mandamus to compel the respondent to deliver to the relator the property pertaining to the office of county superintendent of Stanton county. The respondent's counsel contends that the advice of the state superintendent should control the judgment of this court, and refers to section 11678, Ann. St. 1909, which provides with reference to said officer: "He shall decide disputed points in school law, and all such decisions shall be held to have the force of law till reversed by the courts." The decision of the state superintendent cannot overrule the law as determined by this court in *State v. Hyland, supra*. There is no disputed point of school law for the state superintendent to settle, and his advice and decision in no manner justify the respondent in refusing to recognize the certificate of election held by the relator.

Counsel further argues that by the terms of the statute the relator was ineligible to hold said office or to be elected thereto November 2, 1909, and therefore there was no election of a county superintendent in Dakota county in said year. That question we shall not determine in this action. The certificate of election and the oath and bond conform to law; the relator's *prima facie* title to said office is thereby established, and he is entitled to the possession of the books, money, and other property relating to said office. *State v. Jaynes*, 19 Neb. 161; *Cruse v. State*, 52 Neb. 831; *State v. Hyland*, 75 Neb. 767; *Ewing v. Turner*, 2 Okla. 94.

Counsel for the respondent suggests that in *State v. Quible, ante*, p. 417, we considered and determined the eligibility of the relator to hold office, and that we ought

to decide that question in the case at bar. In the cited case the litigants jointly requested us to determine the relator's eligibility, whereas in the instant case the relator protests against our assuming jurisdiction of and passing upon that defense to his application for a writ. Under the circumstances we shall adhere to the law as announced in *State v. Hyland, supra.*

The respondent suggests that, inasmuch as she has qualified as a hold-over county superintendent, we cannot issue the writ without in effect passing upon her title to said office, and this we ought not to do in this action, unless we consider and determine the relator's eligibility to hold said office. The respondent misapprehends her status. The relator is holding the office of county superintendent of Dakota county, and the purpose of this action is to require the respondent to deliver to that occupant the room and chattels pertaining thereto. A compliance with our judgment in the instant case will in no manner prejudice the right of respondent to maintain an action in *quo warranto* to determine the question of title to said office should she desire to do so.

A peremptory writ of mandamus is allowed as prayed for.

WRIT ALLOWED.

THOMAS W. BLACKBURN, APPELLANT, V. CITY OF OMAHA ET AL., APPELLANTS; OMAHA GAS COMPANY, APPELLEE.

FILED MAY 5, 1910. No. 16,018.

Cities: ORDINANCES: VALIDITY. Under the charter of the city of Omaha, as it existed October 11, 1905, an ordinance not published two weeks before it was passed *held* void, where it modified conditions of a former ordinance under which the Omaha Gas Company obtained its charter.

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

Weaver & Giller, H. E. Burnam and *John A. Rine,* for appellants.

W. J. Connell and *W. H. Herdman, contra.*

ROSE, J.

This is a suit for an injunction to prevent the enforcement of a lighting contract executed by the city of Omaha and the Omaha Gas Company, defendants. The validity of the contract, and of the ordinance authorizing it, was properly raised by the pleadings. The action was dismissed after a full hearing, and Thomas W. Blackburn, plaintiff, and the city of Omaha, defendant, appeal.

By the contract in controversy the Omaha Gas Company assumed the obligations imposed by a lighting ordinance containing the following provisions: "That the contract be made with the Omaha Gas Company for a minimum number of twelve hundred (1200) Welsbach street lamps, the same to be provided by said company with Welsbach burners, and each of said lamps to have a capacity of giving and to give, when lighted, during the entire term of said contract a light equal to eighty (80) candles, the said lamps to be maintained, lighted and extinguished by said company during said term, and the gas and equipment therefor to be furnished and provided by said company, all for the price of twenty-eight ($28) dollars per lamp per year for the period of five years commencing January 1, 1906." This ordinance and the contract made pursuant thereto are assailed on the following grounds: The lighting ordinance is a modification of the terms and conditions of a former ordinance containing the franchise of the Omaha Gas Company, and is illegal and void, because it was not published two weeks prior to its passage; and the lighting contract is illegal and void, because it violates the terms and conditions of the franchise ordinance. A section of the ordinance granting the franchise is as follows: "Said grantee further agrees for itself, its successors and assigns that it will supply and sell to the

said city of Omaha during the continuance of this ordinance all gas which it may be required by said city to supply to the city for its use in its public buildings at the rate of $1 per thousand cubic feet; and that it will, when and so often as requested so to do by said city of Omaha during the continuance of this ordinance, bid for the supply of gas to the city for street lamps along the line of its mains at a rate which shall not exceed for each lamp burning gas at the rate of five feet per hour, $25 per annum per lamp lighted every night one-half hour after sunset and extinguished one hour before sunrise, said sum to include lighting, extinguishing and cleaning."

It is argued that these conditions of the ordinance containing the Omaha Gas Company's franchise were modified by the later ordinance under which the lighting contract in controversy was made, and that the modification was a violation of that provision of the Omaha charter which declares: "No ordinance granting, extending or modifying the conditions of any franchise shall be passed until at least two weeks shall have elapsed after its introduction, nor until after the same has been published daily for two weeks in two established daily papers of the city." Comp. St. 1905, ch. 12*a*, sec. 16. The lighting ordinance was introduced October 3, 1905, and without publication was passed at a special session of the council October 11, 1905. The contract was executed the same day. It is conceded by the Omaha Gas Company that the lighting ordinance was not published for two weeks before it was passed, but it is insisted the franchise ordinance was not modified in any particular, and that therefore publication was unnecessary. The franchise ordinance requires the Omaha Gas Company, "when and so often as requested" by the city, to bid for the supply of gas at a price not to exceed $25 a lamp annually, and at the rate of five cubic feet an hour for each lamp, including lighting, extinguishing and cleaning. Under this provision the city, "when and so often as requested" by it, is entitled to a bid which complies with the terms of the fran-

chise ordinance. The rule is that bids must meet the requirements of the law under which they are made. *State v. York County,* 13 Neb. 57; *Weed, Parsons & Co. v. Beach,* 56 How. Pr. (N. Y.) 470; *Boren & Guckes v. Commissioners of Darke County,* 21 Ohio St. 311. Within the jurisdiction of the city the franchise ordinance has the same force as an act of the legislature. Until modified or repealed it is in its original form binding alike on both the city and the Omaha Gas Company. The rights and obligations created by it can only be abrogated or modified in the manner provided by law. In no other way can the city divest itself of the rights created by the franchise ordinance, or release the grantee from its obligations, or deprive the public of the benefits secured. The Omaha Gas Company is in the same situation. The necessity for protecting the conditions imposed by franchise ordinances is so urgent that the legislature has enacted a specific statutory provision on that subject. A section of the Omaha charter declares that such conditions can only be modified by an ordinance passed after it "has been published daily for two weeks in two established daily papers of the city." Comp. St. 1905, ch. 12*a*, sec. 16. It thus appears by statute that modifications of the conditions of franchise ordinances in cities of the metropolitan class are matters requiring publicity. Haste and secrecy in making such changes are condemned by law. Without two weeks' publication the city council passed the lighting ordinance containing the provisions already quoted. That ordinance required the Omaha Gas Company to furnish a minimum number of Welsbach street lamps, including gas, equipment and maintenance, for $28 a year each. These are not the conditions of the bid which the Omaha Gas Company is required by the franchise ordinance to make, "when and so often as requested" by the city. There is an obvious variance, and the lighting ordinance is mandatory. It requires the making of a lighting contract on terms different from the conditions of the bid required by the franchise ordinance. The

right of the city to call for such a bid is not reversed. The lighting ordinance requires a contract covering a period of five years, and provision is made for complying with its terms during that time. The lighting contract contains the terms prescribed by the lighting ordinance, and the right of the city to call for a bid in conformity with the franchise ordinance is not recognized. Before the lighting ordinance was passed the gas company was required by the franchise ordinance, "when and so often as requested" by the city, to bid for the supply of gas at a price not to exceed $25 a lamp annually and at the rate of five cubic feet an hour for each lamp, including lighting, extinguishing and cleaning. After the lighting ordinance was passed, if valid, the gas company was not required to make such a bid, "when and so often as requested" by the city, but was relieved from that obligation for the period of five years, and in the meantime was protected by a contract to supply gas on different terms, while the city had lost the right to request such a bid during the same period. If the franchise ordinance could be thus changed for five years by an ordinance not published before it was passed, it could be changed in like manner for the full term of the gas company's franchise. In such an event the city would be permanently deprived of the benefit of conditions which, under the city charter, could only be modified by an ordinance passed after two weeks' publication. The obligation of the gas company to make bids was changed, reduced, qualified and limited as to time at least.

Was the franchise ordinance modified? "Modified", according to the Century Dictionary, means "to qualify; especially, to moderate or reduce in extent or degree." In construing the clause "may modify or abolish grand juries," as used in the constitution of Oregon, the supreme court of that state said: "In a general sense, to modify means to change or vary, to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary,

and popular sense. A power given to modify or abolish implies the existence of the subject matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject matter to be modified, without touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally existing thing." *State v. Lawrence,* 12 Or. 297. Within the meaning of the city charter, there was certainly an attempt to modify the conditions of the franchise ordinance, and to accomplish that result by means of a lighting ordinance which had not been published two weeks before it was passed. For the reasons stated, the lighting ordinance and the contract made under it are void.

The judgment of the district court is therefore reversed and the cause remanded, with directions to allow the injunction.

REVERSED.

SEDGWICK, J., not having heard the argument, took no part in the decision.

LETTON, J., dissenting.

I cannot accept the reasoning of the majority opinion. By the terms of its franchise the gas company contracted that it would, "when and so often as requested so to do by said city", bid for street lighting at a rate not exceeding, "for each lamp burning gas at the rate of five feet per hour $25.00 per annum per lamp lighted every night one-half hour after sunset and extinguished one hour before sunrise, said sum to include lighting, extinguishing and cleaning."

The city made no agreement or contract upon its part to light its streets with gas, but as a condition for the grant of the franchise, exacted from the gas company the foregoing provision. The city became under no obliga-

tions to take gas from the gas company, but the gas company is obligated to offer to supply it to the city at the price fixed by the franchise ordinance for the service therein specified.

The opinion holds that because the city enacted an ordinance authorizing its officers to enter into a contract for street lighting by the use of Welsbach mantels and appliances upon different terms than those which the gas company were required by the ordinance to offer when so requested, the franchise ordinance was modified. The reason assigned is that by entering into a contract for five years with the gas company the city had lost the right to request such a bid from the gas company and the gas company was relieved from that obligation for the same period. I cannot so consider.

The invention of the Welsbach system of incandescent lighting, whereby a more economical and better system of illumination than the old system of lighting by the naked gas flame has been devised, and which is in general use, made it entirely proper for the city to adopt the improved method of lighting its streets.

It was not bound by the franchise ordinance to adhere to or adopt any system of lighting. It might use gas, electricity, gasoline, or any other system. It might disregard the old plan and adopt a new if in its judgment it seemed wise to do so. If this contract had been entered into with a competitor of the gas company, how could such an entirely independent contract be in any wise a modification of the franchise? The effect would be precisely the same as to the rights of the city and the gas company. The obligation of the gas company to make the specific bid would still exist, notwithstanding the city had entered into a contract with a third party to light its streets for five years. And so, when it entered into this contract with the gas company, the company is not relieved from its franchise obligation, nor is the city prevented from calling upon it "when and so often" as the proper officers deem it for the best interest of the city

to call for such bids. Suppose that, for some reason or other, the city should desire to return to the naked flame system, could it not compel the gas company to bid under the franchise ordinance, leaving the question of damages for a breach of the present contract to be settled according to the legal principles governing such a breach; or, suppose that a competitor's bid had been accepted and it had failed to comply with the contract, or after beginning service had stopped performance, could not the city still call upon the gas company for a bid under the provisions of the franchise ordinance?

By the franchise ordinance, the gas company was bound, while the city was free. The gas company was under obligations to propose when requested, but the city was under no obligations to accept. This being so, and the city officials having deemed it best to adopt a plan of lighting not covered by any provisions of the franchise ordinance, how can it logically be said that the provisions of that ordinance have been modified?

I think this contract was made entirely outside of the provisions of the franchise ordinance, and I am unable to see any sound reason for the holding that "the obligation of the gas company to make bids was changed, reduced, qualified, and limited" by the new ordinance.

JOSEPH V. SHAVLIK, APPELLEE, V. PHILIP WALLA ET AL., APPELLANTS.

FILED MAY 5, 1910. No. 16,029.

1. **Trial: VIEW OF PREMISES: REVIEW.** Where a controlling question involved in a case tried to the court is the topography of a certain locality, and the trial court, by consent of and in company with the parties and their attorneys, personally visits such locality and views the topography thereof, its findings upon such question are entitled to great weight with the reviewing court.

2. **Waters: DRAINAGE: LIABILITY.** "An owner's right to discharge

surface water from his premises does not extend so far as to permit him to collect it in a volume and by means of an artificial channel discharge it upon another's land, contrary to the natural course of drainage, to the latter's damage and detriment." *Todd v. York County*, 72 Neb. 207.

3. Limitation of Actions: FLOODING OF LANDS: ACCRUAL OF ACTION. The right to damages for the wrongful flooding of land by the digging of a ditch which collects surface water in a volume and directs it in a course, contrary to the natural course of drainage, does not accrue when the ditch is dug, but when the flooding of the land actually results.

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

Jesse M. Galloway and *F. Dolezal,* for appellants.

H. Gilkeson and *Charles H. Slama, contra.*

FAWCETT, J.

Plaintiff and defendants are owners of farm lands in the Platte valley in Bohemia precinct, Saunders county. The Platte river at this point flows from west to east, the general slope of the valley being toward the east. "Kunesh Hollow" is one of the outlets from the bluffs overlooking the valley at this point, and drains, in round numbers, 1,000 acres of land. Its mouth is upon the land owned by defendant Kavan. The general direction of this hollow is to the northwest. Prior to 1884, when the Platte valley was reached the water ceased to flow in a solid stream and became diffused and spread out over the surface of the adjoining lands, all of which seem to have been more or less low and flat. In 1884 some of the defendants and the ancestors of the others met at the house of Kavan and entered into an agreement for the construction of a ditch to prevent the waters when leaving Kunesh Hollow from flowing to the north and east. In doing so they scraped or scooped out the channel which had been made by the water before becoming diffused, and then dug a ditch from four to six feet deep and about the same in

width at the bottom, and 12 to 14 feet wide at the surface, northwesterly across the land of defendant Kavan, and thence due west on the line between the lands of defendants Kavan and Philip Walla to a point about 20 rods east of the west line of said defendants, and the same distance, plus the width of a public road, east of the northeast corner of plaintiff's land. Upon reaching the last named point an outlet was made for the water in a northerly or northwesterly direction into a large marsh upon the land of defendant Walla. Prior to or contemporaneously with the construction of this ditch, defendants filled up another short ditch which had been previously dug from the mouth of Kunesh Hollow due north. If the water from Kunesh Hollow were permitted to flow through this last named ditch, it would, after leaving such ditch, scatter over the lands of some of the defendants, and find its way in an easterly direction to the Platte river. But, when caused to run through the first named ditch into the marsh on defendant Walla's land, the land of defendants would be relieved of any danger of flooding except upon occasions when the water would come down Kunesh Hollow in such volume as to overflow the banks of the ditch, which, we take it, seldom occurred. As the land on the hillsides of Kunesh Hollow became cultivated more and more, the soil, with each succeeding freshet, would be carried down through the ditch and deposited in the marsh on Walla's land. The result of this was that eventually the marsh referred to became entirely filled and covered with a rich soil, so that what had at one time been a valueless marsh became a fertile field. Defendants failed and neglected to keep the ditch cleaned out, the evidence showing that during all the years from 1884 down to the time of the trial they had attempted to clean it out but once, and then only partially performed the work. As a result the ditch, and particularly the west end of it, as well as the marsh referred to, have filled up so that, for the last three or four years before the commencement of this suit, water from the

Kunesh Hollow for the first time overflowed plaintiff's land, causing him more or less damage. Plaintiff brought this suit to enjoin defendants from gathering and emptying the water drained by said Kunesh Hollow upon plaintiff's land, and from maintaining and using the ditch referred to, and for a decree ordering that said ditch be filled up, and that defendants be compelled to take care and dispose of surface waters drained by said Kunesh Hollow so that plaintiff should not be damaged thereby, and for his damages already suffered in the sum of $150. For answer defendants deny all allegations in plaintiff's petition, and, further answering, aver that plaintiff's land is a natural sink, into which surface water from surrounding lands to the south, east and west have drained from time immemorial; that a certain ditch dug by plaintiff himself caused and facilitated the gathering of waters upon his land, and that plaintiff's cause of action, if any, is barred by the statute of limitations. The reply is a general denial.

After both sides had rested, by agreement of the parties, the trial judge, in company with the parties and their counsel, visited the locality and viewed the ditch and its surroundings. This adds great weight to the court's findings. In a very full and able opinion, filed in the case, the trial court says: "From this view it appears to the court that in a state of nature there was what may be called a hogback or whaleback, extending northwest across the Kavan land. This little rise in the natural surface of the ground formed a watershed which turned the flood waters to the west and to the east. In extending the ditch to the northwest the projectors seem to have chosen the crest of this so-called whaleback and dug their ditch upon it and carried it along to the north line of the Kavan eighty, where it turns west. This is very apparent at the point where the line of the Northwestern railroad crosses the ditch, near the north line of the Kavan eighty. At this point it is shown in the evidence, and is very manifest upon a view of the place, that the water which over-

flows the ditch at that point flows both to the east and to the west. Water leaving the ditch on the west side runs west to the land of the plaintiff, and water leaving the ditch on the east side runs east to the land of other of the defendants. * * * While nearly all of the defendants' witnesses testify that the water ran northwest before the ditch was dug, still, none of them testify that it reached the land of the plaintiff at that time. There is a sharp conflict as to whether the water turned east after coming out of the bluffs through Kunesh Hollow, or whether it continued northwest. When the matter is considered in all of its bearings, it is not very material which set of witnesses is in the right in this contention. All admit that it did not reach the plaintiff's land. This is the material point in controversy. It must be apparent, however, that a great portion of this water must have followed the natural fall of the Platte river to the east, which fall is about seven feet to the mile. Otherwise the defendants Cippera, Hajek and Walla, living from a half mile to two miles east, would have had no interest in constructing the ditch to prevent the water from going in that very direction. This fact is obvious to any one who examines the ground, even at this late day. This water was conducted northwest and then west for some purpose. The only reasonable purpose of these defendants in incurring the great expense of constructing the ditch to so conduct the water was to prevent it from turning east after coming out of the hills, and overflowing their own lands. The defendants joined together and constructed the ditch and gathered the flood waters into it, and conveyed the water to the swamp in the Walla land as before described. Then, when the Walla land filled up so that it will receive no more water, the defendants elect to practically abandon their enterprise, and allow the water conducted by their efforts to this point to take care of itself, and to flow out of the ditch over the field of Kavan and upon the plaintiff's land." This resume by the court

tells the whole story and renders any further discussion of the evidence superfluous.

Defendants contend that this water was surface water, and seek to shield themselves behind the rule that surface water is a common enemy, and that they had a right to dispose of this surface water as was done. This question has been well settled in this state. In *Todd v. York County,* 72 Neb. 207, following *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138, we held: "An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume and by means of an artificial channel discharge it upon another's land, contrary to the natural course of drainage, to the latter's damage and detriment." Yet this is just what the defendants in the case at bar have done.

Defendants must also fail in their attempt to shield themselves behind the statute of limitations. In *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456, we held: "The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the railroad is built, but when the overflow actually results." In the opinion we said: "A man has no right to anticipate an injury from the probable negligence of some one else. The statute of limitations does not run until the injury has been actually received. Plaintiff had no right to sue defendant until defendant injured him by a negligent act. His right of action did not accrue in this case until his land had been overflowed; hence the statute of limitations would run from the date of the overflow of the land, and not from the date of the completion of defendant's railroad." In the case at bar, plaintiff could not have maintained an action against defendants until he suffered damage as the result of their wrongful act. He was not bound to anticipate that they would neglect their ditch and permit it to fill up with the accumulation of years until the bottom of the ditch was practically on a level with the adjoining lands, nor that, when the swamp on Walla's land became filled up so that it would no

longer serve as a receptacle for the surplus water, defendants would not resort to other means to avoid causing him damage.

Defendants further contend that plaintiff does not in his petition allege negligence in the construction of the ditch. We think the trial court very aptly met that contention in the following language: "It is contended by the defendants that because negligence is not alleged or proved plaintiff cannot maintain his action. True, it is not alleged in the bill for the injunction that the ditch was negligently constructed. This we cannot conceive to be necessary under the facts proved in this case. What possible difference, in law, can it be whether the water was negligently conveyed upon the plaintiff's land, or whether the object was very carefully, but deliberately, achieved? If a man might be liable if he negligently drive his team and wagon upon a foot passenger, would it be seriously contended that he would not be liable, if he deliberately and intentionally accomplished the act? We think not." We also think not.

After considering all of the evidence, the court awarded plaintiff $100 damages. This allowance we think was fully justified by the evidence. The decree must, however, be modified. It adjudges that the defendants who have appealed "be, and they and each of them hereby are, perpetually restrained and enjoined from maintaining and using the said ditch constructed by them described in paragraph 9 of plaintiff's petition, and these said defendants, and each of them, hereby are commanded to fill up the said ditch, and they, and each of them, are further commanded and ordered to place and make the outlet of Kunesh Hollow in the same condition, as nearly as may be, as it was before they constructed the said ditch complained of and described in paragraph 9 of plaintiff's petition, and these defendants, and each of them, are further commanded and ordered to remove all earth, filling and obstructions placed by them in and along the outlet to said Kunesh Hollow, and particularly that part of the

outlet of said hollow that formerly ran in a northeasterly direction, and these said defendants, and each of them, are hereby further commanded and ordered to so take care of the flood waters of said Kunesh Hollow, and to so provide for the outlet for said waters, that said flood waters shall not flow upon or over or damage the lands of the plaintiff." We think this imposes upon defendants too great a burden in two particulars: (1) They should not be compelled "to fill up" the entire ditch. If they take the proper steps to prevent the water from flowing through it, whether by filling or by any other method which will accomplish that end, they will do all that plaintiff has a right to demand. (2) If they take such steps as will restore the outlet of Kunesh Hollow to "the same condition, as nearly as may be, as it was before they constructed the said ditch", they will do everything that the law requires. They should not be burdened with the further duty of so taking care of the flood waters of Kunesh Hollow that said waters shall never flow upon or over plaintiff's land. If the conditions are restored to their normal state, and some of the flood waters should eventually reach plaintiff's land and damage him without their fault, defendants would not be responsible therefor.

As thus modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

CHARLES J. BAKER V. STATE OF NEBRASKA.

FILED MAY 5, 1910. No. 16,522.

1. **Bigamy**: INFORMATION: SUFFICIENCY. In a prosecution for bigamy, the allegation in the information that the defendant married a person named at a specified time and place, and then and there had the said (naming her) for his wife, is a sufficient allegation of the first marriage, without the further allegation that the parties then had "a legal right to marry."

2. ———: EVIDENCE: PREJUDICIAL ERROR. In a prosecution for bigamy, when it appears that the first wife is still living, it is erroneous to exclude evidence offered by defendant tending to show that prior to his second marriage he was credibly informed that his first wife had obtained a divorce, and that he had sufficient reason to believe and did believe the information so received, and relied thereon in good faith.

ERROR to the district court for Cass county. LEANDER M. PEMBERTON, JUDGE. *Reversed.*

A. N. Sullivan, for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is the plaintiff in error here, was convicted of the crime of bigamy in the district court for Cass county. It was charged in the information that "on or about the 22d day of May, A. D. 1883, in the county of Lake, in the state of Ohio," the defendant "did then and there marry one Abigal L. Shaw, and her, the said Abigal L. Shaw, then and there had for his wife, and * * * being so married to the said Abigal L. Shaw, as aforesaid, afterwards and during the life of the said Abigal L. Shaw, his wife", did marry one Lillian L. Vroman.

1. It is first contended that the information is insufficient in that it "does not allege that the parties to the first marriage had any legal right to marry." There has been some conflict in the authorities as to the manner of alleging the first marriage in prosecutions for bigamy, particularly with regard to the formality with which the particulars of such marriage should be set forth in the information. Few courts have gone so far as to hold that it is necessary to allege specifically that the first marriage was a legal one. In *Kopke v. People,* 43 Mich. 41, the court, by Campbell, J. said: "An averment setting out the first marriage must be presumed to intend a lawful marriage, and the prosecution must prove one." This

view of the law has been practically adopted in this state. *Hills v. State*, 61 Neb. 589. We think that this holding is well supported by the authorities, and the objection, therefore, to the information is not well taken.

2. The defendant testified in his own behalf, and was asked by his counsel whether he had received a letter from his daughter in regard to his wife having obtained a divorce. Upon objection he was not allowed to answer this question, and thereupon he offered to prove by his own testimony that after he and his first wife had separated, and while he was living in Nebraska and his wife was living in Ohio, he received a letter from his daughter, who was also living in Ohio, in which she informed the defendant that his wife had obtained a divorce. He also offered to prove that he relied upon the information so obtained and believed that it was true, and that the letter in question had been destroyed. There were some informalities in making these offers, and perhaps there were technical reasons that might have justified the court in sustaining the objection to the questions and offers. No matters of that kind, however, are now insisted upon by the state, and upon the whole record it would seem that the court intended to exclude all evidence of any information to the defendant that his wife had procured a divorce, or that the defendant had ground to believe and did believe that the marriage relation had been dissolved.

When a defendant is on trial charged with a crime and offers evidence tending to prove a defense which would require his acquittal of the crime charged, the court cannot exclude such evidence on the ground of its weakness or insufficiency. It is not the province of the court to determine that the evidence offered by the accused is weak and, if received, would not be sufficient to prove the point to which it is directed. The jury must pass upon the weight and sufficiency of the evidence; and if the evidence is competent and tends to prove a fact which, if established, would constitute a defense, it must

be received and submitted to the jury with proper instructions. The trial court having excluded evidence tending to show that the defendant had reason to believe and did believe that his former wife had been divorced, the question is whether the statute is absolute and admits of no defense where there has been a second marriage, except the defense that the former wife was dead or in fact divorced before the second marriage.

If one of the married parties dies or there is a legal divorce, the survivor thereby becomes single, and under our laws has the same right to contract marriage that he had to contract his first marriage. The question presented is, whether, if one is mistaken in regard to the death or divorce of his wife, and acting under that mistake contracts a second marriage, the statute is absolute and he is guilty of crime without regard to the grounds of his belief or his good faith in contracting the second marriage. In *Reynolds v. State*, 58 Neb. 49, the information charged that the defendant was married to one Jennie Ford in 1895, and in 1897 was married to one Lizzie Caulk. One of the principal questions considered in the case was whether there was a valid marriage with Jennie Ford. It was shown that Jennie Ford was married to Frank Ford in 1884, and, of course, if Frank Ford was living at the time of her alleged marriage with the defendant she could not then become the wife of the defendant. Upon the trial she was allowed to testify that she had received a letter from some one in Kansas City informing her of the death of the said Frank Ford. The trial court denied the motion to strike out this evidence, and in the opinion of this court it was stated that the motion should have been sustained. This court said: "The witness was not on trial; her intent, whether criminal or innocent, was not in issue, and, therefore, her belief touching the contents of the letter was wholly immaterial." Some of the language used in that opinion was quite appropriate to the question there being discussed, but wholly irrelevant to the question now under

consideration. By the second paragraph of the syllabus the question presented in this case was specially reserved, and not decided.

Under statutes like ours the authorities are not entirely in harmony. The statute of Alabama, like ours, made it criminal for any person having a former wife or husband to marry another in that state. It made an exception in favor of one who has procured a decree of divorce, "the decree allowing him or her to marry again", and an exception like ours: "Any person who, at the time of the second marriage, did not know his or her former husband or wife was living, if such husband or wife had been absent for the last five years preceding such marriage." Under that statute the court held (*Jones v. State*, 67 Ala. 84) that "the only criminal intent, which is of the essence of the offense, is the intent to marry the second time, not knowing the husband, who had been absent only one year, to be dead", and the court said in the opinion: "Whoever marries the second time, having a former husband or wife living, absent for a less period than five years, violates the statute, and is subject to punishment." The opinion quotes from and apparently follows *Commonwealth v. Mash*, 7 Met. (Mass.) 472.

In *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, the court quoted from the language of Shaw, C. J., in *Commonwealth v. Mash*, apparently with approval, as follows: "Whatever one voluntarily does, he, of course, intends to do. If the statute has made it criminal to do any act under peculiar circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." The Nevada court, however, was not then considering the point herein discussed. The questions before the court in that case were, whether a marriage is valid although the statutory provisions in regard to solemnization have not been complied with, and, can married persons divorce themselves by their contract for that purpose. The case therefore does not afford much assistance in determining the present question.

In *Commonwealth v. Mash*, 7 Met. (Mass.) 472, the trial court instructed the jury "that the defendant's ignorance that her said husband, Peter Mash, was alive, and her honest belief that he was dead, constituted no legal defense." The facts in this case are briefly stated in the opinion by Mr. Chief Justice Shaw, who, in referring to the instruction of the trial court, said: "The rule, as thus laid down, in effect was, that a woman whose husband suddenly left her without notice, and saying, when he went out, that he should return immediately, and who is absent between three and four years, though she have made inquiry after him, and is ignorant of his being alive, but honestly believes him to be dead, if she marries again, is guilty of polygamy." The eminent chief justice then stated the substance of the statute defining the crime, and declared the law of that state, as follows: "It appears to us, that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one should have a right, upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time. It is analogous to other provisions and rules of law, by which a continued absence of a person for seven years, without being heard of, will constitute a presumption of his death." The history of the enactment of their statute is given, and the conclusion reached is based upon the intention of the legislature in enacting the law, and this intention is derived, to some extent at least, from changes made in the pro-

posed legislation while the matter was under consideration by the legislature. The law so announced is contrary to the rule finally established in England after much consideration and debate. The reputation and recognized ability of the renowned author of that opinion have undoubtedly had much influence with those American courts who have followed the rule there laid down. It is to be noticed that the judgment in that case was never enforced against the defendant. The court did not pass sentence upon the defendant, but took a recognizance for her appearance at court at a future day. In the meantime she obtained a full pardon from the governor, and pleaded that pardon in bar of sentence, and the court thereupon ordered her discharge. In this way the court and the governor accomplished that which it seems the legislature should have done, but neglected to do.

In a recent case the court of that state felt compelled to follow the decision in *Commonwealth v. Mash, supra*, because it had "been since acted upon as a part of our system of law regulating marriages, and controlling persons contemplating marriage", and the court further said: "If the reasons which, after much difference of opinion, have led to the final declaration in England, that an honest and reasonable belief in the death of the former wife or husband is a good defense to a prosecution for polygamy, should be dealt with here, it should be by that department of the government which has the lawmaking power." *Commonwealth v. Hayden,* 163 Mass. 453, 47 Am. St. Rep. 468.

The question being still undetermined in this state, we feel at liberty to examine the reasons given by courts holding a different doctrine. In Texas the matter seems to be determined by the provisions of their criminal code. "If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense. * * * The mistake as to fact which will excuse, under the preceding article, must be such that the person so acting under a mistake would

have been excusable had his conjecture as to the fact been correct; and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense." *Watson v. State,* 13 Tex. App. 76. In that case it was held unnecessary to define in an instruction what is meant by proper care, and that an incorrect definition would require a reversal of the judgment.

In Indiana the law is stated to be that, "in a prosecution for bigamy, it is proper to charge the jury that if they believe from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care, and made due inquiry, to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, then they should find for the defendant." *Squire v. State,* 46 Ind. 459. In Bishop, Statutory Crimes (3d ed.) the subject is discussed and the conclusion of the discussion is given in these words (sec. 596*a*): "He is to be judged by the rule of the unwritten law, which pervades the entire system of our criminal jurisprudence, that, in the absence of carelessness or other fault, men are exempt from criminal liability who act uprightly on what appear to them to be the facts, equally when the appearances are found afterwards to be false as when they are true." In a note to the above section the author says: "The question has been a good deal muddled in some of the cases." In this note some of the cases are referred to in which the defendant was held guilty under such circumstances, and in criticising these cases it is said: "It is to be further noted of them, as circumstances not inspiring confidence in their conclusions, that the judges seemed utterly oblivious to the familiar rule of statutory interpretation, * * * that legislative acts are to be construed in connection with, and as limiting and limited by, the unwritten law. And, looking *only* at the statute, as they should not, and taking *no* cogniz-

ance of the doctrines of the common law, which they should, they were so confident in their own superior wisdom as to refuse, to convicted men, the boon of laying the question before the judges *in banc*, though they knew that other judges were of opinion contrary to their own. A frame of mind like this is not judicial." In regard to the case of *Commonwealth v. Mash, supra*, and in regard to the rule there announced, it is said: "But this sort of doctrine appears not to prevail to any considerable extent in our other states."

It is true that crimes against the marriage relation are dangerous to the peace of society and injurious to the morals of the people. Bigamy is a crime severely punished by the laws of all civilized states. It destroys the happiness of families and social order; it places the stigma of illegitimacy upon innocent children; it complicates and prevents the regular descent of property, and deprives the unoffending of their rightful inheritance. The law will not allow its penalties to be evaded by trifling or unsubstantial excuses. Divorces are matters of record. These records are for the information of all parties interested. A certified copy of the decree will resolve all doubts. One who contemplates a second marriage on the faith of a divorce should use such care and precaution as the great importance of the act demands. If he has had a former wife who has not been so long absent and unheard of as that the law presumes her death, he will not be justified in assuming the existence of a divorce from rumors, or from statements of individuals who have no special means of knowledge. No lapse of time will raise a presumption of divorce. Substantial evidence is required to justify such a conclusion. But, as stated by Mr. Bishop, when a man is misled without his own fault or carelessness concerning facts, and, while so misled, acts as he would be justified in doing were the facts as he believes them to be, he is legally innocent, the same as he is innocent morally. 1 Bishop, Criminal Law (8th ed.) sec. 303.

The defendant should have been allowed to make such proof if he could, and, upon evidence tending to show such a condition, the question as to his information and good faith, that is, as to the sufficiency of his ground of belief, and whether in fact he did believe that the obligations of his former marriage had been removed by a legal divorce, should be submitted to the jury with proper instructions.

Because of the error in regard to this evidence, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., dissenting as to conclusion.

I have no fault to find with the law laid down in the opinion, but it seems to me that it is inapplicable to the facts in this case, and that the exclusion of the offered testimony was not prejudicial. The evidence shows that defendant was married in 1883, and lived with his wife for 25 years. She bore him six children, five of whom were living at the time of the trial. The family home was in Ashtabula, Ohio. Baker and his wife had lived somewhat unhappily, and they separated some time in the summer of 1908. In the latter part of September or the first of October, 1908, he left Ashtabula, where his wife and family were, and came to his brother's home in Niobrara, Nebraska, where he remained until about the 20th of December, 1908. He testifies that while there he received a letter from his daughter Mrs. Knapp, that he burned up a lot of letters, and presumes that letter was amongst those he burned. He then offered to prove that he showed this letter to his brother Frank, that it informed him that his wife had obtained a divorce, and that the information was believed by him and relied upon by him. The defense also offered to prove by Frank Baker that the defendant received such a letter, that he read it, that it contained information that defendant's wife had

obtained a divorce in Ashtabula. These offers were rejected and the evidence excluded.

He married again on January 11, a few days more than three months from the time he left Ohio. After his arrest he stated he had been informed by a lawyer that his first marriage was not legal, and that it was unnecessary to procure a divorce. The testimony of this attorney was offered by him, and received, to the effect that he had told Baker the marriage laws of Ohio, as to the marriage of minors, had not been complied with at the time of the marriage; but he also testifies he told him that his wife was, at least, a common law wife, and that his advice was that, "to clear up the matter, the easiest way would be to get a divorce."

The case stands thus: A man leaves his wife and family in Ohio, comes to Nebraska, and, in about three months from the time of leaving, marries again. His wife testifies that after he came west she wrote to him for money for the support of the family, and this is not disputed. Conceding that he had received the letter from his daughter, could this fact change the legal and necessary result of the undisputed facts? He knew that his wife was living in Ashtabula, and that the expenditure of a few cents would procure him information from the proper officer as to whether a divorce had been granted. The time was so short since he left his wife that he was not justified in blindly accepting such a statement, even if made. He made no attempt to ascertain the facts. The case is different from one where there was any care taken or any diligence used, or where there could be any well-grounded reason for such a belief. There can be no doubt that the defendant did not use due care, because the proof shows he used no care at all, and made no inquiry, and, under all the authorities, due care and due inquiry are essential to such a defense. It has been well said that "no man can be acquitted of the responsibility for a wrongful act, unless he employs the means at command to inform him-

self. Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely." If the evidence had been received, it would not have been erroneous for the court to instruct the jury that, under the circumstances of the case, it did not constitute a defense. If such facts as those offered to be proved constitute a valid defense in a prosecution for bigamy, then a man may acquire a new family with impunity every 90 days if he only testify that a relative within 90 days from his departure from his wife and home wrote him a letter telling him that his wife had received a divorce.

I think that, under all the circumstances shown, the court committed no error in excluding this testimony, because, even if established, it did not constitute a defense. Under all the facts proved, I think that the sentence is too severe and should be reduced, but a new trial should not be granted.

THOMAS B. KERR ET AL., APPELLANTS, V. WILLIS P. MCCREARY ET AL., APPELLEES.

FILED MAY 6, 1910. No. 16,596.

Appeal: REMAND: FINALITY OF JUDGMENT. Where, on appeal to this court, a case is decided upon the merits and a mandate issued to the district court commanding it to enter a specific judgment which will finally dispose of all the matters in controversy in said case, and the district court, in obedience to said mandate, enters a judgment in strict conformity therewith, such judgment is final and cannot be superseded or appealed from.

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

R. A. Batty and *H. F. Favinger,* for appellants.

John C. Stevens and *W. P. McCreary, contra.*

PER CURIAM.

This case was before us and heard and decided upon the merits April 24, 1909. *Kerr v. McCreary*, 84 Neb. 315. On January 6, 1910, we modified our judgment, and a mandate went down commanding the district court to modify its decree "so as to require the defendant Mary B. McCreary, as a condition of the relief granted to her, to pay to the plaintiffs the amount bid at the foreclosure sale, with simple interest thereon at 7 per cent. per annum from the date of said sale, except for the period during which the plaintiffs have had the possession of the property, and that she shall also pay plaintiffs the amounts they have paid for taxes on said property, with 10 per cent. simple interest thereon from the dates such payments were made." In obedience to that mandate, and in strict conformity therewith, the trial court, on February 10, 1910, denied the request of plaintiffs to include taxes which had been paid by their grantor prior to his conveyance of the land in controversy to plaintiffs, and entered the decree now complained of. This constituted a final disposition of the case, as commanded. On February 14, 1910, it having been made to appear to the district court that defendant Mary B. McCreary had complied with the decree of that court, entered upon the mandate, the court granted said defendant a writ of assistance to place her in possession of the property in controversy. On application of plaintiffs, the court allowed a supersedeas, and plaintiffs filed their appeal to this court. Defendant now moves that said supersedeas be vacated so as to permit the judgment of this court, as finally rendered and complied with by the district court, to become effective.

An examination of the record now before us shows that all of the matters which plaintiffs seek to review on this appeal were before the court and were decided by its former judgment, and that the decree entered by the district court is in strict compliance with the mandate from

this court. When the district court received the mandate of this court commanding specific action, it could not lawfully do other than obey the commands of said mandate. Its discretion was at an end. Having executed the mandate of this court in strict conformity with its terms, its action is not subject to review.

The motion of defendant for an order vacating the supersedeas granted by the district court is sustained; and, as this ruling upon the motion leaves nothing else which can be reviewed on the present appeal, the appeal should be, and it is,

DISMISSED.

SEDGWICK, J., not sitting.

STATE OF NEBRASKA V. GUS A. JUGENHEIMER.

FILED MAY 20, 1910. No. 16,088.

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

C. C. Flansburg and *Leonard A. Flansburg,* for plaintiff in error.

T. J. Doyle, contra.

PER CURIAM.

The city attorney of the city of Lincoln and the county attorney of Lancaster county were given permission to file a bill of exceptions, transcript and petition in error for the purpose of reviewing a ruling of the district court for Lancaster county construing rule number 24 of the excise board of the city of Lincoln. The rules of the excise board provide that any person convicted of a violation of any of those rules shall be fined not less than $100 nor to exceed $200. In *State v. Dudgeon,* 83 Neb. 371,

we held that the police judge is without power to try upon the merits any case involving a violation of the rules of the excise board where a fine exceeding $100 may be imposed, but that he should, in such cases, sit as an examining magistrate. It now appears that the police judge tried the case upon the merits and fined the defendant. The defendant appealed to the district court, wherein, upon a further trial upon the merits, he was acquitted. The district court upon an appeal from a judgment of the police judge is not clothed with jurisdiction to try a case not within the jurisdiction of the police judge to determine, and the superior court is not vested with original jurisdiction to hear and determine complaints charging a violation of the rules of the excise board of the city of Lincoln. Its judgment in the premises is a nullity. At no time during the progress of the proceedings in this court have counsel directed our attention to the fact that the district court was without jurisdiction, but an examination of the record discloses that condition.

Under the circumstances, the proceedings should be dismissed. *State v. Gipson,* 85 Neb. 285.

DISMISSED.

GEORGE W. CRILE, APPELLANT, V. MARY FRIES ET AL., APPELLEES.

FILED MAY 20, 1910. No. 16,036.

1. **Tax Certificate: FORECLOSURE: PAYMENT.** F., the owner of real estate, gave her niece the money with which to pay the taxes due and delinquent thereon. The niece, instead of paying the taxes, procured the treasurer to issue to her a tax sale certificate therefor, which she afterwards assigned to C., her father, a brother of F. In an action to foreclose the tax lien, *held* the transaction was a payment of the taxes by F., and foreclosure should be denied.

2. **Mortgages: FORECLOSURE: PAYMENT.** F., who executed a mortgage on her homestead for $500, being unable to pay it when it became due, ascertained that the owner thereof would cancel and satisfy

the mortgage for $150. She thereupon sold and transferred to her brother, C., enough live stock to enable him to raise the money and procure for her a satisfaction of the mortgage. C. kept the stock and borrowed the money with which to pay off the mortgage. Instead of having it satisfied, he took an assignment of it to himself. In an action by C. to foreclose the mortgage, *held* that the transaction amounted to a payment of the mortgage debt by F., and foreclosure was therefore denied.

3. Evidence examined, and found to be amply sufficient to sustain the judgment of the district court.

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

J. E. Porter, for appellant.

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

BARNES, J.

Action in equity in the district court for Dawes county to foreclose a mortgage and a tax lien on certain land situated in that county. The defense was payment by the owner of the premises. The defendant had judgment, and the plaintiff has appealed.

Plaintiff's principal contention is that the evidence does not sustain the judgment, and the only question for our determination is one of fact.

It appears from the bill of exceptions that the defendant is the owner of the land in controversy; that she procured title thereto from the government of the United States as a homesteader; that the plaintiff is her brother, and, in order to better his condition in life, in 1893 he moved from the state of Illinois to Dawes county, Nebraska, and took up his residence with the defendant; that he lived on the land in controversy for three years, at the end of which time the defendant requested him to sell some wheat and pay the interest on a $500 loan which she had theretofore procured upon the land, together with the delinquent taxes thereon; this he declined to do, and took up his residence upon another tract

of land of which he now seems to be the owner; that defendant then rented the premises in question to one Buckley, who remained thereon less than one year, and upon his removal she rented the land to one Harvey, who, in about a year thereafter also removed from the premises; that thereupon the plaintiff took possession of the land, together with the defendant's live stock, consisting of horses and cattle, and thereafter there was an agreement entered into by which he was to care for them and have one-half of the increase thereof; this arrangement was made some time in the year 1898; that since then the defendant has resided a greater part of the time in Johnson county, in this state, occasionally visiting the land in question; in 1890 the defendant went with the plaintiff's daughter to the county treasurer's office at Chadron for the purpose of paying the taxes due and delinquent upon her farm; that while in Chadron she became suddenly and violently ill, and her niece, at her request, took her money, went to the treasurer's office and paid the taxes in question; that instead of taking the ordinary tax receipt she obtained a treasurer's certificate of purchase therefor; that later on, and before the commencement of this suit, she assigned the same to the plaintiff. We further find that when the mortgage above mentioned became due the defendant was unable to pay the same; that certain negotiations were had with the owner of the mortgage by which it was agreed that he would accept $150 in payment and satisfaction thereof; that thereupon the defendant sold to the plaintiff enough of her horses and cattle to enable him to raise the money with which to pay the $150, and thus satisfy the mortgage; that the plaintiff did procure the money, paid the same to the owner of the mortgage, but instead of having the mortgage canceled he took an assignment of it to himself; that he remained in possession of the defendant's homestead, took the rents and profits thereof, and paid the taxes thereon from year to year, which amounted to something less than $5 per annum; that no settlement has ever been had

between plaintiff and defendant; that they have never divided the live stock, but they have each sold some of the increase of the stock and used the proceeds thereof.

The district court found that, when the plaintiff's daughter obtained the tax sale certificate with the defendant's money, the transaction amounted to a payment of the taxes; that by the sale of the live stock above mentioned the defendant had reimbursed the plaintiff for the money expended by him in procuring the assignment of the mortgage, and that, when plaintiff paid the money and procured such assignment, the payment was made for the purpose of canceling the mortgage debt. Upon these findings the district court rendered judgment for the defendant. We are satisfied, after a careful examination of the record, that his judgment is amply sustained by the evidence.

The district court declined to enter into an accounting as between the plaintiff and defendant in relation to the other matters in controversy between them. It is our view of the matter that all of their differences might have been settled in this action, but as the petition contains no prayer for an accounting and the defendant seems to be satisfied with the judgment of the district court, we are of opinion that the judgment of the trial court was right, and it is hereby

AFFIRMED.

NATIONAL BANK OF ASHLAND, APPELLEE, V. JOHN S. COOPER, APPELLANT.

FILED MAY 20, 1910. No. 16,049.

1. **Appeal:** TRIAL TO COURT: FINDINGS. In an action at law tried to the judge of the district court, his findings and judgment are entitled to the same weight and consideration as is the verdict of a jury.

2. ———: CONFLICTING EVIDENCE. In such a case, where the evidence is conflicting, the judgment will not be set aside by a reviewing court unless it is clearly wrong.

3. **Evidence:** CONVERSATIONS BY TELEPHONE: ADMISSIBILITY. The conversations, relating to a contract, had between the parties thereto by telephone may be received in evidence, where the witness testifies positively that he recognized the person, with whom he was talking, by his voice; and the probative force of such evidence is a question for the determination of the court or jury, as the case may be.

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

Lambert & Winters, for appellant.

J. J. O'Connor, contra.

BARNES, J.

Action in the district court for Douglas county on an alleged acceptance or promise to pay a bank draft. The plaintiff had judgment, and the defendant has appealed. The trial was to the court without the intervention of a jury, and the finding was a general one in favor of the plaintiff.

Defendant's first contention is that the evidence is not sufficient to sustain the judgment. It appears from the plaintiff's evidence that on the 25th day of March, 1905, one C. L. Andres, who was engaged in buying horses in Ashland and vicinity, called on the plaintiff, the national bank of that city, and informed the cashier of that institution that he was buying horses for the defendant, John S. Cooper, who was engaged in that business in South Omaha, Nebraska; that he would need the sum of $500; that the defendant would honor his draft for that amount, and would telephone the bank to that effect; afterwards, and on the same day, plaintiff received a telephone call from defendant Cooper, at South Omaha; its cashier, one White, responded to the call, and was informed by one Jones, who it is admitted is the defendant's bookkeeper, that Cooper would honor Andres' draft for $500; that when Andres returned to the bank the draft in question was prepared and signed by him, and he was

paid at that time $130, and credit was given him for $370, the balance due thereon; that a few days thereafter Andres checked out his balance, and thereupon plaintiff sent the draft to a bank in South Omaha for collection; that payment was refused, the draft went to protest, and suit was immediately commenced thereon. Plaintiff's cashier, White, testified that he knew it was defendant's bookkeeper who conversed with him by telephone, because he recognized his voice. The witness also testified that immediately after the draft was protested he had a conversation by telephone with one George Smith, the defendant's manager in South Omaha, in which he asked Smith why the draft had not been paid; that the reply was, in substance, that they had not received any horses yet from Andres, but that when they got the horses the draft would be honored. The president of the plaintiff bank, one Randall K. Brown, who resides in Omaha, also testified that he called up the defendant, John S. Cooper of South Omaha, by telephone, and was answered by Smith, the defendant's manager; that he asked him why the draft had not been paid, and was informed, in substance, that they had not received any horses from Andres; that the draft had been ordered on condition that they should receive the horses, and if they secured them the draft would be paid. On the other hand, both Jones and Smith denied that they ever ordered the draft, or ever had any business transactions with Andres, or that he was ever authorized by them to purchase horses in any manner whatever. They also denied that they ever had any conversation with the plaintiff or any of its officers, or any one representing it, by telephone at any time, and denied any knowledge of the transaction.

The judge of the district court evidently disbelieved the defendant's witnesses, and in this conclusion we think he was fully justified. The rule is settled beyond question, in this jurisdiction, that when an action at law is tried without the intervention of a jury the findings of the trial court are entitled to the same consideration by

the appellate court as is the verdict of a jury. *Evans v. DeRoe,* 15 Neb. 630. It is also well settled that a verdict based on conflicting evidence will not be set aside unless it is clearly wrong. *Woods v. Hart,* 50 Neb. 497.

Defendant's last contention is that the court erred in receiving the plaintiff's evidence of conversations with defendant's bookkeeper and manager by telephone. Counsel cites no authorities to sustain this contention, but relies on his assertion that sufficient foundation was not laid to render the evidence competent. It may be stated, however, that the record shows that plaintiff's cashier, when he talked with defendant's bookkeeper, recognized him by his voice as the person who had authorized the draft in question, and he so testified. The same may be said of the evidence of witness Brown as to his conversation with the defendant's manager, Smith. We are therefore of opinion that the evidence in question was properly received, and its probative force was a matter for the determination of the trial court. *Galt v. Woliver,* 103 Ill. App. 71; *McCarthy v. Peach,* 186 Mass. 67.

This disposes of the questions presented by the appeal, and, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

BERT M. TAYLOR V. STATE OF NEBRASKA.

FILED MAY 20, 1910. No. 16,342.

1. **Indictment:** SUFFICIENCY. An indictment charging murder while perpetrating and attempting to perpetrate a rape upon Pearl Taylor, referring to that person as "her", is good without alleging that person to be a woman, and is not vulnerable to a demurrer or motion to quash on the ground of duplicity.

2. **Continuance:** DISCRETION OF COURT. An application for a continuance is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed where no abuse of discretion is shown. *Argabright v. State,* 62 Neb. 402.

3. **Criminal Law:** CHANGE OF VENUE: DISCRETION OF COURT. A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and unless there has been an abuse thereof its ruling on the motion will not be disturbed. *Sweet v. State*, 75 Neb. 263.

4. **Jury:** IMPANELING: CHALLENGE FOR CAUSE. A challenge of a juror for cause raises a question which is to be decided by the trial judge from a consideration of all the facts developed during his examination, and any circumstances which tend to enlighten upon the matter, and of these are the appearance and actions of jurors while undergoing the examination. An opinion formed from reading newspaper accounts, or from common talk or rumor, if the juror is unbiased and can impartially decide upon the evidence, does not disqualify him. *Rottman v. State*, 63 Neb. 648.

5. **Criminal Law:** HOMICIDE: CIRCUMSTANTIAL EVIDENCE: INSTRUCTIONS. In a criminal prosecution for the crime of murder committed whle perpetrating or attempting to perpetrate a rape, where it is necessary for the state to rely upon the facts and circumstances surrounding the transaction, and the condition of the deceased immediately following the tragedy, in order to establish the manner in which the killing took place, it is proper for the court to instruct the jury as to the nature and effect of circumstantial evidence.

5*a*. ———: ———: DEFENSES OF INSANITY AND INTOXICATION: INSTRUCTIONS. In such a case, where the defenses of insanity and intoxication are relied upon by the defendant, it is proper for the court to instruct the jury on those questions, including the legal effect of so-called insane delusions.

6. ———: TRIAL: MISCONDUCT OF JURY. It appears that during the trial the jury were taken to a picture gallery, conducted by the bailiff's wife, and were photographed. They were also taken by the bailiff, in a body, to the Methodist church on Sunday, and attended divine worship. It also appears that the jury did not communicate with any other person or persons, nor was any other person or persons suffered to communicate with them, and it was not made to appear that anything occurred upon either of those occasions which could in any manner prejudice the substantial rights of the defendant. *Held*, That while such conduct on the part of the officer is not to be commended, and should not be indulged in, it is not sufficient ground, under the circumstances of this case, to require a new trial.

7. ———: ———: ARGUMENT OF COUNSEL. In his closing argument, counsel for the prosecution charged *arguendo* that counsel for the defendant were trifling with the court and jury by present-

ing the defenses of insanity and drunkenness, when they knew, or ought to have known, that there was no merit in them. This language was objected to, and the objections were overruled. *Held*, That the remarks complained of were within the limits of fair and reasonable discussion, and are not sufficient to require a new trial.

8. ———: ———: ADJOURNMENT. It appears that the court adjourned the trial in this case from Saturday night, May 29, to Tuesday, June 1, because of the fact that Monday, May 31, was to be observed as "Decoration Day." It not appearing that such adjournment in any manner interfered with the defendant's rights, *held* not sufficient ground for a new trial.

9. ———: ———: RECORD: PRESUMPTIONS. Where the record fails to show affirmatively that the court, before passing sentence upon the defendant, informed him that a verdict of guilty had been found against him, as required by section 495 of the criminal code, and in the absence of any showing in the record to the contrary, the fact that such information was given will be presumed.

10. Evidence examined and found to be sufficient to sustain the verdict.

ERROR to the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. L. McPheely and *Hamer & Hamer*, for plaintiff in error.

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

BARNES, J.

Bert M. Taylor, hereafter called the defendant, was tried in the district court for Kearney county on an indictment containing two counts, charging him with murder in the first degree. The first count alleged that the defendant killed one Pearl Taylor, intentionally, with deliberate and premeditated malice, by choking her to such an extent that she died of the wounds, hurts and bruises inflicted thereby. The second count of the indictment charged the defendant with a violation of the provisions of section 3 of the criminal code, by killing

the said Pearl Taylor while perpetrating and attempting to perpetrate a rape upon her. The jury found the defendant guilty as charged in the second count of the indictment, and fixed the death penalty, as his punishment. To reverse the judgment rendered upon the verdict, defendant has brought the case to this court.

The record contains many assignments of error, some of which were abandoned upon the hearing, and those which were urged as grounds for a new trial will be considered and disposed of in the order of their presentation.

1. Defendant assigns error for the overruling of his motion to quash and his demurrer to the indictment. His contention is that it is nowhere alleged in the second count of the indictment that Pearl Taylor was a female. We think this contention is without merit. It has been frequently held that an indictment for the crime of rape need not allege that the female raped or assaulted was of the human species, that she was a person in being, that she was a female child or woman, if the other words show sex. 33 Cyc. 1439. In *Battle v. State,* 30 Am. Rep. 169 (4 Tex. Ct. App. 595), it was said: "An indictment charging an attempt to commit a rape upon 'Theresa Gaudaloupe', and referring to that person as 'her', is good without alleging that person to be a woman." To the same effect are *Warner v. State,* 54 Ark. 660; *Joice v. State,* 53 Ga. 50; *State v. Hussey,* 7 Ia. 409; *Tillson v. State,* 29 Kan. 452; *State v. Warner,* 74 Mo. 83; *State v. Farmer,* 26 N. Car. 224; *State v. Barrick,* 60 W. Va. 576. If this be the rule when charging the crime of attempting to commit rape, it would seem that the allegations of the indictment in this case are sufficient to charge the crime of murder while committing and attempting to commit rape. Counsel for the defendant have failed to direct our attention to any authority supporting their contention, and we have been unable to find any. We are therefore of opinion that the district court did not err in refusing to sustain defendant's motion and demurrer upon this ground.

It is also contended that the indictment is bad for duplicity, because it contains an allegation that the defendant killed Pearl Taylor in attempting to or in perpetrating a rape upon her. As above stated, the prosecution was instituted under the provisions of section 3 of the criminal code, which reads as follows: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or if any person, by wilful and corrupt perjury or by subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." It will be observed from the language of the section above quoted that the crime of murder in the first degree is committed by the killing of a person either in the perpetration or in the attempt to perpetrate a rape. It matters not whether the homicide be in the perpetration of the rape, or in the attempt to perpetrate it. Under the well-recognized rules of pleading, the prosecution could join the various ways in which the crime may have been committed conjunctively, as it did in the second count of the indictment, in order to meet the proof, and this proposition is so elementary that it is not necessary to cite authoritity in support of it.

2. Defendant further contends that the district court erred in overruling his motion for a continuance. It appears from the record that the crime charged in the information was committed on the 28th day of April, 1908; that the defendant fled the country, and for a long time his whereabouts could not be ascertained; that he was arrested in the state of California, and brought to Minden and confined in the county jail some time in the month of January, 1909; that an information had theretofore been

filed against him, and on the 29th day of March, 1909, the grand jury for the district court for Kearney county, then in session, returned the indictment upon which the defendant was tried; that on the next day defendant filed a poverty affidavit, as provided by section 508 of the criminal code, and J. L. McPheely, Esquire, was appointed as counsel to defend him; that McPheely thereupon called to his assistance the firm of Hamer & Hamer of Kearney, Nebraska, and on the 31st day of March, 1909, the motion to quash and the demurrer to the indictment heretofore mentioned was filed and overruled. Defendant thereupon filed his motion for a continuance, alleging as the principal ground therefor that Doctor S. J. Jones, a resident of Minden, Nebraska, and a practicing physician, was temporarily attending college, or taking a post graduate course at Vienna, Austria; that he would return to the city of Minden within four months, at which time defendant could procure his testimony; that Doctor Jones was a material witness for the defendant; that he attended Pearl Taylor after her injuries, and made a physical examination of her person, and that from such examination he would testify that no rape had been committed upon her. The motion for a continuance was overruled, but the court, in the exercise of a wise discretion, issued a commission to take the testimony of Doctor Jones, and also the testimony of one Doctor Martin, which was accordingly done, and the deposition of both of these physicians was produced by the defendant, and read in evidence upon the trial. It is not claimed that, had these witnesses been present in court, their testimony would have been other or different than it appeared in the depositions, and nothing is brought to our attention to show that the defendant was prejudiced because they were not personally present in court when they gave their testimony. We are therefore of opinion that the court properly overruled defendant's motion for a continuance.

3. Defendant complains of the district court for overruling his motion for a change of venue. An application

for a change of venue is addressed to the sound discretion of the trial court, and, unless there appears to have been an abuse of discretion which has resulted in depriving the defendant of some substantial right, the ruling on that question should be sustained. *Smith v. State,* 4 Neb. 277; *Lindsay v. State,* 46 Neb. 177; *Argabright v. State,* 62 Neb. 402; *Welsh v. State,* 60 Neb. 101; *Goldsberry v. State,* 66 Neb. 312; *Jahnke v. State,* 68 Neb. 154; *Sweet v. State,* 75 Neb. 263. In the instant case, the principal reason assigned for the application was that by reason of the enormity of the crime with which the defendant was charged, and the newspaper accounts thereof, the minds of the people of Kearney county were so inflamed against him that he could not obtain an unbiased jury, and have a fair and impartial trial in that county. Defendant supported his application by his own affidavit and the affidavits of his attorneys, to which were appended newspaper accounts of the tragedy published about the time of its occurrence. The application was opposed by the affidavits of a large number of reputable citizens of that county, who deposed to the effect that no such feeling existed against the defendant as would prevent him from obtaining a fair and impartial jury for the trial of his cause, and that, by reason of lapse of time, whatever excitement was created against defendant at the time the offense was committed had ceased to exist. It appears that the crime was committed more than a year before the trial took place; no attempt had been made to do violence to the defendant, no assault had been made upon him, and no public feeling exhibited against him by any one other than the father of his victim. An examination of the record satisfies us that the district court did not abuse his discretion in overruling the motion for a change of venue.

4. It is strenously urged by defendant's counsel that the trial court erred in overruling their challenges for cause to several of the jurors, and many pages of the de-

fendant's brief are devoted to excerpts from the *voir dire* examination of the jury. Our attention is challenged to the examination of C. E. Wilson, who was called into the jury-box, and on cross-examination by defendant's counsel stated that he had read newspaper accounts of the transaction, from which he had formed some little opinion in relation to the guilt or innocence of the defendant, but that it would not require any evidence to remove that opinion. He was thereafter interrogated by the court as follows: "Q. Notwithstanding what you have heard or read, Mr. Wilson, can you say now that, if selected as a juror, you can render a fair and impartial verdict between the state of Nebraska and the defendant, Bert Taylor, disregarding what you have heard and read? A. Yes, sir. Q. And, if selected as a juror, would you do that? A. Yes, sir. Q. And you are confident that you could do that now? A. Yes, sir." Thereupon defendant's challenge was overruled.

The examination of venireman Harden Yensen, to whom defendant objected, discloses the same state of facts as testified to by Wilson; but, in addition thereto, counsel for the defendant questioned him as follows: "Q. Now, if selected as a juror, and remembering what you have read and heard, it would require some testimony to remove the impression you have in your mind? A. No, sir; not if I was retained as a juror. Q. But you say, 'if retained as a juror'; what do you mean by that? A. I mean, if I was retained as a juror, I am to drop what I have heard, and decide the case according to the evidence in the court here. * * * Q. You have an opinion in your mind now, is not it true, Mr. Yensen, that Pearl Taylor was murdered, and that Bert Taylor murdered her—you have that in your mind? A. I heard that; yes, sir. Q. And you believe that now? A. As far as the newspaper reports and rumor goes, I believe it. Q. And that opinion is such that would require evidence to remove it from your mind; that is, that Pearl Taylor has been murdered, and that Bert Taylor was guilty of the crime? A. Not if

I was retained as a juror, it would not." The juror further testified that he could render a fair and impartial verdict on the evidence and the law of the case, and he was sure of that. It appears that the above named persons were peremptorily challenged by the defendant.

Complaint is also made of the retention of Chris Anderson, who served on the jury and acted as its foreman. It appears that Anderson had lived in Kearney county ten years; eight years of the time in Grant township, and the remaining two years about 12 miles from Minden, the county seat; that he had heard some talk in his neighborhood about the tragedy, and had read newspaper reports of it at or about the time it occurred; that he was not acquainted with any of the parties to it, or with any of the witnesses, and knew nothing about the facts of the case. When asked if he had any opinion as to the guilt or innocence of the defendant he said: "Sometimes I have, and other times I have doubts." He also stated that he could render a fair and impartial verdict according to the evidence. He was then examined by counsel for defendant, and testified in part as follows: "Q. From what you have heard and read, you formed an opinion as to whether a crime had been committed, didn't you? A. No; I have not done that—that a crime had been committed. Q. You are informed as to that? A. Yes. Q. And you have that opinion now, have you not? A. Yes, sir. * * * Q. You believe that now? A. Things have turned up since that I have my doubts. Q. You would require evidence to remove the impression that you have? A. Yes, sir." Thereupon, as provided by the statute, the juror was examined by the court: "Q. Now, Mr. Anderson, notwithstanding the opinion that you formed from what you heard and read that a crime had been committed, and notwithstanding the impression that may have been made at various times on your mind as to the guilt or innocence of the defendant, do you say now that you could enter upon the trial of this case and render a fair and impartial verdict between the state of Nebraska

and the defendant, Bert Taylor, without regard to what you have heard or read? A. Yes."

It appears from the record that practically the same state of facts existed as to all of the other veniremen and jurors objected to by defendant in his brief. That they were qualified jurors and were properly retained by the court is beyond question, unless we disregard that part of section 468 of the criminal code which reads as follows: "Provided, that if a juror shall state that he has formed, or expressed, an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, * * * the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." This provision has been upheld and given its proper force and effect in *Palmer v. People*, 4 Neb. 68; *Carroll v. State*, 5 Neb. 31; *Smith v. State*, 5 Neb. 181; *Basye v. State*, 45 Neb. 261; *Bolln v. State*, 51 Neb. 581; *Russell v. State*, 62 Neb. 512; *Jahnke v. State*, 68 Neb. 154. In *Ward v. State*, 58 Neb. 719, it was said: "A challenge of a juror for cause raises a question which is to be decided by the trial judge from a consideration of all the facts developed during his examination, and any circumstances which tend to enlighten upon the matter; and of these are the appearance and actions of the juror while undergoing the examination. An opinion or impression of a juror formed from reading newspaper reports and hearing general rumors, of none of which he has a settled belief, but expresses rather disbelief or disregard, is hypothetical and does not disqualify him if he also states that he can render a fair and impartial verdict based solely upon the evidence and wholly without the

interference of such opinion or impression. * * * The decision of a challenge of a juror for cause will be sustained on review if not clearly wrong."

After reading the evidence we have no doubt of the fact that each of the jurors objected to by the defendant qualified himself within the language of the statute and the rule announced by the foregoing decisions. It was evidently the purpose and intention of the legislature, in adopting the statutory provision above quoted, to raise the standard of juries in this state. We are of opinion that ignorance and indifference to what transpires in the community where a juror resides, and lack of reading, of knowledge and of general information are not calculated to best qualify him to serve his state in the capacity of a trial juror. The mere fact that a person takes interest enough to read new papers and inform himself upon the current events of . . should not disqualify him from acting in that capacity, if he can truthfully say that, notwithstanding what he has heard by way of common rumor and read in the way of newspaper accounts, he could render a fair and impartial verdict upon the law and evidence in the case.

Complaint is also made because the trial court allowed the state to ask certain of the jurors whether they had conscientious scruples against capital punishment. One of the statutory grounds of challenge for cause on the trial of an indictment for an offense, the punishment whereof is capital, is that the juror's opinions are such as to preclude him from finding the accused guilty of an offense punishable with death. Criminal code, sec. 468. This provision of the statute has been upheld in *St. Louis v. State*, 8 Neb. 405; *Bradshaw v. State*, 17 Neb. 147; *Johnson v. State*, 34 Neb. 257; *Rhea v. State*, 63 Neb. 461. It thus appears that this question is so well settled that a further discussion of it is unnecessary, and it must be resolved against the defendant's contention. We are therefore of opinion that there was no error committed

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by the district court in the impaneling of the jury in this case.

5. Defendant assigns error in giving and refusing instructions, and contends: (1) That the court erred in giving instructions numbered 36 and 37. Those instructions treat of the nature and effect of circumstantial evidence. Neither their form nor the substance is assailed, but it is contended that there was no circumstantial evidence in this case, and therefore it was reversible error to give them. In this we think the attorneys for the defendant are mistaken. It must be remembered that the defendant was convicted of murder while perpetrating and attempting to perpetrate a rape. No one saw the transaction, and no one was present when the crime was committed but the defendant and his victim. The defendant did not testify, and his victim was so badly injured that she never regained consciousness, and was never able to speak of the matter. So it was necessary for the state to resort to the facts, circumstances and conditions surrounding the transaction as shown by the testimony of the sister of the deceased, together with the condition in which he left his victim, his subsequent flight and conduct, as circumstances tending to prove the manner in which the crime was committed, and in support of the allegations of the second count of the indictment. It was therefore entirely proper for the court to instruct the jury on the question of circumstantial evidence. (2) Error is also assigned for the giving of instructions numbered 46 and 47. Those instructions treat of the question of insane delusions, and it is now contended that there was no evidence before the jury upon that question, and therefore a new trial should be awarded. An examination of the record discloses that counsel for the defendant did not contend that he had not committed the acts complained of, but attempted to defend on two grounds; one of which was that he was insane, and therefore not responsible for his acts; and the other that at the time the transaction took place he was intoxicated to such an ex-

tent as to render him wholly irresponsible for his acts. Having attempted to establish the defense of insanity, it was proper for the court, if there was evidence enough to justify it, to instruct the jury upon that question, which of course would include the matter of insane delusions. Again, there is evidence in the record that the defendant had stated to the deceased, and her sister Ida, that their father had in some manner injured him; and he complained to his victim, shortly before the tragedy, that her deceased sister, who was his wife, had been guilty of infidelity toward him, and that he would get even with them. There was no evidence introduced from which it could be inferred that he had any just cause to believe either of the above statements, and it was not improper for the court to treat them as the result of delusions, and instruct the jury upon that question. While we do not approve of instruction 47, it responds to a matter of defense interposed by the accused, and the defendant was not prejudiced thereby. (3) Complaint is also made of the instructions given upon the question of intoxication. We have examined those instructions, and find that they are in form and substance the same as are usually given in such cases and have many times been approved by this court. In considering this question, it is proper for us to say that the record contains no competent evidence of intoxication, and the court could have refused to instruct upon this question at all. In fact the instructions complained of were given solely because of the contentions made by the defendant, and submitted to the jury his attempted defenses of insanity and intoxication. Therefore, if the instructions were erroneous, in any particular, it was error without prejudice.

Many other criticisms are made of the instructions. For example, counsel for the defendant quote the following: "It must appear from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in either count of the indictment." This statement is severely criticised, and it is

stated that there was no intimation that any other person committed the act in question. This statement is incorrect, for we find in the record a letter written by the defendant to the sheriff of Kearney county, while the accused was a fugitive from justice, and which was introduced as a part of his defense, in which he charged that a certain person other than himself (describing him) was guilty of the crime, and that he was pursuing such person with a view of bringing him to justice. The foregoing example is given solely for the purpose of illustrating the fact that many of the defendant's criticisms are without any substantial merit.

6. Defendant further alleges misconduct of the jury, and the bailiff in charge of the jury, after the cause was submitted. It is asserted that the bailiff took the jury to a picture gallery, owned by his wife, and had their photograph taken, and this, it is strenuously contended, entitles the defendant to a new trial. While we do not approve of this transaction, we find that it is nowhere shown that the jury were guilty of any improper conduct; that they communicated with any one, or that any one was permitted to communicate with them on that occasion; and there is nothing in the record to indicate that anything occurred at that time which could in any manner prejudice the defendant's rights.

Complaint is also made because the jury were taken, in a body, to the Methodist church on the Sabbath day for the purpose of Sunday worship; and in support of this assignment counsel direct our attention to the case of *Shaw v. State*, 83 Ga. 92. That was a case where, during the progress of the trial, the bailiff in charge of the jury took them to a prayer-meeting, which was being conducted by the *public prosecutor*. The court said: "When they arrived there, they were shown to their seats by the prosecutor, who provided for them a place apart from the remainder of the congregation, and who led the services and addressed the congregation. Prayers were offered for the court and its officers. How long they remained

there does not appear. For aught that appears in the record the house may have been crowded. One of the grounds of the motion alleges that there was 'shouting' at the meeting. What influence this shouting and religious excitement may have had upon the minds of the jury does not appear. It does not appear that Mr. Hooten, the prosecutor, was not among those who shouted. The jury seeing this going on, and seeing this prosecutor filled with religious zeal and fervor, may have reasoned in their minds, and doubtless did, that this man, who was the active prosecutor of the defendant, who assisted in the selection of themselves as jurors in the case, and who testified before them as a witness, by his conduct and declaration at the prayer-meeting showed that he was a good and upright man, and that such a man would not prosecute the defendant unless he believed him to be guilty. Some of them were perhaps members of his congregation, and looked up to him as their pastor and spiritual guide." It was held that under such circumstances a new trial should have been granted. In the case at bar, however, it is not claimed that the sermon delivered by the pastor on that occasion contained any reference whatever to the defendant, the crime with which he was charged, or to the trial which was then in progress, or that anything occurred which might prejudice the defendant or influence the jury in the slightest degree in arriving at their verdict. We are therefore of opinion that the case cited is so clearly distinguishable from the facts in the case at bar as to present no foundation for the defendant's criticism, and we are not willing to hold that the mere fact that during the progress of the trial, even in a capital case, the jury, accompanied by the bailiff, and properly guarded from outside influences, attended divine worship on the Sabbath day affords cause for setting aside their verdict.

7. It is contended as a seventh ground for a new trial that counsel for the state was guilty of misconduct in his closing argument to the jury. Without quoting the language complained of, it appears that the assistant prosecu-

tor in the closing argument charged counsel for the defendant with trifling with the jury and the court by presenting the defenses of insanity and drunkenness, when they knew, or ought to have known, that there was no merit in them. The language was called to the attention of the trial court and objected to, and the objection was overruled. While counsel may be guilty of such misconduct in argument to the jury as warrants the granting of a new trial, still in the case at bar we are of opinion that the argument was, as held by the court, within the limits of fair and reasonable discussion; and we are of opinion that the evidence by which it was sought to establish those defenses was so slight and trifling as to merit the criticism indulged in by counsel for the prosecution.

8. It is further contended that the court erred in adjourning the trial from Saturday night, May 29, to Tuesday morning, June 1. It appears that May 31 was to be observed as "Decoration Day"; and, instead of holding court on that day, it was treated as a legal holiday, and the trial was adjourned until Tuesday, the day following. It is not suggested in the argument that this could work any prejudice to the defendant's substantial rights, and this criticism of the court as to the manner of conducting the trial is so unwarranted that we would be justified in ignoring it altogether. It certainly affords no ground for a new trial.

9. Finally, it is contended that the verdict is contrary to the evidence. In discussing this assignment of error, the testimony of the witnesses will not be quoted. As above stated, it is not seriously contended that the defendant did not commit the acts complained of. Counsel in their brief, at page 14, say: "As before stated, and as will be more particularly argued, we think, as appears by the evidence, that the jury were justified in so finding, that a horrible act had been committed. That is to say, and we mean exactly what we say, that the jury were justified in finding that the plaintiff in error strangled and choked the said Pearl Taylor, and of such injuries she lingered

and died." It was stated by counsel that the defendant denied that he committed a rape upon Pearl Taylor. Upon this point a careful examination of the evidence satisfies us that the jury were fully justified in determining that question against him. So the only questions left for the determination of the jury were whether or not there was sufficient evidence before them to sustain the defense of insanity or intoxication. Upon these questions we have carefully read the evidence. It appears that Doctor Andrews of Hastings, who it may be conceded is a man eminent in his profession, examined the defendant, for the first and only time, during the progress of the trial, which was more than a year after the crime was committed. He testified that at the time he examined him he found him in a nervous condition, with an accelerated pulse; that his temperature was above the normal; that he had exaggerated reflexes, which to him indicated that the mind and brain were not in their normal condition, and that he found evidences of insanity. To quote his own words, he said: "I find that with the short examination which was made, but upon which no man could make a positive diagnosis, that there are signs of insanity." The doctor, however, refused to testify that the defendant was insane even at the time he examined him, much less would he testify as to the condition of his mind when the crime was committed.

The testimony of Doctor Shields, who was the other witness produced by the counsel for the defendant on the question of insanity, disclosed that he examined the defendant for the first time during the progress of the trial; that he found the defendant's tongue coated and tremulous; that he had exaggerated reflexes, especially of the knee; that there was an increased pulse; that he had an idea that he was being unjustly persecuted, which is a symptom of insanity; that he observed from his actions a tendency to depressive melancholia, which is one of the symptoms of insanity, and is one of its forms. It appears, however, upon his cross-examination, that he was only

with the defendant, the first time, for about 10 minutes; that he examined him again shortly afterwards, and was with him about 15 or 20 minutes; that all of the symptoms he saw might have been the result of other causes than that of insanity; that his increased pulse might have been caused by the trial, which was progressing, and that all of the symptoms which he described could exist without insanity. He was finally asked: "Q. Can you say to this jury whether on the 28th day of April, 1908, this man was in such a mental condition that he did not know the difference between right and wrong with respect to the murder of a human being?" To this question he answered, "I couldn't say so." This is all the evidence introduced by the defendant even tending to establish the defense of insanity.

Upon the question of his intoxication, several witnesses were examined both for the prosecution and the defense. It appears beyond question that before the transaction complained of the defendant drank two, or perhaps three, glasses of beer, during a time extending from about 7 o'clock in the evening up to near midnight; that he played pool with some companions at a pool-hall in the city of Minden; that he told them he was going to leave the following morning, and called them up to drink with him on one occasion, stating that it was probably the last time that they would have a chance to drink at his expense. All of these persons, except one, testified that they observed nothing in his conduct, his walk, his appearance, or his conversation, which would indicate that he was under the influence of intoxicating liquor. One of defendant's companions, a person of the name of Peterson, testified that he played pool with the defendant on the evening in question until about 9 o'clock; that he saw the defendant after the pool-hall closed, which was about 11 o'clock that night; that he thought he was a little bit under the influence of liquor. It is not claimed that Peterson saw the defendant drink any intoxicating liquor, and it appears that his belief was founded on the fact that

he had been able to beat the defendant while playing pool, and that he had theretofore thought the defendant was a better player than he was. His testimony was: "Q. You thought, you say, that he was somewhat under the influence of liquor? A. Yes, sir; I kind of thought he was. Q. To what extent would you say? A. I didn't hardly know; I thought he had been drinking a little. Q. How did it manifest itself to you? A. I thought I could tell from his appearance—his countenance and eyes. Q. And his face? A. Yes, sir. Q. Could you tell it in any other way? A. I didn't notice it." This being all of the evidence tending to show that the defendant was intoxicated, and all the other persons who saw him and conversed with him on that evening, up to within an hour of the commission of the crime, having testified positively that he exhibited no signs of intoxication whatever, it seems clear that the jury were justified in finding against him on that question.

Before concluding this opinion, we desire to say that in consultation it was suggested that the record fails to show that the district court, in pronouncing the sentence in this case, informed the defendant that a verdict of guilty had been found against him, and for that reason the judgment rendered upon the verdict should be set aside, and the court asked to comply with that statutory requirement and thereafter resentence the defendant. It appears, however, that defendant failed to mention that matter either in his original motion for a new trial or in his motion, as amended, after sentence was pronounced against him, and we therefore conclude that the court did, as a matter of fact, strictly comply with all the requirements of the statute, or that the defendant and his counsel elected to waive the omission, if it actually occurred. In *Bond v. State,* 23 Ohio St. 349, the supreme court of Ohio said: "Where the record does not show that the court, before passing sentence upon the defendant, informed him of the fact that a verdict of guilty had been found against him, as required by the criminal code

(66 Ohio L. 313, sec. 169), in the absence of a bill of exceptions showing the contrary, the fact that such information was so given will be presumed." Our criminal code on this point is a copy of the Ohio statute, and the decision of the court of last resort in that state in disposing of this question may safely be followed by us. We have not overlooked the cases of *McCormick v. State,* 66 Neb. 337, and *Evers v. State,* 84 Neb. 708, and it is not our intention to criticise or overrule them, but we have concluded, because of the purely technical nature of this provision, to require the defendant to raise that question by motion for a new trial or otherwise, and thus enable the district court to correct such omission, if it really exists, and literally comply with this formal and perfunctory requirement of the statute. If that is not done, it should be presumed that this formal provision of the statute has been observed.

A careful examination of the entire record leads us to the conclusion that the jury could not have acquitted the defendant on any theory of the case, and that the only debatable question for them to consider was whether defendant's punishment should be death or imprisonment for life.

Finding no reversible error in the record, the judgment of the district court is affirmed, and Friday, the 28th day of October, A. D. 1910, is hereby fixed for carrying into execution the judgment of the district court.

AFFIRMED.

REESE, C. J., dissenting.

Instructions numbered 46 and 47 are taken from Good and Corcoran, Nebraska Instructions to Juries, pp. 249, 250. They are here copied: No. 46, "You are instructed that it is not every delusion that can be considered as an insane delusion and which would exempt a person from punishment; that if a person labors under a delusion regarding some particular subject or person only and is not in other respects insane he is considered in law in

the same situation as to responsibility as if the facts with respect to which the delusion exists were real. If under the influence of his delusion a person supposes another man to be in the act of taking his life and kills the man as he supposes in self-defense, he would be exempt from punishment; but if his delusion was that deceased had done a serious injury to his property or business and he kill him in revenge for such supposed injury, having at the time a degree of reason sufficient to control his actions and judgment and being able to distinguish between right and wrong with respect to the act charged, he would yet be liable to punishment notwithstanding such delusion might exist, because, if real, it would not justify the taking of human life." No. 47: "Something has been said in these instructions about insane delusions. It is not every delusion that can be considered as an insane delusion. The delusion must be of such a character that if things were as the delusion imagined them to be, they would justify the act springing from the delusion. To illustrate: If a person be under the insane delusion that he is the Almighty himself, or is directly commissioned or commanded by the Almighty himself to shoot a particular person that the Almighty has decided must be shot, and he is moved by such delusion alone to the shooting, that would be an insane delusion, because if true would justify the shooting. But if a person be under the delusion that some man has done him a mean trick and that he ought to be shot for it, and the delusion moves the person to shoot the man, that is no excuse on the ground of insane delusion, because if the fact had really been that the man had done the person a mean trick just imagined, it would not justify the shooting. An insane delusion is like a waking dream. The subject can neither be reasoned into it nor out of it. It may throw some light on the application of the subject to this case to consider whether a conviction in this case would have a tendency to prevent a repetition of such acts." The former was given in *Walker v. State,* 46 Neb. 25; the

latter is from *Thurman v. State*, 32 Neb. 224. I copy both for the reason, in part, that, in my opinion, the courts should refrain from copying instructions blindly from the books on instructions, without reference to repetitions. The whole of the two instructions applicable to this case could have been condensed into one intelligible instruction and thus made to apply to the facts of the case as reflected by the evidence. My particular criticism is as to the closing portion of No. 47: "An insane delusion is like a waking dream." Indulging in the presumption of the high intelligence of jurors with which they should be credited, we conclude they fully understood the purport of this language, yet it is difficult for the writer to comprehend its meaning. However, we cannot say plaintiff in error was prejudiced by the comparison. The instruction continues: "The subject can neither be reasoned into it nor out of it. It may throw some light on the application of the subject to this case to consider whether a conviction in this case would have a tendency to prevent a repetition of such acts." It is true that the whole portion of the instruction above quoted was given in *Thurman v. State, supra*, but what was that case? Thurman was prosecuted for shooting Parker with intent to kill. Upon final conviction he was sentenced to the penitentiary for the term of three years. Chief Justice COBB, in discussing this part of the instruction, at page 229, says: "It was an abstract proposition in moral economy to be considered by the jury, in its relation to the prisoner, and in his relation to the public, and we see no prejudicial error in the proposition. It, at least, is suggestive of doubt as to the propriety of conviction." Preceding this language the chief justice said: "However weak that evidence as to insanity and delusion might be, would his conviction, under the circumstances, tend to prevent a repetition of such acts?" In this language it is clearly held that the instruction suggested that "in his relation to the public" the conviction of the accused might prevent a repetition of the crime, by him, of which

he was charged. The case was not a capital one. Parker was not killed. Was the mental condition of Thurman such that a punishment for the shooting could or would deter him from the commission of similar offenses, a "repetition"? Viewed in that light, a strong hint was given to the jury that they might "consider whether a conviction in this case would have a tendency to prevent a repetition of such acts" by the accused. They evidently "saw the point." His conviction would probably have that effect. Under the circumstances of this case, the instruction may not have been to the prejudice of the accused, but that the language quoted from an instruction in a dissimilar case was useless, if not worse than useless, cannot be doubted.

As I take it, the construction given section 3 of the criminal code by the cases of *Morgan v. State,* 51 Neb. 672, and *Rhea v. State,* 63 Neb. 461, and followed in this case, will cause that section to read: If any person shall in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, every person so offending shall be deemed guilty of murder in the first degree. By this construction all idea of purpose or intent to kill and all idea of deliberate and premeditated malice are effectually eliminated. Let us illustrate: By the section defining arson, the burning of any building of the value of $50, or containing property of the value of $50, or the burning of any bridge or water craft of the value of $50, wilfully and maliciously, is declared to be arson. A building may be of the value of $5, yet if it has property within it of the value of $50 the crime is the same. For these offenses the penalty may be imprisonment in the penitentiary from one to twenty years; yet, if in the *attempt* to burn such building, criminally, the accused, with no intention to injure any one personally, by accident or otherwise, "kill another", he is guilty of murder in the first degree, and, by law, may suffer the

penalty of death. By the same rule, if death is caused by "administering poison, or causing the same to be done", with no intent or purpose to kill, but death ensue, the person administering the poison or causing it to be done is guilty of murder in the first degree and may be caused to meet a similar fate. Other illustrations are suggested by the provisions of the statutes, but this is deemed sufficient to demonstrate the barbarous character of the rule announced. I need say no more upon this subject than to refer to the dissenting opinion by Judge SEDGWICK in *Rhea v. State*, 64 Neb. 889, which is, to my mind, a correct statement of the law.

SEDGWICK, J., I concur in the foregoing dissent.

PETER JOHNSON, APPELLEE, V. J. M. LEIDY, APPELLANT.

FILED MAY 20, 1910. No. 16,510.

1. **Intoxicating Liquors: "LICENSE YEAR."** The mayor and council of metropolitan cities may, for the purpose of licensing and regulating the sale of intoxicating liquors, declare the municipal or license year to be the same as, and coextensive with, the fiscal year fixed by the terms of the city charter; and the board of fire and police commisioners of such city may grant a license therefor commencing on the 1st day of January and terminating on the 31st day of December of the current year.
2. **Case Distinguished.** *Reusch v. City of Lincoln*, 78 Neb. 828, distinguished.

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

L. D. Holmes and *Elmer E. Thomas*, for appellant.

John P. Breen, contra.

BARNES, J.

Peter Johnson applied to the board of fire and police commissioners of the city of Omaha for a license to sell

malt, spirituous and vinous liquors from the 1st day of January, 1910, to the 1st day of January, 1911. The board granted the prayer of his petition and issued to him a license ending on the 31st day of December, 1910. One J. M. Leidy protested against the issuance of this license, and appealed from the order of the board. The district court for Douglas county affirmed the order, and from that judgment the protestant has appealed to this court.

Appellant contends that the district court erred in affirming the order of the board, and argues that the board of fire and police commissioners of the city of Omaha cannot issue a license extending beyond the municipal year; that the municipal year of that city extends from the third Monday in May in each year to the third Monday in May of the succeeding year; that the license in question in this case, which was issued on the 1st day of January, 1910, was void because it extended beyond the third Monday in May of that year. This is the only question presented for our determination. To support his contention appellant cites *Reusch v. City of Lincoln*, 78 Neb. 828. In that case we had occasion to determine what constituted the municipal year in the city of Lincoln, and it was held, for reasons therein stated, that the municipal year in that city commenced on the 3d Tuesday in May of each year and ended on the Monday preceding that date in the following year; but it does not follow that the municipal year in metropolitan cities is the same as in cities of the first class. It appears that, when our present liquor law took effect the charter of the city of Lincoln provided for annual elections. For that reason, and in order to comply with the spirit of the act, the mayor and council of that city determined that the so-called municipal or political year should commence when the newly elected officers entered upon the performance of their official duties. That rule has been continued to the present time, and was approved in *Reusch v. City of Lincoln, supra*. It further appears that, when chapter

50 of the Compiled Statutes was enacted, the charter of the city of Omaha provided for biennial elections, and the fiscal year in that city was fixed by law as commencing on the 1st day of January of each year and ending on the 31st day of December following. In compliance with the provisions of that chapter, the mayor and council of that city determined that the municipal or political year, in other words, the license year, should be considered the same as the fiscal year, and that rule has been observed by the city authorities from that time to the present. We find that the charter of the city of Omaha contains no reference to a municipal year; the law relating to the license and sale of intoxicating liquors nowhere defines the term municipal year, and it is therefore incumbent upon us to ascertain, if possible, what should be considered the municipal year for that purpose in the city of Omaha.

Section 100, ch. 12*a*, Comp. St. 1909, which constitutes the charter of metropolitan cities in this state, provides that the city comptroller of such cities shall prepare, and cause to be published, in pamphlet form, a statement of the receipts and expenditures of the city during the fiscal year, commencing January 1, and terminating December 31, annually. Section 101, among other things, provides that during the month of December of each year the mayor and city council shall prepare or cause to be prepared a list of all supplies required for each office and department or board for the ensuing year. It further appears that the mayor and council in the month of December of each year are required to make an estimate of the expenses necessary to properly conduct the city government for the ensuing fiscal year; that at their meeting in January city taxes are levied for all purposes in compliance with the estimate so made. It is therefore evident that the fiscal year for the city of Omaha begins on the 1st day of January and ends on the 31st day of December of each year, and for convenience, and in order to facili-

tate its business, the mayor and council adopted the fiscal year as their license or municipal year.

Again, in view of the fact that the board of fire and police commissioners of the city of Omaha were formerly appointed by the governor, it is clear that the policy of the city government in relation to license and sale of intoxicating liquor has never been determined by the election of an excise board. It is also apparent that at the present time, by the election of the board of fire and police commissioners for the period or term of three years, the policy of the government of that city in relation to the license and sale of intoxicating liquors is now determined at each triennial election, with no opportunity for the voters to express themselves in favor of a change of such policy during that time. We can therefore see no reason for abrogating the rule above mentioned.

It appears that the present board of fire and police commissioners of the city of Omaha were elected on the first Tuesday in May, 1909, and their term of office will not expire until May, 1912. The license in question in this case was issued on January 1, 1910, and expires December 31 of that year, so there can be no change of policy in relation to the license and sale of intoxicating liquors during the life of this license. It is contended, however, that, if January 1 is held to be the commencement of the license year, the present board on the 1st day of January, 1912, may issue a license which will extend beyond their term of office, and that by issuing such a license they may determine the policy of the city of Omaha or their successors in office in relation to the license and sale of intoxicating liquors for more than six months beyond the expiration of their official term, and that the license in question is therefore void. As above stated, that question is not involved in this controversy, and may never arise, for it is possible that, before the expiration of the term of office of the present board, state wide prohibition or county option will have been adopted.

We therefore decline to express any opinion as to the validity of a license which may be issued on the 1st day of January, 1912, and extend beyond the time of the expiration of the official life of the present board of fire and police commissioners.

Finally, we are of opinion that it was within the power of the mayor and council of the city of Omaha to declare the municipal year to be co-extensive with the fiscal year designated in the city charter, and this rule is not in conflict with the provisions of sec. 25, ch. 50, Comp. St. 1909, which provides that the corporate authorities of cities and villages shall not have power to issue a license which extends beyond the municipal year in which it shall be granted.

For the foregoing reasons, the judgment of the district court was right, and it is therefore

AFFIRMED.

WILLIAM BRUSHA, APPELLANT, V. MAMIE PHIPPS, APPELLEE.

FILED MAY 20, 1910. No. 16,052.

1. **Executors and Administrators**: SALE OF LAND: CONFIRMATION: NOTICE. An administrator's sale of real estate under license to pay debts may be confirmed by the district judge in vacation at chambers without 10 days' notice, under section 498 of the code, being given.

2. ———: ———: PROCEEDINGS IN REM. Such proceedings are of the nature of proceedings *in rem*, and are not actions governed by the provisions of the code.

3. ———: ———: HOMESTEAD: EVIDENCE. Real estate consisting of a house and part of certain lots in an incorporated city was purchased by a widow, whose only child was an adult married son living in another state. She lived in the house and rented rooms, had no one living with her as a member of her family, and there was no one under her care and maintenance. After her death the son claimed the property as the homestead of his

mother as against a purchaser at an administrator's sale to pay debts of her estate. *Held*, That the property was not exempt under section 2, ch. 36, Comp. St. 1909 (Ann. St. 1909, sec. 6276), and section 15, ch. 36, Comp. St. 1909 (Ann. St. 1909, sec. 6289).

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

John C. Watson, for appellant.

Pitzer & Hayward, contra.

LETTON, J.

This is an appeal from a decree refusing relief to the plaintiff in an action to quiet the title to certain premises in Nebraska City.

In 1872 Nancy Brusha, with her husband and son, lived in Phelps City, Missouri. The husband died that year, and from that time until 1889 she and her son, William Brusha, the plaintiff in this action, lived together. In 1889 the son married, and moved to Ong, Nebraska, where she lived with him until October of that year, when she removed to Nebraska City, and lived there until her death, with the exception of a few months' absence at different times for the benefit of her health. She had lived in a rented house until August, 1895, when she purchased the property in controversy. In 1890 her son left Nebraska, she never saw him afterwards, and for years before her death he had not communicated with her. From the time she bought the property, until about three or four years before her death, Mrs. Brusha lived in the house, and rented rooms, but, her health failing, she became unable to take care of the property, and therefore removed to a steam-heated apartment building in the city, where she was living at the time of her last illness. She died intestate, and the plaintiff is her only heir.

Upon the settlement of her estate claims were allowed in excess of the value of her personal property, and the

administrator of her estate applied to the district court for a license to sell real estate to pay the debts. A license was granted, and the property in controversy sold to Mamie Phipps at administrator's sale. The sale was confirmed, and an administrator's deed executed on September 21, 1907, under which Mrs. Phipps took and now holds possession. On the 9th of November, 1907, William Brusha began this action for the purpose of quieting his title to this property, alleging that it was the homestead of his mother, Nancy Brusha, at the time of her death.

A number of other issues were presented by the pleadings, but at the trial the issue was narrowed to the question as to whether the property constituted the homestead of the deceased at the time of her death, and hence, this is the only matter requiring consideration in this court. Much of the evidence taken was as to whether when Mrs. Brusha left the house some years before her death she had the intention of returning there to live, or whether she had abandoned it as her home; but, in the view we take of the law governing the case, it is unnecessary to consider this point. When Mrs. Brusha bought the property she was a widow, with an adult son, the plaintiff, who was then living in Arizona, and who was himself the head of a family consisting of a wife and children. She had no one dependent upon her, and no one ever lived there with her as a member of her family. Since she was not married, in order to entitle her to the homestead exemption, she must have been, as provided by section 2, ch. 36, Comp. St. 1909 (Ann. St. sec. 6276), "the head of a family, within the meaning of section 15." Section 15, ch. 36, Comp. St. 1909 (Ann. St. 6289), is as follows: "The phrase 'head of a family', as used in this chapter, includes within its meanings: *First.* The husband, when the claimant is a married person. *Second.* Every person who has resided on the premises with him or her, and under his care and maintenance, either: (1) His or her minor child, or the minor child of his or her deceased wife or husband. (2) A minor brother or sister,

or the minor child of a deceased brother or sister. (3) A father, mother, grandfather or grandmother. (4) The father or mother, grandfather or grandmother of a deceased husband or wife. (5) An unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." Mrs. Brusha falls within neither of these divisions. She was not married, and was not the head of a family, and therefore was not entitled to claim the property as a homestead. It was not exempt from sale by the administrator of her estate for the purpose of paying debts. *Emerson v. Leonard,* 96 Ia. 311; *Holnback v. Wilson,* 159 Ill. 148; *Walker v. Thomason,* 77 Ga. 682; *Betts v. Mills,* 8 Okla. 351.

This disposes of most of the points made in plaintiff's brief, except the contention that the confirmation is void because it was made at chambers in vacation without 10 days' notice to the adverse party. The plaintiff relies on the case of *Armstrong v. Middlestadt,* 22 Neb. 711, which holds that a judge has no authority to confirm a sale in chambers in vacation, unless 10 days' notice has been given to the adverse party or his attorney of record. The sale in that case was made under a decree of foreclosure of tax liens in a proceeding in which there was an adverse party, notice to whom, under section 498 of the code, was essential to jurisdiction. The sale in this case, however, was made in pursuance of a special power conferred by the statutes relating to the sale of real estate by executors and administrators for the purpose of paying debts of the deceased. *Poessnecker v. Entenmann,* 64 Neb. 409; *Birby v. Jewell,* 72 Neb. 755. While the language of the syllabus is general in the case relied upon, it must be held to apply to "all cases" of sales under code provisions, and not to sales made under different statutory powers. A similar question was presented in *Stewart v. Daggy,* 13 Neb. 290, with respect to the authority of a judge of the district court to grant a license at chambers to a guardian to sell the real estate of his

ward. It is pointed out in the opinion by Judge MAXWELL that the power to sell property by guardians and administrators was, in territorial days, exercised by the probate court of the proper county, but that by the constitutions of 1866 and 1875 this power was taken from the probate court and conferred upon the district court. It was held that, "in granting a license, the duties of a judge of the district court are precisely the same as those of a judge of the probate court were under the territorial laws." See, also, opinion of court, and dissenting opinion of Judge MAXWELL, in *Slack v. Royce,* 34 Neb. 833, 846. The same reasoning applies to sections 87 and 88, ch. 23, Comp. St. 1909 (Ann. St. 1909, secs. 4961, 4962), which provide for the return of the license and the confirmation of the sale by the district judge. Section 87 provides: "The executor or administrator making any sale shall *immediately* make a return of his proceedings upon the order of sale in pursuance of which it is made to the judge of the district court granting the same," etc. Section 88: "If it shall appear to the district judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum than above specified cannot be obtained, he shall make an order confirming such sale, and directing conveyances to be executed." By section 57, ch. 19, Comp. St. 1909 (Ann. St. 1099, sec. 4751), a judge of the district court at chambers is authorized: "(5) To discharge such other duties or exercise such other powers as may be conferred upon a judge in contradistinction to a court." We have heretofore held that in a proceeding by an administrator to sell real estate of his decedent for the purpose of paying debts there are, strictly speaking, no adverse parties. The proceeding is of the nature of an action *in rem. McClay v. Foxworthy,* 18 Neb. 295; *Schroeder v. Wilcox,* 39 Neb. 136. This being the case, and the provisions of the statutes relating to sales by administrators for the payment of debts having been followed, no notice to the

plaintiff was necessary in order to confer jurisdiction upon the judge of the district court to confirm the sale in chambers, and the sale and confirmation were valid and effectual to pass the title.

The judgment of the district court, therefore, is

AFFIRMED.

JOHN A. STOREY V. ANDREW MILES ET AL.; MARY E. GAVIN ET AL., APPELLEES; SARAH W. PALM, APPELLANT.

FILED MAY 20, 1910. No. 16,412.

Tax Liens: FORECLOSURE: ORDER OF SALE. In an action to foreclose a tax lien the owner of a junior lien was made a party and found to have a second lien on the premises. The property was sold under the decree, the sale confirmed, and a deed delivered to the purchaser, but the proceeds were not sufficient to pay any part of the second lien. The purchaser, two years afterwards, conveyed the property to her mother, who was the mortgagor. Subsequently the clerk of the district court, at the request of the holder of the second lien, and without an order of court, issued an order directing another sale of the property to satisfy the second lien. *Held*, (1) That, under the facts proved, the order of the district court recalling the order of sale was warranted; (2) that the second order of sale was issued by the clerk without authority.

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

Charles Battelle, for appellant.

W. S. Shoemaker, contra.

LETTON, J.

This action was originally brought to foreclose certain tax liens on a number of tracts of real estate in Omaha, among which were lots 5, 6 and 7, block 20, Walnut Hill addition, the title to which was in the name of Mary E. Gavin and Patrick A. Gavin.

Sarah W. Palm, who was the owner of a decree foreclosing a first mortgage upon said real estate, was made a party defendant. She filed an answer and cross-petition, alleging ownership of the property in fee in the Gavins, the foreclosure of her mortgage, and that the decree was unpaid. At the hearing a decree was rendered awarding the plaintiff a first lien upon the premises for taxes in the sum of $138, with interest and costs, and awarding Mrs. Palm a second lien. On April 11, 1903, an order of sale was issued. The return to this order shows that on June 2, 1903, the property was offered for sale, but was not sold for want of bidders, and that on August 11, 1903, it was again offered for sale and sold to Ellen Gavin for the sum of $221. A motion to confirm the sale was filed. Sarah W. Palm then filed a motion to set aside the appraisement and sale, and also objecting to the confirmation. Evidence was taken upon this motion, but it was overruled, and the sale confirmed. On the 26th of April, 1904, the deed was executed by the sheriff and delivered to Ellen Gavin as ordered.

On March 23, 1909, Sarah W. Palm filed a precipe with the clerk of the district court for an order of sale to issue directing the sheriff to sell the property to satisfy the lien in her favor, and the clerk issued such order. Mary E. Gavin then filed a motion praying the court to direct the clerk to recall this order of sale, setting forth the facts as to sale and confirmation; that a deed had been issued to Ellen Gavin, who for a good and sufficient consideration had sold and conveyed the property to Mary E. Gavin; and that the order of sale was issued by the clerk without authority. A hearing was had, the motion sustained, and the sheriff directed to return the order of sale, and not to offer the property for sale. The appeal of Sarah W. Palm from this order is now before us for consideration.

The bill of exceptions is brief. In an affidavit Ellen Gavin deposes that she is 25 years of age, a single woman, and a school teacher by profession; that she attended the

sale under the tax foreclosure decree, and purchased the property in controversy for the sum of $221; that Charles Battelle, representing Sarah W. Palm, was present at the sale, offered no bids, and made no objections to the sale; that she bought the property for herself, and for no other person; that she paid for it with money that belonged to her in her individual right; and that on the 10th day of November, 1906, for good and sufficient consideration she sold the property to her mother, Mary E. Gavin, and executed a deed therefor, which is recorded in the deed records of Douglas county. The parties then stipulated that the only deeds of conveyance covering the property since the making of the mortgage are the sheriff's deed to Ellen Gavin and the deed from Ellen Gavin to Mary E. Gavin; that, at the time of the commencement of the suit by John A. Storey, Ellen Gavin resided with her parents upon the property, and has since resided with them thereon, with the exception of a temporary removal to another place in the city, with the expectation of returning there in a very short time.

The appellant's argument is short, and can be best stated in his own words: "The tax liens foreclosed in this case were the liens created by the default of the defendants, the mortgagors. It was their duty to pay the taxes, and all they accomplished was the payment of these taxes. After the entry of the decree, these defendants, the Gavins, could have paid the amount of Judge Storey's lien to the clerk of the district court and redeemed the same. Such payment should not in any way affect that part of the decree allowing the appellant a lien. The effect of what the Gavins did was to pay the taxes, and left it undisturbed as to the lien allowed appellant." In support of this argument he cites *Gibson v. Sexson*, 82 Neb. 475; *Toliver v. Stephenson*, 83 Neb. 747, and *Pitman v. Boner*, 81 Neb. 736. *Toliver v. Stephenson* was an action to foreclose a real estate mortgage. The grantee of the mortgagor had bought in the property at a tax foreclosure sale, in which action both mortgagor

and mortgagee were made parties. At the time the land was bid in, the purchaser was the owner of the fee title, and the court held that, under the ruling in *Pitman v. Boner* and *Gibson v. Sexson,* the payment of the amount bid was simply a payment of the taxes due; that his purchase at the sheriff's sale was nothing more or less than a redemption, and that the holder of the mortgage was entitled to a decree of foreclosure. *Pitman v. Boner, supra,* was similar in its facts. The syllabus is: "Where a mortgagor owes a duty to the mortgagee to pay taxes upon the mortgaged property, neither he nor his assigns can acquire any right against such mortgage by purchasing the property at a judicial or administrative sale for taxes which such mortgagor ought to have paid." In *Gibson v. Sexson, supra,* it was alleged and the evidence showed that the mortgagor Sexson conveyed the premises to his brother-in-law Hill, with the design of having the lien of the mortgage discharged and divested without payment of the mortgage, and that in pursuance of such design Hill purchased a tax sale certificate, foreclosed the tax lien, purchased the land at the foreclosure sale, and two months later conveyed it to Sexson for a consideration of $2, and that during all of the time Sexson was owner and in possession of the land; that Sexson entered a personal appearance, but filed no answer, and made no defense to Hill's foreclosure proceeding. It was held that the duty rested upon Hill and Sexson to pay the taxes; that the tax foreclosure proceeding was a device by them to defeat the plaintiff's mortgage, and that consequently Hill's purchase was simply a payment of the taxes, and the sheriff's deed nothing more than a receipt for the same.

In this case, however, there is no finding by the court of any fraud or collusion upon the part of Ellen Gavin and Mary E. Gavin, and there is no evidence in the record to sustain such a finding. It is true that the grantee of a mortgagor is as much under a duty to pay taxes as his grantor, but this is by reason of the privity existing between them. There is no privity shown to have existed

between Ellen Gavin and her mother when the property was bought, and, while there may be some presumption of a concert of action from their relationship, it is rebutted by the proof. If Ellen Gavin became the true and *bona fide* owner of the property in her own right by her purchase, she might sell to whom she pleased. The distinction is clear between the facts in this case and in the cases cited. The principle of the former cases is sound, but it is not applicable here.

It may be said here that the practice followed was improper. If it was desired to reinstate the decree as to the lien of Sarah W. Palm, the application should have been made to the court upon proper notice to the adverse parties, and not to the clerk. The decree upon its face was satisfied by the sale of the property. The return of the order of sale and the confirmation of the sale ended the clerk's authority to issue an order for the sale of this property without an order from the court.

The order appealed from directing the recall of the second order was clearly right, and is

AFFIRMED.

GROVE-WHARTON CONSTRUCTION COMPANY, APPELLEE, V. ADELAIDE W. CLARKE ET AL., APPELLANTS.

FILED MAY 20, 1910. No. 16,034.

1. **Mechanics' Liens:** SEPARATE CONTRACTS. Where material has been furnished and labor performed for the construction of a building under distinct contracts between a contractor and the owner of said structure, one claim for a lien for the amount due upon the several contracts may lawfully be filed if material was furnished or labor performed under all of the contracts within four months of the date the claim was filed.

2. ———: PERFORMANCE OF CONTRACT. In an action to foreclose a mechanic's lien for labor performed upon and material furnished for a building, proof that there was a trifling failure to perform the contract will not defeat the action, where it appears that the lienor substantially performed his contract.

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

W. W. Slabaugh, for appellants.

John C. Wharton and *Byron G. Burbank, contra.*

ROOT, J.

This is an action to foreclose a mechanic's lien. The plaintiff prevailed, and the owner of the lots involved appeals.

1. The defendant insists that the district court erred in foreclosing three distinct contracts included in one claim for a lien. The evidence shows that the plaintiff agreed with the defendant to furnish lumber for the house thereafter constructed; subsequently a distinct contract was made between the parties for mill work to finish said building; and finally a third contract was made between them with reference to painting said structure. All of the contracts were oral, and were referred to in one verified claim for a lien filed in the office of the register of deeds. We have held that separate contracts for labor performed or material furnished in constructing or repairing a building upon or appurtenances to real estate may not be tacked so that material furnished or labor performed under a subsequent contract may be considered for the purpose of extending the time within which the claim under the prior contract may be filed. *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb. 207; *Hansen v. Kinney,* 46 Neb. 207. But we have never decided that one claim filed within the time provided by law for the first contract will not sustain a mechanic's lien for several contracts with reference to one building or other improvement. The general statements in the syllabus of *Nye & Schneider Co. v. Berger,* 52 Neb. 758, should be considered in connection with the facts referred to in the opinion. In that case material had been furnished under separate contracts for the construction and

improvement of a building. The claim for a lien had been filed too late to sustain the earlier contract, unless work performed and material furnished under the later contract gave validity to the claim for all material furnished. We held the claim had been filed too late to continue a lien for the contract that had been performed more than four months before that claim was filed. In *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685, a single lien for services rendered under five distinct contracts was foreclosed. In that case the claim was filed within four months of the date the last services under the first contract were rendered. *Kinney v. Duluth Ore Co.,* 58 Minn. 455. The point of law urged by the defendant is not well taken.

2. The defendant further contends that none of the material furnished under the contract for lumber was delivered within four months of September 30, 1907, the date the claim for a lien was filed. The evidence demonstrates that the plaintiff delivered to the defendant, under the contract, lumber on May 31, June 3, and June 17, 1907. There is some contention that the material furnished in June was extra lumber not included in the original contract, and should not be considered for the purpose of upholding a lien for lumber. Whatever may be the fact concerning the June deliveries, we are satisfied that the flooring delivered May 31, 1907, is described in and was delivered pursuant to the contract first entered into between the parties hereto. We therefore hold that the verified account was filed in time.

3. The defendant contends that part of the material charged against her by the plaintiff was not furnished, but the record does not bear out the assertion. Mr. Grove, the plaintiff's president and manager, testifies positively that all of the material thus charged was furnished the defendant, and there is considerable evidence in the record tending to corroborate that testimony. It also appears from a consideration of the evidence that the plaintiff

and the defendant, after the house was constructed, agreed upon the items of material furnished under the first contract, and the amount unpaid therefor. We find nothing in the record to justify setting aside the findings of the district court in this particular. The proof concerning the mill work also supports the decree.

4. Some complaint is made by the defendant that the plaintiff furnished inferior material for and did not properly paint the house subjected to the lien foreclosed herein. We do not think the evidence preponderates in defendant's favor upon this subject, but, on the contrary, establishes a substantial performance by plaintiff of its contracts with the defendant. Furthermore, the answer is a general denial. The defendant's evidence, uncontradicted, will not support a finding that any definite sum should be deducted because of the alleged failure of the plaintiff to perform its contract in every detail. In this situation, the case is ruled by *Hahn v. Bonacum*, 76 Neb. 837, and the plaintiff is entitled to a foreclosure of its lien.

The judgment of the district court is right, and is

AFFIRMED

PIERSON D. SMITH, APPELLEE, V. J. L. NOFSINGER ET AL., APPELLANTS.

FILED MAY 20, 1910. No. 16,053.

1. **Highways: PRESCRIPTION.** To establish a highway by user, the general public must have traveled a definite path or way without substantial change, uninterruptedly for ten consecutive years, under a claim of right adverse to the owner of the fee.

2. ———: ———. If the owner permits the public to travel the way, or during the ten years interrupts such use and excludes the public therefrom, or travel is substantially and permanently diverted from one locality to another, the user will not ripen into an absolute easement in favor of the public.

3. Appeal: EQUITY: JURISDICTION. Where the defendant without objection joins issue in an equitable action prosecuted to enjoin him from trespassing upon the plaintiff's land, and prays for affirmative equitable relief with relation to the subject matter of the controversy, he will not be heard on appeal to question the jurisdiction of the court to hear the action in equity.

APPEAL from the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed.*

A. M. Post and *A. E. Garten,* for appellants.

H. C. Vail, contra.

ROOT, J.

This is an action in equity to enjoin the defendant from trespassing upon the plaintiff's land and for general equitable relief. The plaintiff prevailed, and the defendants appeal.

1. The record discloses that plaintiff since 1871 has controlled, and since 1898 has owned, the northeast quarter of section 19, township 19, range 6 west, in Boone county. The defendant, J. L. Nofsinger, owns the south half of the northwest quarter of section 20 in said town and range, and for many years has rented the northwest quarter of section 19. There is a public road on all sides of said section, and one north and south through the center thereof. Some time prior to 1884 a public schoolhouse was built in the southeast corner of the northwest quarter of the section. Since the construction of said building, children and adults residing east and southeast of that point, in going to and from the school-house, have traveled over the plaintiff's land; the defendant during about the same period, in going to his landlord's premises and returning therefrom, has traveled across said land, and other persons occasionally have crossed said premises. In 1894 the plaintiff broke the raw prairie in said quarter section, and thereafter has cultivated the soil, except in and along Plum creek, which runs diago-

nally through said farm. The testimony is somewhat conflicting, but we are convinced that before the prairie sod was broken in 1894 travel across the plaintiff's land was not confined to any particular path, and there was absolutely nothing in the circumstances connected with that use to suggest to the plaintiff that the public claimed any right of way over his land. Since 1894 the greater part of the path traveled by the public during the fall and winter has been plowed in the spring, and small grain or corn planted thereon. During the spring and summer seasons the defendants and other persons have followed the turning row where corn was planted, and at times have driven over the small grain. Travel at all times has been light, and until 1902 did not follow a definite and consistent path. At some points the path crossed the half section line, and for a space was upon the southeast quarter of said section. Only at the point where the way entered the plaintiff's land near the southeast and southwest corners thereof, and where it has followed a certain curve of Plum creek, has the path remained unchanged and certain for more than ten years before this action was commenced. In 1902 and 1903 the owner of the southeast quarter of section 19 built a fence along the north line of his land, and thereby closed up parts of the old way. The public then sought and traveled a path or paths exclusively upon the plaintiff's land. In 1908, when the plaintiff first learned that the defendants asserted a right for themselves and on behalf of the public to cross said land, he acted promptly, notified them not to further trespass upon his property; and, when they insisted upon a right to travel across his land, commenced this action. The evidence to our minds is not sufficient to sustain a finding that the defendants or the public, for ten years next before the commencement of this action, have asserted a right to travel a definite path over and across the plaintiff's land, but that whatever use has been made of that land has been permissive. No one has ever resided upon the plaintiff's land, it is not inclosed,

and has been farmed since 1894 by tenants or men in the plaintiff's employ. The proof is undisputed that those tenants and employees were instructed by the plaintiff to plow and till the land to the dividing line between the quarter sections, and the preponderance of the evidence is to the effect that these directions were carried out. In 1904 and 1905 J. L. Nofsinger offered to pay the plaintiff's employee if the latter would not obstruct said road. The public authorities have never worked this road or any part of it, but, so far as we are advised, have refused to recognize it as a public road, although importuned by the defendants and other interested individuals to assume jurisdiction over it and to intervene in the instant case and assert a right on behalf of the public. There is no claim or pretense that the plaintiff has been paid for any land included within the right of way contended for by the defendants, or that he has dedicated it to the public. Mere willingness to accommodate school children, a neighbor, or the public ought not to be made the basis for a decree wresting from the individual his property rights. The mere fact that a path has been traveled by the public for ten or more consecutive years does not necessarily prove that such use has been adverse to the owner of the fee. It is a circumstance to be given more or less weight according to the other facts and circumstances testified to by the witnesses or established by the other evidence.

In *Graham v. Hartnett,* 10 Neb. 517, we held that mere user by the public of a way over wild, uninclosed land, or the construction of a bridge in the line of that way by the authorities without the knowledge or consent of the owner of the fee, would not set the statute of limitations running against him. These were the only points involved in that case. Subsequently the effect of user by the public in connection with a defective attempt by the public authorities to locate a highway, or in conjunction with positive acts or declarations by the owner indicative of an intent to dedicate his land to public use, has been considered by this court in numerous cases. In *Engle v.*

Hunt, 50 Neb. 358, we stated in the second paragraph of the syllabus: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." In that case the law is stated in the affirmative, but the application to the facts is negative. The rule was applied to defeat an asserted highway in *Bleck v. Keller*, 73 Neb. 826, and in *Nelson v. Sneed*, 76 Neb. 201. In *Lewis v. City of Lincoln*, 55 Neb. 1, we stated in the second paragraph of the syllabus: "To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land."

Counsel for the defendants argue that the district court felt bound by the law announced in *Lewis v. City of Lincoln, supra*, they challenge the soundness of that rule, and assert that but for said case the decree would have been in favor of their clients. We find nothing in the record to support this assertion. The law is correctly applied to the facts in *Lewis v. City of Lincoln, supra*. The plaintiff in that case sought to have its title quieted to a strip of land within the defendant's inclosure, but claimed by the plaintiff as part of Twenty-seventh street. There was no proof of a dedication by any owner of the land, and the testimony concerning an easement was insufficient to sustain a judgment for the plaintiff upon that issue. The public had a way along the street, but the city did not have possession of, or the public use of, any part of the tract in dispute. *Engle v. Hunt* is approved in *Lewis v. City of Lincoln*. In *Hill v. McGinnis*, 64 Neb. 187, *Lewis v. City of Lincoln* is cited in the syllabus, but *Engle v. Hunt* is also referred to with approval in the body of the opinion. The travel in that case had

varied from four to eight rods across the plaintiff's land, and we held a way by user did not exist. In *Kansas City & O. R. Co. v. State*, 74 Neb. 868, *Lewis v. City of Lincoln* is cited and followed. In that case there had been no user. In *Brandt v. Olson*, 79 Neb. 612, we held: "Evidence of ten years' use by the public of a road through cultivated land without substantial variance, with the knowledge and acquiescence of the owner for a period of ten years, raises the presumption of an implied dedication and acceptance of such road as a public highway." *Engle v. Hunt* and *Block v. Keller, supra,* are cited with approval, but no mention is made of *Lewis v. City of Lincoln.* In *Kendall-Smith Co. v. Lancaster County,* 84 Neb. 654, *Engle v. Hunt* is cited with approval, and no reference is made to *Lewis v. City of Lincoln,* and the same situation exists in *Brym v. Butler County,* p. 841, *post.* Professor Angel says that, strictly speaking, the law of prescription does not apply to highways, because the law allows a prescription only to account for the loss of a grant, and the public cannot be a grantee in a deed because it has no capacity to take or convey an estate. Angel, Highways (3d ed.) sec. 131. The author of the textbook states that, notwithstanding this seeming barrier to the application of the law of prescription to highways, the doctrine has been applied to highways by many courts. In Nebraska the statute of limitations is one of repose, and not of presumptions. *Gatling v. Lane,* 17 Neb. 80; *Ballou v. Sherwood,* 32 Neb. 666. Whether we say that ten years' continuous adverse user raises a presumption of dedication, or that it vests the public with an easement of the right to travel the way, is not material, the same conclusion is reached by either process of reasoning. The position taken by this court in *Engle v. Hunt* and *Brandt v. Olson, supra,* is supported by the courts of sister states. *Town of Marion v. Skillman,* 127 Ind. 130; *State v. Hunter,* 5 Ired. Law (N. Car.) 369; *Valentine v. City of Boston,* 22 Pick. (Mass.) 75; *Arndt v. Thomas,* 93 Minn. 1; *Earle v. Poat,* 63 S. Car. 439,

453; *Onstott v. Murray,* 22 Ia. 457; *Dow v. Kansas City S. R. Co.,* 116 Mo. App. 555; *Whitesides v. Green,* 57 Am. St. Rep. 740 (13 Utah, 341), and monographic note thereto.

A consideration of the opinions of this court upon the subject impels us to say that the rule announced in *Lewis v. City of Lincoln, supra,* and the other cases following that decision, should not be strictly applied. Proof that the officers having control of the highways in a county or municipality worked a way or exercised other acts of dominion over it to the knowledge of the owner of the fee should convince the trier of fact that from thenceforward the use was adverse to such owner, but circumstances may be such in a particular case that the road overseer, the county commissioners or the supervisors would have no occasion to work the road, to compel the landowner to cut the weeds growing along the beaten path, or to exercise any other overt act to indicate they were assuming jurisdiction over a highway, and yet the user may have been under a claim of right to the knowledge of the owner of the fee. In such cases the litigant should consider what has been said in *Engle v. Hunt, Brandt v. Olson,* and *Kendall-Smith Co. v. Lancaster County, supra.* Giving the defendants the benefit of the last cited cases, we are satisfied the evidence amply sustains the judgment of the district court.

2. The defendants argue that the plaintiff has an adequate remedy at law, and that a court of equity is without jurisdiction to enjoin them from committing a trespass upon the plaintiff's land. The subject is an interesting one, but will not be pursued, because the defendants made no objection to the form of action before the decree was rendered, but asked for equitable relief, to the end that they might be confirmed in a right to travel the path across the land in controversy. Having voluntarily submitted to the jurisdiction of the court, they will not be heard to say, after decree has been entered

against them, that the action should have been tried at law. *Sherwin v. Gaghagen*, 39 Neb. 238.

The judgment of the district court is right, and is

AFFIRMED.

FANNY J. BRYM, APPELLEE, V. BUTLER COUNTY, APPELLANT.

FILED MAY 20, 1910. No. 15,999.

1. **Highways: PRESCRIPTION.** By continuous, adverse user under claim of right for ten years the public may acquire a highway along a section line through cultivated lands.
2. ———: ———: **ESTOPPEL.** The power to establish, change, maintain or abandon public highways having been committed by the legislature to the county board, petitioners for the opening of a section-line road, the county clerk, viewers and appraisers, when acting independently of the county board in taking preliminary steps authorized by statute, cannot estop the county from asserting that the road had already been acquired by adverse user.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

A. V. Thomas, for appellant.

R. C. Roper, contra.

ROSE, J.

This is a controversy over a claim against Butler county for a strip of land used for a highway. The county board rejected the claim. Plaintiff appealed to the district court, and there recovered a judgment for $50. The matter is presented here on an appeal by defendant.

Plaintiff owned the north half of the northeast quarter of section 16, township 13, range 3, in Butler county. A strip 20 feet wide along the east side of her tract, as thus described, is the land for which the trial court allowed

damages. The county attorney insists that by continuous, adverse user under claim of right for more than the statutory period of ten years the public acquired a highway running north and south between sections 15 and 16, and that the disputed strip is part of the highway. Is this position well taken? A witness testified to the effect that he had been acquainted with the road 14 or 15 years, having traveled it with a steam thresher nearly 15 years ago, and that he had seen the road since, and that it had been used just like any other road for traveling. One of plaintiff's witnesses, who knew the road and first traveled it in 1889, said that part of the land on either side was cultivated at that time, and that "any one having cause to go over the road could." A witness called by defendant stated he had lived for about 13 years in township 13, in which the road is located, and that he had been acquainted with it probably 12 years; that he was a road overseer in 1900 and 1901, and as such worked the road, making a culvert, and being assisted by a man who was working out a poll tax. The road overseer who was elected in 1894 testified that he put in a tile culvert in 1895, and that the road was the main-traveled one to Seward. The work of the overseers seems to have been confined principally to the draws where the culverts were needed, but there is proof that elsewhere the road was good. Proof of work on that part of the road in good condition was unnecessary. *Brandt v. Olson,* 79 Neb. 612. A resident of the township said he had been acquainted with the highway since 1884, and since that time it had been traveled generally by the public. A man from David City, who visited the *locus in quo* in 1899, testified that he found a good road, with wagon tracks which "looked like they had been cut down in the sod for 15 years." A witness who had been acquainted with the road since 1891 said his recollection was that the land on both sides was then in cultivation. During the period covered by the proofs, most of the land on both sides of the section line had at one time or another been fenced,

but the public travel was never interrupted, a roadway having been left open. Some unfenced land had been cultivated clear up to the beaten track, but teams in passing each other were driven through the grain when necessary. It is clear that the highway was continuously used more than ten years before this proceeding was commenced. The evidence disclosed no material divergence from the line of travel, within the meaning of the rule that slight deviations to avoid mud, pools or encroachments will not necessarily prevent the public from acquiring prescriptive rights, where the roadway has been used without interruption or substantial change for more than ten years. *Kendall-Smith Co. v. Lancaster County*, 84 Neb. 654. There is no evidence to show that any landowner on either side of the section line, or any other person, ever interfered with public travel at any time. Plaintiff traveled over the highway herself and looked at the land before she bought it. Defendant's position on this issue is fairly established, within the meaning of the rule that by continuous, adverse user under claim of right for the statutory period of ten years the public may acquire a highway through cultivated lands. *Engle v. Hunt*, 50 Neb. 358; *Nelson v. Sneed*, 76 Neb. 201. There is some proof tending to show that the road was 40 feet wide 14 or 15 years ago. The question of width, however, is settled by the following stipulation made in open court: "It is hereby stipulated and agreed that the width of the road between sections 15 and 16 herein is to be 40 feet in any event concerning the result of this suit."

Plaintiff contends, however, that the county board participated in proceedings to condemn a portion of her land for highway purposes, and thereby estopped the county from claiming it by prescription or adverse user. Twenty residents of the county commenced proceedings October 27, 1906, by filing with the county clerk a petition for the opening of the road. A viewer, subsequently appointed, reported December 12, 1906, as follows: "I will report in favor of the opening of said road. It will re-

quire one culvert four by six feet to make said road passable." The county clerk by newspaper publication notified those interested to file their objections to the opening of the road and their claims for damages in his office on or before March 16, 1907. Appraisers appointed by the county clerk reported April 16, 1907: "We have examined said road, and find there are no damages, because of the fact that said road has become a lawful road by virtue of having been traveled for more than ten years. We would also recommend that said road be declared open and worked." At a meeting of the county board May 14, 1907, plaintiff's claim was rejected, the reports of the viewer and appraisers approved, the road declared open, and the clerk instructed to make the proper entry on the county records. Through these proceedings did the public lose the valuable rights previously acquired by prescription or adverse user? Is the county estopped to assert the rights thus acquired? These questions require an examination of the statutes and the nature of the proceedings described. The power to establish, repair, change, maintain or abandon public roads has been committed by the legislature to the county boards. Comp. St. 1909, ch. 78. Petitioners, viewers, appraisers or county clerks, having no jurisdiction over those subjects, cannot by estoppel deprive the public of legally acquired highways. If the county is estopped in the present case, it must necessarily be by some act of the county board. That tribunal did not initiate this proceeding. The road is on a section line, and could have been opened by the county board without a petition, if not already opened. Comp. St. 1909, ch. 78, sec. 46; *Berry v. Deloughrey*, 47 Neb. 354. No such action was taken. On the contrary, the record shows that in 1899 the county board made an order reciting that it considered the road already established. In appointing appraisers and in notifying those interested to file their objections and claims for damages, the county clerk performed ministerial duties imposed by statute. Comp. St. 1905, ch. 78, secs. 4-24. The nature

of those acts depended on the law, which plaintiff was bound to know. The county clerk, in giving plaintiff an opportunity to be heard before the county board, did not prevent the county from subsequently asserting that the road had already been established. Neither the viewer nor the appraisers had any authority to bind the county by any preliminary report or finding, since the power to establish, maintain or abandon roads, and to allow or to reject claims against the county, had been granted to the county board. Its first order in this proceeding, according to the record, was made May 14, 1907, when plaintiff's claim was rejected, the reports of the viewer and appraisers approved, the road declared open, and the county clerk instructed to make the proper entry on the county records. Neither the viewer nor the appraisers reported that the road had not been established, and the approval of their reports was not an assertion of that fact. There was no county record of the highway, because it had been acquired by the public independently of any action of the county board. The approval of the reports amounted to no more than the making of a formal order for the opening of a road already in existence. Plaintiff had the same means as the county board of obtaining knowledge of the prescriptive rights of the public. She was required to take notice of the law under which the county clerk published the notice and appointed the appraisers. She was not misled or deprived of any property or right by the conduct or decision of the county board. The elements of estoppel are entirely wanting. On the record made in the district court, the findings should have been in favor of the county.

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

REVERSED.

FAWCETT, J., dissenting.

The majority opinion sustains the county's claim to the road in question by adverse user for more than ten years.

Plaintiff does not admit that the road was ever established by user, but alleges that if such were the case, it could only be to the extent of the way used. It is clear that the road was never used the full legal width, but on the contrary, for many years, fences were maintained and crops raised on the land now sought to be appropriated. That being true, plaintiff is clearly entitled to compensation for the land not previously used by the public. Where a road is established in the regular way, the law fixes it at a certain width. Such action on the part of the county authorities gives a kind of color of right or title, and the rule of *pedis possessio* does not apply; but when there has not been any legal establishment of a road, the rule does apply. The district court took that view of the case and allowed plaintiff for a strip of land twenty feet wide which had not been used by the public. In this I think the district court was right. All must concede that even the lawful establishment of a section line road does not cut off claims for damages for the land taken; and where a road is never legally opened, nor the full width fixed by law occupied for the full period of ten years, the right to damages for the land not used remains unimpaired. Plaintiff received damages for twenty feet of land never used except by herself in connection with and in the same manner that she had used her other lands. Her right to compensation therefor had never been surrendered or lost. I think the judgment of the district court should be affirmed.

REESE, C. J., concurs.

ERICK W. WESTMAN, APPELLANT, V. CHARLES CARLSON ET AL., APPELLEES.

FILED MAY 20, 1910. No. 16,016.

1. **Process:** SERVICE: PRESUMPTIONS. Where the return of a sheriff recites that he served the summons, on which the return is indorsed, the presumption is that he performed his duty in making the service.
2. ———: ———: IMPEACHMENT. The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof.
3. **Judgment:** SUIT TO CANCEL: MERITORIOUS DEFENSE. A suit in equity to cancel a judgment rendered by default in an action at law in which a summons was legally served on defendant should be dismissed, where the facts pleaded and proved fail to disclose a meritorious defense to the original action.

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

Tibbets & Anderson, for appellant.

John L. Sundean and *William R. Patrick, contra.*

ROSE, J.

This is a suit in equity brought by plaintiff in the district court for Saunders county to cancel a judgment rendered by default against him and Peter John Westman in the county court of Saunders county, September 7, 1898, for the sum of $373.89, in an action on three promissory notes given by them to the payees, Carlson and Hanson, for the purchase price of a second-hand cornsheller. The suit in equity was dismissed, and plaintiff has appealed.

In the county court the firm of Carlson & Hanson was plaintiff and Peter John Westman and Erick W. Westman were named in the petition as defendants. August 17, 1898, the county judge issued a summons returnable September 6, 1898, on which the sheriff made return as fol-

lows: "Received this writ on the 17th day of August, 1898, and on the 25th day of August, 1898, I served the within defendants by leaving a certified copy of the same, with all the indorsements thereon, at their usual place of residence in Saunders county. W. D. Farris, Sheriff, by W. H. Collins, Deputy. Fees: Service, $0.75; copies, $0.50; mileage, $1.70; $2.95." The Westmans did not appear in response to the summons, and the judgment which is now the subject of controversy was entered against them by default. Under issues properly raised by the pleadings, plaintiff in the present suit adduced testimony to impeach the return quoted; and whether the evidence is sufficient for that purpose is the principal question presented by this appeal. Plaintiff in his own behalf testified, in substance, as follows—the sheriff's return showing service August 25, 1898: Plaintiff and his brother John were unmarried, and with two sisters, named Helga and Lorena, lived with their mother on a farm in Saunders county during the month of August, 1898. The mother and Helga were invalids, requiring constant care. Helga died October 16, 1898, and the mother June 6, 1907, before this case was tried in the district court. Lorena was generally in attendance upon them, but when absent one or the other of the brothers took her place. The mother could not converse in English, and for that reason seldom went to the door to meet callers. That duty usually fell to Lorena. So far as plaintiff knew, the sheriff or deputy had called only twice with process, once to serve a subpœna, and again to serve a summons issued by the county judge in a prior suit begun August 12, 1898, to recover judgment on the notes already described, and dismissed August 16, 1898. Plaintiff remembered both services, but never knew of the summons issued August 17, 1898, or of the judgment against him, until execution was threatened or issued in 1908. John and Lorena testified to substantially the same facts. In addition, Lorena said that she was only absent from the farm once or twice during the month of August, 1898, that the sheriff could

not have served the summons as stated in his return without her knowing it, and that she knew of no such service. She admitted, however, that her mother and Helga were sometimes out of doors, and that an officer might have handed either of them copies of a summons. This testimony rests in the memory of the witnesses, and relates to a time nearly ten years earlier, when they would naturally be distracted by the illness of their mother and sister. For anything appearing in the proofs, the service may have been made as certified by the sheriff. The return of the officer is part of the judicial record of the case. It appears to be regular on its face. It shows in addition to the return that the sheriff charged mileage and fees for copies of the summons. He performed his duties under an oath of office and the penalties of an official bond. As to serving the writ and making the return, the presumption is that the officer performed his duty. *Parker v. Starr,* 21 Neb. 680. The return of a sheriff that he served a summons on defendant can only be impeached by clear and convincing proof. *Connell v. Gallagher,* 36 Neb. 749; *Unangst v. Southwick,* 80 Neb. 119. This doctrine is essential to the integrity and permanency of judicial records. In the light of all the evidence, the trial court correctly held that plaintiff in making his case did not meet the requirements of the rule stated.

Plaintiff insists, however, that in any event he did not have notice or knowledge of the suit, that he had a valid defense which, without fault or neglect on his part, he was prevented from making, and that on equitable grounds the judgment of the county court should be opened. The defense pleaded is that the notes were given for a corn-sheller upon the condition it would be repaired by Carlson and Hanson, from whom it was purchased, so that it would do good work, that they did not so repair it, that it was of no value, and that in consequence there was a failure of consideration. There is some testimony in support of this defense, but there is convincing proof that the

father of plaintiff bought the cornsheller for his sons, when they were minors, but did not pay for it. After they reached majority, after the sheller had been on their farm perhaps two years, and after they had used it, plaintiff and his brother John signed the notes in question. The record justifies a finding that after the signing of the notes they procured supplies for the sheller from Carlson and Hanson without paying for them, used the machine several years, and made no attempt to return it or to rescind the contract of purchase, or to have the notes canceled or returned. A consideration of all the evidence leads to the conclusion that plaintiff herein is not entitled to have the judgment by default opened.

No error being found in the record, the judgment of the district court is

AFFIRMED.

JOHN WESTMAN, APPELLANT, V. CHARLES CARLSON ET AL., APPELLEES.

FILED MAY 20, 1910. No. 16,015.

Appeal: BRIEFS: WAIVER OF ERROR. On appeal from the district court to the supreme court, an assigned error will be deemed to be waived, where it is not discussed in appellant's brief.

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

Tibbets & Anderson, for appellant.

John L. Sundean and *William R. Patrick, contra.*

ROSE, J.

The facts and issues in this case are the same as in *Westman v. Carlson, ante,* p. 847, except in the following particulars: Plaintiff herein was sued in the county court of Saunders county as Peter John Westman, while his real name is John Westman or John Peter Westman.

For failure of the district court to open the county court's judgment, on account of the misnomer suggested, error is assigned in this court. The question, however, is not discussed in plaintiff's brief, and for that reason is deemed to be waived. It follows that the decision in the present case is controlled by the rulings in the case cited.

The judgment of the district court is therefore

AFFIRMED.

HARRY OWEN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED MAY 20, 1910. No. 16,038.

1. Mechanics' Liens: SUBCONTRACTOR. A plaintiff who completed a job of grading on the roadbed of a railway *held* to be a subcontractor within the meaning of the laborers' lien law, where his proof showed that the work was orally sublet to him, through his father, by the original contractor, that the subcontract was made for his benefit, that he used his own grading outfit, and that he paid the laborers with his own money.

2. ———: CONSTRUCTION OF ACT. The statutes providing for mechanics' and laborers' liens are remedial enactments and should be liberally construed.

3. ———: DESCRIPTION OF PREMISES. In a subcontractor's lien for a job of grading on the roadbed of a railway, a description is sufficient, when it will enable a person familiar with the locality to identify with reasonable certainty the premises intended to be described.

4. ———: ———. In a subcontractor's lien, the description, "Grading and excavating on the Chicago, Burlington and Quincy Railway right of way between A and D streets in the city of South Omaha, Nebraska," *held* sufficient, where the right of way described is the only one owned by that corporation between the streets named.

5. ———: ———. "The fact that an affidavit for mechanic's lien contains a description of more land than will be subject to the lien will not render the proceeding void, if not done with a fraudulent intent." *White Lake Lumber Co. v. Russell*, 22 Neb. 126.

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

Greene, Breckenridge & Matters and *W. H. Hatteroth,* for appellants.

Crofoot & Scott and *H. S. Daniel, contra.*

ROSE, J.

According to the petition, S. Cox, defendant, entered into a contract with the Chicago, Burlington and Quincy Railway Company, defendant, to do some grading and excavating on its right of way on Twenty-ninth street between A and D streets in South Omaha, and immediately sublet a portion of the work to plaintiff, agreeing to pay him 18 cents a cubic yard for excavating and removing earth. Plaintiff commenced the job September 1, 1906, and completed it October 3, 1906, having in the meantime excavated and removed 3,690 cubic yards of earth. Neither of the defendants paid him for his work, and he filed a lien November 30, 1906, for $664.20 against the roadbed and right of way at the *locus in quo.* This is a suit by plaintiff to foreclose his lien. Cox permitted a default. The railway company filed an answer containing a general denial. A trial resulted in a decree of foreclosure, the amount of plaintiff's recovery being $743.50. The railway company has appealed.

The decision of the trial court is first assailed as follows: "There is not sufficient evidence to sustain the findings and decree to the effect that plaintiff was a subcontractor of defendant Cox." In support of this contention it is asserted that plaintiff was employed by the firm of Owen & Lovelace to whom the job had been sublet by Cox. These inferences are drawn chiefly from testimony that plaintiff's father, Henry E. Owen, senior member of the firm of Owen & Lovelace, made the contract with Cox, and that the laborers were paid with checks of that firm. On the other hand, there is proof tending to

show these facts: Cox wanted plaintiff to do the work, and was told to make the deal with the senior Owen, and did so. The contract was not made for the father or for the firm, but for plaintiff individually. In doing the work plaintiff used his own grading outfit, and had been in business for himself two years. The laborers were paid by plaintiff out of his own funds with the checks of Owen & Lovelace, his individual business having been kept separate from that of the firm. Cox never paid the firm or Henry E. Owen or plaintiff for the work. A consideration of all the evidence leads to the approval of the trial court's finding that plaintiff was a subcontractor of Cox, that he performed the contract on his part, and that his claim is unpaid.

The remaining objection to the decree of foreclosure is stated as follows: "The statement of the mechanic's lien is imperfect in that the description of the premises sought to be charged with the lien is too vague and indefinite, and is inapplicable to the particular track and roadbed actually benefited." The description required by statute is found in the following enactment: "Every person, whether contractor, or subcontractor, or laborer or material man who wishes to avail himself of the provisions of the foregoing section, shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement, to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing *a correct description of the property to be charged with the lien.*" Comp. St. 1909, ch. 54, art. II, sec. 3. The property to be charged with a subcontractor's lien is described by statute in this language: "The said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, roadbed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which including the

right of way, shall constitute the excavation, erection or improvement provided for and mentioned in this act." Comp. St. 1909, ch. 54, art. II, sec. 2. The statutes are remedial and must be liberally construed. *White Lake Lumber Co. v. Russell,* 22 Neb. 126. Within the meaning of the statutory provisions quoted, when thus construed, is plaintiff's description sufficient? It is as follows: "Grading and excavating on the Chicago, Burlington & Quincy Railway right of way between A and D streets in the city of South Omaha, Nebraska." The test of sufficiency is whether the lienor's description will enable a person familiar with the locality to identify with reasonable certainty the premises intended to be described. *Guiou v. Ryckman,* 77 Neb. 833; *White Lake Lumber Co. v. Russell,* 22 Neb. 126. It is shown by the proofs that the right of way on which plaintiff worked runs south on Twenty-ninth street, and crosses A, B and C streets at right angles, terminating at D. There are two parallel spur-tracks on Twenty-ninth street. One leaves the main line north of A and terminates between B and C. The other leaves the main line north of A and terminates at D. Both tracks belong to the Chicago, Burlington & Quincy Railway Company, and one witness stated that it had no other tracks between A and D in South Omaha east of the Union Pacific tracks. The only track extending from A to D is on the right of way where plaintiff worked. West of the Union Pacific tracks the streets corresponding to A, B, C and D are known as West A, West B, West C and West D; so that one familiar with the locality would not mistake the right of way described in plaintiff's lien for the right of way owned by the Chicago, Burlington & Quincy Railway Company west of the Union Pacific tracks. One track owned by the Chicago, Burlington and Quincy Railway Company in South Omaha, in addition to those on Twenty-ninth street, seems to cross A street diagonally at the west end, but it runs toward the southwest to a point only a trifle south of A street, and one familiar with the locality would not

mistake that track for "the Chicago, Burlington & Quincy Railway right of way between A and D streets in the city of South Omaha." In this view of the proofs, the Chicago, Burlington & Quincy Railway Company had no right of way or tracks between A and D streets in the city of South Omaha to prevent identification of the right of way described in plaintiff's lien. With the location of the graded right of way thus described, a person familiar with the locality could identify it almost as readily as Twenty-ninth street between A and D. No reason can be given for the application of strict or technical rules in testing the description. The record contains no intimation that defendants were misled by it, or that there was any fraud or wrongdoing on the part of plaintiff, or that the right of any third person had intervened. The description is sufficient for the identification of the property to be charged with the lien.

It is argued, however, that there are two tracks on Twenty-ninth street between A and D; that plaintiff described a right of way, and his description, if sufficient to identify the premises, includes both tracks; that plaintiff worked on one only, and that his lien can attach to no other. This point is without merit. In an opinion by the present chief justice it is said: "The fact that an affidavit for mechanic's lien contains a description of more land than will be subject to the lien will not render the proceeding void, if not done with a fraudulent intent." *White Lake Lumber Co. v. Russell*, 22 Neb. 126. The statute quoted (Comp. St. ch. 54, art. II, sec. 2) seems to apply. There was no fraud to invalidate the description in the present case. If too much property was described, the trial court had authority to confine the lien to the property legally affected by it.

No error appearing in the record, the judgment is

AFFIRMED.

SAMUEL C. NELSON V. STATE OF NEBRASKA.

FILED MAY 20, 1910. No. 16,511.

1. **Information:** SURPLUSAGE. "Averments in an information of matters which are immaterial, and not necessary ingredients of the offense charged, may be rejected as surplusage." *Hase v. State*, 74 Neb. 493.

2. ———: EMBEZZLEMENT: DESCRIPTION OF PROPERTY. Under section 121 of the criminal code, an information charging an agent with the embezzlement of money in a specific sum named contains a sufficient description of the property embezzled.

3. **Embezzlement:** INSTRUCTIONS. An instruction which permits a jury to convict an agent of embezzlement without finding that by a felonious, adverse use or holding he deprived his principal of the property alleged to have been embezzled is erroneous.

ERROR to the district court for York county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

Gilbert Bros. and *W. A. Prince,* for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for York county, Nebraska, Samuel C. Nelson, defendant, was convicted of embezzling $1,900 belonging to his principal, the York Alfalfa Milling Company, and for that felony was sentenced to serve a term of five years in the penitentiary. As plaintiff in error he now presents for review the record of his conviction.

The information charges: "Samuel C. Nelson, on or about the 15th day of April, 1909, in said county of York and State of Nebraska, he the said Samuel C. Nelson, being then and there the agent and officer of the York Alfalfa Milling Company, a certain incorporated Company, and he, the said Samuel C. Nelson, not being a person within the age of eighteen years, and not being

then and there an apprentice, did then and there by virtue of such employment, as agent and officer of said corporation, the York Alfalfa Milling Company, receive and take in his possession certain money, to wit, $10,000, and certain checks of the amount and value of $10,000, all of which checks and money was and is the property of said York Alfalfa Milling Company, a corporation, his principal, and did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle said checks and money without the assent of said York Alfalfa Milling Company, his principal."

The general charge that defendant embezzled "certain checks of the amount and value of $10,000," without any further description of the checks, is said to be fatally defective. If this point is well taken, a question not decided, the information, with all reference to the checks omitted, charges defendant with the embezzlement of money in the sum of $10,000. The rule is that "averments in an information of matters which are immaterial, and not necessary ingredients of the offense charged, may be rejected as surplusage." *Hase v. State*, 74 Neb. 493; *Hurlburt v. State*, 52 Neb. 428; *Blodgett v. State*, 50 Neb. 121; *Hall v. State*, 40 Neb. 320. After eliminating that part of the information relating to the checks, defendant is charged with the embezzlement of money in the sum of $10,000. In charging accused with the embezzlement of money, a more specific description of the embezzled property than that given in the information is unnecessary. *State v. Knox*, 17 Neb. 683; *Mills v. State*, 53 Neb. 263.

The state attempted to prove the embezzlement of several items of property, but the trial court limited the jury to the consideration of two, which are described in instructions 10 and 11 as follows:

"10. The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that the draft of $1,000 mentioned in the evidence, issued by the First National Bank of York on April 20, 1909, was received

by the defendant Nelson at and within the county of York in the state of Nebraska; that he was at said time and place an officer or agent of the York Alfalfa Milling Company, a corporation; that the draft or money represented thereby was at said time the property or money of the said York Alfalfa Milling Company and that he received the same by virtue of his said employment by said company; that he then and there or shortly thereafter formed the fraudulent and felonious intent and purpose to convert said draft and the money represented thereby to his own use and to deprive the said York Alfalfa Milling Company of said money without the assent of said York Alfalfa Milling Company, the owner thereof; that he did not, at any time thereafter, pay over or account for the money represented by said draft to his said employer; and if you further find from the evidence, beyond a reasonable doubt, that he did not retain the amount represented by said draft claiming the same in good faith to be due him for fee, commission or charges on collections made or services rendered by him; then, in case you find each and all of said elements above mentioned to be shown by the evidence beyond a reasonable doubt, you will find the defendant guilty in manner and form as he stands charged in the information, and you will further find in your verdict the amount and value of the draft at said time and include the amount so found in your verdict."

"11. Upon the question of the transfer of $900 in a certain bank in Kansas City, Missouri, to the defendant Nelson, mentioned in the evidence of the witness Laurenson as having occurred in the month of June, 1909, if the jury believe from the evidence, beyond a reasonable doubt, that the fraudulent purpose was formed by the defendant to convert said item of $900 to his own use and that the decisive steps taken to carry out that purpose were had and done at and within the county of York in the state of Nebraska; that said defendant was at said time and place an officer or agent of the York Alfalfa Milling Company, a corporation, that the item of $900 was, at said

time the property or money of the said York Alfalfa Milling Company and that he received the same by virtue of his said employment by said company; and that, as above stated, he formed the fraudulent and felonious intent and purpose to convert said money to his own use and to deprive the said York Alfalfa Milling Company of said money without the assent of said York Alfalfa Milling Company, the owner thereof; that he did not, at any time thereafter, pay over or account for said money to said employer; and if you further find from the evidence, beyond a reasonable doubt, that he did not retain said money claiming the same in good faith to be due him for fee, commission, or charges on collections made or services rendered by him; then, in case you find each and all of said elements above mentioned to be shown by the evidence, beyond a reasonable doubt, you will find the defendant guilty in manner and form as charged in the information, and you will further find in your verdict the amount and value of said money at said time and include the amount so found in your verdict."

The jury found defendant guilty of the embezzlement of $1,900. This sum was composed of two items, one being the draft for $1,000 mentioned in the tenth instruction, and the other being the credit of $900 described in the eleventh. Defendant now insists there is no proof to show that the draft was embezzled in York county, as charged in the information. There is evidence tending to show these facts: The York Alfalfa Milling Company was incorporated at York, March 22, 1909, for the purpose, among others, of constructing and operating an alfalfa mill at York. Defendant was a director of the corporation and also a member of the executive committee. At its first meeting, March 23, 1909, he was instructed to act for the corporation in negotiating for the purchase of a building owned by the Fairmont Creamery Company at a price not to exceed $1,500. April 20, 1909, G. M. Stryker, who was treasurer of the York Alfalfa Milling Company, drew a check for $1,000 on the First National

Bank of York, and the same day the bank issued to him a draft on the First National Bank of Chicago for $1,000, which, after having been indorsed by defendant, was by him presented to and cashed by the National Bank of Commerce of Kansas City, April 24, 1909. This is the draft mentioned in the tenth instruction and the amount of which is included in the verdict. Defendant testified he received the draft at Kansas City, presented it for payment there, and that the money was needed in the negotiations for the building owned by the Fairmont Creamery Company. The evidence fails to show that the draft was ever in defendant's possession in Nebraska, or that he was in York county between the date on which the draft was purchased by Stryker and the date on which it was cashed in Kansas City. As to this item, there is a failure to prove embezzlement in York county, and for that reason the verdict cannot be allowed to stand.

Defendant insists further that the tenth instruction was given as a complete statement of the law applicable to the embezzlement of the draft or of the money realized therefrom, and that it permitted a conviction without a finding by the jury that defendant in fact embezzled the property. Manifestly the trial court intended to include in the tenth instruction all the elements essential to a conviction, as to the item mentioned therein, and, having thus attempted to cover the entire subject, no material element of the crime could be omitted without error. *Higbee v. State,* 74 Neb. 331. According to the instruction, a finding that defendant deprived his principal of the property by a felonious, adverse use or holding was not essential to a conviction. The omission is apparent. The forming of a felonious intent on part of defendant to convert to his own use property of his principal is mentioned as an element of the crime, but an unexecuted purpose to embezzle is not embezzlement. It has not escaped observation that the jury were required to find, before convicting defendant, that he did not pay over to his principal, or account to the latter for, the money represented

by the draft, and also that he did not retain it in good faith for services or charges on collections; but failure to pay over or account for money received by defendant as agent would not amount to embezzlement, if his principal was not in fact deprived of the property by a felonious, adverse use or holding. Under the information, actual conversion with a felonious intent was essential to a conviction. *Chaplin v. Lee*, 18 Neb. 440; *McAleer v. State*, 46 Neb. 116; *Hamilton v. State*, 46 Neb. 284; *Higbee v. State*, 74 Neb. 331. On account of the omission described, therefore, the tenth instruction is erroneous. Instruction 11 is not free from the same vice. It describes as elements of embezzlement a fraudulent purpose on part of defendant to convert to his own use an item of $900 and the "decisive steps taken to carry out that purpose." "Decisive steps", in the connection in which the words are employed, do not properly define the overt acts constituting embezzlement and should not have been used for that purpose in the charge.

For the reasons given, the judgment below must be reversed, but to prevent the recurrence of errors appearing in other instructions the following observations are made: The court in defining "embezzlement" made a reference to the felonious removing or secreting of personal property. This part of the charge should not have been given for the reason it had no proper application to any question submitted to the jury for determination. An instruction defining "conversion" was likewise inapplicable to the issues. In addition, the jury, by one of the instructions, were erroneously permitted to consider irrelevant testimony adduced by the state for the purpose of proving the embezzlement of items withdrawn from the consideration of the jury by another instruction.

REVERSED AND REMANDED.

THOMAS DENNISON, APPELLEE, V. DAILY NEWS PUBLISHING COMPANY, APPELLANT.

FILED MAY 20, 1910. No. 16,508.

1. Appeal: EVIDENCE: LAW OF CASE. On a second appeal to this court where the evidence is substantially the same as upon a former appeal, and on such former appeal this court has determined the probative force and legal effect of such evidence, the evidence upon that point will not be again reviewed on such second appeal.

2. Libel: INSTRUCTIONS. Instruction number 2, given by the court upon its own motion, and discussed in the opinion, *held* not erroneous.

3. ———: ———. While a published statement made in the alternative will not ordinarily be held to be libelous *per se* unless the language used in the alternative is of such character, yet if the statement, taken as a whole, is such that it will not admit of any other reasonable construction except that the party referred to in such statement participated in and connived at the doing of the main act charged, it is not error to instruct the jury that the entire statement constitutes a libel *per se*.

4. Trial: ALLEGATIONS AND PROOF. The rule that the *allegata et probata* must agree does not mean that the allegations in the petition must be in precise language, but the rule is satisfied if the allegations of the petition fairly indicate the facts sought to be proved and the case is tried throughout by both parties upon the theory that such facts tend to support an issue in the case as made by the pleadings.

5. Libel: DAMAGES. In an action for damages for libel, the question of the amount of plaintiff's damages is largely a question for the jury; and where it appears that such issue has been submitted to the jury under proper instructions, this court will not disturb the finding of the jury unless the amount found by the verdict is clearly excessive.

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

Baxter & Van Dusen, for appellant.

W. J. Connell and *Walter P. Thomas, contra.*

FAWCETT, J.

This case is before us a second time. The opinion of Mr. Commissioner EPPERSON on the former hearing, reported in 82 Neb. 675, contains such a full and clear statement of the case that we do not deem any further statement necessary. On the second trial in the district court, plaintiff again recovered judgment, and defendant appeals.

Defendant's first contention is: "There was no sufficient evidence to support the allegation that the libel was published of and concerning the plaintiff." It is asserted by plaintiff, and not denied, that plaintiff's testimony upon this branch of the case is the same as that offered on the former trial. This being true, defendant's first contention must fail for the reason that that point is decided adversely to it by our former decision. We there said: "Plaintiff's competent evidence fairly establishes the fact that he is the person referred to by Mr. Thomas. No attempt was made to prove the contrary. Defendant tried the case upon the theory that plaintiff was the person whose character was assailed by the publication. If the case depended upon this assignment of error, we doubt that we could recommend a reversal." We think it must be said of this last trial, as was said of the former, that "defendant tried the case upon the theory that plaintiff was the person whose character was assailed by the publication." Indeed, the closing paragraph of its answer shows such to have been defendant's theory, viz: "Further answering said petition, and as a further defense thereto, this defendant alleges: First, that at and for a long time prior to the 26th day of November, 1904, plaintiff's general reputation in the city of Omaha, Douglas county, state of Nebraska, was bad; that his reputation was that of a gambler, and the associate and protector of the criminal classes, and a pernicious and baleful manipultor of Omaha city politics and a foe of good government." These allegations by defendant coincide so fully with the state-

ments contained in the alleged libel as to furnish strong identification of plaintiff as the person indicated in the publication.

Defendant's second contention is that the court erred in instruction number 2, given by the court upon its own motion. The objection is as to the use of the words "by this same individual", in the closing portion of the paragraph of the instruction objected to. The contention is made that the court thereby substituted the words "by this same individual" for the pronoun "he." We do not think the instruction is susceptible of this criticism. What the court told the jury was: "And that the following statement set out in plaintiff's petition as a part of the alleged libelous publication, to wit: 'That county attorney Shields offended this same individual, and a convict in the Iowa penitentiary says he was offered $3,000 to dynamite Shields' house' likewise was and is libelous *per se,* provided that you shall find that the fair and reasonable interpretation of said words, taken in the sense that is most natural and obvious and in the sense in which those persons to whom the publication should come would be most likely to understand them, is as follows: That county attorney Shields offended this same individual, and a convict in the Iowa penitentiary says he was offered by this same individual $3,000 to dynamite Shields' house." It will be seen that the court, by the words complained of, was not assuming to quote from the alleged libel, but was instructing the jury that the statement contained in the publication would be libelous *per se,* provided the fair and reasonable interpretation of the words used is that the offer of $3,000 to the convict to dynamite Shields' house was made "by this same individual"; referring to the same individual who was the one referred to and aimed at throughout Mr. Thomas' speech. We do not think the court erred in the use of the words referred to, nor do we think that even if they had been improperly used it could be held that they were prejudicial to defendant.

Plaintiff's third contention is that the court erred in giving instruction number 2 on its own motion, wherein the jury were told that "this man either threw the bomb, hired some one to throw it, or knows who did it" was libelous *per se;* and erred in refusing to give instruction number 3 requested by defendant. This, we think, is the only serious question in the case. It is urged by defendant that there is no allegation in the petition that any bomb was thrown, and that there is no evidence thereof in the record; and that, even if a bomb had been thrown, the charge is in the alternative, viz., that the statement, "Who threw the bomb? This man either threw the bomb, hired some one to throw it, or knows who did it", was not libelous *per se* because of the last clause, "or knows who did it"; that a charge that plaintiff knew who threw the bomb was not charging him with anything which would constitute a libel *per se.* While we concede that ordinarily a charge made in the alternative might not be libelous *per se,* we think that the language here quoted, taken in connection with the whole article, is not susceptible of any other reasonable construction except that "this man" either threw the bomb, hired some one to throw it, or had guilty knowldge as to who did it. In other words, we think it fairly charges that "this man" was an active or at least a passive participant in, and connived at, the throwing of that bomb. The court therefore did not err in instructing that this language constituted a libel *per se.*

Plaintiff's fourth contention is that "the court erred in permitting the plaintiff to testify as to the alleged bomb." It is contended that the petition contains no allegation that any bomb was thrown or exploded upon Mr. Thomas' porch or elsewhere. In precise language, this is true; but we think the allegations of the petition are sufficient to support the proof tendered upon that point. The second paragraph of the petition sets out the alleged libel in the reported speech of Mr. Thomas: "When I began this fight as attorney for the civic federation I saw at the

outset a man who stood across the path of good government in this city. It was necessary that this man be driven out of the city. It was because of the fight made on that man that my family has been placed in jeopardy of their lives. * * * Who threw the bomb? This man either threw that bomb, hired some one to throw it, or knows who did it." These allegations of the petition, taken in connection with the fact that the case was tried by both sides upon that theory, support the opening statement in our former opinion, viz.: "On the night of November 22, 1904, in the city of Omaha, the home of Elmer E. Thomas, attorney for the civic federation, while it was occupied by himself and his family, was partially wrecked by the explosion of a dynamite bomb, brought about by some person unknown, with the probable intention of murdering said Thomas." On direct examination, Mr. Dennison was asked if he remembered the incident of the bomb being exploded on the porch of Elmer E. Thomas, to which he answered: "Yes." On cross-examination by defendant's counsel, he was interrogated about this matter in a manner which clearly indicates that the fact that a bomb had been exploded upon Mr. Thomas' porch and that the throwing of that bomb was the cause of the meeting at which Mr. Thomas made the speech published by the defendant was a fact recognized by both sides. We do not think that we ought to adopt any different theory here.

The fifth and last assignment is that the damages awarded are excessive and were entered by the jury under the influence of passion and prejudice. This branch of the case was submitted to the jury upon instructions, the correctness of which are not questioned by defendant. We cannot say as a matter of law that their verdict is not sustained by the evidence. Two juries have found substantial damages for the plaintiff. Two district judges who heard the evidence have denied new trials and entered judgments upon those verdicts. Under the circum-

stances, we must decline to disturb the verdict on the ground that it is excessive.

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

AFFIRMED.

ROSE, J., took no part in the decision.

SEDGWICK, J., dissenting.

I cannot agree that the allegation of the answer quoted in the opinion furnishes an identification of the plaintiff as the person concerning whom the libel was published. A defendant may plead as many defenses as he has, under the express provision of the code. It is not inconsistent to plead that the supposed libel was not published of and concerning the plaintiff, and in the same answer allege that the plaintiff has the precise characteristics defined in the libel.

If a libel charges larceny and is really published of and concerning A, and B sues supposing it was published concerning him, the defendant would clearly be entitled to defend on both grounds; that B had in fact been guilty of larceny, and that he was not the party concerning whom the supposed libel was published. In such case to allege in the answer that B was in fact a thief would not identify him as the person concerning whom the supposed libel was published.

The right given by statute to plead consistent defenses ought not to be abridged by the courts. It is for this reason that I consider it my duty to dissent from that part of the reasoning of the opinion and not because it necessarily affects the conclusion reached, in which I concur.

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7. Where one promises to do two things, one legal and the other illegal, he will be held to that which is legal, unless the two cannot be separated. *Faist v. Dahl*..... 669

Corporations.

1. Under sec. 126, ch. 16, Comp. St. 1907, *held* that building and loan associations are not required to file articles of incorporation with the secretary of state, but domestic corporations must file such articles with the county clerk where their headquarters are located. *State v. Searle*..... 259
2. Where members of an insolvent partnership form a corporation, and a third person in good faith invests in the reorganization, creditors of the partnership can seize only the partners' interest in the corporation to satisfy partnership debts. *Hall v. Baker Furniture Co*..... 389

Counties and County Officers. See BRIDGES.

1. Under secs. 9, 9*a*, 9*b*, ch. 10, Comp. St. 1909, the expense of a county treasurer's official bond executed by a bonding company and accepted by the county board is a binding obligation of the county. *Haase v. Buffalo County*..... 145
2. Where a county treasurer retained clerks theretofore authorized by the county board, and paid them the increased compensation provided by sec. 1, ch. 72, laws 1905, *held* that the county cannot recover on his bond the increased compensation. *Gage County v. Wright* 347
3. Where before the amendment of 1905 to ch. 35, laws 1901, a county board authorized the county treasurer to employ three assistants, *held* he could pay them the increased salaries provided by the amendment. *Gage County v. Wright* 347
4. A woman may be eligible to the office of county treasurer. *State v. Quible* 417
5. Where the county board with knowledge of the fact allowed the treasurer in their settlement with him the sum paid to assistants under ch. 35, laws 1901, *held* the county cannot recover the same in an action on his bond. *Gage County v. Wright* 436

Courts.

1. Construction of a statute involving a question of practice only, which has been followed many years by trial courts, and indirectly approved by the supreme court, will be followed until changed by the legislature. *Mosher v. Huwaldt*, 686
2. Former decisions of the supreme court construing sec. 60 of the code approved. *Mosher v. Huwaldt*..... 686
3. The advice of the state superintendent of public instruction contrary to the judgment of the supreme court in a case will not vest a litigant in a similar case with any right, nor oust the court of jurisdiction to determine by mandamus the title to office of a county superintendent of public instruction. *State v. Quinn* 758

Criminal Law. See ADULTERY. BIGAMY. EMBEZZLEMENT. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 1. JURY, 1. LARCENY. ROBBERY. SODOMY. WITNESSES, 5, 6.

1. Instruction to regard mere inculpatory statements as confessions *held* erroneous. *Burnett v. State*..... 11
2. Confessions by one of two persons charged with a crime are admissible against the one confessing. *Burnett v. State*, 11
3. Confessions against an alleged accomplice *held* inadmissible, unless made in his presence or assented to by him. *Burnett v. State* 11

Criminal Law—*Continued.*

4. Instruction defining reasonable doubt *held* erroneous. *Burnett v. State* 11
5. A party who calls a witness, and is taken by surprise by his unfavorable testimony, may refresh his recollection by a written statement previously made by him. *Masourides v. State* 105
6. Where a statement of a homicide is prepared by the county attorney and signed by a witness who contradicts a part of it on the trial, it is reversible error to permit the statement to be read to the jury. *Masourides v. State*..... 105
7. Ordinarily a party may not impeach his own witness by showing his contradictory statements, but this will not prevent proof of the truth by other evidence or witnesses. *Masourides v. State* 105
8. That the name of a witness is indorsed on the information will not prevent the state from impeaching his testimony, if called as a witness for the accused. *Booton v. State*.... 114
9. Method of proof of venue of crime stated. *Booton v. State*, 114
10. Evidence *held* insufficient to establish an alibi. *Booton v. State* 114
11. Instruction that "a reasonable doubt is such a doubt as you are able to give a reason for" *held* erroneous. *Blue v. State*, 189
12. The jury are the sole judges of the weight of testimony. *Clarence v. State* 210
13. An instruction that certain facts are shown by a witness, *held* to usurp the function of the jury. *Clarence v. State*.. 210
14. It is error to submit the question of the materiality of evidence to the jury. *Clarence v. State*..... 210
15. On a trial for murder, admission of certain evidence *held* error. *Clarence v. State* 210
16. The admission of evidence of the finding of footprints, not connected with the accused in any way except that they led in the direction of his home, *held* reversible error. *Kinnan v. State* 234
17. The supreme court has no jurisdiction to review a judgment in a criminal case, unless proceedings in error are instituted within six months after its rendition. *Dirksen v. State* 334
18. An order postponing the trial until four of defendant's witnesses were released from quarantine *held* not erroneous. *Ossenkop v. State* 539
19. Rebuttal testimony for the state may be given by witnesses whose names were not indorsed on the information. *Ossenkop v. State* 539

Criminal Law—*Continued.*

20. Record *held* not to show an abuse of discretion in refusing a continuance on the ground that additional names of witnesses were indorsed on the information. *Ossenkop v. State*, 539
21. Order denying continuance *held* not prejudicial nor an abuse of discretion. *Ossenkop v. State*..... 539
22. Where there was no abuse of discretion in denying a change of venue, the ruling thereon will not be disturbed. *Ossenkop v. State* 539
23. The narration in good faith in the opening statement of counsel for the state of facts not subsequently proved, or which are inadmissible, *held* not reversible error, where no prejudice is shown. *Ossenkop v. State*..... 539
24. An order permitting the jury to separate for 21 days during a postponement on the ground that four of defendant's witnesses had been quarantined, *held* not an abuse of discretion. *Ossenkop v. State* 539
25. Instruction relating to declarations by defendant after a homicide *held* not erroneous. *Ossenkop v. State*..... 539
26. Where it was not shown that the victim of a homicide had been under the influence of liquor, *held* not error to sustain an objection to a question as to his disposition when under the influence of liquor. *Ossenkop v. State*..... 539
27. A conviction will not be set aside for nonprejudicial rulings in admitting or rejecting evidence. *Ossenkop v. State*..... 539
28. To render misconduct in open court of persons not connected officially with a criminal prosecution ground for a new trial, prejudice to accused must appear. *Aabel v. State*, 711
29. A ruling on a motion for a change of venue will not be disturbed where abuse of discretion is not shown. *Taylor v. State.* 795
30. In a prosecution for murder while perpetrating a rape, where circumstances and the condition of decedent immediately after the crime are relied on to establish the manner of the killing, *held* proper to instruct as to the nature and effect of circumstantial evidence. *Taylor v. State*..... 795
31. Where insanity and intoxication are relied on as defenses, *held* proper to instruct on those questions, including the legal effect of so-called insane delusions. *Taylor v. State*.. 795
32. Certain conduct of a court officer and the jury *held* not sufficient ground for new trial. *Taylor v. State*..... 795
33. Where counsel for the prosecution charged *arguendo* that counsel for accused were trifling with the court and jury by presenting the defenses of insanity and dunkenness, *held* that the statements are not ground for new trial. *Taylor v. State* 795

Criminal Law—*Concluded.*

34. An adjournment from Saturday to Tuesday on account of Monday being observed as "Decoration Day" *held* not ground for new trial. *Taylor v. State* 795

35. Where the record fails to show affirmatively that the court before passing sentence informed accused that a verdict of guilty had been found against him, as required by sec. 495 of the criminal code, it will be presumed that such information was given. *Taylor v. State*..... 795

Crops. See VENDOR AND PURCHASER, 3.

Unsevered crops planted by an intruder are the property of the owner of the land. *Warner v. Sohn*..... 519

Damages. See DEATH. LIBEL, 1. PLEADING, 6. SALES, 6.

Instruction relating to pain and suffering *held* not prejudicial. *Olmstead v. City of Red Cloud*..... 528

Death.

1. A parent may recover for pecuniary loss reasonably probable from death of his minor child by wrongful act. *Crabtree v. Missouri P. R. Co*..... 33

2. To determine the amount a parent may recover for pecuniary loss from death of his minor child by wrongful act, evidence of the circumstances of the father and of the age and condition of his family is admissible. *Crabtree v. Missouri P. R. Co.* 33

Deeds.

1. Where a father, 75 years of age, living with his son, conveyed to him his farm without pecuniary consideration during his last illness, excluding his other child from participation in his property, the presumptions are against the validity of the conveyance. *Nelson v. Wickham*..... 46

2. Evidence *held* to support a finding that a conveyance from father to son was made voluntarily and without undue influence. *Nelson v. Wickham* 46

3. Acts *held* to constitute delivery and acceptance of deed. *Svanda v. Svanda* 203

4. Evidence *held* not to show mental incapacity to execute a deed. *Ward v. Ward* 744

5. Evidence *held* to justify a finding that a deed was delivered. *Ward v. Ward* 744

6. A presumption of fraud or undue influence does not arise solely from the fact that a deed from a parent to his child was voluntary. *Ward v. Ward* 744

Depositions.

Failure of the clerk to place a filing mark upon the inner wrapper of a deposition will not deprive the party filing it of the right to use it. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.* 623

Divorce. See CONSTITUTIONAL LAW, 5.

1. Evidence *held* to warrant setting aside decree of divorce for suppression of material evidence. *Winder v. Winder*.. 495

2. Prior to ch. 45, laws 1909, a divorced person could contract within six months from the decree to marry after the six months. *Leininger Lumber Co. v. Dewey*..... 659

Drains. See CONSTITUTIONAL LAW, 2-4.

1. A drainage district organized under art. IV, ch. 89, Comp. St. 1909, is a public and not a private corporation. *Drainage District v. Richardson County* 355

2. Sec. 19, art. IV, ch. 89, Comp. St. 1909, authorizing assessment of benefits to a highway from drainage improvement, *held* not in conflict with sec. 2, art IX of the constitution, exempting property of the state and county from taxation, nor sec. 6, art. IX, authorizing municipalities to make local improvements by taxation of property benefited. *Drainage District v. Richardson County* 355

3. Under sec. 19, art. IV, ch. 89, Comp. St. 1909, assessments for benefits to highways within drainage districts must be charged to the county, and not the townships, where the county is under township organization. *Drainage District v. Richardson County* 355

4. Evidence *held* to sustain order of supervisors of drainage district in assessing benefits. *Drainage District v. Richardson County* 355

Easements. See MORTGAGES, 3. VENDOR AND PURCHASER, 8, 9.

1. Easement *held* to be appurtenant, and not in gross. *Smith v. Garbe* 91
2. An easement appurtenant to land will pass by a conveyance, although the words "with the appurtenances" are not used. *Smith v. Garbe* 91

Election of Remedies.

One entitled to rent from the occupant of real estate may sue therefor, notwithstanding he has resorted to a remedy to which he was not entitled. *Stone v. Snell*..... 581

Elections. See MUNICIPAL CORPORATIONS, 5. SCHOOLS AND SCHOOL DISTRICTS.

Embezzlement. See INDICTMENT AND INFORMATION, 5. LARCENY.

An instruction which permits conviction of embezzlement without finding that by a felonious, adverse use he deprived his principal of the property is erroneous. *Nelson v. State*.... 856

Equity.

Execution of chattel mortgage to third party by lessee *held* to constitute a fraud on the lessor against which equity will grant relief. *Rogers v. Trumble* 316

Estoppel. See APPEAL AND ERROR, 29. MORTGAGES, 1. WILLS, 1, 3.

Evidence. See ADULTERY. APPEAL AND ERROR. CRIMINAL LAW. DEPOSITIONS. MARRIAGE, 2. PRINCIPAL AND AGENT. PROCESS, 2, 3. TAXATION, 5. TRIAL. WITNESSES.

1. Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, parol evidence tending to modify or contradict it *held* admissible. *Heisler Pumping Engine Co. v. Baum*..... 1
2. Vendor of land may show by parol evidence that crops were reserved. *Cooper v. Kennedy* 119
3. Opinion of a nonexpert witness concerning plaintiff's mental condition *held* admissible, where based on intimate acquaintance and facts within his personal knowledge. *Hilmer v. Western Travelers Accident Ass'n* 285
4. A physician may give his opinion, based on the evidence, concerning the cause of a person's physical condition. *Hilmer v. Western Travelers Accident Ass'n* 285
5. In an action against a city, the court may take judicial notice of the class of cities to which it belongs, and of the laws by which it is governed. *Olmstead v. City of Red Cloud* 528
6. Conversations by telephone *held* admissible in evidence, and its probative force a question for the jury. *National Bank v. Cooper* 792

Executors and Administrators. See HOMESTEAD, 3, 4.

1. An executor should be credited in his final account with a reasonable attorney's fee in probating the will. *In re Estate of Hentges* 75
2. Evidence *held* not to justify withholding of compensation of administrator for misconduct. *In re Estate of Wilson*... 175
3. An order for allowance to widow without notice to heirs *held* not void. *In re Estate of Whiton*..... 367
4. Where objections to certain items of the final account of an administrator pray that it be allowed as to all other items, *held* proper to exclude all evidence not relevant to the disputed items. *In re Estate of Whiton*..... 367

Executors and Administrators—*Concluded.*

5. The title to real estate cannot be adjudicated on objections to the final report of an administrator. *In re Estate of Whiton* 367
6. An appeal lies from a county court's order granting letters of administration to the district court for a trial *de novo;* and an affirmance may be entered, where the order was a proper one and free from error. *In re Estate of Graff*..... 535
7. Failure to sign petition for letters of administration is not jurisdictional. *In re Estate of Graff*..... 535
8. An objection that petitioner for letters of administration did not sign his petition cannot be made for the first time on appeal. *In re Estate of Graff*..... 535
9. An administrator's sale of real estate to pay debts may be confirmed by the district judge in vacation at chambers, without 10 days' notice under sec. 498 of the code. *Brusha v. Phipps* 822
10. Administrator's sale of land is in the nature of a proceeding *in rem;* and not an action governed by the provisions of the code. *Brusha v. Phipps* 822

Forcible Entry and Detainer.

1. In actions of forcible entry and detention, on appeal to the district court, new pleadings need not be filed. *Anderson v. Carlson* 126
2. Forcible entry and detainer may be maintained by one dispossessed by an unlawful and forcible entry by a person having the present right of possession. *Anderson v. Carlson,* 126

Fraud. See DEEDS, 6. MORTGAGES, 5.

Fraudulent Conveyances.

Marriage is a valuable consideration sufficient to sustain an antenuptial settlement and conveyance of property as against the creditors of the grantor. *Leininger Lumber Co. v. Dewey* 659

Highways.

1. Purchaser of land affected by a highway established by agreement cannot take advantage of an error in the county clerk's record describing the location, where he purchased with knowledge of the actual location. *White v. Lippincott,* 82
2. Dedication of land for a highway may be established by parol evidence of declarations and conduct. *Anderson v. Nelson* 752
3. Petition for location of a public road in 1888, though silent as to its width, should be construed to request a road 66 feet wide as provided by sec. 2, ch. 78, Comp. St. 1887. *Anderson v. Nelson* 752

Highways—*Concluded.*

4. To establish a highway by user, the public must have traveled a definite way without substantial change for ten years, under an adverse claim. *Smith v. Nofsinger*..... 834
5. Where public travel of a way is permissive, or its use interrupted during ten years, or travel is permanently diverted, user of the way will not ripen into an easement in favor of the public. *Smith v. Nofsinger*..... 834
6. By continuous, adverse user under claim of right for ten years the public may acquire a highway along a section line through cultivated lands. *Brym v. Butler County*..... 841
7. The power to establish highways being vested in the county board, petitioners and officers, when acting independently of the county board, cannot estop the county from asserting that a road had been acquired by adverse user. *Brym v. Butler County* 841

Homestead.

1. The county court has jurisdiction to appoint appraisers and to set aside a homestead to a widow. *In re Estate of Robertson* 490
2. Where a woman while living with her husband and children on the family homestead became insane, and remained so until after her husband's death, he had no power to divest her of her interest in the homestead by will. *In re Estate of Robertson* 490
3. An executor is not entitled to possession of the homestead as against a surviving spouse. *In re Estate of Robertson*.. 490
4. Certain house and lot *held* not exempt as a homestead as against a purchaser at administrator's sale to pay debts of estate under secs. 2 and 15, ch. 36, Comp. St. 1909. *Brusha v. Phipps* 822

Homicide. See CRIMINAL LAW, 25, 26, 30. INDICTMENT AND INFORMATION, 3. WITNESSES, 6.

1. An instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous. *Clarence v. State* 210
2. The use of the words "at least" in an instruction defining murder in the second degree, *held* prejudicial error. *Clarence v. State* 210
3. Evidence *held* to sustain the verdict. *Taylor v. State*..... 795

Indictment and Information. See BIGAMY, 1. SODOMY.

1. Names of witnesses examined before the grand jury, who are to be called upon the trial, need not be indorsed upon an indictment. *Donnelly v. State* 345

Indictment and Information—*Concluded.*

2. The purpose of requiring names of the state's witnesses to be indorsed on an information is to give accused notice of the identity of witnesses who are to testify against him. *Ossenkop v. State* 539

3. An indictment charging murder while perpetrating a rape, which referred to decedent as "her," without alleging that decedent was a woman, *held* not vulnerable to a demurrer or motion to quash for duplicity. *Taylor v. State*..... 795

4. Immaterial averments in an information may be rejected as surplusage. *Nelson v. State*..... 856

5. Under sec. 121 of the criminal code, an information charging an agent with embezzlement of money in a specific sum contains a sufficient description of the property. *Nelson v. State* 856

Infants.

A guardian *ad litem* has no right to possession of realty of his ward or to rents and profits therefrom. *In re Estate of Robertson* 490

Injunction. See INTOXICATING LIQUORS, 5. JUDGMENT, 2. MUNICIPAL CORPORATIONS, 1. OFFICERS.

Where the right to an injunction is ancillary, damages for its wrongful issuance are limited to expenses incurred in securing its dissolution. *Darling v. McBride*..... 481

Insurance. See CONTRACTS, 1.

1. A fraternal insurance company cannot have the benefit of its by-laws and amendments thereto as a defense, unless certified copies thereof were filed with the auditor of public accounts. *Metzger v. Royal Neighbors of America*..... 61

2. A person so injured that he cannot intelligently give notice of an accident will be excused while so disabled. *Hilmer v. Western Travelers Accident Ass'n*..... 285

3. Where a policy holder is incapacitated because of an injury, and a third person gives the insurer notice of the accident and the insurer acts thereon, it will be held to have received notice of the injury. *Hilmer v. Western Travelers Accident Ass'n*..... 285

4. The insurer may show by any competent evidence that the insured knowingly made false representations in his application for life insurance. *Bryant v. Modern Woodmen of America* 372

5. An untrue answer in an application for life insurance as to matters of opinion or judgment will not avoid the policy if made in good faith. *Bryant v. Modern Woodmen of America* 372

Insurance—*Concluded.*

6. An untrue answer in an application for life insurance as to material matters within the knowledge of the applicant will avoid the policy. *Bryant v. Modern Woodmen of America* 372
7. Evidence that an applicant for insurance was told by his physician that he was suffering from tuberculosis, *held* material as to the applicant's honesty and good faith in making the application. *Bryant v. Modern Woodmen of America.* 372
8. Sec. 94, ch. 43, Comp. St. 1909, prohibiting acceptance of members over the age of 55 years, *held* no defense to an action on a benefit certificate issued before passage of the act. *Palmer v. Loyal Mystic Legion of America*..... 596
9. Evidence in action on benefit certificate *held* to sustain finding that no misrepresentation as to age of the member was made at the time of his admission. *Palmer v. Loyal Mystic Legion of America* 596
10. Where by-laws of a beneficial association provided that payment should be made within 90 days after proof of death, but fixed no time within which the proof should be made, *held* that 30 days was a reasonable time, and that interest should not be computed until after 120 days. *Palmer v. Loyal Mystic Legion of America*..... 596

Interest. See INSURANCE, 10. JUDGMENT, 9.

Intoxicating Liquors.

1. Evidence *held* to support a conviction for selling intoxicating liquors without a license. *Donnelly v. State*..... 345
2. The supreme court may on its own motion dismiss an appeal from an order granting a liquor license, where the term of the license has expired, and no motion was made to advance the case. *Brown v. Buckley* 572
3. Petitioners to an application for a liquor license are not proper parties to an appeal from an order granting or refusing a license. *Weiler v. Fischer*..... 614
4. Where, on appeal from an order granting a liquor license, the signers to applicant's petition were not made parties, and entered no appearance, the district court cannot tax the costs against them. *Weiler v. Fischer*..... 614
5. Where the district court without jurisdiction taxed the costs on appeal to the signers of an application for liquor license, the persons affected need not make application to retax the costs, but may enjoin enforcement of the void order. *Weiler v. Fischer* 614

Intoxicating Liquors—*Concluded.*

6. The mayor and council of metropolitan cities may make the license year coextensive with the fiscal year fixed by charter; and the board of fire and police commissioners may grant liquor licenses commencing on the 1st day of January and terminating on the 31st day of December of the current year. *Johnson v. Leidy* 818

Judgment.

1. In a proceeding under sec. 602 of the code to open a judgment for fraud more than two years after its rendition, petition *held* insufficient. *State v. Lincoln Medical College,* 269
2. Where persons severally liable on separate contracts are collusively joined as defendants for the purpose of suing a defendant in a county wherein he does not reside, a summons served upon him in the county of his residence is void, and, if the record discloses those facts, collection of the judgment may be enjoined. *Ayres v. West* 297
3. Defendant against whom a judgment by default was entered *held* not entitled to relief in equity. *Gurske v. Britt* 312
4. In a suit to vacate a judgment because defendant was *non compos mentis*, evidence *held* not to show incompetency. *Gurske v. Britt* 312
5. The district court has power to set aside a judgment during the term, if it was procured by fraud, or if erreoneous. *Winder v. Winder* 495
6. An order vacating a decree of divorce *held* to have been made during the term. *Winder v. Winder* 495
7. A judgment on the merits concludes parties and privies, not only as to every matter determined, but as to any other admissible matter. *Triska v. Miller* 503
8. A fact or right in issue determined by a decree cannot be again litigated by the parties without a modification or vacation of the decree. *Triska v. Miller* 503
9. In an accounting between a trust estate and the principal beneficiary, decree *held* one for the payment of money, and to draw interest from rendition at the rate of 7 per cent. per annum, under sec. 3, ch. 44, Comp. St. 1909. *Smullin v. Wharton* 553
10. In a suit to set off a claim against a judgment, an attorney's lien for services in procuring the judgment will not be allowed to reduce the set-off, if the judgment is sufficient to satisfy the set-off and the attorney's lien. *Stone v. Snell* 581
11. A court of equity may in its discretion allow a set-off of a claim against a judgment where the judgment creditor is insolvent. *Stone v. Snell* 581

Judgment—*Concluded.*

12. A suit to cancel a judgment by default should be dismissed where a meritorious defense to the original action is not shown. *Westman v. Carlson* 847

Jury. See CONSTITUTIONAL LAW, 4.

1. Sec. 465*a* of the criminal code should be construed with sec. 664 of the civil code. *Aabel v. State*..... 711
2. A challenge of a juror for cause must be decided from a consideration of facts and circumstances developed during his examination, including his appearance and actions. *Taylor v. State*..... 795
3. An opinion formed from reading newspaper accounts, or from common talk or rumor, *held* not to disqualify a juror. *Taylor v. State* 795

Justice of the Peace.

1. A justice *held* to have jurisdiction to enter a judgment by default for failure to appear. *Gurske v. Britt*..... 312
2. A justice of the peace, in a case tried without a jury, where property has not been attached or the defendant arrested, must render judgment within four days after close of the trial, and in computing time, under sec. 1002 of the code, he should include the day of trial and of judgment. *Calland v. Wagner* 755

Landlord and Tenant. See EQUITY. MARSHALING ASSETS. SPECIFIC PERFORMANCE, 4. STATUTE OF FRAUDS, 2, 3.

1. An unsuccessful attempt to evict a tenant by a landlord will not defeat his claim for rent. *Stone v. Snell*..... 581
2. Damages caused by wilful interference with the rights of a tenant may reduce his liability for rent. *Stone v. Snell*.... 581

Larceny.

A clerk appropriating goods from his employer's store *held* guilty of larceny, and not embezzlement. *Aabel v. State*... 711

Libel.

1. In an action for damages for libel, where the question of the amount of damages has been submitted to the jury under proper instructions, their finding will not be disturbed unless clearly excessive. *Dennison v. Daily News Publishing Co.* 862
2. If a published statement made in the alternative will not admit of any reasonable construction except that a party referred to participated in the main act charged, it is not error to instruct that the entire statement constitutes a libel *per se*. *Dennison v. Daily News Publishing Co*..... 862

Libel—*Concluded.*

3. Substitution of the words "by this same individual" for the pronoun "he" in an instruction *held* immaterial. *Dennison v. Daily News Publishing Co*..... 862

Licenses.

A parol license to construct a dam and ditches for irrigation, acted upon and used for years without objection, is irrevocable. *Arterburn v. Beard* 733

Limitation of Actions.

1. Where an injury to crops is caused by the negligent construction of a railroad embankment, the cause of action accrues at the date of the injury. *Reed v. Chicago, B. & Q. R. Co.* 54
2. Time within which to bring a suit to remove a cloud on title to land stated. *Dringman v. Keith*..... 476
3. The right to damages for the wrongful flooding of land with surface water by means of a ditch does not accrue when the ditch is dug, but when the flooding occurs. *Shavlik v. Walla* 768

Mandamus.

1. The order allowing a writ of mandamus to issue is the extent of the power of the judge, and the clerk of the district court must issue the writ, authenticated by the seal of the court. *State v. Carrico* 448
2. A writ of mandamus cannot be issued until the petition therefor is filed and the writ allowed by the judge. *State v. Carrico* 448
3. A mandamus proceeding in Nebraska is an action at law. *State v. Farrington* 653
4. Title to an office cannot be tried by mandamus. *State v. Quinn* 758
5. Mandamus will lie to compel an officer whose term has expired to deliver to the person who holds the certificate of election and has qualified the property of the office, and possession of the office room. *State v. Quinn*..... 758

Marriage.

1. Instruction as to what constitutes a contract to marry approved. *Hinckley v. Jewett* 464
2. Hearsay evidence, such as general talk in the community in which the parties reside, is inadmissible to establish a contract to marry. *Hinckley v. Jewett* 464

Marshaling Assets.

In a suit for specific performance of a contract of lease, where a third person to whom the lessee had fraudulently mortgaged the crops was made a party, rule for marshaling assets stated. *Rogers v. Trumble* 316

Master and Servant.

1. Two servants in the same service, and neither under the control of the other, are fellow servants. *Waxham v. Fink*, 180
2. Master *held* not liable, the injury complained of having been caused by a fellow servant. *Waxham v. Fink*..... 180
3. Allegation in petition for injury to employee *held* to charge that the master had knowledge or should have known of the danger of the work. *Hankins v. Reimers*..... 307
4. If the employment of a minor contrary to sec. 5490, Ann. St. 1909, is the proximate cause of an injury to the child, his master is liable. *Hankins v. Reimers* 307

Mechanics' Liens.

1. In a suit to foreclose a mechanic's lien, where defendant files a general denial, plaintiff must prove that his account was filed for record within 60 days from date of furnishing some part of the material. *Nebraska Material Co. v. Seelig*..... 387
2. Where more than four months intervene between items for material furnished, a mechanic's lien will not attach for those preceding the hiatus, unless all were furnished under one contract. *Cross & Johnston v. Eyerley*..... 516
3. A tenant cannot, without authority of the landlord, charge the leased premises with a lien for material used in repairing a building. *Cross & Johnston v. Eyerley*..... 516
4. A mechanic's lien in favor of a principal contractor is based upon contract for the purpose of securing debts thereunder. *Occidental Building & Loan Ass'n v. McGrew*..... 694
5. One lien for several contracts may be filed if material was furnished or labor performed under each within four months of the date the lien was filed. *Grove-Wharton Construction Co. v. Clarke* 831
6. A trifling failure to perform the contract will not defeat the lien. *Grove-Wharton Construction Co. v. Clarke*..... 831
7. Evidence *held* to show one who did grading on roadbed of railway to be a subcontractor under the laborers' lien law. *Owen v. Chicago, B. & Q. R. Co*..... 851
8. Statutes providing for mechanics' and laborers' liens *held* remedial and to be liberally construed. *Owen v. Chicago, B. & Q. R. Co*..... 851
9. In a subcontractor's lien for grading roadbed of railway, a description of premises *held* sufficient, which enables one familiar with the locality to identify them with reasonable certainty. *Owen v. Chicago, B. & Q. R. Co*..... 851
10. Description of railroad right of way in a subcontractor's lien *held* sufficient. *Owen v. Chicago, B. & Q. R. Co*..... 851

Mechanics' Liens—*Concluded.*

11. Describing more land than is subject to the lien will not render a mechanic's lien void, if not done with fraudulent intent. *Owen v. Chicago, B. & Q. R. Co*..... 851

Mortgages.

1. A junior mortgagee who was a party to a foreclosure of prior mortgages *held* estopped from suing the purchaser at the sale, or those claiming under him, to redeem from the prior incumbrances and foreclose his mortgage. *Mansfield v. Kilgore* 452

2. Mortgagee *held* not entitled to relief against one who purchased the mortgaged property under a mistake as to its location arising from representations of the mortgagee. *Occidental Building & Loan Ass'n v. McGrew*..... 694

3. Where a mortgage, executed prior to an easement granted without the mortgagee's knowledge and consent, is foreclosed and the grantees of the easement are parties to the suit, a purchaser at the foreclosure sale takes free from the easement. *Arterburn v. Beard* 733

4. A foreclosure sale, unless the decree otherwise provides, transfers to the purchaser every interest in the property of all the parties to the action. *Arterburn v. Beard*..... 733

5. A mortgage for the excess in value of real property exchanged for personalty will be canceled in the hands of the original payee for fraud. *Dwinell v. Watkins*..... 740

6. In a suit to foreclose a mortgage, evidence *held* to show payment of the mortgage. *Crile v. Fries*..... 789

Municipal Corporations.

1. Special assesments for a sidewalk, levied without considering benefits and damages, are void, and may be enjoined. *Schneider v. Plum* 129

2. The legislature has power to grant authority to villages to license or probibit billiard-halls, pool-halls or bowling-alleys. *Cole v. Village of Culbertson*..... 160

3. The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts. *Cole v. Village of Culbertson*..... 160

4. Under sec. 8887, Ann. St. 1907, village trustees have power to prohibit billiard-halls, pool-halls and bowling-alleys. *Cole v. Village of Culbertson* 160

5. Where the board of canvassers refuses a candidate a certificate of election, he has no *prima facie* right to office. *Hotchkiss v. Keck* 322

Municipal Corporations—*Concluded.*

6. One who is elected and serves as trustee of a village is entitled to hold over after his term expires until his successor is elected and qualified. *Hotchkiss v. Keck*..... 322
7. Where two lots are used as one property, in estimating damages from grading a street the injury to the entire property should be considered on appeal from the award of appraisers. *Kavan v. City of South Omaha*..... 469
8. Where a lot owner appeals from the award of appraisers of damages for grading a street, he waives all objections to irregularity of proceedings of the city council in making the improvement. *Kavan v. City of South Omaha*..... 469
9. In estimating damages for grading a street, special benefits to the property should be set off against actual damage. *Kavan v. City of South Omaha*..... 469
10. An ordinance, modifying a former ordinance chartering a gas company, not published for two weeks as required by sec. 16, ch. 12*a*, Comp St. 1905, *held* void. *Blackburn v. City of Omaha* 761
11. Petition to recover from an abutting owner damages for injuries from his failure to repair an adjacent sidewalk, *held* demurrable, where it did not allege that the city in notifying defendant to make repairs indicated the manner of making them or the kind of materials to be used. *McAuliffe v. Noyce* 665

Negligence.

1. Where different minds may reasonably draw different inferences, negligence and contributory negligence are questions for the jury. *Vorce v. Independent Telephone Co*.... 27 *Crabtree v. Missouri P. R. Co.* 33
2. Evidence *held* sufficient to require the submission of the questions of negligence and contributory negligence. *Baker v. Racine-Sattley Co.* 227
3. In an action for injuries to an employee *held* error to instruct the jury to find for defendant if the injuries were caused by an accident, unless they are further instructed that defendant's negligence was not a proximate cause of the injury. *Hankins v. Reimers*..... 307
4. In an action for injuries caused by slipping on refuse on a sidewalk, verdict for defendant sustained. *Riseman v. Hayden Bros.* 610

New Trial. See APPEAL AND ERROR, 3, 12, 16, 20, 24, 30.

1. A new trial for newly discovered evidence will be denied where due diligence is not shown. *Metzger v. Royal Neighbors of America* 61

New Trial—*Concluded.*

2. Assignment of error that the verdict is not sustained by sufficient evidence, or the verdict is contrary to law, is sufficient to challenge attention of trial court to its ruling in refusing to direct a verdict. *Waxham v. Fink* 180
3. A conflict of evidence is not ground for a new trial. *Hinckley v. Jewett* 464

Officers. See COURTS, 3. MANDAMUS, 4, 5.

One without *prima facie* right to office who attempts to discharge its duties will be restrained at suit of incumbent. *Hotchkiss v. Keck* 322

Partnership. See CORPORATIONS, 2.

Pleading. See APPEAL AND ERROR, 29. HIGHWAYS, 3. MUNICIPAL CORPORATIONS, 11. WILLS, 1.

1. Answer *held* an admission of plaintiff's ownership of the note and mortgage on which the action was based. *Hornstein v. Cifuno* 103
2. Filing an amended or substituted answer in which a different defense is set forth in place of one to which a demurrer was sustained, *held* a waiver of any error in the ruling on the demurrer. *Papillion Times Printing Co. v. Sarpy County* 219
3. A defendant may plead as many defenses as he may have if not so repugnant that, if one be true, another must be false. *Hilmer v. Western Travelers Accident Ass'n*..... 285
4. The defense that a written instrument was executed and delivered under a mistake of fact must be specially pleaded. *Bee Building Co. v. Weber Gas & Gasoline Engine Co*..... 326
5. Signing verification of petition *held* a compliance with sec. 112 of the code, requiring every pleading in a court of record to be subscribed by the party or his attorney. *In re Estate of Graff* 535
6. In action for unliquidated damages plaintiff must allege in his petition facts to warrant the conclusion that defendant's wrongful acts were the proximate cause of the damages. *Bahr v. Manke* 750

Principal and Agent.

1. In a suit by a manufacturer to recover from a retail agent amount due on purchasers' notes guaranteed by him, evidence of release of the guaranty by plaintiff's authorized agent *held* sufficient to show the agent's authority. *Cooper Wagon & Buggy Co. v. Torbert*..... 143
2. Agency cannot be proved by mere acts or declarations of an alleged agent not brought home to the principal. *Warner v. Sohn* 519

Principal and Agent—*Concluded.*

3. In proving authority of an agent to bind the principal by the former's transaction, there must be evidence of the agency at the time. *Warner v. Sohn*..... 519
4. The presumption that agency continues, when once established, may be overcome by proof. *Warner v. Sohn*..... 519

Process. See TAXATION, 9.

1. In an action against the maker of a note in the county where he resides, alias summons cannot be issued to another county for the guarantor of the debt. *Ayres v. West*..... 297
2. Return of sheriff that he served the summons raises a presumption that he performed his duty. *Westman v. Carlson*, 847
3. Return of sheriff that he served a summons can only be impeached by clear and convincing proof. *Westman v. Carlson*, 847

Quieting Title.

In a suit by vendee to quiet title, evidence *held* to support decree quieting title in plaintiff. *Lanham v. Bowlby*..... 148

Quo Warranto.

1. After the corporate existence of a village has been terminated, persons assuming to act as village trustees may be ousted by *quo warranto* proceedings. *State v. Greer*..... 88
2. Where the county attorney consents, an elector whose property is being assessed by persons illegally acting as village trustees may institute *quo warranto* proceedings. *State v. Greer* 88

Railroads. See LIMITATION OF ACTIONS, 1. WATERS, 1.

1. If a traveler approaching a railroad crossing fails to look and listen without reasonable excuse, and such failure contributes to his injury, he cannot recover. *Crabtree v. Missouri P. R. Co*..... 33
2. If the view of a traveler at a crossing is obstructed or his attention distracted, whether he exercised ordinary care is a question for the jury. *Crabtree v. Missouri P. R. Co*.... 33
3. Where an intelligent girl nine years of age was killed at a railroad crossing, the jury may consider her age in determining whether she used ordinary care. *Crabtree v. Missouri P. R. Co.* 33
4. Evidence *held* to sustain verdict against a railroad company for damages from defective construction of an embankment. *Reed v. Chicago, B. & Q. R. Co*..... 54
5. While it is the duty of a pedestrian at a railway crossing to look and listen, he is not necessarily negligent because he did not look at the most advantageous point. *Wallenburg v. Missouri P. R. Co*..... 642

Receivers.

A district court having jurisdiction over the receivership of an insolvent state bank may without notice accept the resignation of the receiver and appoint his successor. *In re Estate of Graff* 535

Replevin.

It is not error to direct a verdict for defendant in replevin, where the evidence is insufficient to sustain a judgment for plaintiff. *Warner v. Sohn* 519

Robbery.

1. Evidence *held* sufficient to identify the accused as the persons who committed a robbery. *Booton v. State*..... 114
2. Evidence in a prosecution for robbery *held* to sustain verdict. *Booton v. State* 114

Sales. See CONTRACTS, 3.

1. Where the vendor in a conditional sale fails to file his contract as authorized by sec. 6045, Ann. St. 1907, he cannot interfere with a *bona fide* purchaser of the property sold. *Mathews Piano Co. v. Markle*..... 123
2. Action by vendor of personal property sold on condition to recover the debt is a waiver of the condition and the sale becomes absolute. *Mathews Piano Co. v. Markle*..... 123
3. Action for price of wagons sold *held* premature, and dismissed without prejudice. *Peru Plow & Implement Co. v. Johnson Bros.* 428
4. Where a buyer under an executory contract refuses to accept goods, the only remedy of the seller is to sue for breach of contract. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.* 623
5. Where a buyer under an executory contract refuses to accept goods, the seller may sue for damages. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co*..... 623
6. The measure of damages for breach of an executory contract ordinarily is the difference between the contract price and the market price at the time and place of acceptance. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co*..... 623
7. Where a buyer, after countermanding an order for goods, treated the contract as in force by testing them, he waived the countermand. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.* 623
8. Where a buyer under an executory contract refused to accept the goods after delivery to a carrier, an action for goods sold will not lie, and a charge that, if the jury find for plaintiff, he can recover the purchase price is erroneous. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co*..... 623

Schools and School Districts.

Women entitled to vote at school elections may vote for or against school district bonds. *Olive v. School District*.... 135

Sodomy.

Indictment *held* not to charge the crime prohibited by sec. 205*a* of the criminal code. *Kinnan v. State*..... 234

Specific Performance.

1. In a suit for specific performance, plaintiff *held* entitled to a decree quieting her title to a part of the land. *Svanda v. Svanda* 203
2. In a suit for specific performance, where the answer alleged a homestead interest, decree denying any relief reversed, with direction as to the pleadings and the ascertainment of the homestead interest. *Svanda v. Svanda*..... 203
3. Where defendants, in consideration of the marriage of plaintiff to their son, agreed to convey to them jointly a designated tract of land, delivery and acceptance of a deed to a part of the land *held* to bar a suit for specific performance of the contract. *Svanda v. Svanda* 203
4. In a suit for specific performance of a contract of lease, a finding as to a demand construed. *Rogers v. Trumble*..... 316
5. Decree of specific performance of land contract affirmed. *Spier v. Schappel* 335

Statute of Frauds.

1. Contract by two men to construct a ditch on land of a third party is not a contract for an interest in land within the statute of frauds. *Meese v. Nixon*..... 691
2. Under sec. 5, ch. 32, Comp. St. 1909, a parol lease for three years is valid for one year only, and may be terminated by either party at the end of the year by notice. *Osgood v. Shea* 729
3. Possession by tenant for one year under parol lease for three years is not such part performance as will avoid the statute of frauds. *Osgood v. Shea* 729

Statutes. See COURTS, 1, 2. MECHANICS' LIENS, 8.

1. Sec. 895 of the code, relating to computation of time, *held* to apply alike to the construction of statutes and to matters of practice. *Johnston v. New Omaha T.-H. E. L. Co.*. 165
2. The act requiring certain corporations to file articles with the secretary of state and the act establishing fees for such services *held in pari materia*, and to be construed together. *State v. Searle* 259
3. Rule for construing an exception in a statute stated. *State v. Searle* 259

Street Railways.

In an action for personal injury, there being evidence that defendant's negligence caused plaintiff to fall upon pavement, *held* not error requiring a reversal to permit a physician to testify that a fall upon pavement could have caused the injury. *Gugler v. Omaha & C. B. Street R. Co*..... 586

Taxation.

1. An unauthorized division of land into town lots and a sale thereof for taxes by such designation is void. *State v. Several Parcels of Land* 100
2. It is error to confirm a tax sale where the taxes have been paid. *State v. Several Parcels of Land*..... 100
3. A sale of land for taxes, where there was no assessment, *held* void, and the land subject to redemption. *Equitable Land Co. v. Willis* 200
4. Where notice of proceedings to collect delinquent taxes under sec. 10650, Ann. St. 1903, was published in a newspaper other than the one designated by the county commissioners and the county accepted the services without protest, *held* that the publisher can recover the actual cost of the services rendered, not exceeding the legal rate. *Miles v. Holt County* 238
5. Proof of indorsement of a tax sale certificate by an original purchaser and possession by an indorsee are *prima facie* evidence of ownership of it. *Farmers Loan & Trust Co. v. Joseph* 256
6. A mere trespasser claiming no interest in the property, and having no duty to pay the taxes, is not an actual occupant upon whom notice must be served to vest the court with jurisdiction to confirm the sale. *Parsons v. Prudential Real Estate Co.* 271
7. The right of redemption from a tax sale under the scavenger act (laws 1903, ch. 75) is a property right belonging to those having an interest in the real estate, and not to a mere trespasser. *Parsons v. Prudential Real Estate Co*.... 271
8. The owner of land sold under the scavenger act (laws 1903, ch. 75) must redeem within two years from the sale under the decree, not from final confirmation. *Parsons v. Prudential Real Estate Co.* 271
9. In a personal action to foreclose a tax lien against a resident, service by publication is void. *Clarence v. Cunningham* 434
10. Where a decree foreclosing a tax lien is set aside as void for want of service, the owner should be allowed to redeem. *Clarence v. Cunningham* 434

Taxation—*Concluded.*

11. In a suit to foreclose a tax lien, evidence *held* to show payment of the taxes. *Crile v. Fries* 789
12. In a suit to foreclose a tax lien, where a junior lienor was made a party, and the property sold under decree, *held* that a second order of sale issued by the clerk was without authority. *Storey v. Miles* 827

Telegraphs and Telephones. See CONSTITUTIONAL LAW, 1.

1. Proceedings for violation of the provisions of subd. *c*, sec. 15, ch. 90, laws 1907, must be by criminal prosecutions, and not by civil actions. *Western Union Telegraph Co. v. State*, 17
2. State Railway Commission law (laws 1907, ch. 90), so far as it relates to prevention of abuses, extortions and unjust discriminations, is applicable to telegraph and telephone companies. *Western Union Telegraph Co. v. State*..... 17

Trial. See APPEAL AND ERROR. CONTRACTS, 4. CRIMINAL LAW. EVIDENCE, 6 REPLEVIN. SALES, 8.

1. Testimony apparently irrelevant may be excluded where proponent does not state that evidence to be introduced will make it relevant. *Metzger v. Royal Neighbors of America*, 61
2. The credibility of a witness is for the jury, and they may credit or reject the whole or any part of his testimony. *Baker v. Racine-Sattley Co.* 227
3. A verdict in favor of two defendants and against another, based on conflicting evidence which is the same as to all, cannot stand. *Young v. Rohrbough*..... 279
4. Though the form of a question in a deposition be technically objectionable, if the answer furnishes proper evidence, it is admissible. *Bryant v. Modern Woodmen of America*... 372
5. When a witness gives a proper but incomplete answer to a proper question, it is not error to refuse to strike the answer. *Gugler v. Omaha & C. B. Street R. Co*..... 586
6. The rule that allegations and proof must agree is satisfied if the allegations fairly indicate the facts to be proved, and the case is tried on the theory that such facts support an issue made by the pleadings. *Dennison v. Daily News Publishing Co.* 862
7. In an action against one alleged to have assumed a debt due for an engine, direction of verdict for defendant *held* proper. *Heisler Pumping Engine Co. v. Baum*..... 1
8. An instruction that the evidence of certain witnesses was entitled to greater weight than that of others *held* properly refused as invading the province of the jury. *Crabtree v. Missouri P. R. Co.* 33

Trial—*Continued.*

9. If instructions are more favorable to appellant than the record warrants, a verdict will not be set aside because in minor details some may be criticised. *Metzger v. Royal Neighbors of America* 61
10. Instructions not applicable to the testimony or the law should not be given. *Anderson v. Carlson*..... 126
11. It is not error to refuse requested instructions where the principles are stated in instructions given. *Anderson v. Carlson* 126
12. Assignment in motion to direct verdict for defendant that "the facts proven are not sufficient to entitle the plaintiff as matter of law to recover" is equivalent to assigning that the evidence is insufficient to justify verdict for plaintiff. *Waxham v. Fink* 180
13. Where defendant asks for a directed verdict, he should make his motion without reservation. *Baker v. Racine-Sattley Co.* 227
14. Where defendant upon the overruling of his motion for a directed verdict offers testimony in support of his defense, he waives any error in the overruling of the motion. *Baker v. Racine-Sattley Co.* 227
15. Admission of immaterial and incompetent evidence may be cured by an instruction to disregard it, where it is of such a nature as not to prejudice the substantial rights of complainant. *Baker v. Racine-Sattley Co*..... 227
16. If a material fact is alleged and proved without contradiction, the court should so instruct the jury. *Bee Building Co. v. Weber Gas & Gasoline Engine Co*..... 326
17. Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous. *Bryant v. Modern Woodmen of America* 372
18. An instruction withdrawing all defenses but one, while there is evidence tending to prove another defense pleaded, is erroneous. *Bryant v. Modern Woodmen of America*.... 372
19. Where there is no testimony on an issue raised by the pleadings, it may be withdrawn from the jury by an instruction. *Olmstead v. City of Red Cloud*..... 528
20. By neglecting to request instructions on a particular subject, defendant may waive the right to urge error for failure to instruct thereon. *Olmstead v. City of Red Cloud*..... 528
21. Where the court attempts to recite in an instruction matters to be considered in determining the preponderance of the evidence, the instruction should embrace all matters to be considered. *Gugler v. Omaha & C. B. Street R. Co*..... 586

Trial—*Concluded.*

22. It is not error to refuse an instruction that might be understood by the jury to mean that they should compare the number of witnesses in determining the facts to which they testified. *Gugler v. Omaha & C. B. Street R. Co*..... 586
23. Instructions not applicable to the evidence should not be given, although they may state correct, abstract principles of law. *Wallenburg v. Missouri P. R. Co*..... 642
24. Where the trial court viewed the topography of a locality, its findings with reference thereto are entitled to great weight. *Shavlik v. Walla* 768

Trusts. See JUDGMENT, 9. WILLS.

Vendor and Purchaser. See ADVERSE POSSESSION.

1. Purchaser of land under an unrecorded deed *held* entitled to recover from her grantor, who had subsequently conveyed to another, the value of her interest at the time her title was destroyed. *Hilligas v. Kuns* 68
2. In an action for the value of land, evidence *held* admissible in mitigation of damages, but not to defeat the action. *Hilligas v. Kuns* 68
3. Growing crops pass by deed, but may be severed by reservation, either by parol agreement or by instrument in writing. *Cooper v. Kennedy* 119
4. Destruction of deed by grantor after delivery and without grantee's consent *held* not to divest grantee of title. *Svanda v. Svanda* 203
5. In a suit by vendee to cancel an executory contract and recover money paid thereon, where the defendant alleged performance and tender, evidence *held* insufficient to sustain decree for plaintiff. *Patterson v. Mikkelson*..... 512
6. In decreeing strict foreclosure of a land contract, the court should give the party in default a reasonable time to avoid the foreclosure by performing the contract. *Patterson v. Mikkelson* 512
7. A conveyance of real estate transfers all the interest of the grantor, including rents not then accrued. *Stone v. Snell*.. 581
8. One purchasing land burdened with an open and visible easement is ordinarily chargeable with notice thereof. *Arterburn v. Beard* 733
9. Where parties, foreclosed of easements of flowage and a dam and ditches for irrigation, continue to maintain them for two years thereafter, claiming title thereto, a subsequent purchaser with notice takes the land charged with the easements. *Arterburn v. Beard*..... 733

Venue. See CRIMINAL LAW, 9, 29.

Waters. See LICENSES. LIMITATION OF ACTIONS, 3. VENDOR AND PURCHASER, 9.

1. Damages paid to a riparian owner for diversion of a stream do not cover future injuries from defective construction of a railroad embankment. *Reed v. Chicago, B. & Q. R. Co....* 54
2. A landowner cannot collect surface water in a volume and by an artificial channel discharge it upon another's land to his damage. *Shavlik v. Walla* 768

Wills.

1. In a suit to require the widow of a testator to account, admission in answer that she had received from the income of a trust estate part of an allowance for her maintenance *held* not to preclude her from asserting that she should not be charged in the accounting with the sum thus received. *Smullin v. Wharton* 553
2. In an accounting between a trust estate and the principal beneficiary, the beneficiary may be credited with the net proceeds of personalty bequeathed to her, where used for the benefit of the trust estate, she having been charged with a sum received by her from the real estate. *Smullin v. Wharton* 553
3. In an accounting between a trust estate and testator's wife who was the principal beneficiary, a rejected demand at a former trial for the amount due her under the will, less sums paid her for maintenance, *held* not to estop her from asserting that such payments were not chargeable to her in the accounting. *Smullin v. Wharton* 553
4. Will construed. *Smullin v. Wharton* 553

Witnesses. See CRIMINAL LAW, 5-8. INDICTMENT AND INFORMATION, 1, 2.

1. In an action by children on a certificate of insurance on the life of their mother, the surviving husband cannot testify to privileged communications made by her during marriage unless the privilege is waived. *Metzger v. Royal Neighbors of America* 61
2. A statement by a physician to a patient in the course of a professional visit, based upon a relation of facts by the patient, or a physical examination by the physician, *held* privileged. *Bryant v. Modern Woodmen of America*.....372
3. A waiver of the privilege of the statute disqualifying a physician from testifying is a waiver of the disqualification as to the whole transaction. *Bryant v. Modern Woodmen of America* 372
4. Certain witness *held* not incompetent under sec. 329 of the code. *Scott v. Micek* 421

Witnesses—*Concluded.*

5. The purpose of sec. 333 of the code is to prevent improper disclosure of facts learned by means of the confidential relation between physician and patient. *Ossenkop v. State*.. 539
6. Where defendant in a prosecution for murder employs a physician to examine decedent's body, the physician is not excused, under sec. 333 of the code, from testifying to the results of his investigation, when called as a witness for the state. *Ossenkop v. State* 539