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LAURA DRAPER ET AL., APPELLEES, V. CHARLES OSTERMAN ET AL., APPELLANTS.

FILED JULY 9, 1910. No. 16,106.

Appeal: AFFIRMANCE. Where, on an investigation of a question of fact in a suit in equity brought to this court on appeal, our finding accords with the judgment of the district court, that judgment will be affirmed, without discussing or quoting the evidence.

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

John A. Whitmore, for appellants.

John J. Sullivan, George W. Ayres and *John C. Martin, contra.*

BARNES, J.

Action in the district court for Hamilton county, Nebraska, to quiet the title to the undivided two-sixths of the south half of the northeast quarter of section 30, township 13, range 5 west of the sixth principal meridian, situated in that county. The plaintiffs had judgment, and the defendants have appealed.

It appears that the plaintiffs' father, Jasper Allen Foster, obtained title to the quarter section of land, above described, as a government homestead, and, together with his family, resided thereon for about 15 years prior to his death, which occurred on the 24th day of October, 1889. At that time the land in question was incumbered by a mortgage for $600 on which there was some interest due and payable, and certain unpaid taxes for an amount not disclosed by the record. The deceased left surviving him a widow and five children, including the plaintiffs, who at that time were minors of tender years. The deceased had no interest in any other real estate except 40 acres of rough, uncultivated land in section 19 of the same township and range in which his homestead was situated,

which he held under a contract of purchase from the Union Pacific Railroad Company. This land was undeeded, and nearly one-half of the purchase price, which was $200, was unpaid at the time of his death. The widow undertook to have her homestead set off under the provisions of what is commonly known as "Baker's Decedent Law" (laws 1889, ch. 57), which has been declared unconstitutional by this court. *Finders v. Bodle,* 58 Neb. 57; *Walker v. Ehresman,* 79 Neb. 775; *Draper v. Clayton,* p. 443, *post; Helming v. Forrester,* p. 438, *post.*

The county court of Hamilton county, assuming to act under, and in accordance with the provisions of the Baker act, assigned to the widow as a homestead the north one-half of the land entered by her deceased husband as a government homestead, and the 40 acres of rough, uncultivated and undeeded land in section 19. The appraised value of the land so assigned as a homestead appears at that time to have been less than $2,000. Thereafter the south one-half of the government homestead was sold to pay the debts of the deceased, at administrator's sale, and the defendant, Charles Osterman, was the purchaser at said sale. On January 8, 1907, which was less than ten years after the plaintiff, Marion Foster, had attained his majority, and about three years after his coplaintiff, Bertha Foster, had attained her majority, they instituted this action to quiet the title of each of them to an undivided one-sixth of the land thus sold at administrator's sale. The findings and decree of the trial court were in their favor, and from a judgment in accordance therewith the defendants have brought the case to this court for review.

Counsel for the defendants commences his argument as follows: "As we view the law of the state of Nebraska, under the statutes and decisions of this court, the only question in this case is this: Was the homestead of Jasper Allen Foster, at the time of his death, worth less or more than $2,000 over and above the incumbrances thereon? If it were less than the said sum, we concede that the

judgment of the district court was right, and should be affirmed." The plaintiffs, at the opening of their argument, also said: "The sole question involved in this controversy at this time is the net value of the Foster homestead at the time of the owner's death in 1889." Accepting these statements as the basis of our inquiry, the only question for our determination is whether the finding of the district court that the value of the homestead of Jasper Allen Foster, at the time of his death, was less than $2,000 responds to the weight of the evidence contained in the bill of exceptions. Without quoting the testimony of the witnesses, it is sufficient to say that after carefully reviewing the record we find that a fair preponderance of the evidence shows that at the date of the administrator's sale the homestead was worth about $2,400, and its net value, after deducting the incumbrances, was a trifle less than $1,800. This fact is established by the testimony of at least four witnesses as against one, all of whom seem to be of equal credibility, and with like opportunities for observation. This accords with the finding of the district judge, who heard and saw the witnesses.

In such a case the judgment of the district court should be affirmed, and it is so ordered.

AFFIRMED.

CHARLES G. HELMING ET AL., APPELLANTS, V. EMIL O. FORRESTER ET AL., APPELLEES.

FILED JULY 9, 1910. No. 16,065.

1. **County Courts:** JURISDICTION. An *ex parte* order confirming in a widow a title in fee simple to a homestead under the Baker decedent act (laws 1889, ch. 57) is one which the county court has no jurisdiction to make.

2. **Constitutional Law:** "CURATIVE ACTS": VESTED RIGHTS. An act of the legislature, of the class known as "curative acts," which

attempts to take away property rights already vested violates the constitution and is void. *Draper v. Clayton*, p. 443, *post*.

3. **Remainders**: LIMITATION OF ACTIONS. The right to bring an action for the possession of real property in the possession of a life tenant does not accrue to a remainderman until the termination of the life estate.

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

J. J. Thomas, Edwin Vail, C. E. Spear, F. J. Mack, E. M. Bartlett and *Douglas Deremore*, for appellants.

E. A. Cook, contra.

LETTON, J.

William F. Helming died intestate on the 5th day of December, 1889, without issue, leaving a widow, Minnie C. Helming. His mother, Charlotte Helming, and his brothers, Charles G. Helming and Otto B. Helming, and his sister, Minnie Sill, were his only heirs. His mother died soon thereafter, and her interest descended to the brothers and sister who are the plaintiffs in this action. The widow made application to the county court of Dawson county under the provisions of chapter 57, laws 1889, known as the "Baker Decedent Law," to have the homestead assigned to her. Action was taken by the court thereunder, setting aside and assigning to her the homestead of the deceased consisting of 160 acres of land. She afterwards married Emil O. Forrester, and afterwards died, leaving the defendant, Paul Forrester, a minor, as the sole issue of this marriage. During coverture, Mrs. Forrester and her husband executed a mortgage on the premises to one Le Flange, which mortgage was afterwards assigned by him to Emil O. Forrester. The mortgage and the assignment both appear on the records of Dawson county. Mrs. Helming and the defendants have held possession of the premises ever since the death of William F. Helming. The plaintiffs bring this action,

alleging that they are the heirs of William F. Helming and the owners in fee of the premises, that the proceedings by which the county court attempted to assign the title in fee to Mrs. Helming were void. They pray that the cloud upon the title created by the decree and the mortgage and assignment may be set aside, for an accounting of the money paid by defendants for the benefit of the estate, and of the rents and profits received, and further pray for the possession of the premises.

The answer pleads the decree of the county court; the passage of the curative act of April 9, 1895; the payment of certain mortgage indebtedness upon the land in reliance upon the title of Minnie C. Helming; title by adverse possession ever since the entry of the decree in 1890. Defendants pray that their title be quieted and for general equitable relief.

The reply alleges that the curative act is void, being in violation of the constitution of the state, and denies the other allegations in the answer. The court found that the defendants and Mrs. Helming have been in the adverse possession of the land since the 20th day of March, 1890, and that since the date of the decree in the county court no right of plaintiffs in the real estate has been admitted or recognized by Mrs. Forrester or these defendants, and quieted the title in the defendants.

1. The principal matters in controversy in this case have already been determined by this court. In the case of *Finders v. Bodle,* 58 Neb. 57, it was held that a decree of the county court assuming to vest in a widow the absolute title to a homestead selected from the lands of her deceased husband is void as an exertion of power not granted by the constitution or laws of this state. This case is followed by *Walker v. Ehresman,* 79 Neb. 775. In *Draper v. Clayton,* p. 443, *post,* opinion handed down at this session of the court, it was again decided that an *ex parte* order confirming in a widow a title in fee simple to a homestead under the Baker decedent act was one which the court had no jurisdiction to make. The order of the

county court in the proceeding attacked here was made without notice to any one.

2. The question of the validity of the curative act is also considered in the opinion in *Draper v. Clayton, supra,* and decided adversely to the contention of the defendants herein. It is therein held that the curative act is void for the reason that it is violative of a number of the provisions of the constitution. It is unnecessary to do more than refer to this opinion on this point; but, upon the proposition that a curative act, which attempts to take away property rights already vested, is void, the following cases are in point, in addition to those cited in that opinion: *Gladney v. Sydnor,* 172 Mo. 318; *Roche v. Waters,* 72 Md. 264; *Richards v. Rote,* 68 Pa. St. 248; *In re Christiansen,* 17 Utah, 412; *Denny v. Mattoon,* 84 Mass. 361; *People v. Board of Supervisors,* 26 Mich. 22; *Lewis v. Webb,* 3 Me. 326; *Atkinson v. Dunlap,* 50 Me. 111.

3. Since the Baker decedent law and the decree entered thereunder in nowise affected the title to the land in question, upon the death of her husband Minnie C. Helming became vested with a life estate in the homestead. It is not disputed that the homestead character attached to the entire 160 acres. She and all persons claiming under her were entitled to possession of the premises against the plaintiffs until her death in December, 1901, and until that event occurred the plaintiff could not maintain an action in ejectment to recover the possession. The right of action for such purpose began at that time, and, ten years not having elapsed, the possessory action has not been barred by the statute. *Currier v. Teske,* 84 Neb. 60; *Hobson v. Huxtable,* 79 Neb. 334. The defendants contend that, since under the provision of the statute (Ann. St. 1909, sec. 10868) an action may be brought to quiet title by any person or persons, whether in actual possession or not, against any person who claims an adverse estate or interest in lands, a cause of action accrued as soon as Mrs. Helming claimed the fee title under the

decree. Section 10870 provides: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act." So far as appears from the record, the heirs were of full age at the father's death, and there is no doubt that under these provisions an action to quiet title might have been brought as soon as knowledge of the intention to deprive the heirs of their title by Mrs. Helming or her privies was brought home to them. *First Nat. Bank v. Pilger*, 78 Neb. 168; *Hobson v. Huxtable, supra.*

We are of opinion, therefore, that, so far as this action is for the purpose of quieting title, it is barred by the statute, but the purpose of the action is to recover possession as well as to quiet title. It is true that the case was tried to the court, and not to a jury, to which the parties in a possessory action are entitled; but, since neither party demanded a jury trial and they proceeded to try this issue without objection, they waived that right. Moreover, the defendants interposed an equitable defense and prayed for equitable relief. This did not change the character of the action from one for possession as well as to quiet the title (*Albin v. Parmele*, 70 Neb. 740, 746), and under the rule in *Hobson v. Huxtable, supra*, the cause of action for the possession of the property having been brought within ten years from the termination of the life estate was not barred. The holding in *First Nat. Bank v. Pilger, supra*, to the effect that the statute of limitations commences to run against an action to quiet title at the time the adverse claim attached, is not inconsistent with these views. *Holmes v. Mason*, 80 Neb. 448.

We are of opinion that the decree of the district court quieting title in the defendants is erroneous. Its judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

LAURA DRAPER ET AL., APPELLEES, V. SAMUEL T. CLAYTON ET AL., APPELLANTS.

FILED JULY 9, 1910. No. 16,047.

1. **County Courts: JURISDICTION.** "A decree of the county court assuming to vest in a widow the absolute title to a homestead selected from the lands of her deceased husband is void as an exertion of power not granted by the constitution or laws of the state." *Finders v. Bodle*, 58 Neb. 57.

2. **Homestead, Setting Off: ESTOPPEL.** An *ex parte* order made upon a widow's application setting apart to her a homestead interest in the lands of her deceased husband will not estop his children residing at that time in the county where the homestead is situated, and who have not subsequently ratified the order or otherwise waived their right to object thereto. REESE, C. J., and SEDGWICK, J., dissent.

3. **Constitutional Law: VESTED RIGHTS.** Chapter 32, laws 1895 (Comp. St. 1909, ch. 23, sec. 29*a*), contravenes section 3, art. I of the constitution of the state of Nebraska, and is null and void.

4. **Guardian and Ward: ACTS OF GUARDIAN: ESTOPPEL.** An infant's guardian by giving a receipt for money not received by her, but purporting to have been received in satisfaction of the ward's share of a surplus over and above the appraised value of the infant's ancestor's homestead, in proceedings prosecuted under the "Baker act" (laws 1889, ch. 57), will not estop the ward from asserting his estate in said homestead.

5. **Quieting Title: HOMESTEAD: REMAINDERMAN: LIMITATIONS.** If a widow asserts, by virtue of a void order of the county court, a title in fee simple to a homestead selected from her late husband's lands, an infant child of the decedent ordinarily may at any time within ten years after attaining his majority maintain an action under sections 57-59, ch. 73, Comp. St. 1909, for the purpose of quieting his title in said land.

6. **Life Estates: INCUMBRANCES: PAYMENT BY LIFE TENANT.** Where a life tenant of real estate pays off a past due incumbrance which is a lien upon the entire estate, he is entitled to contribution from the remainderman, and should recover from him the difference between the principal debt and the present value of an annuity equal to the annual interest charge running during the years which constitute the life tenant's expectancy of life.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed in part and reversed in part.*

Hainer & Smith, for appellants.

John J. Sullivan, George W. Ayres and *John C. Martin, contra.*

ROOT, J.

This is an action in equity to confirm in plaintiffs title to a tract of land. Two of the plaintiffs were given partial relief, and the defendants appeal.

In 1880 Jasper Foster received a patent, under the federal homestead law, for the northeast quarter of section 30, in township 13, range 5 west, in Hamilton county. Foster occupied said real estate as his home until 1889, during which year he died intestate, leaving him surviving six children and his widow. At that time Foster held an executory contract for the purchase of the southwest quarter of the southeast quarter of section 19, in said town and range, and owed thereon about $100. An administrator was duly appointed for Foster's estate. Subsequently Foster's widow made application according to the provisions of chapter 57, laws 1889, to have the 40 acres of land above described and the north half of said northeast quarter of section 30 appraised as the homestead of her late husband and herself. The county court proceeded in conformity with the terms of said act, found that said 120 acres of land had been selected by Jasper Foster as his homestead, and that the petitioner was entitled to select said land as her homestead. Appraisers were appointed and their appraisal was confirmed by the county court. The widow elected to accept the land at its appraised value, and paid to her adult children their proportion of two-thirds of such value over and above a mortgage lien thereon and the $1,000 interest therein, which said act purports to grant a widow in her deceased

husband's homestead. She also receipted as guardian for the plaintiffs, her minor children, for their share of such surplus. The court then confirmed said proceedings. The widow thereafter claimed to own said real estate in fee simple. The defendants assert title thereto as her grantees. The appellees each represent a one-sixth interest in said land. The district court charged the land with the value of permanent improvements made thereon subsequent to Mr. Foster's decease, subrogated the appellants to the rights of the mortgagee for the amount due upon the mortgage at the time Foster died and subsequently satisfied by appellants' grantor, confirmed the appellants in the right to occupy and enjoy the north half of the northeast quarter of section 30 during the natural life of the widow, gave them credit for taxes paid upon the 40 acres in section 19, charged them with the rents and profits of said tract, and decreed that upon the payment by each appellee of a sixth part of the difference between the taxes paid upon said 40 acres and the value of said improvements, on the one hand, and the rental value of the 40 acres, on the other, the appellees should severally have a writ of assistance to place them in possession of their interest in said land, and, upon the death of Mrs. Foster, each appellee, upon payment of one-sixth of the amount due upon said mortgage at the date Foster died and chargeable against the 80 acres, should have a like writ to place him in possession of his interest in said real estate.

1. The appellants argue that the county court had authority, independently of chapter 57, laws 1889, to assign to the widow a homestead estate in the lands of her deceased husband, and, by decreeing an estate in fee simple instead of a life estate, the court merely committed an error, but its judgment is not void. The act of the legislature under which the county court assumed to set apart a homestead to Mrs. Foster was held unconstitutional and void subsequent to the proceedings herein considered. *Trumble v. Trumble,* 37 Neb. 340.

Section 16, art. VI of the constitution, provides, among other things, that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, * * * and such other jurisdiction as may be given by general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question." At the time the county court of Hamilton county assumed to confirm in Mrs. Foster a title in fee simple to the land described in this action, there was no statute, independently of the invalid act above referred to, purporting to give that court authority to set off or determine the boundaries or value of a homestead. Section 22, ch. 20, art. I, Comp. St. 1909, was then in force and provided, as it does now, that all writs, notices, orders, citations and other process issued out of the county court should be served in like manner as a summons in a civil action in the district court, and authorized that court to direct the service of a writ by publication, where personal service could not be made in the state, and in the cases specifically provided by law.

By the terms of chapter 36, Comp. St. 1909, the head of a family is authorized to select a homestead not to exceed 160 acres in extent and $2,000 in value, which shall be exempt from sale upon attachment or an ordinary execution. Section 17 of said chapter provides that the homestead, if selected during the lifetime of the owner of the fee, shall upon his or her death vest for life in the surviving spouse, remainder, if not otherwise devised, in the heirs of the fee-holding spouse, and the quality of exemption is continued as against the creditors of the deceased. It has ever been the policy of the legislature to exempt a homestead from forced sale upon attachment or ordinary execution. At the time the present constitution was prepared by the constitutional convention and adopted by the people, an act entitled "An act to exempt the homestead of families from attachment, levy, or sale upon execution or other process issuing out of any court in the

state of Nebraska" (laws 1875, p. 45), approved February 25, 1875, was in force. By the provisions thereof the homestead exemption was extended to the head of a family, to his widow, to his infant children, and to any unmarried child occupying the homestead after his decease. In case it became necessary to ascertain the extent of the homestead, the district court, upon application by any person interested, appointed appraisers to view the premises and report concerning its value. The appraisal was conclusive unless complaint was made, and, in that event, the court had power to order the premises reappraised. Upon an application to the district court by an executor or administrator to sell the decedent's land for the payment of his debts, the court had authority to appoint appraisers to set apart the homestead.

The constitution of 1866 (art. IV, sec. 4) provided that probate courts should not have authority to "order or decree the sale or partition of real estate," otherwise the were to exercise such jurisdiction as might be provided by law. The constitution of 1875 is more positive in its restraint upon the jurisdiction of that court. The course of legislation and the decisions of this court up to and including 1875 give no indication that the county court was vested with power to hear and determine an application to establish the existence, limits or value of a homestead, but the district court was the forum wherein all proceedings were prosecuted for the protection of that estate. In 1885, in *Guthman v. Guthman,* 18 Neb. 98, this court held that a county court has authority upon a widow's application to set apart from her deceased husband's lands the homestead, if none of the facts essential to create that estate are controverted. The reasoning is plain that the central fact to justify and support such an order is that the designated land or some part thereof constituted the homestead of the petitioner and her husband at the time of his death. This fact being made to appear, the law determines the estate of the widow and the interest of the remaindermen. The opinion in *Guth-*

man v. Guthman, supra, has never been overruled or questioned by this court, but, on the contrary, has been approved and reaffirmed. *Tyson v. Tyson,* 71 Neb. 438; *In re Estate of Robertson,* 86 Neb. 490. The principle announced in *Guthman v. Guthman* is now a rule of property in Nebraska, and ought not to be doubted by practioners or the courts. *Grandjean v. Beyl,* 78 Neb. 354. At the same time the rule should not be extended so as to justify the county courts in assuming to try and determine questions of title connected with an assertion of a homestead estate in the lands of a decedent. The jurisdiction of the probate court to cause a homestead to be appraised and set apart to the widow does not include the right to determine that the homestead estate is one in fee. In entering such a judgment the court would determine title, the very subject withheld from its jurisdiction by the fundamental law. We cannot therefore accept the argument of defendants' counsel that the order confirming in the widow a title in fee simple was one the court had jurisdiction to make.

2. It is contended that the county court had jurisdiction independent of the Baker act to cause Foster's homestead to be assigned to his widow, and that, since that court assigned the whole 120-acre tract, the district court should have respected the order in so far as it confirmed the appellants in an estate during the natural lifetime of the widow. The record shows that no notice was given to these appellants, who were then minors, except by publication for one week in a local newspaper. In the absence of a statute providing for such method of notice, this was unavailing to affect their title to the property. The testimony is undisputed that the 40 acres described in the contract was used for pasture, and was not included within the fence that inclosed Foster's federal homestead, and that the last described tract was improved and occupied by the decedent as his home at the time of his death. The district court committed no error in ignoring the proceedings in the county court.

3. It is contended that chapter 32, laws 1895 (Comp. St. 1909, ch. 23, sec. 29*a*), cured all defects inhering in the proceedings in the county court. The act purports to validate all proceedings prosecuted to judgment under the "Baker Act" before it was held invalid by this court. The appellees assail this curative act on the ground that it contravenes section 3, art. I of the constitution, which provides: "No person shall be deprived of life, liberty or property, without due process of law." It will be remembered that section 17, ch. 36, Comp. St. 1909, provides that in all cases where the owner of a homestead shall die intestate, the surviving spouse shall succeed to but a life estate therein, with remainder to his heirs. This statute was in force during the time the "Baker Act" appeared upon the statutes and still is the law in Nebraska, and the county courts have at all times been without power to transfer the remainderman's estate to the widow. If the curative act gave vitality to proceedings prosecuted under the invalid act, it amends the homestead law without mentioning or repealing it, or vests the county courts with jurisdiction prohibited by the constitution, and, without giving remaindermen their day in court, transfers their estates to their ancestor's widow. None of these things may the legislature lawfully do. The curative act is therefore void. *Maxwell v. Goetschius*, 11 Vroom (N. J.) 383; *Pryor v. Downey*, 50 Cal. 388; *Nelson v. Rountree*, 23 Wis. 367; *McCord v. Sullivan*, 85 Minn. 344; *Finlayson v. Peterson*, 5 N. Dak. 587; *Maguiar v. Henry*, 84 Ky. 1; *Conway v. Cable*, 37 Ill. 82.

4. The defendants urge that the plaintiffs are estopped from prosecuting this action because Mrs. Foster, as guardian for the plaintiffs, receipted for the share of the surplus created by her acceptance of the homestead at its appraised value which they would have received if the act were valid. The proof is undisputed that the appellees received no money or other consideration from their guardian. For this reason, they are not within the rule announced in *Mote v. Kleen*, 83 Neb. 585, and *Borcher v.*

McGuire, 85 Neb. 646. Nor does the principle announced in *Staats v. Wilson*, 76 Neb. 204, apply in the case at bar.

5. Finally, the defendants argue that the plaintiffs' laches should bar them from equitable relief. *Hurley v. Von Lanken*, 75 Neb. 597, is cited. The instant case is ruled by *Holmes v. Mason*, 80 Neb. 448, and *Hobson v. Huxtable*, 79 Neb. 334, 340. Appellees commenced their action within ten years of the date the elder attained his majority. A consideration of the facts in *Hurley v. Von Lanken, supra*, will satisfy the reader that the principle of estoppel was wisely and lawfully applied to defeat the plaintiff in that action. In the case at bar the appellees were infants, the younger but three years of age, when Jasper Foster died. Neither before nor after attaining majority have they, so far as the record discloses, done anything in the premises to in any manner mislead or prejudice the defendants, nor has there been an instant of time subsequent to the date the widow claimed to own the land in fee simple, that she or any of her grantees could have prosecuted any proceeding to lawfully divest the appellees of their title. The defenses of estoppel must therefore be resolved against the defendants.

6. The defendants say that, although they may not be vested with an estate in fee simple to the 80 acres, they are life tenants, and the court erred in postponing the collection of the mortgage lien to which they are subrogated by the court's decree. We think there is merit in this contention. The mortgage constituted a lien upon the remaindermen's as well as upon the life tenant's estate. Before the maturity of the debt it was the duty of the life tenant, at least to the extent of the rental value of the property, to keep down the annual interest, but he was not compelled to pay off the principal sum when it became due or thereafter. When he satisfied the mortgage, he had a right to an accounting with the remaindermen. *Downing v. Hartshorn*, 69 Neb. 364. Where a common charge rests upon a fund which belongs to several

owners by simultaneous but unequal titles, and the entire charge is paid by one owner, he may call upon the other owners for contribution. In cases like the one at bar, where one estate is for life and the other in remainder, and the life tenant pays the lien, to the extent that he has relieved his estate of the interest charge he has paid his own debt, and the excess is the debt of the remaindermen. The uncertainty of the duration of the tenant's life injects an element of doubt into the problem, but, by adopting a standard life table, a calculation definite enough for the purposes of the law may be made. The payment of the life tenant of the present worth of an annuity equal to the annual interest running during his expectancy of life represents his individual indebtedness, and the remainder, after subtracting that sum from the mortgage debt, is the share which the remaindermen should contribute. In the instant case the rule should be applied as of the date the computation shall be made; the widow's expectancy of life should be considered, and not the expectancy of the appellants. *Tindall v. Peterson,* 71 Neb. 166; 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1223; *Thomas v. Thomas,* 17 N. J. Eq. 356. The rule adopted by the district court may not work much hardship to the defendants, but it is their lawful right to have immediate contribution. The evidence will not justify us in making that computation.

For the reasons above stated, the decree of the district court is in all things, save and except as to the subject of contribution, affirmed, and as to the matter of contribution, the cause is reversed and remanded for further proceedings. The costs taxed in this court will be equally divided between the appellees on the one part and the appellants on the other.

JUDGMENT ACCORDINGLY.

JAMES W. MCFARLAND ET AL., APPELLEES, V. SARAH J. FLACK ET AL., APPELLANTS.

FILED JULY 9, 1910. No. 16,111.

1. **Homestead:** DESCENT. Upon the death of the owner of the fee in a homestead estate the same descends to the surviving spouse for life, and the remainder to the children of the owner of the fee title.

2. **County Courts:** JURISDICTION. The county court is without jurisdiction to assign a fee title in a homestead to the surviving spouse of the owner of the fee title, and chapter 32, laws 1895, is inoperative to validate such decrees.

3. **Remainders:** LIMITATION OF ACTIONS. The statute of limitations of an action by a remainderman to recover possession of the estate does not begin to run until the death of the owner of the life estate. The possession of the owner of the life estate is not adverse to the rights of the remainderman.

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

Lewis C. Paulson and *George A. Adams*, for appellants.

Joel Hull and *Adams & Adams, contra.*

SEDGWICK, J.

These plaintiffs began this action in the district court for Kearney county to recover possession of 80 acres of land. Josiah W. McFarland and Elizabeth McFarland, his wife, occupied the premises as a homestead prior to the 18th day of June, 1890, the title being in the name of Elizabeth McFarland, and on that day Elizabeth McFarland died, leaving surviving her her said husband, Josiah W. McFarland, and these plaintiffs, her children. After the death of Elizabeth McFarland proceedings were had under the act commonly known as the "Baker's Decedent Law" (laws 1889, ch. 57), by which the county court of that county made an order assigning in fee the said real estate to the said Josiah W. McFarland. Under

those proceedings McFarland occupied the premises as his home until the 12th day of January, 1893, when he sold and conveyed the same to the defendant Henry J. Flack. Flack took possession of the premises and occupied the same until his death, which occurred in April, 1908. The said Josiah W. McFarland died on the 5th day of September, 1907. The district court found generally in favor of the plaintiffs and entered a decree giving them possession. The defendants have appealed.

The defendants urged that the county court had jurisdiction to assign homesteads, and if it erred in assigning the title to McFarland that decree is not therefore void, but is valid as against this collateral attack, and they further insisted that the curative act of the legislature (laws 1895, ch. 32) has remedied any defect that might otherwise have existed in the proceedings of the county court. They further urged that, as all of these plaintiffs became of legal age more than ten years before the commencement of this action, the statute of limitations is a complete bar, and that, as these plaintiffs had at least constructive notice by the recording of instruments that the title was claimed adversely, and the defendants and the parties through whom they claim have held the lands adversely for more than ten years prior to the commencement of the action, this adverse possession is a complete defense. All of these contentions of the defendants have been heretofore decided by this court. *Finders v. Bodle,* 58 Neb. 57, and two cases decided at the present session, *Draper v. Clayton, ante,* p. 443, and *Helming v. Forrester, ante,* p. 438. All of these cases hold that the Baker's decedent law is unconstitutional, following *Trumble v. Trumble,* 37 Neb. 340. In *Draper v. Clayton, supra,* it is held upon full discussion that the said curative act is void, and in *Helming v. Forrester, supra,* it is held that an action for possession by the children and heirs of the owner in fee of a homestead is not barred by the statute of limitations or adverse possession until ten years after the termination of the life estate in the

homestead which the statute gives to the surviving spouse. The reasons for these holdings are fully given in the cases referred to, and no further discussion is required.

It follows that the judgment of the district court is right, and it is therefore

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1910.

BELLE WILLIAMS, ADMINISTRATRIX, ET AL., APPELLANTS, v. JOSEPH H. MILES ET AL., APPELLEES.

FILED SEPTEMBER 26, 1910. No. 15,547.

1. **Appeal:** REMAND: LAW OF CASE. "The language used in the former opinions of this court, commenting upon the evidence of the various witnesses, was used with reference to the questions presented in this court only, and was not a discussion of the weight that should be given to this evidence upon a new trial of this case. The court will apply the law of the case so far as it has been determined by this court, but the discussion of the evidence here will not restrict the trial court in its examination and submission of the questions of fact." *Williams v. Miles*, 73 Neb. 205.

2. **Wills:** REVOCATION: SUBSEQUENT WILL: EVIDENCE. The fact, if established by competent proof, that a subsequent will was made is not sufficient of itself, and without some proof of its actual contents, to show the revocation of a former will (*Williams v. Miles*, 68 Neb. 463), nor would the proof of such fact alone be sufficient to justify the setting aside of the due probate of a former will, the alleged subsequent will not being found or produced, nor a verified copy thereof presented.

3. ———: EXECUTION: EVIDENCE. An attorney testified that he prepared a will consisting of two sheets and four pages to be executed by the proposed testator; that the instrument was signed by the testator and witnessed in his presence. In his testimony he detailed the facts and circumstances attending its execution, including remarks made by himself, the testator and the wit-

nesses, but did not know the witnesses and failed to remember their names. Two witnesses testified that they witnessed the signature of an alleged will of the same person at the place and about the time stated by the attorney; that the person signing as testator said it was his will, but they were not informed of its contents, did not read any part of it, and did not know what the paper contained; that it consisted of many sheets forming a body of paper near half an inch in thickness; that there was but one other person, aside from the alleged testator and the witnesses, in the room, and that person was wholly unknown to one of the witnesses, the other witness testifying to a total want of recollection as to who the other person was, or whether he knew him, neither one being introduced to him, and both agreeing that he did not utter a word at or before the signing or while they were in the room. *Held*, That these facts failed to show that the paper there signed, if so signed, was the one said to have been written by the attorney, and that there was insufficient proof of the contents of the alleged will, or that the paper witnessed by the two persons signing as witnesses was the instrument claimed to have been prepared by the attorney, or was a will.

4. ———: REVOCATION: SUBSEQUENT WILL: EVIDENCE. The proof of the execution and contents of a lost will should be clear and convincing, and the declaration of the testator alone that an instrument he is signing is his will, but without any evidence as to its contents, will not be held sufficient to revoke a former will proved to have been made and duly admitted to probate, there being no proof that the alleged lost will was ever seen after its supposed execution.

5. ———: EXECUTION: EVIDENCE. The evidence as to the execution of any will by the deceased, at the place and on the date named, is examined and set out in the opinion, and the same is *held* insufficient to establish the fact.

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

John L. Webster, John H. Atwood, Reavis & Reavis, I. J. Ringolsky, Frank M. Hall and *J. H. Broady*, for appellants.

T. J. Mahoney, J. A. C. Kennedy, Clarence Gillespie and *E. Falloon, contra.*

REESE, C. J.

Stephen B. Miles, a resident and having his domicile in Richardson county, in this state, executed and declared a certain written instrument as his will, at Rulo, in said county, on the 27th day of November, 1888. On the 11th day of April, 1889, at the same place, he executed a codicil by which he changed one item in the will. Both the will and codicil were duly witnessed and executed in accordance with all the requirements of law, the two constituting his will. He retained his residence and home in said county until the 30th day of October, 1898, when he died at Falls City. The will made at Rulo will hereafter be referred to as the Rulo will. It was presented to the county court of Richardson county for probate, and, after proper proceedings being had, was admitted to probate on the 2d day of December, 1898, without objection or contest, and no appeal was taken from the decree. On the 29th day of March, 1899, a petition was filed in the county court by the plaintiffs herein, in which the relationship of the plaintiffs to deceased was set out and the probate of the Rulo will was averred. It was then stated, in substance, that the probated will was not the last will and testament of the said Stephen B. Miles, deceased, which fact was alleged to be well known to the proponent thereof at and before the time he caused and procured it to be admitted to probate; that his actions in that behalf were fraudulent; that a later will had been duly made and executed by the testator, by which the Rulo will had been revoked, all of which was alleged to be well known to him at the time, but was unknown to plaintiffs until long after the decree probating the Rulo will had been entered; that about the 1st day of April, 1897, the said Stephen B. Miles duly made another and later will at the city of St. Louis, Missouri, by which he had changed the disposition of his estate from that made in the Rulo will, and had by his said later will fully revoked and canceled said will and all others by him before that time made, and

that no other or later will had been since made; that the estate of the said Stephen B. Miles was of the value of about $1,600,000, the real estate thereof being worth about $1,000,000, and the personal property, consisting of stocks, bonds and other choses in action, worth the sum of $600,000; that the defendant Joseph H. Miles, upon the probating of the Rulo will, became the executor and possessed of all the books and papers of the deceased, and it is averred upon information and belief that among said papers was the later will made in St. Louis, which he had secreted and suppressed with the purpose and intent of defrauding plaintiffs. The petition is of considerable length, but it is not deemed necessary to state the averments with any greater particularity. The prayer is that the previous order of the court admitting the Rulo will to probate be set aside and that plaintiffs be permitted to present the will of about April 1, 1897, for probate.

An answer was filed by the defendants Joseph H. Miles, John J. Williams, John W. Holt, Nora Harrison, John I. Dressler and J. K. Biles, by which the death of Stephen B. Miles and the execution and probate of the Rulo will were admitted, as also was the extent and value of his estate at the time of his death. All averments of the petition as to the making of the will at St. Louis (which for convenience will be hereafter referred to as the St Louis will) or any will subsequent to the making of the Rulo will were denied. It was alleged in substance that full, due and legal notice was given of the presentation of the Rulo will for probate; that the county court had full jurisdiction of the subject matter of the parties; and that said decree was a final adjudication of the whole matter. All averments of the petition not admitted were denied.

The defendant Samuel A. Miles filed an answer and cross-petition, in which, after the denial of certain averments of the petition reflecting upon himself, he practically realleged those of that pleading and joined in the prayer for a new trial, the cancelation of the decree ad-

mitting the Rulo will to probate and that the alleged St. Louis will be probated. The pleadings are voluminous, but it is believed that the foregoing statement of their contents will be sufficient.

Upon a trial in the county court, the prayer of the petition of plaintiffs and the cross-petition of Samuel A. Miles were denied and the action dismissed, thus leaving the decree probating the Rulo will unimpaired. The cause was then appealed to the district court, where the pleadings were to some extent amended, but in view of the questions here presented it is not necessary to refer to them further. Pending the proceedings in the district court the cause has been appealed to this court a number of times, and the history of such proceedings may be found in 62 Neb. 566; 63 Neb. 851, 859; 68 Neb. 463, 479; 73 Neb. 193, 205, 206. The cause has been finally tried to the district court for Richardson county, the trial resulting in a finding and decree in favor of defendants and dismissing plaintiffs' petition and cross-petition of Samuel A. Miles. Plaintiffs and cross-petitioner appeal. On this appeal we are confronted with a bill of exceptions of about 3,000 pages and a transcript of 275 pages, as well as elaborate briefs of over 800 pages. In view of the condition of a part of the bill of exceptions it would be practically impossible to understand and comprehend the evidence, were it not for the care and labor bestowed upon the briefs, and the very able arguments presented by counsel.

A motion to suppress the bill of exceptions is filed by defendants. On the trial of the case some 600 pages of the evidence offered and received by the court, the greater part of which was introduced to prove certain alleged corrupt practices by an attorney residing in another state, but representing plaintiffs, was discarded by the court and stricken out at the time of entering the decree in favor of defendants. This evidence, however, had all been introduced. The bill of exceptions was prepared and submitted by plaintiffs without including that evi-

dence. The bill as presented consisted of 5 volumes of from 500 to 800 pages each. Defendants and cross-petitioner Samuel A. Miles objected to the approval of the bill by the trial judge, when the cross-petitioner prepared and submitted the 6th volume, containing, as claimed, all of the discarded evidence, but the preparation and submission of that volume was delayed for some time after the settling of the other 5 volumes. It is claimed by counsel for defendants that a large portion of the evidence contained in the 6th volume at the time it was served upon them has been removed therefrom. This is perhaps true, but we think from the record made that the portion referred to was removed by the judge for the reason that it was contained in the 5 volumes before that time settled. It is also claimed by defendants that important documents and other evidence submitted on the trial are not included in any of the volumes. The certificates of the judge render it reasonably certain that he understood that all the evidence was included in the bills as finally allowed and signed. If this be correct, the evidence will be retained notwithstanding the irregularity of the settling of the bill. The motion to suppress is overruled.

The legal propositions involved in the case in the different phases through which it has passed have been substantially all settled by the former decisions of this court, above referred to, and the principal question now involved is one of fact, and that is: "Was a will executed at St. Louis in 1897 by Stephen B. Miles, deceased?" If such a will was prepared, executed and witnessed, as claimed by plaintiffs, containing a revocatory clause, it will have to be conceded that the Rulo will was thereby revoked and rendered null and void, and the decree admitting it to probate would have to be set aside and the new trial granted as prayed for by plaintiffs. The finding of the district court was "that Samuel A. Miles and the plaintiffs are not entitled to have the probate of the 1888 will set aside," and "that Stephen B. Miles did not execute a will in St. Louis in 1897, as alleged in plaintiffs' petition, and

that the will known in the records as the 'Rulo will' is the last will and testament of Stephen B. Miles, deceased." Upon these findings plaintiffs' suit was dismissed. There is no proof in the record that the will alleged to have been made in St. Louis has ever been seen since its alleged execution, and therefore neither the will nor a verified copy of it was introduced in evidence. It is not contended that there was sufficient proof of the whole contents of the will, as to the distribution of the property of the deceased, to entitle it to probate as to the legacies or devises, but practically the whole contention is that a will was duly made and executed and that it contained a clause revoking former wills and testaments, the effect of which, if established, would be to destroy the Rulo will, leaving the property of the deceased intestate and subject to distribution under the law of descent, which, as conditions now are, would probably be more equitable than as provided in that will. However, we are forbidden to enter that field, and, as above indicated, confine ourselves to the one question decided by the district court, to wit, considering the whole evidence, is it sufficiently proved that the deceased executed a will in St. Louis, Missouri, about the 1st of April, 1897? The evidence taken upon that part of the case tending to prove and to disprove such execution is quite voluminous, and it is claimed by each side that the evidence preponderates in its favor. The burden of proof being upon plaintiffs, it follows that it is not enough that the evidence produced by plaintiffs renders it probable that Mr. Miles made some kind of a will at St. Louis, but such fact must be shown by a preponderance of the evidence or plaintiffs must fail. In disposing of the case we will confine our investigations to the one question.

Preliminary to this, however, it might be well to inquire how far the former expressions of this court while considering the evidence in the case then before it should be considered as bearing upon the finding of the district court upon the trial from which this appeal is taken, or

upon the holding here on appeal. There are a number of expressions indicating a conviction upon the minds of the judges in writing the opinions that the proofs then before the court offered by appellants showed, or tended to show, that a will was in fact made in St. Louis. What effect should such expressions have upon the judgment of the district court when subsequently hearing the trial of the case, and to what extent, if at all, are they binding upon us in considering this appeal? In other words, do they become the law of the case from which no departure should be made? In the opinion in 68 Neb. 463, at page 475, it is said: "Without going over the details, we may say that the evidence produces a strong conviction that a will of some sort was made at St. Louis. There is not only the testimony of the two subscribing witnesses, but a very considerable mass of circumstantial evidence. Moreover, the declarations of the testator are well authenticated and circumstantial. Taking all these matters into account, and bearing in mind the apparent injustice of the disposition made in the instrument admitted to probate, the suspicious character of many things connected with the finding of the Rulo will, and the disposition of the testator to make wills, as shown in evidence, if the question were merely whether a subsequent will was executed, we should hesitate to say that the decree could stand." In the opinion written by Judge SEDGWICK, 73 Neb. 193, the judge, after quite an extensive review of the evidence then before the court upon the subject of the execution of the St. Louis will, says: "Upon the hearing of this application for a new trial the district court found that 'there was a will made by Stephen B. Miles, deceased, in 1897, at St. Louis.' The witness Paul T. Gadsen (Gadsden) positively testifies to this fact. He also states quite definitely the contents of the will. The character of this witness and the reliance to be placed upon his testimony will be again referred to. It is sufficient now to say that we consider the whole evidence amply supports this finding of the trial court." Again, in writing an opinion upon a motion to

modify the former opinion, the judge says (73 Neb. 206): "What was meant was that, if the evidence introduced before the district court upon the new trial which has been ordered should be the same as it now is in this court, it would be sufficient to require the district court to reverse the order of the county court in refusing to set aside the probate of the Rulo will." There are other expressions in the line of decisions in this case, equally strong and definite, perhaps, bearing upon the evidence, but which need not be here noticed, as the above will be sufficient to attract attention to the proposition involved. In the opinion first written (73 Neb. 193) Judge SEDGWICK, at page 196, says: "If a decision of this court should ever become the law of the case, it should be upon a question of practice (then under discussion), when the parties to the litigation have acted upon that decision and guided their practice by it;" thus holding, in effect, that as a declaration of the law applicable to a question presented, and on which the parties have acted during the subsequent stages of the litigation, it should not be departed from. But, as said in the *per curiam* opinion (73 Neb. 205) at page 206: "The language used in the former opinions of this court, commenting upon the evidence of the various witnesses, was used with reference to the questions presented in this court only, and was not a discussion of the weight that should be given to this evidence upon a new trial of this case. The court will apply the law of the case so far as it has been determined by this court, but the discussion of the evidence here will not restrict the trial court in its examination and submission of the questions of fact."

This holding, in the opinion of the writer, is in harmony with the well-settled law upon the subject, and left the district court, as well as this court upon subsequent appeals, to pass upon the weight of the evidence, unaffected and untrammeled by the expressions of this court upon former hearings. In *Koyer v. Willmon*, 106 Pac. (Cal.) 599, it is said, quoting from *Allen v. Bryant*, 155 Cal. 256:

"When the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision." Without referring at length to the decisions of other courts upon this subject, the writer concludes that the whole subject of the execution of the St. Louis will was for the decision of the district court upon the final trial and submission of the case upon the evidence, untrammeled and unconstrained by anything we may have said upon the evidence before us at the time the decisions were made. The same is true as to its application to the hearing now before us. These views are not fully concurred in by a majority of the court.

However, it is proper to say here, without going into details, that additional evidence was presented upon the last trial, which, if believed to be true, might, and probably would, lead this court now to revise its opinion. It is said, in substance, that this new evidence is the result of the labors of detectives sent out to *find* the needed testimony, and does not carry with it the conviction of its truth which might otherwise obtain. It often happens that detectives, like other people, are unscrupulous and corrupt; that when sent out upon a mission they will resort to almost all kinds of corruption in order to meet the requirements imposed, and the results of their efforts should be looked upon with suspicion. From observations of the method adopted by that class, the writer hereof is in sympathy with the contentions of plaintiffs, and yet this does not of necessity carry with it the conviction that the testimony of apparently disinterested witnesses, even if *found* by a detective, is untrue and not entitled to credit. They may be truthful and their testimony be en-

titled to credence, while if the same facts were testified to by the detective who it is said made the "discovery" of the witness, such testimony might and probably would not carry the same weight. As we have said, the claim is that a will was made in St. Louis long after the Rulo will was executed. As to the execution and admission to probate of the Rulo will there is no dispute. The deceased resided in this state. The parties to this action resided here. The St. Louis will, if made, was written by a stranger to the deceased and all the parties to the suit. It was said to have been witnessed by persons unknown to many, if not all, of the litigants. So far as the evidence shows, no will nor a copy of it has been found. In view of these facts, it is not surprising that both sides of this controversy found it necessary to resort to the labors of detectives in making needed investigations, as both did. While there is much in the briefs and arguments in the way of crimination and recrimination concerning this feature of the case, we do not find it necessary to engage in a discussion of the subject of the methods employed, nor to cast any reflections upon either party. It may be that each felt justified in pursuing the course adopted.

This brings us to the one controlling question in the case: Does the evidence preponderate in favor of the contention that a will was made in St. Louis? If not, the decision of the district court finding that no such will was made will have to stand. If the affirmative of the question is shown by the necessary evidence, a reversal of the decree must follow, and the new trial sought be granted. To the mind of the writer, the question is shrouded in considerable mystery. The testator resided in Richardson county in this state. He had been a citizen of Richardson county for many years, he having been one of the early pioneers of that county. He had amassed an immense fortune, much of which was in that county. He had employed an attorney in Falls City who had become familiar with his affairs and in whom he had confidence. His time was mostly spent upon his farm, or ranch, in that

county, until the later years of his life. He had interests in the state of Maryland, his former home, and was there more or less frequently, and spent a good portion of the winter months of his later life in the St. James hotel in St. Louis, Missouri. He had a number of acquaintances there, among men of high standing in commercial pursuits and at the bar. He was well acquainted with the proprietor of the hotel and the hotel clerk, but he does not seem to have made them his special confidants in his general business affairs. They testified that he informed them that he contemplated or desired to make a will; that he was not satisfied with the disposition of his property made by a former will; that about the last day of March or the first day of April, 1897, they were sent for to go to his room, and when they were there he asked them to witness what he said was his will, and produced a paper or instrument consisting of a number of sheets which he signed, saying it was his will, and asked them to sign as witnesses, which they did, but neither knew its contents, nor if it was a will, except as so stated by him. They say a stranger, with whom they were unacquainted, was in the room, but to whom they were not introduced and whom they have never since met. It is asserted that the St. Louis will was written by Paul T. Gadsden, a young man, an attorney, then residing in St. Louis, with little if any practice in the courts, but little known in St. Louis and wholly unknown to deceased. Mr. Gadsden testifies that he wrote a will about the time named for a person claiming to be Stephen B. Miles of Falls City, Nebraska, and which was signed and witnessed at the St. James hotel. While we are not inclined to indulge in any unnecessary criticism of Mr. Gadsden, we are persuaded that, to say the least, he may have been mistaken as to the identity of the testator, if any will were written by him. The history of the alleged execution of the instrument is quite complex, and there are many circumstances shown which, upon an analysis of the testimony of those connected with the affair, present serious doubts. The life history of

Gadsden leads one to believe that at the time named he was quite unstable as to his purposes, not remaining long in one place, and when finally located he was in the Republic of Mexico, and, upon request and the advancement of sufficient funds, came to St. Louis and asserted the writing of the will. Our attention is attracted to the circumstances surrounding the preparation and execution of the alleged will. The fact of the existence of Mr. Gadsden was wholly unknown to Mr. Miles. It appears that at the time of the writing of the alleged will Mr. Gadsden and a Mr. Blow had their offices in a suite of rooms on the eighth floor of the Security building, in St. Louis, in connection with another attorney by the name of Wind; that a Mrs. Wilson was employed by Gadsden & Blow as their stenographer and typist, and that she acted in the same capacity for Mr. Wind. Her testimony was taken by deposition. She testifies that she was in that office in 1897, and that while she was there, in the latter part of the winter or early spring, a gentleman, a Jew, having an office on the same floor and near by, but whose name she does not know, came into the office accompanied by a young man and an old gentleman, whose names she does not know, asked for Mr. Gadsden, and introduced the old gentleman to him. She described the old gentleman referred to as "a very small old gentleman," and stated that he and Mr. Gadsden sat down and talked from 20 minutes to half an hour, and then they stepped into an adjoining room for a short time, when they returned, and the old gentleman and the young man left. In her further description of the old gentleman she says: "I couldn't understand anything he said because, I don't know, there was something the matter with him. I don't know what it was—his voice or something." Her attention being again called to the subject in her examination in chief, with the request that she describe him more particularly, she said: "Why, he was quite old, and I don't know—I don't know what was the matter, his voice must have gone, he talked something like, I don't know whether

—he had shortness of breath, or something, I don't know what it was; I couldn't tell, something the matter—he talked kind of in a peculiar tone, he didn't have much to say anyway, just sat there for a few minutes, he sat in Mr. Blow's chair and had his back turned toward me, and Mr. Gadsden was sitting here (indicating) and they were talking to him, and then they got up and went in the other room." On cross-examination she stated that he was not sitting with his "whole back" toward her, but partially so; that she could not see his features distinctly because he was "muffled up." "He was bent, I don't know what was the matter with him, he was kind of stoop-shouldered. * * * He talked kind of husky, or like he was short breathed, or something, I don't know what was the matter with him. I remember him well because I thought he was so awfully old to be out in such weather. * * * He didn't have very much to say, the other man did most of the talking"; that while there they talked about making a will, or see about a will, or something to that effect; that she never saw him after that; that some days after that the young man came in early in the morning, and inquired for Mr. Gadsden who had gone out. He left word for Mr. Gadsden to come to a hotel, she understood the Southern, and went away. She informed Mr. Gadsden, but directed him to the Southern, whither he went, but returned saying they were not there. On the same day the young man came again and left a card, saying he would return for Mr. Gadsden. She went to lunch, and supposed they met and went away together. Mr. Gadsden returned and directed her to take the dictation of a will from notes and memoranda which he held. She took his dictation of the will in full in shorthand, subdivided into paragraphs, and wrote it out at length with the typewriter, at the same time making a carbon copy; that the whole was written on two sheets of typewriting paper. She was asked: "And at that time there had been no will made?" Her answer was: "No, sir; I am positive of that." She further stated that when she had prepared the

copies Gadsden "seemed to be in a rush and left the office immediately and went over there (to the hotel)"; that he told her "he was going over to have the copy signed"; that he returned in a short time and narrated the circumstances of the execution of the will, the sickness of the testator, "the surroundings being so peculiar, something about the bed, I don't know what it was, whether sheets or what it was, but he went on talking about it, but I didn't pay much attention to it, but I imagine that he had sheets around the bed, but I did not ask."

The testimony of Gadsden was also taken by deposition. This deposition was taken in January, 1902, and according to his answer he was 31 years of age the previous June, and at the time of the alleged execution of the will on the last day of March or the first day of April, 1897, he was less than 26 years of age, and had been admitted to practice at the bar of St. Louis two years before. For the purpose of a comparison with the testimony of plaintiffs' other witnesses it will be necessary to observe his testimony with some care. He testifies that he was sitting in his office one morning with his stenographer, Mrs. Wilson, when two gentlemen came in accompanied by a third one; that said third party, who occupied a nearby office and was known to him by sight, but he could not give his name, said: " 'You young men are lawyers in here?' I said, 'Yes,' and he said, 'Here are some gentlemen looking for a lawyer,' " and left the room; that the older man of the other two said his name was Stephen B. Miles from Falls City, Nebraska, and proceeded to give a list of his property and heirs, as the witness says he remembers it; that after referring to a ranch and other large tracts of land the witness asked him about how many acres of land he had, and he said some 20,000 acres; that he mentioned a long list of other property, a small tract of land near Falls City, a farm of some 300 acres, another small farm by name, stocks, bonds, bank stocks, notes, liens, mortgages and other evidences of indebtedness. The witness continued: "And when he got through with that I looked up to see if anything was the

matter with him. To me, he appeared a comparatively poor man. I thought he was off his head, or was trying to 'stuff me,' as they sometimes say, and I looked at him, for it included nearly every kind of property that I had heard of. * * * He then said city lots in St. Louis, Missouri. He then said other farm lands, and after that he commenced to tell me how he wanted to leave his property." The witness gives the names of persons to whom he says Miles desired the property to be devised and bequeathed, the witness naming Miles' grandchildren by his daughters, one of whom was not his grandchild, and the witness also gives the names of a number of other persons to be remembered in the will. The witness further testifies that he asked Miles if he had any special instructions as to whom he wanted property left in addition to those named by the witness, when Miles said he wanted to do the fair thing by all his children, that he was getting old, was preparing to leave this world, and he thought no animosities should be left behind; that the witness told him he thought he was right, spoke to him of his own father's will from which some friction arose, and that he thought a will ought, as near as possible, to follow the law of descent; that Miles said when he died he wanted every one who thought they had the right to expect anything of him to feel that he had remembered them; that Miles asked him if it was necessary to include a revoking clause, and was informed that such would not be necessary; that Miles said he had written other wills, and was informed by the witness that the safest way was to destroy all previous wills, and Miles said he did not think he knew where a former will was; that Miles and the young man left the office, the witness having made a penciled memorandum of the substance of what disposition was to be made of the property. When asked how long those people were in his office during that conversation, his answer was: "Not more than 25 minutes I should judge at the most." The witness further states that perhaps the next afternoon Mr. Miles came to his office alone and countermanded much of what he directed

the day before as to the disposition of his property; that instead of giving his sister Amanda all his cash in bank he desired that she have one-half, and the other half to be equally divided between his children and their representatives; that all his bonds were to be given to his two sons Samuel and Joseph; that one-half of his bank stocks were to be given to his two sons, and the whole of the remainder of his estate to be equally divided into four equal parts and apportioned among the four children or their representatives. As the witness expressed it, "The entire balance of the estate to be divided in the same way," one-fourth part to each of the four children or their heirs.

It would perhaps be proper to digress for a moment at this point. We have searched the record in vain for any later instructions as to what the contents of the alleged will should be. About 100 pages further on in the examination of the witness he is asked to give the contents of the will as executed, and he puts it: That of the other lands of the testator the will gave "his friend Frank Marvin such one of his farms, was the statement, not exceeding 300 acres in extent, as he might elect to choose. To his namesake, Miles somebody—that name I don't remember—he devised another farm, simply describing it as 'my *blank* place,' and adding some phrase, where he now lives with his parents, or some such descriptive phrase." If the witness is telling the truth, or rather if the final instructions were as he gives them, it is clear that those instructions were violated by him, and, according to his own theory of the facts, the will he says Mr. Miles signed was not his will, and Mr. Miles knew nothing of the contents of the paper it is claimed he signed. The witness details trips to the Southern hotel; his finding a card upon his table; his going to the St. James hotel, taking a pen or pencil "rough copy" of the will he had prepared; his being escorted to the room occupied by Mr. Miles, where he found him lying on a bed, "around that bed was some kind of curtains, or a sheet or mosquito net, or something surrounding it almost entirely"; his finding another gen-

tleman in the room, and, "as I came in, this man said, 'Have you got Mr. Miles' will?'" The witness says he answered: "'Yes, but it is not in shape to be signed this morning. Is it necessary?' And he said, 'Yes, Colonel Miles wanted to sign it today,' and I said, 'Yes, it may be done, if one of you gentlemen will write it out here I will dictate it to you from the draft I have got of it.' He said he didn't have any paper, so they sent out and got some. Perhaps one of the gentlemen got it. * * * I then dictated the will to one of the gentlemen present from my original draft, and he took it down in pen, writing it, commencing with a margin, and writing it in paragraphs down this sheet, down the reverse, as I remember, across this, across this, and part of the way at least, if not all through it, into another sheet (that you call four pages). I remember that during the writing of it the man who was writing it didn't say a word. I simply dictated it to him and he put it down. When it was finished I exchanged papers with him and reread it, and found it as correct according to my original draft, and that it was in condition to be signed, and I then said, 'Will you gentlemen witness it.' And they said, 'Oh, we rather not, suppose you get some one else as one of us has written it.' One of them said, go down and get so and so, and so and so, and one of them left the room, and I think both of them went out shortly. After one went out the other did. Then came in a man who was a stranger to me. He was there for a few minutes and waited, and I spoke to him, and he spoke to Colonel Miles, who was on the bed at that time. I said, 'Where is the other gentlemen who is going to witness the will?' He then either went out or sent for him. Shortly afterward another of them came in. To neither of these gentlemen was I introduced. I don't think when either came in was any one else there. No one but myself and Mr. Miles. Before the second one came into the room the first one and myself helped the colonel to a little table that was in the room to sign the will. When the second one came in I said,

'Gentlemen, this is a will that Mr. Miles is making, which I have just drawn up in this room, and we are going to witness it. I want you to witness it.' The colonel said something to them. The colonel said, 'Yes, it is my will,' or some short sentence, and I said, as I remember it, 'Mr. Miles, you declare this to be your last will and testament, and that you sign it here in the presence of these two gentlemen?' He said, 'I do,' and he signed it in an exceedingly shaky hand, and when he got through the signature, I could hardly recognize it, the Miles part was plainer than the Stephen part. I said, 'Gentlemen, I want you to witness this. Do you witness this in the presence of Mr. Miles, the testator, and in the presence of each other,' and they said, 'We do,' and signed under a clause so declaring. I then took my original draft and entered on it, as I recall, the names of the two witnesses to that will." He then testifies he did not know the men, and does not know or remember their names. He says he folded the will in the ordinary way, indorsed its contents, with his name at the bottom of the folded paper, put the original draft in his pocket and carried it out of the room; that it was complete including the signature. When asked if the will contained a revocatory clause his answer was: "The last clause of the will proper as executed, as I remember it, was this: 'I declare this will to be in revocation of all previous wills and testaments I have made, and further declare it is to be of my own free act and deed.' " He further testifies that, having seen a notice in a newspaper a day or two after the will was written that Mr. Miles was a "man of property, I took out that original draft from my desk, and dictated to Mrs. Wilson a copy, saying I thought it would be worth while to keep that will—it might come up some day; that evidently the old man was worth a good deal of money, and the newspapers said he was, and I thought I would fix it in such a condition that I could preserve it, and I dictated it to her, and she put it down on the typewriter in duplicate and gave me both copies, and I put one in my office desk, and took

the other one and the original draft out to my house, and either one of them, or both, went into my trunk." Both are said to have been finally lost. There is such a clear conflict in the testimony of plaintiffs' witnesses as to create the impression that, to say the least, the fact of the execution of the alleged St. Louis will, *by Stephen B. Miles,* is left in serious doubt. It may be that some one applied to Mr. Gadsden to write a will as asserted, but the description of that person, as given by Mrs. Wilson, does not coincide with the appearance or description of Stephen B. Miles, as given by plaintiffs' witnesses who knew him. Again, she testifies in the most positive way that before the will was taken to the hotel for execution it was dictated to her, taken in shorthand and written with a typewriter, and then taken in a "rush" to be signed. In this she contradicts the testimony of Gadsden, who says the will was written by an unknown person in the room occupied by Miles, the testator. Each is positive, and both cannot be correct. As we have seen, Gadsden testified in detail as to the execution of the will, giving just what he said to the witnesses and to Mr. Miles, which is herein above set out. The two alleged witnesses to the will were called by plaintiffs as witnesses upon the trial, and, if they are to be believed at all, Gadsden was not present on the occasion referred to by them. If Gadsden told the truth as to what he said and did, then there is no proof that the will was ever witnessed, for the two witnesses, and the only ones testifying to the witnessing of a will, did not witness the will he wrote.

Mr. Quynn, one of the two, testifies that he was called to witness a will; that it had been written with a pen, but that the only evidence he had that it was a will was a remark by Mr. Miles that the paper was his will; that he did not read a word of it, has never seen it since; that there must have been 8 or 10 sheets or leaves, forming a bulk or body of sheets of paper about half an inch in thickness; while Gadsden testifies there were but 2 sheets or leaves, making less than 4 pages. Quynn testifies fur-

ther that those present were Mr. Miles, Mr. Miller, the other witness to the paper, himself, and another man of from 35 to 37 years of age. The description he gives of the fourth man renders it quite certain it was not Gadsden. He states that said fourth man did not utter a word during the whole time they were present; that he never, to his knowledge, saw Gadsden, either before or since, and did not know the fourth man present. Mr. Miller, the other alleged witness to the will, testifies that when he went into Miles' room the fourth man was there. Then he, as he remembers, went down to the hotel office for Quynn, and when he returned the man who was there where he left him remained while the paper was being witnessed, but did not utter a word during the whole time, to the knowledge of the witness. He does not know if he knew the man, has no recollection upon that subject, is unable to give any description of him. It is very clear that by the absolute silence of that man he did not in any degree attract Miller's attention or notice, nor was he interested in the execution of the will.

Note what Gadsden testifies to: "When the second man came in I said, 'Gentlemen (addressing the witnesses), this is a will Mr. Miles is making, which I have just drawn up in this room, and we are going to witness it.' * * * The colonel said, 'Yes, it is my will,' or some short sentence, and I said, as I remember it, 'Mr. Miles, you declare this to be your last will and testament, and that you sign it here in the presence of these two gentlemen.' He said, 'I do.'" And again, he says he said to the witnesses: "'Gentlemen, I want you to witness this. Do you witness this in the presence of Mr. Miles, the testator, and in the presence of each other,' and they said, 'We do.'" It is very evident that nothing of this kind occurred on the occasion referred to by Mr. Miller and Mr. Quynn. There is collateral evidence, not depending upon the testimony of Gadsden, that he (Gadsden) probably wrote a will for some one about the date referred to, but this collateral evidence falls far short of proving that that one was

Stephen B. Miles. It may be possible that Gadsden was deceived, yet in view of some phases of his testimony it is difficult to harmonize what he says with the exact truth and a conscientious relation by him of the facts while upon the witness stand. To say the least, he has displayed a most remarkable memory of details of minor importance occurring so long before the date upon which his testimony was given. This applies with equal force to his alleged memory of the names of the beneficiaries under the alleged will. He could have had but few interviews with Mr. Miles prior to the time it is claimed Miles signed the will, and none after. They were total strangers until he says Miles came into his office two or three days before he says the will was made. They never met afterward. He seems to have paid no attention to the identity of the two young men, one of whom he says wrote the alleged will, nor to the men who it is claimed by him witnessed the execution of the will. Had he done so he could have remembered who they were, having met and associated with them, as he says, fully as well and distinctly as the names of those whom he never saw. It seems to the writer that he "doth protest too much." An uncharitable view, insisted upon by counsel for defendants, and not without some foundation, is that he had by some means been furnished with certain facts concerning Stephen B. Miles, his family and property, but not by counsel practicing at this bar and residing in this state. This subject need not be here discussed. He perhaps did discuss the question of the necessity for a revocatory clause in a will with Mr. Wind with whom he was officing. He probably exhibited to Mr. Cannon a folded paper said to be a copy of a will he had written, but of this we only have his evidence, as Mr. Cannon did not see the contents of the paper. These and other facts testified to by the witness named may have occurred, and yet the instrument, if written, not have been the will of Mr. Miles. The description of the little, old, debilitated man, given by Mrs. Wilson, does not correspond in any particular with the appearance and

condition of Mr. Miles, as testified to by Quynn and a number of other witnesses. Gadsden's story, upon his return to his office, of appearances at the room where he said he had been, and to which he testified, is not sustained by any witness who was present in Miles' room at the time they claim they witnessed the execution of a will by Miles. His office was not very far from the St. James hotel. He had a competent typist there. When he arrived at the room of the testator he found a total stranger present. He was informed that it was desired that the will be made that day. There was no paper at hand. The necessary material was sent for while he waited. He asked the strange gentleman to write the will as he dictated or read it from the paper which he held. It was written, read and compared with his "rough draft" and found to be an exact copy. Common experience teaches us that economy of time and the preservation of the secrets of his client would have caused him to return to his office and had the will typewritten. The story is far from convincing. So far as is shown by the evidence, that was the last that was ever seen of the alleged will. If Gadsden's story is true, that will was never witnessed by either Miller or Quynn. If their story is true, they witnessed a much more extended instrument when Gadsden was not present and of which he had no knowledge, and of the contents of which neither the witnesses, the district court, nor this court have been advised.

It is not our purpose to enter into an examination or discussion of the motives, actions or consciences of the witnesses, nor to make any unnecessary unfavorable comments upon them personally, as those whose testimony is now under consideration are citizens of another state, and whose lives are wholly unknown to the courts passing upon this case, except as the same may be reflected by the testimony of witnesses and the record. It is our opinion that both Mr. Miller and Mr. Quynn are mistaken when they testify, as they probably believe, that they witnessed a will for Stephen B. Miles. As we have above indicated,

they were permitted to know nothing whatever as to the contents of the paper which they say they witnessed. All they claim to *know* about it is that Mr. Miles said it was his will. So far as is shown by the proofs, neither they nor any other person now living has ever since seen such a document. It seems to us that, assuming the candor and truthfulness of those men, Mr. Quynn may easily have been deceived as to the papers he then signed, and that another transaction, when recalled nearly two years thereafter, may have misled his mind in remembering the facts. The date fixed by all the witnesses in support of the theory that a will was made is the very last days of March or first days of April, 1897, the stronger inclination being the last day of March. It is shown that on that day Mr. Quynn witnessed a number of instruments for Miles and Miller, to wit, a promissory note for $6,000 from Miller to Miles, the assignment of stock in the St. James Hotel Company from Miller to Miles, and four assignments of bank stock from Miles to Miller, copies of all of which are attached to the bill of exceptions showing the date to be March 31, 1897. Both Miller and Quynn develop a high degree of uncertainty as to just where that transaction occurred—whether in the office of the hotel, or in the room occupied by Mr. Miles. Accepting their testimony as an effort to be truthful, it is very clear that neither of them know. Since no will has been brought to light, we are forced to the conclusion that none was made, and that the witness Quynn is mistaken, or may have been deceived, as to what the instrument was or instruments were, which he signed. This might have been the case with Miller. He was present when the transfers were made, but his memory is sadly at fault as to just where it was done. There can be no doubt but at that time both Miller and the hotel company were on the verge, at least, of insolvency and bankruptcy. He at that time purchased $6,000 worth of solvent and good bank stock of Miles, giving his note therefor, secured by the assignment of the hotel stock as collateral. Miller was the principal, almost

the exclusive, owner of the capital stock of the hotel company. He had formerly had a lease upon the hotel, and owned the furniture and property therein. He organized the hotel company as a corporation, fixing the value of the assets at $10,000. He gave one share of the stock to a man by the name of Moore in order that he might be eligible as a member of the board of directors. He was indebted to Quynn, and transferred a small portion of the stock to him. He was also indebted to another, and settled the demand with a transfer of stock. He was the president of the company, and Quynn was the secretary and treasurer without bond. Some time after his purchase of the bank stock from Miles, the execution of his note and the assignment of the collateral, the hotel company made an assignment, and he went into bankruptcy, canceling his debts without any payment whatever, his note was worthless, the hotel stock was equally so, and the Miles' estate lost the whole of the $6,000. He may not have intended to practice a fraud and swindle upon Mr. Miles, his guest and friend, but we cannot escape the conviction that he knew of the rotten condition of the hotel company, the worthless character of its stock, and of his own insolvency. Under these circumstances it is hard to believe that he could not remember with clearness the details of the transaction of the execution of the note and the making of the assignments and where it occurred.

As we have said, the question of the making of a will in St. Louis is, and must be, the controlling one in this case. The burden of proof to establish the fact of the making of the will is upon plaintiffs. It is the well-settled doctrine in this state that "parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which cannot be found, must be clear, unequivocal and convincing." *Williams v. Miles,* 68 Neb. 463; *Clark v. Turner,* 50 Neb. 290. In the latter case we quote with approval the following from *Chisholm's Heirs v. Ben,* 7 B. Mon. (Ky.) 408: "The books of reports contain many cases in which wills lost or de-

stroyed have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established. But in an examination of these cases, as extensively as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known, the contents of the will from their own inspection; none in which the declarations or even professed reading of the decedent have been held to be alone sufficient on this point; and none which would sanction their admission upon the question of the contents of the will with any other effect than as merely corroborative of the more direct evidence." As we have seen, the witnesses to the paper, said and alleged to be the will of Mr. Miles, knew nothing whatever as to its contents and have never seen it since. If we eliminate the testimony of Gadsden as to the contents of the will which he says he wrote, but which was not witnessed in his presence by either Miller or Quynn, there is not a scintilla of evidence as to the contents of the paper, the existence of which is sought to be established as the will of Mr. Miles. This, to our minds, must be decisive of the case.

It is said the provisions of the Rulo will are unjust and an improper discrimination in favor of some of the children of the deceased and against others. As viewed from the standpoint of conditions as they exist at this time, and not at the time of the making of the will, or up to the time of the death of the testator, this would seem true. But, unfortunate as it may be for some who are not so well provided for and who are now respected, respectable and moral citizens, we are not prepared to denounce the testator as having been during his life lacking in judgment or a disposition to conserve his estate and do justice between his children. It would, no doubt, have been intensely gratifying to Mr. Miles could he have said at any time before his death that the best and proper thing to do would be to divide his large estate equally among his children, giving to each his full share in fee absolute,

but who can say that would have been the best or even the proper thing to do. It sometimes occurs that not only would an estate, the labors of a lifetime, be squandered, but that the recipient of wealth suddenly bestowed would be, in reality, injured thereby. This is by law left to the conscience and judgment of the testator.

Evidence was taken and submitted bearing upon the conduct and statements of Mr. Miles after his return from St. Louis and before his death. If we apply the rule of *Clark v. Turner, supra,* the statements of the testator, if made, that he had made a will in St. Louis, or elsewhere, subsequent to the execution of the Rulo will, could not establish either the fact of the execution or contents of such will. If he disposed of and distributed to his heirs property claimed by plaintiffs to have been devised and bequeathed by the supposed will, but not in accordance with its supposed provisions, if entitled to any consideration, it could only be construed as indicating that no will had been made.

It was sought to prove by the facts and testimony of witnesses that defendant Joseph H. Miles was guilty of unfilial conduct toward his father at the time of his last sickness and death, and thereafter in connection with the remains of the deceased, and that he did not act in good faith with his brother Samuel, as well as the contention that he had had the opportunity to find and destroy the will said to have been made at St. Louis, but we find no satisfactory proof of unfilial conduct upon his part, and there is no evidence that he ever found or destroyed any will. These charges rest in suspicion which it is hoped is entertained only by counsel.

Not only do we find no sufficient reason for disturbing the decree of the district court, but we are satisfied that the finding and decision of that court that "Stephen B. Miles did not execute a will in St. Louis in 1897, as alleged in plaintiffs' petition, and that the will known in the records as the 'Rulo will' is the last will and testament

of Stephen B. Miles, deceased," is right, and the decree dismissing this action should be, and is,

AFFIRMED.

ANTON CIPERA, ADMINISTRATOR, APPELLEE, V. AMIEL CHMELKA ET AL.; ANTON CHMELKA, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,119.

Appeal: EVIDENCE. Only questions of fact are examined upon the decision of this case, and it is found that the decree of the district court is sustained by the evidence.

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

A. H. Briggs, for appellant.

Louis J. Piatti and *F. Dolezal, contra.*

REESE, C. J.

In the month of September, 1898, Amiel Chmelka and plaintiff were married, plaintiff receiving something near $1,200 in money and property from her parents, and defendant Amiel a suitable allowance from his parents. On the 24th day of the same month defendant's father, Anton Chmelka, who is also defendant in this action, and who was living on a farm in Dodge county, consisting of 240 acres, conveyed 160 acres thereof to Amiel by a warranty deed, but reserving a life estate in about 2 acres upon which the house in which he lived was situated. There was also expressed a "condition" in the deed that Amiel should annually deliver to his father one-fourth of all the grain, hay, grass, seeds and vegetables of every description raised on the land during the lives of the grantors (Anton and his wife), and that the grantee should not sell nor lease the land during the lives of the grantors without their written consent. There appears

to have been a second house upon the land of which plaintiff and Amiel took possession, and Amiel took or continued in charge of the management of the farm. His efforts in that direction were such that by the month of December, 1905, he was hopelessly swamped in debt, owing in the neighborhood of $12,000. It was then agreed that, as Amiel could not pay his debts, the land was to be reconveyed to his father who assumed Amiel's obligations, but Amiel and wife continued to reside on the land, and, so far as outward appearances indicated, matters were conducted on the farm as before, except that Anton testified that the financial management was assumed by him. Three children were born to Amiel and plaintiff, when plaintiff's health failed and serious surgical operations became necessary. Amiel's conduct toward plaintiff appears to have become unbearable by reason of his habits of intoxication and brutality until plaintiff, as she alleges, was practically driven from the house. She went to Omaha, and in November, 1907, instituted an action against Amiel for divorce and alimony. The charges contained in her petition consisted of repeated acts of adultery, habitual drunkenness and extreme cruelty. This action resulted in a decree in her favor upon the ground of extreme cruelty, and $3,000 alimony was allowed her, which has not been paid. Pending the suit for divorce plaintiff filed a *lis pendens* in the proper office in Dodge county, and commenced a suit to hold the land, in the hands of Anton, for the payment of temporary alimony which had been allowed her, and, after the decree for divorce and permanent alimony had been entered, filed a supplemental petition setting up the facts, and asking relief to the extent of the decree. It was alleged, in substance, in the petition, that the conveyance from her husband and herself to Anton was the result of a conspiracy between her husband and his father to cast her out of the family, by fraud to deprive her of any claim upon the farm for her dower and homestead rights, as well as of money and property contributed by her at the time of

the marriage, and the collection of any alimony for her support, but of which conspiracy she at the time had no knowledge; that she did not understand the legal effect of the deed, but that it was upon the condition and understanding that when the debts of the said Amiel Chmelka were paid the said real estate would be reconveyed to him.

The answer of the defendants consists of admissions of the allegations of the petition as to the relation of defendants to each other; of the suit in the district court in Douglas county for divorce and alimony; that Amiel has no property or other resources out of which to pay the demands of plaintiff; that the children were born of the marriage as alleged; that defendant Anton is the owner of the real estate described in the petition and answer; and alleges that the indebtedness of Amiel, which defendant Anton has paid and assumed, was largely in excess of the value of the property received from him and plaintiff; and a general denial of other averments.

The trial consisted to a great extent of the examination of the issue formed upon the question of the promise and undertaking of Anton to reconvey the real estate when Amiel's debts were paid, and upon which there was a direct conflict in the evidence, and the inquiry as to the amount of money paid or assumed by Anton of the debts of Amiel as compared with the value of his interest in the property conveyed by him and plaintiff to Anton. It was developed that the property had been sold by Anton, but that not all of the purchase price had been paid, leaving more remaining unpaid than the sum of plaintiff's demands. Much time and energy were devoted to the question of how much and what particular debts of Amiel were satisfied by Anton. The decree entered by the district court is a finding in favor of plaintiff, and that she should receive from Anton out of the unpaid portion of the purchase price of the land sold the sum of $1,800, with interest thereon at the rate of 7 per cent. per annum from the 10th day of April, 1908, with costs of suit. Defendant Anton appeals.

It is shown to this court that since the docketing of the appeal and filing of the briefs, and but a short time before the cause was reached for hearing, the plaintiff died, and, by agreement, the cause is revived in the name of Anton Cipera, the administrator of her estate, but, so far as the treatment of the facts are concerned, it will be disposed of as if she were still living.

There are two principal, and perhaps controlling, questions to be considered: Did Anton, the father of Amiel, agree with plaintiff, as an inducement to the execution of the deed to him, that when Amiel's debts were paid he would redeed the land in question to Amiel? If so, was the total of Amiel's debts paid or assumed by Anton equal to or in excess of the value of the property received? The latter question may not be important, since, if that agreement was made, the obligation might exist even though the amount paid out might exceed such value.

1. As to the question of the agreement, the evidence is squarely contradictory. Plaintiff testified in the most positive terms that such was the clear understanding, while both defendants deny that any such agreement was ever even suggested. The notary before whom the deed was acknowledged, who was defendant's banker and no doubt often consulted by him, testified that no such agreement was referred to in his presence at the time of the execution of the deed, the subject discussed being the agreement of Anton to pay Amiel's debts, a considerable amount of which was owing to or in the bank's hands for collection. There is also some evidence of statements made by plaintiff subsequent to the execution of the deed which seem to contradict her contention upon the trial. So far as the oral evidence as to the particular fact is concerned the preponderance seems to be in favor of the defendants. However, there are some facts as to the conduct of defendants shown which point toward the truth of plaintiff's contention. Amiel is the only child of Anton. The execution of the deed to Anton, December 14, 1905, appeared to produce no effect upon the relation of the par-

ties to it. The premises were not vacated by Amiel or plaintiff and the farm work was continued as before, and which so continued until August, 1907, when plaintiff alleged she was driven from the farm—her home—and, indeed, those relations of father and son seem to have continued until the time of the trial of this cause, although Amiel had removed to Colorado, taking $1,200 of Anton's money with him for the purchase of property there, and their relations in matters of business continue as before. This is persuasive evidence that there were matters of agreement between them of which plaintiff was not advised, and also that such an agreement was probably made. It is testified to by defendant Anton that he at one time made such a promise to Amiel, but that it was made a long time subsequent to the conveyance to him, and not at or before that time. Without reference to that particular question, however, we are persuaded from all the evidence and circumstances shown upon the trial, and by the record, that there has been no time when Amiel did not retain an interest in the real estate, and, after its sale, in the money for which it was sold.

2. It is contended that defendant Anton has paid out, on the debts of Amiel contracted before the conveyance of the land back to Anton, fully as much as the land and other property received were worth. Defendant Anton so testified, but, if so, it was unfortunate for him, if material, that he could not specify as to all the items of debts paid, nor furnish proof of the fact, except his general statement upon the witness stand. There was ample proof of the larger claims, such as mortgages upon the property, notes at the bank, etc., but not in detail as to other debts. We might, probably, go through the record, make and present an itemized statement of his payments proved to have been made, but in view of the whole record and all the circumstances shown, we are satisfied with the decree of the district court, and will have to be excused from entering upon the undertaking.

The decree is AFFIRMED.

JOHNSON COUNTY, APPELLEE, V. CHRISTENA E. TAYLOR, APPELLANT; KEMPER, HUNDLEY & MCDONALD DRY GOODS COMPANY ET AL., APPELLEES.

FILED SEPTEMBER 26, 1910. No. 16,129.

1. Creditors' Bill: HUSBAND AND WIFE: ESTOPPEL. The husband, while holding the title to the property of his wife, became surety upon the depository bond of a bank, justifying in the sum of $10,000. Before the approval of the bond, the county commissioners caused investigation to be made as to his financial standing and worth in an adjoining county in which he resided, and received a favorable report. They were also informed by the county clerk that he held real estate in the county where the bank was situated, that being the county wherein the bond was filed. But the commissioners were not informed as to what particular land was in the name of the surety, nor its value. The commissioners testified that in approving the bond they relied upon the ownership by the husband of land in the county, as well as upon his affidavit of justification, and the report from the adjoining county *Held*, by a majority of the court, that these facts estopped the wife to claim that the land was her separate property, even though the same were true.

2. Trusts: HUSBAND AND WIFE: RIGHTS OF CREDITORS. "Where a husband uses the money of his wife in paying for land, the title to which he takes in his own name, a trust will arise in favor of the wife, which a court of equity will protect against the husband's creditors, unless it is made to appear that such creditors gave the husband credit on the faith of his being the actual owner of the property of the wife, the title to which was in his name." *Hews v. Kenney*, 43 Neb. 815.

APPEAL from the district court for Johnson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed as to Johnson county and reversed as to the other appellees.*

S. P. Davidson and *F. L. Dinsmore*, for appellant.

Hugh La Master and *Jay C. Moore*, *contra*.

REESE, C. J.

This action, in the nature of a creditors' bill, was brought by the county of Johnson, as plaintiff, against

the principal defendants Christena E. Taylor and Frank A. Taylor, her husband, together with certain judgment creditors, the object and purpose of which is to set aside two deeds to the east half of the southeast quarter and the southwest quarter of the southeast quarter of section 5, in township 4 north, of range 12, in Johnson county, excepting 3 acres, described in the petition. The conceded facts in the case are that in the fall of 1895 defendant Christena E. Taylor, then the wife of Frank A. Taylor, received from her deceased father's estate the sum of $6,000, and in the spring of 1896 she received the further sum of $350 from the same source, making a total of $6,350 of her private individual means. With this money, or a major portion of it, she, through her husband acting as her agent, purchased a farm in Johnson county, he taking the title in his own name, but without her knowledge. Later on she sold the land so purchased, and on December 9, 1898, bought the land here in dispute, her husband acting for her, when he again took title in his own name, but without her knowledge, and caused the deed to be recorded. Later, when she learned that the title to the land was in the name of her husband, she, by consultation with an attorney and others and with him, sought to have the land conveyed to her, but, for some reason, she did not succeed, the subject apparently having been dropped, and the record title remained in the name of her husband. On or about the 10th day of January, 1902, and while the title to the land in dispute remained in the name of Frank A. Taylor, of record, the Chamberlain Banking House became a depository of the funds of Johnson county, and defendant Frank A. Taylor became one of the sureties upon the depository bond of said bank, but of which defendant Christena had no knowledge. The bank having failed, suit was brought upon the bond September 2, 1902, which resulted in a judgment in favor of the county and against Frank A. Taylor and others for the sum of $7,109.75. Said judgment was rendered June 19, 1906. The deed to Frank A. Taylor bears date December

9, 1898, and was filed for record on the 31st of the same month. The defendant Frank A. Taylor owned lands in Nemaha county upon which he and his family resided. At the time of the failure of the bank Frank A. Taylor was absent from the state and in the state of Idaho. Upon his return home he was intercepted at Tecumseh on his way by the financial officers of the county and their attorney, and informed of the failure of the bank, and an arrangement was made by which his wife was to be brought across the line from their home in Nemaha county and the claim of plaintiff secured. She with her husband met the county officers at night at the home of Mr. Armsted, when by an agreement among and between the parties Taylor conveyed 80 acres adjoining the 80-acre homestead in Nemaha county to his wife, and the two executed a mortgage to plaintiff upon all the land, both in Nemaha and Johnson counties. This meeting was held on the 2d day of September, 1902, and before the rendition of the judgment upon the depository bond. There is no doubt of the *bona fides* of Mrs. Taylor's claim that the property in dispute was purchased with her individual means. There is also no doubt of the right of her husband to convey and of hers to receive the title to her land, unless the facts hereinafter referred to created an equitable estoppel against her.

Much is said in the briefs and was presented in the oral argument at the bar of this court as to what occurred at the home of Mr. Armsted upon the night of the conveyance of the Nemaha county land from Frank A. Taylor to his wife, defendant herein. It is clear that Mrs. Taylor was suffering under very great excitement on that occasion, she having been induced to cross the county line without more than 30 minutes' notice, and meet the county officers and their attorney without any knowledge of what her husband had done, and with no one to advise her as to the course she ought to pursue. The fact of her great mental perturbation is clearly established by all the witnesses who testified upon that subject,

including plaintiff's attorney then present and directing the management of the county's interest. The mortgage referred to as having been executed to the county is not found in the bill of exceptions, but is frequently referred to in the evidence and briefs, and it is insisted in the brief of the county that defendant "is estopped by reason of her giving the mortgage to the county." After the rendition of the judgment, and while the mortgage executed by the Taylors was in force, this suit was instituted by the county to cancel the deeds made by the husband to the wife after the execution of the mortgage. It is the opinion of the writer hereof that at the time of the commencement of this action plaintiff might have pursued either of two remedies—foreclosed the mortgage, or instituted this action; that by pursuing the latter all rights under the mortgage are waived, and it has no legal or binding force or effect and that it is not entitled to any consideration in this case. This, however, is not decided, as it is the opinion of the other members of the court that the question is not before us.

As we all view this case, the controlling question is whether or not the fact that the title to the land was permitted to stand in the name of the husband works an estoppel as against defendant and in favor of the county. This question arises upon the effect to be given to the testimony of the county commissioners as to what occurred at the time of the approval of the depository bond by them. It was known by them that Frank A. Taylor, one of the sureties, was a resident of Nemaha county. The county clerk, or his deputy, was instructed to write to some of the county officers of Nemaha county for the purpose of ascertaining the financial condition of Taylor. This was done and a favorable answer was received, Taylor having justified in the sum of $10,000. The clerk also reported that Taylor had land in Johnson county, and upon the strength of his affidavit the report from Nemaha county, and the report of his ownership of land in Johnson county, the bond was approved, but none of

the commissioners knew just what land was in his name in Johnson county, nor its value. It appears that their knowledge in that behalf was that he was a "landowner" in that county, but they did not know of what particular tract nor of the value of the land the title to which was in his name, but they were informed by the county clerk that he had 120 acres of land in the precinct in which the land was located. He made no representations upon that subject. Was that knowledge sufficient to warrant the commissioners in approving the bond upon the reliance of his ownership and solvency? There can be no question but that had the commissioners, either by themselves or another authorized to act for them, examined the records, learned as to the exact location of the land and its value, and acted and relied upon that information, defendant could not now question the liability of the property for the payment of the debt, the credit being given upon the faith of his ownership. It is the opinion of the majority of the court, but not concurred in by the writer, that the proof of the examination made and information obtained by the commissioners was sufficient to show their reliance upon the ownership of real estate in the county by Taylor, and that the decree of the district court in favor of the county should be affirmed.

Among others named in the petition as defendants were the Kemper, Hundley & McDonald Dry Goods Company, and the Turner, Frazer Mercantile Company, who were brought in as judgment creditors of Frank A. Taylor. They filed their joint answer and cross-petition setting up that on the 5th day of March, 1908, the Kemper, Hundley & McDonald Dry Goods Company recovered a judgment in the district court for Johnson county against the Chamberlain Banking House and the defendant Frank A. Taylor for the sum of $937, and the Turner, Frazer Mercantile Company at the same time and in the same court recovered a judgment for $489, and their costs. Sufficient facts are alleged to show that the judgments were duly and legally rendered and are unpaid and un-

satisfied, each remaining in full force and effect. It is further averred that on the 14th day of November, 1905, and for more than 5 years prior thereto, the said Frank A. Taylor was the owner and in the possession of the lands involved in this action, describing them, and that on said day the defendant Frank A. Taylor "wrongfully, unlawfully and fraudulently conveyed said property without any consideration therefor, and solely for the purpose of hindering, delaying and defrauding his creditors in the collection of their claims against him, to Christena E. Taylor, the wife of said Frank A. Taylor, and the said defendant Frank A. Taylor and the defendant Christena E. Taylor, combining, conspiring and confederating together, made said unlawful, wrongful and fraudulent conveyance and transfer, each with full knowledge and each with the intent and purpose of defrauding the creditors of said Frank A. Taylor," etc. The answer and cross-petition designates the conveyance herein above referred to as in plaintiff's petition, and attack the same as fraudulent. Other averments are made, similar in most part to those contained in plaintiff's petition, and they join in the prayer that the conveyances may be set aside and canceled, the property declared to be that of Frank A. Taylor, and subject to the payment of their judgments. The decree of the district court was in their favor, and the land declared subject to their judgments, with right to issue execution and sell the same. There is no averment, nor is there any proof in the record, that the cross-petitioners were in any way misled or deceived by the condition of the title to the land. There is no suggestion in the cross-petition as to the original foundation or basis of the judgments, nor any suggestion that the petitioners relied upon the state of the title as shown by the records. The demand for relief is bottomed on the one averment that the conveyance to Christena was a general fraud and conspiracy on the part of herself and husband to defraud his creditors. Unless the decree was upon the assumption that the deed from Taylor to his

wife of the 80 acres of land in Nemaha county, and the execution of a chattel mortgage to her upon the chattel property of Taylor, was a full satisfaction of her claim to the land in Johnson county and released her equity therein, both having been made at the suggestion of plaintiff on the night of September 2, 1902, at the home of Armsted and under the circumstances disclosed, we are quite unable to see how or why that part of the decree was entered. The chattel mortgage was to secure the ostensible sum of $1,400. It was, in fact, dated the 3d day of September, but was clearly a part of the transaction of the night of the 2d which continued until about midnight. The mortgage was never foreclosed, nor was possession of the property taken under it. Mrs. Taylor never received the proceeds of it in any way, and it is clear that she was alone as clay in the hands of the potter on that night. As we have said, the land in Johnson county, now involved in this suit, was hers and hers alone, and, so far as she and her husband and his general creditors were concerned, the land was held for her by her husband. Unless some estoppel is shown against her she is entitled to it under many decisions of this court. It is unnecessary and unimportant to inquire whether there was a resulting trust, or whether her husband was indebted to her. In either event her property should not be taken from her and given to the general creditors of her improvident husband. *Goldsmith v. Fuller,* 30 Neb. 563; *Hews v. Kenney,* 43 Neb. 815; *National Bank of Commerce v. Chapman,* 50 Neb. 484; *Cleghorn v. Obernalte,* 53 Neb. 687; *Dunn v. Bozarth,* 59 Neb. 244; *Weis v. Farley,* 77 Neb. 729.

The decree of the district court in favor of Johnson county is affirmed. Those in favor of Kemper, Hundley & McDonald Dry Goods Company, and Turner, Frazer Mercantile Company, are reversed and their cross-petition dismissed at their costs.

JUDGMENT ACCORDINGLY.

FAWCETT, J., concurs in the opinion as written.

CITY OF CRAWFORD, APPELLANT, V. WILLIAM J. DARROW ET AL., APPELLEES.

FILED SEPTEMBER 26, 1910. No 16,594.

1. **Case Approved.** The decision in *City of Chadron v. Dawes County*, 82 Neb. 614, approved and followed in so far as applicable to this case.

2. **Mandamus:** PLEADING: PRESUMPTIONS. An application for the allowance of a writ of mandamus was made to one of the judges of the district court of the Fifteenth judicial district. An order allowing the writ was duly made, returnable to the other judge in the district on the 20th day of August, 1909. On the 11th day of January, 1910, an amended application was filed in the district court. A demurrer was filed to the amended application, one of the points presented being that the proceedings did not run in the name of the state, *ex rel.* The transcript filed in this court does not contain a copy of the alternative writ. As the writ itself is by section 653 of the code declared to be the pleading in the case on the part of relator, it will be presumed that if an alternative writ was issued it complied with the requirements of the law and procedure of the state.

3. **Counties:** COUNTY BOARD: CLAIMS: APPEAL. It is alleged in the petition that a specified amount of road taxes belonging to relator city had been collected by the county treasurer for relator; that the county board had wrongfully appropriated and transferred the same to one of the county funds; that relator had filed its claim with the board for the full amount, all of which had been allowed, but that the county board had directed the clerk to issue a warrant for but one-half of the claim, which was done and the warrant received. *Held*, That this did not exonerate the county from the payment of the remaining half, and that there was nothing from which relator could have maintained an appeal.

4. **Pleading:** DEMURRER. All averments of a petition which are well pleaded are taken as admitted to be true when assailed by a demurrer, so far as the hearing upon the demurrer is concerned.

5. **Accord and Satisfaction:** COUNTIES: ALLOWED CLAIMS: PARTIAL PAYMENTS. A payment of a part only of a liquidated, past-due claim against a county allowed by a county board, even if accepted as in full satisfaction thereof, is not good as an accord and satisfaction. See *McIntosh v. Johnson*, 51 Neb. 33.

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

Allen G. Fisher, A. M. Morrissey and *Earl McDowell,* for appellant.

Edwin D. Crites, contra.

REESE, C. J.

The city of Crawford presented to Honorable W. H. Westover, one of the judges of the Fifteenth judicial district of this state, a petition and application for a writ of mandamus to the board of county commissioners and county clerk of the county of Dawes requiring the issuance of a warrant in favor of relator on the county treasurer of said county for an amount alleged to be due the city as its portion of the road fund collected off the property within the city for the years named in the petition. On the 10th day of August, 1909, the judge made and signed an order directing that an alternative writ issue as prayed, and that the same be made returnable before Honorable James J. Harrington, at O'Neill, in Holt county, on August 20, at 11 o'clock A. M. The record before us does not disclose that any writ was ever issued, nor that any return was ever made by respondents, the transcript consisting only of the petition, the order of Judge Westover allowing the writ, an amended petition filed January 11, 1910, a demurrer thereto, and the ruling upon the demurrer by which it was sustained and the action dismissed. The relator appeals, presenting this transcript.

Counsel appear to have overlooked the provisions of section 653 of the code, which provides: "No other pleading or written allegation is allowed, than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and

the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action." These are the pleadings by which issues of fact are to be joined. Of course, a demurrer may be interposed to either pleading and its sufficiency tested. *Long v. State,* 17 Neb. 60. In view of the record before us, we must assume that no alternative writ has ever been issued in this case, and relator has taken occasion to amend its application, and respondents have availed themselves of their right to test the legal merits and strength of that application without waiting for the issuance of an alternative writ, which they have the right to do. *State v. Chicago, St. P., M. & O. R. Co.,* 19 Neb. 476. But the practice is not recommended. *State v. Home Street R. Co.,* 43 Neb. 830. The demurrer in this case attacks the amended petition upon a number of grounds, one of which is that plaintiff has no legal capacity to sue. With this may be considered another, which is, that there is a defect of parties plaintiff. The contention in its brief is that the title of the action should be "The State of Nebraska, on the Relation of the City of Crawford," v. Respondents. In this respondents are correct, for the constitution (art. VI, sec. 24) provides that all process shall run in the name of the state. But this objection can hardly be raised to the application or petition. The answer or return is to be made to the writ. If an alternative writ has issued, we must presume that it has run in the name of the state. If none has issued (as appears by this record), it will be time enough to correct the defect should one be issued. While it is true that the writ "may issue on the information of the party beneficially interested" (code, sec. 646), yet the practice in this state has been to issue it in the name of the state upon the relation of the party claiming the relief sought, and no case has been cited holding that the writ may be applied for and issued in the name of the complaining party only. In *State v. Shropshire,* 4 Neb. 411, Judge GANTT, in writing the opinion of the court, quotes with approval from High,

Extraordinary Legal Remedies (3d ed.) sec. 431, saying: "Where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public *duty*, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws." Assuming therefore, as we have, and must by this record, that the respondents have seen fit to attack the amended petition by demurrer, we are called upon to examine that paper for the purpose of ascertaining if it contains such facts as would justify the issuance of either an alternative or peremptory writ, the design of the demurrants probably being to test the legal prospositions involved at the inception of the action.

The petition is not as skillfully drawn as might be desired, but it may in fairness be held to allege that the city of Crawford is a municipal corporation within the county of Dawes, and has been such with the same municipal limits since on and after the 1st day of March, 1886; that the respondents are the county commissioners of the county; that relator is and has been during all of said time a road district in said county; that during the time named one-half of the road taxes assessed upon the property within the boundaries of relator have amounted to the sum of $1,439.64, which has been collected by respondents and placed in the road fund of said county; that it was the duty of the several county treasurers to pay to relator the said one-half of the said taxes so levied and collected, but which duty they failed to perform, and that the county board has wrongfully appropriated said funds to the use of the general fund by transferring them thereto, thus placing it beyond the power of the treasurer to pay relator the one-half so due it; that on December 4, 1906, relator presented to and filed with the county board its claim for the said sum of $1,439.64, which said claim was duly allowed by said board, but the board of county

commissioners directed the county clerk to issue to relator a county warrant for the sum of $719.82, one-half of the amount found due by said allowance, and no more, which was accordingly done, and the county by its board and officers have ever since refused to issue the warrant demanded, as was their duty to do. There is an unnecessary averment that the then county attorney for the benefit of the county induced the then counsel of relator to enter into an agreement with the county board that the said claim should be satisfied by the issuance and acceptance by relator of the warrant for one-half of the sum so allowed, but that said agreement was void for want of power to make it, that there was no consideration for it, etc. This whole subject, if of any value in the case, could constitute only defensive matter to be presented by respondents or waived, and, like many other averments, has no place in the petition. It is alleged that it is the duty of the county board to convene and enter an order directing the clerk to issue a warrant upon the county general fund for the said sum of $719.82 and accumulated interest, and the prayer is that they be required "to perform said duty." The demurrer consists of a number of grounds, but it is not deemed necessary to discuss them in detail, the eighth being that the amended petition does not state facts sufficient to constitute a cause of action, and presents the real controversy.

Assuming the allegations of the petition to be true, as we must when assailed by demurrer, the case is practically disposed of by our decision in *City of Chadron v. Dawes County,* 82 Neb. 614, and so far as the questions therein decided are applicable to this case no further reference need be made to them.

It is insisted in the brief of respondents that relator has mistaken its remedy, and should have appealed from the action of the county board in allowing but half of its claim. In this counsel have overlooked the averment of the amended petition alleging that the whole claim of relator was allowed by the county board on December 4,

1906. The demurrer, for the purposes of the hearing thereon, admits the truth of this allegation, and there was therefore nothing from which an appeal could have been taken. The acceptance of the warrant for the $719.82 was only a partial payment of the amount due upon that adjudication and did not release the county from the payment of the remainder, and even the naked agreement to receive one-half the amount thus allowed in full could not work an estoppel or accord and satisfaction, as such action would have been without consideration and therefore not binding. *McIntosh v. Johnson,* 51 Neb. 33. It is contended further that no demand for the performance of the acts sought to be coerced by the writ is alleged, and therefore relator is not entitled to the writ under any conditions. If the averments of the petition are true, as admitted by the demurrer, there was no necessity for any demand, and indeed there would seem to be no necessity for any action on the part of the county board, since the allowance of the full claim exhausted their powers, except as to a reconsideration, and any direction they might give to the clerk to pay but half of the claim so allowed would be void, and the writ might run against the clerk alone, except for the fact of the alleged wrongful act in the appropriation and transfer of the money of relator to the funds of the county. Much is said in respondents' brief in the way of maintaining the right and power of the county board in scaling down and compromising doubtful claims against the county. This cannot be successfully questioned, but that rule of law does not and cannot be applied to this case: First, it is alleged that the whole claim was allowed; second, there is nothing doubtful about the claim, nor is there anything to compromise. If, as alleged, the money was in the treasury, it belonged to relator, and was held only in trust for it, and not as owner or debtor (*City of Chadron v. Dawes County, supra*), and it was the legal duty of the treasurer to pay over, until by the alleged wrongful act of the county board the fund was ostensibly placed beyond his reach.

The judgment of the district court is reversed and the cause is remanded, with leave to relator to amend the alternative writ if one has been issued, if deemed necessary, and, in case none has issued, to amend its petition, if so advised.

REVERSED.

JOHN OLTMANN, APPELLEE, V. STEVAN KORUS ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,060.

Appeal: AFFIRMANCE. Where the record brought to this court on appeal presents no issue and contains no evidence from which we can determine what relief the appellant is entitled to receive, the judgment of the district court will be affirmed.

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

John J. Sullivan, James G. Reeder and *Louis Lightner*, for appellants.

J. S. Pedler, contra.

BARNES, J.

Action to remove a cloud from the title to certain real estate. The plaintiff had judgment, and the defendant has appealed.

It appears that on the 28th day of September, 1907, the parties to this controversy entered into a written contract for the purchase and sale of the southwest quarter of section 32, township 15 north, of range 13 west of the sixth P. M., situated in Sherman county, Nebraska. The consideration named was the sum of $9,000; $800 of which was to be and was paid by the defendant at the time the contract was signed. It was provided therein, in substance, that the remainder of the purchase price should be paid by the defendant to the plaintiff on the 1st day of March, 1908, at which time plaintiff was to furnish de-

fendant an abstract, showing clear title, and was to convey the premises to him by a good and sufficient warranty deed. It was specifically provided in the contract: "And in case of a failure of the said party of the second part to make either of the payments, or to perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the second party shall forfeit all payments made by him on this contract, and such payments shall be retained by said party of the first part in full satisfaction of all damages by him sustained." The plaintiff retained possession of the premises, and shortly before the 1st day of March, 1907, was informed by the defendant that by reason of a failure to sell his land in Platte county, Nebraska, he was unable to perform his part of the contract at that time. The defendant also notified one Long, who was acting as the agent for the plaintiff in the transaction, and was employed by the defendant to procure a loan on the premises in question in order to complete his purchase, that if he could have 30 or 40 days' additional time he thought he would be able to perform his contract, pay the purchase price, and take the land in question. This additional time was granted to him. At the expiration of that time defendant notified Long that he was unable to perform his contract and would have to give it up. Thereafter, and some time during the month of June, 1907, defendant placed a copy of the contract, which had been executed in duplicate, upon record in the office of the county clerk of Sherman county, and thereafter the plaintiff commenced this action solely for the purpose of removing the cloud cast by the record of said contract upon his title to the land in question. To the plaintiff's petition defendant filed an answer, denying all of its allegations except those qualified or expressly admitted; admitted that he entered into the contract with the plaintiff as alleged in the petition; denied that the plaintiff had ever offered to perform his part of the contract; admitted that the defendant had

placed the contract on record; alleged that he had the lawful right so to do; and concluded with the prayer that plaintiff's petition be dismissed, and that the defendant have such other and further relief as may be just and equitable. To this answer plaintiff replied by way of a general denial and an allegation that he had at all times been ready and willing to perform the contract according to its terms; that he had made, executed and delivered a deed and abstract of the premises in question, and had deposited the same in escrow in the Loup City State Bank ready for delivery to the defendant at any time he should comply with the terms thereof.

Defendant made no appearance at the trial and offered no evidence. The plaintiff produced evidence on his part establishing the averments of his petition. Thereupon the district court found the issues joined in his favor, and entered a decree canceling the contract in question and removing the cloud from the premises thereby. From this decree defendant has appealed, and now contends that the trial court, before granting the relief prayed for by the plaintiff, should have required him to return to defendant the $800 paid by him to the plaintiff at the time of the execution of the contract. It will be observed, however, that the contract in question provides specifically for a forfeiture of the $800 payment in case the defendant should fail to perform the contract on his part as the plaintiff's measure of damages for such failure. While forfeitures are not favored, and defendant by proper pleading and proof might have had judgment for a return of a part of the $800, it must be observed that neither by his answer nor at the trial did he make any claim for the return of this money or any part of it. While, on the other hand, the plaintiff's proof was amply sufficient to sustain the finding of the court that he had at all times been ready and willing to and had in fact performed all of the conditions of the contract upon his part; that defendant had failed to perform his part thereof; and this was the only issue tendered by the pleadings.

Again, it appears from the plaintiff's testimony that he incurred considerable expense in the transaction; that he paid $150 as a commission to an agent who negotiated the sale. The defendant produced no evidence to the contrary. Indeed, no claim was made or proof offered that plaintiff's damages were any less than the amount of the first payment, as stipulated in the contract. We are therefore of opinion that the district court could not have rendered any other decree than the one complained of.

The judgment of the district court is, therefore, in all things

AFFIRMED.

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

FILED SEPTEMBER 26, 1910. No. 16,113.

1. Carriers: DUTY TO PASSENGERS. A stock shipper, riding on a freight train for the purpose of caring for his shipment of live stock, is entitled to the highest degree of care and protection consistent with the proper and careful operation of the train and with that means or method of transportation.

2. ———: ———: NEGLIGENCE. When such a passenger is compelled, by an attack of illness, to leave the train at his first opportunity, which fact is known to the conductor and those in charge of the train, it is negligence for them to knowingly permit him to leave the way-car while it is standing on an open bridge or trestle at a time when it is so dark that he is unable to see his surroundings or ascertain the danger.

3. ———: ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. The question as to whether, under such circumstances, the passenger was guilty of contributory negligence, is a proper one for the determination of the jury.

4. Trial: INSTRUCTIONS. Where the trial court has, on his own motion, fully and fairly instructed the jury upon all of the issues and the law of the case, it is not error to refuse to give additional instructions requested by the parties.

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

James E. Kelby, H. F. Rose and *Frank E. Bishop*, for appellant.

Reavis & Reavis, contra.

BARNES, J.

From a verdict and judgment in favor of the plaintiff, in an action for personal injuries, the defendant has appealed.

It appears that on the 13th day of December, 1907, the plaintiff shipped two car-loads of hogs over the defendant's railroad from Verdon, Nebraska, to Kansas City, Missouri. As is customary in such cases, plaintiff was furnished with transportation to enable him to accompany and care for his stock shipment. It may be stated at the outset that under his contract for transportation he was not entitled to the full measure of care and protection which the law would afford him had he been traveling on one of defendant's regular passenger trains; but he was, while accompanying his stock on defendant's freight train, entitled to receive the highest degree of care and protection from the defendant's servants and agents consistent with the nature of the train on which he was riding, and its proper and careful operation.

The train left the village of Verdon at 8 o'clock in the evening, and reached a point in the vicinity of the village of Nodaway about 3 o'clock the next morning. Before reaching Nodaway the plaintiff had an attack of sudden illness, and sought for a closet in the way-car, and, finding none, he informed the conductor of his condition and his necessity, and was told that the train would reach Nodaway in about 15 minutes where it would stop long enough for him to get off. After the lapse of about 15 minutes the train whistled and came to a stop. The plain-

tiff then asked the conductor if this was Nodaway, and was told that it was. When the train stopped the brakeman took his lantern and left the car, passing out of the rear door and closing it after him. About two or three minutes thereafter the plaintiff followed him. It appears that the train was not at Nodaway station, but had stopped short of that point because another train ahead had not cleared the block signal. The brakeman was aware of that fact, and says he left the train to go back and flag any other train which might have been approaching from the rear, and his knowledge must be imputed to the defendant. When the plaintiff reached the rear platform of the car he took hold of the railing, descended the steps, took one additional step, and alighted upon what he supposed was the roadbed. He says he saw what he took to be the brakeman's lantern; he then advanced an additional step, and landed in the bed of a river some 30 feet below; the way-car having stopped on an open bridge or trestle which there spanned the stream. It further appears that the night was pitch dark; that it was snowing or sleeting so it was impossible for the plaintiff to see the situation or ascertain the danger there existing. The brakeman testified that, by the light of his lantern, he saw the plaintiff come out of the car and descend the steps onto the bridge; that he called out to warn him of the danger. It seems clear, however, that either the plaintiff did not hear him, or that the warning came too late to be of any avail. The foregoing statement fairly reflects the undisputed facts of this case, and it is the defendant's first contention that they fail to show such negligence on its part as will entitle the plaintiff to recover for the injuries which it must be conceded, he thereby sustained.

For the following reasons, we are of opinion that this contention should not be upheld. The plaintiff was a passenger being transported on the defendant's freight train, and as such was entitled to the highest degree of care and protection from defendant's agents and servants consistent with the proper operation of its train and that

method of transportation. En route it became absolutely necessary for him to leave the train. This the conductor of the train well knew. Having such knowledge, he informed the plaintiff that the next stop was Nodaway, and that the train would stop long enough to enable him to alight and attend to the call of nature. As above stated, when the train stopped the conductor knew, or was charged with the knowledge, that they had not reached Nodaway station, and it was his duty to so inform the plaintiff. Knowing that the plaintiff was about to leave the car, the conductor should have notified him of his danger and warned him to look out for a safe place to alight. Not only was this the duty of the conductor, but a due regard for the safety of human life and limb should have impelled him to have exercised at least some reasonable precaution for the welfare of his passenger. This he did not do, but allowed the plaintiff to go forth into the darkness, following the brakeman, without consideration, or warning of any kind. We are therefore of opinion that his conduct constituted such negligence as entitles the plaintiff to recover.

It is strenuously contended, however, that plaintiff was guilty of contributory negligence, and therefore the verdict and judgment in his favor cannot be sustained. Many cases are cited by counsel for defendant in support of this contention. Among them we find *Chicago, B. & Q. R. Co. v. Martelle,* 65 Neb. 540, and *Chicago, B. & Q. R. Co. v. Mann,* 78 Neb. 541, decided by this court. In the *Martelle* case the plaintiff jumped from a rapidly moving train, while in the *Mann* case the plaintiff, in attempting to board a freight train, under an agreement to do so at his own risk, fell into a properly constructed ash pit. It was therefore rightly held in both cases that there could be no recovery. We have examined the cases cited from other jurisdictions and are satisfied that they are all distinguishable from the case at bar. In this case it appears, without dispute, that the plaintiff's condition made it imperative for him to leave the train at the first opportu-

nity. His urgent necessity compelled haste, and he had been given permission by the conductor to alight from the way-car at the very time he made the attempt to do so. Again, the brakeman had preceded him, and when he reached the platform of the car he saw what he took to be the brakeman's lantern some little distance away. Therefore he had the right to assume that the car was standing at a place where it would be safe for him to alight. It also appears that, notwithstanding his haste, he exercised at least some degree of caution, for he says that when he left the steps he kept hold of the railing of the car until his foot rested upon what seemed to him to be the solid roadbed. Being thus assured of his footing, he let go of the railing, took a second step, and fell from the open bridge or trestle to the bed of the stream below. Under such circumstances we are of opinion that the question of contributory negligence was one for the determination of the jury, and, both of the foregoing questions having been properly submitted to them, we should not disturb their verdict.

Finally, it is contended that the district court erred in giving paragraphs 1 to 5 of his instructions to the jury, and in refusing to give instructions numbered 4, 5 and 6, tendered and requested by the defendant. Without discussing these several assignments separately, it is sufficient to say that we have carefully considered them, and are of opinion that the trial court did not err in giving and refusing instructions.

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

AFFIRMED.

ISABEL CORNELL, APPELLEE, V. PETER B. HAIGHT ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,114.

1. **Pleading:** MOTION TO MAKE DEFINITE: REVIEW. The plaintiff by her petition sought to recover for services rendered the defendants in making or compounding 5,000 bottles of a certain medicine, called "Co-lon-co," for which they furnished the materials, except the ingredients of a so-called secret formula. The defendants moved the trial court to require the plaintiff to make her petition more definite and certain by setting forth the ingredients of her formula. The motion was overruled. *Held*, That the disclosure thus sought to be obtained was immaterial, and therefore it was not error to overrule the motion.

2. **Witnesses:** CROSS-EXAMINATION. The plaintiff, on cross-examination, should not be required to make proof of, or give evidence tending to establish, matters not alleged in his petition or put in issue by the pleadings.

3. **Trial:** INSTRUCTIONS. It is the duty of the court to refuse to instruct the jury on matters not in issue and upon which he has refused to receive evidence.

4. ———: ———. Where the court has, on his own motion, fairly submitted to the jury all of the questions in issue, it is not error for him to refuse to give further or additional instructions tendered by the parties.

5. **Appeal:** VERDICT: CONFLICTING EVIDENCE. A verdict of a jury rendered upon conflicting evidence will not be set aside by a reviewing court unless it appears that upon some material matter there is not sufficient competent evidence by which it can be sustained.

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

A. S. Churchill, for appellants.

John M. Macfarland and *Charles E. Foster, contra.*

BARNES, J.

This was an action at law to recover for services alleged to have been performed for defendants by plain-

tiff, at their special instance and request, in making or compounding a certain medicine called "Co-lon-co." The plaintiff had the verdict and judgment, and the defendants have appealed.

The petition contains two counts, and charges, in substance, that on or about the 1st day of September, 1904, the defendants Haight and Webster, doing business under the name and style of P. B. Haight & Company, contracted to and with the plaintiff to manufacture for them a medicine known as "Co-lon-co," for which they were to furnish all of the ingredients, except those of a secret formula, together with the bottles and labels. Defendants were to put the same upon the market, and when sold they were to pay the plaintiff therefor 37½ cents a bottle; that her services were to be performed at such times as the defendants demanded; that in accordance with this agreement plaintiff did, between the 1st day of September, 1904, and the 1st day of April, 1905, manufacture, prepare and deliver to the defendants 1,500 bottles of Co-lon-co; that the defendants accepted, received and sold the same, but have failed, neglected and refused to pay the plaintiff therefor; that there is now due to her from the defendants upon her said first cause of action the sum of $562.50.

Plaintiff's second cause of action was for like services performed for the defendants in making for, and delivering to, them 3,500 bottles of Co-lon-co between the 1st day of April, 1905, and the 1st day of August, 1906, at the agreed price of 37½ cents a bottle, and it was alleged that defendants received and sold the same, for which they have neglected, failed and refused to pay the plaintiff anything, and that there is due to her from the said defendants on her second cause of action the sum of $1,112.50. The petition concluded with a prayer for a judgment against the defendants for the sum of $1,675, with interest thereon from the 1st day of September, 1906, at 7 per cent. per annum, and costs of suit.

To this petition the defendants answered by a denial, both general and special, that the firm of said P. B.

Haight & Company, or either of its members, ever entered into any contract or agreement with the plaintiff, either verbal or written, for the manufacture of the medicine known as "Co-lon-co." The answer also alleged that whatever Co-lon-co defendants received or sold was purchased by them from a company known as the Co-lon-co Remedy Company, composed of P. B. Haight and N. H. Cornell, deceased, who was the husband of the plaintiff, and that whatever service she performed in manufacturing the medicine in question was done and performed for said remedy company at the instance and request of her deceased husband, who was a member of that company, and whose duty it was to manufacture said medicine, and that her services were not performed for the defendants. The answer also contained a statement of the formation of the Co-lon-co Remedy Company, the agreement under which its business was carried on, and some other immaterial matter, which it is unnecessary for us to consider. To this answer the plaintiff replied by way of a general denial, and upon the issues thus joined there was a trial to the jury and a verdict and judgment as above stated.

1. It appears that the defendants, before filing their answer, attacked plaintiff's petition by motion to require her to make it more definite and certain by setting forth the ingredients of the secret formula mentioned therein. The motion was overruled, and, for this, error is assigned. It is also contended that the trial court erred in refusing to require the plaintiff to disclose the nature of her secret formula on cross-examination. Those two assignments will be considered together.

It must be observed that the issues tendered by the petition and finally made by the pleadings were: First. Did plaintiff make and deliver to the defendant 5,000 bottles of Co-lon-co, or any part thereof, for the agreed compensation of 37½ cents a bottle to be paid for when sold by them? Second. Had the medicine so made and delivered been sold at and before the filing of her petition? It follows, therefore, as a matter of course, that the nature

and ingredients of the so-called secret formula, if there was one, were wholly immaterial, and had no place in the controversy. If the medicine was made for, delivered to, and sold by defendants to their customers, without complaint on the part of the latter, plaintiff should recover regardless of what it contained. The district court was therefore right in overruling the motion and excluding the evidence above mentioned.

2. The defendants next complain of instructions numbered 5 and 6, given by the trial court on his own motion, and allege error because by those instructions the jury were not required to find that there was a secret formula for making the medicine in question, or that plaintiff furnished or put into the medicine the ingredients of that formula. What we have said in disposing of defendants' first and second assignments of error is decisive of this question. The instructions complained of fairly stated all of the material issues made by the pleadings, and informed the jury of the nature of the evidence required of the plaintiff in order to entitle her to recover. Therefore, this assignment of error must fail.

3. The defendants' third assignment of error is predicated upon the refusal of the court to give the jury paragraphs numbered 1 and 2 of the instructions requested by them. Those requests both contain a statement, in substance, that before the plaintiff can recover she must prove, by a preponderance of the evidence, that in making the medicine in question she put into it the ingredients of the so-called secret formula. As we have already seen, under the issues made by the pleadings and the evidence received at the trial, this was wholly immaterial, and whether she placed any, all, or a part only of the ingredients of her formula in the medicine should not affect her right of recovery. For this reason, the instructions in question were properly refused.

4. Defendants also contend that the district court erred in not giving the third paragraph of the instructions requested by them. By that instruction they sought to have

the jury told, in substance, that defendants were not bound by the statements made to plaintiff by her deceased husband. While this statement is correct as an abstract proposition of law, we find nothing in the pleadings or the evidence requiring such an instruction. The plaintiff sought to recover on an express agreement which she alleged was made between herself and the defendants. Her testimony supported that issue, and none other, and it was therefore the duty of the trial court to refuse such an instruction.

5. Error is also assigned for a failure to give the fourth paragraph of the instructions tendered by the defendants. By that paragraph they sought to have the jury instructed that before plaintiff could recover she must prove by a preponderance of the evidence that she made the Co-lon-co in question for the defendants, and that there must have been a secret formula for making it; that she furnished the materials therefor and put the same into the medicine so manufactured by her. The defendants thus again sought to raise the question of the secret formula and its ingredients. What we have said in discussing the first assignment of error fully disposes of this question; and, although defendants seem to have been obsessed with the idea that the nature of the so-called secret formula was a matter available to them as a defense to this action, we do not so understand it, and therefore are of opinion that the instruction was properly refused.

6. Defendants further complain of the refusal of the court to give instructions numbered 5, 6 and 7, tendered by them. Those requests will be considered together, and may be disposed of by saying that the court fully covered the propositions contained in each of them by the charge given to the jury on his own motion. In fact, a careful perusal of the record shows that the questions at issue were fully and fairly submitted to the jury, and there was no error committed in giving or refusing instructions.

7. All of defendants' other assignments of error, but one, relate to, and deal with, the sufficiency of the evi-

dence to sustain the verdict. It may be said that there seems to be no serious dispute as to any of the matters in controversy, except the main one relating to the agreement under which the plaintiff claims to have made and delivered medicine called "Co-lon-co" to the defendants. Her evidence was direct and positive that the agreement was made, as alleged in her petition, with the members of the firm of P. B. Haight & Company; that she was to receive 37½ cents a bottle for the medicine when the same was sold. Defendants denied that they ever made such a contract, and so testified. They also testified that plaintiff's services were rendered to a company called the "Co-lon-co Remedy Company." This she positively denied. So upon that point there was a direct conflict of evidence. Its determination was therefore purely a question for the jury, and they having found for the plaintiff it is not within our province to set their verdict aside.

8. Finally, it is contended that the verdict is excessive; that the plaintiff did not make and deliver to the defendants 5,000 bottles of Co-lon-co. On this point the evidence for the defense is vague, uncertain and indefinite, while the plaintiff testified that she made 5,000 bottles of the remedy in question for them, that she bottled it, pasted the wrappers on the bottles herself, and placed the bottles when thus prepared on the shelves in the defendants' store. It is evident that the jury believed her testimony, and we are concluded by their verdict.

Failing to find any reversible error in the record, the judgment of the district court is

AFFIRMED.

THOMAS BEETEM ET AL., APPELLEES, V. GEORGE D. FOLLMER ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,132.

Vendor and Purchaser: BREACH OF CONTRACT: DAMAGES. In an action by a vendee for breach of contract to sell real estate because the defendant cannot convey a good title, if the former prevails, he is entitled to recover for all money paid by him, whether interest or principal, upon said contract, the money paid by him for taxes on the land, for the reasonable value of the permanent improvements that he in good faith placed upon the premises, with interest from the date of each expenditure made by him as aforesaid, and also such sum as will indemnify him for the loss of his bargain. As against the aforesaid items of damage, the vendor is entitled to set off the reasonable rental value of the premises while held by plaintiff, with interest thereon from the close of each year's possession by the vendee. *Anderson v. Ohnoutka*, 84 Neb. 517.

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

Cole & Brown and *Charles H. Sloan*, for appellants.

S. W. Christy and *L. E. Cottle, contra.*

BARNES, J.

Action in the district court for Nuckolls county to recover money paid the vendor on a contract for the sale of real estate and damages for his failure to convey the land to plaintiffs according to the terms of the agreement. The plaintiffs had the verdict and judgment, and the defendants have appealed.

It appears that the defendants were engaged in the real estate business in Nuckolls county, Nebraska, and on the 1st day of August, 1906, they entered into a written contract with the plaintiffs for the sale and purchase of a 160-acre farm situated in that county; that by the terms of the contract the plaintiffs were to pay $8,500 for the farm, $2,100 of which was paid in August and September

of that year, and plaintiffs thereupon went into possession. The remainder of the purchase price was to be paid or secured on the 1st day of March, 1907, at which time the defendants were to convey the land described in the contract to plaintiffs by good and sufficient warranty deed. It further appears that the farm was owned by one Hungerford, from whom the defendants expected to obtain the title in order to carry out their contract with the plaintiffs. For reasons which do not affect the questions involved in this action, defendants failed to obtain the title, and were unable to perform their part of the contract. The plaintiffs remained in possession of the premises and placed some lasting and permanent improvements thereon, but finally surrendered to the defendants some time before the 1st day of January, 1908, and thereupon commenced this action.

As to the foregoing facts there seems to be no serious dispute. At the trial plaintiffs introduced considerable competent evidence showing, or at least tending to show, that on the 1st day of March, 1907, when the land was to be conveyed to them, it was reasonably worth the sum of $9,600, and that their bargain, if the contract had been fully performed by the defendants, would have been worth to them about $1,100. It was fairly shown that the permanent improvements placed on the land by the plaintiffs were worth at least $60, and these items, with the payment of the $2,100, and interest thereon at 7 per cent. per annum, would amount to about $3,500. It was also shown that the rental value of the land while plaintiffs were in possession was at least $360. Some of these items and amounts were controverted by defendants, but we think they were fairly established by the evidence. With the testimony in the condition above stated, the court, among other things, instructed the jury as follows: "(5) If you find for the plaintiffs, the measure of plaintiffs' damages is the amount of money paid by the plaintiffs to the defendants, which is conceded to be $2,100, with interest at 7 per cent. from the time the payment was made to the

first day of this term of court, and such sum, if any, as you find the fair market value of the land to have increased from the date of making the contract to the date of the breach thereof, which was on the 2d day of March, 1907, and, third, the amount which you find the permanent improvements put upon the place by the plaintiffs increased the fair market value of the place, not what they cost to the plaintiffs in work and material, but the increased value they lent to the place, which was returned by them to the defendants upon their surrender of the land; and from this sum you should subtract the rental value of the land—such sum as you find from the evidence was the rental justly due to the owner of the land."

Defendants complain of this instruction and contend that the plaintiffs were not entitled to recover both interest on the money paid on the contract and on the value of their bargain, or, in other words, the amount of the increase in the value of the premises from August 10, 1906, to March 2, 1907, when the breach of the contract occurred. At first blush it would seem that there was some merit in defendants' contention, but when we consider the fact that the plaintiffs were required to pay the defendants the rental value of the premises while they were in possession thereof, it would seem that the instruction was a correct statement of the law. Indeed, we are of opinion that this case should be ruled by *Anderson v. Ohnoutka*, 84 Neb. 517, where it was said: "In an action by a vendee for breach of a contract to sell real estate because defendant cannot convey a good title, if the former prevails, he is entitled to recover for all money paid by him, whether interest or principal, upon said contract, the money paid by him for taxes on the land, for the reasonable value of the improvements that he in good faith placed upon the premises, with interest from the date of each expenditure made by him as aforesaid, and also such a sum as will indemnify him for the loss of his bargain. * * * As against the aforesaid items of damage, the vendor is entitled to set off the reasonable rental value of the premises

while held by plaintiff, with interest thereon from the close of each year's possession by the vendee." This rule would seem to put the vendee as nearly as possible in the same position he would have been in had the vendor complied with the terms of his contract, and is the one which accords with justice and the great weight of authority in this country.

Our attention has been directed to *Nolde v. Gray*, 73 Neb. 373, and it is contended that the rule there stated should govern this case. In this we think counsel are mistaken. The facts there are not at all like those in the case at bar, and it therefore should not be considered as authority here.

It is also contended that the trial court erred by reinstating paragraph 6 in the plaintiffs' petition, that paragraph having been at one time stricken out as redundant and immaterial matter. If this ruling was error, it was certainly error without prejudice, and could have made no difference with the amount of the plaintiff's recovery.

Finally, it is contended that the district court erred in refusing to give the first instruction asked for by the defendants. In that instruction the court was requested to inform the jury, in substance, that the plaintiffs could not recover until a certain mortgage for $1,000, which was to have been given as a part of the purchase price, was negotiated. We find nothing in the contract or in the evidence that would warrant the giving of such an instruction. According to the terms of the contract plaintiffs were to give the defendants a mortgage for $1,000 on certain lots in the village of Douglas, Nebraska, but it is nowhere provided that they were to negotiate it, or guarantee its negotiation. It was shown that they executed the mortgage and were ready to deliver it according to the terms of the contract, and so far as we can ascertain from the record its negotiation was a matter which, if desired, was to be attended to by the defendants themselves.

Considering the amount of the verdict and judgment in this case, which was only $2,369.22, together with the evi-

dence contained in the bill of exceptions, which would warrant a recovery of a very much greater sum, we are of opinion that the defendants have no cause to complain of the result of the trial in the district court. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

JOHANNA W. NIELSEN ET AL., APPELLEES, V. CENTRAL NEBRASKA LAND & INVESTMENT COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,075.

1. **Mortgages: FORECLOSURE: DEFENSES: ESTOPPEL.** The owner of a life estate in a homestead attempted to convey a title in fee simple to a purchaser and took a purchase money mortgage back apparently conveying the entire estate. After the termination of the life estate the remaindermen, who are also the owners of the mortgage, brought this action to foreclose the same. *Held*, that the mortgagor and his grantees, who are still in possession claiming title, are not entitled to defend on the ground that the estate conveyed by the deed and mortgage was only a life estate.

2. ———: ———: ———. If remaindermen recognize the validity of a deed made by the owner of the life estate purporting to convey the entire estate in fee simple, they are entitled to foreclose a purchase money mortgage given to the seller, which they inherited. If they affirm the title, the mortgagor cannot set up its failure as a defense to the mortgage.

3. ———: ———: ———: DUTY OF OWNER TO PAY TAXES. Where a person becomes the owner of land, either by a quitclaim deed or other means, ordinarily it becomes his duty to pay the taxes, and he cannot defeat a prior mortgage by purchasing the property at a tax foreclosure sale.

4. **Appeal: ISSUES.** Cases appealed to this court must be considered upon the issues presented in the district court.

5. **Mortgages: FORECLOSURE: EVIDENCE.** If there is some circumstantial evidence which tends to sustain the allegation in a petition for the foreclosure of a mortgage that no proceedings at law have been had for the recovery of the debt, and nothing appears to show that the defendant has been prejudiced by the omission

of direct proof, this court will observe the provisions of section 145 of the code, and the judgment will not be reversed merely by reason of such defect.

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

Sullivan & Squires, for appellants.

Beal & Shinn, contra.

LETTON, J.

This is an action to foreclose a mortgage on 160 acres of land. A decree of foreclosure was rendered, and defendants appeal.

In 1891 the land was owned by one Nielsen, who with his wife, Nielsine Nielsen, and family resided upon it as a homestead. Nielsen died in 1891, leaving surviving him his wife and ten children. In September, 1892, the widow procured a decree from the county court of Custer county under the so-called "Baker" decedent act, setting apart the entire estate in the premises to her in fee simple as a homestead. In 1893 Mrs. Nielsen sold the premises to John Hanson and conveyed the same to him by warranty deed, and Hanson and wife gave a mortgage back to Mrs. Nielsen to secure the sum of $800, part of the purchase money. This action is brought by the heirs of Mrs. Nielsen to foreclose this mortgage. Hanson immediately took possession of the premises, and claimed to own the same subject to the lien of this mortgage until September 3, 1902. In October, 1895, one Griffith purchased the premises at tax sale, and in December, 1899, he began an action to foreclose the tax lien, making Hanson and wife, C. F. Sheldon, and Niel Nielsen parties. Hanson and wife were served personally and Sheldon appeared. Nielsen was dead and none of his heirs were made parties. In 1901 a decree of foreclosure was rendered, the premises ordered sold, and afterwards the premises were sold to Paul H. Marlay, the sale confirmed, and a deed executed by the

sheriff to him on September 3, 1902. It is admitted in the pleadings that on the 13th of February, 1901, John Hanson and wife executed and delivered to Paul H. Marlay a quitclaim deed to the premises. In April, 1902, Marlay sold the land to the Central Nebraska Land and Investment Company by warranty deed, and that company afterwards entered into a contract to sell the same to defendant Christensen. Marlay and his grantees have been in the exclusive possession of the premises holding adversely since the 3d of September, 1902. The case was submitted on the pleadings and an agreed statement of facts, so the only questions raised are as to the law applicable thereto.

The defendants' view is that the action of the county court was void in so far as it attempted to confirm in the widow a fee simple title to the land, because both the Baker act and the curative act (laws 1895, ch. 32) are void; that her deed to Hanson conveyed only a life estate in the premises, which expired with her life; that the purchase money mortgage was a mortgage upon the life estate only, and that when that terminated the mortgage lapsed; that Marlay, having derived his title from an independent source, was not in privity with Hanson and had a right to resist the mortgage. The brief further argues that since in the foreclosure of the tax lien Sheldon by cross-bill set up a prior mortgage given by Hanson, which was foreclosed by the same decree, the plaintiffs are not entitled to bring this action, but could only have an action to redeem from the first mortgage.

In the case of *Draper v. Clayton, ante,* p. 443, the Baker act and the curative act were both considered in a like controversy, and were held to be without effect upon the rights of the parties. Mrs. Nielsen's deed to Hanson, therefore, conveyed only a life estate, and the mortgage incumbered no greater estate than that conveyed. The plaintiffs, however, occupy a dual position with reference to the land and the mortgage; they are the owners of the mortgage debt by inheritance from their mother, and they are also the legal owners of the land by

inheritance from their father, Niel Nielsen. The deed to Hanson purported to convey a fee simple title. The heirs of Nielsen have the right to ratify and confirm the conveyance by which their mother sought to transfer the whole estate, if they elect to do so.

In their brief they say they are content that Hanson and his grantees have the title to the land, and that all they ask is the agreed price. We see no reason why they should not have the right to confirm the title by ratifying and adopting the mortgage as a valid lien upon the whole estate, unless in some manner they are prevented from so doing by the tax foreclosure and purchase of the land at sheriff's sale. Whether these proceedings affected their rights we will now consider. When in February, 1901, Marlay became the owner of Hanson's interest in the premises by virtue of the quitclaim deed, it became his duty to pay the taxes. His subsequent purchase at the tax foreclosure sale was in legal effect a redemption of the premises for his own benefit or for the benefit of his covenantees, and the sheriff's deed, so far as the taxes were concerned, conveyed no better title to him than he had acquired by his quitclaim deed. It appears incidentally in the evidence that Sheldon's mortgage was attempted to be foreclosed in that action, but the defendants do not now plead any rights derived by or under it, make no mention of it except in their brief, and base the whole defense upon the invalidity of plaintiff's mortgage, and upon the alleged independent title acquired by the sheriff's deed and the possession taken thereunder. The plaintiffs' mortgage was dated December 1, 1893; it became due on the 1st day of December, 1898. This action was begun within ten years from its maturity, and, hence, the action is not barred by the statute.

The petition contains the formal allegations that no proceedings at law have been had for the recovery of the amount due on the mortgage or any part thereof, nor has any part thereof been collected or paid. There is a general denial in the answer. Defendants strenuously insist

that this allegation is denied, and that there is no evidence to support it. The allegation is negative in its nature, and we have said that where there is some evidence tending to support the allegation, and no contrary showing is attempted, a decree of foreclosure will be affirmed. *Enyart v. Moran,* 64 Neb. 401; *McLanahan v. Chamberlain,* 85 Neb. 850; *Chaffee v. Sehestedt,* 4 Neb. (Unof.) 740; *Brown v. Collins,* 2 Neb. (Unof.) 149.

It is admitted that the sum of $1,724.25 is due and unpaid on the mortgage; that the mortgage was inherited by the plaintiffs from their mother's estate; that they have never sold or assigned the note and mortgage and are now the owners thereof. The note itself was apparently barred by the statute of limitations. These admitted facts afford circumstantial evidence to some extent of the truth of the allegation. The record fails to show that this objection was called to the attention of the district court. No error affecting defendants' substantial rights is apparent.

In this state of the proofs, we feel bound to apply the provisions of section 145 of the code that "the court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The judgment of the district court, therefore, is

AFFIRMED.

DANIEL O'HANLON ET AL., APPELLANTS, V. JAMES M. BARRY, APPELLEE.

FILED SEPTEMBER 26, 1910. No. 16,122.

Parol Evidence: VARYING EFFECT OF DEED. Where it is sought to vary the effect of a deed of conveyance by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory in its nature in order to warrant a court to grant the relief prayed.

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

J. J. McAllister and *John V. Pearson,* for appellants.

R. E. Evans and *Paul Pizey, contra.*

LETTON, J.

In 1903 the plaintiff, Daniel O'Hanlon, purchased of one Gerald Dillon 74 acres of land in Dakota county for the sum of $5,000. He paid no money, but gave a note and mortgage for the entire purchase price. The interest not having been paid when due, Dillon instituted foreclosure proceedings, which resulted in a decree of foreclosure, and the sale of the premises to him at sheriff's sale. The sale was confirmed. O'Hanlon took preliminary steps to prosecute an appeal from the confirmation, and no deed to the purchaser was then executed. On February 12, 1906, the defendant, James M. Barry, purchased the right, title and interest of Dillon in the land for $5,400, and Dillon assigned the decree of foreclosure to Barry, and executed a deed to the land. A few nights afterwards O'Hanlon and wife joined in the execution of the deed made by Dillon to Barry. This transaction took place at Barry's residence. Barry and O'Hanlon had dealt with each other frequently before this. On March 30 Barry made a written lease to O'Hanlon for the premises until December, 1906, for a cash rent, and at the expiration of the respective terms like leases were made for two succeeding years. The O'Hanlons were in possession of the land as their homestead at the time of the conveyance to Barry and have been in possession of it ever since. In June, 1906, no appeal having been perfected from the order of confirmation, a deed was executed by the sheriff to Dillon, and delivered to Barry, who caused the same to be recorded. Afterwards Dillon, without the knowledge or consent of Barry, made and delivered to Mrs. O'Hanlon a quitclaim deed to the land, which was afterwards recorded. Dillon died soon after, and before the trial. The

plaintiffs assert that before the transaction between Barry and Dillon whereby Barry purchased Dillon's interest in the land, Barry had agreed with them that he would advance the money to pay off the mortgage debt and costs, and would hold the land as security until they were able to pay the judgment, and that the deed executed by them at Barry's house was in fact a mortgage, and was executed upon condition that as soon as they paid the amount advanced by Barry the land should be conveyed to them. Barry, on the other hand, maintains that he purchased from Dillon for his own benefit exclusively, and that no agreement was ever made by which he promised to reconvey the premises to the O'Hanlons upon any condition whatever. From this controversy disputes as to the possession arose, and several actions were begun in the district court for Dakota county respecting the title, possession, and right to the crops upon the land. The present action was begun by O'Hanlon to declare the deed to be a mortgage and to be allowed to redeem. These actions were finally consolidated and tried as one case. The district court found for the defendant Barry, quieted his title in the premises, awarded possession to him, and, pending this appeal, appointed a receiver for the rents and profits. From this decree the O'Hanlons have appealed.

The bill of exceptions consists of nearly 600 typewritten pages. Much of the testimony is entirely irrelevant to the main issue in the case. It is impossible within the limits of this opinion to review the same at length or to do more than briefly set forth the grain of wheat which the writer has laboriously winnowed from the pile of chaff contained in the record.

One of the principal factors in the case is the determination of what actually took place at the time of the execution of the deed by the O'Hanlons at Barry's house. As to this there is a direct and positive conflict in the testimony. Mr. and Mrs. O'Hanlon testify that they went there in response to a request by Barry made in Dakota city on the day he closed the transaction with Dillon; that

when they first went to the house there were present in the sitting room only Barry and Mr. and Mrs. O'Hanlon; that in the conversation prior to the execution of the deed they asked Barry for a written contract that he would return the land when the money was paid to him that he had paid to Dillon, but that Barry said he would give no contract, that his word was better than a contract, and that whenever the O'Hanlons were able to pay they would have the land back; that O'Hanlon signed the deed; that Barry then called his son James, who was in the kitchen, and sent him for his uncle, Thomas Brennan, who was a notary public and who lived nearby, and that shortly afterwards Brennan came into the room. Mrs. O'Hanlon testifies: "I said I wouldn't sign the deed without a contract. He said his word is better than any contract. He says, 'I am superior to any contract. What I say I will do. When you pay me this mortgage money, or this money for the judgment'—he says, 'when you pay me this judgment, I will turn you back your deed,' and he had turned to Mr. Brennan and he says, 'If you don't believe what I say, here is Mr. Brennan, I want him to witness what I say—when you pay me up my money, I will turn you back your deed.'" They further say that Barry told them to come back in a few days and he would make them a lease of the land. Brennan testifies that he went to the house with James Barry, that he was not sure whether O'Hanlon had signed the deed or not before he went into the room, but that Mrs. O'Hanlon signed it when he was there. He further says: "When I asked her about the signature, she said, 'We sign it with the understanding if the judgment is paid we get the land back.'" He testifies that when he went into the house Amelia Anderson and Mr. Sullivan were in the kitchen, and there might have been others of the family.. Brennan is a brother of Mrs. Barry.

On the other hand, Mr. and Mrs. Barry and Thomas Sullivan, a neighbor, who appears to be a man of some standing and repute in the county, and who seems to have no interest in the controversy, all testify that they were

present in the room during the whole conversation between Barry and the O'Hanlons, were there when the deed was signed, and when Brennan took the acknowledgment, and each swears positively that no such conversation took place. There is circumstantial and collateral evidence in the record which, if unexplained, would tend to corroborate the evidence of Mr. and Mrs. O'Hanlon; but, if the testimony of Barry and others is believed, these facts equally support another hypothesis. Furthermore, a number of witnesses testify to statements made by O'Hanlon at various times and places that Barry owned the land. The conduct of the O'Hanlons with respect to the payment of rent and the making of improvements also seems inconsistent with the idea of ownership on their part. It is shown that Barry employed men to cut weeds on the farm and that he procured hundreds of loads of manure to be hauled upon the premises from his own land.

The matter is not free from doubt. It may be possible that the district court erred in finding for the defendant. The trial judge had the advantage of seeing the witnesses and hearing them testify, which is an advantage this court is deprived of. It is difficult to say from the cold typewritten page which witnesses were telling the truth. We have repeatedly said that where it is sought to establish by parol that an absolute deed was only intended as a mortgage or given as security, the evidence must be clear, convincing and satisfactory. *Deroin v. Jennings,* 4 Neb. 97; *Schade & Schade v. Bessinger,* 3 Neb. 140; *Stall v. Jones,* 47 Neb. 706; *Butler v. Peterson,* 79 Neb. 715. Weighing the whole testimony, we are convinced that the trial court was warranted in holding that the evidence was not sufficient to decree that the deed was only intended as a mortgage, and in granting the relief prayed.

For these reasons, the judgment of the district court is

AFFIRMED.

IRA C. MUNGER, APPELLEE, V. T. J. BEARD & BROTHER, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,476.

1. Mortgages: FORECLOSURE: PARTIES. A mortgagor who has conveyed the legal title to the mortgaged property and is not in possession is not a necessary party to an action to foreclose the mortgage.
2. ———: ———: DECREE: CONCLUSIVENESS. The holder of a junior judgment lien who appears in a foreclosure action, in which it is alleged he claims some interest in the property adverse to the plaintiff, but who does not assert his lien in the action, is concluded by the decree as to the lien of the judgment upon the property, and may not afterwards sell the property under an execution on the same judgment.

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

John O. Yeiser, for appellant.

C. E. Herring, contra.

LETTON, J.

This is the second appeal in this case. The facts are fully stated in the opinion in the first appeal, which may be found in 79 Neb. 764. That appeal was taken from a judgment rendered after a demurrer to the answer had been sustained, and the defendant stood upon the demurrer. Upon appeal it was held that, since the answer pleaded actual possession of the property by Anna J. Fitch, it stated a cause of action, and the judgment of the district court was reversed for further proceedings.

After remand, the cause was tried and evidence taken with respect to possession by Mrs. Fitch. The evidence shows that certain property, consisting of a house and eight lots, was owned by Mrs. Fitch; that lots 12 and 13, in controversy, had no buildings or improvements upon them, but were inclosed in a fence surrounding the whole

tract. The whole property was heavily incumbered, and R. C. Patterson, who was the owner of one of the liens, obtained a deed to it from the Fitchs' in 1890 under an agreement by which he was to have the property and get what he could out of it to help pay the debt that Fitch owed him. He testifies that he did not occupy it as a tenant, that he paid no rent, and accounted to no one.

The first mortgage on the house and the six lots was foreclosed in the circuit court of the United States, and Patterson surrendered possession to the purchasers under that mortgage, John Jeffries & Sons of Boston, in the summer of 1896. He testifies that while in possession he endeavored to buy lots 12 and 13 from the plaintiffs Munger. One Stonecypher leased the house from Jeffries & Sons' agents in 1896 and lived there until 1899, and two other parties occupied the house and inclosure in the interval between Stonecypher's occupancy and the purchase of the house and six lots by Mrs. Yeiser from Jeffries & Sons in September, 1903. They used the vacant lots, but did not claim or assert any rights except such as they acquired by renting the house. Jeffries & Sons at all times expressly disclaimed any assertion of ownership over lots 12 and 13.

We are of opinion that this evidence entirely fails to prove the possession of the property by Mrs. Fitch at the time the foreclosure action was begun. In the foreclosure action the Beards were made defendants and entered their appearance. By the decree all their interest in the premises derived by virtue of their judgment was foreclosed and conveyed to the purchaser at the foreclosure sale. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Currier v. Teske*, 84 Neb. 60. We are convinced that upon this ground, as well as for the reason that Mrs. Fitch had neither the legal title nor the possession when the foreclosure action was begun, the plaintiff is entitled to restrain defendants from attempting to sell the lots under the same judgment. They had the opportunity to assert their rights under the judgment in that action at that

time. *White v. Bartlett,* 14 Neb. 320. Having failed to do so, they were concluded by the decree.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., took no part in the decision.

STATE OF NEBRASKA V. BERNARD C. MARTIN.

FILED SEPTEMBER 26, 1910. No. 16,525.

Arson: EVIDENCE. A tenant who wilfully and maliciously sets fire to and burns a storehouse, the property of his landlord, of which the tenant is in possession, is guilty of the crime of arson as defined in section 54 of the criminal code.

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

H. E. Burkett and *T. J. Doyle,* for plaintiff in error.

R. J. Millard and *M. F. Harrington, contra.*

LETTON, J.

The defendant was charged by information with the crime of arson in setting fire to and burning one storehouse in the village of Belden, the storehouse being the property of Mrs. C. F. Nelson, and of the value of $50 and more. He was arraigned, pleaded not guilty, and placed upon trial. The testimony of Mrs. Nelson disclosed that she was the owner of the building which was burned at the time of the fire, and that the defendant was occupying the same as her tenant, using the lower story for a jewelry store and the second story as a dwelling, and being the only occupant of the building. The defendant then objected to the introduction of any further evidence for the reason that the building burned was a dwelling-house, and not a storehouse, and because "he being in the use, possession, and occupancy of this property, as he was, was

the owner of the property within the meaning of the law of arson." The objection was sustained; to which the state excepted, and upon the motion of the defendant the court directed the jury to return a verdict of not guilty, and the defendant was discharged. From this ruling of the trial court, the state has presented exceptions to this court for review under the provisions of sections 483 and 515, criminal code.

We have not been favored with a brief in support of the ruling of the district court, but are informed that it was based upon the authority of *Holmes Case,* decided in 1634 by the court of King's Bench, 2 Croke (Eng.) 376, 2 East, P. C. (Eng.) 1022, wherein it was held that it was not felony to burn a house whereof one is in possession by virtue of a lease for years, two of the justices saying: "It cannot be said to be *vi et armis;* when it (the house) is in his own possession." At the common law a trespass must accompany the act of setting fire, since the arson was regarded as a crime against the habitation or dwelling-house, and not merely against property. 2 Bishop, New Criminal Law (8th ed.), secs. 8-21; 1 Wharton, Criminal Law (10th ed.), secs. 825-844.

Section 54 of our criminal code is almost identical in language with section 12 of the Ohio act for the punishment of criminals, passed March 7, 1835. In the case of *Allen v. State,* 10 Ohio St. 287, the same contention was made on the part of the defendant, but the supreme court of that state held that the procuring of another to burn a warehouse, the property of a third person, by a person in possession of the warehouse under a lease was an indictable offense under the crimes act. In the opinion the court pointed out the distinction between the statutory crime and arson under the common law, showed that for a tenant to burn a building belonging to another of which he was in possession was a high misdemeanor at common law, and reached the conclusion that the Ohio statute comprehended not only burnings which were arson at common law, but burnings of the other class which con-

stituted a high misdemeanor at common law. Under the well-known principle of statutory construction that, where a statute has been adopted from another state, ordinarily a construction given previous to its adoption by the courts of that state will be followed in the adopting state, we are content to abide by the Ohio rule, believing it to be a proper construction of the statute. *O'Dea v. Washington County,* 3 Neb. 118; *Forrester & Co. v. Kearney Nat. Bank,* 49 Neb. 655; *Morgan v. State,* 51 Neb. 672. Moreover, statutes substantially the same have been considered by the courts of Indiana, New York, Washington, Missouri, and Colorado, and a like view taken. *Garrett v. State,* 109 Ind. 527; *Shepherd v. People,* 19 N. Y. 537; *McClaine v. Territory,* 1 Wash. 345; *State v. Moore,* 61 Mo. 276; *Lipschitz v. People,* 25 Colo. 261.

We are of opinion that the learned district judge erred in sustaining the defendant's motions, and the exceptions of the state are

ALLOWED.

CHARLES B. SELDOMRIDGE, APPELLEE, V. FARMERS & MERCHANTS BANK ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,115.

1. **Sales:** WAIVER. If a vendor after selling a quantity of corn so as to pass title thereto without actual delivery resells it to another person and executes to each vendee a bill of sale for one-half of the grain, the first vendee by accepting the bill of sale and waiving his right to one-half of the grain first sold to him does not renounce his title to the other half thereof.

2. ———: PASSING TITLE: GRAIN IN MASS. Where a specified quantity of grain identical in kind and uniform in value is sold from a mass, a separation is not necessary to vest title where the intention of the parties that title shall pass is clearly manifested.

3. ———: ———: REVIEW. Whether title to personal property sold, but not actually delivered, passes to the vendee, depends upon the intent of the parties to the transaction, and the question of intent is rather one of fact than of law, so that the finding of the trial court upon that issue in an action at law will not be

set aside by this court unless against the clear weight of the evidence.

4. ———: RESCISSION. An order given by a vendee to his banker not to pay a check, drawn and delivered by the former in payment for chattels sold to him, will not in itself work a rescission of the contract of sale.

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

J. L. McPheely, for appellants.

Adams & Adams, contra.

ROOT, J.

This is an action in replevin to recover a quantity of corn held by the defendant sheriff by virtue of a levy of a writ of attachment. The plaintiff prevailed, and the defendant appeals.

The evidence is meagre, but the record discloses that February 28, 1908, Clyde Merriman owned 2,000 bushels of shelled corn contained in several bins in his granary. Upon that date Merriman sold to the plaintiff 2,000 bushels of corn, received a check for approximately one-half of the purchase price, and agreed to deliver the grain at the plaintiff's elevator in Axtell. The same day Merriman sold in like manner 2,000 bushels of corn to the Hayes & Eames Elevator Company and received a check for half of the purchase price. Merriman then prepared two bills of sale purporting to convey to each of his vendees "1,000 bushels of shelled corn now located on the N. W. ¼ of section 28, township 7, range 16, Kearney county, Nebraska." These documents were given by Merriman to his brother-in-law, a Mr. Wells, with directions to deliver the corn to the respective vendees. Merriman negotiated the checks, paid Wells for delivering the corn, and then absconded. In the forenoon of March 2 Wells filed the bills of sale with the county clerk, informed the vendees of the transaction, and delivered 348 bushels of the corn

to the plaintiff. The corn was accepted, but the plaintiff directed his banker not to pay said check. Subsequently, but before the check was presented, the order was rescinded and the check thereafter paid upon presentation. At 7 o'clock P. M., March 2, the Farmers & Merchants Bank of Axtell caused an attachment to be levied on all of the undelivered corn. The parties waived a jury and tried the case to the district court.

The litigants agree that, if title to the 652 bushels of corn vested in the plaintiff before the levy, the judgment of the district court should be affirmed. The litigants stipulated in open court during the trial of the case "that the corn attached is the same corn that had been purchased, except 348 bushels that had been delivered prior to the attachment." This stipulation removes from the case any question concerning the appropriation of the corn to the contract. If Merriman sold this corn to the plaintiff and received his pay therefor, the sale was perfect and title vested in the plaintiff. Manual delivery is not always a condition precedent to the transfer of title to personal property bargained and sold. *Baker v. McDonald,* 74 Neb. 595. The chattels should be identified, and if they form part of a larger mass should generally be segregated therefrom. In the case at bar the plaintiff purchased all of Merriman's corn, so that segregation was not necessary for the purposes of identification or appropriation. The fact that Merriman twice sold the identical corn is no concern of the attaching creditor. By acquiescing in Merriman's resale of one-half of that corn, the plaintiff did not relinquish his title to the remaining fraction, but from thence forward the vendees became tenants in common of the mass of grain. If it is conceded that Merriman's conduct precludes a finding that he intended to transfer to either vendee title to the 2,000 bushels of grain, it becomes material to ascertain whether the parties intended that title to 1,000 bushels of corn should vest in each vendee.

If the acts and declarations of a vendor and a vendee

clearly evince an intention to make an immediate transfer of title to a quantity of grain sold from a larger mass of like quality and kind, the title will pass, although there may have been no separation of the quantity sold. *Kimberly v. Patchin,* 19 N. Y. 330, 75 Am. Dec. 334; *Hurff v. Hires,* 40 N. J. Law, 581; *Horr v. Barker,* 11 Cal. 393, 70 Am. Dec. 791; *Winslow, Lanier & Co. v. Leonard,* 24 Pa. St. 14, 62 Am. Dec. 354.

Since the intent of the parties must control in determining whether a present vested title to the corn passed to the vendee, the trier of fact in passing upon that issue must examine the conduct of the parties in the light of the surrounding circumstances. In the instant case the corn, so far as we are advised, was of uniform quality and value. It is plain that Merriman did not intend to retain title to the grain, because he twice sold it, then executed a bill of sale to the plaintiff for one-half of the corn, applied the plaintiff's money to the payment of the thousand bushels, and finally absconded. Since Merriman did not intend to retain title to any of this corn, but did everything possible short of delivering actual possession thereof to the plaintiff to vest that title in his vendee, we are of opinion the court was justified in finding the title did in fact pass to the plaintiff. That finding should not be ignored unless it is clearly against the weight of the evidence. *Kneeland v. Renner,* 2 Kan. App. 451, 43 Pac 95; *Graff v. Fitch,* 58 Ill. 373; *Towne v. Davis,* 66 N. H. 396. Upon the entire record we are of opinion the evidence sustains the finding of the trial court.

The defendant argues, however, that the plaintiff by stopping payment of his check rescinded his contract, but we are of opinion that no such consequences followed his order. The check was accepted by Merriman in payment for the grain. If the check had not been honored, doubtless the vendor could have rescinded the contract, but it was paid, and Merriman makes no complaint that intermediate its execution and payment the plaintiff stopped payment thereof.

Upon the entire record, we find no error prejudicial to the defendants, and the judgment of the district court is

AFFIRMED.

LETTON, J., concurring.

The opinion is based upon the assumption that the stipulation entered into by the attorneys at the trial of the case was an admission that the entire mass of corn in the granary on the farm was the thing which was sold to Seldomridge. I think this is not the meaning of the stipulation. It is not in accordance with the other evidence in the case, and I am sure that defendant's attorney never intended to make a stipulation which would defeat him.

I concur in the conclusion, however, for the reason that where there is a contract for the sale of unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller, with the assent of the buyer, the property in the goods thereupon passes to the buyer. The assent of the buyer may be expressed or implied, and it may be given either before or after the appropriation is made. 35 Cyc. 297; Sale of Goods Act, rule 5 (2 Mechem, Sales, p. 1482).

In this case Merriman appropriated the corn to the buyers before the attachment by the execution of the bill of sale and by pointing out the property to his brother-in-law for the purposes of delivery to the buyer and notifying the buyer of such appropriation.

In the absence of any appropriation by the seller in this case, I think the plaintiff's attachment would have been good, because the title to the corn would still have been in Merriman.

HAYES & EAMES ELEVATOR COMPANY, APPELLEE, V. FARMERS & MERCHANTS BANK ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1910. No. 16,116.

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

J. L. McPheely and *C. A. Chappell,* for appellants.

Adams & Adams, contra.

ROOT, J.

The facts in this case are almost identical with those reported in *Seldomridge v. Farmers & Merchants Bank, ante,* p. 531, the only difference being that no grain was delivered to the plaintiff herein before the attachment was levied, and the check given for the corn was protested for nonpayment March 2, but was paid with protest fees March 3. We do not think these facts take the case without the principles announced in *Seldomridge v. Farmers & Merchants Bank, supra.*

Following the decision in that case, the judgment in the instant one is

AFFIRMED.

CHARLES E. SMITH, APPELLEE, V. WILLIAM LORANG, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,131.

1. Intoxicating Liquors: ACTION FOR INJURIES: EVIDENCE. In an action against a saloon-keeper to recover damages for personal injuries resulting from the defendant's traffic in intoxicating liquors, the plaintiff is not required to prove that intoxicating liquors sold by the defendant were the sole or even the principal cause of the former's injury, but only that intoxication caused by such traffic contributed thereto.
2. Instructions should be construed together, and if, taken as a whole, they do not prejudice the appellant will be held sufficient.
3. Appeal: HARMLESS ERRORS. This court will disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the appellant.

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

R. J. Millard and *B. Ready,* for appellant.

H. E. Burkett, contra.

ROOT, J.

This is an action for damages caused by personal injuries resulting, as alleged, from the defendant's traffic in intoxicating liquors. The plaintiff prevailed, and the defendant appeals.

The evidence is harmonious in many particulars. The proof is undisputed that the defendant in 1908 was engaged in the retail sale of intoxicating liquors; that the plaintiff was in the defendant's saloon from 2 o'clock until the evening of a day in June of that year, and then and there purchased over the defendant's bar and drank intoxicating liquors. The evidence also proves that the plaintiff was sober when he entered said saloon and intoxicated at 6 o'clock that evening, and there is no proof that he procured intoxicating liquor at any other place

that day. It also appears from evidence received without objection that the plaintiff while thus intoxicated engaged in an altercation with a Mr. McKenzie in said saloon, and when ejected by the defendant from said building fell or stumbled on a cement walk. An examination by a physician demonstrated that the process of the bone projecting over the plaintiff's left elbow joint was fractured.

1. McKenzie testified for the defendant, and, after the witness had given his version of the contest with the plaintiff, the court, on the plaintiff's motion, excluded McKenzie's testimony. The defendant insists this ruling was erroneous because the witness stated with reference to the plaintiff: "I put a hammer on his elbow and twisted that loose, and he had me by the other arm also." Counsel asserts this testimony justifies an inference that McKenzie struck the plaintiff upon the elbow with a hammer and thereby caused the fracture. The context of the testimony convinces us the witness referred to a wrestling grip or hold, and that the jurors would not be justified, upon a consideration of all the evidence, including that excluded by the court, in concluding that the wrestling bout was responsible for the injury to the plaintiff's arm. The transaction, however, was so closely connected with the plaintiff's expulsion from the saloon that the testimony was relevant and competent, but its exclusion could not have prejudiced the defendant. It is immaterial whether the plaintiff's arm was fractured during his fight with McKenzie or at the time he was expelled from the saloon, so long as his intoxication caused or directly contributed to that injury. *Wiese v. Gerndorf*, 75 Neb. 826. Proof therefore that the plaintiff's arm was fractured during his fight with McKenzie would be no defense to the action, provided the plaintiff's intoxication induced by the defendant's liquors was a contributing cause of the injury. The court protected the defendant upon this branch of the case by instructing the jury there could be no recovery unless the injuries were caused or contributed to by the plaintiff becoming intoxicated as a result of drinking the

defendant's liquors. The most that can be said in the defendant's favor is that proof that the injuries were inflicted during the fight would not support the allegation of the petition that the fracture occurred at the time the plaintiff fell upon the sidewalk. But this slight variance would be controlled by section 138 of the code. This assignment of error is controlled by section 145 of the code and will be overruled.

2. The court's charge to the jury is severely criticised by the defendant's counsel. Upon the record there were but two questions of fact for the jury to determine: First, did the plaintiff's intoxication cause or contribute to his injury? Second, if such intoxication did cause or contribute to the injury, how much should the plaintiff recover? Some of the instructions, considered apart from the remainder of the charge, are not entirely satisfactory; but, taken together, they fairly submit to the jury the issues upon which there is any conflict in the evidence. In some respects the charge is more favorable to the defendant than the evidence justifies. The recovery is not excessive—$400—but little more than double plaintiff's liability for medical services rendered.

Section 145 of the code applies with peculiar force to every error committed during the trial of this case. The defendant has no just cause for complaint, and the judgment of the district court is

AFFIRMED.

ALFRED T. STALEY V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1910. No. 16,614.

1. **Bigamy: PROOF OF PRIOR MARRIAGE.** When the state in a prosecution for bigamy proves that the defendant, prior to his alleged bigamous marriage, married a woman in the state of Iowa, and upon her cross-examination it appears that she and the defendant are first cousins, but no evidence is offered to prove that they are cousins of the whole blood, it devolves upon the state

to prove either that said cousins are of the half blood, or that for other reasons the Iowa marriage is lawful.

2. ———: INSTRUCTIONS: PRIOR MARRIAGE: PRESUMPTIONS. In such a case it is error to instruct the jury that there is a presumption that the Iowa marriage is lawful.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed.*

James L. Caldwell, for plaintiff in error.

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

ROOT, J.

Alfred T. Staley was convicted in the district court of bigamy, and appeals. He will be referred to as the defendant.

1. Numerous errors are assigned, but only one feature of the case need be considered. The state proved that in 1907 the defendant was married in Iowa to Hattie Bixler, an unmarried woman, subsequently cohabitated with her in Omaha, and that said marriage had not been dissolved. The defendant in 1909 married Miss Stoner in Lancaster county, Nebraska, and was living with her in that county as his wife at the time he was arrested. The first wife testifies that she and the defendant are first cousins. The court instructed the jury that, although the laws of Nebraska forbid the marriage of first cousins of the whole blood, it is presumed that a marriage performed in another state was entered into in accordance with its laws. No evidence was introduced to prove the laws of Iowa upon the subject of marriage. Section 3, ch. 52, Comp. St. 1909, provides, among other things, that a marriage shall be void "when the parties stand in the relation to each other of * * * first cousins, when of whole blood * * * ; and this subdivision extends to illegitimate as well as legitimate children and relatives." Section 1, ch. 25, provides that marriages prohibited by section 3,

ch. 52, *supra*, "are void without any decree of divorce." Section 17, ch. 52, provides that "all marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." The construction given this statute in *State v. Hand, ante*, p. 189, renders unnecessary a discussion of counsel's argument upon certain phases of the instant case. Generally, upon proof of a marriage, the presumption exists in favor of a lawful union; but, where two successive marriages occur, the presumption in favor of the legality of each is equal, and an actual marriage must be established by proof. *Lowery v. People*, 172 Ill. 466. According to a rule established many years ago in this state, and consistently adhered to thereafter, a presumption exists, in the absence of evidence to the contrary, that the law of a sister state is identical with the law of Nebraska upon a given subject, and this rule obtains in criminal prosecutions as well as in civil actions. *Lord v. State*, 17 Neb. 526; *Bailey v. State*, 36 Neb. 808. Upon the record, in order to establish that the defendant and Miss Bixler were lawfully married, it is necessary to presume either that they are cousins of the half blood, or that the laws of Iowa contemplated and permitted first cousins of the whole blood to marry. In our opinion the state should have assumed the burden of clearing up those doubtful questions by proving one condition or the other, that is, that Miss Bixler and the defendant are cousins of the half blood, or, notwithstanding the parties could not lawfully marry in Nebraska, they could thus marry in Iowa. *Weinberg v. State*, 25 Wis. 370. We do not hold the state in all prosecutions for bigamy should prove the law of a sister state or of a foreign country if the first marriage were celebrated in that state or country, but upon the facts established by the evidence in this case the state should have made the further proof referred to.

2. Some argument was offered to demonstrate a fatal variance between the allegation and the proof with respect to the date the defendant and Miss Bixler were married.

The complaint upon which the defendant was arrested and bound over to the district court correctly recites that the marriage was celebrated in 1907, but the information charges the date as 1909. Upon a second trial the county attorney may, by an amendment, cure that defect, and we shall not determine its effect in the present state of the record. Reference is not made to other points argued by the defendant's counsel, because we are of opinion they do not control this case.

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

REVERSED.

SINGER SEWING MACHINE COMPANY, APPELLANT, V. WILLIAM ROBERTSON, JR., APPELLEE.

FILED SEPTEMBER 26, 1910. No. 16,026.

1. **Replevin**: EXECUTION OF WRIT. In executing a writ of replevin a sheriff is not authorized to seize the property in the hands of a stranger claiming to be the owner, but not protected by the replevin bond, though plaintiff and the owner are directed by defendant to the place where the property may be found.
2. ———: PROCEDURE. Under section 186 of the code, providing that when property has not been taken under a writ of replevin the action may proceed as one for damages, a defendant may be held liable for the value of the property, if transferred by him in bad faith, though it was not in his possession or under his control when he was sued, nor taken under the writ.
3. **Appeal**: INSTRUCTIONS: PREJUDICIAL ERROR. The giving of an instruction which misstates the law on a material issue to the prejudice of plaintiff is a sufficient ground for the reversal of a judgment against him.

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

Claude S. Wilson and *Charles T. Dickinson*, for appellant.

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

ROSE, J.

The action is replevin and the property in controversy is a sewing-machine alleged to be of the value of $40. Plaintiff did not get the property under the writ, but to recover its value prosecuted the suit to final judgment. The trial resulted in a verdict for defendant, and from an order of dismissal plaintiff has appealed.

Several rulings in giving or refusing instructions and in admitting or excluding testimony are challenged by plaintiff as erroneous, but defendant argues they should all be disregarded for the reason it is conclusively shown by uncontradicted testimony properly admitted that defendant was not in possession of the sewing-machine when the action was instituted, and that consequently no right to recover existed in favor of plaintiff. There is proof tending to show: Several months before the suit was commenced defendant bought the sewing-machine from one who had purchased it from plaintiff. The original purchaser, according to her own testimony, paid the purchase price to an agent of plaintiff, but the name of the person to whom it was paid was not divulged. Defendant, before plaintiff brought suit or threatened to do so, told one of plaintiff's agents that he had given the sewing-machine to his sister, and that she sold it to Laura McCandless, to whom it had been delivered at 120 North Thirty-first street, Lincoln, Nebraska, where it could still be found. When the sheriff attempted to serve the writ of replevin, he was informed by defendant that the latter did not have the property, but was directed where to find it. Plaintiff did not get possession of the sewing-machine by means of the writ, and the sheriff stated in his return that it could not be found. From proofs of this nature defendant draws the conclusion that plaintiff knew where the sewing-machine was, that it could have been taken under the writ, and that plaintiff was not entitled to a verdict, since the property was not in possession of defendant when he was sued. The writ did not direct the

sheriff to seize the property in the hands of a stranger to the suit. Pursuant to a statutory requirement the affidavit for the writ contained this allegation: "The property is wrongfully detained by *defendant.*" Code, sec. 182. In replevin the bond under which plaintiff obtains possession runs to the *defendant* alone. Code, sec. 186. The writ authorized the sheriff to take the property from defendant, but did not direct him to seize it in the hands of a stranger claiming in good faith to be the owner, but who is not protected by plaintiff's bond. *Sexton v. McDowd,* 38 Mich. 148; *Lehman v. Mayer,* 40 N. Y. Supp. 933; *King v. Orser,* 4 Duer (N. Y.) 431. If defendant was answerable in replevin for the wrongful detention of the property, he did not relieve himself from liability by directing the officer to the place where it could be found in possession of a third person. If the action was properly brought against defendant, plaintiff was not required to commence a new suit, give a new bond, and with another writ pursue a stranger. The latter might be insolvent and consequently unable to pay costs or damages. To sustain his position defendant relies on *Heidiman-Benoist Saddlery Co. v. Schott,* 59 Neb. 20, and *Burr v. McCallum,* 59 Neb. 326. The latter case follows the earlier one wherein the rule was stated as follows: "In replevin the plaintiff cannot recover damages for property which was not in defendant's possession or under his control at the beginning of the suit."

This is the common-law rule, and the court in applying it recognized the exception announced in *Depriest v. McKinstry,* 38 Neb. 194, to the effect that replevin is a proper remedy where defendant concealed, removed or disposed of the property for the purpose of avoiding the writ. The exception is about as well established as the rule itself. *Andrews v. Hoeslich,* 47 Wash. 220, 18 L. R. A. n. s. 1265, and cases collected in note. The statute gives a plaintiff in replevin the benefit of the exception. *Lininger & Metcalf Co. v. Mills,* 29 Neb. 297. Section 186 of the code requires the plaintiff, as a condition of obtaining pos-

session of the property under the writ, to give a bond for defendant's protection. Section 193, among other things, declares: "When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section 186, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper." "When the property claimed has not been taken," says the statute, "the action may proceed as one for damages only." In an action properly commenced this statute provides a remedy where the property has not been taken under the writ. Replevin is a common-law action. The provision quoted, therefore, was not enacted in derogation of the common law. The common law is supplemented or extended by the code, and the statute should be liberally construed. The tendency of recent decisions is to make replevin more flexible, and in this regard they reflect the spirit of modern legislation. A plaintiff beginning a suit to recover possession of a chattel alleged to be wrongfully detained by a defendant who disposed of it in bad faith before the action was instituted is not now required to resort to a different form of action for redress. In the language of the code, "the action may proceed as one for damages." *McBrian v. Morrison,* 55 Mich. 351; *Brockway v. Burnap,* 16 Barb. (N. Y.) 309; *Helman v. Withers,* 3 Ind. App. 532; *Andrews v. Hoeslich,* 47 Wash. 220, 18 L. R. A. n. s. 1265, and cases cited in note.

Is the present case within the exception? The record contains evidence tending to prove: The sewing-machine was manufactured and owned by plaintiff. It was shipped from Chicago to Lincoln, and within a short time disappeared from the storeroom of plaintiff's Lincoln agency. It was never sold, and plaintiff never parted with the title to it. It was stolen or lost. Defendant was a dealer in second-hand goods at 1450 O street, Lincoln, Nebraska. For a time the sewing-machine was stored in a barn occupied by one of his employees. Later the employee traded

it to defendant for a horse, giving $10 to boot. Defendant did not comply with the statutory provision requiring dealers in second-hand goods to report purchases to the chief of police, nor take the sewing-machine to his store, but left it at his sister's residence, where it remained several months. A few days before the bringing of the suit the sister sold the sewing-machine to Laura McCandless, and defendant delivered it to the purchaser, afterward receiving and cashing a check in part payment, and later giving his sister a rug instead of the money. After the sewing-machine was removed from the sister's house, and before it was delivered to Laura McCandless, it stood for probably four hours on the sidewalk in front of defendant's store. There it was seen by one of plaintiff's agents who drove up in a vehicle bearing the sign, "Singer Sewing-Machine Company," which was observed by an employee of defendant. Plaintiff's agent made inquiries at the time and took the number, which proved to be the same as that of the missing sewing-machine. What occurred was reported to defendant by his employee before the sewing-machine was taken away. Plaintiff made a demand on defendant for the property, but did not get it. An acrimonious controversy was promptly started, and this suit followed within a few days. If plaintiff's witnesses truthfully testified to the facts which tend to show that plaintiff originally owned the sewing-machine and never sold it or parted with the title, defendant of course never owned it and never legally transferred it to his sister. The circumstances narrated and other proofs not mentioned raise a question as to the *mala fides* of defendant in his dealings with the property. His liability to plaintiff for its value, therefore, in view of the principles of law stated, is a proper matter for litigation in this action, within the meaning of section 193 of the code, though the sewing-machine may not have been in his possession or under his control when plaintiff sued him. It follows that the judgment in his favor cannot be affirmed without examining the merits of plaintiff's appeal.

The giving of the following instruction is assigned as error: "If you find from the evidence that prior to September 13, 1904, the sewing-machine in controversy was in the possession and exclusive control of the defendant's sister, and that on said date the defendant was given the possession of said machine for the purpose, and only purpose, of transporting the machine to Mr. or Mrs. McCandless who had purchased said machine, and in the pursuance of such purpose on said date the defendant delivered the said machine to the said purchaser, then and in that case the defendant could not be said to have parted with the machine for the purpose of avoiding the writ sued out in this case, and the plaintiff could not recover whether it was the real owner or not. If, on the other hand, you should find that the machine at the time was in defendant's possession, and that he did not part with it in good faith for the purpose of delivering it into the possession of McCandless, who was entitled to the possession as between the defendant and McCandless, but, on the contrary, parted with his possession of the same in bad faith for the purpose of avoiding the writ sued out, or about to be sued out, then in such case, if you find the other facts in favor of the plaintiff necessary for its recovery as told you in these instructions, the plaintiff would be entitled to recover."

This instruction disregards any liability arising from the preliminary act of bad faith on part of defendant in concealing the stolen or lost machine at his sister's residence, or in presenting it to her, for the purpose of avoiding the writ, if such were the fact. The effect of the direction quoted, when considered with the entire charge, was to authorize a verdict in favor of defendant, if the jury found that his sister, at the time she sold the machine, had exclusive possession and control of it, and that in delivering it he acted alone for her. This was a misstatement of the law on a material issue, and it cannot be said to be harmless error.

Not finding it necessary to discuss other rulings of

which complaint is made, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

AMANDA PRINGLE, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,110.

1. **Insurance Certificate: CONSTRUCTION AND ENFORCEMENT: LAW GOVERNING.** In a suit on a fraternal beneficiary certificate issued by an association organized under the statutes of Illinois and transacting business in Nebraska, under the laws thereof, through local camps, the certificate will be construed and enforced according to the laws of Nebraska, where it was signed and delivered in this state by officers of a local camp pursuant to by-laws of the association.
2. **Appeal: LAW OF CASE.** On appeal to the supreme court, the determination of a question becomes the law of the case, and ordinarily will not be re-examined on a subsequent appeal in the same case.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Benjamin D. Smith, Talbot & Allen and *W. H. Thompson,* for appellant.

Wilcox & Halligan, contra.

ROSE, J.

This is a suit on a 2,000-dollar beneficiary certificate issued June 30, 1900, by defendant, a fraternal beneficiary association, to Frank W. Pringle for the benefit of his mother, the plaintiff. The certificate provides that it shall become null and void in the event of assured's conviction of a felony. When he was a member of the association he was convicted of horse-stealing, and he died in the penitentiary September 6, 1901. The case was tried without a jury, and the trial court held that assured's conviction forfeited his certificate and membership. For

this reason, the action was dismissed. On appeal to this court from the judgment of dismissal, it was held that the forfeiture had been waived by reason of the following facts which were pleaded and proved by plaintiff: "It appears that Frank W. Pringle became a member of the defendant association in May, 1900, and the benefit certificate in question was issued and delivered to him on the 30th day of June, of that year. He paid all of his dues and assessments up to and including the 15th day of April, 1901, when he was convicted of a felony. He was, up to that time, a member of the association in good standing, and, desiring to continue so and keep his certificate in force for the benefit of his mother, he, together with the clerk of his local camp, examined the by-laws of the order for the year of 1897, which were then in the hands of that officer and were the only by-laws to which they had access, but found nothing therein to prevent him from keeping up his payments and retaining his membership. He thereupon deposited with the clerk a sum of money sufficient to pay his dues and assessments for some months, with instructions to forward the same to the head camp as required. When the money so left with the clerk was exhausted, the beneficiary was notified of that fact, and she thereafter continued to make the necessary payments until after Pringle's death, which occurred on the 6th day of September, 1901. It further appears that he was buried under the auspices of the order by the local camp, with full knowledge on the part of the members thereof of the foregoing facts." *Pringle v. Modern Woodmen of America,* 76 Neb. 388. The clerk of the local camp remitted the required sums monthly to the head camp, and testified that the governing body knew of assured's conviction. *Pringle v. Modern Woodmen of America,* 76 Neb. 384, 388. On the facts stated, this court held that the forfeiture was waived, and consequently the dismissal was reversed. When the case was retried below, plaintiff recovered the full amount of her claim, and from the judgment in her favor defendant has appealed.

Plaintiff argues there is no merit in this appeal for the following reasons: Whether defendant waived the forfeiture resulting from assured's conviction was the only question determined on the former appeal, and the same question is now presented on a record containing no material change in the issues or proofs. If this position is well taken the judgment must be affirmed, under the oft repeated rule that on appeal the supreme court's determination of a question becomes the law of the case, and ordinarily will not be re-examined on a subsequent appeal in the same case. *Bettle v. Tiedgen,* 85 Neb. 276. Defendant, however, insists that it is not concluded on this appeal by the former decision, because the answer, after the remanding of the case, was amended to plead the laws of Illinois and to allege that the certificate is an Illinois contract, while the certificate was treated on the former appeal as a Nebraska contract. It is now argued by defendant that the result will be different, if the contract is construed according to the laws of Illinois. The amended answer states: "Defendant further alleges that it now is, and was at all of said times, a fraternal beneficiary association as defined by the statutes of the state of Nebraska relating to fraternal beneficiary associations. * * * And that it has complied in all respects with the provisions and regulations contained in said Nebraska statutes relative to fraternal beneficiary associations, organized in other states, applying for admission to transact business in the state of Nebraska, and that it now is, and was at all of the times in plaintiff's amended petition mentioned, duly authorized to transact its said business in the state of Nebraska as a fraternal beneficiary association under the provisions of chapter 47 of the laws of 1897, and that the benefit certificate herein sued on was issued by the defendant in the regular course of its business in the state of Nebraska, and in strict compliance with the laws of said state relating to fraternal beneficiary associations, and subject to all the provisions contained in said statutes aforesaid." The answer also admits that the

copy of the certificate attached to plaintiff's petition is correct. The certificate thus pleaded bears the following indorsement: "Member adopted and certificate delivered this 30th day of June, 1900. H. H. Hugh, Consul. August Sudman, Clerk, Oshkosh Camp, No. 4990, M. W. A."

It thus appears by defendant's own pleading that the certificate "was issued by the defendant in the regular course of its business in the state of Nebraska," and that it was signed and delivered in Nebraska by the officers of the local camp. In certifying to the adoption of assured and in delivering the certificate the local officers acted under the by-laws of the association. Notwithstanding allegations to the effect that the certificate is an Illinois contract, the record therefore shows that it is a Nebraska contract, enforceable according to the laws of this state. *Dolan v. Supreme Council Catholic Mutual Benefit Ass'n,* 113 N. W. (Mich.) 10, 116 N. W. 383, 152 Mich. 266; *Johnson v. Mutual Life Ins. Co.,* 180 Mass. 407, 63 L. R. A. 840, note 4. In this respect the issues and proofs are the same as on the former appeal.

The evidence on both trials was the same, except it was agreed at the second trial that the by-laws pleaded in the amended answer were duly filed in the office of the auditor of public accounts and published in defendant's official paper. It was pleaded in the original answer that assured had knowledge of the by-laws, and that they were duly filed in the office of the auditor of public accounts. Plaintiff made no question on either trial as to the filing of the by-laws in the office of the auditor of public accounts. There is no material change in the issues or proofs, and the former holding is on this appeal the law of the case.

AFFIRMED.

STELLA HENTON ET AL., APPELLEES, V. SOVEREIGN CAMP WOODMEN OF THE WORLD, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,124.

1. **Insurance**: AGENCY: EVIDENCE. Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties.

2. ———: REINSTATEMENT: ESTOPPEL. A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part.

3. **Appeal**: REQUEST FOR DIRECTED VERDICT: REVIEW. Where both parties, at the close of the evidence, request a peremptory instruction, and a verdict is directed in favor of plaintiff, the action of the trial court in declining to submit issues of fact to the jury presents no question for review in the appellate court.

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

Arthur H. Burnett, Matthew Gering and *A. G. Ellick*, for appellant.

A. L. Tidd, contra.

ROSE, J.

This is a suit on a fraternal beneficiary certificate issued May 7, 1906, by defendant to W. E. Henton, who died March 7, 1907. Plaintiffs are his widow and orphans. They were named as beneficiaries in his certificate, which, if enforceable, obligates defendant to pay them $750 and to expend $100 for a monument at assured's grave. Plaintiffs recovered judgment for the full amount of their claim, and defendant has appealed.

The Sovereign Camp of the Woodmen of the World is in Omaha. Assured was a member of the local or subordinate camp at Plattsmouth. To retain his membership and keep his insurance in force he was required to pay monthly assessments of $2.15 each. The assessment for each month was payable on or before the first day of the month following. For failure of a member to make payment within that time, a by-law provides that "he shall stand suspended, and during such suspension his beneficiary certificate shall be void." It is admitted in the answer that the insurance was in force during January, 1907, though the proofs do not show the payment of the assessments for December, 1906, and January, 1907, until the latter part of February. There is evidence to sustain a finding that those assessments were paid to the clerk of the local camp about ten days before the death of assured, and that on March 7, 1907, before his death, the February assessment was also paid to the clerk. The December and January assessments were paid by a son of assured after the latter had been suspended for nonpayment of the January assessment. Assured's brother-in-law paid the February assessment by check.

Defendant denies liability on the ground that assured, after he had been suspended, was never reinstated. This defense is based on the following propositions: Assured was presumed to know the laws of the association and the limitations they impose upon officers and members of the local camp. He had been suspended more than ten days when the January assessment was paid. Thereafter he could only be reinstated by paying all arrearages and complying with a by-law which required him to deliver to the clerk a signed statement that he was in good health. Such a certificate was never furnished. When the arrearages were paid defendant was afflicted with the malady which resulted in his death, and for that reason he could not be reinstated. The local officers had no authority to waive the health certificate or other requirements of the by-laws. The points of law involved in the position taken by de-

fendant are ably argued. It is contended that in accepting the payments, after assured had been delinquent more than ten days, the clerk of the local camp was the agent of assured. In addition to its constitution and by-laws defendant relies on the following language, which is copied from the clerk's receipt: "If any part of the above amount is paid for the purpose of reinstating the sovereign so paying, it is received upon the condition and agreement that I receive and hold the same in trust for him pending the necessary action upon his application for reinstatement, and that he has no claim upon the order until such application is accepted in accordance with the constitution and laws. If such application is not accepted, the above sum to be refunded."

The evidence tends to show these facts: Assured's suspension and reinstatement were entered on the records of the local camp and reported to the sovereign camp. Afterward the latter received and audited the payments of the December and January assessments, and no effort was made to return them until April, 1907. The delinquent payments were returned by defendant to the local clerk, but he did not tender them back to plaintiffs, and they were never refunded, though there is in the record an offer by defendant to return them. Nothing was said about the health certificate when the clerk collected the arrearages, and no request for it was ever made. Fraud on the part of assured is not shown. The clerk knew of assured's illness, and had previously reported the fact to the local camp at a regular meeting. Before the February assessment was paid inquiry was made of the clerk as to assured's standing, and he replied: "He owes one assessment and had better pay it."

Under these circumstances was the district court justified in holding that the health certificate and forfeiture were waived? Defendant's by-laws require members to pay each assessment and all arrearages, in cases of suspension and reinstatement, to the clerk of the local camp, who is required to forward the funds to the sovereign

camp. Transactions essential to the reinstating of a member who has been suspended for nonpayment of assessments must be conducted with the clerk of the local camp. The by-laws provide: "Should a suspended member pay all arrearages and dues to the clerk of his camp within ten days from the date of his suspension, and if in good health and not addicted to the excessive use of intoxicants or narcotics, he shall be restored to membership and his beneficiary certificate again become valid. After the expiration of ten days and within three months from the date of suspension of a suspended member, to reinstate he must pay to the clerk of his camp all arrearages and dues and deliver to him a written statement and warranty signed by himself and witnessed that he is in good health, and not addicted to the excessive use of intoxicants or narcotics, as a condition precedent to reinstatement, and waiving all rights thereto, if such written statement and warranty be untrue." The penalty imposed upon a clerk for reinstating a member whose health is at the time impaired is suspension from office and expulsion from the camp. It seems clear, therefore, that the clerk is the agent of defendant in receiving arrearages and in reinstating members. *Pringle v. Modern Woodmen of America*, 76 Neb. 388; *Sochner v. Grand Lodge, Order of Sons of Herman*, 74 Neb. 399. Under the facts disclosed the clerk did not divest himself of such agency by the form or terms of the receipt quoted. The effect of the clerk's agency is stated in *Pringle v. Modern Woodmen of America*, 76 Neb. 388, as follows: "In *Modern Woodmen of America v. Colman*, 68 Neb. 660, we held that a forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them, without objection, until after the death of the insured; that it is the duty of the agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this

duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to public safety, that notice to an agent in the course of his employment is notice to his principal."

The agency of the clerk of one of defendant's local camps was considered in *Frame v. Sovereign Camp, W. O. W.*, 67 Mo. App. 127. The report of the case shows that a member in arrears took sick Sunday, and died Wednesday, following. A relative went to the clerk of the local camp Sunday, reported the sickness, paid the delinquent assessments, and obtained a certificate of reinstatement. The language of the court follows: "The result of our views on this branch of the case is this: That if the clerk of the local camp, with knowledge of the condition of the delinquent and suspended member, receives his dues and reinstates him in the fraternity, it is, in the absence of fraud or collusion, binding on the order; and that such order cannot after such action, if it turns out that the delinquent afterward dies of the sickness with which he was known to be afflicted when reinstated, repudiate the action of its constituted agent. The matter of accepting arrearages and reinstating members was intrusted to the clerk, and his action on such matter, when taken in good faith, binds his principal, as in other cases of principal and agent." This is in harmony with the views expressed in *Pringle v. Modern Woodmen of America*, 76 Neb. 388. Adherence to the principle announced in the case last cited requires the approval of the finding in favor of plaintiffs in the present case.

At the close of the evidence both parties requested a peremptory instruction, and a verdict was directed in favor of plaintiffs. It follows that the action of the trial court in declining to submit issues of fact to the jury presents no question to this court for review, though assailed as erroneous. *Dorsey v. Wellman*, 85 Neb. 262; *Segear v. Westcott*, 83 Neb. 515.

No error has been found in the record, and the judgment is

AFFIRMED.

ROOT, J., not sitting.

EDWARD BUNGE V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1910. No. 16,565.

1. **Names:** IDEM SONANS. "Adolph" and "Adolf" are *idem sonans*, when used in both forms as the Christian name of the complaining witness in an information for robbery and in the transcript of the proceedings of the examining magistrate.

2. **Robbery:** TRANSCRIPT: CORRECTION OF NAME. In a trial for robbery, an order permitting the examining magistrate to correct the transcript of his proceedings by changing the spelling of the name of the complaining witness from "Adolph Hennig" to "Adolf Hennig" is not prejudicial to a defendant who has been familiar with the complainant's identity from the beginning of the prosecution.

3. ———: LARCENY FROM THE PERSON. Under an information charging robbery, accused may be convicted of larceny from the person.

4. ———: ———: INSTRUCTIONS. Where the trial court permits the jury to find defendant guilty of larceny from the person after instructing them that the charge of robbery is not sustained by the evidence, instructions on the law of robbery should not be given.

5. ———: INSTRUCTIONS. Under a charge of robbery, there is no error in the trial court's failure to submit to the jury issues as to simple assault and petit larceny, where the evidence fails to show that either of those offenses was committed.

6. **Larceny from the Person:** WITNESSES: CREDIBILITY: WEIGHT OF EVIDENCE. Where the proofs on behalf of the state are sufficient to support a verdict finding defendant guilty of larceny from the person, the credibility of the witnesses and the weight of their evidence are questions for the jury.

ERROR to the district court for Dixon county: ANSON A. WELCH, JUDGE. *Affirmed: Sentence reduced.*

C. A. Kingsbury and *Kingsbury & Hendrickson,* for plaintiff in error.

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

ROSE, J.

Under a charge of robbery alleged to have been committed in Dixon county, July 6, 1909, Edward Bunge, defendant, was found guilty of stealing from the person of Adolf Hennig, without putting him in fear, property of the value of $8.10. The stolen property consisted of a pocketbook and $8 in money. The sentence imposed by the district court was a term of three years in the penitentiary. By petition in error defendant now presents for review the record of his conviction.

The substance of the first assignment, if correctly understood, is that the trial court erred in permitting the examining magistrate to correct the transcript of his proceedings by changing the spelling of the name of the complaining witness from "Adolph Hennig" to "Adolf Hennig." The identity of the complaining witness was established by the proofs beyond any question. He accused defendant of the robbery in the presence of witnesses before they separated the morning the offense was committed. The preliminary examination shows that defendant knew who accused him of the robbery. The given or Christian names, Adolph and Adolf are *idem sonans,* and the change in the transcript was clearly immaterial. In any event the record shows conclusively that defendant was in nowise prejudiced by the correction.

It is next argued that the trial court erred to the prejudice of defendant in instructing the jury as follows: "The evidence in this case is insufficient to sustain a verdict finding the defendant guilty of forcibly and by violence or by putting in fear the said Adolf Hennig, and taking any money or personal property from the said Adolf

Hennig, with the intention to rob or steal the same. But the court instructs you that, under the information in this case, you can find the defendant guilty of stealing the property described in said information from the person of said Adolf Hennig, without putting him in fear by threats or the use of force and violence, if you find from the evidence, beyond a reasonable doubt, that at the time and place stated in the information the defendant did take from the person of the said Adolf Hennig the property so described in the information, without putting the said Adolf Hennig in fear by threats or use of force and violence, with the intent to steal, take and carry the same away, and without the consent of said Adolf Hennig."

In criticising this instruction defendant asserts it practically directs the jury to find him guilty of larceny, and he argues it was the duty of the trial court to instruct them on the law of robbery, there having been no direction on that subject. The rulings of the trial court are not open to defendant's criticism. The charge of robbery included the lesser offense of larceny from the person. Under an information charging robbery, accused may be convicted of stealing property from the person. *Brown v. State,* 33 Neb. 354, 34 Neb. 448. The instruction did not permit the jury to find defendant guilty of larceny from the person, unless they found from the evidence beyond a reasonable doubt that he committed that offense. In directing the jury that the evidence was insufficient to sustain a conviction for robbery, the trial court ruled in favor of defendant, and the effect was to acquit him of the graver offense charged. Afterward it would have been improper to instruct the jury on the law of robbery. Defendant also suggests that petit larceny and simple assault were included in the charge of robbery, and complains because the trial court did not on its own motion submit those issues to the jury. Such a course was not warranted by the evidence.

Another instruction assailed as erroneous reads as follows: "If you find from the evidence, beyond a reasonable

doubt, that at the time and place stated in the information the defendant, either by himself or assisted by the said Ed Maughan, did take from the person of said Adolf Hennig, without putting him in fear by threats or use of force and violence, the property described in said information, or any part thereof, with intent to steal, take and carry the same away, and without the consent of said Adolf Hennig, and that the property so taken was of value, then you will find the defendant guilty of larceny from the person of said Adolf Hennig, without putting him in fear by threats or the use of force and violence."

When the offense was committed, Ed Maughan was present. He was also charged with the robbery, but defendant was separately tried. The complaining witness testified to having been assaulted by Maughan. Five other persons were present at the time, and in view of these facts it seems to be the contention of defendant that the instruction in some way authorized the jury to hold him accountable for the doings of others. "If a crime was committed," says the brief, the giving of the instruction "narrows the evidence down to the defendant alone and takes from the jury any other consideration of the evidence." The question for the determination of the jury was the guilt or innocence of defendant. They were not permitted to convict him unless the evidence of his own acts satisfied them beyond a reasonable doubt that he was guilty. If the crime was committed by some one else, and not by defendant, the instructions as a whole required a verdict of not guilty. The instruction is not challenged on any meritorious ground.

A reversal is also sought on account of the insufficiency of the evidence to sustain the verdict, but a careful examination of all the proofs has failed to disclose a reason for interfering with the conviction on this ground. Hennig, the complaining witness, was a German 27 years old. For four months prior to the commission of the offense charged he lived at Concord, Dixon county, and during that time was there engaged with a partner in the livery business.

Before that, after coming from Germany, he had been a farmer in Thurston county 11 years. Some of the facts to which he testified positively are, in substance: In a spring wagon containing three seats he conveyed defendant, his companions and some gaming paraphernalia from Concord to German Hall, where a celebration or dance was in progress in the afternoon, subsequent to their arrival, and which was continued during the night following. He was unable to collect his livery bill until evening, and then only succeeded in doing so with the aid of a marshal. He finally received eight silver dollars, which he put into his pocketbook. Defendant kept him under surveillance during the night. Next morning, before daylight, the gambling devices were loaded into his wagon and he drove to Emerson in a rain with defendant, Ed Maughan and four other passengers. He occupied the right end of the front seat and shared the other end with one of the passengers. Defendant sat directly behind him in the middle seat with Ed Maughan and Pete Mortenson. The other passengers sat in the rear seat. Before reaching Emerson, Maughan climbed into the front seat beside Hennig and demanded $2 in change, saying he had previously given him a 5-dollar bill for the livery hire which amounted to $3 for the trip. Hennig denied the receipt of the 5-dollar bill, but through fear of violence offered Maughan his pocketbook containing $8. The offer was refused, and Hennig put the pocketbook in his overcoat pocket on his right side. Pretty soon he "felt some one in his pocket," to use his own expression, and immediately missed his pocketbook. Turning around he saw it between defendant's legs, and said: "You stole my pocketbook." Hurrying to a livery barn at Emerson, he told the manager in charge of it that defendant had robbed him, and promptly called for a marshal. In the meantime defendant went alone to the rear of the barn. Later the empty pocketbook was found near the place thus visited by defendant, and it was positively identified at the trial as the one stolen when it contained $8. The proof

of these facts, when considered with other circumstances which need not be related, is sufficient to sustain the verdict of guilty. Though the larceny was denied and much of the state's testimony contradicted by defendant, the credibility of the witnesses and the weight of the evidence were questions for the jury. All of the assignments have been examined without finding an error prejudicial to defendant.

BY THE COURT.

A careful consideration of the entire record leads to the conclusion that the sentence of three years is excessive and that a sentence of one year will meet the demands of justice. The sentence is therefore shortened to one year, and as thus reduced the judgment is

AFFIRMED.

JOHN WELSH, APPELLEE, V. SARPY COUNTY, APPELLANT.

FILED SEPTEMBER 26, 1910. No. 16,133.

Judgment: CONCLUSIVENESS. "If to a petition or pleading in an action a general demurrer is interposed, and the pleading is determined defective for the want of a material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked is supplied, constituting the pleading sufficient as a statement of a cause of action, the judgment in the first case is not a bar to the second suit, though both were instituted to obtain the enforcement of the same right." *State v. Cornell*, 52 Neb. 25.

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

Ernest R. Ringo, for appellant.

James T. Begley, contra.

FAWCETT, J.

Plaintiff was appointed bailiff of the district court for Sarpy county, and discharged the duties of that office for

23 days. The statute fixes the compensation for such services at $2 a day. He filed a claim with the board of county commissioners for the amount due, but failed to make the oath required by section 38, ch. 28, Comp. St. 1909. The board disallowed the claim, whereupon plaintiff appealed to the district court. In that court the county attorney filed a demurrer containing two counts: First, that the court was without jurisdiction of the person of defendant, or the subject of the action; and, second, that the petition did not state facts sufficient to constitute a cause of action. The record then recites: "This cause now coming on to be heard upon the demurrer of defendant to the petition of plaintiff, in that said petition fails to state a cause of action; the court having heard the argument of counsel, and being fully advised in the premises, sustains said demurrer; whereupon plaintiff dismisses this action without prejudice to the commencement of a new action." Thereupon plaintiff filed a second claim with the commissioners, with the proper oath. The claim was rejected, and plaintiff again appealed to the district court. On the second appeal defendant set up the former proceedings as a bar to plaintiff's action. There was a trial to the court without the intervention of a jury, and a finding and judgment in favor of plaintiff for the amount of his claim. Defendant appeals.

The admissions of defendant in its answer and in the record upon the hearing are that the claim is in due form, that plaintiff was regularly appointed bailiff and served the number of days claimed, and that the amount demanded is the amount allowed by law. We are utterly at a loss to understand why the county commissioners rejected this claim. It is just as much the duty of county commissioners to pay honest claims as it is to refuse to pay dishonest demands; and where commissioners, in disregard of their plain duty, reject an honest claim, it is no part of the duty of the legal department of the county to resort to persistent legal proceedings in an attempt to aid the commissioners in the perpetration of the attempted

wrong. Viewed from any standpoint, the defense in this case is utterly without merit. Counsel for defendant relies upon *Richardson County v. Hull,* 24 Neb. 536; but that case is in no manner in point. There the claim was filed with the county board and rejected. Claimant appealed to the district court. In the course of proceedings in the district court the appeal was dismissed. He subsequently commenced a second action in the district court, and we held that the dismissal of the appeal in the former action was a final disposition of the case. The effect of the dismissal of the appeal was to leave the judgment of the commissioners in full force and effect. The further point decided in that case was that the district court, upon the second hearing, was without jurisdiction for the reason that a claim must first be filed with the board, which was not done in that case.

But it is needless to spend time discussing this case. The question has been decided, and correctly disposed of, adversely to defendant's contention, both in this court and in the supreme court of the United States. *State v. Cornell,* 52 Neb. 25; *Gould v. Evansville & C. R. Co.,* 91 U. S. 526. In the *Cornell* case we held: "If to a petition or pleading in an action a general demurrer is interposed, and the pleading is determined defective for the want of a material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked is supplied, constituting the pleading sufficient as a statement of a cause of action, the judgment in the first case is not a bar to the second suit, though both were instituted to obtain the enforcement of the same right." Precisely to the same effect is the *Gould* case.

There are other reasons which could be assigned in support of the judgment of the district court, but we deem it unnecessary to refer to them.

AFFIRMED.

ORVILLE R. LAMB ET AL., APPELLANTS, V. EDWIN A. FINCH ET AL., APPELLEES.

FILED SEPTEMBER 26, 1910. No. 16,135.

1. Venue: ACTION TO RECOVER MONEY. In an action for the recovery of money, when the defendant is a non-resident of the state, where it does not appear that there is property of, or debts owing to, the defendant in the county where such action is brought, such action cannot be instituted before the defendant enters the county.
2. ———: ———. In such a case the rule as to residents and non-residents is the same.

APPEAL from the district court for Perkins county: HANSON M. GRIMES, JUDGE. *Affirmed.*

B. F. Hastings, for appellants.

Wilcox & Halligan, contra.

FAWCETT, J.

On May 25, 1908, plaintiffs filed their petition and precipe for summons in the district court for Perkins county. On the same day summons was issued and delivered to the sheriff for service. On May 28 the summons was served upon defendant Edwin A. Finch. Defendant appeared specially and objected to the jurisdiction of the court over the person of defendant for the reasons: (1) That defendant is a resident of the state of Colorado, and was not within Perkins county nor the state of Nebraska at the time that the petition was filed; (2) that he was not in the said county or state at the time the summons was issued. The objections are supported by uncontradicted affidavits which fully establish defendant's contention. The district court sustained the objections to jurisdiction, and, plaintiffs electing to stand upon the service had, dismissed the action with costs. Plaintiffs appeal.

Defendant relies upon *Coffman v. Brandhoeffer,* 33 Neb. 279; *Davis v. Ballard,* 38 Neb. 830; *Hoagland v. Wil-*

cox, 42 Neb. 138, and *Hanna v. Emerson, Talcott & Co.*, 45 Neb. 708. Plaintiffs rely upon section 59 of the code and *Adair County Bank v. Forrey*, 74 Neb. 811. We are unable to find anything in the *Forrey* case that will aid plaintiffs in this. The question in that was whether in an action against two or more nonresident defendants, and service was properly obtained on one of them in one county, the summons could be sent to another county for service upon the others. We held that it could, and that "a nonresident of the state who may be found therein is as liable to service as a resident." We think the converse of that is equally true, viz.: A nonresident of the state is not more liable to service than a resident, where the service is attempted to be made under that clause of section 59 of the code which provides that an action may be brought against a nonresident in any county in which there may be property of, or debts owing to, said defendant, "or where said defendant may be found." Section 60, upon which defendant's authorities are predicated, provides: "Every other action (than those enumerated in sections 51 to 59 inclusive) must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned." The difference between sections 59 and 60 is in phraseology merely, and not in substance. The meaning in each is that an action may be brought in any county where the defendant resides or may be found and summoned. So far as this provision for bringing an action is concerned, the legislature has not made any distinction between residents and nonresidents, and we cannot make any. The fact that the legislature in section 59 has given other grounds for bringing an action against a nonresident cannot be held to have either enlarged or restricted the one under consideration. It follows that, this action having been brought and summons issued before defendant entered the state, the service was ineffectual to give the court jurisdiction of the person of defendant. The action was therefore properly dismissed. See defendant's citations *supra*.

AFFIRMED.

IN RE ESTATE OF CATHERINE HANSEN.

MARY JUEL ET AL., APPELLANTS, V. PETER HANSEN ET AL., APPELLEES.

FILED SEPTEMBER 26, 1910. No. 16,117.

1. Wills: CONSTRUCTION. If husband and wife join in an instrument in form of a joint will, which disposes only of property of which the husband is the sole owner, it will be sustained as the will of the husband.
2. ———: ———: DEVISE OF HOMESTEAD: PRESUMPTIONS. If from the language used by the testator it is doubtful whether he intended to devise his real estate in fee simple to his wife or only a life estate therein, the fact that the real estate is their homestead and the law would give her a life estate therein, and that the will contains no other provision changing the statutory disposition of his property, should be considered in determining the true meaning of the will in that respect. In such case the presumption that the testator knew the statutory provision and intended to change or modify the disposition which the law would make will be indulged to aid in determining the intention of the testator.

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

M. D. King and *J. L. McPheely,* for appellants.

Lewis C. Paulson, contra.

SEDGWICK, J.

Christian Hansen and Catherine Hansen executed a written instrument as their joint will. They were husband and wife, and Christian Hansen was then the owner of 80 acres of land in Kearney county, upon which they were living as their homestead. After the death of Mr. Hansen, Mrs. Hansen deeded the land to their son Martin, under which deed he claims to be sole owner of the land. After the death of Mrs. Hansen, other children of Mr. and Mrs. Hansen brought this action claiming an interest in the land as heirs of their father. The questions presented

are whether the instrument executed as a will by two persons jointly is valid for any purpose, and, if so, did it devise a fee title with power to sell and convey, or only a life estate?

1. The substance of the instrument is as follows: "Whereas we, Christian Hansen and Catherine Hansen, husband and wife, of Kearney county, Nebraska, are advancing in years and knowing the uncertainty of this mortal life, although we, at present, have fair health and sound mind and memory does hereby make and publish this our last will and testament (thanks be to God that we have some property in our declining years to bequeath) in manner and form following, that is to say: First. We, or either of us, give and bequeath all our separate or joint property both real and personal to the one of us that shall overlive and survive the other. Second. The survivor is hereby appointed executor and administrator without bond of the entire estate of the deceased. Third. After both our death we severally request that our property be equally divided among our children, share and share alike, in case any of our children shall die in our lifetime, leaving issue and descendants, we direct that his or her share shall not lapse, but shall be passed to such descendants in equal proportions. In witness whereof we and each of us have hereunto subscribed our names in Minden, Kearney county, Neb., this the 30th day of November, 1894." It was signed by both parties and attested in statutory form.

In *Walker v. Walker,* 82 Am. Dec. 474 (14 Ohio St. 157), which is cited by the plaintiffs, the court held: "An instrument by which a husband and wife jointly attempt to make a testamentary disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either, or of both. Such an instrument is in its nature irrevocable, and contravenes the policy of the law." Several authorities are cited by the court, some

agreeing with the conclusions therein reached, and others apparently holding a contrary doctrine. It appears from a note to this case in the American Decisions that the doctrine has been somewhat limited by the same court in *Betts v. Harper,* 39 Ohio St. 639. In those authorities which have found objection to the execution of joint wills the reason generally assigned appears to be that "it is of the essence of a will that it is revocable," and that such a writing, being in the nature of a compact, if it should be held valid would interfere with the freedom of revoking and altering the will by the testator. This objection does not seem to the writer to be insurmountable, but it is not necessary to determine the general question discussed in the Ohio decision now under consideration. The opinion in that case expressly distinguishes it from the case which we now have before us. In discussing the matter that court used the following language: "Nor is this the case of a will where A and B join in the execution of what is, in form, a joint will, but which only disposes of property of which A is the sole owner—as shown by evidence *aliunde* the will. Such an instrument has been sustained as the several will of A; B, having nothing on which the will could operate, being held to be a mere cipher in the transaction: *Rogers et al., appellants,* 11 Mo. 303." It is conceded in the case which we are considering that the land in question was the sole property of Christian Hansen, and that Mrs. Hansen had no property of her own at that time, and had no interest in the land in question except that she occupied it with her husband as their homestead. This will then, though joint in form, is in substance only the will of Christian Hansen, and as such was undoubtedly rightly probated as his will.

2. Does the will give Mrs. Hansen the fee title in the land in question or only a life estate? Our statute provides: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear, by the will, that the devisor intended to

convey a less estate." Comp. St. 1909, ch. 23, sec. 124. This provision appears to have been treated by some authorities as bearing upon the question herein discussed, although there is no question raised as to the estate that the will disposed of, it being considered by all parties that it disposes of the whole interest in the land, the question disputed being to whom the disposition was made, whether in fee to the wife or only a life estate to her and the remainder to the children. In *Bills v. Bills,* 80 Ia. 269, the first clause of the will was: "I give and bequeath to my wife, Irene Bills, all of my real and personal property situated in Jones county, Iowa, except as hereinafter specified," and the fifth clause was: "All the real and personal property herein bequeathed to my wife, Irene Bills, remaining at her decease, I desire to be divided into five equal shares, to Daniel B. Bills and Abigail E. Diviney, and remaining shares to my brothers' two sons, Frank E. Bills and Frederick A. Bills, and Sanford H. Brownell. All of which said several legacies or sums of money I direct and order to be paid to said respective legatees within one year after my decease; and I hereby appoint as my executors of this, my last will and testament, my wife, Irene Bills, and John Bender, of Jones county, Iowa, hereby releasing them from giving bonds, and hereby revoking all former wills by me made,"—and it was held that "the wife takes a fee simple in the realty, and the absolute property in the personalty, the latter clause being merely precatory." The language used in the will in that case was essentially the same as that used in the will under consideration, except the positive direction in the latter that the share of a deceased child shall go to his "issue and descendants," and "shall be passed to such descendants in equal proportions." In this particular the case is to be distinguished from the Iowa case, since in that case it is directed and ordered that the special legacies given to various persons by the second, third and fourth provisions of the will should be paid to them respectively within one year after the decease of the

testator, but there is no such provision as to the residue which he "desired" should be divided as specified in the fifth clause.

We should have found difficulty in supporting the decision of the trial court if it were not for the fact that in no other way can we give any force or effect to the will whatever. The land in question was the homestead of the testator and his wife, and under the statute, in the absence of any will, would have descended to the widow for life, and after her death to the children. We will not presume that the testator intended by his will to dispose of the property precisely as the statute would have disposed of it in the absence of a will. Having in mind that there might be such change in existing conditions as to make it necessary that his wife should dispose of the property, he left it with her to determine whether in the light of subsequent events the property should be equally divided among the children after her decease. The evidence in this case tends to show that he was wise in so doing.

We think that upon the whole record in this case the true construction of the will is that it devised this property to Mrs. Hansén in fee simple, and the judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF HEINRICH J. JURGENS.

FILED OCTOBER 7, 1910. No. 16,140.

Homestead: ASSIGNMENT TO WIDOW: VALUE AND EXTENT. In assigning a homestead to the widow of an intestate, where the estate owes no debts, the value of their homestead as owned and occupied by them at the time of the death of the husband should be adopted in fixing the extent thereof; and its enhanced value created by the industry and economy of the applicant should not be considered.

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

G. W. Prather, for appellant.

F. L. Carrico and *Hague & Anderbery, contra.*

BARNES, J.

This was an application by Anna C. Jurgens, widow of Heinrich J. Jurgens, to assign to her a homestead out of the lands of her deceased husband. The county court denied her application, and on appeal to the district court for Franklin county there was a finding that at the time of the death of said Heinrich J. Jurgens the said above described real estate did not exceed in value the sum of $2,000 above the liens and incumbrances thereon, and the following judgment was rendered: "It is therefore ordered, adjudged and decreed that said above described real estate, to wit, the northeast quarter of section 10, township 14, range 16 west of the sixth P. M. in Franklin county, Nebraska, be and the same is hereby assigned to the said Anna C. Jurgens for and during the term of her natural life, and that the minor heirs, to wit, George Jurgens, Jurgen Jurgens, Rezena Jurgens, Ona Jurgens and Anna Jurgens share with her in the rents, issues and profits of said homestead during their minority. To which findings, decree and judgment the guardian *ad litem* excepts." From that order the guardian *ad litem* has appealed to this court.

It appears that in the month of October, 1899, Heinrich J. Jurgens purchased and took possession of the east half of section 10, township 14 north, of range 16 west of the sixth P. M. in Franklin county, Nebraska, under a contract for a warranty deed, the purchase price being $8,000, $2,000 of which was paid at that time; that the petitioner and her husband selected the north half of the said tract, the same being the land now in question, as their homestead, and resided thereon until her husband's death, which occurred on the 28th day of June, 1901; that at that time the remainder of the unpaid purchase price of the

half section amounted to about $6,500; that the petitioner, together with her minor children, have resided on the northeast quarter of said section 10 as their homestead continuously until the present time; that they have cultivated and improved the land, and by their industry and economy have paid the remainder of the purchase price, together with other debts owing by the deceased at the time of his death, amounting to about $700; that on the 10th day of September, 1908, the widow filed her petition in the county court for the assignment of the said northeast quarter of said section as her homestead; a guardian *ad litem* was appointed for the minor heirs, and upon a hearing before the county judge her petition was denied, and she thereupon prosecuted an appeal to the district court where a trial resulted in the order and judgment above quoted.

It is now contended by the guardian *ad litem* that the district court erred in holding that, in assigning the petitioner's homestead, its value and extent should be determined as of the date of the death of her husband, and this is the main question presented for our determination. By the terms of section 17 of the homestead act (laws 1879, p. 57, Comp. St. 1909, ch. 36) the land in question in this case descended in fee on the death of the intestate to his children, subject to the life estate of the widow. In construing the provisions of the homestead law it was said in *In re Hadsall*, 82 Neb. 587: "The title to the lots in question was in Henry B. Hadsall at the time of his decease. It was his homestead. On his death a life estate therein vested in his widow, the applicant herein, and the fee vested in his heirs subject to the widow's life estate. This homestead was not an asset of the decedent's estate or subject to administration, and we are unanimous in the opinion that all claims against the estate of whatever kind or nature must be paid out of the assets belonging to the estate." It seems clear, therefore, that the homestead which vests at the death of an intestate in the survivor for life is the identical homestead in quantity and

value defined in section 1 of the act of 1879, and the statute recognizes none other.

It is claimed, however, that the applicant having by her industry and economy paid the remainder of the purchase price of the half section of land of which her husband died seized, together with the other debts owing by his estate, and having placed valuable improvements on that portion of it occupied as a homestead, thereby materially increasing its value, she is not entitled to have the whole homestead of 160 acres assigned to her, and that she is only entitled to so much of it as is now at this time worth $2,000. We do not think this view should be adopted. The law is well settled that, if a creditor of the deceased debtor claims that the homestead exceeds in value the statutory amount, its worth at the time of the decedent's death will govern. 21 Cyc. 576; *Parisot v. Tucker, Adm'r,* 65 Miss. 439, 4 So. 113; *McLane v. Paschal,* 74 Tex. 20, 11 S. W. 837. We are of opinion that the same rule should govern in the matter of the assignment of a homestead when petitioned for by the widow of an intestate.

It is further contended that the court erred in refusing to receive evidence of the amount and value of the improvements placed upon the land by the petitioner, but in view of the rule above announced such evidence was clearly immaterial, and the court did not err in excluding it.

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

AFFIRMED.

J. M. LEIDY, APPELLANT, V. STORZ BREWING COMPANY, APPELLEE.

FILED OCTOBER 7, 1910. No. 16,635.

1. **Intoxicating Liquors: APPEAL: NOTICE: TRANSCRIPT: JURISDICTION.** In an appeal by remonstrators from the decision of a licensing board granting a liquor license, jurisdiction is con-

ferred upon the district court by giving notice of the intention to appeal and filing a transcript of the proceedings had upon the hearing before the board immediately or as soon as the transcript can, by the exercise of reasonable diligence, be obtained.

2. ———: DISMISSAL OF APPEAL. The protestant failed to give notice of his intention to appeal, and delayed the filing of his transcript in the district court for 14 days after he had obtained the same, without any reasonable excuse for such delay. *Held*, That the district court did not err in dismissing the attempted appeal.

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

L. D. Holmes, Elmer E. Thomas and *W. R. Patrick*, for appellant.

John P. Breen, contra.

BARNES, J.

The Storz Brewing Company applied to the board of fire and police commissioners of the city of Omaha for a wholesaler's license to enable it to sell the product of its brewery. One J. M. Leidy filed a protest to the granting of the license, a hearing was had thereon, and on the 4th day of January, 1910, the protest was overruled and the license was granted. The protestant excepted, and caused the following order to be entered of record: "The protestant, J. M. Leidy, excepts to the ruling and order of the board, and requests that the record be made up in this case, and that said record be furnished to him, as required by law; but protestant does not at this time give notice of appeal to the district court, but reserves the right to give such notice hereafter." No notice of appeal was ever given, but on the 24th day of January a transcript of the proceedings of the board was filed in the district court for Douglas county. Meanwhile the applicant presented to the proper authorities a good and sufficient bond; paid to the city treasurer the sum of $1,000, amount required for a license, and the same was duly

issued to him within a few days thereafter. On the 9th day of February the district court dismissed the appeal because the same was not taken in time, and from that order the protestant has prosecuted this appeal.

It is contended by appellant that his appeal was prosecuted in time, and that his delay in not filing his transcript in the district court until the 24th day of January, 1910, was not caused by any negligence on his part, but was due to the negligence of the officers to furnish him a proper transcript. The undisputed facts disclose, however, that the transcript of the proceedings was delivered to the appellant on the 10th day of January, and that he failed and neglected to present the same to the mayor for his signature until the 24th day of that month, and after obtaining such signature filed the same. There is no showing that any of the officers failed to properly and speedily perform their duties in preparing and furnishing the transcript, and no reasonable excuse is shown on the part of the appellant for his delay in filing it as soon as it was received by him. In *Lydick v. Korner*, 13 Neb. 10, a similar question was before the court, and Judge MAXWELL in writing the opinion said: "This being the case, an appeal from the decision of a city council overruling a remonstrance against issuing a license to sell liquor must be taken immediately after the order is made. That is, as soon as the transcript can with reasonable diligence be prepared it must be filed in the district court and the case docketed. No undertaking is given to stay the proceedings, and the city council and the party applying for license have a right to know that an appeal has been taken. The testimony taken before the city council must be reduced to writing, and should be certified by the presiding officer as all the testimony taken, as the statute seems to require the judge of the district court to decide the case upon such evidence alone. In this case the transcript was not filed in the district court and the appeal docketed until 60 days after the order appealed from was made. This gave the district court no jurisdiction, and the license

having been issued after a reasonable time had elapsed from the time the order appealed from was made, and before any appeal was taken, was a valid license, and the mere notice of an intention to appeal without actually taking an appeal did not affect its validity."

In the case at bar it is true that 60 days had not elapsed before the filing of the transcript in the district court; but it was held in *State v. Trustees of Village of Elwood*, 37 Neb. 473, that "an appeal by a remonstrant from an order of a village board under the provisions of section 4, ch. 50, Comp. St. 1893, in order to have the effect of a stay and prevent the issuing of license to the applicant, must be taken immediately and perfected as soon as a transcript can with reasonable diligence be procured and filed in the district court." In that case an unexplained delay of ten days in filing the transcript was declared to be an unreasonable delay.

Again, it appears in the case at bar that appellant never gave any notice of appeal either to the board or to the appellant, and it has been held by an unbroken line of authorities that in order to effect an appeal in such a case notice of appeal must be given. In *State v. Board of Fire & Police Commissioners*, 76 Neb. 741, it was said: "An appeal from the decision of the board in granting a liquor license is taken by giving notice of the intended appeal, and procuring a transcript of the record of the proceedings before the board, and filing the same in the appellate court." In *Clark v. Foltyn*, 82 Neb. 610, it was held: "In an appeal by remonstrators from the decision of a licensing board granting a liquor license, jurisdiction is conferred upon the district court by giving notice of the intended appeal, and filing within a reasonable time in said court a transcript of the proceedings had upon the hearing before the licensing board." In *State v. Bonsfield*, 24 Neb. 517, it was said: "Where an application is made to the city council for a license to sell intoxicating liquors, to the issuance of which a remonstrance is filed, and upon a hearing a license is ordered to issue, it is the

duty of the council, upon notice of appeal being given, to withhold the license until the expiration of a sufficient time within which an appeal may be taken to the district court by the remonstrants." In fact, whenever this court has spoken on the question it has made it plain that, in order to effect an appeal from the decision of the licensing board, the remonstrators or protestants must immediately give notice of their intention to appeal, and without any unnecessary delay file a transcript of the proceedings in the district court.

It appearing in this case that no notice of appeal was given, and that there was an unreasonable, unnecessary and unexplained delay in filing the transcript in the district court for Douglas county, we are of opinion that the appeal was properly dismissed, and the judgment of the district court is, therefore,

AFFIRMED.

JOHN O. ANDERSON, APPELLEE, V. IRA P. GRISWOLD, APPELLANT.

FILED OCTOBER 7, 1910. No. 16,604.

Appeal: DILIGENCE: DISMISSAL. Where an appellant fails to exercise due diligence in the prosecution of an appeal to this court, without reasonable excuse, his appeal will be dismissed on motion.

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

George C. Gillan and *John H. Linderman,* for appellant.

H. D. Rhea and *E. A. Cook, contra.*

LETTON, J.

This is a motion to dismiss the appeal. The grounds of the motion are: That the appeal was not taken within six months; that the pleadings upon which the case was

tried in the district court are not made a part of the transcript; that no precipe has been filed in this court as required by rule 13 of this court; that no notice of appeal has been issued and served, and that no briefs have been served and filed in the case. Section 592 of the code provides: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within six calendar months after the rendition of the judgment or making of the final order complained of." Section 675 of the code, in addition to the requirement that a transcript shall be filed in the supreme court within six months from the rendition of the judgment or the overruling of a motion for a new trial in the case, contains the further provision that "the filing of such transcript shall confer jurisdiction in such a case upon the supreme court." In *Bickel v. Dutcher,* 35 Neb. 761, it is held: 'The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings of the district court." This rule is followed in *Ward v. Urmson,* 40 Neb. 695; *Norfolk State Bank v. Murphy,* 40 Neb. 735; *Morrison v. Gosnell,* 76 Neb. 539.

The transcript before us discloses that the final judgment was not recorded in the journal of the district court until the 29th day of September, 1909. The transcript being filed in this court on March 29, 1910, was, under the rule which excludes the first day and counts the last, filed on the last day upon which an appeal might be perfected. The court thereby acquired jurisdiction of the appeal.

The next question presented is whether the appeal should be dismissed for want of prosecution. Section 675*b* of the code provides: "It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was ren-

dered, within 90 days after the rendition thereof, a notice of intention to prosecute such appeal, signed by the appellant or appellants or his or their attorney of record, but if such notice is not given, the supreme court may provide by rule for notice after the appeal is lodged in that court." No notice of such intention was filed in the district court. Section 675c of the code provides: "The supreme court shall by general rule provide for the filing of briefs in all causes appealed to said court." Pursuant to these sections of the statute, this court adopted rules governing the time of filing briefs, and the giving of notice of appeal. These rules until changed by this tribunal have the force of law. Rule 9, so far as applicable, is as follows: "At the time of docketing each *civil* case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as 'Rule Day,' within which the plaintiff, appellant or relator shall serve his brief of points, which shall be separately stated and numbered, together with his citations in support thereof, on the opposite party or his attorney of record, which rule day shall be not less than 90 days before the date of hearing so estimated by the clerk." Rule 13 provides: "The party or parties appealing shall file with the transcript a precipe, which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The precipe shall also specify the party or parties appealing, and designate all others made parties to the appeal as appellees." Rule 14 provides: "Upon the filing of said transcript and precipe, where no notice of appeal has been filed in the district court within 90 days after the rendition of the judgment or decree, the clerk shall issue a notice of appeal, which shall designate as appellants the names of the parties joining in the appeal, and as appellees the names of all other parties. It shall also designate the court from which the appeal is taken, the date of judgment

appealed from, and separately state the names of the parties plaintiff and the parties defendant, respectively, in the district court. The notice shall be returnable within 30 days after it is issued, and shall be served upon the appellees named therein or their attorney or attorneys of record in the district court. The service shall be made by the sheriff of the county in which the parties or attorneys may be found, and as provided by law for the service of summons in civil actions in the district court. The issuing and service of the notice may be waived by writing, signed by the parties to be served, but neither such waiver nor the filing of notice of appeal in the district court will dispense with the filing of the precipe."

The rule day fixed for the filing of briefs in this case was July 29, 1910. No precipe was filed with the transcript as required by rule 13, nor up to the time of the filing of this motion, and no briefs have been served and filed by the appellant. The failure to serve notice of appeal does not affect the jurisdiction of the court. *Shold v. Van Treek*, 82 Neb. 99. This court, however, has the same power and duty with respect to regulating practice and proceedings before it that are possessed by courts generally. This includes the power to dismiss a case for want of prosecution if no good and sufficient cause is shown for the delay; otherwise, a malicious or spiteful litigant or a careless attorney might delay the trial of an appeal in such a manner as to harass and wear out his opponent. The necessary delay caused by appeal is vexatious enough at best, and to allow the prolongation of a controversy at the will and by the procrastination of a litigant would be a gross injustice. This power extends to the length of dismissing an appeal for want of compliance with the rules of court governing the giving of notice of appeal and the filing of briefs.

In *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, it appeared that the cross-appellant did not file any cross-assignment of errors or any brief until more than 13 months after the judgment was entered in the dis-

trict court, and more than 8 months after the transcript was filed in this court. Rule 35 of this court provided: "Such brief must be filed within 30 days after service of notice of appeal upon them, or within the same time after having waived such service, or within the time limited by statute for appealing." The court said: "The typewritten or printed brief, which shall contain only the errors complained of, was not filed within 30 days after the service of notice of appeal upon Mrs. Humphrey and the Wheelers, nor within the time limited by statute for appealing. The failure of Mrs. Humphrey and the Wheelers to comply with the provisions of the statute and the rules of the court deprives them of the right to now perfect their cross-appeal, and the motion to reinstate the cross-appeal should be overruled." See, also, *Cathers v. Glissman*, 80 Neb. 384.

We are not unaware of the fact that notice of an appeal is not always necessary to constitute due process, and that a statute may provide that litigants must take notice, but in this state both the statute and rules provide for such notice, and it is a wise provision. An affidavit has been filed that the appellee's attorney had actual notice of the filing of the transcript in this court. This we deem insufficient as an excuse for lack of diligence. We are the more inclined to apply a strict rule in the circumstances of this case. At the trial a jury was waived, and the cause tried to the court, which rendered judgment on the facts. No bill of exceptions has been filed in the case. The appellant delayed the filing of the transcript until the last day of the six months allowed therefor. Nearly six months thereafter have elapsed, and he has still taken no steps to further his appeal. To judge by appearances his appeal was only taken for delay. We cannot countenance such laches.

The motion, therefore, is sustained, and the appeal

DISMISSED.

JOHN O. YEISER, APPELLEE, V. FRANK A. BROADWELL ET AL., APPELLANTS.

FILED OCTOBER 7, 1910. No. 16,655.

Insolvent Debtor: RIGHT TO EMPLOY ATTORNEY. "An insolvent debtor has the right to employ attorneys to defend his estate and himself, and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated." *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130.

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

Byron G. Burbank, Lysle I. Abbott and *John T. Cathers*, for appellants.

Sullivan & Rait and *John O. Yeiser, contra.*

LETTON, J.

This is the second appearance of this case in this court. The facts are stated in the former opinion, *Yeiser v. Broadwell*, 80 Neb. 718. On the former appeal the judgment of the district court was reversed on account of the denial of a jury trial. After being remanded the case was submitted to a jury, which returned a general verdict for the plaintiff, and also made special findings as follows: "Question 1. What are the services shown by the evidence to have been rendered the Lintons by plaintiff John O. Yeiser reasonably worth over and above the cash payments shown by the evidence to have been made by the Lintons to plaintiff? Answer to question 1. Four thousand dollars. Question 2. Was the assignment by the Lintons to plaintiff John O. Yeiser made in order to hinder, delay, cheat or defraud the creditors or some creditor of the said Lintons? Answer to question 2. No." Judgment was rendered upon the verdict, from which the plaintiff has appealed.

The controversy in this case is over the right to a fund in the hands of the defendant Broadwell, clerk of the district court, arising from rents of property of the Lintons. Yeiser claims the right to the fund by virtue of an oral agreement made in May, 1902, whereby it was agreed that he was employed as attorney to attend to litigation in Nebraska concerning the property of the Lintons, and that the rents and revenue from their real estate should be his and be applied by him in part payment for his services; and by virtue of a written telegraphic order to W. K. Potter, receiver of the Omaha Loan and Trust Company, who had theretofore been collecting these rents, as follows: "Pay John O. Yeiser any money in your hands due the undersigned;" and by virtue of later written instruments, one dated April 20, 1903, directing Broadwell to pay the plaintiff any funds in his hands belonging to the Lintons; and by certain later written assignments and orders, dated in 1904, whereby all the right, title, and interest of the Lintons in and to any rents due or to become due belonging to them were assigned by the Lintons to Mr. Yeiser. The interveners Cathers and Paxton claim the fund by virtue of certain garnishment proceedings instituted on March 23, 1905, whereby it was sought to apply the fund upon a judgment against the Lintons. The issues of fact involved were as to the value of Yeiser's services, and whether the oral agreement and the subsequent assignments and orders by which the money derived from rents was assigned to Yeiser were fraudulent in their nature and void as against creditors.

The evidence establishes that at the time of the alleged oral agreement the Lintons were engaged in extensive and important litigation involving large amounts of money and property, and that Yeiser was the only attorney employed by them. The verdict and special findings of the jury have conclusively settled that Yeiser rendered services exceeding in value the amount of the fund, and that the assignment was made to him in good faith before the garnishment proceedings were begun.

The remaining questions are as to whether the court erred in its statement and application of the law. The appellants strenuously contend that the parol contract made in May, 1902, whereby Yeiser was to act as attorney and to apply the rents of the real estate in payment for his fees, was void, being violative of several provisions of the statute of frauds. We find it unnecessary to consider this question, since Mr. Yeiser's right to the rents does not rest entirely upon the oral contract. Even if we should agree with the appellants' view that the court erred in the admission of the parol agreement as to the rents, still the error could in nowise prejudice them because the evidence clearly shows ample consideration for the subsequent written assignments, which were made long before the garnishment.

Appellants' next contention is that the court erred in submitting a special finding as to the value of Mr. Yeiser's services, and in this connection they complain that the court erred in refusing to give instructions Nos. 5, 6 and 7 asked by them. These instructions were to the effect that the alleged parol contract made in May, 1902, was null and void, that under the pleadings and evidence the plaintiff cannot recover, and that transfers of property by an insolvent client to his attorney are presumptively fraudulent.

Appellants argue as to the first point: That there had been no settlement between Yeiser and the Lintons; that the question of the amount due could not be litigated in this action, and it was error to submit it; but they overlook the fact that the first and second instructions requested by them sought to leave to the jury the question as to the reasonable value of Yeiser's services, and whether they were a full and fair consideration for the assignments. This we think was a proper and necessary inquiry under the issues, and was properly submitted.

Considering the next contentions, the district court instructed the jury in substance that the burden of proof was upon the plaintiff to establish that he gave an ade-

quate consideration for the assignment, and that the burden of proof was upon the appellants to establish that the assignment was made in fraud of the creditors of the Lintons; that if they found from the evidence that Yeiser's services were worth over and above the money paid to him direct as much or more than the amount of the fund, and that the assignment was not made in order to hinder, delay, or defraud creditors, then the plaintiff might recover; but that if the plaintiff had failed to establish that his services were worth the amount of the fund, or if they found that the assignment was made in order to hinder, delay, or defraud the creditors of the Lintons, then they should find for the interveners. The jury were also instructed that the Lintons were insolvent at the time of the assignment, and that transfers of property to an attorney by an insolvent client are to be subjected to close scrutiny, and if the alleged consideration is disproportionate to the services rendered, or if the attorney's charges are exorbitant, such transfers will be set aside; but that fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered in the future.

The relations existing between an insolvent client and his attorney, and the respective rights of client, attorney, and creditor have been fully considered by this court in *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130, 68 Neb. 713. The same contention was then made as to the transaction being presumptively fraudulent. In the first opinion the court say on this point: "The proof is clear that the services performed under the employment were fairly and reasonably worth the amount paid Mosher. The plaintiff practically concedes that fraudulent intent did not exist in this transaction, as a matter of fact, but contends that this transfer is one which the law makes fraudulent. A very able and exhaustive brief has been filed by plaintiff in support of this contention, but, viewed in the light of our statutory enactments and the decisions of our own court, we think the position untenable"—and

held that the question of fraud in such a transaction is one of fact, and not of law, citing section 20, ch. 32, Comp. St. 1899. In the syllabus it is said: "An insolvent debtor has the right to employ attorneys to defend his estate and himself, and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated." In the second opinion it is held that a creditor seeking to attack such a transfer should do so before services to the full value of the property are rendered. In the light of these rules, we are of opinion that the refusal of the instructions complained of was entirely proper, and that the law was properly laid down in the instructions given by the court.

Finally, the appellants strongly urge that the judgment must be reversed on account of the fourth instruction given by the court. This instruction is as follows: "You are instructed that, if you find that the consideration given by the plaintiff to the Lintons for the assignment to him of the fund in question was not equal in value to the amount of said fund, that fact would not of itself render the assignment fraudulent." It is said this is contrary to the rule in *Switz v. Bruce,* 16 Neb. 463, and *Hennecy Buggy Co. v. Ashenfelter,* 60 Neb. 1. We have no desire to change the rule announced in those cases, but since the jury found that the value of Yeiser's services was $4,000; that the transaction was not entered into for the purpose or with the fraudulent intent of defeating the creditors of the Lintons; and since the fund is less than $2,000, this instruction, even if erroneous, could not prejudice the appellants. Moreover, we think this instruction, when considered in connection with the other instructions, correctly states the law as applicable to the facts in this case. Before Yeiser's employment by the Lintons, Cathers had been their attorney. He sought to reach their property for the purpose of paying their indebtedness to him. Long before he had acquired any valid

lien upon this fund, Yeiser accepted employment as their attorney, and rendered continuing services as such, which at the time of the garnishment exceeded in value the amount of the fund. The rents were transferred to him in payment of such services, and were not disproportionate to the value of the contemplated service.

The circumstances of the case are somewhat peculiar, but the findings of the jury settle the facts, and we find no error in the record. The judgment of the district court is, therefore,

AFFIRMED.

FAWCETT, J., not sitting.

VICTOR LITTLE ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1910. No. 16,254.

Burglary: EVIDENCE: ADMISSIONS. If, in a prosecution in the district court of boys under the age of 18 years for the crime of burglary, it appears without dispute that they entered a plea of guilty during their preliminary hearing upon the advice of an officer, who had them in charge, that it would be to their advantage to do so, it is prejudicial error to receive in evidence, over the defendants' objections, proof of the contents of the complaint filed in the lower court and of their plea thereto.

ERROR to the district court for Dawes county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

A. M. Morrissey, for plaintiffs in error.

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

ROOT, J.

In the district court for Dawes county the plaintiffs in error, who will be hereinafter referred to as the defendants, were found guilty of the crime of burglary, and,

from the sentence imposed, have prosecuted error proceedings to this court.

The evidence is uncontradicted that, at the time of the transaction referred to, but one of the defendants was 17 years of age and the other defendants were about 15 years of age; that the defendants were beating their way west on the railway, and after a day in Chadron slept in a box car in the railway yards; that three boys, not implicated in the transaction herein referred to, preceded the defendants, inspected and passed by the refrigerator car alleged to have been burglarized, and noticed that the doors thereof were ajar; that four of the five defendants subsequently entered the refrigerator car, broke open a box therein, and took therefrom five pairs of boots. The boys discarded their shoes, put on the boots, and later gave to young Storms, who did not enter the car, a pair of boots which he substituted for his shoes. Three of the four defendants who entered the refrigerator car testified positively that the doors of the car were open when they approached it. One of the defendants did not testify. Two of the boys who were not implicated in the theft of the boots also positively testified that the doors of the car were partially open before the other boys made their entry therein. A police officer told the defendants, while they were in his custody, that he did not want them to go to the penitentiary, but he believed that if they would go before the judge, plead guilty, and tell him all of the facts, they would get a short sentence in the industrial school. During the afternoon of that day the defendants were arraigned in the county court upon a charge of burglariously entering a railway car with the intent to steal goods of the value of $20. The judge was under the impression that he had authority to commit the defendants to the industrial school. The county judge testified, in substance, that he informed the defendants that, if they were guilty and over 18 years of age, they would be sent to the penitentiary, but, if under that age, would be committed to the industrial school; that they were entitled to counsel

and a trial if they so desired. The defendants thereupon entered a plea of guilty, and the county judge first entered a judgment of conviction, but subsequently made an order binding them over to the district court. During the trial in the district court an employee of the railway company testified that the refrigerator car containing the boots in question arrived in the railway yards in Chadron during the night of the alleged burglary; that the witness inspected the car, and the doors were closed and the seals thereon intact. There is no evidence other than the testimony of the inspector and the admissions of the defendants even tending to prove that the car doors were closed at the time the defendants entered therein. The state was permitted, over the defendants' objections, to introduce the complaint filed in the county court and to prove that the defendants pleaded guilty thereto. The court instructed the jury that they should disregard any evidence of the defendants' admissions if such admissions were induced by promises or threats made the defendants by any person in authority over them.

In the state of the record, it seems to us the defendants' pleas of guilty entered in the county court should not have been received in evidence. The state's witness Hartzell, the policeman in charge of the defendants the day they were arraigned, admitted that he advised the boys to plead guilty. It also appears that the defendants understood they were pleading guilty to stealing the boots but not to the crime of burglary. The difference between the crime of burglary and the misdemeanor of petit larceny was not explained to the boys. In *Heldt v. State*, 20 Neb. 492, Judge MAXWELL states the law: "The rule is well settled that a promise of benefit or favor, or a threat or intimation of disfavor connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement either of hope or fear." See, also, *Heddendorf v. State*, 85 Neb. 747. Generally, where the question is

presented, there is sufficient doubt either as to the existence of menaces or promises, or the effect produced thereby, if they were made, to justify submitting the question to a jury, as was done by the learned trial judge. In the instant case, as we view the record, there was no conflict in the evidence upon this subject. If the defendants' admissions are excluded from consideration, the evidence strongly preponderates in favor of a finding that they did not commit burglary in entering the car. The state is more interested in reforming than in punishing the defendants. The influence of a judgment of conviction for an alleged felony, which quite likely they did not commit, will not, it seems to us, advance the best interests of society or of the defendants.

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

REVERSED.

JOSEPH GUTSCHOW, APPELLANT, V. FRED RAMSER ET AL., APPELLEES.

FILED OCTOBER 7, 1910. No. 16,652.

Mandamus: WHEN ISSUABLE. The writ of mandamus should not be issued if a relator does not establish a clear legal right to the performance by the respondent of the particular duty sought to be enforced.

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

H. C. Brome and *Clinton Brome,* for appellant.

E. B. Carrigan, contra.

ROOT, J.

This is a proceeding in mandamus. The respondents prevailed, and the relator appeals.

The relator is the owner of several tracts of land in the eastern part of Washington county. In 1883 the county commissioners of said county and the county commissioners of Burt county caused an open ditch to be constructed from a point in the last named county south into Washington county so as to connect said drain with Fish creek, a natural watercourse. Subsequently the commissioners of Washington county caused a ditch, designated as the "Hiland" ditch, to be excavated in the path of the ditch first referred to, and in parts of the bed of Fish creek. The facts relative to the location and construction of the Hiland ditch are referred to in *Morris v. Washington County*, 72 Neb. 174, and *Gutschow v. Washington County*, 74 Neb. 794, 81 Neb. 275. In 1909 an alternative writ of mandamus was issued upon the relation of Mr. Gutschow, commanding the respondents, the county commissioners of Washington county, to show cause why they should not forthwith remove obstructions from the bed of Fish creek. Upon a return to the writ the issues joined were tried upon a stipulation of facts and transcripts of proceedings in the matter of the Hiland ditch. In some respects the facts are clearly stated in the stipulation, but in other particulars we are not advised concerning material facts. The trial court would not have been justified in finding from the evidence whether the obstructions in the bed of Fish creek were caused by the construction of the Fish creek ditch in 1883, or by the change in the course of the Missouri river in 1886, or by unusual rainstorms with resulting flood-waters in 1902, or by a combination of those events. The trial court could not say, and we shall not attempt to find, that the bed of Fish creek would not have been obstructed if the commissioners of the aforesaid counties had not constructed Fish creek ditch. If conditions for which the commissioners of Washington county were in nowise responsible caused the obstruction of the channel of said creek, the relator would have no cause of action in the instant case. The relator must show a clear legal right to a performance by the respondents of the duty

sought to be enforced or a writ of mandamus will not be issued. *State v. City of Omaha*, 14 Neb. 265; *State v. Bartley*, 50 Neb. 874. An application for the writ is addressed to the sound legal discretion of the trial court. *Moores v. State*, 71 Neb. 522.

Upon the record presented, we find that the district court did not err in refusing to issue a peremptory writ of mandamus, and its judgment, therefore, is

AFFIRMED.

PETER E. OLSON, APPELLEE, V. NEBRASKA TELEPHONE COMPANY ET AL., APPELLANTS.

FILED OCTOBER 7, 1910. No. 16,654.

1. **Master and Servant**: ASSUMPTION OF RISKS: DUTY OF MASTER. A servant employed by a telephone company as a groundman, but advanced at increased wages to the work of a lineman, by accepting the promotion, assumes all risks ordinarily incident to his new duties and either known to him or obvious to a man of ordinary understanding; but, if the new work involves unusual hazards not obvious to a man of ordinary understanding or known to the servant, the master should exercise reasonable care and caution to instruct the servant and warn him of those dangers.

2. ———: INJURY: BURDEN OF PROOF: INSTRUCTIONS. The court should not instruct the jury that the burden is upon the master to prove his servant was injured in consequence of a danger ordinarily incident to his employment; but if, taking the instructions together, it is apparent an instruction that the burden was on the master to prove his servant was injured in consequence of a danger known and appreciated by him, or which he should have known and appreciated, did not prejudice the master, the error is without prejudice.

3. ———: ACTION FOR INJURY: INSTRUCTIONS. If a telephone company, whose lead of wires was built before an electric light company constructed its wires through the zone occupied by the telephone company, has an arrangement with the electric light company whereby the former can secure the removal from that zone of the electric light wires, and they constitute a menace to the lives of the employees of the telephone company, the court

may, in a proper case prosecuted against the telephone company by one of its employees, instruct the jury concerning the negligence of the master in failing to exercise reasonable prudence to make the place where its employees work reasonably safe, the character of the employment considered, and instruct them concerning the duty of the master to warn its inexperienced employees of the dangers incident to the location of those wires, but not known to the servant or obvious to a man of ordinary understanding.

4. ———: NEGLIGENCE: EVIDENCE: QUESTION FOR JURY. The violation of a city ordinance enacted for the purpose of protecting persons and property from injury may be such proof of negligence as will support an action brought by the injured person against the violator of the ordinance; but it is for the jury to say whether evidence of such violation establishes the defendant's negligence.

5. Appeal: INSTRUCTION: HARMLESS ERROR. In such a case, the mere fact that an instruction is ambiguous, where it is apparent the losing party was not prejudiced thereby, will not justify reversing a judgment amply sustained by the evidence.

6. ———: 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 re-examined in a subsequent appellate proceeding." *Taylor v. Stull*, 86 Neb. 573.

7. Trial: VERDICT: CERTAINTY. A verdict finding for the plaintiff and against each of two defendants in the sum of $10,000, is not rendered uncertain by the addition thereto of the words "to be assessed equally against each of the said corporations," but is a joint verdict against both of the defendants for $10,000.

8. ———: ———: CORRECTION. In such a case, an oral statement by the trial judge to the jury, at the time they returned the verdict, that they had no power to apportion damages, the return to them of the verdict, the striking therefrom by the foreman of the quoted words, and their second return of the verdict without leaving their box, presents no ground upon which the defendant can successfully predicate error.

9. Damages: EXCESSIVENESS. In the case at bar, the evidence tends to prove that the plaintiff at the time he was injured had 38 years' expectancy of life and was earning $2 a day; by reason of his injuries the bone of his left thigh was fractured midway between the knee and hip, so that a broken end was forced through the muscles and flesh of the limb; he suffered and still suffers pain, was in the hospital five weeks, and said limb after the injury was an inch shorter and noticeably smaller than before the accident; his right foot was injured so that he could

not, without suffering pain, bear his weight thereon four years after the accident; his nervous system was severely shocked; he cannot sleep well, and is incapacitated from performing ordinary labor. *Held*, A judgment of $10,000 is not so excessive as to justify this court in reversing the judgment or in compelling a remittitur therefrom.

10. Evidence: SUFFICIENCY. The evidence concerning the defendants' liability examined and discussed in the opinion, and *held* to sustain a finding against each defendant.

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

Greene, Breckenridge & Matters, for appellants.

E. T. Farnsworth, contra.

ROOT, J.

This is an action to recover damages for personal injuries caused, as alleged, by the defendants' negligence. The plaintiff prevailed, and the defendants appeal.

This is the second appeal in this case. The opinions heretofore written are reported in 83 Neb. 735, and 85 Neb. 331. The facts established by the evidence adduced at the first trial are clearly stated in the opinion of our chief justice in 83 Neb. 735, but other evidence received during the last trial impels us to restate the facts.

Twenty-fourth street in the city of Omaha runs north and south, Grant street runs east and west, and enters Twenty-fourth from the east about 50 feet south of the point where it emerges therefrom in its course westward. Some 20 years before the plaintiff was injured the defendant telephone company erected poles and constructed a lead of wires north and south on the west side of Twenty-fourth street. The defendant Electric Light & Power Company for at least ten years prior to said date maintained a line of poles and a lead of wires along the east side of Twenty-fourth street. In 1896 and 1897 the electric light company suspended three electric light wires

diagonally across Twenty-fourth street at the intersection of Grant street. Two of these wires carried a current of 8,000 volts each for arc lights, and the third wire conducted a current of 2,300 volts for incandescent lamps. At the time the accident occurred the ordinances of the city of Omaha provided, among other things, with respect to wires used for the purpose of conducting electricity:

"Section 1. No electric current shall be used for illumination, decoration, power or heating, except as hereinafter provided." This section was received in evidence against the electric light company only.

Rule 33, and that part of rule 28 hereinafter quoted, being parts of said ordinance, were received also in evidence against the electric light company only:

"Rule 28. Wires must be drawn taut to avoid swinging contacts and in such cases the stretches must be short."

"Rule 33. All wires designed to carry an electric light or power current must be covered with a substantial, high-grade insulation not easily worn by friction, and whenever the insulation becomes impaired, it must be renewed at once; this applies to joints which must be soldered and as well insulated as the conductors."

Sections 47 and 48 of said ordinance were received in evidence against both of the defendants and are as follows:

"Section 47. Whenever it is necessary for an electric light conductor to approach or cross the line of any fire-alarm and police-telegraph, telegraph or telephone line, the same shall not approach or cross at a distance of less than five feet either above or below said fire-alarm and police-telegraph, telegraph or telephone wire, and shall be securely fastened on supports placed as near as practical to said fire-alarm and police-telegraph, telegraph or telephone lines, or shall be carried in troughs or boxes across the route of said fire-alarm and police-telegraph, telegraph or telephone line, so constructed and placed as to prevent the electric light and police-telegraph, telegraph or telephone lines coming in contact in case either should break or become detached from fixtures.

"Section 48. That no wires used as conductors for electric lighting purposes shall be so erected or placed as to interfere by contact, induction or otherwise, with the successful operation of any fire-alarm and police-telegraph, telegraph and telephone wire, circuit or instrument."

In February, 1905, the plaintiff entered the employ of the defendant telephone company as a groundman, and worked for it in that capacity in the country until April, 1906, at which time he was transferred to Omaha, and his wages increased. He continued to work in said city as a groundman until transferred to the construction gang, with another increase of wages, June 1. The plaintiff was injured June 28, and for the preceding two weeks had been riding cable. The telephone company had erected a leaden cable about 1½ inches in diameter, which by the use of iron hooks in the form of a figure 8 it suspended from and about six inches below a much stronger parallel wire, referred to as a "messenger." The hooks were attached to the cable before it was elevated, but were not securely closed until after both the messenger and the cable had been suspended from the poles. The telephone company provided its employees with a saddle, so constructed with an upright iron frame and overhead wheels that, when placed in position upon the messenger wire, an operator might sit therein, suspended from the messenger, and travel back and forth at will. The plaintiff was directed by his foreman to occupy a saddle suspended from said messenger and to securely close the aforesaid hooks. The plaintiff testifies, in substance, that he was afraid, and stated the fact to the foreman, with a request for a helper, but none was furnished him, and notwithstanding these facts he continued to work as directed by his foreman.

1. The evidence, to our minds, disposes of the plaintiff's contention that at the time of his injury he was temporarily engaged in work he had not been employed to perform. The evidence clearly proves that Olson had recently before his injury received a promotion, anticipated and desired by him, so that as a matter of law he assumed

the hazard of all dangers incident to the work of a lineman and known to him, or which in the exercise of reasonable care and caution he should have known; but at the time of that promotion, and for a reasonable time thereafter, he was entitled to a warning from his master concerning the hazards peculiar to his new employment not known to him or obvious to a man of ordinary understanding. *Evans Laundry Co. v. Crawford,* 67 Neb 153; *Ferren v. Old Colony R. Co.,* 143 Mass. 197; *O'Connor v. Adams,* 120 Mass. 427. The plaintiff's foreman testifies that he instructed the plaintiff to look out for electric light wires and to always assume they were alive. The plaintiff denies the foreman's statement, and testifies he was given no instruction or warning concerning electric light wires or other dangers he might encounter while riding the cable. The plaintiff was charged with knowledge of the laws of gravitation, but we do not think it can fairly be said, from the evidence before us, that he was called upon to anticipate that the electric light company maintained dangerous live wires within two feet of the telephone wires.

Upon the former appeal, in the state of the record, it was assumed by the plaintiff and by the court, and in nowise denied by either defendant, that, if the electric light wires had been insulated so as to conform to the city ordinance, there would have been no danger from a contact of the saddle frame with the insulated wire, but upon the last trial the superintendent of the electric light company testified, in substance, that such insulation would not prevent a grounded circuit under the circumstances of this case. The law will not impose upon the plaintiff the burden, if uninstructed and ignorant, of comprehending a hazard not obvious to men of ordinary understanding. If, therefore, the telephone company knew or ought to have known the position of the electric light wires with respect to its telephone wires and the messenger wire it had suspended two weeks before the plaintiff was injured, it should have exercised reasonable diligence to warn him of the consequences that would follow a contact of the

saddle with the electric light wires. In this connection it may be said that, but for the testimony of the superintendent of the electric light company, the instruction given by the court at the plaintiff's request concerning a safe place to work would have been erroneous. *Prima facie* the telephone company had no right to disturb the wires of the electric light company, and, having no control over them, the rule that the employer should exercise reasonable care to furnish a reasonably safe place for its employees to work, the nature of the employment being considered, would not apply. 1 Dresser, Employers' Liability, sec. 100. The superintendent testified, in substance, that there was an arrangement between the respective defendants whereby the one desiring to suspend a wire above or below an established wire of the other should notify the company first in possession of the zone, and joint arrangements would be made to provide for the new construction, but that no such notice was given by the telephone company of its intention to construct or suspend a new cable on Twenty-fourth street. It therefore appears that the telephone company in a limited sense had the power to control the electric light wires at the point where the plaintiff was injured, and there was some justification for giving the plaintiff's instruction numbered 3.

2. Instruction numbered 10, given by the court on its own motion, is criticised by the defendants, but is pertinent to the facts disclosed by the record. By instruction numbered 9 the jury were informed "that the plaintiff, by accepting employment with the defendant telephone company, assumed all the ordinary risks of injury caused by the dangers arising from the conditions under which his work was carried on, including the place, appliances and instrumentalities of his work, which were known or apparent and obvious to him or to persons of his experience and understanding, or which should have been obvious or apparent to persons of his experience and understanding in the use of ordinary care." The third instruction relates to the burden of proof in the various aspects of the case,

and is divided into seven subdivisions, some of which are subdivided into several paragraphs. By the fourth paragraph of the seventh subdivision thereof the jury were informed "that the burden of proof is upon the defendant Nebraska Telephone Company to establish by a preponderance of the evidence the defense of assumption of risk (unless the evidence introduced on the part of plaintiff itself shows such assumption of risk by plaintiff); that is, that the injury to plaintiff was in consequence of a danger which he knew and appreciated or ought to have known and appreciated."

Counsel for the defendant telephone company strenuously insist the burden of proof is not upon it to prove that the plaintiff's injury resulted from a risk ordinarily incident to his employment and obvious to a man of ordinary understanding, and we agree with them. *Malm v. Thelin*, 47 Neb. 686; *Missouri P. R. Co. v. Baxter*, 42 Neb. 793; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442; *Evans Laundry Co. v. Crawford*, 67 Neb. 153; *Glantz, Adm'r, v. Chicago, B. & Q. R. Co., ante*, p. 60; *Duffey v. Consolidated Block Coal Co.*, 124 N. W. (Ia.) 609; *Obenchain v. Harris & Cole Bros.*, 126 N. W. (Ia.) 960. It does not necessarily follow that the instruction, if read in connection with the ninth instruction, *supra*, could or did mislead the jury. Following the fourth paragraph of the seventh subdivision of the third instruction, if the jury found from the plaintiff's evidence that the hazard considered in the instant case was an ordinary risk incident to the employment of riding cable, the plaintiff should not recover from the telephone company. The verdict amounts to a finding that the plaintiff's evidence disclosed no such situation. If it did not appear from the plaintiff's evidence that the risk was one ordinarily incident to the employment, that fact could only have been proved by the defendant's evidence. The verdict still being in favor of the plaintiff, the jury must have found that all of the evidence upon this subject did not convince them that the risk was an ordinary incident of riding the cable.

It should be remembered the testimony of the plaintiff and his foreman are in sharp conflict upon one subject, and that is as to whether the foreman warned the plaintiff to look out for electric light wires and to assume they were "hot." If the foreman's testimony is accepted, the plaintiff was to some extent warned of the hazard responsible for his injury, and with that warning he assumed the risk incident thereto. It is probable the court had this testimony in mind when it gave the last paragraph of subdivision 7 of instruction numbered 3. We are of opinion the lower court might have instructed with greater precision upon the subject of the burden of proving an assumption of risk; but, considering all of the evidence and all of the instructions upon this subject, we are of opinion there was no error in instruction numbered 3 prejudicial to the defendant telephone company. Code, sec. 145.

3. The fourth instruction given by the court is as follows: "You are instructed that negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would not hav done. And in this connection you are further instructed that evidence of the violation of a city ordinance is to be taken by you as evidence tending to show negligence on the part of the person or corporation shown to have violated such ordinance; and it is to be considered in connection with all the other evidence in the case in determining that question." Counsel for the defendants say the ordinance relates solely to the duty of the electric light company, and was not violated by the telephone company. If we admit the premises, the conclusion of prejudice does not necessarily follow. The proof is satisfactory that the electric light company did violate the ordinance, and, if the telephone company did not, the instruction could not prejudice it. We do not forget the court received sections 47 and 48 of the city ordinance as evidence against both defendants; but this

evidence was proper for the purpose of proving the duty imposed by the municipal law upon the electric light company, and that the telephone company, by suspending its new cable within five feet of the electric wires, aggravated a situation created by the unlawful acts of the electric light company. The ordinance has some probative force against the telephone company upon the issue of whether it should have warned the plaintiff of the hazard created by the location of the wires. The telephone company ought not to be permitted to say that, because the electric light company was first negligent, the telephone company was not guilty of any negligence. *McKay & Roche v. Southern Bell Telephone Co.*, 111 Ala. 337, 31 L. R. A. 589.

We do not approve so much of the instruction as reads: "The violation of a city ordinance *is to* be taken by you as evidence tending to show negligence on the part of the person or corporation shown to have violated such ordinance." Had the court substituted the word "may" for the words "is to," the instruction would fairly respond to the rule of law announced in *Omaha Street R. Co. v. Duvall*, 40 Neb. 29. We do not think, all of the evidence being considered, this slight deviation from a proper statement of the rule of law worked to the defendants' prejudice.

Counsel for the defendants direct our attention to the criticism in our first opinion of the instructions given by the court with respect to contributory negligence, and respectfully ask us to as zealously safeguard the rights of the defendants upon this appeal as we did those of the plaintiff upon the first appeal. The cause was reversed on the first appeal for error in directing a verdict for the telephone company and in receiving irrelevant and prejudicial evidence over the plaintiff's objections. For the benefit of the trial court we referred to some imperfections appearing in the charge to the jury, so that upon a second trial like errors might not be committed, but we did not say that, if there had been no other errors, the giving of those instructions would have justified a reversal of the case.

4. Instruction numbered 5, requested by the plaintiff and given by the court, responds to the law of the case announced in our former opinions in this case. The principle stated is also supported by authority. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790; *Bott v. Pratt*, 33 Minn. 323. The former opinions of this court, so far as the litigants are concerned, control the trial court and should be followed upon subsequent appeals. *Taylor v. Stull*, 86 Neb. 573.

5. The jury returned a verdict as follows: "We, the jury, duly impaneled and sworn in the above entitled cause, to well and truly try the issues joined between the said parties, do find for the said plaintiff and against the Nebraska Telephone Company, a corporation, and Omaha Electric Light and Power Company, a corporation, and do assess his damages at the sum of ten thousand dollars ($10,000) to be assessed equally against each of the said corporations." The court thereupon orally instructed the jurors they could not apportion damages, and returned the verdict to their foreman. The jurors consulted without retiring, and the foreman, after drawing a line through the last clause in the verdict, delivered it to them. It was examined by all the jurors and returned as their verdict. At the request of the defendant's counsel the jury were polled, and each juror answered in the affirmative to the following interrogatory propounded by the clerk: "Was and is this still your verdict?" The defendants insist the trial judge should not have given an oral instruction to the jury, but, if not satisfied with the verdict, should have returned it with written instructions, and the jurors should have retired to consider the case in the privacy of the jury room.

The court's written instructions permitted the jury to return a verdict in favor of the plaintiff against either or both of the defendants, or in favor of both of the defendants and against the plaintiff. In the verdict first returned the finding is for the plaintiff against both defendants and the damages are assessed at $10,000. There is

nothing on the face of the verdict to suggest that the jury sought to apportion damages, but each defendant is held for the entire recovery. Striking out the last clause of the verdict did not change the liability of either defendant. *State v. Beall,* 48 Neb. 817.

6. The defendants urge that the damages are excessive, the result of passion and prejudice, and that the evidence does not sustain the recovery. Upon this point the proof establishes that the plaintiff, as a result of the electric shock, was thrown from the saddle, 30 feet, to the paved street; he suffered a compound fracture of the bone in his left thigh, and the broken bone, after being forced through muscles and flesh, protruded from the limb, and he was confined to the hospital five weeks. The plaintiff's left leg, as a result of those injuries, is smaller and shorter than its mate; the ligaments in the instep of his right foot were bruised and strained, so that four years after the injury he suffered pain when compelled to bear his weight upon that foot. The shock has seriously affected the plaintiff's nervous system and interferes with his ability to sleep. The testimony is undisputed that those injuries are permanent and the plaintiff cannot perform an ordinary day's labor. Olson has suffered, and for an indefinite period, in all probability, will suffer, severe pain. At the time of the accident the plaintiff's expectancy of life was over 38 years, and he was earning $2 a day. Because of his condition, induced by his injuries, the plaintiff's earning capacity has been almost destroyed. This court cannot compute the compensation that should be awarded for pain suffered, or reasonably certain to be suffered, by the plaintiff, nor can we measure the amount of money he should receive for the humiliation he will endure by reason of his crippled condition, or for a possible decrease in his natural life. While the recovery is considerable, we do not think it is so excessive, all of the elements of damage being considered, that we should either reverse the judgment or compel a remittitur.

7. Counsel insist the evidence will not sustain a verdict

against either defendant. We shall not attempt to restate the evidence. It may be said, however, that the electric light company for ten years prior to the accident had maintained its wires at the intersection of Twenty-fourth and Grant streets in violation of the terms of the city ordinance, and the defendants should be charged with knowledge of that fact. The evidence discloses that the telephone company for some time prior to the accident maintained a cable upon its poles along Twenty-fourth street at the point where the plaintiff was injured, so that the electric light company should be charged with notice of the fact that an employee of the telephone company might ride that cable for the purpose of making repairs without regard to new construction, and it will not be heard to say it should not be held in reason to have anticipated the appearance of the plaintiff at said point. The telephone company, in addition to the notice given to it by the long continued location of said electric light wires, knew through its foreman, in control of the construction and suspension of the new cables, of the dangerous conditions referred to. With that knowledge it directed the plaintiff, a man of slight experience, to ride an iron-framed saddle suspended from the aerial cable, without warning him of the presence of the electric light wires or of the terrible shock he would receive the instant that saddle should so much as touch one of those wires, whether they were insulated or uninsulated.

In our opinion there is sufficient evidence to sustain a finding that each defendant was guilty of negligence and that the plaintiff should recover therefor. The issue of the plaintiff's contributory negligence was properly submitted to the jury, and their verdict finding against this defense is sustained by the evidence. There are some arguments in the defendants' briefs not specifically referred to in this opinion. They have all been considered, but in our judgment they do not raise issues so important as to justify extending this opinion by disposing of them in detail and we shall not make further reference thereto.

Upon the entire record, we find no error prejudicial to either defendant, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

In the second paragraph of the syllabus the law is stated to be that "the court should not instruct the jury that the burden is upon the master to prove his servant was injured in consequence of a danger ordinarily incident to his employment." This, I think, is not the law. It is directly contrary to a large proportion, if not all, of the respectable authorities. See *Duffey v. Consolidated Block Coal Co.*, 124 N. W. (Ia.) 609, and the authorities suggested in the editorial note. By this paragraph of the syllabus and the criticisms in the opinion of the instruction quoted, this court becomes, for the first time, committed to the proposition that it is error to instruct the jury in such cases "that the burden of proof is upon the defendant Nebraska Telephone Company to establish by a preponderance of the evidence the defense of assumption of risk (unless the evidence introduced on the part of plaintiff itself shows such assumption of risk by plaintiff); that is, that the injury to plaintiff was in consequence of a danger which he knew and appreciated or ought to have known and appreciated."

If the plaintiff himself shows in his pleadings or proof that he was guilty of contributory negligence, or that he assumed the risk of the danger complained of, he, by so doing, fails to make a case; but, unless the plaintiff discloses those facts by his own pleadings and evidence, it devolves upon the defendant to allege and prove contributory negligence or the assumption of risk. The rule, I suppose, is the same in regard to both. The opinion cites *Malm v. Thelin*, 47 Neb. 686, and *Glantz, Adm'r, v. Chicago, B. & Q. R. Co.*, *ante*, p. 60, and other cases. In the last named case, in a dissenting opinion, I tried to point out that *Malm v. Thelin* and similar cases are not in point and are not authority for holding that the burden of proof

is upon the plaintiff to show that he did not assume the risk. If the risk which he alleges in his petition is such that the courts will take judicial notice that it is ordinarily incident to such employment as he alleges he was engaged in, or if plaintiff's evidence on the trial shows that the risk complained of is ordinarily incident to his employment, he fails to make a case, unless he can show an exception such as is indicated in *Malm v. Thelin, supra.* The same is also true in regard to contributory negligence, and the rule is invariably applied that the burden of proof is upon the defendant who relies upon it to establish contributory negligence or assumption of risk. The conclusion reached in the opinion is undoubtedly right, and is not dependent upon this erroneous statement of the law. The rule now adopted is the more important because, if adhered to, it must logically be extended to contributory negligence or other defenses, and so introduce confusion into the rules of pleading which have been long supposed to be settled.

FAWCETT, J., concurs in the foregoing dissent.

LETTON, J.

I think the recovery is excessive under the proof, and that a remittitur of $2,500 should be required as a condition of affirmance.

FRANK WARD ET AL., APPELLEES, V. C. T. HOLLIDAY, APPELLANT.

FILED OCTOBER 7, 1910. No. 16,090.

1. Gaming: RECOVERY OF WAGER: DEMAND. "Money wagered on the result of a horse race may be recovered from the stakeholder by the party depositing the same, if, before the stake is paid over to the winner, a demand has been made upon the stakeholder for its return." *Deaver v. Bennett*, 29 Neb. 812.

2. Appeal: HARMLESS ERROR. On appeal, an error or defect in the pleadings or proceedings, when not prejudicial to appellant, is not a ground of reversal. Code, sec. 145.

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

Sullivan & Squires, for appellant.

Silas A. Holcomb and *A. P. Johnson, contra.*

ROSE, J.

Plaintiffs bet $500 on a horse race, deposited the money with defendant as a stakeholder, and lost. Before the deposit was turned over to the winner, defendant was notified to return it to plaintiffs. He refused to do so, and they jointly sued him to recover the sum stated. From a judgment in their favor for the full amount of their claim defendant has appealed.

As a ground of reversal defendant asserts that each of plaintiffs deposited with him a separate sum, and that consequently he is not answerable to them jointly. If the technical rules of pleading and practice required each plaintiff to bring a separate action against defendant, as argued by him, and gave him the privilege of defending two suits instead of one, still he is not entitled to a reversal unless he was prejudiced. Section 145 of the code declares: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Within the meaning of this statute, was defendant prejudiced by being required to answer to plaintiffs jointly? As stakeholder he had in his hands $500 belonging to them. The evidence justifies a finding that before he turned the money over to the winner they made a demand upon him for its return. He was liable for the amount received from

each depositor. *Riddle v. Perry*, 19 Neb. 505; *Deaver v. Bennett*, 29 Neb. 812. Under the evidence he has no valid defense to the demand of either plaintiff. Plaintiffs sued him jointly, alleging the money was jointly contributed by them. There is evidence to sustain the allegation. The money did not belong to defendant, and the winner had no legal claim upon it. The judgment in favor of plaintiffs will protect defendant in returning the amount of their deposit. If there was any error or defect in the pleadings or proceedings, a question not decided, it is clear, therefore, that defendant was in nowise prejudiced. The judgment is

AFFIRMED.

ETHEL CLARK, APPELLEE, V. JACOB FLEISCHMANN ET AL., APPELLANTS.

FILED OCTOBER 7, 1910. No. 16,487.

1. Witnesses: COMPETENCY. In applying the statutory rule that no person having a direct legal interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction between the deceased person and the witness, the real nature of the transaction should be considered.

2. ———: ———. Exceptions to the statutory rule that "every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases" (code, sec. 328) should not be extended by construction beyond the import of the terms used by the legislature.

3. ———: ———. Where a partnership composed of two members buys a school-land contract with firm money for the benefit of the firm and takes the assignment in the name of one of the partners for convenience in transacting partnership business, the purchase is not a transaction between the partners, but between the firm and the holder of the school-land contract; and the death of the partner in whose name the assignment is taken will not prevent the surviving partner from testifying to the real nature of the transaction in a suit by decedent's devisee to recover the land from one claiming title through the partnership, within the meaning of section 329 of the code, which declares:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness."

APPEAL from the district court for Cass county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

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

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

ROSE, J.

The petition contains two counts. The first is ejectment for a tract of land in Cass county, and the second is for the rents and profits thereof for four years prior to the bringing of the suit. Plaintiff claims the land under the will of her father, John W. Clark, who died February 15, 1889. She traces the title to testator in the following manner. The realty described was formerly school land, and was purchased from the state by M. J. Foote under a contract dated February 16, 1882. By mesne assignments testator acquired the interests of Foote through H. A. Bragg, and paid the remainder of the purchase price December 24, 1888. The state deeded the land to "John W. Clark, his heirs and assigns," February 23, 1889, a date subsequent to his death. That the deed was executed after the death of the grantee named therein is not material to this controversy, however, for the reason that both plaintiff and defendants assert rights under it.

In resisting the suit, the position of defendants, for present purposes, may be summarized as follows: John W. Clark, from 1884 until his death February 15, 1889, was a partner of Thomas M. Howard. In the firm name of Clark & Howard they were engaged in the real estate and loan business at Weeping Water. The firm for its own benefit, with its own money, bought the school-land contract from H. A. Bragg, and for convenience in

transacting its business took the assignment in the name of John W. Clark. Under Clark's will, after his death, his brother, Thomas K. Clark, became executor and trustee, and as such obtained from the county court a license to sell, and afterward sold to Howard, testator's partnership interests, including the school-land contract. Through this sale the executor realized the full amount of testator's interest in the land. Later Thomas K. Clark purchased from Howard, the surviving partner, an interest in the partnership, which was afterward conducted in the name of the new firm of Clark & Howard. Jacob Fleischmann, defendant, bought the land from the new firm for $2,535, December 16, 1889, procured a deed February 28, 1890, from Thomas K. Clark, executor and trustee of the estate of John W. Clark, deceased, took possession under his deed March 1, 1890, and has been in possession ever since. In the meantime he made improvements to the extent of $5,000. The facts are more fully stated in an opinion on a former appeal. *Clark v. Fleischmann,* 81 Neb. 445.

The case has been twice tried in the district court. At the first trial the suit was dismissed after the parties had introduced their proofs. From the judgment of dismissal plaintiff appealed to this court, where it was held that the evidence was insufficient to show the land was the property of the partnership, and that, if it was not, the title vested in plaintiff under the will. In the opinion, however, it was observed: "It may be that evidence can be produced on another trial showing that the decedent's interest in the copartnership was sold and that the land in controversy was a part of the assets of the firm. If such was the case, and the sale received the approval of the probate court, that, of course, would divest the plaintiff of any interest in the land. The estate has not yet been settled. The executor has not made his final report or received his discharge. If the land in controversy has been sold as a part of the assets of the copartnership, the executor on final settlement must account for the proceeds." *Clark v. Fleischmann,* 81 Neb. 445, 456. Upon a

retrial in the district court plaintiff recovered a judgment for the land and for rents and profits thereof in the sum of $1,580.25. The case is now presented on an appeal by defendants.

At the second trial in the district court the proofs adduced at the first were received in evidence and defendant Jacob Fleischmann was re-examined as a witness in his own behalf. In addition defendants offered the deposition of Thomas M. Howard, whose testimony, among other things, tends to prove: For three years prior to the death of John W. Clark, the latter and Howard were partners at Weeping Water under the firm name of Clark & Howard, and as such were dealers in real estate and farm loans. In the name of John W. Clark the firm took an assignment of the school-land contract from H. A. Bragg. The purchase was made with firm money and the school-land contract was firm property, though the assignment was taken in Clark's name. The land was sold by the new firm of Clark & Howard to Jacob Fleischmann and deeded to him by Thomas K. Clark, executor and trustee of the estate of John W. Clark, deceased, the latter having taken the assignment in his own name when acting for the partnership. Howard received one-half of the purchase price, the full amount of which was paid to the firm. One question was answered by the witness Howard as follows: "After the death of John W. Clark and the appointment of T. K. Clark as executor and trustee, I purchased from said executor the entire interest of John W. Clark in the firm's business and partnership property, and paid him for it. The contract for said school-land was included in this purchase. After I bought Clark's interest, a new partnership was formed between Thomas K. Clark and T. M. Howard, under the firm name of Clark & Howard. When we formed the new partnership I sold half of my interest in the business to Thomas K. Clark, and the sale to Mr. Fleischmann was made by the new firm of Clark & Howard, who considered themselves the owners of the contract for said school lands." Howard, according to his

own testimony, paid the executor for John W. Clark's interest in the land, and it was sold to Fleischmann with the executor's consent.

To support the defense already outlined, Howard's testimony in the form of a deposition was offered in connection with other proofs properly admitted, but in the main was rejected by the trial court under section 329 of the code, which declares: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

In effect the trial court held that, under the foregoing provision of the code, Howard was not a competent witness to testify that the partnership purchased and owned the school-land contract in controversy—a transaction material to the defense pleaded. The correctness of this ruling is the controlling question presented by the appeal. An examination of the statute is therefore unavoidable. It will also be necessary to consider the real nature of the transaction itself in testing the competency of the witness. 1 Wharton, Law of Evidence (3d ed.), sec. 468. "Every human being of sufficient capacity to understand the obligation of an oath," declares the code, "is a competent witness in all cases," except as otherwise provided by statute. Code, sec. 328. Witnesses are only incapacitated by specific, statutory exceptions to the general provision which makes them competent to testify in all cases. Experience

has shown that the rejection of testimony in obedience to rules established by the code sometimes results in iniquities more shocking than the evils against which the legislation is directed, and for this and other reasons courts are not inclined to extend the statutory provisions beyond the import of the terms used by the legislature. Why was Howard's testimony rejected? It was because the trial court was of the opinion that the witness had a direct legal interest in the result of the suit; that the adverse party was the representative of a deceased person; that the witness in his deposition testified to a "transaction or conversation had between the deceased person and the witness."

Within the meaning of the latter clause, was the transaction to which Howard testified a transaction "between the deceased person and the witness"? He was not a party to the suit nor to any deed in either party's chain of title. This was the substance of the transaction: The partnership, which had been composed of the witness and John W. Clark, now deceased, bought for partnership purposes the school-land contract in controversy and paid for it with partnership funds. The assignment was taken in the name of John W. Clark, one of the partners. This was a transaction between the partnership and the holder of the school-land contract. To the actual transaction the relation of the witness and the deceased person was exactly the same. Both were partners on the same side of the same bargain. The firm, composed of the two members, was purchaser. Their interests were identical. A text-writer says: "The exception does not incapacitate where the transaction was with two or more parties, of whom one is dead, while the other, against whom suit is brought, survives." 1 Wharton, Law of Evidence (3d ed.), sec. 469. In *Hardy & Bros. v. Chesapeake Bank*, 51 Md. 562, 598, the foregoing rule was quoted with approval, the court of appeals saying: "If that construction is good as applied to the co-contractors on the defendant side of the contract, it is equally good as applied to the co-contractors on the

plaintiff side of the contract." In *Hayward v. French*, 12 Gray (Mass.) 453, 459, it was said: "The proviso in the statute of 1857, c. 305, 'that where one of the original parties to the contract or cause of action then in issue and on trial is dead, the other party shall not be admitted to testify in his own favor,' is not applicable to a case of a suit brought against a copartnership originally consisting of three members, one of whom has deceased before the trial, and on which trial the plaintiffs are offered as witnesses."

The transaction described by the witness Howard was not between the partners as individuals. It was not between John W. Clark, "the deceased person," and Thomas M. Howard, "the witness." It was a transaction between the partnership, composed of both Clark and Howard, on one side, and the holder of the school-land contract, on the other side, and was not therefore a transaction "between the deceased person and the witness." It follows that the surviving partner is not prevented by section 329 of the code from testifying to the real nature of the purchase.

For the erroneous rejection of testimony material to the defense, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ROOT, J., not sitting.

STATE, EX REL. PLEASANT J. BARRON, ET AL., APPELLANTS, v. HENRY W. NEFF ET AL., APPELLEES.

FILED OCTOBER 7, 1910. No. 16,661.

Municipal Corporations: CITIES OF SECOND CLASS: ELECTION OF COUNCILMEN AT LARGE. Under article I, ch. 14, Comp. St. 1909, the electors of a city of the second class having a population of more than 1,000 and less than 5,000 have no authority to elect councilmen at large, and the canvassing board should not be required by mandamus to canvass the returns of an election to fill such offices.

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

C. C. McElroy and *William Morrow*, for appellants.

Beach Coleman and *Wright, Duffie & Wright, contra.*

ROSE, J.

This is an application to the district court for a peremptory writ of mandamus commanding respondents as the board of trustees of the village of Scottsbluff to convene and canvass the votes cast at an election held April 5, 1910, for the purpose of electing officers of Scottsbluff as a city of the second class having a population of more than 1,000. Relators refused to plead further after a demurrer to their application had been sustained. A dismissal of the action followed, and they have appealed.

The litigation grew out of an effort on part of relators and others to supersede the present village government by the form of government prescribed in the charter of cities of the second class, to which Scottsbluff now belongs. The pleading filed by relators shows in substance these facts: The village clerk gave public notice that the annual election would be held at the office of the Pathfinder Lumber Company, April 5, 1910, to elect two village trustees and to vote on the proposition to retain village government. No official notice of an election for city officers was given. Some of the electors met at the time and place mentioned; but, finding no election board, proceeded to organize one from their own number. They then adjourned to the Herald building, which is situated across a street from the polling place designated by the village clerk, held an election for city officers in the building to which they adjourned, counted the ballots, made return to the board of village trustees, and demanded a canvass, which was refused. In the meantime the village election was in progress at the office of the Pathfinder Lumber Company,

and resulted in the election of two trustees and in the rejection of the proposition to retain village government.

The question presented is: Did the district court err in denying the writ to compel the board of village trustees to canvass the votes cast for city officers? Councilmen are officers essential to city government under the charter of cities of the second class. The city must be divided into not less than two nor more than six wards. The council must consist of not less than four nor more than twelve citizens. "Each ward in each city," says the charter, "shall have at least two councilmen, who shall be chosen by the qualified electors of their respective wards." Comp. St. 1909, ch. 14, art. I, secs. 2-4. There was no such an office as councilman at large. Relators pleaded that, notwithstanding Scottsbluff was a city of the second class prior to April 5, 1910, respondents refused to divide it into wards and to give notice of the election of city officers April 5, 1910. These allegations, when considered with the entire pleading and the city charter, show that the voters attempted to elect councilmen at large. That there were no such offices is clearly established by the statute cited. Public offices are created by law. No officer can be elected where there is no office to fill. *Norton v. Shelby County*, 118 U. S. 425. There having been no such offices as councilmen at large in cities of the second class, to which Scottsbluff belongs, no duty required the board of village trustees to canvass the returns. This reason alone is sufficient to justify the ruling of the district court in denying the writ, and further inquiry into the irregularity or invalidity of the election in question is unnecessary.

AFFIRMED.

IN RE GROVER C. MCDONALD.

CARL ANDERSON ET AL., APPELLANTS, V. GROVER C. MCDONALD, APPELLEE.

FILED OCTOBER 7, 1910. No. 16,733.

1. **Intoxicating Liquors:** ISSUANCE OF LICENSES. A license to sell intoxicating liquors is in the nature of a personal trust, and the applicant for such license must be a person competent, willing and intending himself to carry out such trust.

2. ———: ———. And where the evidence fairly shows that the one in whose name an application for such a license is made is not the real party in interest, but that such license is being sought for the purpose of enabling another to do business thereunder, it is the duty of the licensing board to refuse to issue such license.

3. ———: ———. Evidence examined and set out in the opinion *held* amply sufficient to show that the applicant in this case is not the real party in interest.

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

Perry, Lambe & Butler, for appellants.

W. S. Morlan, contra.

FAWCETT, J.

On April 14, 1910, Grover C. McDonald filed with the clerk of the village of Elwood a petition praying for a license to sell malt, spirituous and vinous liquors in said village. A remonstrance was filed and overruled, and remonstrators appealed to the district court, where the action of the village board was affirmed. Remonstrators now appeal to this court.

Remonstrators urge four principal reasons why the license applied for should not have been issued. Having reached the conclusion that the third reason assigned is good, the others will not be considered.

The third reason assigned is that the applicant for a license is not the real party in interest, but is simply a dummy for his brother, Edward L. McDonald. The rules of evidence were to some extent ignored by the licensing board on the hearing of this application, in this: that all objections were overruled. The result was that some evidence was received which ought to have been excluded. Considerable hearsay evidence was received, to which the only objection offered was that it was immaterial. In nearly all of those instances the objection was not good, and that evidence was properly received. The record, taken as a whole, and considering only the evidence properly received, fairly shows the following facts: That the building where the saloon business was to be carried on is situated on lot 3, block 20, in the village of Elwood; that E. L. McDonald, a man of mature years and a brother of the petitioner, is the owner of the lot, building and saloon furniture and fixtures; that he originally conducted the saloon business in said building, but, on account of his violation of the Slocumb law, he was unable in 1909 to obtain a license for himself; that he thereupon procured a license to be issued in the name of one William S. Darnell for that year; that during said year the said E. L. McDonald was in and about the saloon acting as proprietor, as one witness puts it: "Ed McDonald appeared to be the boss and owner"; that Darnell was arrested and prosecuted for a violation of the law, and E. L. McDonald employed counsel to defend him, and paid such counsel $100 for said service; that at the time applicant filed his petition with the clerk of the village board, E. L. McDonald accompanied him to the office, and at the same time filed a petition for a license himself; that these two petitions are signed by identically the same persons. One of them prayed that a license be issued to G. C. McDonald for the sale of liquor in the building above referred to, and the other that a license be issued to E. L. McDonald for the sale of liquors in the same building. E. L. McDonald signed the G. C. McDonald petition as signer No. 31, and

also signed his own petition at the same number. That during all the time Darnell was running the saloon during 1909 E. L. McDonald was in and about the saloon acting as if he were proprietor; that his actions were such as to lead those who frequented the saloon to believe that he was in fact proprietor; that during the year 1909, while the license was in Darnell's name, a boy under the age of 21 years visited the saloon; that at the time he was there E. L. McDonald was present and apparently in charge; that at said time this boy purchased intoxicating liquors, consisting of whiskey and beer, to such an extent that he became intoxicated; that E. L. McDonald about a year and a half prior to the hearing in this case had filed on a homestead of land in Canada, which homestead he had never relinquished; that during 1908 E. L. McDonald applied for a saloon license at Arapahoe, but, upon a remonstrance being filed, withdrew his application, and, through his own negotiations, obtained a lease to Grover C. McDonald for a saloon building; that a license was issued to Grover C.; that E. L. McDonald employed the bartenders in that saloon during the year the license was in the name of Grover C., and paid such bartenders monthly wages for running the saloon; that Grover C. McDonald is a young man somewhere from 20 to 23 years of age, and is without means sufficient to pay $1,000 for a license; that he has no fixed home, but is working here and there as opportunity may offer. The record is entirely barren of any evidence even tending to show that he, either in Elwood or Arapahoe, ever participated in the running of a saloon business, or that he has ever manifested the least intention to engage in such business, other than the mere fact that he permitted his name to be used by E. L. McDonald at Arapahoe, and that he went to the office of the secretary of the board in the present case, in company with E. L. McDonald, and handed the secretary the petition in controversy. No attempt is made to contradict or explain any of the foregoing testimony. We think the evidence shows, beyond a doubt, that E. L. McDonald had so con-

ducted himself that he was unable to obtain a license to sell intoxicating liquors, either in Elwood or Arapahoe; that he used Darnell in 1909 at Elwood, and his young brother, G. C. McDonald, at Arapahoe in 1908, and is now attempting to use him again for the current year in Elwood, all for the purpose of evading the law and obtaining the benefit of licenses which he himself could not obtain.

Conceding that, where bad faith is alleged by those opposing the granting of a license, the burden rests upon the remonstrators to introduce evidence tending to show that the applicant is not acting in good faith, this issue is to be tried as other issues of like character, and the ordinary rule should be applied that, when one who has a negative to prove has introduced evidence tending to prove it and the knowledge in regard to the matter in dispute and the evidence upon the question is wholly or largely in the possession of the other party, it devolves upon such party to produce the evidence at his command. This rule did not require conclusive evidence from the remonstrators in the first instance in order to put the applicant upon his proof as to those points; and, having failed to furnish such proof, if any he had, he must suffer the consequences of such failure. In this case the evidence introduced by remonstrators tends strongly to prove that the application of Grover C. McDonald was not made in his own interest, and that he had no intention of engaging in the saloon business in Elwood on his own account. This evidence, standing, as it does, without contradiction or explanation on his part, must be held to conclusively establish the fact that he is not acting in good faith and is not the real party in interest. It is taxing our credulity too much to ask us to say by a judgment of affirmance that G. C. McDonald is the real party in interest in the present case. The statutes of this state require that, before a license shall be issued, a petition must be presented, signed by 30 resident freeholders, setting forth that the applicant is a man of respectable character and standing and a resident of this

state, and praying that a license may be issued to him. The statute does not mean that a man of respectable character and standing and a resident of this state, such as G. C. McDonald may be, can permit his name to be used by another, who is not a man of respectable character and standing and a resident of the state, for the purpose of conducting a business under a license which he himself could not obtain. In the case of *In re Application of Krug*, 72 Neb. 576, we held: "A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out such trust, and not delegate it entirely to others." We also held: "Under the provision of section 1, ch. 50, Comp. St. 1903, the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship, and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understanding that such person or corporation will select a person to conduct the business under the license." The gist of that holding, it will be seen, is that the licensing board must pass upon the character and standing of the applicant and his citizenship, and that the board is without authority to grant a license in the name of one shown to be not the real party in interest. Speaking through Mr. Chief Justice HOLCOMB in that case, we said: "The undisputed evidence in this case discloses that the applicant to whom the license was granted by the licensing board was not the real party in interest. It is, by the evidence submitted in support of the objections filed to the granting of the license applied for, rendered manifest that the business of dealing in intoxicating liquors for which the license was granted was to be conducted under the unqualified control, ownership and proprietorship of a third party, for whose sole and exclusive use and benefit the license was being obtained. The only possible qualifica-

tion of absolute ownership of the business of owning and dealing in intoxicating liquors for the sale of which the license was granted is some evidence to the effect that the owner of the saloon would be required to conduct an orderly place of business. In principle, the case at bar comes altogether within the rule announced in *In re Tierney*, 71 Neb. 704." In *State v. Lydick*, 11 Neb. 366, speaking through Mr. Justice COBB, we said: "An examination of the above provisions of law can scarcely fail to satisfy any one that the people of this state have reserved to themselves, acting through the several local boards, county and city, the right to discriminate between the different applicants for liquor licenses, to license such applicants as upon the principles laid down should be deemed worthy, and refuse those who, upon the application of the same principles, should be held to be unworthy. A licensee, under the above provisions, accepts from the authorities a personal trust and assumes personal duties and responsibilities quite repugnant to the idea of his selling his license along with his stock on hand, furniture and fixtures. Under statutes much less discriminating than ours, it has been held by the courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York, and other states, that a liquor license is a personal trust or permit, and is incapable of assignment." If, as there held, the granting of a license imposes on a licensee such a personal trust that he cannot, when he sells his business, transfer the license with it to another party, clearly he cannot in the first instance permit his name to be used as a mere dummy to procure the issuance of a license to one who could not obtain such license himself. To our minds, the case is so plain as not to require further discussion.

The judgment of the district court is therefore reversed and the cause remanded, with directions to reverse the decision of the village board and require that the license issued in this case be canceled; and that the costs be taxed to the petitioner.

REVERSED.

GEORGE P. LEWIS, APPELLEE, V. GEORGE B. DARR ET AL., APPELLANTS.

FILED OCTOBER 7, 1910. No. 16,137.

Appeal: VERDICT: REVIEW. This case comes within the often announced rule that, when there is substantial evidence supporting the verdict of a jury, the judgment will not be disturbed unless upon the whole evidence it appears that the verdict is clearly wrong.

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

George C. Gillan, for appellants.

E. A. Cook, contra.

SEDGWICK, J.

The plaintiff and defendant were real estate agents in Lexington, Nebraska. Darr and Spencer owned a half section of land near Lexington, which they sold to one Entrekin. Afterwards the plaintiff began this action against Darr and Spencer to recover a commission upon the sale. Darr and Spencer answered that they were ready to pay the commission, but that this defendant claimed that he was entitled to it, and asked that the defendant be made party, which was done, and issues were then made between the plaintiff and defendant, each claiming the commission. The cause was tried by a jury, who rendered a verdict in favor of the plaintiff, and the defendant has appealed.

No question of law is presented upon the appeal. The defendant asked for a reversal upon the sole ground that the verdict and judgment are not sustained by the evidence. Mr. Darr testified that they listed the land with the defendant to be sold, but neither of these parties had any written contract with the owners of the land authorizing him to make the sale. The plaintiff took Mr. Entrekin

in charge and showed him several pieces of land, among others this land in question, and Mr. Entrekin did not recognize at the time that he had been shown the same land by the defendant. The plaintiff then took Mr. Entrekin to the owner of the land and introduced them, and testified, as did also the owner of the land, that in that interview Mr. Entrekin was furnished with a written statement showing the description of the land and the price and terms. Mr. Entrekin does not remember this circumstance. Afterwards Mr. Entrekin bought the land for the price and upon the terms stated in the memorandum. There are other circumstances shown in the evidence tending to support the verdict of the jury. The whole evidence shows an animated contest between these two men as to which one of them could take such part in the sale as to entitle him to the commission. We are not at liberty to weigh this evidence to determine which of these parties has the stronger claim to this commission. One Stevens was in some way associated with the defendant in the real estate business, and he accompanied Mr. Entrekin from his home in Geneva to Lexington, and went at once with him to the office of the defendant. The defendant drove with Mr. Entrekin during one whole day and half of another and showed him many pieces of land for sale. Among other pieces he showed him the half section in question, and told him the price, but did not tell him the owner of the land. Mr. Van Horn appears to have been authorized to make this sale, and to have been the first to show the land to Mr. Entrekin, and also to have taken part in closing the contract, and upon the whole evidence, if the matter had been submitted to us as an original proposition, we should have hesitated to give the commission to another, but this is peculiarly a matter for the jury, and there is substantial evidence supporting their verdict. We cannot therefore disturb it.

The judgment of the district court is

AFFIRMED.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,498.

Parties. When the determination of a controversy cannot be had without the presence of new parties to the suit, the code directs the court to order them to be brought in. Code, sec. 46.

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

C. C. Flansburg and *L. A. Flansburg,* for appellant.

S. J. Tuttle, contra.

PER CURIAM.

In rendering the judgment from which this appeal is taken, the district court held that the city of Lincoln is liable to plaintiff as the owner of real estate damaged by the construction of a viaduct on Tenth street over intersecting railroad tracks owned by three railway systems—the Chicago, Burlington & Quincy Railway Company, the Chicago & Northwestern Railway Company and the Missouri Pacific Railway Company. The record discloses these facts: The electors of the city decided by ballot at an election duly called that the viaduct was necessary for the public safety. Afterward by ordinance the railway companies were ordered to construct the viaduct and approaches, but refused to do so. To coerce them into the performance of that duty the city applied to the district court for a writ of mandamus. While the action was pending, the parties thereto entered into a stipulation binding the city to appraise the damages to abutting property and obligating the railway companies to begin the work of construction upon the city's obtaining an award of appraisers. With a view to carrying out the terms of the agreement thus made, the city passed an ordinance pro-

viding for the ascertainment of damages, and pursuant thereto appointed a committee of three members of the city council to make the appraisement. By publication the committee gave the abutting property owners and the railroad companies notice of the time and place of the meeting to perform their duties. The claim filed by plaintiff with the city clerk, omitting the verification, is as follows: "Before the Mayor and Common Council of the City of Lincoln, Lancaster County, Nebraska. In the Matter of Claim for Damages by the Phœnix Mutual Life Insurance Company. And now comes the Phœnix Mutual Life Insurance Company, a nonresident corporation, and shows that it is the owner in fact of record of lots numbered 10 and 11, in block numbered 9, in North Lincoln, an addition to the city of Lincoln, and a part thereof; and that said lots are reasonably worth $6,000. And said claimant further shows that, by the building of the contemplated viaduct on Tenth street in said city, said lots will be damaged to the extent of one-half of the value thereof, that is to say, $3,000; and the claimant aforesaid therefore claims damages in the sum of $3,000."

The damages sustained by plaintiff were fixed by the appraisers at $500, and from the appraisement in that sum it appealed to the district court. Though the claim on its face purports to present only a question as to the amount of plaintiff's damages, plaintiff and the city, on appeal, stipulated the sum to be $500, and submitted to the district court the question of the city's liability for the payment thereof. The city was held liable, and judgment was rendered against it for $500. It is from this judgment that the city has appealed to this court.

The city now argues that, on the undisputed facts disclosed by the record, both the common law and the city charter impose upon the railroad companies liability for the damages to plaintiff's property; that the city has not assumed any part of such liability either by contract or ordinance or by participation in the proceedings to appraise the damages. Plaintiff controverts these proposi-

tions, but suggests that in any event the city is liable in the first instance, and that liability on part of the railroad companies, if any exists, obligates them to respond to the city. The railroad companies are not parties of record, and in their absence it should not be held that they are liable to plaintiff or to the city of Lincoln for damages resulting from the construction of the viaduct. When these questions were submitted to the district court, if properly presented by the record for determination, it was its duty under section 46 of the code to order the railroad companies to be brought in. That section declares: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

For failure to bring in necessary parties in compliance with the directions of this statute, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES H. WHITE, APPELLANT, V. MICHAEL P. MUSSER, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,144.

1. **Ejectment:** DEFENSE OF ADVERSE POSSESSION: EVIDENCE. In an action in ejectment, defendant claimed under adverse possession for more than 10 years. The evidence is examined and found to sustain the verdict of the jury and judgment thereon in favor of defendant.
2. **Adverse Possession:** VOID TAX DEED: COLOR OF TITLE. "A tax deed purporting on its face to convey title to land, although void for failure to comply with the statute, affords color of title under the general statute of limitations." *Lantry v. Parker*, 37 Neb. 353.

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

Lee Card and *Allen G. Fisher,* for appellant.

Cornelius Patterson, contra.

REESE, C. J.

This is an action in ejectment instituted in the district court for Sheridan county. The contest is over the possession of lots 1 and 2 and the south half of the northeast quarter of section 1, township 32 north, range 45, in said county. It is alleged that defendant has had the possession and enjoyment of said property and the rents and profits thereof since the 1st of January, 1900, of the value of $2,500, for which, with the possession of the land, judgment is demanded. The answer of the defendant contains three subdivisions or counts: First, a general denial; second, a plea of the statute of limitations averring possion under a tax deed for more than 10 years prior to the commencement of the action; third, a plea of the statute of limitations as to the claim for rents and profits from January 1, 1900, to the year 1904. The reply contains a general denial of the averments of the answer, as well as of specific denials of the facts stated in each cause of defense. The case was tried to a jury, which returned a verdict in favor of defendant, and upon which judgment was entered. Plaintiff appeals.

It is shown by the record that the land in dispute was patented to Ella Purdy on the 26th day of June, 1891, and by her conveyed to plaintiff on the 19th day of July, 1907. So far as we are enabled to discover from the evidence contained in the bill of exceptions, little, if any, attention was paid to the land by the patentee after the issuance of the patent, except that about that time, or within a short time thereafter, she leased it for one season to a neighbor who cut and removed hay from a portion of it. The taxes for the years 1893, 1894 and 1895 having been unpaid and becoming delinquent, the defendant and his associates in business purchased the property at tax sale, and it is

alleged and sufficiently proved that a county treasurer's tax deed was issued to defendant, or to him and his associates in business, and that he assumed to take possession and control of the property from that time on to the time of the commencement of this suit. The deed from the county treasurer was invalid for the alleged reason that there was no county treasurer's seal attached, and, by the early decisions in this state, this is true. *Sutton v. Stone*, 4 Neb. 319. However, such a deed, when held by one in possession claiming as owner, creates color of title and extends the possession so as to include the whole tract described therein if the claim of ownership is so extended. 1 Cyc. 1082 *et seq.*, and cases there cited; *Lantry v. Parker*, 37 Neb. 353. Defendant and his grantors have paid the taxes since the issuance of the void tax deed, and neither plaintiff nor his grantor have paid any thereof. The property is largely pasture or grazing land, and under the rule stated in *Lantry v. Parker, supra*, the possession shown by defendant must be held sufficient to protect him. It is true that other people's stock was not at all times excluded, but the hay was cut by defendant, or his lessees, when of sufficient quantity, and a partial inclosure was maintained a portion of the time. A publicly traveled road is shown to have crossed the land, and it may be that a legal public highway was established by user, but this could not militate against defendant's possession of the remainder. However, it is also shown that, for a portion of the time, at least, gates were maintained by defendant on the line of the road at the point of entrance upon the land. The evidence is not as satisfactory as could be desired and is in some respects conflicting, but the issues were fairly submitted to the jury, and their verdict cannot be molested.

The judgment of the district court is therefore

AFFIRMED.

ANNA L. RITCHIE, APPELLANT, V. ILLINOIS CENTRAL RAILROAD COMPANY ET AL., APPELLEES.

FILED OCTOBER 22, 1910. No. 16,145.

PROCESS: SERVICE OF SUMMONS: MANAGING AGENT. The I. C. R. Co. was extended into this state from Fort Dodge, Iowa, having its terminus in the city of Omaha, where it maintained its station and agency. The M. & St. L. R. Co. had a line of railroad running northward from Fort Dodge, Iowa, to Minneapolis and St. Paul, Minnesota, but no part of its line of railroad entered this state, nor is it shown by the evidence that it had any place of business or agency within the city of Omaha, or elsewhere in this state. The I. C. R. Co., by its agent, sold plaintiff a coupon ticket in the usual form, which authorized plaintiff to travel over its line of road from Omaha to Fort Dodge, and thence over the line of the M. & St. L. R. Co. from the latter city to Minneapolis, and return, as a passenger, and while passing over that line of road plaintiff received the injury complained of. This suit was brought in the district court against both companies, and service of summons was made upon the I. C. R. Co. in the usual manner for service of summons on railroad companies, and upon the I. C. R. Co. and its agent as the managing agents of the M. & St. L. R. Co. *Held*, That the mere sale of the coupon ticket, such as is sold over connecting lines generally, did not constitute the I. C. R. Co., or its agent the managing agents of the M. & St. L. R. Co., upon whom service of summons might be made.

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

McCoy & Olmstead, for appellant.

William Baird & Sons and *John I. Dille, contra.*

REESE, C. J.

This action was instituted in the district court against the Illinois Central Railroad Company and the Minneapolis & St. Louis Railroad Company to recover for alleged personal injuries received by plaintiff while a passenger over the defendants' lines of railroad. The material facts were that plaintiff purchased a round-trip ticket

from the agent of the Illinois Central Railroad Company, at its ticket office in Omaha, for passage from Omaha to Minneapolis, Minnesota, and return. The ticket purchased was the usual coupon ticket, Omaha "to Minneapolis or St. Paul, Minn., and return, via route designated in coupons attached." The record does not contain the ticket purchased, nor a ticket or copy of one sold at Omaha for the trip designated, but does contain a copy of what is said to be a similar ticket with a coupon over another road, issued for the same occasion, to wit, the G. A. R. encampment at the city of Minneapolis. The line of the Illinois Central railroad extended from Omaha to Fort Dodge, Iowa, and from that point to Minneapolis the travel was over the line of the Minneapolis & St. Louis railroad, and over which the coupon provided passage. The Illinois Central train which left Omaha proceeded to Fort Dodge, and was there placed upon the east and west line, and proceeded to Chicago, with the exception of one Pullman car which was detached and placed in the train of the Minneapolis & St. Louis railroad and proceeded to Minneapolis. As plaintiff was returning home on the line of the latter road, between Minneapolis and Fort Dodge, she received the injury complained of. The Illinois Central enters this state at Omaha, and has its ticket office and agency in that city. The Minneapolis & St. Louis road does not enter this state anywhere, and has no ticket office or agency at Omaha, unless the ticket office and agency of the Illinois Central company in that city, and by which the ticket was sold to plaintiff, can be said to be its ticket office and agency. The suit having been commenced against both, the summons was, presumably, served upon the Illinois Central Railroad Company in the manner provided by the statute, and service was sought to be made upon the Minneapolis & St. Louis Railroad Company by delivering a copy thereof to the agent of the Illinois Central, and also upon the Illinois Central, the company which sold the ticket over both lines, as the managing agents of the Minneapolis & St. Louis Railroad Company.

A special appearance was made by the Minneapolis & St. Louis Railroad Company, and objection was made to the service and jurisdiction of the court over it. Upon a hearing of the objections to the service and jurisdiction over the Minneapolis & St. Louis Railroad Company, the district court found that no legal service had been made upon said company, and the exceptions to the jurisdiction were sustained. From that decision plaintiff appeals.

The sections of the statute under which it is claimed jurisdiction was obtained are 59, 60, 73, 75, 912 and 914 of the code, and section 4, art. I, ch. 72, Comp. St. 1909. These sections are as follows:

Section 59: "An action other than one of those mentioned in the first three sections of this title, against a nonresident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose."

Section 60: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned."

Section 73: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or last usual place of business of such corporation."

Section 75: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

Section 912: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or,

if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof."

Section 914: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

Section 4, art. I, ch. 72, Comp. St. 1909: "Service upon railroad companies may be made as upon other corporations, or by leaving a copy of the summons by the proper officer, with any station agent, ticket agent, conductor, or other officer of said railroad formed within the limits of this state, or left at their usual place of business within said county."

The question arises: Has the plaintiff by the service made brought her case within any of those sections? As we view the question, plaintiff's right must depend upon the provisions of sections 73 and 75 of the code, or section 4, art. I, ch. 72, Comp. St., above quoted. If the service comes within the provisions of section 73, it must be because either the agent of the Illinois Central company, or that company itself, is the "managing agent" of the Minneapolis & St. Louis company. The same is true of section 75. Upon this point the evidence showed that the Minneapolis & St. Louis company had no agent or agency in Omaha or elsewhere in this state, and that neither of the parties served had any management of the traffic or business of that company, unless the mere fact of selling the coupon ticket, as such tickets are sold throughout the country, constituted such "managing" agency. If we assume that the copy of the ticket shown in evidence is, in its general terms, a correct copy of the ticket actually sold plaintiff, it contains the following clause: "In selling this ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line." While this recital might be construed as establishing the agency of the Illinois Central company in the sale of the ticket, yet we are unable to discover how that agency could be extended further, or

how it could constitute the agent for selling the coupon to be "managing agent." These words have received judicial construction by many of the courts of this country, but it would extend this opinion to an unreasonable length to collate the cases, and we will be content by referring to 5 Words and Phrases, p. 4320. As a general definition we incline to the first one given by the authority referred to, which is: "A 'managing agent' must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it"—citing a number of cases. Other definitions are given, but which do not differ essentially from the above, and to which reference may be had. In *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14, the late Judge MASON in writing the opinion of the court said: "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the meaning of section 75 of the code, which authorizes service of summons on a managing agent of a foreign corporation, and it is immaterial where he resides." The service was held good in that case, as the defendant had a ticket and freight office at Omaha and ran its passenger and freight trains into that city, and the service was made upon the person having general charge of the business of the company, both there and in Council Bluffs. As it is made clear by the evidence that the only authority of the Illinois Central Railroad Company or its agent was to sell the coupon ticket over the Minneapolis & St. Louis railroad as they did over all other roads over which passengers were to be routed, we cannot hold that either was a "managing agent" within the provisions of the sections above quoted.

We are unable to see that the service comes within the provisions of section 4, art. I, ch. 72, Comp. St. It sufficiently appears that the Minneapolis & St. Louis com-

pany has neither station, station agent, ticket agent (except as above stated), conductor, or other officer of the company, or that said company is "formed within the limits of this state." There is no doubt that had the Minneapolis & St. Louis company had a station or place of business in Douglas county, and had the summons been served upon the agent of the company who was controlling and managing its affairs in this state, even to a comparatively limited extent, the service might have been held good, but that is not this case. It is true that the petition states a cause of action against the Minneapolis & St. Louis Railroad Company. It is carefully and skillfully drawn. But we must look to the facts as shown by the evidence for the basis of the decision of the district court and of this court. That evidence shows, as above suggested, that the same relation existed between the Illinois Central Railroad Company and the Minneapolis & St. Louis Railroad Company as between the Illinois Central Railroad Company and practically all other roads of its class. Coupon tickets are sold in connection with tickets over its own line, but nothing more. This could not render the seller of the ticket a "managing agent" of each road over which the ticket provides for passage. A large number of cases are cited by counsel for each party, but it is not deemed necessary to notice them further, as the statutes must control.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

W. J. WATERS, TREASURER, APPELLANT, V. D. H. HARDT, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,154.

1. Appeal: ACTION AT LAW: TRIAL TO COURT: REVIEW. Where, in an action at law, the cause is submitted to the trial court upon conflicting evidence, and there is sufficient to sustain the finding of

the court hearing the cause, this court will not reverse the judgment, even if there was sufficient evidence to have sustained a finding in favor of the opposite party.

2. ———: CONFLICTING EVIDENCE. In such case, "this court will not weigh conflicting evidence." *Fischer v. Kram*, 63 Neb. 241.

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

R. M. Proudfit, for appellant.

J. E. Addie, contra.

REESE, C. J.

This was an action upon a promissory note given by defendant to plaintiff for $110. The petition is in the usual form. The defendant answered setting up as his principal defense a change or alteration of the note after its execution and delivery, and without his knowledge or consent, whereby the rate of interest which the note was to draw had been increased from 5 per cent. per annum to 8 per cent. per annum. The cause was tried to the district court without the intervention of a jury, the trial resulting in a finding and judgment in favor of defendant. Plaintiff appeals.

On examining the bill of exceptions, we find a sharp conflict in the evidence. The defendant and the person who was the agent of plaintiff, and who made the contract with defendant and prepared and accepted the note, both testified in the most positive terms that the note, as originally written, transmitted to and received by plaintiff, provided for a 5 per cent. rate of interest. It is shown that the note bore unmistakable evidence that an erasure had been made and the figure "8" placed over the erasure. Under those circumstances, the judgment will have to be affirmed, as we cannot say that the finding is clearly wrong. *Fischer v. Kram*, 63 Neb. 241.

AFFIRMED.

GEORGE WILSON V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1910. No. 16,621.

1. **Criminal Law:** INDORSEMENT OF WITNESSES ON INFORMATION. The names of witnesses upon which the state relies to prove the charge against one accused of crime should be indorsed upon the information at as early a day as practicable after the discovery of such witnesses, and in all cases before the cause is called for trial, and reasonable time after such indorsement should be allowed to enable the defendant to prepare for trial.

2. ———: JURORS: DISQUALIFICATION. A juror in a criminal prosecution, where the defendant is accused of murder in the first degree, disclosing on his *voir dire* examination that he has an opinion as to the guilt or innocence of the party charged, and being shown that such opinion is formed, in part, upon his actual knowledge of many of the facts to be proved on the trial, his personal inspection of the place where the tragedy occurred soon after the commission of the alleged offense, his visit to the home of the deceased the evening of and after the alleged killing, his personal acquaintance with the deceased, his lodging during the night of the tragedy at the same hotel where the accused boarded, his knowledge of the arrest of the accused the next morning and hearing remarks by the people present that they thought the accused was guilty, should render him incompetent to sit as a juror in the trial of the case.

3. ———: ———: EXAMINATION. It is the policy of the law that a person charged with a capital offense, and placed upon trial therefor, should have ample opportunity, in the examination of jurors as to their qualifications to act as such upon the trial, to ascertain the facts as to their competency, and his right in that behalf should not be unreasonably abridged or denied.

4. ———: EVIDENCE. In a prosecution of a defendant charged with murder in the first degree, it is error to allow proof by the state, in making its case in chief, that the accused had committed the crime of desertion from the United States army a short time previous to the alleged homicide.

5. ———: TRIAL: MISCONDUCT OF PROSECUTOR. The evidence showed that the accused was a married man; that his family resided in the state of South Dakota; that after coming to this state he had agreed to marry another woman with whom he was on intimate terms, the woman with whom the agreement was made being sworn as a witness to prove the fact of the promise, but the marriage relation had not been entered into. The prosecution

caused and procured the wife of the accused to come from South Dakota, take her place within the bar during the trial, and procured a witness to designate and point her out to the jury. *Held*, improper practice.

6. ———: WITNESSES: EXAMINATION BY THE COURT. While it is the right of a trial judge in the exercise of a sound discretion, and in case of urgent necessity, to interrogate witnesses on the trial of a criminal case, or even the accused himself when upon the witness stand, when essential to the administration of justice, yet the practice of so doing should be discouraged, and, in some instances, condemned. Should this discretion be abused, or prejudice to the accused be apparent, a new trial should be granted.

7. Constitutional Law: TRIAL BY JURY: DUTY OF COURTS. The constitution and laws guarantee to every person a fair and impartial trial by an impartial jury. The obligation to protect these constitutional rights devolves upon the courts, and no court, when called upon to act, can shirk or evade the responsibility cast upon it by law.

8. Criminal Law: TRIAL: MISCONDUCT OF PROSECUTOR. In the argument of a cause to the trial jury in a case where the accused was on trial charged with murder in the first degree, an attorney for the prosecution said to the jury: "If this jury find the defendant guilty and do not bring in a verdict recommending the death penalty, no member of this jury need come to me and apologize, or to apologize to any member of the audience." This is *held* to be such a gross violation of the rules of argument as to require the strongest censure; and no condemnation of the language by the trial court can effectually obliterate the injury and prejudice which might result to the accused.

ERROR to the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

J. A. Douglas, for plaintiff in error.

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

REESE, C. J.

Plaintiff in error was convicted of the crime of murder in the first degree, and, his punishment having been fixed

by the jury at death, he was sentenced by the court to be hanged. He presents his case to this court by proceedings in error for review.

The information under which he was put upon trial charged him with the crime of murder in the perpetration of a robbery. The person alleged to have been killed was Jacob Davis, Junior, and the crime was alleged to have been committed at Ainsworth, in Brown county. There seems to be no doubt but that Davis was brutally murdered near his own door on the night of December 27, 1909, in the city of Ainsworth, and that he was robbed at the same time, the indications supporting this latter theory being the fact that, when he was discovered a short time before his death, no money was found on his person, and one of his pockets, the one in which he usually carried his money, was turned or drawn out as though it had been hastily rifled of its contents. He was never restored to consciousness and no evidence could be obtained from him as to the facts of the assault upon him, nor who was the guilty party. He died within three or four hours after receiving his injuries. An examination of his body before and after death showed that he had been struck on the head with some instrument by which his forehead and scalp were severely injured and the skull fractured, and also showed a gunshot wound passing through the head from the right to the left side, the ball entering on the right side a little above and back of the ear and lodging against the scalp upon the opposite side. The crime was committed between 11 and 12 o'clock at night as deceased was returning home from his place of business, the night being a bright moonlight night, the ground covered with snow. The fact of the commission of the crime by some one is not questioned. There was no direct evidence of the guilt of plaintiff in error, and the question of his connection with the commission of the offense depends upon circumstantial evidence alone. It is not our purpose to discuss the evidence with regard to its convincing quality, as, according to our view, a new trial must be had, and

the evidence upon a second trial may differ in some particulars from that presented on the first.

The first contention of plaintiff in error is that the district court erred in permitting the indorsement of the names of ten additional witnesses upon the information. The record shows that the information was filed on the 31st day of January, 1910. On the 1st day of February, following, plaintiff in error was arraigned, and entered his plea of "not guilty" to the information. The cause was set for trial on the 14th day of the same month, when court adjourned to that day at the hour of 10 o'clock A. M. On that day, "after 9:30 o'clock A. M.," notice was served upon counsel, who had been appointed to defend plaintiff in error, of the pendency of the motion for leave to indorse the ten additional names upon the information. When court convened and the trial was about to proceed, and "one juror had been called by the clerk and had taken his seat in the jury box," the county attorney presented his application for leave to indorse the names, and the "juror thus called was informed by the court he would not be needed, and requested to vacate the jury box, which he did," and permission was given to make the indorsement. The showing made by the county attorney was to the effect that the ten persons, naming them, were material witnesses for the state; that at the time of the filing of the information it was not known to the county attorney or to the other attorneys for the prosecution (there being two others assisting the county attorney) that the persons named would be material witnesses; and that "the same was not known by affiant (the county attorney) until after the adjournment of court on February 1, 1910." Formal objection was made to the granting of the order. The court granted the leave asked, and "advised the defendant and his counsel that the court would on its own motion continue said cause for 24 hours," when counsel "consented to waive said time and proceed with the trial, * * * renewing, however, his objections to the indorsement of additional names on the information."

By section 579 of the criminal code it is provided that the prosecuting attorney shall indorse upon the information "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." In *Stevens v. State,* 19 Neb. 647, we held that this provision was intended to apprise the accused in advance of the trial what witnesses would testify against him, and must be strictly complied with by the prosecutor, and in *Sweenie v. State,* 59 Neb. 269, it was held to be error for the court to permit the name of a witness for the state to be indorsed on the information after the commencement of the trial. In *Gandy v. State,* 27 Neb. 707, 732, it was held that the names of witnesses cannot be added unless it be shown that they were not known before. In *Gandy v. State,* 24 Neb. 716, it was held that the prosecutor should indorse the names of witnesses on the information before the day of trial, if known to him. In *Parks v. State,* 20 Neb. 515, we held, quoting from the supreme court of Michigan (from which state our statute was substantially taken), that "the defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known, and to have any new witnesses indorsed on the information as soon as discovered." It is not deemed necessary to refer further to our decisions upon this point. As we have already observed, the showing made by the county attorney was that the names of the witnesses were not known to the attorneys for the prosecution at the time of the filing of the information, nor until after the adjournment of the court on February 1; but there is no showing that the discovery was not made soon thereafter. Notice of the fact that the application would be made was not given to counsel for plaintiff in error until less than half an hour before the calling of the case for trial. The application was not made until after the case had been announced and called for trial, the impaneling of the jury

commenced, and one juror called into the jury box. It is true that the court offered to adjourn the trial of the cause for 24 hours, if desired by the defense, but the time offered was so unreasonably short there could have been nothing gained by such postponement, and counsel waived no right by declining to accept such adjournment. See *Johnson v. State*, 34 Neb. 257. The importance of such a trial would seem to require the utmost good faith on the part of the prosecution. It is strongly our impression that the knowledge of the step to be taken was unreasonably and unjustly withheld from the defense until the last moment in which the application could be made, if indeed not later than it should have been allowed. This might not of itself demand a reversal of the judgment, but it must be apparent that it was such an irregularity as might work serious injustice to a defendant.

The next contention is that the court erred in overruling certain challenges of jurors for cause, and that, the defendant having exhausted his peremptory challenges, such error should demand the reversal of the judgment. It is unnecessary for us to repeat what is provided by our constitution, and so often declared by all the courts of the land, including this one, that in all criminal cases an accused is entitled to a fair and impartial trial by an impartial jury, and that it is the sworn duty of the courts to see that that right is scrupulously maintained.

A juror by the name of Woorley was called, and, upon being examined by one of the attorneys for the prosecution as to his competency as a juror, testified that he had neither formed nor expressed an opinion as to the guilt or innocence of the accused, and that he could enter upon the trial of the case with his mind free from any opinion upon that subject. Upon being examined by counsel for the defense, he stated that he resided some 30 miles from Ainsworth, had formerly lived in that city, was well acquainted with the deceased, that he was in the city the night of the tragedy, spent the night at the hotel where the accused was boarding, was in the city the 28th, knew of

the arrest of Wilson immediately after it occurred on the morning of the 28th, that he talked with the people that day about the affair, was at the house of deceased, knew all the circumstances of the body being found, how deceased was supposed to have been killed, was to the premises where the tragedy occurred, and had thought about the case in connection with the accused. He was asked the following: "From your knowledge of the facts and the visits you paid to the town, do you say now that you haven't formed any opinion as to the guilt or innocence of the defendant?" His answer was: "Well, none but what it could be changed." Then follows: "Q. Well, it would take some evidence to change your mind, would it not? A. Yes, according to the evidence. Q. You have heard one side of the case? A. That is all. Q. You have heard the state's side? A. That is all. Q. It would take some evidence to cause you to change your mind? A. Yes, sir. Q. As to the guilt or innocence of the defendant? A. Yes." The court then took the juror in hand in quite an extended examination. The answers were apparently candid, but there was little, if anything, brought out showing the exact condition of the juror's mind. When asked if the persons with whom he talked claimed to know the facts, his answer was: "No; they didn't know. They thought it was Mr. Wilson." His answers were generally, "I think so." His attention was not called to his former statement that it would take some evidence to change his mind, and no explanation or modification of those answers was made.

Upon a consideration of all the answers of this juror, we are unanimously of the opinion that the circumstances detailed by him required that the challenge be sustained and that he be excused from the panel. The statement made by him that he had formed an opinion as to the guilt or innocence of the accused, which it would require evidence to remove, when taken in connection with his acquaintance with the deceased, his presence at the home of the deceased, his visit to the spot where the tragedy

occurred, his remaining at the hotel where Wilson was boarding, his intimate knowledge of so many of the facts and of the condition of the minds of those who "thought it was Wilson," failed to show that he was "impartial," and that he would not be influenced by his opinions based upon what he had seen and heard.

The juror Cunningham, when interrogated by counsel for the state, answered questions as follows: "Q. From what you have heard or read, have you formed or expressed an opinion as to the guilt or innocence of the defendant? A. Well, I have to a certain extent; yes, sir. Q. Do you still have that opinion? A. Well, I believe I do. Q. How is that? A. I believe I have; yes, sir. Q. Is that opinion such as it would require evidence to remove if you were selected as a juror in this case? A. Yes, sir; I think it would take some." When interrogated by counsel for the defense, the same state of mind of the juror was clearly shown. He was challenged for cause. The court propounded a number of questions, many of which were quite leading in character, and by the answers to which the former statements of the juror were modified. The challenge of the defense was overruled. Counsel for the accused then said: "'I would like to ask him another question.' By the court: 'Request denied.' Defendant excepts." Just why the request was denied is not shown by the record, and indeed we doubt if any good reason could be given. There was no objection made by counsel for the state, and we are unable to perceive why or how any could have been properly made. In the case of *Basye v. State*, 45 Neb. 261, the subject of the right of a party to propound questions to a jury within reasonable limits is discussed at considerable length, and that right is fully established. This juror was retained and served in the trial of the case, the accused having exhausted his peremptory challenges.

William Renziehausen of Fort Meade, South Dakota, a lieutenant in the United States army, was called as a witness, and, in answer to questions, stated in response that

the accused enlisted in the United States army at Fort Slocum, New York, on the 8th day of January, 1908, by the name of Walter Rifenburg, and had been known by that name ever since; that he was a married man; that his wife was then sitting at the table in the court room (stated by counsel to be a table within the bar of the court); that he was given a 10 days' furlough to take effect the 11th day of November, extending to the 20th day of the same month; that he left the post at that time; that witness next saw him on the 13th day of November, 1909, when he came to draw his pay for the month of October, which he did; and that the witness had not seen him since that time until the time of the trial. He was then asked: "Q. Was the defendant ever discharged from the army?" Objection was made to the question as "being an effort on the part of the prosecution to prove that the defendant has committed a crime against the laws of the United States." The court responded: "I will allow it on the theory of his occupation." The witness then answered: "He has never been discharged from service. He deserted." Counsel for the defense moved to strike out the words "he deserted," for the reason as stated above. This motion was sustained, when counsel excepted to the answer of the witness, "as the same tends to prejudice the defendant in his trial in this case." The objection was overruled, and exception taken. This testimony and many other portions of the record show and demonstrate beyond all doubt the existence of a set purpose on the part of the prosecution to discredit the accused in the minds of the jurors. There is no kind of merit in the contention that, under the claim of "occupation," this evidence, offered in chief in the state's case, as it was, was or could have been competent. It is true that the court ordered the words "he deserted" stricken out of the answer of the lieutenant, but there is no suggestion in the record of the ruling that the jury were admonished that the statement should not be considered by them, and all the injury the language could inflict had been accomplished. But back of this is the question

itself. It had been shown, whether correctly or not, that the accused had enlisted in the United States army; that he had been granted a 10 days' furlough; that after his departure under that furlough the commanding officer had not seen him until the opening of the trial. The witness was then asked: "Was the defendant ever discharged from the army?" With a willing witness upon the stand there could be no doubt as to what the answer would be, or what was desired, but the objection was overruled "on the theory of his occupation." Of similar import and purpose was the production of the wife of the man on trial, placing her at a table within the bar, and having this same witness point her out to the jury. It had been shown that accused was a married man; also by the witness, Miss Leads, that he had made an engagement to marry her, but had not done so at the time of his arrest. It is openly charged in the record, the brief and argument, and not denied, that the prosecution caused and procured the lawful wife, the only one, whom it was well known could not be used as a witness against him, to be brought from South Dakota to Ainsworth, placed within the bar, and pointed out and designated, and thus made to appear as a living witness against him. There may be other cases where such things have been attempted, but, if so, we have not found them. This subject of proof of the commission of other offenses was before the court of appeals of the state of New York in *People v. Sharp,* 107 N. Y. 427, 1 Am. St. Rep. 851, where the subject is ably discussed by Judge Danforth, and at page 457 of 107 N. Y. he says: "If Sharp had given evidence of good character, the prosecution might have answered that evidence by proof that his character was bad, but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that an issue upon it could be tendered by the prosecution"—citing cases. Indeed, the proposition is so elementary as to require no discussion here. We know of no case where a conviction has been allowed to stand where this salutary

rule has been thus violated. See *Paulson v. State*, 118 Wis. 89.

These observations apply with equal force to the cross-examination of the accused, who took the witness stand in his own behalf. He was 23 years of age, and, judging by his answers and language used, is not as well qualified to sustain himself under such an examination as older and more experienced persons might be. The ordinary and well-established rules of cross-examination appear to have been forgotten or ignored, and many of the minute details of his domestic life were dragged into public view over the objections of his counsel. At one point in his examination in chief he sought to show that prior to his coming to Ainsworth he had something of a sum of money, some of which at times was deposited in a bank in South Dakota. Whether his statements and claims in this regard were true or not, both his examination in chief and cross-examination demonstrated that he was not entirely clear in his testimony, and that his business capacity was limited. His deposits in the bank were of comparatively small amounts. His cross-examination proceeded as follows: "Q. Then all the money you had in the bank was what you had in the Commercial National Bank in July? A. I think so. Q. And your account with that bank was closed at that time, wasn't it? A. I think so. Q. What is the fact about the matter? A. I wouldn't say what month it was." By the court: "Q. Was your banking business so extensive you couldn't tell that? A. I couldn't tell the month I drew the last money out of there; no, sir." The cross-examination by counsel for the state then proceeded upon the same subject. When we consider the great length of the cross-examination, the length of time the accused had been upon the stand, the small amount of deposit which it was claimed had been made, the persistence with which the cross-examining counsel had pressed the subject, in substance, if not in form, repeating his inquiries, and the natural embarrassments under which the witness must have labored, even if he were trying to

tell the truth, we cannot refrain from saying that, under the circumstances, the injection of the one question by the court, evidently sarcastic, was ill-timed and ought not to have been indulged in. The subject of such interferences by the courts has been before this court in *Maynard v. State,* 81 Neb. 301, and in *Fager v. State,* 22 Neb. 332, and in both cases the practice was condemned, except "in case of urgent necessity." This is the rule in this state, and it ought to be adhered to. There was no "urgent necessity," nor indeed any necessity at all, for the interrogatory, and this is especially so since the state was represented by three able counsel, any one of whom was entirely competent to care for and protect the right of the state.

It is insisted with considerable earnestness that the court erred in the admission of evidence over the objections of the accused; that there was error in the instructions, both given and refused; and that the verdict is not sustained by sufficient evidence. Since there will have to be a new trial, these questions will not be examined, as they may not arise in the further progress of the case.

Our constitution provides that in all criminal prosecutions the accused shall have his trial by an impartial jury. This provision necessarily carries with it the assurance of a fair and impartial trial. Without any suggestion on our part as to either the quantity or quality of the evidence we are convinced that neither of these constitutional guaranties has been extended to the accused in this case. Every judicial officer in this state has been sworn to support and protect this constitutional right, and the obligation should be observed at all hazards. None of them can evade it. As emphasizing what we have said and indicating the intense feeling and bitterness of the prosecution, we need but refer to a portion of the argument of one of the state's counsel to the jury. We here copy that portion shown by the record: "If this jury finds this defendant guilty and do not bring in a verdict

recommending the death penalty, no member of the jury need come to me and apologize, or to apologize to any member of the audience." Due objection was made to this highly objectionable language. It was denounced by the court in proper and unmeasured terms, and the jury were strongly and fittingly cautioned against it. The general interest taken in the case, and the trial, in connection with the language used, renders it clear that there was an "audience" present. This court and courts generally throughout this enlightened country, backed up by every text-writer upon the subject, have spoken in emphatic terms as to the duties of a prosecutor. A public prosecutor is declared to be a semijudicial officer. His duties are not to secure convictions, but to present and aid the court and jury in ascertaining and arriving at the truth. There is no demand in any case for browbeating and abusing defendants or witnesses, or intimidating juries. All such conduct should be avoided by prosecutors. Is the public mind inflamed against an accused? If so, seek to allay bitterness of strife and deliberately and dispassionately search for the truth. More than this would be a violation of public duty.

The judgment of the district court must be reversed and the case remanded for further proceedings, which is done.

REVERSED.

HAMILTON COUNTY, APPELLANT, V. JASPER B. CUNNINGHAM ET AL., APPELLEES.

FILED OCTOBER 22, 1910. No. 16,150.

County Treasurers: LIABILITY FOR INTEREST. A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest.

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

A. M. Post and *Albert & Wagner,* for appellant.

J. J. Thomas and *Hall & Stout, contra.*

BARNES, J.

Action by the county of Hamilton against an ex-county treasurer on his official bond for the recovery of money alleged to be due the county on account of interest on the public funds while in his custody as such officer. The defendants had judgment, and the plaintiff has appealed.

The undisputed facts as shown by the record are as follows: The defendant Cunningham was the treasurer of Hamilton county for two terms, a period of four years, from January, 1902, to January, 1906, and the defendant, the American Bonding Company, was the surety on his official bond. Shortly after Cunningham assumed the duties of his office large sums of money were paid to him as county treasurer, and thereupon he, together with the county commissioners, made every possible effort to induce the banks doing business in Hamilton county to become county depositories, under the provisions of ch. 18, Comp. St. 1909, in order to faithfully administer the affairs of the office and provide a safe place or places in which to deposit, safely keep and obtain interest on the public funds. It appears that all of the banks doing business in the county, except the First National Bank of Aurora and the Aurora State Bank, duly qualified and became county depositories; that thereupon the treasurer deposited in each of said depository banks the full amount of money which they were respectively entitled to receive under the provisions of the county depository law; that he at all times during his official incumbency kept in said banks the full amount of money which they were lawfully entitled to receive, and thus obtained interest on all of the public funds which he was able to place in such depositories; that there was in his hands from time to time a large amount of public money which he was unable to

thus dispose of; that he made every possible effort to obtain depositories in other counties, and in good faith endeavored to induce the First National Bank of Aurora and the Aurora State Bank to become depositories. This they declined to do, and at all times refused to pay any interest on the public money, for the reason that they had constantly on hand more money of their own than they could profitably loan or invest.

It thus clearly appears that the defendant treasurer was unable to obtain interest on the balance of the public money in his hands. It also appears, and is conceded, that during all of the time that Cunningham held the office of county treasurer the vault and safe furnished to him by the plaintiff county were unsafe, and he was furnished no safe place in which to keep the public money; that thereupon, from time to time, as he deemed it necessary for the safe-keeping of such money, he purchased demand certificates of the Aurora State Bank, which was conveniently located at the county seat, payable to himself personally; that he immediately indorsed the same to himself as county treasurer and deposited them in the county safe; that in transacting the business of his office he handled the certificates as cash, and they were so considered by the board of commissioners, who had full knowledge of the transaction, and who approved of the same by making settlements with the defendant treasurer semiannually, receiving and treating them upon such settlements as so much cash, and that all of such certificates have been paid in full; that the defendant treasurer at the expiration of each of his terms of office made final settlement with the county board, and paid over to his successor in office the full amount of public money which he had received, including all the interest and accumulations which he had actually obtained thereon; that he never received any interest or accumulations of any kind or amount upon the demand certificates which he thus purchased and procured with county funds which he could not lawfully place in any of the depository banks.

On the foregoing facts the district court held that the defendants were not liable, and dismissed the plaintiff's action.

It is strenuously contended that it was the duty of the treasurer to collect the interest on the demand certificates above described, and therefore he is liable to the county for such interest, and the fact that he was unable to do so is no defense to this action. In support of this our attention is directed to article III, ch. 18, Comp. St. 1909, commonly called the "depository law," in which the following provisions are found: That the county treasurer shall keep on deposit, for safe-keeping, in state, national or private banks, doing business in the county and of approved and responsible standing, the amount of moneys in his hands collected and held by him as county treasurer; that all banks receiving and holding such deposits shall pay interest thereon at not less than 2 per cent. per annum; that the county board shall act upon applications of banks to receive such deposits, and approve the bonds of those selected as public depositories; that the county treasurer shall not deposit such money or any part thereof in any bank other than those thus selected, if any have been selected for the purpose, and that all deposits that he shall make in any bank whatsoever shall be paid at a rate of not less than 2 per cent. per annum.

It therefore seems clear that it was the duty of the county treasurer to deposit all of the funds in his hands in depository banks, if sufficient banks had qualified to enable him to do so, and it was also his duty to collect and receive from such depository banks interest at a rate of not less than 2 per cent. per annum. It appears, however, that the defendant treasurer in this case performed that duty to the full extent of his ability; that, notwithstanding that fact, there still remained in his hands a large sum of public money which he was unable to thus dispose of, and upon which he could collect no interest whatsoever. Of the safety of this fund he was an insurer, as declared by the statutes and the decisions of this court;

and, in order to protect himself and save the county from loss, it was necessary for him to deposit it in some safe and suitable place. It is agreed that the county had furnished him no such place, and therefore he was obliged to place the money in some responsible bank. He could not lawfully deposit it in any of the depository banks, and none of the other banks in the county would accept the money, if required to pay interest thereon, so the only course left open to him was to purchase the demand certificates in question, and, having done so in good faith, he should not, as a penalty for his actions, be required to pay interest thereon.

It is further contended that the facts of this case rendered the Aurora State Bank a *de facto* depository, and several authorities are cited in support of that contention. On this theory it is claimed that the treasurer is chargeable with interest on the demand certificates. It appears, however, that in the cases cited there had been an attempt on the part of the bank and public officers to comply with the terms of the depository law; that by some mistake, neglect or inadvertence the statutes had not been literally complied with. Recovery was sought upon the bonds of such banks, and it was held that the attempt to qualify under the provisions of the law had rendered them *de facto* depositories. In the case at bar, however, there was no attempt on the part of the Aurora State Bank to become a depository. On the contrary, it had persistently refused to qualify as such, and had steadily declined to receive any of the public money, if required to pay interest thereon. We are therefore of opinion that the cases cited do not support the plaintiff's contention.

Again, when this action was commenced the defendant treasurer had retired from office; he was no longer a representative of the county, and had no control over its funds. If the county was entitled to recover interest from the bank, which question we do not here decide, the fund belonged to the county, and the treasurer could not maintain an action to recover it. Therefore, it cannot

be said that he was even charged with the duty to collect it.

Finally, by construing the depository law in the light of other statutory provisions relating to the powers, duties and liabilities of county treasurers, and according to our former decisions, we are of opinion that the acts of the defendant Cunningham were not such as to render him liable to the county for the interest sought to be recovered in this action. Statutes ought not to be so construed as to require impossibilities of public officers in the discharge of their official duties.

The judgment of the district court is therefore

AFFIRMED.

ROOT, J., concurs in the conclusion.

ROSE and SEDGWICK, JJ., not sitting.

ED R. WESTING, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,160.

1. **Appeal:** VARIANCE: REVIEW. A judgment will not be reversed for a variance between plaintiff's allegations and his proof, unless it is clearly shown to be material and that the defendant has been misled thereby to his prejudice in making his defense.

2. ———: ———: ———. Unless the matter of variance has, in some suitable manner, been brought to the attention of the trial court, a court of review may decline to consider it.

3. **Railroads:** DAMAGE BY FIRE: BURDEN OF PROOF. In an action for damages clearly shown to have been caused by the escape of fire from a railroad engine, the burden is upon the company to show that the engine was properly constructed, equipped, and operated.

4. **Trial:** FAILURE OF PLAINTIFF TO TESTIFY: INSTRUCTIONS. Where the plaintiff, by the evidence of competent and disinterested witnesses, fully establishes his cause of action and the amount of

his recovery, he may decline to testify in his own behalf, and his omission, while upon the witness stand, to state the amount of his damages does not require the court in his instructions to comment unfavorably upon that fact.

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

James E. Kelby, Byron Clark and *J. L. McPheely,* for appellant.

Adams & Adams, contra.

BARNES, J.

Action to recover damages by a fire alleged to have been caused by the negligence of the defendant. The plaintiff had the verdict and judgment, and the defendant has appealed.

One of defendant's assignments of error, and perhaps the principal one, is that there was a fatal variance between the plaintiff's allegations of negligence on which he sought to recover and the proof contained in the record. The charging part of the plaintiff's petition is, in substance, as follows: That on or about the 5th day of November, 1907, the defendant, contrary to its duty in that regard, carelessly and negligently omitted to keep its right of way free and clear of dry and combustible materials, but negligently permitted large quantities of dry grass and weeds to accumulate over and upon its tracks and right of way near the premises of plaintiff, and especially near the northeast quarter of section 26, in township 8, range 14 west, in Kearney county, Nebraska; that on or about said 5th day of November, 1907, the servants, agents and employees of defendant in operating and running its engines over its line of road at or near the northeast corner of section 27 aforesaid, the same being near the premises of the plaintiff in said county, negligently and carelessly permitted said engine, being an engine operated

by said servants at said time, to cast out sparks and coals of fire therefrom into the dry grass and other combustible materials on defendant's right of way and set fire thereto, which spread out and over said lands of plaintiff, and thereby burned up and destroyed all the grass and herbage on said lands.

Defendant's answer contained a general denial, and also certain allegations of contributory negligence on plaintiff's part, which caused the damages for which he sought to recover.

The record fairly discloses that the fire which caused the damage in question originated from sparks or coals of fire thrown by one of the defendant's engines or locomotives, but instead of starting in the rubbish, weeds, dry grass, etc., alleged to have accumulated on defendant's right of way, it started in the grass several feet outside of the right of way on a small tract of land belonging to one Lang, and thence it spread onto the plaintiff's premises. This is the matter of variance on which the defendant relies for a reversal of the judgment of the district court. It is contended that such variance is material, and therefore the verdict is not sustained by the evidence.

There might be some force in this contention if the defendant had seasonably presented that question to the trial court. It appears, however, that when the plaintiff introduced his evidence it was not objected to because it failed to support the allegations of the petition and was at variance therewith. In fact, it does not appear that the matter of variance was urged or even suggested by any one at any time during the trial in the district court. It was not raised or discussed during said trial or in the motion for a new trial, and there is nothing in the record which tended to raise that question, unless it be held that defendant's request for a directed verdict had that effect.

By section 138 of the code it is provided: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action

or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." In accordance with the foregoing, it was held in *Knight v. Finney*, 59 Neb. 274, that "variances between allegation and proof which are immaterial or not prejudicial do not call for a reversal of a judgment." In the opinion it was said: "It is argued that there were fatal variances between the note in suit as pleaded and the one introduced in evidence. There were some differences, but none material to the issues, or the existence of which could in the least prejudice the rights of the complainant; moreover, the error, if any in this regard, was in no manner the subject of notice, objection or exception in the trial court, and is not entitled to consideration here." In *Spencer v. Wilson*, 74 Neb. 459, it was held: "Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial, and, unless it is so raised and suggested to the trial court, it will not be considered on error in this court." Again, we have frequently held that a variance between the averments of a pleading and the evidence given to sustain it is not to be deemed material unless it has misled the adverse party to his prejudice. *Lubker v. Grand Detour Plow Co.*, 53 Neb. 111; *Toy v. McHugh*, 62 Neb. 820; *Stull v. Masilonka*, 74 Neb. 309; *Ittner Brick Co. v. Killian*, 67 Neb. 589.

It is true that in the case at bar it was alleged in the petition that the fire started in the weeds, dry grass and combustible materials which defendant had negligently permitted to accumulate on its right of way, while the proof shows that it started outside of the right of way; but it clearly appears that defendant's section foreman made a report of the fire at the time it occurred, and the company was fully aware of that fact, therefore it has

ample opportunity to prepare its defense in accordance with that view of the case. So it cannot be said that the variance complained of misled the defendant to its prejudice, and it therefore affords no ground for reversing the judgment of the district court.

Defendant's other assignments of error relate to the matter of instructions, and the foregoing rule disposes of all of them but two, which we will now consider.

It is contended that the court erred in giving instruction numbered 3, upon his own motion, by which it was stated in substance, among other things, that in order to entitle the plaintiff to recover it would only be necessary for him to prove that the defendant, by and through its agents and employees, set out the fire, and that the same spread over his premises, destroying his crops and injuring his land as claimed by him in his petition. It is contended that the burden of proof is upon the plaintiff; that he had alleged negligence; and that this instruction cast the burden of proof upon the defendant. A like question was before this court in *Union P. R. Co. v. Keller,* 36 Neb. 189, where it was said: "Where the proof shows that a fire originated from an engine running over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Negligence will be presumed from the fact that fire was set out." In *Rogers v. Kansas City & O. R. Co.,* 52 Neb. 86, we held: "Where damage is caused by the escape of fire from a railroad engine, the burden is upon the company to show that the engine was properly constructed, equipped, and operated." From the foregoing it is apparent that the district court did not err in giving the instruction complained of.

Finally, it is contended that the court erred in refusing to give instruction numbered 14, requested by the defendant. The request reads as follows: "The court instructs the jury that, the fact of plaintiff's not testifying as to the value of the property he claims was destroyed by fire in

determining the amount of damage he has sustained, you have a right to presume that his knowledge and evidence, if given, would be against his interest." It is true that the plaintiff did not testify as to the amount of his damages; but there is sufficient competent evidence given by apparently disinterested witnesses upon that question to sustain the verdict of the jury. We are not aware of any rule compelling the plaintiff to establish the amount of damages by his own testimony, and there would seem to be no reason for him to testify upon that point if he is able to establish it by the evidence of other competent and disinterested witnesses. We are therefore of opinion that the court properly refused to give this instruction.

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

AFFIRMED.

SEDGWICK, J., concurring.

It is said in the opinion that the defendant "had ample opportunity to prepare its defense" because its section foreman reported the facts to the company at the time they occurred. I think that this will not do as a rule of pleading. If this is to be the rule of pleading, then there will be no necessity of pleading at all; it will only be necessary to prove that the defendant has had "ample notice" from some other source that the plaintiff has a valid claim and full notice of the nature of the claim. A defendant in a lawsuit has a right to rely upon the petition as stating all that he is required to defend against. It is not supposed that he will be ready, in court, to defend against other charges not contained in the pleadings.

I concur in the conclusion on other grounds stated in the opinion.

REESE, C. J., concurring.

I concur in the result reached in the opinion of the majority, but desire to say that I do not think that under

the circumstances of this case the averment that the fire was started within the right of way is material in so far as the statement of facts constitutes a cause of action is concerned. I believe the petition would be good without the allegation. If I am correct in this, the fact that defendant knew of the true conditions through the report of a proper employee, there could be no surprise, and therefore no error, even if the matter had been properly presented to the district court.

K. B. WARD, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,718.

Municipal Corporations: PUBLIC IMPROVEMENTS: LIABILITY. L., a city of the first class, entered into a valid contract for the construction of a sidewalk, the cost thereof to be paid by a special assessment to be levied on the lots abutting the improvement; the sidewalk was constructed according to the contract, and the city levied a special assessment upon the abutting lots to pay for the same; thereafter the city failed and neglected to collect the assessment, and entered into an agreement with the owner of the lots by which it attempted to release them from the lien of the special assessment and caused the same to be canceled and discharged of record. *Held*, That such conduct on the part of the city rendered it liable in an action to recover the contract price of the improvement.

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

H. Rosenthal, for appellant.

C. C. Flansburg and *L. A. Flansburg, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county sustaining a general demurrer to the plaintiff's petition and dismissing his action. The

only question presented for our determination is: Does the plaintiff's petition state facts sufficient to constitute a cause of action?

The petition alleges, in substance, that the defendant is a city of the first class existing under and by virtue of the statutes of Nebraska; that defendant then having power and authority to let contracts for the construction of sidewalks within its corporate limits, and to levy and assess taxes against the abutting real estate to pay for the construction of such sidewalks and collect said taxes, did on or about August 21, 1891, enter into a contract with one R. J. Gaddis for the construction of sidewalks in front of lots 7 to 12, inclusive, in block 4, Fitzgerald's second addition to the defendant city, and agreed to pay for said sidewalks from funds to be realized from assessments and special taxes on said lots; that Gaddis constructed the sidewalks according to his contract, and did all things required of him to be done in the performance of the same; that defendant, in accordance with its contract with Gaddis, issued to him six certificates, by which it certified that he was entitled to the several amounts mentioned therein, the same being the contract price of the sidewalk, with interest and penalties thereon, whenever said assessments should be collected, and reciting that the certificates were issued in accordance with an ordinance of the city of Lincoln, approved August 21, 1891, and in accordance with an order of the city council made December 8, 1891. The certificates were numbered, and each described the lot upon which the abutting sidewalk had been constructed. It was further alleged that the certificates were for a valuable consideration duly sold and assigned to the plaintiff, who is still the owner thereof; that the defendant levied and assessed taxes against the lots in question to pay for the construction of the sidewalks and for the payment of said certificates, with interest and penalties; that the taxes so levied and assessed remained unpaid, and became delinquent, and were included in and constituted a part of the amount of delinquent taxes declared by the

district court for Lancaster county to be due on said lots by a decree rendered on or about September 15, 1905, in a case wherein the state of Nebraska was plaintiff and Several Parcels of Land et al. were defendants, in a scavenger tax suit for the year 1905, and that said decree also contained the city and county taxes for more than four years; that in pursuance of the decree the county treasurer of Lancaster county on the 18th day of April, 1906, sold the lots in question to one A. C. Ricketts, the owner thereof, each lot selling for an amount which was less than the amount of the decree in said tax suit; that on May 1, 1906, and prior to the expiration of the time for premium bids on said lots, the defendant accepted and received in full settlement and satisfaction for the taxes and decree against said lots a sum of money on each of them in addition to the sum paid to the county treasurer at the time of sale, but which several sums so paid on each of said lots were less than the amount of taxes found due thereon by the decree; that the defendant entered into a stipulation recommending to the court that the decree theretofore entered against the lots in question be vacated and set aside, and that a new decree be entered against each of said lots in amount equal to the several sums so paid thereon, and that said sums be received in full payment and satisfaction for all assessments included in said tax suit; that the court entered a decree in accordance with said stipulation, and by reason thereof premium bids on the sales of the lots were prevented.

A copy of the stipulation was attached to and made a part of the petition, and so much of it as is material to this controversy reads as follows: "It is hereby stipulated by and between the plaintiff and A. C. Ricketts, the owner of the property hereinafter described, all of the said property being in Fitzgerald's second addition to the city of Lincoln, Lancaster county, Nebraska, that the default and the decree entered in the above action as to said several tracts hereinafter described be, and the same hereby is, set aside and vacated." Then followed a de-

scription of the property in question, together with other lots and blocks. The stipulation then continued: "It is further stipulated and agreed that, upon payment to the clerk of the district court within ten days from the entry of the decree herein of the several sums herein stipulated as due the plaintiff on said several tracts of land, all taxes and special assessments levied against said property for the year 1904, and prior thereto, shall be discharged and canceled of record, and the city treasurer and the county treasurer shall be directed and ordered, upon the payment of said sums, to cancel and discharge said taxes on the books of their respective offices." Then followed a copy of the decree, which in form and substance followed the terms of the stipulation.

It was further alleged that at the time the original decree was entered there were no unpaid taxes that had been levied and assessed on the lots in question prior to the special assessment against them for sidewalk purposes, except regular city taxes for the year 1891; that the amount of said regular city taxes for the year 1891 included in the decree was as follows: $13.17 each on lots 7, 8, 9, 10 and 11, and $14.17 on lot 12, and that the defendant, the city of Lincoln, received as proceeds of said sales for taxes, as finally consummated between it and the owner of the lots in question, for lot 7 $63.34, for lots 8, 9, 11 and 12 $66.57 each, and for lot 10 $66.02; that since such payment to the defendant and the receipt thereof the plaintiff presented his certificate to the city treasurer of the defendant city and demanded payment of the same, but payment was refused; that on June 30, 1909, plaintiff filed his claim in due form for the amount due on said certificates in the office of the city clerk of the defendant city, and presented the same to the city council of said city for audit and allowance, but that the city council has by inaction failed and neglected to allow or disallow said claim, though said council has had said claim a sufficient time to pass upon the same. Then follows an allegation of the amount due on the certificates; that the defendant, the

city of Lincoln, has failed, refused and neglected to pay the same and to provide any fund for such payment, and still refuses and neglects to pay or provide a fund for the payment of said certificates, and the petition thereupon concluded with a prayer for a judgment in the usual form.

Plaintiff contends that the defendant city, by failing, neglecting and refusing to provide a fund for the payment of its claim, and by permitting the owner of the lots specially benefited by the sidewalk improvements in question to pay off and discharge all taxes levied thereon, including the special assessments made against them to pay for the construction of the sidewalks, has rendered itself liable in an ordinary civil action to recover the amount due on his certificates. The defendant claims that the cost of the construction of the sidewalks could only be paid out of funds raised by a special assessment against the abutting real estate; that its agreement with the owner and the decree rendered thereon, by which the special asssments were released and satisfied of record, was legal and valid in all respects, and the plaintiff is therefore without any remedy whatsoever.

Upon the question thus presented the authorities are divided. We think, however, that we are committed to the rule contended for by counsel for the plaintiff. The contract with Gaddis for the construction of the sidewalks was valid, and one which the defendant city was authorized to make. In *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, it was said: "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." That case was followed and approved in *Rogers v. City of Omaha*, 76 Neb. 187, and again in *Rogers v. City of Omaha*, 82 Neb. 118, where it was said: "A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it

shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city." In that case, discussing the question involved in this inquiry, it was said: "It is insisted by defendant that, the warrants in question having been issued against a fund which never was in fact created, the warrants themselves were void and of no force or effect whatever. This contention has already been decided adversely to defendant in *Abrahams v. City of Omaha,* 80 Neb. 271, where we held: 'A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city. A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and promise to pay it.' That the defendant, through its mayor and council, had full power and authority to enter into the contracts for the sidewalks cannot be seriously questioned, but the defendant contends that, inasmuch as the contract itself provides that the work done by the contractor shall be paid for in warrants drawn against a special fund to be created by an assessment upon the lots, and that the contractor agreed to receive such warrants in full satisfaction and payment for all work done and all material furnished by him under his contract, and no fund ever having been created, the city is relieved from all liability. This will not do. The law is well settled that, when a municipal corporation enters into a contract of this character, it thereby agrees to create the special fund, by valid assessments, and that, failing to do so, it is liable generally. It will not do to say that a city may contract for the expenditure of large sums of money and material and a large

amount of labor in constructing valuable improvements for the city, and agree to pay for such improvements out of a fund to be created by a special assessment, and then escape all liability by never creating the fund, or, if it attempts to create such a fund, by proceeding so irregularly that the assessments when levied cannot be enforced. No such dishonesty would be tolerated in an individual, and we see no reason why it should be in the case of a municipal corporation. As said by the supreme court of California in *Pimental v. City of San Francisco,* 21 Cal. 351: 'The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. *Argenti v. City of San Francisco,* 16 Cal. 255. The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice.' In *Pine Tree Lumber Co. v. City of Fargo,* 12 N. Dak. 360, it is said: 'The city, as we have seen, is provided with the means of fully protecting itself against expense in the making of special improvements. Any payments made upon its contracts for paving should be paid out of the funds realized from the special assessments; and, if the city exercise the powers given it, the general taxpayer cannot be burdened at all with the cost of the improvement. If, however, the city council fails to take advantage of the means provided to realize upon special assessments the cost of the improvement, as between the city it represents and the contractor, the consequences of the neglect should fall upon the city.'"

O'Hara v. Scranton City, 205 Pa. St. 142, was a case

where the plaintiff sued the city for the price of constructing a sewer. There was a city ordinance which provided that the contractor should not receive any sum in excess of the amount actually received by the city from the assessment for the sewer. The contract contained this clause: "It is expressly understood that the fund for the payment of the above contract price is to be derived from assessments upon the city and abutting property owners according to benefits, and as to assessments upon abutting properties the city is liable to the contractor only for amounts actually collected." The city solicitor failed to file liens within the time prescribed by the ordinance, whereby many assessments were lost to the contractor. The court in construing the ordinance said: "It may be that as between the city and her solicitor the default should be charged to the solicitor; but if so the city must indemnify herself at the expense of him and his sureties, and not at the expense of O'Hara."

In the case of *Lyon v. District of Columbia*, 19 Ct. Cl. 649, the claimant was the owner of three tax-lien certificates, which were liens upon certain lots of land in Washington for the amount therein stated as overdue and unpaid taxes. The owners of the land in each case proved to the district commissioners that the assessments upon their land, for which said certificates were issued, were erroneous, in that they were for too large an amount. The district commissioners, finding that the lot owners had been assessed too much, reduced the assessments and discharged the liens on the land by the payment of the reduced amount. The court said: "When the commissioners destroyed the claimant's lien by settling with the lot owners for amounts less than the claims which they had sold, that was an implied obligation to pay him the difference."

We find that the cases of *Heller v. City of Garden City*, 58 Kan. 263; *City of Belton v. Sterling*, 50 S. W. (Tex. Civ. App.) 1027; *O'Brien v. Police Jury*, 2 La. Ann. 355; *Jones v. City of Portland*, 35 Or. 512; *Commercial Nat.*

Bank v. Portland, 24 Or. 188; *Kearney v. City of Covington*, 58 Ky. 339; *Bucroft v. City of Council Bluffs*, 63 Ia. 646, and *Barber Asphalt Paving Co. v. City of Denver*, 72 Fed. 336, to a greater or less extent support the rule above stated. On the other hand, counsel for the city in an elaborate and well-written brief have cited many authorities, some of which seem to support their contention. But, in view of our former decisions in which we think we are fairly committed to the more just and equitable rule contended for by the plaintiff, we are of opinion that the petition was sufficient in form and substance to resist a general demurrer.

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

REVERSED.

ROSE, J., dissenting.

My understanding of the facts pleaded by plaintiff and of the law applicable thereto leads me to dissent from the opinion and the conclusion of the majority. The petition does not contain a copy of the contract between the city and the contractor who constructed the sidewalks. It does allege, however, that the contractor, R. J. Gaddis, agreed with the city to construct sidewalks in front of lots 7 to 12, inclusive, in block 4, Fitzgerald's second addition, and that the city "agreed to pay for said sidewalks *from funds to be realized from assessments and special taxes on said lots.*" If this allegation left any doubt as to the agreement that the contractor was to be paid from funds arising from special assessments against the lots, the matter is made clear by the following certificate which is copied from the petition: "No. 121. $17.08. Office of City Clerk, Lincoln, Neb., Dec. 8, 1891. City Treasurer of Lincoln, Nebraska: This is to certify that R. J. Gaddis, or order, is entitled to seventeen and 8-100 dollars, assessments or special taxes for sidewalk construction on lot 7, in block 4, Fitzgerald's second addition, in the city of Lincoln, Nebraska, together with the interest and penal-

ties thereon whenever said assessment, penalty and interest shall be collected, and you will pay the same to the order of R. J. Gaddis on the presentation of this certificate with proper identification, after said assessment has been collected. This certificate is issued in accordance with an ordinance of the city of Lincoln, approved August 21, 1891, in accordance to an order of the city council made Dec. 8, 1891. No. 1620. D. C. Van Duyn, City Clerk."

The petition shows on its face, when this certificate is considered, that the contractor agreed to construct the sidewalks and to receive his pay from funds to be realized from special assessments against the lots. In thus providing for payment of the contractor, the city adopted the only means created by law for discharging the obligation. Its charter gave it no authority whatever to pay for the sidewalks described in the petition with funds raised by general taxation. In dealing with the officers of the city, the contractor was bound to know the limitations of their power. They had no authority as representatives of the city to guarantee the payment of his claim, or to assure him that the taxes would be sufficient to pay it, or that any deficiency would be made good by general taxation, or that the city would exercise extraordinary diligence in collecting special assessments from the lot owners, or that he would be relieved from the ordinary vigilance imposed by law upon lienors in collecting their claims. Where a city is not authorized by its charter to use its general funds for the purpose of constructing sidewalks, the law, as generally announced, does not imply an agreement to do so, and a rule of general acceptation limits a contractor to specific or special funds where, under authority of law, he contracts with reference thereto. *Lake v. Trustees of Williamsburgh,* 4 Denio (N. Y.) 520; *City of Huntington v. Force,* 152 Ind. 368; *Reock v. Mayor,* 33 N. J. Law 129; *Finney v. City of Oshkosh,* 18 Wis. 220; *Peake v. New Orleans,* 139 U. S. 342; *City of Alton v. Foster,* 74 Ill. App. 511; *Farrell v. City of Chicago,* 198 Ill. 558; *Craycraft v.*

Selvage, 10 Ky. 696; *City of Greencastle v. Allen,* 43 Ind. 347; *Goodrich v. City of Detroit,* 12 Mich. 279; *Northwestern Lumber Co. v. City of Aberdeen,* 20 Wash. 102; *Wilson v. City of Aberdeen,* 19 Wash. 89. The doctrine that a contractor is limited to the specific fund with reference to which he contracts is especially applicable to agreements for the construction of sidewalks. His judgment as to whether the property will sell for enough to pay the tax liens ought to be as good as that of the city officers, and he has the privilege of bidding it up to its full value. Like other creditors, he takes his chances on the sufficiency of his security. Ordinary business sagacity would lead him to consider in advance the location, character and value of the lots. These are matters of which the citizens generally will know little, even if they are required, after paying for their own sidewalks, to pay also for like improvements for the benefit of others, when the city is held liable to the contractor for the full amount of his claim. If the limitations solemnly imposed by the legislature for the protection of the public must yield to "the common obligation to do justice which binds individuals," still a valid contract honestly and fairly made pursuant to the terms of a city charter ought to settle the question of ethics between the parties. Civic integrity does not necessarily bind a city to insure its contractors against loss. The state constitution is a fair measure of public rectitude, and it declares: "The legislature shall never grant any extra compensation to any public officer, agent, servant, or *contractor after the services shall have been rendered or the contract entered into.*" Article III, sec. 16. A city must make estimates, levies and appropriations and contract in relation thereto. It can only pay its obligations by taxation or other limited means of raising revenue, and persons dealing with it should observe these limitations. Plaintiff's petition, as already stated, fairly shows that the contractor agreed to build the sidewalks and to wait for his pay until "after said assessment has been collected." Plaintiff is not the contractor, but is the holder of the lat-

ter's certificate. Is he not required, like other lienors, to be vigilant? It has been held that he must see that the officers perform their duty even to the extent of applying for mandamus. *City of Greencastle v. Allen,* 43 Ind. 347. I do not observe anything in his petition to indicate that he has been diligent in his own behalf, though he does state that the city officers properly levied the necessary taxes. As I understand the petition, it fails to show that the amount realized by taxation was less than the full value of the property, or that he would have increased such amount by bidding, had he been given an opportunity to do so, or that by stipulation or otherwise plaintiff was injured through the acts or negligence of the officers. The stipulation, however, as pleaded in the petition demurred to, indicates that the property could not have been sold for more than the sum realized, since the following is indorsed thereon: "On recommendation of James A. Sheffield, city assessor, and believing this will secure the city as much as can be obtained for the foregoing property, I sign this stipulation. E. C. Strode, City Attorney."

According to my understanding of this controversy, the doctrine announced in the cases cited by the majority should not be applied here. In my opinion, the demurrer to the petition was properly sustained and the judgment should be affirmed.

SEDGWICK, J., dissenting.

The act of 1889 (laws 1889, ch. 14, p. 191), provided that, when sidewalks and other such improvements were authorized to be paid for by special assessments, they should "in the first instance be paid for out of the general fund." In 1891 this section was amended. Laws 1891, ch. 8, p. 144. The provision that these improvements should be paid for out of the general fund was omitted, and in lieu thereof it was expressly provided that "the contractor shall receive his pay for such work from the assessments against the real estate in front of which

said work was done," and that "the city treasurer of said city shall pay over to such contractor * * * all assessments or special taxes against such real estate collected, together with the interest and penalty collected thereon, which shall in each case be full compensation to such contractor for any work so done under his said contract." This amendment took effect April 9, 1891, and it is beyond question that the legislature by this amendment intended to change the rule that had obtained and to withdraw from the city council the authority to pay for such improvements from the general fund. For this reason, I concur in the dissenting opinion of Judge ROSE.

JOHN F. REAMS, APPELLEE, V. GEORGE CLOPINE, SR., ET AL., APPELLANTS.

FILED OCTOBER 22, 1910. No. 16,152.

1. **Appeal:** INSTRUCTIONS. Inexactitude in the language of an instruction stating the issues is not ground for a reversal when the jury are not misled thereby.
2. **Trial:** VIEW OF PREMISES: DISCRETION OF COURT. Whether or not a jury shall be allowed to view the premises in an action for damages caused by flood waters is within the legal discretion of the court, and unless it is clearly shown that this discretion has been abused it will be presumed that it was properly exercised.
3. **Appeal:** ADMISSION OF EVIDENCE. A judgment will not be reversed and a new trial granted on account of an error in the admission of evidence where the defendant has not been prejudiced thereby.

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

Owsley Wilson, for appellants.

George M. Castor, *A. H. Byrum* and *W. S. Morlan*, *contra.*

LETTON, J.

This is an action for damages caused by the flooding of plaintiff's land. Plaintiff and defendants are farmers owning and occupying lands in the valley of the Republican river. Wortham creek, which is a natural drainage channel, has its source in the hills some ten miles southwest of plaintiff's farm. Its waters flow from the hills across a portion of the valley of the river in a well-defined channel to a point near the line of defendants' lands, then the channel becomes less distinct and almost entirely ceases to exist, permitting the waters to spread out and sink into the ground. In 1888 a number of persons owning lands along the creek subject to overflow straightened, widened, and deepened the natural channel, and dug a ditch from the end of the natural channel in a northeasterly direction through a sand ridge, so that the waters flowed into a swale or depression and found their way from there to the river. The plaintiff's land was thus protected from overflow from the creek. Plaintiff alleges this condition continued until about June, 1902, when the defendants dammed up and filled in the ditch, thereby causing the water to overflow upon the plaintiff's land, destroying his crops and damaging his land to the extent of $1,675.

The defendants by their answer deny that they filled the ditch, and allege that the natural course of the surface waters from the hills has always been in a northeasterly direction over plaintiff's land, not reaching defendants' lands at all; that in 1890 a ditch was constructed carrying the water into and on a part of the land now owned by defendants, that no outlet existed or was ever made whereby the waters could run into the river; that the ditch was abandoned and disused, and had become filled with silt and vegetation when the defendants bought and took possession of the land. The reply is a general denial.

The petition and answer are unnecessarily prolix and involved, and contain a number of other allegations un-

necessary to be here set out. The cause was tried to a jury, and a verdict rendered for plaintiff, assessing his damages at the sum of $500. Judgment was rendered upon the verdict, from which the defendants have appealed.

The errors assigned may be grouped under three heads: Errors in the giving of instructions; in refusing to grant a view of the premises by the jury; and in admitting testimony as to the value of the crops.

1. Instruction No. 1, which is complained of, merely states the issues presented by the pleadings in a somewhat condensed form. The jury were told that the plaintiff in his petition claimed that in the spring of 1902 the defendants obstructed the ditch, "thereby causing the destruction of certain alfalfa of the value of $375, and also certain corn of the value of $300 on the lands of plaintiff," and that they afterwards erected another dam causing the waters to run on plaintiff's land at another point, "and that by reason of said obstructions the lands of plaintiff to the amount of some 45 acres were greatly damaged (25 acres of said land being set with a good thick stand of alfalfa) to the damage of plaintiff in the sum of $1,000."

Complaint is made that no destruction of existing corn or alfalfa is claimed in the petition. The language of the petition in this respect is that the plaintiff was damaged: "(1) By the loss of crops of alfalfa for the seasons of 1902, 1903, and 1904 on 25 acres of his said land amounting to 125 tons of hay of the value of $375. (2) By loss of crops of corn on 20 acres for the seasons of 1902, 1903, and 1904 to the amount of 1,200 bushels of the value of $300. (3) Damage to the said land by reason of killing out of 25 acres of alfalfa which was growing in good condition and in good thick stand thereon, and by injury to said land by reason of rendering 45 acres thereof useless and of no value for farming or for any other purpose in the sum of $1,000."

The evidence shows that in 1902 a ripened crop of alfalfa in the shock standing upon plaintiff's land was destroyed by flood waters, and that the roots of the plant

were also destroyed. It was further shown that the flooding rendered the land so wet that it could not be cultivated, and there is testimony that it thereby became worthless, and there was no evidence of any damage to crops except in 1902. Considering these facts, we are unable to see how the defendants were damaged by this instruction.

Instruction No. 3, which is also complained of, states the rule as to the measure of damages for injuries to land and to crops in accordance with the settled law of this state. The same criticism is made of this instruction, as of the statement of the issues in No. 1, that it allows the full value for alfalfa destroyed in 1902, as well as for crops in 1903 and 1904. We do not think the jury were misled as defendants complain. While the petition alleged damage to crops in 1902, 1903, and 1904, the evidence only shows damage to the crops in 1902, and the instructions only cover that year.

2. Instruction No. 9, which is complained of, states the proper rule with respect to the right of a landowner to defend his premises against surface water, and further informed the jury that, if they found that the defendants "turned the surface water in a reasonable manner and without negligence into a natural swale or surface water drain on their own premises, the plaintiff is not entitled to recover for any damage thereby occasioned, and you should find for defendants, and each of them, unless you further find that the plaintiff had acquired a right or easement in the use of the ditch across the lands of defendants by the adverse use thereof for the period of ten years preceding the obstruction of the same by the defendants, as alleged in plaintiff's petition and as herein instructed." By instructions previously given the jury had been advised with great particularity of the defendants' rights with respect to the disposition of surface water, and of the burden devolving upon plaintiff to prove the existence of an easement across defendants' lands. The specific complaint made of instruction No. 9 is that

the court in this instruction assumes that the defendants obstructed the ditch as alleged in the petition. We do not so understand the instruction. All that portion of it relating to surface water and defendants' rights with reference thereto was requested by the defendants. The court merely modified the same by indicating that, even though the landowner had such a right, it might have been lost by the prior grant of an easement providing for the diversion of the waters, so that they drained through an artificial channel.

3. The next complaint is that the court erred in refusing to send the jury to view the premises. This is a matter peculiarly within the discretion of the court, and unless this has been abused this court will not interfere. A number of years had elapsed between the damage complained of and the time of the trial, and it is shown that the conditions now are not the same as at the time that the injury is said to have occurred. Furthermore, where there is as little difference in the level of land as the plat in evidence shows there is at the *locus in quo,* it would be almost impossible to make a correct estimate by the eye alone of the manner in which water would naturally flow. Common experience teaches us that it is exceedingly difficult to determine a slight difference in the level of land merely by looking at it. We think there was no abuse of discretion by the court in refusing to send the jury to view the premises.

Complaint is made of the introduction of evidence relating to the measure of damages. The evidence showed that the alfalfa in 1902 had been cut and was in the shock when the waters destroyed it. It was shown that the fair market value of alfalfa was $4 a ton. The question as to price included the years 1903 and 1904; but no objection was made on that account. It was shown that in 1902 plaintiff's corn where not destroyed by the water made 55 bushels an acre, and that the fair market value of corn at gathering time was 28 cents and 29 cents a bushel. It is clear that the value of corn gathered and delivered is not

a true criterion of the value of growing corn in the middle of June. *Berard v. Atchison & N. R. Co.*, 79 Neb. 830. However, the value of the standing crop might have been brought out upon cross-examination. In any event, the amount of recovery, which is considerably less than the damage proved, shows clearly that the jury must have made some allowance, and the case ought not to be reversed on this ground alone.

4. The evidence in the case is conflicting, and it is difficult to ascertain from the record whether the jury reached the proper conclusion as to whether the defendants were in fact responsible for the flooding of plaintiff's land. A finding that the ditch had been filled by natural causes, such as silt and decaying vegetation, before defendants purchased the land over which it ran, would be fully as well supported by the evidence. But the experience of centuries has shown that the determination of such questions is best committed to an impartial jury, and we must abide by their decision on the facts.

We have found no errors which we consider prejudicial to defendants. The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

ISAAC G. TRAUERMAN ET AL., APPELLEES, V. NEBRASKA LAND & FEEDING COMPANY, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,156.

Appeal: SUFFICIENCY OF EVIDENCE. Upon an issue as to whether a certain contract of sale was abandoned and repudiated by the buyer a verdict based upon a finding that the contract was not abandoned will not be disturbed when there is sufficient competent evidence to support it.

APPEAL from the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

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

LETTON, J.

The facts in this case have been fully stated in the preceding opinions, *Nebraska Land & Feeding Co. v. Trauerman,* 70 Neb. 795, and *Trauerman v. Nebraska Land & Feeding Co.,* 77 Neb. 403. When the case was last before the court a judgment had been rendered in favor of the defendant. The defendant then insisted that the principle governing the disposition of the case was that announced in *Walter Bros. v. Reed & Gerard,* 34 Neb. 544, and *Lexington Mill & Elevator Co. v. Neuens,* 42 Neb. 649. It was pointed out in the opinion that in those cases the purchaser had absolutely refused to proceed further in performance of his contract, but that, under the evidence in this case, it was not clear that the plaintiffs had absolutely repudiated it, and it was held that if on another trial it could be established that the plaintiffs had not abandoned the contract, but at a later date were ready and willing to receive and pay for the calves, then whatever damages the defendant may have sustained in consequence of the plaintiffs' failure to strictly fulfil its terms should be allowed, and plaintiffs permitted to recover the surplus in defendant's hands, if any. The cause was again submitted under instructions in substantial accordance with the principles announced in the two opinions of this court, and the jury returned a verdict for $800 in favor of the plaintiffs. Defendant appeals.

It is impracticable to set out all the evidence, which largely consists of letters and telegrams. Among other letters it is shown that on October 19, 1900, a letter was written on behalf of the plaintiffs from O'Neill, Nebraska, to the defendant at Chadron, Nebraska. The letter is ambiguous and uncertain in its language, but may be fairly construed as a request to defendant to sell the 500 calves

bought for the second delivery (as it had done with the calves bought for a prior delivery), and says also: "We doubt very much if we will be able to handle them at the specified time, October 27." The defendant introduced a letter-press copy of a letter dated October 20, 1900, which stated that they were unable to find a purchaser for the calves which were to be delivered October 27, and that they would be obliged to hold plaintiffs upon the contract, saying further: "Trust that you will be on hand for the second delivery." Both Mr. Trauerman and his foreman testify that such a letter as this was never received by them either at Sioux City or at O'Neill. It appears that on October 19 Mr. Trauerman left his ranch at O'Neill for a trip into South Dakota to make provision for taking care of the cattle, which had been returned upon his hands, mentioned in his letter of October 19. Trauerman also testifies that upon his return to Sioux City on October 31 he was handed a telegram sent by the defendant on October 26, notifying him that the calves would be at Irwin tomorrow, and asking if he would be there to receive them, and that the next day he wrote the following letter: "Sioux City, Iowa, Nov. 1, 1900. Nebraska Land & Feeding Co., Chadron, Nebraska. Gentlemen: On my arrival home last night your message was handed me stating that you would have calves at Irwin on Oct. 26th, we having written you that it would be impossible for us to receive the calves until a week or ten days later, and we think you certainly should have the consideration for us in not insisting on exact date of delivery, which was following up the personal conversation we had with Mr. Comstock at the time we bought the cattle, as he distinctly said you would not be particular and not insist on exact dates, we therefore would like to know what you have done in reference to the matter, as we heard nothing more in reply to our letter, and therefore desire to hear from you at once and we will then arrange to fulfil our contract. Respectfully yours, I. G. Trauerman & Co." He also testifies that previous to October 27 he had telephoned

the general freight agent at Omaha for rates, and to ascertain whether he could get cars in which to ship these cattle.

Other evidence as to prior dealings, and as to later efforts of plaintiffs to obtain delivery, was before the jury. On the whole evidence the jury might well find that the proof of abandonment of contract was not clear, and that the defendant was only entitled to actual damages sustained. The cost of delivery and return was proved; also evidence was given pro and con as to shrinkage in the value of the calves. Judging only from the amount of recovery, we think it probable that the jury in fixing the damages took into account the fact that defendant had the benefit of the use of the $1,000, advance payment, for nearly ten years. Perhaps, considering the fact that the jury were of the vicinage and better fitted to weigh evidence and determine questions of fact relative to the value of live stock in the western part of the state than the members of this court are, the amount of damage allowed defendant is fully compensatory. Under such circumstances, we would not be justified in setting aside the verdict, even if we thought the amount recovered more than it should have been.

Complaint is made as to the giving and refusing of instructions, but the case seems to have been submitted so as to place fairly before the jury the respective contentions of the parties and the law applicable thereto.

The judgment of the district court is

AFFIRMED.

ROBERT M. WELCH, APPELLEE, V. JOHN Q. ADAMS, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,146.

1. **Pleading: SUFFICIENCY.** A statement in an answer that the defendant is not indebted to the plaintiff is not a denial of any fact upon which the right to recover depends, and raises no issue.

2. ———: CONSTRUCTION. Where an objection that a petition does not state a cause of action is not interposed until after the commencement of the trial of a case, the pleading will be liberally construed, and, if possible, sustained.

3. Witnesses: REFERENCE TO MEMORANDUM. If, at the time a statement is made, a witness makes a memorandum thereof and knows and testifies that the memorandum is correct, he may produce the memorandum and testify therefrom, although he admits that he has no independent recollection of such facts.

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

Oliver S. Erwin, *Nelson C. Pratt* and *Alvin F. Johnson*, for appellant.

Bryce Crawford and *Rich, O'Neil & Gilbert, contra.*

ROOT, J.

This is an action upon a contract. The plaintiff prevailed, and the defendant appeals.

The defendant employed the plaintiff to solicit advertisements, and agreed to pay him one-half of the amount paid by the advertisers, as follows: One-fourth of the contract price for every advertisement whenever a contract should be received and accepted, "balance of commission payable as the contracts are collected by the said party of the first part." The plaintiff alleged in his petition that the defendant had received and accepted orders secured by the plaintiff aggregating $2,659.25, "and the defendant has collected thereupon from such advertisers the sum of $——, and the defendant thereby became indebted to the plaintiff in the sum of $1,329.62." The plaintiff admits having received from the defendant $1,022, and demands judgment for $307.07. The petition was not assailed by motion or demurrer before trial; but an answer was filed, wherein the defendant alleged that he did not owe plaintiff anything, and further pleaded a settlement. The defendant's plea of *nil debit* did not deny or place

in issue any fact alleged in the petition. *Gray v. Elbling*, 35 Neb. 278; *Baldwin v. Burt*, 43 Neb. 245; *Bankers Union of the World v. Favalora*, 73 Neb. 427.

Upon the trial of the cause, the defendant objected to the introduction of any evidence because the petition did not state facts sufficient to constitute a cause of action in the plaintiff's favor, but did not state in what particular the pleading was defective. The objection was overruled. The defendant now insists the plaintiff did not allege that the defendant collected any money upon the advertising contracts, and for that reason it does not appear that the defendant is in debt to the plaintiff. The rule is well established that, if the defendant's liability depends upon a condition, the plaintiff should charge that the event has come to pass. *Wilson v. Clarke*, 20 Minn. 367; *Inda v. McInnis*, 25 Nev. 235. If, however, the defendant does not object to the sufficiency of the petition until after the trial is commenced, the pleading will be liberally construed, and, if possible, sustained. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167; *Peterson v. Hopewell*, 55 Neb. 670; *Fire Ass'n v. Ruby*, 60 Neb. 216; *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698.

Applying the rule to the case at bar, we are of opinion that the allegation in the petition should be construed as an imperfect statement that the defendant has collected the amount due on all of the advertising contracts. Thus construed, the pleading states a cause of action in plaintiff's favor. We have no doubt that, if the defendant had asked for a more specific statement, or in any other manner had challenged the trial court's attention to the blank in the petition, that court would have compelled the plaintiff to amend. Upon the trial of the case, the defendant testified in his own behalf and did not deny having collected every penny called for in the contracts, but relied upon the alleged settlement as a defense to the action. The issues were presented to the jury upon instructions not criticised by the defendant's counsel, and we are satisfied not only that the defendant was not prejudiced by the

condition of the petition, but that substantial justice has been done the parties and that section 145 of the code applies to the case at bar.

Upon the trial of the case, a witness testified concerning the defendant's testimony during the trial of the cause before a justice of the peace. The witness produced, and testified from, a memorandum made by him at the time the defendant testified in the lower court. The witness stated that the memorandum was correct, but that independently of it he could not testify to the facts therein referred to. The memorandum referred to the amounts of money the defendant admitted had been paid to him upon 49 contracts, and the necessity for a memorandum to supplement the witness' memory is apparent. The testimony was competent. *Lipscomb v. Lyon,* 19 Neb. 511; *Gross v. Scheel,* 67 Neb. 223.

The judgment of the district court is right and is

AFFIRMED.

DES MOINES BRIDGE & IRON WORKS, APPELLEE, V. MARXEN & ROKAHR ET AL., APPELLANTS.

FILED OCTOBER 22, 1910. No. 16,157.

1. **Counties: BUILDING CONTRACT: LIABILITY ON BOND.** A board of supervisors in contracting for the construction of a courthouse may lawfully require the contractor to pay for the material used in the erection of said building, and a bond executed to secure the faithful performance of that contract inures to the benefit of a materialman.

2. **———: ———: ———.** In such a case the materialman will not be prejudiced by the failure of the supervisors to require the contractor to produce receipts signed by the materialmen and laborers before paying the contractor for constructing the building.

3. **———: CONTRACTOR'S BOND: APPROVAL.** If the bondsman in his answer admits the execution and delivery of the bond, the materialman need not prove that the board of supervisors formally approved it.

4. Appeal: ESTOPPEL. While it is the duty of the clerk of the district court in entering a judgment against two persons, one of whom is the principal debtor and the other a surety, to certify to those facts, yet if judgment is entered in strict conformity to a suggestion made to the court by the surety, it will not be heard to complain on appeal to this court concerning the form of the judgment.

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

Thomas F. Lee, L. H. McKillip, Alfred G. Ellick, Benjamin S. Baker and *A. L. Preston,* for appellants.

Howard J. Clark, contra.

ROOT, J.

This is an action prosecuted by a subcontractor upon an undertaking executed by a contractor and his bondsman. The plaintiff prevailed, and the defendants appeal.

The defendants Marxen & Rokahr, in a contract with Seward county, agreed to furnish the material, machinery, appliances and labor necessary for the construction of, and to construct, equip and fully build, a courthouse according to plans and specifications attached to said contract and made a part thereof. The contract provided that Marxen & Rokahr should furnish to the supervising architect of the courthouse and to the county, before progress certificates should be issued by the architect or partial payments be made for the work as it progressed, a receipt in full to that date from the parties who had furnished material for said building, and from all mechanics and laborers for work and labor performed upon the structure. It is also provided in the contract: "Before final settlement, or at any time the proprietor may demand, the contractor must settle all accounts for material delivered or work performed, as per his respective agreements for such material or labor, before further progress certificates are granted or payments of money

are made on the contract." At the time the contract was made the defendants Marxen & Rokahr and the Title Guaranty & Trust Company executed to Seward county a bond in the sum of $30,000 conditioned: "That if the said Marxen & Rokahr shall well and truly keep and perform all the conditions of this contract on their part to be kept and performed, and shall indemnify and make payment and save the said Seward county harmless as therein stipulated, then this obligation shall be of no effect," etc. The plaintiff furnished Marxen & Rokahr material that was used in the construction of the courthouse. Marxen & Rokahr failed to pay a large part of the plaintiff's claim, and the board of supervisors by resolution called upon them to pay the plaintiff's bill and any other valid unpaid claims on account of the construction of the courthouse.

The defendant the Title Guaranty & Trust Company contends there is no proof that the bond was approved by the board of supervisors of Seward county, and for that reason the undertaking did not become a valid obligation. In so far as the plaintiff is concerned, the bond is a common law obligation, and a formal approval is not necessary for the purposes of this action. The trust company admits in its answer that the bond was executed and delivered, and its argument is not well taken.

In exhaustive, well-reasoned arguments in the briefs and at the bar, the defendants contend that since the plaintiff is not named in the undertaking, and the contracting parties did not know when the bond was executed, that the Des Moines Bridge & Iron Works would furnish any material to Marxen & Rokahr, and because the county of Seward, the obligee in the bond, is under no legal or equitable obligation to the plaintiff or to any other materialman or subcontractor, this action cannot be maintained, but that the undertaking should be construed merely as a statutory bond for the protection of laborers and mechanics. It may be conceded that many authorities sustain the argument advanced, but an opposite conclusion was announced by this court in *Sample & Son v.*

Hale, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649; and *Morton v. Harvey*, 57 Neb. 304. The controlling facts in *Lyman v. City of Lincoln, supra*, are parallel with the facts in the instant case. Counsel suggest that the argument made by them in the case at bar was not presented to this court in the cases just cited. While the opinions may not advise the reader that the court received the benefit of an argument along the lines pursued by defendants' counsel in the instant case, the briefs filed in *Doll v. Crume, supra*, show that such an argument was made with great force and learning. It is apparent, therefore, that the court was duly advised concerning the principles now contended for by defendants' counsel.

It is better that the law with respect to contracts should be certain than that it should in all particulars conform to the views of the courts of some of our sister states. The defendants in the case at bar must have contracted with reference to the law as announced in the cited cases, and the defendant bonding company must have known that it was assuming an obligation to pay the subcontractors and materialmen as well as the laborers and mechanics engaged in constructing the courthouse referred to. The plaintiff in contracting to furnish material for the courthouse also had a right to rely upon the law repeatedly stated by this court, and should not be deprived of the defendants' obligation to pay for that material because a like bond could not be enforced in the state of New York. We are not convinced that we should overrule a long line of our decisions, and shall not do so in the instant case. *City of Wahoo v. Nethaway*, 73 Neb. 54.

Counsel for the defendants argue that the principle they are contending for was recognized in the opinion of Judge HOLCOMB in *Frerking v. Thomas*, 64 Neb. 193. It is true that the New York cases were referred to with approval in *Frerking v. Thomas, supra*, but that case does not in-

volve a contract like the one considered in the instant case or those construed in *Sample & Son v. Hale* and *Lyman v. City of Lincoln, supra;* nor was there any intention on our part in accepting Judge HOLCOMB'S opinion to discredit the law announced in the cited cases.

The defendant bond company's undertaking was given for the benefit of the materialmen who might furnish materials for the construction of the courthouse, as well as for the protection of the laborers and mechanics who should work upon that building. The bond company contends that it should be released from all liability because the county did not require Marxen & Rokahr to produce receipts showing that the materialmen and laborers had been paid for material furnished and for services performed, and alleges that payments were made in excess of the 85 per cent. provided for in the contract. The plaintiff had no control over the board of supervisors, and the conduct of that board will not prejudice the plaintiff's right to sue the bond. *Doll v. Crume,* 41 Neb. 655; *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson,* 124 Ia. 599; *People v. Banhagel,* 151 Mich. 40.

Finally, the bond company urges that it is a surety for Marxen & Rokahr, and that the clerk should have so certified upon the judgment record conformable to section 511 of the code. The judgment first entered was joint and several against all of the defendants. The bond company subsequently moved the court to modify the judgment, and in its motion set out the form of journal entry it desired the clerk of the court to make. The court sustained the motion, and the record was modified according to the suggestions made by said defendant. We think, under the circumstances, the bond company should not be heard to complain. *Drexel v. Pusey,* 57 Neb. 30.

There is no conflict in the evidence concerning the amount due the plaintiff from Marxen & Rokahr on account of the material furnished for the Seward county courthouse. The trial judge followed the law as announced years since by this court. There is no error in

the record prejudicial to the defendants, and the judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

J. G. BESTE, EXECUTOR, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,147.

Eminent Domain: OPENING HIGHWAY: DAMAGES: LESSEE OF SCHOOL LAND. Where a tenant occupying school land under a lease executed by the state files with the county clerk pursuant to notice a claim for damages to his leasehold on account of the opening of a highway on a section line and appeals to the district court from an adverse decision of the county board, he is entitled to damages to the extent of his injury without joining the state as plaintiff.

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

J. C. Robinson, for appellant.

H. E. Burkett, contra.

ROSE, J.

The sufficiency of the following petition to state a cause of action in favor of Stephen A. Dugan, plaintiff, and against the county of Cedar, defendant, is the question presented by this appeal:

"Comes now the above named plaintiff, and for cause of action against the above named defendant alleges:

"(1) That on July 13, 1906, William Lammers and others filed with the county clerk of said county their petition for the location of a public highway to be established over and across the lands of this plaintiff hereinafter described.

"(2) That on August 11, 1906, this plaintiff, in pursuance of notice given by the said county clerk, filed with the said clerk his claim for damages on account of the location of said highway over and across the lands of the plaintiff, to wit, the northwest quarter of section 36, in township 31, of range 1 west, in the sum of $70.

"(3) That on December 6, 1907, the board of county commissioners of said county of Cedar granted the petition before referred to, and established and located a public highway over and across said lands of this plaintiff, and then and there rejected and disallowed plaintiff's claim for damages on that account.

"(4) That on December 21, 1907, plaintiff served upon the county clerk a notice that he intended to appeal from said decision of said board of commissioners; all of the facts hereinbefore stated being more fully set forth in the transcript filed herein by the county clerk of said county to which reference is hereby made.

"(5) That plaintiff is the owner, as hereinafter stated, of the whole of the north half of section 36, township 31, range 1 west, and that he is now, and for the past eight years and more has been, in the actual possession and occupancy thereof. That the same is an improved farm and constitutes the home of plaintiff.

"(6) That plaintiff's ownership and title to said lands arise under and by virtue of certain school land leases duly executed and delivered on the part of the state of Nebraska by the commissioner of public lands and buildings to one ....., and which leases have each and all been duly assigned by the lessee therein and delivered to plaintiff. That said leases confer upon the lessee and his assignee the absolute right to the possession, occupancy, use, and the rents, income and profits from the whole of said premises, and that such right continues during the whole term of said leases, which term continues and will not terminate until January 1, 1923.

"(7) That, by the establishment and location of the public highway aforesaid, the defendant has taken and

appropriated a strip of land two rods wide across the entire west end of the said tract for said highway, and has thereby deprived the plaintiff of the possession, use and benefits thereof to his damage on account of such taking in the sum of $75.

"(8) That there is now due and owing to this plaintiff from the defendant the sum of $75, together with interest thereon at 7 per cent. from December 6, 1907, no part of which has been collected or paid.

"Plaintiff therefore prays for judgment in the said sum of $75 and for an order requiring the board of county commissioners of the defendant to issue and deliver to plaintiff a warrant in due form in payment of said amount with cost."

A demurrer to this petition was sustained, and from a judgment of dismissal plaintiff appealed. After the filing of the transcript in this court plaintiff died, and the cause was revived in the name of J. G. Beste, executor of the last will and testament of Stephen A. Dugan, deceased.

To justify the ruling of the trial court in sustaining the demurrer these prospositions are urged: It is shown on the face of the petition that the land taken by the county for highway purposes is school land. The state owns the fee. Plaintiff is lessee and occupies the land as the state's tenant. In an action to recover damages for that part of the land taken for a highway the state is a necessary party. There is therefore a defect of parties plaintiff. In support of the position thus stated defendant cites *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123. The report of that case shows: Ingalls bought land partially occupied by a highway. Before the purchase price had been paid in full and while the vendor held the legal title, the railroad company built a track on the highway. Without making the vendor a party, Ingalls sued the railroad company for damages to the land by reason of the additional burden placed thereon by the use of the highway for railroad purposes. On these facts the court observed: "Ingalls

had an estate in the land and was in possession. To the extent of the estate he was entitled to recover. At the most there was a defect of parties; but no objection of this kind was made in the pleadings, and therefore he was entitled to recover for the injury to the extent of his interest."

Distinguishing features of the present case are obvious. Plaintiff did not institute this proceeding. The petition shows that, pursuant to notice given by the county clerk to plaintiff, he filed his claim against the county. It was rejected, and he appealed to the district court. The questions for determination were the same in both tribunals. If the state was a necessary party, the duty of bringing it into the proceeding did not devolve upon plaintiff. Under a similar proceeding by which land may be appropriated for railroad purposes, the following rules, in an opinion by Judge SEDGWICK, were held applicable to a railroad company: "It is therefore its duty to bring in all parties having an interest in the estate in order that the condemnation money may be properly applied. The word 'owner' as used in the statute applies to all persons who have an interest in the estate. Where it is necessary the court possesses ample power to require such parties to interplead, and to apportion the money according to their rights." *State v. Missouri P. R. Co.*, 75 Neb. 4.

After plaintiff in the present case was notified to appear and file his claim with the county clerk, his right to compensation for damages to his leasehold did not depend upon his joining the state as plaintiff. The attorney general prosecutes or defends civil suits in which the state is a party or interested, and his official acts cannot be controlled by private suitors. If plaintiff and the state are both entitled to damages, the court has authority to apportion the amount to which each is entitled, but the burden of bringing the necessary parties into the proceeding does not rest on plaintiff. The case cited by defendant is not in point therefore, and it is clear that defendant cannot, by reason of a defect of parties, avoid answering to the merits of the petition.

It is further argued by defendant, in substance: Before plaintiff leased the land taken for a highway, the state had dedicated it to the public for that purpose. Plaintiff's leasehold was subject to the superior rights which the county acquired by dedication. When the highway was opened the dedication was accepted by the public, and the acceptance related back to the original grant. To establish the dedication defendant relies upon language found in the following enactment of the legislature: "Section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause them to be worked in the same manner as other public roads: Provided, that any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided." Laws, 1879, p. 130, sec. 46; Comp. St. 1905, ch. 78, sec. 46. This statute dispenses with formal, preliminary proceedings in the opening of highways on section lines, but preserves the landowner's right to compensation for property taken or injured. *Scace v. Wayne County*, 72 Neb. 162; *Barry v. Deloughrey*, 47 Neb. 354. If the legislature intended to donate a portion of the school lands to counties for highway purposes, as argued by defendant, the legislative grant was limited by the proviso: "Any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided." The enactments to which the proviso refers provide a method of compensating an owner for land taken or damaged for highway purposes. Comp. St. 1905, ch. 78, secs. 18-29. The word "owner" as used in such statutes applies to all persons having an interest in the estate taken or damaged. *State v. Missouri P. R. Co.*, 75 Neb. 4. Within the meaning of the road laws plaintiff is an owner, and the leasehold described in his petition is an estate or property, which is protected from invasion by the pro-

viso quoted and by the constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21. The petition shows that plaintiff's leasehold was damaged by the opening of the road, and to the extent of his injury he is entitled to recover. The demurrer was erroneously sustained.

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

REVERSED.

WILLIAM KRUSE, APPELLANT, V. FRANK JOHNSON, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,159.

1. **Judgment:** SUIT TO CANCEL: PETITION. Where the return of a constable, reciting that he served a summons on defendant by leaving a copy thereof at his usual place of residence, is assailed as false in a suit in equity to cancel a judgment rendered by a justice of the peace on the faith of the alleged false return, the petition should state that the place where the copy was left was not at the time defendant's usual place of residence, if that fact is relied upon as a ground of equitable relief, or state facts equivalent to such an allegation.

2. **Pleading:** SUFFICIENCY. In testing the sufficiency of a petition mere conclusions of law should be disregarded.

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

C. W. Britt and *M. O. Cunningham,* for appellant.

John T. Cathers, contra.

ROSE, J.

This is a suit in equity to cancel a judgment which a justice of the peace had rendered against William Kruse for $85.40 on a claim for the balance due Frank Johnson

for grading lots, in an action wherein Johnson was plaintiff and Kruse was defendant. The district court sustained a demurrer to the petition in equity and dismissed the action. Kruse has appealed.

Kruse did not appear before the justice of the peace, but asserts as grounds of equitable relief that no summons was served upon him and that he had no notice of the action until execution issued on the judgment. He has attached to his petition a transcript of the proceedings before the justice of the peace, and it appears therefrom that a summons was issued and that it bore the following indorsement, when returned: "July 28, 1908. Received this writ July 28, 1908. Served by leaving a certified copy of this writ and indorsements thereon at the usual place of residence of the within named defendant in Douglas county, Nebraska. Paul Stein, Constable."

If the constable's return speaks the truth, the summons was served in a statutory manner by the leaving of a copy at Kruse's usual place of residence. Code, sec. 69. In regard to the service of summons the petition alleges: "Petitioner is informed and believes and states the facts to be that a pretended service of summons was had upon this plaintiff by leaving a copy of said summons at the house located at the northwest corner of Twenty-fifth and Cass streets, which said last named place is not the home or property of this plaintiff, and over which this plaintiff exercises no control and did not at the times mentioned in said alleged summons." The code provides: "The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day." Code, sec. 69. "The words, 'usual place of residence,' mean the place of abode at the time of service." *Blodgett v. Utley,* 4 Neb. 25; *Seymour v. Street,* 5 Neb. 85. The language copied from the petition does not contain an allegation that the house at which the summons was left was not Kruse's usual place of residence, or not his place of abode, July 28, 1908, when the service was made, as shown

by the return. The petition shows that a summons was issued, but fails to state that a copy thereof was not left at Kruse's "usual place of residence" July 28, 1908. That Kruse did not have notice of the action in time to make a defense is nowhere stated, except in the form of a conclusion which should be disregarded in testing the sufficiency of the petition. *Woodward v. State*, 58 Neb. 598; *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255. The return of the constable that he served the summons on Kruse by leaving a copy at his usual place of residence is part of the judicial record of the action and was made by the officer when acting under his official bond and his oath of office. When such a return is assailed in a court of equity as false, the facts showing its falsity should be stated. The insufficiency of the allegations in reference to the material facts essential to Kruse's cause of action fully justified the trial court in sustaining the demurrer.

The judgment is therefore

AFFIRMED.

HORACE E. BURNHAM, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,571.

1. **Pleading:** SUFFICIENCY. In a petition, a general allegation of negligence is sufficient, if not assailed by motion.

2. **Appeal:** REVERSAL: RETRIAL: ADMISSIONS AT FORMER TRIAL. When a case is retried in the district court after a general reversal on appeal, the trial court, in construing an admission made by plaintiff at the former trial, should consider the situation of the parties at that time and the circumstances under which the admission was made.

3. ———: ———: ———. A plaintiff, by trying his case and recovering an erroneous judgment under allegations which, when proved, afford him no remedy, is not precluded from relying on other allegations of the same petition after his judgment has been reversed on appeal and the cause remanded generally.

4. Railroads: KILLING STOCK: NEGLIGENCE: QUESTION FOR JURY. In a suit against a railway company to recover the value of a horse which, when running on the track ahead of a train, was struck and killed by the locomotive, whether the engineer by the exercise of ordinary care could have stopped the train in time to avoid the collision after he saw the horse and blew the whistle to frighten it is a question for the jury, where there is competent proof to sustain a verdict in favor of plaintiff on that issue.

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

James E. Kelby and *Frank E. Bishop,* for appellant.

Wilmer B. Comstock, contra.

ROSE, J.

At Burnham, July 5, 1905, a freight train operated by defendant struck and killed plaintiff's horse, and this is a suit to recover its value. There were two trials. At the first plaintiff recovered a judgment on the theory that defendant was negligent in failing to fence its track where the horse entered the right of way. On appeal to this court, the first judgment was reversed because defendant was under no obligation to fence its track at that place. *Burnham v. Chicago, B. & Q. R. Co.* 83 Neb. 183. Upon a retrial in the district court, plaintiff recovered a judgment for $162.20, the ground of defendant's liability being negligence in the operation of its train. This judgment is now presented for review on an appeal by defendant.

The first point argued is that the petition will not sustain a judgment based on negligence in the operation of the train. The petition was the same at both trials. While negligence in failing to fence the track is specifically alleged, the petition also contains the general allegation that the horse was, "through the negligence and carelessness of defendant, run upon, against and over by one of defendant's engines and train of cars and killed." This general allegation is not assailed by motion, and in

absence of such an attack is sufficient. *Union P. R. Co. v. Vincent,* 58 Neb. 171.

It is next argued that the course pursued by plaintiff at the first trial prevents a recovery for damages resulting from the negligent operation of defendant's train. This point seems to be based on an admission or election by plaintiff and an instruction of the trial court. During the first trial, at the close of the testimony, counsel for defendant inquired of opposing counsel: "As a matter of convenience, Mr. Comstock, as I understand you from your original statement, the action here is for a failure to fence; so that would be all that we need to contest here?" This was answered: "Yes, sir." The court instructed the jury as follows: "As the case is presented to you for your determination, it is not contended by the plaintiff that at the time of the killing of the horse in question the defendant railway company was guilty of any negligence upon its part in the management and operation of the train that killed the horse, or that any liability on the part of the railway company exists in his favor for the loss of the horse on account of the defendant's management and operation of said train."

The effect of the admission should be considered in connection with the situation of the parties at the time it was made. Did plaintiff then rely on negligence in the operation of the train? An admission that he did not would justify the court in withdrawing that question from the consideration of the jury. Such a course would simplify the issues and facilitate further proceedings. "As a matter of convenience," the admission was made pursuant to the inquiry. At the first trial plaintiff did not rely on proof that the train was negligently operated. There was therefore no occasion to argue or submit that question to the jury, and in this situation counsel for plaintiff conceded, for the purposes of the trial, as the evidence then stood, that he did not rely on negligence in the operation of the train. The concession was not intended as an admission amounting to an adjudication that there was in

fact no such negligence, and should not be so construed upon a retrial in the same case. The trial court seems to have taken this view in permitting a recovery for negligence in the operation of the train.

Another proposition argued by defendant is stated in its brief as follows: "There is no evidence to sustain a finding of negligence in the operation of the train as the cause of the death of the horse." To justify the recovery on account of negligence in the operation of the train, plaintiff invokes the following rule: "It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and, if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced." *Omaha & R. V. R. Co. v. Wright,* 47 Neb. 886.

A witness who lived near the place where the horse was killed testified in substance to these facts: The freight train came along there about 5 o'clock in the morning. His attention was directed to the horse by what he termed "a terrible whistling." He was familiar with the alarm. It indicated that something was on the track, and was such as is usually employed to frighten stock. He got up and went out and saw the train and also the horse. The animal was on the track. It ran down the track ahead of the train. The engine was about 80 rods from the horse when the whistling started, and it was kept up continuously until the horse was killed. The witness saw the train overtaking the horse. He did not know the speed of the train, but it was running rapidly and never slackened. The horse was knocked off the track dead. Did the engineer see the horse on the track 80 rods ahead when the stock-alarm was first sounded? Was defendant negligent in running down and killing plaintiff's horse? Could de-

fendant by the exercise of ordinary care have stopped the train in time to avoid a collision? The trial court was not without precedent in submitting these questions to the jury and in upholding the verdict. *Missouri P. R. Co. v. Vandeventer,* 28 Neb. 112; *Burlington & M. R. R. Co. v. Gorsuch,* 47 Neb. 767.

Some complaint is made of the instructions of the trial court, but they are in harmony with rules formerly announced by this court. No error has been found, and the judgment below is

AFFIRMED.

LETTON, J., absent and not sitting.

IN RE ESTATE OF JAMES M. BULLION.

CLARK BULLION ET AL., APPELLEES, V. CURTIS W. RIBBLE, ADMINISTRATOR, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,061.

1. **Executors and Administrators:** LIABILITY FOR INTEREST. It is the duty of an administrator to use reasonable diligence and dispatch in settling the estate committed to him and in delivering the residue of such estate to the heirs and distributees thereof, and for such services he is entitled to credit for his reasonable attorney's fees, expenses and compensation; but, if he negligently or in bad faith unreasonably delays the settlement of his estate, he is liable therefor to the heirs and distributees of such estate for the statutory interest upon all moneys in his hands or under his control as such administrator from the time when such moneys should have been paid by him to the date of payment of the same.

2. ———: ATTORNEY'S FEES. Where it appears that an administrator has defended a suit to which there was in fact no meritorious defense, the mere fact that counsel advised him that he had a defense is not sufficient. He must go further and show facts and circumstances sufficient to show that he acted reasonably.

3. ———: ———. And in such a case, where such facts and circumstances are not shown, the administrator is not entitled to credit for his attorney's fees or other expenses in making such defense.

4. ———: ———. Where the heirs and distributees of an estate in process of settlement in the state courts, without any just cause therefor, bring suit against the administrator of said estate in the federal court, the administrator is justified in defending such suit, and is entitled to credit on his account as such administrator for his reasonable attorney's fees and expenses in making such defense.

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

S. R. Rush, L. W. Colby and *Hall, Woods & Pound,* for appellant.

Robert Ryan and *W. G. Hastings, contra.*

FAWCETT, J.

This is an appeal from the decree of the district court for Saline county on an appeal from the county court of that county in the matter of the final settlement of the accounts of Curtis W. Ribble, as administrator of the estate of James M. Bullion, deceased. The decree being unsatisfactory to both sides, the administrator appeals, and the heirs at law of James M. Bullion, deceased, prosecute a cross-appeal.

The contentions of the respective parties are set forth in their briefs, and the record fairly supports the statements made by counsel. Briefly stated the facts are: That James M. Boullion died intestate in Saline county, Nebraska, January 9, 1901, leaving a widow, two sisters and a half brother, but no issue, him surviving. He owned 80 acres of land in fee simple and held school contracts for 240 acres more. He also owned considerable personal property.

January 21, 1901, his widow applied for appointment as administratrix of his estate. January 23, 1901, she was appointed special administratrix thereof. February 18, 1901, a sister and an aunt of the deceased, who were also his creditors, objected to the widow's appointment as

administratrix. February 19, 1901, the county judge ordered that all claims against the estate be filed within six months of February 22, 1901, and that all claims not filed within that time should be barred. Notice was given of this order by four weeks' publication in a weekly newspaper. February 19, 1901, the sisters of the deceased petitioned for the appointment of a Mr. Butler as administrator. March 20, 1901, the court overruled objections to the appointment of the widow, and appointed her jointly with Butler to represent the estate. Butler did not qualify. The widow qualified April 17, 1901. On the last named date the widow filed her inventory and report as special administratrix, the account was approved and she was discharged. Her attorney, Mr. Colby, was allowed $100 attorney's fees in the matter of the special administration, and she reported $620.60 of other expense, leaving cash in her hands, proceeds of the sale of personal property, $3,251.05. April 18, 1901, without notice to any one, on the widow's application she was allowed $50 a month for her support pending the settlement of the estate.

August 24, 1901, an order was made barring all claims against the estate not then on file in the county court, and hearing on those filed was continued till August 29, 1901. Upon the last named date the court allowed against the estate claims aggregating $6,881.88, not including interest, but the interest then accrued averaged less than six months' time on the claims. Of the claims thus audited, $2,553 bore 10 per cent. annual interest, $800 bore 8 per cent., and $3,525.88 bore 7 per cent.; $3,490.61 was a preferred claim for money in Bullion's hands as guardian for a ward residing in New York.

September 26, 1901, the administratrix filed a report showing the expenditure by her of $1,045.30, including 15 months' support, $750, and reported a balance of $2,579.04 in her hands. September 25, 1901, Mesdames Furmin and Ames, sisters of the deceased, and a Mrs. Hopkinson, an aunt, petitioned for leave to file claims against the estate, based on promissory notes signed by Mr. Bullion,

aggregating about $2,500. The record in this case does not state the fact, but in the opinion of Commissioner GLANVILLE, in *Ribble v. Furmin*, 71 Neb. 108, the statement is made that, intermediate the filing of objections to the appointment of Mrs. Bullion as administratrix of the estate of her deceased husband and the time claims against the estate were directed by the county judge to be filed, Judge Hastings, the attorney for the claimants, was appointed supreme court commissioner, and neglected to report that fact to his clients. The notes, it seems, were in Nebraska during this time.

December 29, 1901, Mrs. Bullion died, and December 30, 1901, Curtis W. Ribble, a DeWitt banker, was appointed administrator *de bonis non* of the James M. Bullion estate, and duly qualified. Hearing on the application of Furmin *et al.* was continued along from time to time till February 17, 1902, on which date the petitions were dismissed and supersedeas bond in the sum of $50 fixed for an appeal in each case. A joint bond of $150 was finally accepted, and the claimants appealed to the district court, where judgment was rendered in favor of the claimants to the extent of reversing the order of the county court and remanding the cases. Ribble appealed to this court, and on February 4, 1904, the district court was upheld, except that its order was modified so that the entire controversy should be settled in the district court.

February 5, 1902, Mr. Ribble filed, in the name of Mrs. Bullion, a final report of her acts as administratrix, showing that she had paid $2,000 on the preferred claim, which, added to other expenditures made and credits claimed by her, left in her hands a balance of $239.90. It is possible that $700 rent money is not properly accounted for, but there is not sufficient evidence to warrant us in disturbing the judgment of the district court upon that point. In the meantime Ribble had sold the school land contracts and the 80 acres of deeded land for the sum of $9,100.

August 4, 1902, the court on the *ex parte* applications

of Ribble, administrator, made two orders; one that $150 should be paid Messrs. Colby and Sands for service in resisting the claims of Furmin *et al.*, and the other that they should be paid $200 for services rendered in selling the land. Previously Mr. Colby had been allowed $50 in addition to the $100 allowed for services as attorney for the special administratrix. September 1, 1902, on *ex parte* application of Ribble, administrator, he was given authority to pay Colby and Sands the further sum of $300 for legal services rendered in resisting the claims of Furmin *et al.*

October 14, 1904, Furmin, Ames and Bullion, sole heirs, asked for an order settling the administrator's accounts and for a distribution of the residue of the estate. December 10, 1904, this petition was dismissed. November 9, 1904, Ribble petitioned the county court for an order directing him to pay all unpaid claims, and November 10 the order was made. November 10, 1904, on Ribble's *ex parte* application, the county court directed him to pay Colby and Sands the further sum of $1,050 for legal services rendered in resisting the claims of Furmin *et al.* November 30, 1904, Ribble filed a report showing a balance of $4,364.38 in his hands.

December 2, 1904, Furmin, Ames and Clark Bullion, sole heirs of the deceased, filed a petition in equity in the circuit court of the United States for the district of Nebraska against Curtis W. Ribble as administrator of the estate of James M. Bullion, deceased, wherein many allegations of alleged fraud and misdoings on the part of the said administrator in the administration of the estate are set forth in the florid language so dear to the old-time equity draughtsman. Among other things, the pleader charges that no claims have ever been allowed against the estate, and the money paid by the administrator was without authority, etc. The prayer is for an accounting and a judgment for the amount due the respective plaintiffs. The federal judge overruled a demurrer to the petition and to the jurisdiction of his court, and thereafter an an-

swer and a reply were duly filed. It is stated by counsel that the cause now awaits the final order of the state courts in the premises.

It may be proper to state that after this court sustained the district court, as above stated, the claimants were met in the district court by all manner of motions which delayed a hearing. Mr. Colby, of counsel for Mr. Ribble, testified that he and his co-counsel, Mr. Sands, "did all kinds of ingenious things" in the cases, which deferred a final hearing. Upon the happening of the death of Mrs. Bullion, two of these claimants and their half brother, Clark Bullion, were the only persons interested in the residue of the estate, so they, with Mrs. Hopkinson, agreed to settle their claims out of court. Thereupon their attorney dismissed the claims to prevent further cost and delay, and then commenced the action in the federal court, above referred to.

November 12, 1904, the county judge made an order vacating the order theretofore made by him commanding the administrator to pay out the money in his hands. On the 13th of November, 1905, the last above order was annulled and a further order made to pay Mr. Rush $500 attorney's fees and all necessary costs in defending the suit in the United States court. The administrator has paid out the entire assets of the estate to the various claimants, other than the heirs, in liquidation of claims allowed and the interest which accrued thereon for about four years.

The district court found that the administrator should not have appealed to the supreme court from the order of the district court September 30, 1902, directing the county court to hear the claims of Furmin *et al.*; and all costs incurred in connection with that appeal, including attorney's fees and the administrator's personal expense, are deducted from the items of credit claimed by Mr. Ribble. An item of $175 is also deducted from said amount. The court further found that immediately after September 30, 1902, Ribble should have paid all claims against the

estate, and that he should have settled the estate not later than November 30, 1902; that the administrator retained in his hands for his personal benefit $6,000 and should be charged 7 per cent. interest thereon from November 30, 1902, less $180 interest accounted for by him. The court also deducts $770 claimed by Ribble for attorney's fees and expenses in federal court. Owing to an error in addition, this item is $100 too large. The correct amount is $670. The court further found that the administrator should account for $5,053.15 as of date August 1, 1908, less whatever money might be necessary to pay unpaid interest on claims against the estate.

The appellees have filed a cross-appeal wherein they insist the administrator should be held for failure to collect from Mrs. Bullion's bond an alleged balance in her hands of the money of the estate and not accounted for by her. Especially is exception taken to the report made by Ribble for the administratrix. Some of the challenged items relate to expense incurred in the widow's last illness and for her funeral expenses. We think it was within the discretion of the county court to consider those items and the excess of the widow's allowance in the light of support for the widow, and that these collateral heirs have no standing to question such credits. The objection to rent for homestead should also be overruled.

We think the court was right in refusing to give credit for attorney's fees and expenses incurred in the supreme court in resisting the claims of Ames, Furmin and Hopkinson. At the time Ribble, on the advice of counsel, resisted those claims, there was an abundance of money in his hands to pay all claims with interest, including the contested claims. Two of those claims were held by heirs of the deceased. None of the heirs requested the administrator to interpose objections to the payment of the notes, nor did any meritorious defense thereto exist. The authorities amply demonstrate that an administrator cannot shield himself from responsibility by stating that he followed the advice of his counsel. *Clement's Appeal*,

49 Conn. 519; *In re Huntley,* 25 N. Y. Civ. Pr. Rep. 78; *Mackin v. Hobbs,* 126 Wis. 216.

This brings us to the question of interest. It is a difficult one to solve. Mr. Ribble testified positively that he did not profit directly or indirectly from the possession all those years of something like $6,000 of the funds of the estate. However, with the exception of one year during which he received 3 per cent. interest on $6,000, he had the money deposited principally to the credit of himself individually and in his own bank. It is immaterial whether he unlawfully converted the money. It is sufficient that he mingled it with his private funds and made it subject to his personal check, instead of using it as administrator for the benefit of the estate, and this, too, in the face of the fact that many of the claims allowed against the estate were drawing 10 per cent. interest per annum. In such a case we think an administrator should be charged with the statutory rate of interest for all of the time the funds are so held and appropriated.

The attorney's fees and expenses in the federal court should have been allowed. There was no excuse for that action. The district court had never shown any disinclination to award appellees their full rights, and, regardless of the question of the jurisdiction of the federal court, which to our minds is none too clear, appellees should, in all fairness, have avoided the expense of resorting to that court, and have submitted any errors of commission or omission of the county court to the district court. To the extent that the plaintiffs therein claimed to be creditors of the estate such claims were then barred by the statute of limitations, and they could only be heard as heirs to demand their distributive share of the estate. The amount due them could only be determined, and was finally determined, in their favor by the state courts. Some of the allegations of the bill are untrue. For instance, there is no proof to sustain the allegation that no claims had ever been allowed against the Bullion estate. On the contrary, the proof shows that over $6,000 in

claims had been thus allowed. While there is some ground for dispute as to some of the smaller amounts allowed, and also as to some of those disallowed, we feel that the evidence before us will not justify interference by this court as to any of such items.

The judgment of the district court is therefore affirmed except as to the item of $670 attorneys' fees and expenses in the federal court, and the case is remanded to the district court, with directions to modify its judgment accordingly. The costs in this court to be taxed against appellees.

AFFIRMED AS MODIFIED.

IOWA HOG & CATTLE POWDER COMPANY, APPELLEE, V. A. A. FORD, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,143.

Trial: DIRECTING VERDICT. "The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it." *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8.

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

Bernard McNeny and *Fred Maurer*, for appellant.

Murdock & Pancoast, contra.

FAWCETT, J.

Plaintiff recovered judgment in the district court for Webster county upon a promissory note. Defendant appeals.

Defendant admits the execution and delivery of the note, and for defense alleges that it was obtained by plaintiff's agent under false and fraudulent representations;

that the agent represented that he was interested in the sale and advertising of certain stock food which was of great value for the cure of hog cholera and other diseases among hogs and cattle; that, if defendant would undertake the agency for the sale of said stock food in his neighborhood, plaintiff would send to him a large shipment of such stock food; that defendant could use some of it on his own stock free of charge; that the shipment was not to be understood as a sale to defendant, but was to be upon the conditions that defendant was to receive it, and if upon a trial he found it beneficial to his stock he was to undertake to sell such portion as he did not use to his neighbors, upon which sales he should be allowed a commission; that if he found the stock food was of no value he was to return it to plaintiff, and that plaintiff would return to him the note sued upon; that it was agreed between plaintiff and the said agent that the note was to be given merely as a memorandum of the trade, and would be returned if conditions were found to be as above stated; that defendant received the stock food, and upon trial found that it was absolutely worthless, had no medicinal properties, and was of no value as a medicine, and that upon making this discovery he immediately returned it to plaintiff; that the representations were known by the agent to be false when made. As a counter-claim, defendant alleges that, relying upon the representations of the said agent, he fed the stock food to some of his sick hogs, and that all of said hogs died; that they were of the value of $200, for which sum he prayed judgment. The reply denies all the allegations of affirmative defense set out in the answer and counter-claim.

Upon the trial, defendant made a feeble attempt to prove the allegations of his answer. He did not go upon the stand himself, but attempted to make such proof through his wife. The testimony offered was so clearly insufficient that the trial court directed a verdict in favor of the plaintiff. The only ground for reversal urged in defendant's brief in this court is that the case should have

been submitted to the jury. This contention must fail. If the case had been submitted to the jury and any other verdict returned than the one directed by the court, it could not have been permitted to stand. The rule is settled in this state that "the trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it." *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8.

The judgment of the district court is

AFFIRMED.

JOHN HOLMES V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1910. No. 16,643.

1. **Courts: APPEAL: EVIDENCE.** Where the evidence in the record is clearly sufficient to sustain the verdict of the jury, this court in considering an assignment that the evidence is insufficient to support the verdict is not required to set out any part of such evidence.
2. ———: ———: **INSTRUCTIONS.** Where objections to instructions given by the trial court are clearly without merit, this court is not required to set out such instructions in its opinion.
3. **Review.** Record examined, and *held* without reversible error.

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

J. G. Thompson and *John Everson*, for plaintiff in error.

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

FAWCETT, J.

Defendant was convicted, in the district court for Harlan county, of the crime of assault and battery, and fined

$100 and costs. He prosecuted error to this court, and obtained a judgment of reversal. *Holmes v. State*, 85 Neb. 506. Upon a second trial he was again convicted, and sentenced as before, and the record is before us for review.

It would serve no good purpose to set out the evidence, as it amply sustains the verdict of the jury. Complaint is made of the seventh, eighth, eleventh and twelfth instructions given by the court, and of the refusal of the court to give instruction numbered 2 requested by defendant. These objections are so clearly without merit that nothing could be gained by setting them out here. The examination of the entire record shows that the case was fairly tried and properly submitted to the jury; that defendant has been twice found guilty of the offense charged, by a jury of his county, and that he ought to pay the penalty of his unwarranted belligerency.

The judgment of the district court is

AFFIRMED.

DUNDEE REALTY COMPANY, APPELLEE, V. ISAAC S. LEAVITT, APPELLANT.

FILED OCTOBER 22, 1910. No. 16,093.

1. **Vendor and Purchaser: BONA FIDE PURCHASER.** A purchaser of real estate from one who has already sold and conveyed the same to another, whose deed is not recorded, cannot hold the land as an innocent purchaser unless he was at the time of his purchase without notice, actual or constructive, of the rights of the prior purchaser.

2. ———: ———: **BURDEN OF PROOF.** The burden of proof is upon the party who alleges that he purchased without notice.

3. ———: ———: **EVIDENCE.** The plaintiff purchased a lot in Omaha, and failed to record his deed, but took possession and caused the grade to be lowered by removing large quantities of soil therefrom at an expense of nearly $200. Afterwards the defendant purchased the lot at about one-half of its value from the same grantor, and caused his deed to be recorded. The defendant

made no inquiry as to the rights of plaintiff. *Held*, That defendant is chargeable with constructive notice of plaintiff's rights in the lot, and is not an innocent purchaser without notice.

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

H. P. Leavitt, for appellant.

McGilton, Gaines & Smith, contra.

SEDGWICK, J.

The plaintiff and defendant both derive their claims to the real estate in question through one Miles Moore; the plaintiff through an unrecorded contract of purchase and alleged possession and improvement of the property, and the defendant through a warranty deed duly recorded. The defendant claims to be an innocent purchaser without notice of plaintiff's rights. The trial court found against him, and he has appealed.

1. The first question requiring consideration relates to the burden of proof in such cases. Many courts have held that when one party produces a warranty deed, which recites full consideration and has been duly recorded, the burden is upon the prior purchaser with an unrecorded title to prove notice or circumstances equivalent to notice. Indeed, it would appear from the note to *Anthony v. Wheeler*, 17 Am. St. Rep. 281, 288 (130 Ill. 128), and authorities there cited, that this rule is almost universal, although the court of appeals of Texas has held otherwise, and the courts of Alabama, California, Iowa, Missouri, and some decisions in the state of New York have to some extent modified the rule. Our own decisions have placed the burden of maintaining this issue upon the party who alleges that he purchased the property without notice of outstanding claims.

In *Bowman v. Griffith*, 35 Neb. 361, the third paragraph of the syllabus states the law as follows: "Where a claim

to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor." And in the body of the opinion it is said: "The burden was upon him and he was bound to prove both payment in ignorance of defendant's equities and that he relied upon the title of his grantor." To support this proposition decisions are cited from Iowa, Michigan and New York. The defendant argues that these statements of the court are dicta merely, and says in his brief that the rule thus stated is undoubtedly correct, but that "the question as to whether the plaintiff would not have sustained his burden of proof and made a *prima facie* case if he had shown the purchase and payment of the consideration, after having examined and relied upon the record title appearing in his grantor," was not involved in the case. This language concedes that the burden of proof was upon the party who alleges that he purchased without notice of outstanding equities, and assumes that that burden is sustained by making the proof suggested in the above quotation from the brief. The above holding in *Bowman v. Griffith* is referred to with approval in *Baldwin v. Burt*, 43 Neb. 245, and *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Neb. 705, and is expressly approved in *Pfund v. Valley Loan & Trust Co.*, 52 Neb. 473. It may be that some of the cases holding a contrary doctrine can be distinguished on account of the legislation upon this subject in those jurisdictions. Our statute provides that deeds and other instruments not recorded "shall be adjudged void as to all creditors and subsequent purchasers without notice whose deeds, mortgages and other instruments shall be first recorded." It would seem that one who expects to bring his claim within this statute should allege and prove all of the statutory requirements, including that he was without notice of the outstanding deed. This requires him to allege and prove a negative, and undoubt-

edly the ordinary rule would obtain as to the sufficiency of the proof offered to make a *prima facie* case, and as to the necessity of the opposing party to produce such evidence as was in his possession or under his control; but, when the evidence upon this point is all before the court or jury, there must be a preponderance in favor of the party alleging purchase without notice, or the issue cannot be found in his favor.

2. The plaintiff alleges that the defendant had actual notice of the plaintiff's interest in the land, and also that the plaintiff had taken such possession and made such improvements upon the land as to give constructive notice to any one who attempted to deal with it. Mr. George, who is principally interested in the plaintiff company, testified positively that he told the defendant, prior to the defendant's purchase, that he, George, had a contract for the land and was improving it for his company. The defendant as positively denies these statements. It has, however, been universally held that actual personal notice is not indispensable. The plaintiff purchased the land at an agreed price of $300, $100 of which was paid at the time of purchase. The plaintiff soon afterwards took possession of the land, which is a lot in Dundee Place, in the city of Omaha, and made a contract with a grading firm to grade this lot, together with various other lots owned by the plaintiff. These lots were graded under this contract, and the soil was removed from the lot in question to about the depth of 2 feet. The defendant was familiar with these lots, and knew that this grading was being done, including the grading upon the lot in question. He saw Mr. George while the grading was being done, and admits that he asked no questions in regard to the ownership of the lots, nor whether the parties grading it were doing so in their own right as owners or for some other person. The grading of this lot cost the plaintiff something over $180. There is no other evidence in the record as to the real value of the lot than that plaintiff contracted to pay $300 for the lot before it was graded, and

expended nearly $200 in grading it. After this grading was done, the defendant bought the lot of Mr. Moore for $250, obtained his deed, and placed it upon record. He says that soon after that he had a conversation with Mr. George, in which Mr. George told him that the plaintiff was the owner of the lot, and he made no denial of that fact. He thought, he says, that he would permit Mr. George to find out who was the owner when he examined the record. Mr. George, as above stated, testifies that this conversation took place before the date of the purchase by the defendant.

The defendant insists that this grading of the lot was not such an act of possession as required him to make any inquiry in regard to the rights of the parties who were doing the grading or procuring it to be done. He insists that the same parties were grading other lots at the same time that did not belong to them nor to this plaintiff, and that he had the right to assume that Mr. Moore still owned the lot and was procuring this grading to be done. We think the defendant is wrong in this position. When he saw unequivocal acts of ownership being exercised over the property, he was under obligations to inquire who was thus assuming to be the owner of the property, and under such circumstances he could not presume without inquiry that Mr. Moore was expending about $200 in improving the lot, and immediately thereafter would sell to him for $250 a lot that before the improvement was worth $300. If the defendant was innocent in the transaction, his neglect to follow up the inquiry so plainly suggested by the circumstances will bring the loss, if any, upon him, rather than upon the plaintiff, who was at least equally innocent.

The judgment of the district court is

AFFIRMED.

BLENKIRON BROTHERS, APPELLANT, V. WILLIAM H. ROGERS, APPELLEE.

FILED OCTOBER 22, 1910. No. 16,148.

1. **Contracts: ALTERATIONS: MATERIALTY.** A merely verbal change in a contract that does not vary its meaning in any essential particular, nor affect the liability of the party to be charged thereon, is an immaterial alteration.

2. ———: ———: ———. In a contract for the sale and delivery of grain, the promisee was named "Blenkiron Grain Co.;" the name of the corporation had recently been changed to "Blenkiron Bros., Inc.;" no other substantial change had been made in the corporation or its business, but by mistake the agent of the corporation had used an old blank in which the former name was printed. The promisee upon discovering the mistake corrected it by erasing "Grain Co." and inserting "Bros., Inc." *Held*, An immaterial alteration.

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

J. C. Robinson, for appellant.

C. B. Willey, contra.

SEDGWICK, J.

The defendant sold a quantity of grain and made and signed a written memorandum of sale, in which "Blenkiron Grain Co." was named as the purchaser. The contract was delivered to this plaintiff. Afterwards the defendant refused to deliver the grain, and the plaintiff brought this action on the contract. There was a general demurrer to the petition, which was sustained, and the cause dismissed. The plaintiff has appealed.

In the petition the plaintiff alleges that the defendant sold and agreed to deliver to the plaintiff 2,500 bushels of oats, which was agreed upon between the parties, and that a memorandum of sale was reduced to writing and signed by the defendant, "and is now in words and figures follow-

ing." Then followed the memorandum of sale, signed by the defendant, in which the name of the purchaser is "Blenkiron Bros., Inc." The petition then alleges that the plaintiff had been conducting said business as a corporation under the name of "Blenkiron Grain Co." and that a short time before the making of the contract the legal name of plaintiff's corporation was changed from "Blenkiron Grain Co." to "Blenkiron Bros., Inc.," but the "stockholders, officers, managers and the place or places and the general nature of the business transacted by the said corporation, Blenkiron Bros., remained and were the same as in the corporation called 'Blenkiron Grain Co.;'" and that at the time of making the memorandum the plaintiff's agent who prepared the same, by mistake or oversight, used a partly printed blank in which the plaintiff's name was by mistake printed "Blenkiron Grain Co.," and that the mistake in the name of the plaintiff was not discovered until after the memorandum was signed and delivered; that the grain was in fact sold to Blenkiron Bros. as both parties well knew and intended, and "in order to make said memorandum conform to the fact and the real intention of the parties, and for no other purpose, plaintiff caused said memorandum to be changed by erasing the words and letters 'Grain Co.' and inserting in the place thereof the words and letters, 'Bros., Inc.,' in the name of the purchaser as it appears in one place in said memorandum."

Some preliminary questions are presented, but the principal question discussed in the briefs is whether the said change of the name of the purchaser without the knowledge or consent of the maker of the instrument would relieve the defendant from liability thereon. There is an interesting statement of the origin and development of the law in regard to alterations of written instruments in a note under *Woodworth v. Bank of America,* 10 Am. Dec. 239, 267 (19 Johns. (N. Y.) *391), long regarded as a leading case. In that note immaterial alterations are defined to be "such merely verbal changes as do not vary the con-

tract in any essential particular, as by the correction of obvious mistakes, or by inserting words which simply express the meaning of the instrument to be what the law would imply it to be without such words." The author states the following instances: "Inserting the words 'on demand' in a note in which no time of payment is specified, for it is payable on demand without those words (*Aldous v. Cornwell,* L. R. 3 Q. B. (Eng.) *573); correcting the figures in the margin to correspond with the body of the note (*Woolfolk v. Bank of America,* 10 Bush (Ky.) 504; *Smith v. Smith,* 1 R. I. 398); or changing the words in the body to correspond with the marginal figures where the latter are correct and the mistake is accidental (*Clute v. Small,* 17 Wend. (N. Y.) 238); correcting a date, as where a note was dated '1868,' by mistake, the true date being '1869' (*Duker v. Franz,* 7 Bush (Ky.) 273, 3 Am. Rep. 314). In general it is held that where the correction does not alter the legal tenor and effect of the instrument, or affect the liability of a party, it will be considered an immaterial alteration. Thus, where a maker, after indorsement, added 'payable before maturity, and interest on unexpired term, refunded, if so elect,' it was held the indorser was not discharged. *Herrick v. Baldwin,* 17 Minn. 183." The following additional instances in this state may be mentioned: Erasing indorsements of payments from the back of a note which had been indorsed by mistake. *Lau v. Blomberg,* 3 Neb. (Unof.) 124. Removing from a note the following words: "This note is given upon condition." *Palmer & Orton v. Largent,* 5 Neb. 223. Interlining the words: "Interest at 6 per cent. on notes remaining over a year." *Thompson Co. v. Baldwin,* 62 Neb. 530. Indorsing by a notary on the back of a contract an extension of time of payment. *Johnson v. Weber,* 70 Neb. 467. The addition of the name of an additional surety on a promissory note. *Barnes v. Van Keuren & Floyd,* 31 Neb. 165; *Royse v. State Nat. Bank,* 50 Neb. 16. Adding the words: "I will pay in cash any deductions made from said claim of $1,975 in full amount of said

deductions." *Fisherdick v. Hutton,* 44 Neb. 122. And, in other jurisdictions, changing the name of the payee by erasing the initial of the middle name. *Cole v. Hills,* 44 N. H. 227. Inserting the words "or bearer" in a promissory note. *Weaver v. Bromley,* 65 Mich. 212. Changing the name of the payee as written in the note from "Francis E. Derby" to "Franklin Derby." *Derby v. Thrall,* 44 Vt. 413. Changing the name of the payee in a note from the "Providence Steam Pipe & Gas Company" to "Arnold, Barbour & Hartshorn." *Arnold, Barbour & Hartshorn v. Jones,* 2 R. I. 345. And many similar instances cited in 2 Daniel, Negotiable Instruments (5th ed.) sec. 1398, and 2 Cyc. 148.

The case of *Arnold, Barbour & Hartshorn v. Jones, supra,* is very similar to the one at bar. In that case the plaintiffs were doing business in both names, and, after the note had been given in which the payee was named as the Providence Steam Pipe & Gas Company, the note was changed by drawing a line through that name and writing over it the name of the payee as Arnold, Barbour & Hartshorn. This was held not to release the surety on the note, who had not consented to such change. The court discusses the general question somewhat at length and announces a very strict rule avoiding instruments generally on account of alterations, but holds that the case then being considered was not within the rule. The court said: "The plaintiffs were the persons who composed this firm, and they carried on the business of dealing in steam and gas pipes, and no other business, as well in the name of 'Arnold, Barbour & Hartshorn,' as in the name of the 'Providence Steam Pipe & Gas Company,' and this note was given for a debt due to this firm. * * * This state of facts shows that the defendant intended to give this note and become liable to whomever might compose this firm; that this note itself did not designate, nor was it evidence of, the names of the persons who composed this firm. The defendant's liability did not therefore depend wholly upon the evidence which this note afforded,

but upon evidence *aliunde,* upon proof of the names of the individuals who composed this firm, to wit, the plaintiffs. And this alteration and erasure could in no way change or affect this proof. * * * This evidence tended conclusively to rebut any presumption of fraud and to show the circumstances under which, and the intent and purpose for which, this erasure and alteration were made and their effect upon the liability of the defendant and the claim of the plaintiffs."

In *Barnes v. Van Keuren & Floyd,* 31 Neb. 165, this court said: "It is not every alteration of a promissory note that will discharge the maker. To have that effect the change must be a material one, something either of advantage or detriment to the promisor." In that case the name of a surety was added to the promissory note after it was delivered, without the knowledge or consent of the maker, and it was held that such an alteration will not discharge the maker. In *Fisherdick v. Hutton,* 44 Neb. 122, it is said: "If the change is immaterial, or unimportant—that is, one which does not vary the legal effect of the document, or change its terms and conditions—it will be disregarded."

If the allegations of the petition are true, and they must be so regarded when tested by a general demurrer, we do not see that this alteration in any way affected the liability of the maker of the instrument. It is alleged that the grain was in fact sold to the corporation, plaintiff in this case; that it was so understood and intended by both of the parties. The principal part of the name was unchanged. After the name of this corporation had been changed from "Blenkiron Grain Co." to "Blenkiron Bros., Inc.," there was no such legal person as "Blenkiron Grain Co." To that extent then the name might be regarded as fictitious, and without doubt when a fictitious name is inserted as promisee in a contract, with the knowledge of both parties, and the contract is so delivered and received as the contract of the parties, to insert the true name would not be a material alteration.

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

REVERSED.

HERMAN ANTON EVERS V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1910. No. 16,607.

Criminal Law: NEW TRIAL. The district court has no jurisdiction to grant a new trial, in a criminal case, upon application by petition filed after the term of the trial.

ERROR to the district court for Dixon county: ANSON A. WELCH, JUDGE. *Affirmed.*

Wilbur F. Bryant and *R. J. Millard,* for plaintiff in error.

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

SEDGWICK, J.

The plaintiff was convicted in the district court for Dixon county of the crime of assault with intent to commit rape. The judgment of conviction was reviewed in this court and no error found therein, except that the court failed to inform the defendant in that prosecution of the verdict of the jury before sentence was pronounced. The cause was remanded to the district court for sentence, 84 Neb. 708. Before the defendant was resentenced, and again immediately afterwards, both being within one year from the trial in the district court, the defendant, who is plaintiff here, filed petitions for a new trial on the ground of newly discovered evidence. Upon motion of the prosecuting attorney the court dismissed these petitions, and the plaintiff has appealed.

As shown by the petitions and exhibits thereto, the new evidence consisted in testimony that the defendant was insane at the time of his trial and conviction, and that

his counsel were not then aware of the fact. It is insisted that section 318 of the code is applicable in this case, and that under that section the district court should have heard the petition for a new trial. No other authorities are cited, and the argument is based entirely upon the supposition that the legislature would not authorize a petition for a new trial in a civil suit and at the same time not allow a man convicted of murder or other serious crime the same remedy. Two of the cases in this court, in which the proposition contended for has been decided against the petitioner, are referred to in the brief, and it is said that the decisions in both of those cases rest upon dicta. In *Bradshaw v. State,* 19 Neb. 644, it was expressly decided that the district court has no jurisdiction to entertain a petition for a new trial in a criminal case after the term at which the trial was had. It was also decided that the district court had no jurisdiction in that case because the petition for a new trial was not filed until more than two years after the trial was had. Either ground would have been sufficient for the decision of the case. In *Hubbard v. State,* 72 Neb. 62, the question to be decided is stated in these words: "Do the provisions of section 318 of the code authorize the district court to grant a new trial in a criminal case, on the ground of newly discovered evidence, on an application made at a subsequent term, but within one year from the time of the rendition of the verdict?" But it is said in the brief that the record in that case will show that the petition for a new trial was not filed within one year, and therefore the whole opinion was dictum only. In the former case the then Chief Justice, MAXWELL, took occasion to say: "The writer desires to add that the rule permitting a petition for a new trial to be filed at any time within one year from the rendition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circum-

stantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises." This expression of Justice MAXWELL was copied at large in the opinion of the later case, as well as in the opinions in other cases in this court, and yet, although that language was published nearly 25 years ago, the legislature has taken no such action. Judge HOLCOMB, in *Hubbard v. State, supra,* re-examines the whole question at length, citing and quoting from the *Bradshaw* case and other like decisions of this court. He says in the opinion: "The remedy is an appeal to the executive, who is clothed with the pardoning power." Judge MAXWELL was not satisfied with this remedy and thought that there should be further legislation. It is, of course, not intended by the constitution that the pardoning power should review and correct the decisions of the courts. The fact of the defendant's guilt or innocence of the crime with which he is charged should be finally settled by the courts, where the evidence can be received and weighed under the well-established rules of law, and where it is supposed that the truth can be ascertained with as much certainty as human imperfection will admit. Circumstances developed after the trial may call for the exercise of pardoning power. Certainty of the conviction of the guilty, and that the full measure of punishment which the law justly inflicts will follow, are both necessary for the prevention of crime. It is the duty of the courts, with the assistance of the jury, to ascertain the facts of a case with the greatest care, and to enter the judgment thereon which the law requires. But the rule has long been established that the jurisdiction of the trial courts to grant new trials in such cases does not exist in the absence of legislation. This has been many times declared by this court to be the law.

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

AFFIRMED.

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

FILED OCTOBER 22, 1910. No. 16,723.

Appeal: LAW OF CASE: REVERSAL. The law of the case as declared by this court must control in the subsequent trial in the lower court; and, if upon such trial the evidence shows without substantial conflict that the defendant is not liable under the law so declared, a verdict and judgment against the defendant will be reversed as contrary to the evidence.

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

Greene & Breckenridge, for appellant.

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

SEDGWICK, J.

When this case was first before this court (82 Neb. 499) it was said that "where a person, after recovery from an accidental injury, succumbs to a disease which would not have been fatal but for the lowered vitality following such injury, the disease, and not the lowered vitality, is the cause of death." When the case was here the second time (85 Neb. 471) it was decided that "it is error to instruct the jury that there may be a recovery under such policy if they find that the death resulted proximately and as the moving cause of the accident, where 'there were other causes that accelerated, or, even being added, resulted in death.'" We are not now at liberty to criticise or discuss the holdings of the court as above stated. Both of these propositions have become the law of the case. The nature of the case and of the questions to be submitted to the jury appear from the opinions above referred to. The evidence in the record now before us shows that on the 1st day of August, 1905, Frank Ward, the insured, had one of his feet injured while he was in

the employ of the Union Pacific Railroad Company in Omaha. He was acting as fireman upon one of the company's engines, and the conductor with whom he was working was called by plaintiff as a witness in the case. He was not asked, however, to give testimony as to the cause or manner of the injury, and there is no evidence in the record as to how the accident happened or through what instrumentality the foot was injured. The plaintiff offered no direct testimony as to the extent of the injury, and called no witnesses who gave any testimony as to the appearance of the injured foot. One of the plaintiff's witnesses, who saw the limb after the foot was bandaged, testified that it was bandaged to the ankle and was black and blue above the bandage. This is substantially all the evidence that the plaintiff offered as to the condition of the foot. Immediately after the accident the injured foot was dressed by the surgeon in the employ of the railroad company, who testified that "he had a bruised and swollen foot," and that he "dressed it or strapped it with adhesive straps and bandages." There were no traces of any fractures or broken bones, and Mr. Ward made no complaint to the physician of any other injury to his body. Mr. Ward stayed at home 15 days after the injury, and, according to the plaintiff's evidence, for 5 or 6 days remained in the house. After that he commenced walking out short distances, but was lame in his foot, and his friends testified that he "limped" when he walked. After 10 or 11 days he was examined by the company's physician, who considered that he was recovered from his injury and able to work, and so certified. On the 15th day of August he returned to work, and undertook to act as fireman upon an engine that was to run from Omaha to Grand Island. The plaintiff and other relatives testified that during these 15 days he complained occasionally of pain in his left side, extending down to his groin, but there is no evidence in the record of any visible injury to his side, nor any evidence from which it could be determined, or even conjectured, what was the cause of this pain, unless it was

that the injury to his foot was caused in some way and through some means that at the same time might have injured his side. We cannot base an opinion upon conjecture of this kind, and therefore are entirely at a loss to discover the cause of the pain complained of. On the way to Grand Island he became ill, and was taken to a hospital in Grand Island, where, after a few hours, he died. He had been performing very severe labor; the weather was very warm, and he drank freely of cold water. The physician who attended him at Grand Island testified that he died of heat exhaustion. Mr. Ward told his nurse that he drank freely of ice water and was taken suddenly with cramps and vomiting. He made no complaint of the injury to his foot or the former accident to either the nurse or the physician.

Under this condition of the evidence the plaintiff called a physician, who had never seen the deceased, and asked him a hypothetical question, reciting some of the facts above stated and some other less important facts disclosed by the evidence, in answer to which the physician stated: "I would say that the injury left the system in such a weakened condition that it was one of the causes of his death." And when asked from the facts stated in the hypothetical question what his opinion was as to the primary cause of death, he answered: "I consider the injury the relative cause of his death, leaving him in such shape that the rest was easily brought on." When asked upon cross-examination "how a crush or a bruise on a man's foot * * * could produce death in 17 days afterwards," he answered: "Just simply from the man being lowered in his vitality, left in a weakened condition, not fully recovering when he took up his former work, which was hard work." This evidence of this witness is supposed to show that the accident complained of was the sole cause of the death of the insured, independent of all other causes. The most favorable view that can be taken of this expert testimony is that the disease which caused his death "would not have been fatal but for the lowered vi-

tality following such injury," and when the case was first before this court, as appears from the quotation from that decision in the first part of this opinion, it was decided that "the disease, and not the lowered vitality, is the cause of death." This holding became the law of this case, and, as we have seen, we are not now at liberty to re-examine or criticise it.

The whole evidence manifestly comes very far short of establishing that the accident was the sole cause of death, independent of all other causes. It is clear that the evidence will not support a verdict in favor of the plaintiff, and the judgment is therefore reversed and the cause remanded.

REVERSED.

REESE, C. J., dissents.

GEORGE CRITSER V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1910. No. 16,751.

1. **Criminal Law: TIME OF TRIAL.** Under section 390 of the criminal code, the accused, if committed to prison, must be brought to trial before the end of the second term of the court "having jurisdiction of the offense" which shall be held after indictment found. A term of court at which no jury is called and only equity business transacted is still within the statute, being a "term of the court having jurisdiction of the offense."

2. ———: ———: **RIGHT TO DISCHARGE.** At the end of the second term after the term at which the indictment is found or information filed, the accused not having been brought to trial, if the delay has not happened on his application, it is error to permit the prosecuting attorney to dismiss the case without prejudice to further prosecution; the accused is entitled to be discharged "so far as relates to the offense for which he was committed."

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

Perry, Lambe & Butler, S. A. Dravo, W. C. Dorsey, J. G. Thompson and *John Everson,* for plaintiff in error.

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

SEDGWICK, J.

Complaint was filed in the county court of Harlan county charging this defendant and one Heddendorf jointly with the crime of murder in the first degree. Upon examination had in that court, the defendants were held for trial to the district court, and in the April, 1909, term of the district court an information was filed charging them in that court jointly with the crime of murder in the first degree. Upon the application of the county attorney, it was ordered that they be tried separately. Thereupon both defendants asked for a continuance until the next term, which was refused, and the defendant Heddendorf was put upon trial and convicted and sentenced to the penitentiary for life. The judgment of conviction was reversed by this court and a new trial ordered. *Heddendorf v. State,* 85 Neb. 747. After the conviction of the defendant Heddendorf in the April, 1909, term of court, this defendant demanded immediate trial, which was refused, and the cause against him continued. Subsequently, after several terms of court, he asked to be discharged under section 390 of the criminal code. This request was refused, and the county attorney was permitted to enter a *nolle prosequi,* whereupon the case was dismissed and the defendant discharged. He insists that this prosecution, being dismissed by the county attorney, would not be a bar to further arrest and prosecution, and that his right was to be "discharged so far as relates to the offense for which he was committed," as the statute provides.

Public justice requires that criminal trials shall be disposed of promptly. The certainty that justice will be done and the guilty convicted without unnecessary delay is

more efficacious in the prevention of crime than are severe penalties. The federal constitution has undertaken to guard the rights of the accused against unnecessary delay, and the fundamental law of this state has assured him protection against imprisonment without trial: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Const. art. I, sec. 11. In some cases more time is required in the interest of the public as well as the accused than is required in other cases. There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime. In practice it is not often found necessary to delay the hearing of the matter during two jury terms after indictment is found or information filed. The legislature has fixed an absolute limit beyond which the trial cannot be delayed. It is as follows: "If any person indicted for any offense and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner." Criminal code, sec. 390. If the defendant has been admitted to bail it is provided by the next section that the trial shall not be delayed for more than three terms. The question to be determined in this case is whether these provisions of the code have been violated. The complaint, as before stated, was made in the county court on the 20th day of March, 1909. It was alleged that the crime was committed on the 17th day of that month. The examination took place on

the 26th day of March. The April term of the district court for Harlan county for the year 1909 was continued into the month of May. The defendant was refused bail, and the information was filed in the district court on the 6th day of May, 1909, that being one of the days of the adjourned April term of that year.

It has been decided by this court that a term of the district court in which the indictment is found or information filed cannot be counted in determining the time within which the accused must be brought to trial under the provisions of section 390. *Hammond v. State,* 39 Neb. 252; *Whitner v. State,* 46 Neb. 144. The next term of the district court for Harlan county was begun on the 20th day of September, 1909. The order of the judge of the district court assigning the terms of the court for that year does not appear in the record; but there is in the record a copy of an order entered in the September term, in which it is recited that that term was an equity term and that no jury was present. For this reason, it is suggested that this term must not be counted in determining the time within which the accused must be brought to trial. The statute in question fixes an arbitrary limit of the discretion of the trial court beyond which it cannot go, and the language of the section is too plain and unequivocal to allow of the meaning suggested. The accused must "be brought to trial before the end of the second term of the court having jurisdiction of the offense." There will be no doubt that the trial court had jurisdiction of the offense at this September term of court. The fact that no regular panel of jury was present at that term is not of controlling importance in a capital case which involves the life and liberty of the accused. It is rare in such cases that the regular panel is sufficient for such purposes. As an illustration, we notice that this record shows that in the trial of the defendant informed against jointly with this defendant, although the regular panel was present at the term, two special writs of venire were issued summoning 100 additional jurors. The Sep-

tember term of court therefore must be considered as one of the terms at which the court had jurisdiction of the offense. At the next term of the district court the defendant applied for a change of venue, which was allowed, and so the defendant himself prevented the trial of his case at that term of court. The case was sent to the district court for Franklin county for trial, and the transcript was filed in that court on the 4th day of January, 1910. The regular term of court for Franklin county for the year 1910 began on the 10th day of January of that year, and on that day the county attorney made application to the court for leave to indorse additional names upon the information, which was allowed, and the case was continued until the next morning. On the 11th day of January the defendant filed a motion to be discharged. In this motion he recites the proceedings already had in this case, stating the date of his arrest and his examination, and the different terms of court that had been held in Harlan county, and that the defendant had been refused bail. Thereupon, on the same day, the record recites that the cause "came on to be heard upon motion of the county attorney *ore tenus* for leave to file a *nolle prosequi,*" and that the defendant then called attention to his motion to be discharged, and that the state asked permission to "withdraw its motion *ore tenus* for leave to file said *nolle prosequi,* which permission was granted" by the court, and the court then overruled the defendant's motion to be discharged. The record recites that "thereafter on motion and application of the county attorney of Harlan county, Nebraska, made in court, a *nolle prosequi* was entered in said cause, which was by the court sustained." To this ruling the defendant excepted, "for the reason that he should be allowed to proceed to trial at this term of court or to have his absolute discharge under section 390 of the criminal code." The defendant was then discharged from custody. On the 13th day of January the defendant filed a motion to vacate and set aside the order dismissing this cause without prejudice, and to grant the defendant a trial at

that term of court, or, if he be not granted a trial at that term of court, that he be discharged. This motion was not passed upon by the court until the 19th day of January, when it was overruled, and the defendant excepted. The term of court was finally adjourned on the next day. There can be no doubt upon this record that the defendant was entitled to a trial at this January term, and, unless tried at that term, he was entitled to be discharged "so far as relates to the offense for which he was committed." The court was in error in dismissing the case without entering such final discharge of the defendant.

The order of the district court is reversed and the cause remanded, with instructions to enter an order discharging the defendant from the offense for which he was committed.

REVERSED.

PETER C. WADE, APPELLEE, V. BELMONT IRRIGATING CANAL & WATER POWER COMPANY, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,187.

Waters: IRRIGATION CONTRACT: ACTION FOR BREACH: MEASURE OF DAMAGES. In an action for damages for the breach of a contract to supply water for irrigating the plaintiff's lands, where it appears that the land is unbroken and practically unproductive prairie, if the plaintiff prevails, he can only recover the difference between the rental value of said land with water according to the terms of the contract and the rental value without such water. The supposed value of what the land might have produced had the water been furnished is too remote, speculative and conjectural.

APPEAL from the district court for Cheyenne county: HANSEN M. GRIMES, JUDGE. *Reversed.*

G. J. Hunt, for appellant.

Williams & Williams and *Wright, Duffie & Wright, contra.*

REESE, C. J.

Plaintiff filed his petition in the district court alleging that the defendant is a corporation organized under the laws of this state for the purpose of operating an irrigating canal and selling the water for irrigation; that he is the owner of the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 19, township 18, range 47, in Cheyenne county, "said land being located under and susceptible of irrigation from the defendant's canal"; that on the 30th day of December, 1897, he purchased the land of defendant with the express understanding that the consideration paid for the land "included payment for two forty-acre tract water rights, the water under said contract to be delivered to plaintiff from said canal, for which water rights plaintiff paid defendant for said lands and said water rights the sum of $1,800," and in consideration of the further sum of $2 defendant executed and delivered to plaintiff a "water deed," a copy of which is attached to the petition, and by which defendant agreed to furnish the necessary water for irrigating said land during each and every irrigating season thereafter; that defendant has failed and neglected to furnish any water to irrigate said land for the year 1907, to plaintiff's damage in the sum of $800, for which judgment is demanded. The defendant answered the petition, denying "that, by reason of defendant's failure to furnish water to the plaintiff in the year 1907, said plaintiff has been damaged in the sum of $800 or in any sum whatever." The cause was tried to the court without the intervention of a jury, the finding of the court being in favor of the plaintiff, and the assessment of his damages in the sum of $400, for which judgment was rendered. Defendant appeals.

A number of questions are presented for decision, but it is thought they may not arise again in another trial, and one only will be here noticed, and that one is as to the proper measure of damages. The proof showed that, prior

to the year 1907, the land had not been irrigated for some time and no crops had been raised upon it; that plaintiff desired it to be irrigated that year so that the native grasses would grow where practically none had grown before. The land was to all intents and purposes wild and substantially a desert waste. The theory of plaintiff's case was that if the soil could be irrigated, beginning early in the season, the moisture would cause the spontaneous growth of grama grass which would within a short time develop into what is called "wheat grass," and from which a cutting could be had. Neither one of the grasses named was growing on the land, except on one or two small spots. At the beginning of the trial plaintiff was called as a witness in his own behalf, and the question arose as to what was the proper measure of damages, when the court announced that "the damage is the difference between the crop actually raised and what would have been raised if water had been supplied." While no exception was taken to the ruling, the decision caused the case to be tried upon that issue, and the question is presented here. As we view the case, there can be no doubt but that the learned district judge was in error in so holding. There were no special damages alleged or declared upon the petition. As we have seen, the averments reach only to the fact that defendant undertook to furnish water sufficient to irrigate the land, and failed to do so, to plaintiff's damage. Indeed it is quite doubtful if under the facts of the case any allegations could be made which would admit of the application of the rule stated by the court.

In *Crow v. San Joaquin & Kings River C. & I. Co.*, 130 Cal. 309, the question of the measure of damages for failure to furnish water in compliance with the contract therefor was under consideration. The trial court admitted evidence to the effect that if plaintiff had obtained the water to which he was entitled he would have planted a crop of alfalfa from which he would have realized certain profits, but owing to his failure to get the water he did not plant the alfalfa, and instructed the jury that the

plaintiff was entitled to recover as damages the profits he would have realized from the crops of alfalfa that he would have raised on the land had water been furnished by defendant as demanded by the plaintiff, less the cost of raising and caring for the crops, and less what the land actually produced during the time of the failure to supply the water. The court say: "The rule embodied in the instruction of the court and under which the testimony on behalf of the plaintiff was admitted is too remote and speculative. The proper measure of damages in a case like this is the difference between the rental value of the land with water and its rental value without it. * * * Conjecture as to profits of the kind sought here cannot be recovered as damages in such cases; they must be damages capable of ascertainment by proof to a reasonable certainty; uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action." This rule is announced in *Pallett v. Murphy,* 131 Cal. 192; *Northern Colorado Irrigation Co. v. Richards,* 22 Colo. 450; *Giles v. O'Toole,* 4 Barb. (N. Y.) 261; *City of Chicago v. Huenerbein,* 85 Ill. 594; *Pollitt & Andrews v. Long,* 58 Barb. (N. Y.) 20; *Horres v. Berkeley Chemical Co.,* 57 S. Car. 189, and is doubtless well settled. There are cases holding, and perhaps correctly, that if a crop is planted and has been well advanced in growth so that by its inspection a well-founded opinion can be formed as to what the crop will produce if permitted to mature according to the usual course of the season, such evidence might be competent, but we have found no well-considered case where the rule has been applied to a case like this. The difference between the rental value of the land with water supply and its rental value as it was must be the test.

It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings, which is done.

REVERSED.

ALICE E. BLAIR, ADMINISTRATRIX, APPELLEE, V. KINGMAN IMPLEMENT COMPANY, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,606.

1. **Judgment**: CONCLUSIVENESS: REFORMATION OF INSTRUMENTS. Where an action was instituted in the district court for the reformation of a memorandum of contract, and the trial resulted in a decree reforming the instrument, the decree being subsequently affirmed on appeal to the supreme court, the memorandum as thus reformed will, in an action thereon, be taken as the true agreement between the parties, and conclusive.

2. **Evidence**: ADMISSIBILITY: JUDGMENT: JOURNAL ENTRIES. In such case, where the admissions of the answer as to the fact of the reformation of the written agreement are indefinite, it is competent for the plaintiff to introduce, and the court to receive, the decree of reformation as the evidence of the fact. And the findings of the court in so far as they are necessary to sustain the decree and which are contained in one journal entry may also be read to the jury.

3. ———: ———: PLEADINGS. Where a defendant in its answer alleges as defensive matter that an appeal to the supreme court was taken from the decree reforming a contract, but contained nothing as to the action of that court on such appeal, and the plaintiff replied admitting the appeal, but alleged that the decree of the district court had been affirmed by the supreme court, there was no error in permitting the introduction of the mandate of the supreme court, during the presentation of plaintiff's evidence in chief, showing such affirmance, the fact of the appeal having been admitted and thereby conclusively established by the pleadings.

4. **Witnesses**: IMPEACHMENT: ADMISSIONS AGAINST INTEREST. Ordinarily when a party to the action on trial takes the stand as a witness in his own behalf he is entitled to no less and no greater rights than any other witness. If the design on cross-examination is to lay a foundation for impeachment by proof that he has previously made other or different statements, material to the case, his attention should be called to the statements by which his testimony is sought to be contradicted. Practically the same rule should be applied if it is sought to prove by him, on such cross-examination, admissions against his interest. There is no error in sustaining an objection to a question asking if it is not a fact that during the litigation the witness has given under oath four different versions of the contract,

which he claims he has made with defendant on a date prior to its reformation, without specifying any of the "different versions." The rule will be applied with the greater force since all questions as to the terms and conditions of the contract are foreclosed by the final decree of reformation.

5. Trial: REQUEST FOR INSTRUCTIONS: REVIEW. Where instructions to the trial jury given by the court on its own motion, and those requested by defendant, are compared, and it is found that those given by the court include in substance those requested and refused, a reviewing court will not further pursue an investigation as to the correctness of those refused.

6. Appeal: EVIDENCE: SUFFICIENCY. The evidence, though not set out in the opinion, is examined and found sufficient to sustain the verdict returned by the jury.

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

Smyth, Smith & Schall, for appellant.

T. J. Mahoney and *J. A. C. Kennedy, contra.*

REESE, C. J.

This action was commenced in the district court for Douglas county. The plaintiff alleged in his petition that defendant was a corporation dealing in agricultural implements and machinery at wholesale; that on or about the 9th day of September, 1902, plaintiff and defendant entered into a contract of employment whereby defendant employed plaintiff for a term of three years beginning on the 1st day of November, 1902, and ending on the 1st day of November, 1905, the agreed salary to be $2,600 for the first year of the employment, $2,800 for the second year, and $3,000 for the third year, payable bi-weekly; that a written memorandum of contract was finally signed by the parties, but which did not contain the true agreement; that about the 15th day of March, 1907, in an action then pending in the district court for Douglas county, the contract was, by a decree of said court, duly reformed so as to state the true agreement of the parties, and which con-

tract as reformed is set out at length in the petition, and is as follows: "Employment Contract. Memorandum agreement made and entered into this 31st day of October, A. D. 1902, by and between Kingman Implement Company (a corporation duly organized under the laws of Illinois), party of the first part, and C. S. Blair of Omaha, Neb., party of the second part, Witnesseth: That the said Kingman Implement Company does hereby employ the said party of the second part for a term beginning November 1, 1902, and ending November 1, 1905, as manager of the wholesale implement establishment of said party of the first part, located in the city of Omaha, Nebraska, at a salary of $2,600 for the first year; $2,800 for the second year, and $3,000 for the third year, payable bi-weekly. Kingman Implement Company to pay all necessary traveling and hotel expenses of said party of the second part while he is on the road, no charge for expenses to be made when at home, unless otherwise agreed in writing. In consideration of the foregoing, said party of the second part agrees to give his entire time and best services to the business entrusted to him, and will at all times further the interests of said Kingman Implement Company to the best of his ability, and will not engage in any other business during the existence of this contract, unless by the written consent of Kingman Implement Company. It is fully understood and agreed that if, through sickness or accident, the party of the second part is disabled from attending to the discharge of the duties of his said employment, the said Kingman Implement Company have the option, at any time, to terminate this agreement by giving the said party of the second part ten days' notice. The said party of the second part agrees at the termination of this contract, either by limitation or cancelation, to turn over to Kingman Implement Company all property of whatsoever kind in his possession belonging to said Kingman Implement Company, and also agrees that all money, promissory notes or valuable papers belonging to said Kingman Implement Company that may be in his

possession at any time shall be considered a fiduciary trust. Kingman Implement Company, By M. Kingman, Pt. C. S. Blair." It is further alleged that plaintiff entered upon the performance of the contract and rendered services thereunder until on or about the 17th day of December, 1903, when defendant, in violation of the contract, wrongfully broke and terminated the same, and refused to permit plaintiff to carry out its provisions on his part, and thereafter refused to allow plaintiff to render the services therein provided for, to plaintiff's damage, etc. Judgment is demanded for the unpaid portion of the salary agreed upon, amounting to the sum of $5,385, with interest.

Defendant answered, admitting its corporate existence and the contract of employment at the salary named, but denying all other averments of the petition. It is alleged that the pretended discharge of plaintiff was by the Kingman Plow Company, and not by defendant; that thereafter plaintiff brought an action against defendant in the county court of Douglas county for a partial payment due upon the contract set out in the petition, alleging its violation by defendant, to which defendant answered; and, upon trial of said cause being had, judgment was rendered in favor of defendant and against plaintiff, and that the questions involved were thereby adjudicated and a bar to plaintiff's recovery in this suit. It is further alleged, in substance, that the decree rendered in plaintiff's favor reforming the contract between the parties was appealed by defendant to the supreme court, but that plaintiff had instituted this action before the expiration of the time allowed by law in which defendant should perfect its appeal and procure a hearing and decision thereon. It is also alleged that plaintiff "did not give his best services to the business entrusted to him and did not further the interests of the defendant to the best of his ability while in the employ of this defendant under the contract set out in said petition"; that he had been in defendant's employ about two and a half years prior to the making of the con-

tract, and that he had thereafter allowed and permitted a great falling off of the business, he being the manager in charge thereof, and which depreciation in business was due solely to the incompetence of plaintiff, and to the fact that he did not give his best services to the business entrusted to him, and did not further defendant's interests to the best of his ability; that he had disobeyed the orders of defendant in many particulars, in failing to reduce the amount of indebtedness due defendant from its customers, and in refusing to reduce the quantity of stock carried, or to press defendant's business vigorously and efficiently, whereby defendant suffered loss and its business was greatly injured and impaired. The facts whereby defendant claims to have been injured by the failures of plaintiff to comply with his contract are stated in detail in the answer, but which need not be set out here. It is averred that after the date upon which plaintiff alleges he was discharged he took service with another company for about six months at the wage of $100 a month, and for an additional six months at $125 a month, as well as for other employers at a later date. For reply plaintiff denied all unadmitted averments of the answer, and alleged that he appealed from the judgment of the county court (referred to in defendant's answer) to the district court, by which the judgment was vacated, and that defendant's appeal from the decree reforming the contract between the parties had been heard and decided by the supreme court and that said decree had been in all things affirmed. A jury trial was had in the district court resulting in a verdict in favor of plaintiff, upon which, after a motion for a new trial had been filed and overruled, a judgment was entered. Defendant appeals.

Since the taking of this appeal plaintiff has died, and, by agreement of counsel, the cause has been revived in the name of Alice E. Blair, as administratrix of his estate.

The decision of this court, in an opinion written by Commissioner CALKINS, is reported in 82 Neb. 344, and must be accepted as finally disposing of the merits of the

suit to reform the contract between plaintiff and defendant, and the memorandum of the contract as thus reformed must be taken as the true expression of the agreement. This being true, the court is relieved from any investigation into that question.

At the commencement of the trial plaintiff introduced in evidence the decree of the district court reforming the contract. This was objected to "as being incompetent, irrelevant and immaterial." The objection was overruled and the record of the decree was read to the jury over the exceptions of defendant. At the conclusion of the reading of the record defendant moved "to strike out of the record all that part of the said decree which has just been read, except that part which sets forth the contract as reformed, as immaterial, and incompetent, and in no way tending to support the issues in this case." The motion was overruled and exception taken. These two rulings of the district court are here complained of and are insisted upon as being prejudicially erroneous. By reference to the pleadings it is found that the contract as reformed by the district court is set out at length in the petition. This is preceded by a statement of the facts leading up to that decree, such as the making of the oral contract of September 9, 1902, and the subsequent execution of the written memorandum of agreement, but which failed to contain the contract as agreed upon. The answer admits the making of the contract of September 9, as alleged in the petition, but denies all other allegations. By this denial and by affirmative allegations the discharge of plaintiff by defendant is put in issue. The fourth paragraph of the answer is not entirely clear to the mind of the writer as to whether it is intended as an admission or an averment of defensive matter. It is as follows: "That afterward, and on or about the 15th day of March, 1907, in a certain action then and there pending in this court, in which the plaintiff herein was plaintiff and the defendant herein was defendant, and after the joining of issues between the plaintiff and defendant and the trial of said action, a de-

cree was entered by this court between the plaintiff and defendant, adjudging and decreeing that the plaintiff and defendant, upon the 31st day of October, 1902, made the contract embodied in the fourth paragraph of said petition; that after said decree was entered, and on or about the 19th day of June, 1907, the defendant appealed from said last mentioned decree to the supreme court of the state of Nebraska, and on or about said date docketed said appeal in said last mentioned court, but that within the time allowed to this defendant to appeal from said decree to the said supreme court the plaintiff commenced this action."

Both the petition and decree refer to the contract of September 9 as the true statement of the agreement between the parties. The decree does not refer to any contract made October 31, 1902, but reforms the memorandum of that date so as to render it in conformity with the contract of September. The answer refers to the October date, reciting that it was adjudged and decreed "that the plaintiff and defendant, upon the 31st day of October, 1902, made the contract embodied in the fourth paragraph of said petition." But the answer goes on and recites that after the decree was rendered the defendant appealed the cause to the supreme court, etc., which was clearly not an admission of any averment in the petition, but must have been intended as affirmative defensive matter. It is contended that no part of the decree should have been received in evidence, for the reason that the answer admitted the reformation and existence of the reformed agreement as embodied in the petition. Had the answer been a specific admission of the reformation of the memorandum to agree with the contract of September 9, there might have been more force in the argument that the introduction of the record was unnecessary, although, even then, not prejudicial. However, the answer left it in doubt as to the true intention of the pleader, and prudence would suggest the making of the proof. There was no error in its admission.

But it is urged that the court erred in not striking out

the findings of the trial court, or, in other words, striking out all except the decretal order. The record of the decree is contained in one entry which includes the findings of fact by the court as well as the judgment. It is not contended that the findings were not within the issues of the cause then decided, nor that they were not properly a part of the entry, but that it was not necessary that they should be read, as they were not in issue, and for the further reason that they had a discrediting effect upon defendant and its witnesses. As the decree was all in one entry and the findings were a part of that record and decree, we are unable to see how they could have had any prejudicial effect, even if not necessarily a part of plaintiff's proofs. We are also unable to find anything in that record which reflects upon defendant or its witnesses more than that portion which might be referred to as the decree itself, which is the result of the findings. Without the findings the judgment would have been erroneous and open to attack in a direct proceeding, though not collaterally. *Kirkwood v. First Nat. Bank*, 40 Neb. 484; *Kirkwood v. Exchange Nat. Bank*, 40 Neb. 497; *Maryott & McHurron v. Gardner*, 50 Neb. 320.

After the introduction of the decree, plaintiff offered in evidence the mandate of the supreme court showing the affirmance of the decree reforming the contract. Objection was made on the grounds of incompetency, irrelevancy, and immateriality. The objection being overruled, defendant excepted, and now assigns the ruling for error. We can observe no error in this. In his petition plaintiff alleged the reformation of the memorandum of agreement, and founded his suit on the reformed instrument. Defendant admitted the rendition of a decree, but alleged that it had appealed therefrom. Plaintiff admitted the appeal, but alleged the affirmance of the decree. This was in the nature of a plea of confession and avoidance—a confession of the appeal, but the avoidance of the effect thereof by averring the affirmance of the decree. Under this issue the fact of the appeal was admitted, and it rested with

plaintiff to show by competent evidence that the case had been finally disposed of. The mandate furnished the proper proof of the fact. It was also proper for the mandate to be received in evidence while plaintiff was making his case in chief, and not to withhold it for rebuttal, for no proof on the part of defendant was necessary to establish the admitted fact of the appeal. It stood as already established. However, were it otherwise, the mere fact that the evidence was introduced out of its order would not be necessarily prejudicial.

The plaintiff, Mr. Blair, was a witness in his own behalf, and detailed the transactions between defendant and himself. On cross-examination he was asked the following question: "Is it not a fact, Mr. Blair, that during this litigation you have given under oath four different versions of the contract which you claim you made with Mr. Kingman in the Paxton Hotel in September, 1902?" The question was objected to and the objection sustained over defendant's exception. The ruling is assigned for error. The question, if not objectionable on other grounds, was too general. If such inquiry were competent for the purpose of impeachment, the proper foundation had not been laid. If it was designed to prove by the witness, on the cross-examination, statements made by him against his interest or different from his testimony then given, his attention should have been called to them. But, aside from this, all questions as to the making of the original contract had been settled by the previous litigation and all "versions of the contract" had been disposed of.

A number of instructions to the jury were presented by defendant, with the request that they be given, but which were refused. Upon a comparison of these instructions with those given by the court upon its own motion, we find that they were all given in substance, and some in practically the same language. To copy the instructions given and refused would extend this opinion to an unreasonable length without corresponding benefits. It must be enough to say that we have considered all instructions with care,

and find that the law of the case has been fully and fairly stated, and we can detect no prejudicial error in that behalf.

It is next contended that the verdict is not sustained by sufficient evidence. We have carefully studied the bill of exceptions, and cannot say that the verdict of the jury should, for the reason assigned, be overturned. The bill of exceptions consists of a large volume, and no effort will be made to set out its tenor or effect. On the controlling features of the case there is a clear conflict in the evidence, but, to a large degree, that conflict is more in the conclusions of the parties and witnesses than in the facts stated by them. It is made to appear with sufficient clearness that in the last year of plaintiff's service there was a falling off in the volume of business, but the question of whether that fact was owing to any failure on the part of plaintiff to comply with the contract as finally established was for the jury to determine.

We find no error that calls for a reversal of the judgment, and it is therefore

AFFIRMED.

JOHN HURD, APPELLANT, V. CITY OF FAIRBURY ET AL., APPELLEES.

FILED NOVEMBER 16, 1910. No. 16,876.

1. **Municipal Corporations: ISSUANCE OF BONDS: SUIT TO ENJOIN: PLEADING.** A special election was called in the city of F. The resolution of submission and notice of election recited that the election would be held "at the regular polling places in the city." In an action to enjoin the sale of the bonds ordered at said election to be issued, one of the grounds for injunction was that the submission and notice were insufficient as not designating the polling places with sufficient certainty. It is *held* that, in the absence of an averment that there were no regular polling places in the city, or that the electors were in some way deprived of their opportunity to vote, the submission and notice must be held sufficient.

2. ———: ———: VALIDITY. By section 8994, Ann. St. 1909, any city of the class to which the defendant city belongs is given the power to establish and maintain a system of electric lights and to levy a tax for the same, and by section 8995 it is provided that, if the levy of the tax would not raise the necessary amount to establish such electric light system, the bonds of the city may be issued, if so ordered by a vote of the people. The resolution of submission and notice provided for the issuance of bonds "for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city." *Held*, That under the statute the bonds voted at the election constituted a valid obligation against the city, the proposition not being dual, nor in the alternative, to the extent of rendering the bonds void.

3. ———: ———: ———. By section 8927, Ann. St. 1909, such city is authorized to purchase, erect, or construct a system of water-works with necessary mains, etc., within the city, and to issue bonds "for the purchase, erection, or construction and maintenance of such water-works," etc., when so directed by two-thirds of the legal voters of the city at an election held for that purpose. By the resolution of submission and the notice of election the question of issuing the bonds of the city "for the purpose of purchasing or erecting, constructing, locating and maintaining a system of water-works within said city" was submitted at a special election and received the requisite two-thirds majority of the vote cast. In a suit to enjoin the sale of the bonds on the ground that the submission and notice of election were void as submitting a dual and alternative question, it is *held* that the submission and notice were a sufficient compliance with the statute and that the bonds were valid.

4. ———: ———: ———. In cities of the class to which defendant belongs a submission of a proposition to issue bonds for the purpose of providing light and water for the use of such city and its inhabitants may be made by resolution duly passed and approved, as well as by ordinance.

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

C. H. Denney, for appellant.

W. J. Moss and *F. N. Prout*, *contra.*

REESE, C. J.

This action was instituted in the district court for Jefferson county for the purpose of restraining and enjoining

the mayor and council of the city of Fairbury from selling certain bonds of said city issued in pursuance of elections held therein, whereby it is claimed by the city officers that the issuance of said bonds has been duly authorized by the electors. The bonds have been duly certified by the auditor of state, and are ready for sale, but some questions have arisen as to the granting of the power by the electors, and plaintiff, a citizen and taxpayer, has sought the decision of the courts as to the validity of the bonds. The petition is of great length, consisting of a carefully prepared history of the proceedings leading up to the issuance of the bonds, copying the records of the city, and averring that the authority for the action of the mayor and council was not given by the electors. The petition is in two counts and states two causes of action. An election was called to be held on the 26th day of April, 1910, "at the regular polling places in the city of Fairbury," for the purpose of voting on two propositions: One, that of issuing the bonds of the city of Fairbury in the sum of $20,000 "for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city;" the other, to issue the bonds of the city in the sum of $115,000 "for the purpose of purchasing or erecting, constructing, locating and maintaining a system of water-works within said city." The former was adopted and carried by the requisite majority, while the latter, failing to receive the required number of votes, was defeated. Another election was called to be held on the 14th day of June, 1910, at which the second proposition was resubmitted, to wit, the issuance of bonds in the sum of $115,000 for the identical purpose as stated in the former submission. This election resulted in the adoption of the proposition by a sufficient vote.

The invalidity of the electric light bonds is alleged and based upon the following grounds: First, the election notice is insufficient because it did not state the polling places at which the election was to be held; second, the question submitted was "whether bonds should be issued

for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city of Fairbury," and that the statement of said question made it a dual question and rendered it impossible for the plaintiff and other electors to vote intelligently and to express their sentiments as to whether said city should purchase the old plant or should erect a new one; third, the record of said proceeding is incomplete in not including in said record the final ordinance fixing the form of the bonds. Without further noting the petition in detail, it must be sufficient to say that the objections alleged and urged against the validity of the water bonds are in substance the same as those against the electric light bonds. To each count of the petition the defendants filed a demurrer, assigning as the grounds therefor that the facts stated did not constitute a cause of action. Both demurrers were sustained, and, the plaintiff not desiring to amend his petition, the action was dismissed at his cost. He appeals.

As to the first contention, that the election notice was insufficient because it did not designate the particular places at which the election was to be held in the different wards, it must be sufficient to say that there is no averment in the petition that there were no "regular polling places in the city of Fairbury" before that time designated and established by ordinance or usage, or that there were none such at which elections had been regularly held, and it would seem that the court cannot assume, in the absence of such averment, that there were no "regular polling places in the city." There is no averment that any elector was deprived of his vote, nor that there was any uncertainty as to where the election should be held, and therefore we must presume that all the existing conditions were met by the notice. If there were regular polling places, the notice was sufficient. We cannot say there were not. Actual notice to the body of electors is sufficient. *Wheat v. Smith,* 50 Ark. 266. It is not alleged that under a different notice another result would have

been obtained (*Ellis v. Karl,* 7 Neb. 381), nor that the electors were not apprised of the places where the election was to be held (*State v. Lansing,* 46 Neb. 514), and the election cannot be held void for the reason stated in the petition alone, without further averments.

The next question is one of no little uncertainty and is quite difficult of satisfactory solution. It applies in some degree to both causes of action contained in the petition. Are these submissions dual, or in the alternative? If so, does the form in which the submissions were made render the proceedings void? The proposition to issue the electric light bonds was stated in this language: "Notice of Special Election. Notice is hereby given that on Tuesday, the twenty-sixth (26th) day of April, A. D. 1910, at the regular polling places, in the city of Fairbury, Jefferson county, Nebraska, a special election will be held for the purpose of submitting to the legal voters of said city of Fairbury the following proposition, to wit: Shall the mayor and city council of the city of Fairbury, Nebraska, issue the bonds of said city in the sum of twenty thousand dollars ($20,000), bearing the date of the day of their issue, and maturing in twenty years from date, bearing interest at the rate of five per cent. per annum, payable semiannually, said principal payable at any time after the expiration of ten years at the option of said city, for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city of Fairbury, Nebraska?" It is conceded by both parties that at the time of the filing of the petition and issuance of the call for the election, and at all times thereafter, there was an electric light plant in the city, owned by private parties, and for the purchase of which, by the city, negotiations had been and were pending, and that it was the purpose to purchase the existing plant; but, in case purchase could not be made on favorable terms, the mayor and council should have authority to construct and install such plant as might be needed. The principal and leading purpose was to procure a system of which the city

might be the owner. We have been furnished a copy of a very carefully prepared opinion by Honorable L. M. Pemberton, the judge of the district court before whom this case was tried, and, as it disposes of the questions involved in this part of the case in accord with our views, we avail ourselves of his reasoning, and copy quite largely therefrom. He says: "Sections 8994 and 8995, Ann. St. 1909, are the ones that seem to control in said matter. They provide that any city of the second class 'shall have the power and is hereby authorized to *establish* and maintain a system of electric lights for such city,' and that the city council shall have the power to levy a tax not exceeding five mills on the dollar in any one year for the purpose of establishing, extending and maintaining such system of electric lights. That when such tax should be insufficient to establish a system of electric lights as contemplated therein, such city may issue its bonds for the purpose of raising a sum sufficient to establish such an electric light system. It will be seen that the statute authorizes the issuance of bonds, when authorized by a vote of the electors, to *establish* a system of electric lights. The proposition submitted to the electors included the purchase of an electric light system. Does the statute confer authority upon the mayor and council to purchase a plant, even when authorized by a vote, or to submit that question to the electors?

"The word 'establish' is a word of various meanings, but there does not seem to be any dictionary definition that is the exact equivalent of the word 'purchase.' Its primary definition is: to make stable; to settle or fix firmly. Other definitions are: to set up or found; to place on a permanent footing; to put in a settled or efficient state or condition; to place upon a firm foundation. Century, Standard, and Encyclopedic Dictionaries. It would seem that before an electric light plant could be purchased by the city it would have to be 'established' by some one else. Yet, it might not be within the above definitions. If it were about to be removed, or taken down, or to fall into

disuse or decay, or were for any other cause in a precarious or inefficient condition, it would not be 'established' within the meaning of that word as contained in several of its definitions. And it might be necessary or proper for the city to purchase it in order to 'establish' it; that is, put it in a settled or efficient state or condition, or upon a firm foundation and permanent footing. See *State v. Rogers*, 107 Ala. 444, 19 So. 909. The authority to establish a system of electric lights would seem to confer power to do anything necessary to provide the city with a *permanent* and *efficient* electric lighting plant. If by purchasing an old plant and putting it into proper repair and good condition, the city could establish a lighting plant more cheaply than by constructing a new one, I think the city would have authority to do so. Thus it has been held that 'power to establish markets' necessarily conferred the power to purchase and hold the land on which such market was to be erected, and to construct buildings thereon for market purposes. *People v. Lowber*, 28 Barb. (N. Y.) 65; *Ketchum v. City of Buffalo*, 21 Barb. (N. Y.) 294. So of a hospital. *City of Richmond v. Supervisors of Henrico County*, 83 Va. 204, 2 S. E. 26; *Beekman v. People*, 27 Barb. (N. Y.) 260. If authority to 'establish' a market or hospital confers power to purchase land and put a building upon it, I can see no reason why the power to establish a system of electric lights should not confer power to purchase land with buildings already upon it, if by that means the city can get property which it can make into a permanent and efficient lighting plant.

"I therefore conclude that the power to establish a lighting plant confers power, in a proper case, to purchase a plant already in existence; and there is no allegation in the petition that this is not a proper case in which to exercise that power if the mayor and council see fit to do so. The presumption is that they will exercise the power properly and in accordance with law.

"In this view of the matter, the question of the proposition submitted to the electors being in the alternative does

not arise. For, if the word 'establish' includes the word 'purchase,' then the alternative is but a mere repetition, and is included in the one word 'establish.' If the power was to 'erect' a system of electric lighting, and the proposition submitted had been to 'erect and construct' such a system, the proposition would have been properly submitted because both words would mean the same thing. So it is with 'purchase' and 'establish,' for, in the sense used, they both mean the same thing. And, if necessary to carry out the intention of the legislature, the word 'or' as used in said proposition should be construed to mean 'and.' *Thomas v. City of Grand Junction,* 13 Colo. App. 80, 56 Pac. 665."

The submission of the question of issuing bonds for the purpose of supplying a system of water-works for the city designated the 14th day of June, 1910, as the date of the special election, and by it the polling places were definitely fixed, but are referred to in the notice as "the regular polling places." No question is raised as to the fairness of the election, and it is not claimed that there was any confusion or misunderstanding on the part of the electors as to the places at which the election was held. The contention that the submission and notice were defective need not be further noticed.

The part of the resolutions submitting the proposition to the electors, which it is deemed necessary to here notice, is as follows: "Shall the mayor and city council of the city of Fairbury issue the bonds of said city in the sum of one hundred fifteen thousand dollars ($115,000), dated the day of their issue and due twenty years from date, payable at any time after five years from date at the option of said city, drawing interest at the rate of five per cent. per annum, payable semiannually, for the purpose of purchasing or erecting, constructing, locating and maintaining a system of water-works within said city of Fairbury?"

Upon this part of the case the learned district judge says: "The statute involved in this case is section 8927,

Ann. St. 1909. By said section the city is authorized 'to provide * * * for a supply of water for the purpose of fire protection and public use and for the use of the inhabitants of such cities and villages by the purchase, erection or construction of a system of water-works, water mains or extensions of any system of water-works, now or hereafter established or situated in whole or in part within such city or village; and for maintaining the same. * * * Such cities or villages may borrow money, or issue bonds * * * for the purchase, erection or construction and maintenance of such water-works mains, portion or extension of any system of water-works or water supply, or to pay for water furnished such city or village under contract. * * * Provided, further, that no such money shall be borrowed, or bonds issued, unless the same shall have been authorized by two-thirds of the legal votes of such city or village cast for and against the proposition at an election held for that purpose.'

"The foregoing is all of the statute relating to the power to issue said bonds. The statute first confers power upon the city to provide for a supply of water for the city and its inhabitants, either by the purchase or construction of a system of water-works. Power is then conferred upon the city to issue bonds for the purchase or erection of such water-works, that is, for the water-works before mentioned, namely, water-works with which to supply the city with water. But no such bonds can be issued unless the same shall have been authorized by two-thirds of the legal voters of such city cast for and against said proposition; that is, the proposition to issue such bonds for a purpose authorized by the statute, at an election held for that purpose. In this case the question submitted to the people, more fully stated, was: 'Shall the mayor and city council of said city issue bonds of said city in the sum of $115,000 to provide a supply of water for the use of the city and its inhabitants, by the purchase or construction of a system of water-works within said city of Fairbury?' The legal voters of the city knew the law under which the

question was submitted to them, and knew the power and authority of the mayor and council thereunder, and voted accordingly. Under said law the mayor and council were the proper persons to elect in what manner the supply of water should be obtained, and if they had had the money could have made said election and put it into effect without submitting any question to a vote of the electors. But not having the money they could not get it by issuing bonds until the question of issuing the bonds had been submitted to the electors and voted by them. The question submitted, of course, must have been, and was, for a purpose authorized by the statute, namely, *for the procurement of a water supply for the city*, either by purchase or construction of a system of water-works as the mayor and council might elect. To this proposition the voters answered 'Yes' by more than a two-thirds vote. The voters have thus expressed their approval of the determination of the mayor and city council to provide a water supply for the city in the manner provided by law, by voting the bonds with which to obtain said water supply. Inasmuch, therefore, as the statute confers power upon the mayor and council to procure a water supply for the city in either of said methods, and the electors of said city have voted bonds to enable the mayor and city council to procure such supply of water in the way pointed out by the statute, I see no reason why the court should overrule both the city authorities and the electors of the city by enjoining the city from disposing of said bonds. As authority for such holding I think the statute itself is wholly adequate; but the following authorities are directly in point: *State v. Allen*, 178 Mo. 555, 77 S. W. 868; *C. B. Nash Co. v. City of Council Bluffs*, 174 Fed. 182; *Thomas v. City of Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

"The cases cited by plaintiff, namely, *City of Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, and *Farmers Loan & Trust Co. v. City of Sioux Falls*, 131 Fed. 890, are not only based upon different statutes from ours, but also cite as their authority the case of *Elyria Gas & Water Co.*

v. City of Elyria, 57 Ohio St. 374. The latter case was not only under a different statute but under a different proposition from the one in the present case, and also a proposition not authorized by the statute. In that case the proposition was for the purchase *and* erection of water-works, while the statute conferred authority to issue bonds for the erection or purchase of such works. The court does not question the right of the city to own two plants, one by purchase and the other by construction, but says the proceedings would be entirely different, and that a resolution for the purchase *and* construction is not a resolution for either purpose separately, but for both purposes combined. What would have been the result had the proposition been for the erection or purchase of such works, as provided in the statute, the court does not say.

"It seems to me that the objection that the voters could not express their wills by voting on a proposition to purchase or construct a plant is more superficial than sound. The proposition was to procure a water supply for the city by the purchase or construction of a water plant, in the discretion of the mayor and council. The voter who did not want to entrust such discretion to them, or who did not want the water-works, only had to vote 'No' in order to express his will completely on the subject. If he wanted to purchase water-works, but not to construct them, or *vice versa,* he could not complain because the council did not submit that kind of a proposition, because it was not for him to dictate the proposition, but to vote on the one submitted, the same being authorized by statute.

"In the *Sioux Falls* case (131 Fed. 890), the court had decided the case on constitutional grounds before it took up the phase of it under discussion, so that what was said on this question was unnecessary to its decision; besides it does not appear from that case what the authority of the mayor and council was with reference to the construction or purchase of the water-works plant."

It should be noted that the decision of the circuit court in the latter case (*Farmers Loan & Trust Co. v. City of*

Sioux Falls, 131 Fed. 890) was reversed by the circuit court of appeals, reported in 69 C. C. A. 373 (136 Fed. 721), in which that court, in an elaborate opinion by Judge Riner, has examined the question with care, and held that the bonds involved in the suit, issued under circumstances quite similar to those under which the bonds in dispute in this case were issued, were legal and binding upon the city of Sioux Falls. That case, as determined by the court of appeals, clearly sustains the decree of the district court in this case.

Another objection presented is that the bonds were issued by virtue of a resolution, and not by ordinance. We regard this question as settled against the contention of plaintiff in *State v. Babcock,* 20 Neb. 522, and we will not further extend this opinion by a rediscussion of the subject.

We conclude that the decision of the district court in sustaining the demurrers is correct, and its judgment is

AFFIRMED.

LETTON, J.

I concur in the opinion. The main purpose of this subdivision of the statute was to authorize the city authorities to provide a water supply and fire protection for the city, to allow them to borrow money for that purpose when authorized by a vote of the citizens, and to leave the details and the exact manner in which the object should be accomplished to the discretion of the city council. The controlling provisions appear as subdivision 15, sec. 69, art. I, ch. 14, Comp. St. 1909. Omitting irrelevant matter it is as follows: "Section 69. In addition to the powers hereinbefore granted cities and villages under the provisions of this chapter, each city and village may enact ordinances or by-laws for the following purposes: * * * XV. To establish, alter and change the channel of water courses. * * * Second, to make contracts with and authorize any person, company or corporation to erect and maintain a system of water-works and water supply.

* * * To provide for the purchase of steam engines or fire extinguishing apparatus and for a supply of water for the purpose of fire protection and public use and for the use of the inhabitants of such cities and villages by the purchase, erection or construction of a system of water-works, water mains or extension of any system of water-works now or hereafter established or situated in whole or in part within such city or village; and for maintaining the same. * * * Such cities or villages may borrow money, or issue bonds for the purpose, not exceeding twenty per cent. of the assessed value of the taxable property within said city or village, according to the last preceding assessment thereof for the purchase of steam engines, or fire extinguishing apparatus, and for the purchase, erection or construction and maintenance of such water-works, mains, portion or extension of any system of water-works or water supply, or to pay for water furnished such city or village under contract; and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, to an amount sufficient to pay the interest and principal of said bonds heretofore or hereafter issued as the same mature, on all the property within such city or village, * * * and all taxes raised under this clause shall be retained in a fund known as 'Water Fund'; Provided further, that no such money shall be borrowed, or bonds issued, unless the same shall have been authorized by two-thirds of the legal votes of such city or village cast for and against the proposition at an election held for that purpose, notice of which election shall have been given by publication in some newspaper published or of general circulation in such city or village for at least two weeks prior to the date of such election." This subdivision further provides for making contracts with private concerns to "maintain a system of water-works and water supply." It gives the city authorities power to make "all needful rules and regulations in the erection, construction, use and management of such water-works, mains, portion or extension of any

system of water-works or water supply"; provides for the appointment of a water commissioner to have the general management and control of the "system of water-works or water supply."

As I view it, the question that was submitted to the voters was whether they should authorize the mayor and council to borrow money to be expended in providing "a supply of water for the purpose of fire protection and public use and for the use of the inhabitants of such cities and villages," the detail of whether by purchase or construction being left to the authorities. If it should be held that each clause in this section separated by the disjunctive "or" constitutes a separate proposition upon which the voters must express their assent or dissent, then there are four distinct propositions which must be submitted to the voters before water supply and fire protection can be made available. It seems to me that, when all that portion of this section controlling the subject of water supply and fire protection is considered, it amounts to but one proposition, or, at most, to two, viz.: Water supply and fire protection—and the real question is whether the city council shall be authorized to borrow money for the general proposition, leaving it to their discretion, if money is voted for fire apparatus alone, whether they shall use a part of it for an engine and part of it for a hose cart or hook and ladder apparatus; or whether, if the money is voted for water supply alone, they shall purchase a water supply system, or shall erect and construct one. It may be even doubted whether the whole matter of borrowing money to purchase fire apparatus and furnish a water supply could not be treated as one proposition, and submitted as one. The purpose of submitting the question is not to control the discretion of the city council in matters of detail, but to ascertain whether the taxpayers are willing to bear the burden of taxation necessary to raise the fund for the purpose. The purpose of the lawmakers is awkwardly expressed, but this is to be expected from a body of practical men from all walks of

life who are probably not as well skilled in niceties of expression as lawyers and judges are apt to be.

In *Linn v. City of Omaha*, 76 Neb. 552, speaking of a different statute, it was said: "A vote of the necessary majority on the question to 'purchase or construct' would leave the matter undetermined and with no choice indicated by the electors." This question was not involved in the case. The point actually decided was that a proposition for the erection of two engine houses and for the purchase of a site for one was but "a detailed statement of the general proposition—to procure engine houses." I do not think this authority militates at all against the conclusion reached in this case. Unless statutes are identical, opinions upon such questions are of little persuasive value, and the cases cited by the plaintiff may, I think, be readily distinguished from this.

ROOT, J., concurs in these views.

SEDGWICK and ROSE, JJ., dissenting.

In *Linn v. City of Omaha*, 76 Neb. 552, this court said: "A vote of the necessary majority on the question to 'purchase or construct' would leave the matter undetermined and with no choice indicated by the electors." If the object of the election is to determine the will of the people as to a proposed investment of the public money, it would seem that the plan of improvement should be fully developed before the election is called, and the proposed expenditure of the public money should be definitely stated so that the voters could intelligently approve or disapprove of the undertaking. This must be the object of the statute. It cannot be supposed that the legislature would require an election to be held for the mere purpose of aiding in the formality of issuing the bonds. The statute governing cities of this class is not as definite in regard to the method of submitting the proposition as are other statutes of similar character. Cities of the first class having from 5,000 to 25,000 inhabitants are required

before submitting such a proposition to procure plans of the proposed system and have estimates made of the actual cost of the proposed improvement and keep them on file subject to public inspection while the proposition is pending, and after a system of improvement is adopted no other system shall be accepted in lieu thereof unless authorized by a vote of the people. Cities of all other classes are placed under similar restrictions. The statute in the case at bar is not as specific as others, but the true construction can be determined from its general purpose, as above stated, and from the language used. It does not seem reasonable to suppose that the legislature intended that bonds might be issued to the amount of 20 per cent. of the assessed value of the property of the city and the money placed in the hands of the council to expend "for the purchase of steam engines or fire extinguishing apparatus, or purchase, erection or construction of water-works or mains or portions of a water system or water supply or to pay for water furnished under contract," or for all or any of such purposes as the council might see fit. But this is the language of the statute that is being construed, and, if it means that the proposition voted upon may be to issue bonds for two or more of the purposes specified in the statute, the same reasoning would require us to say that, if the proposition embraced all of the purposes specified in the statute, the submission would be regular and the election valid, and that the council were at liberty to determine for which one or more of the purposes specified the money should be spent. This reduces the argument to the absurd, and shows conclusively, we think, that the true construction of the statute is that the voters shall determine which one of the many purposes named in the statute shall be adopted, and how much money may be expended for that particular purpose. The proposition submitted to the voters was to issue bonds "for the purchase, erection, or construction and maintenance of such water-works." At the election on this proposition did the electors vote bonds to buy an old plant, or

did they vote bonds to establish a new system? To which one of these public improvements the council will apply the proceeds of the bonds after their approval by the majority opinion is wholly a matter of conjecture. How then did the electors know what they voted for? Would either or both of the propositions have carried had they been separately submitted? This question cannot be determined now because the electors were not permitted to answer it. For these reasons, they did not grant power to issue the bonds, and the history thereof contains no such an expression of the electors' will. When such authority can come alone from the electors in the form of an affirmative vote in answer to a question, why should there be any doubt about what the answer means? When the election involves the power to create a vast indebtedness and the taxation of property for a generation or more, each proposition submitted should be plain, separate and distinct, unless the statute provides otherwise. In no other way can there be a fair expression of the will of the electors. In our view, *City of Leavenworth v. Wilson*, 69 Kan. 74, announces the correct doctrine. That case involved a proposition "to purchase, procure, provide or contract for the construction of water-works." In the opinion it is said:

"Every voter must have a fair opportunity to register an intelligent expression of his will. This the official ballot failed to provide. The subject of purchasing a particular water-works plant already in existence is utterly diverse from that of building a new one. It needs neither argument nor illustration to make this plain truth apparent to any mind of ordinary capacity. The judgment of the mayor and council upon one of these subjects might well be approved by the people through a majority vote in favor of bonds, although the judgment of the same officials upon the other subject would be overwhelmingly repudiated at a bond election. The ballot required to be used at the election in question obliged the voter to approve bonds for both purposes or to reject

bonds for both purposes. If he favored one plan and disapproved the other he was allowed no opportunity to indicate his view. Because of the dual ballot persons adverse to purchase may have voted with persons adverse to building for bonds which, thus supported, carried, although both propositions would have failed ignominiously had they been separately submitted; therefore, the election was not a fair one to the people of the city of Leavenworth."

BELL DRUG COMPANY, APPELLEE, V. WILLIAM L. HUFFMAN ET AL., APPELLANTS.

FILED NOVEMBER 16, 1910. No. 16,165.

Appeal: FINDINGS OF FACT: CONFLICTING EVIDENCE. A finding of fact made upon conflicting evidence by a jury or trial judge in an action at law will not be disturbed unless it is manifestly wrong.

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

W. H. Herdman, for appellants.

W. N. Chambers, contra.

BARNES, J.

Action for rent due the plaintiff from the defendants for the use and occupancy of the second and third floors of the building known as number 1216 Farnam street in the city of Omaha. It was alleged in the petition that the defendants leased the premises in question from the plaintiff at an agreed rental of $60 a month; that they took possession of and occupied the same from the 1st day of December, 1906, until the 1st day of April, 1907; that they paid rent for the month of December, 1906, only, and that there was due from the defendants to the plaintiff the sum of $180 and interest thereon, for which sum the

plaintiff prayed judgment. The answer admitted the leasing and occupancy of the premises, and as a defense alleged the breach of an agreement to repair. It was further alleged that by reason thereof the defendants had been obliged to vacate the premises, and had sustained damages to an amount largely in excess of the plaintiff's claim. The items of defendants' counterclaim were for loss of profits in the business, expenses in moving to and from the premises, and interest on the value of their stock during the time covered by their occupancy. The reply was a general denial, and upon those issues the cause was tried to the district court for Douglas county without the intervention of a jury. At the conclusion of the trial the court found generally for the plaintiff and against the defendants, and rendered a judgment for the amount claimed by the plaintiff's petition.

The defendants have appealed, and assign several grounds for a reversal of the judgment, among which are the failure of the court to allow them any damages for the breach of the alleged agreement to repair. It appears, however, that upon the issue as to whether or not there was such an agreement the trial court found for the plaintiff, and the disallowance of the defendants' counterclaim followed as a matter of course. The evidence in the case was somewhat conflicting, but from a careful reading of the bill of exceptions we find that there was sufficient competent evidence to sustain the finding and judgment of the trial court. The rule that a finding of fact made by a jury or trial judge in an action at law will not be disturbed if supported by competent evidence is so well settled that it is unnecessary to cite authorities in support of it.

Following this rule, it only remains for us to affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

RANSOME SWANGER, APPELLEE, V. EDWARD PORTER ET AL., APPELLANTS.

FILED NOVEMBER 16, 1910. No. 16,179.

1. **Waters:** MUTUAL IRRIGATION COMPANY. An irrigation company organized under the laws of this state, which has no source of income, derives no revenue from the operation of its ditch or canal, and conducts its business solely for the purpose of irrigating the lands of its members and stockholders, is, *de facto*, a mutual irrigation company as defined by section 6845, Ann. St. 1909.

2. ———: ———: BY-LAWS. Such a company may adopt by-laws regulating the use of the water it has appropriated, by its stockholders in turn, and require each of them to contribute his proportionate share to a maintenance fund to enable it to carry on the enterprise, and may make the payment of the same a condition of the right of the stockholder to receive water to irrigate his land; and, where such by-laws are agreed to and signed by all of the stockholders of the corporation, the courts will recognize and enforce the same as a valid contract binding alike upon all of them. *Omaha Law Library Ass'n v. Connell*, 55 Neb. 396.

3. **Mandamus:** IRRIGATION: USE OF WATER. Where, in such case, a stockholder refuses to pay his share of the maintenance fund, he is not entitled to a writ of mandamus to compel the corporation to furnish him water for irrigation purposes.

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

G. J. Hunt, for appellants.

Wright, Duffie & Wright, contra.

BARNES, J.

Action in mandamus to compel the respondents to furnish the relator, who will hereafter be called the plaintiff, water for irrigation. The plaintiff had judgment, and the defendants have appealed.

It appears that in the year 1891 the defendant, the Court House Rock Irrigation Company of Cheyenne

county, was incorporated for the purpose of constructing and maintaining an irrigation ditch and appropriating the water of Pumpkin Seed creek with which to irrigate the lands of the incorporators, and for other purposes; that in 1893 the articles of incorporation were amended, and it was therein provided that the authorized capital stock of the company should be $6,000, divided into 60 shares of $100 each. The irrigation ditch was constructed, the water appropriated, and it was found that the supply was insufficient to carry out the original plan, and therefore only 30 shares of stock were issued, which are now owned by members and stockholders having land under the ditch, and which can be irrigated thereby. It was also ascertained that the flow of water was insufficient to enable any two of the stockholders to use it at the same time, and therefore, by mutual agreement, the ditch was divided into sections, and each irrigator was given the entire use of the water for a certain number of hours in turn, and thus all were supplied to their mutual satisfaction. It also appears that the plan thus adopted has been in operation for more than 12 years without complaint or objection on the part of any of the stockholders until the commencement of this action.

The plaintiff was not a charter member of the corporation, but became a stockholder at so early a date that one of his shares of stock is among those first issued. Article 10, sec. 1 of the by-laws duly adopted by the association, provides: "At the meetings of the board, held on the second Tuesdays in January and July, the board shall make an estimate of the current expenses of the company, and also of the repairs, alterations and improvements to be made, and shall then make an assessment upon the stock sufficient to pay the same, which assessment shall be paid by the shareholders to the secretary of the company on or before any water is delivered to said shareholders." The concluding clause of the by-laws is as follows: "The undersigned stockholders do hereby agree to be governed by these by-laws." Appended thereto ap-

pears the signature of the charter members and every owner of stock, his signature having been placed there when his certificate was issued or was presented for transfer, and the plaintiff admitted that he signed the by-laws.

The record discloses beyond question and without dispute that the ditch is not now, and never has been, operated for profit, and the corporation has no source of revenue whatsoever; that the expense of maintenance has to be met by an equal and proportionate charge upon all of the stockholders. It also appears that it is absolutely necessary to have the ditch cleaned each spring before water can be turned into it; and in case of a break, or other damage, it must be repaired at once, or all of the stockholders will suffer alike; that this work must be done whether each particular shareholder exercises his right to take water or not; that the company has no control over that matter and no means of knowing in advance whether or not any particular shareholder intends to use water; that the only possible way of operating the ditch is to make a close estimate of the cost of maintenance and divide the total cost by the number of shares, and call on each shareholder for his portion thereof. It is also shown that the plaintiff has in times past served upon the board of directors; that he has paid his assessments and used water in previous years under the manner of distribution adopted; that he is now the owner of two shares of stock, and that he has allowed his assessments to remain unpaid for a number of years. It also seems apparent that he conceived an idea or plan of avoiding the payment of his delinquent assessments, and in order to carry it out, on the 11th day of April, 1908, he paid to the treasurer of the company the sum of $15, and demanded that 20 cubic inches of water be furnished him for the purpose of irrigating a portion of his land which lies under the ditch; that at the time he made this payment he was informed that the money would not be accepted upon the terms upon which it was tendered; that it would be received and receipted for as a credit on his past due assessments, and

that he could not be furnished any water until he had paid such assessments in full. A receipt was given to the plaintiff for the sum of $15 paid on account, and he was informed at the time that unless the money was so applied it would not be received at all. Plaintiff took the receipt thus issued to him, refused to pay the balance of his assessments, and immediately brought this action to compel the corporation to furnish him 20 cubic inches of water according to his demand made upon the treasurer.

Upon the foregoing facts, which were clearly established at the trial, the district court found for the plaintiff and awarded him a peremptory writ of mandamus compelling the defendants "and their successors in office, to deliver water to the relator during the irrigation season upon demand and the payment of the reasonable price or charges therefor made by the respondent company during such irrigation season, for the irrigation of his land that is included in the respondent's appropriation, so far as its supply will permit, and not to exceed seven-tenths inches per acre." To this judgment the defendants duly excepted, and, as above stated, have brought the case here by appeal.

It will be observed that the writ does not respond to the prayer of the plaintiff's petition, and it is apparent that the district court in granting relief to the plaintiff followed the rule announced in *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, 76 Am. St. Rep. 122, 45 L. R. A. 647, where it was held that the fully paid-up stock of a corporation is the personal property of the owner, and is not subject to general or specific assessments. It was found by the trial court, as a matter of law, that the plaintiff's stock was nonassessable, and the delinquent assessments thereon for maintenance were declared void. Defendants contend that the rule in that case has no application to the facts in the case at bar; and we are of opinion that this view of the question is correct.

It clearly appears that the members and stockholders of the corporation have, by their by-laws and plan of

operation, brought themselves fully within the provisions of section 6845, Ann. St. 1909, and are now a mutual irrigation company. By this section it is provided: "Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs and other works for irrigation purposes and deriving no revenue from the operation of such canal, reservoir or works, shall be termed a mutual irrigation company, and any by-laws adopted by such company prior to, or after the passage of this act, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state; provided, such by-laws do not impair the rights of one shareholder over another."

It would seem that the by-laws and plan of operation adopted by the defendant company are fully authorized by, and not in conflict with, the provisions of the section above quoted. We are therefore of opinion that this case should be ruled by *Omaha Law Library Ass'n v. Connell,* 55 Neb. 396. In that case it appears that the organizers of the Omaha Law Library Association were of opinion that certain current expenses would have to be met in order to carry out the purposes of the organization. Books would have to be purchased from time to time to keep up the library, rent and taxes would have to be paid, there would be expenses of light and fuel, janitor and librarian services to be provided for, and, with this in mind, the promoters of the corporation by its articles of association authorized its board of directors to enact such a by-law as the one in controversy, namely, one to meet the current expenses of maintaining the library, and it was said: "The by-law, then, is not inconsistent with the law authorizing the creation of a corporation, nor is it inconsistent with the corporation's charter." It was further said: "Connell also interposed as an answer to this action that during the time in which the dues sued for herein had accrued he was not engaged in the practice of law and had no opportunity of enjoying the privileges and the use of the library. This was no defense. The by-law im-

poses the annual due upon the stockholder, and so long as he is a stockholder he is liable for the dues whether he uses the library or not. Being a stockholder he has the privileges of the library, and with the privileges go the burdens."

It is apparent, in the case at bar, that after the defendants' ditch was in operation it was found necessary to provide a fund for its maintenance, and in order to do so the by-laws in question were adopted. The plaintiff assented thereto and signed the same, and he is equally bound thereby with all of the other stockholders of the company. In order to carry out the purposes of the organization and furnish water for irrigation to the stockholders, it was necessary to provide for the maintenance fund above mentioned, and if one of the stockholders can refuse to pay his proportionate share thereof then another can, and so on, and the whole enterprise would fail. While this maintenance fund is apportioned among the stockholders in accordance with the amount of stock held by each of them, still it is not, strictly speaking, an assessment upon the capital stock. The manner of its collection has been fixed and determined by the mutual agreement or contract of the stockholders, and there can be no doubt but such contract is legal and enforceable according to its terms. This being so, the plaintiff, who refused to pay his share of the maintenance fund, was not entitled to demand and receive water until such payment was fully made. Therefore he was not entitled to the relief demanded, and judgment should have been for the defendant company.

For the foregoing reasons, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

MCCAGUE SAVINGS BANK, APPELLEE, V. JOHN W. CROFT ET AL., APPELLANTS.

FILED NOVEMBER 16, 1910. No. 16,550.

Limitation of Actions: COMMENCEMENT OF ACTION. Where at the commencement of a suit the original petition contains two causes of action, which are improperly joined, and afterwards one of such causes is eliminated by the filing of an amended and substituted petition, and a trial is had upon the remaining cause of action as set forth in both petitions, the filing of the original petition and the service of summons thereon arrests the running of the statute of limitations as to the remaining cause of action.

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

John L. Webster and *Joel W. West,* for appellants.

John F. Stout and *Charles Battelle, contra.*

BARNES, J.

This case is here by a second appeal. It appears that the plaintiff declared on the promissory note of the defendants for the sum of $5,000, and also set forth in its petition a note and mortgage given by Fannie M. Croft to John B. Finlay, which plaintiff alleged was held as collateral security for the payment of the note first above mentioned. The relief demanded was for an accounting of the amount due on the note signed by all of the defendants, which was treated as their principal or primary obligation; that the collateral mortgage be foreclosed and the proceeds thereof be applied to the payment of the note first above mentioned; and a personal judgment against all of the defendants for the deficiency, if any, after so applying the proceeds of the collateral note and mortgage. The first trial in the district court resulted in a judgment for the plaintiff and against the defendants Manley and Croft, and in favor of the defendants Cathers and Det-

weiler, administrator. Afterwards the defendant John W. Croft was granted a new trial, which was had to the court without the intervention of a jury, and was determined upon the evidence adduced at the first trial. This resulted in a finding favorable to that defendant. Judgment was rendered upon the verdict, and the plaintiff appealed. Our opinion reversing that judgment is reported in 80 Neb. 702, to which reference is made for a more full and complete statement of the pleadings and the issue presented thereby. After the cause was remanded it was again tried as an action on the principal note, all reference to the collateral note and mortgage having been eliminated by an amended and supplemental petition. The trial resulted in a judgment for the plaintiff and against all of the defendants, from which they have prosecuted this appeal.

The assignments of error relied on present the single question of the statute of limitations. We think that question is fully foreclosed by our former decision in this case. It was there said: "It is urged by appellees that a proper practice will not permit the transformation of a suit from one to foreclose a mortgage into an action at law on a promissory note not secured by a mortgage. In the original petition filed by the plaintiff no personal judgment against the makers of the principal note was asked until after the mortgaged property was exhausted, but it was sought to obtain a personal judgment on the principal note, less any amount which might be derived from the mortgaged premises. It is true that, as against objections made by a defendant, an independent note cannot be joined in an action to foreclose a mortgage. Defendants understood that such was the practice, and raised the question, first, by a demurrer, and again by answer. When objection is made to a petition on the ground that two causes of action are improperly joined therein, the plaintiff may dismiss as to one cause of action and proceed upon the other, or he may file several petitions, each including such of said causes of action as might have been

joined, and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service. Code, sec. 97. A suit upon the principal note of Finlay and upon the mortgage taken by the bank as collateral could not, as against the objections of the defendants, be joined in the same action, but when the plaintiff filed its amended and substituted petition upon which the case was tried, and withdrew any demand for relief on account of the mortgage, it was in effect a dismissal of the cause of action upon the mortgage, and the case then stood for trial upon the principal note declared on; the objection to the petition on the ground of the misjoinder of causes of action being eliminated by the allegations of the amended and substituted petition."

It thus appears that this is a continuation of the original action upon the principal note alone, and we are unable to see how it can be seriously contended that the filing of the amended and supplemental petition was either a change of the cause of action set forth in the plaintiff's original petition or the commencement of a new action upon the principal note. This being a continuation of the action upon one of the causes set forth in the original petition, the statute of limitations ceased to run upon the filing of that petition and the service of summons thereon. *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709; *McKeighan v. Hopkins,* 19 Neb. 33; *Case v. Blood,* 71 Ia. 632; *First Nat. Bank v. Lambert,* 63 Minn. 263.

It further appears from the record that all of the questions of fact raised by the pleadings in this case were submitted to and decided by the jury adversely to the defendants, and we are satisfied that the evidence is sufficient to sustain their verdict. This seems to be practically conceded by the counsel for the appellants.

Therefore, and for the foregoing reasons, the judgment of the district court is

AFFIRMED.

PAUL STUEFER ET AL., APPELLANTS, V. WEST POINT MILLING COMPANY, APPELLEE.

FILED NOVEMBER 16, 1910. No. 16,100.

1. Waters: MAINTENANCE OF DAM: OVERFLOWING OF LAND: EVIDENCE: INJUNCTION. In order to justify the issuance of an injunction to restrain the owners of a milldam from maintaining the dam and from increasing its height and thus permitting water to overflow the plaintiffs' land, the evidence of wrongful acts on the part of the defendant must clearly preponderate. If it is doubtful whether the height of the dam has been the cause of the injury or whether the damage has resulted from some other cause an injunction will be denied.

2. ———: ———: ———: ———. Evidence examined, and *held* that the allegations of the petition have not been sustained by a preponderance of the proof.

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

T. M. Franse and *A. R. Oleson,* for appellants.

P. M. Moodie and *H. C. Brome, contra.*

LETTON, J.

The purpose of this action is to enjoin the maintenance of a milldam and embankments in the Elkhorn river, to restrain the defendant from diverting the waters of the river, and from maintaining or increasing in height the dam, dikes, and embankments so as to allow the waters to overflow plaintiffs' lands.

The allegations of the petition, much abridged, are as follows: That the several plaintiffs are the owners of separate tracts of land in Cuming county, Nebraska, adjacent to and drained by the Elkhorn river; that the natural fall of the stream as it passes through the land and for several miles up and down the stream is very slight; that the subsoil is wholly sand, so that when the flow of the water in the river is obstructed it percolates into the

plaintiffs' lands to such an extent that the lands become sour and wholly unfit for use; that about the year 1875 a dam five feet in height was constructed across the river without authority of law or without the plaintiffs' consent, but that, as so constructed, it did not damage the plaintiffs' lands; that during the last five years the defendant and its predecessor has carelessly and negligently allowed the bed of the river above the dam to fill with silt and refuse so that the bed of the river has been raised a number of feet, and has raised the dam and filled in the river at that point until the dam is eight feet higher than originally built; that, in addition to raising the height of the dam, the defendant has caused embankments and dikes to be constructed along the banks of the river to the height of three feet extending to a long distance above the dam; that by these acts the waters in the river were obstructed and interfered with so as to overflow and submerge these lands and render them valueless for cultivation and pasture; that defendant threatens to build the dam and embankments higher; that the waters flow over the low lands to another outlet below the dam, and the river is forming and will form a new channel over plaintiffs' lands; that the overflow has destroyed growing trees, grass, vegetation and crops, and that there is no adequate remedy at law.

The defendant pleads that the dam has been maintained at the same point ever since the year 1870 at the same height and in the same condition as now for the purpose of furnishing power with which to run a flouring mill, and since 1886 to pump water for the city of West Point; that the lands which are now overflowed have been continuously overflowed since 1870; that in 1904 the dam was washed out and soon afterwards reconstructed at a cost to defendant of between $5,000 and $7,000; that the plaintiffs knew that the dam would be useless and worthless unless it could be reconstructed and maintained at its present height, but, notwithstanding such knowledge, they permitted and encouraged defendant to expend a

large sum of money in such reconstruction without objection or protest. It further denies all the facts in the petition not admitted in the answer. The reply is a general denial.

A large amount of testimony was taken and the cause submitted to the district court, which found that the milldam had not been built higher during the past five years, or at any time, so as to cause the lands to be overflowed to a greater extent than they have been for more than ten years next before the commencement of the action; found, further, that the lands have been overflowed to a greater extent in the past five years than prior thereto; found generally for the defendant and rendered judgment accordingly. From this judgment the plaintiffs appealed, and the case is now here for trial *de novo* upon the evidence produced before the district court.

It appears that in 1867 a special act of the legislature of the territory of Nebraska was passed (laws 1867, p. 99) authorizing certain persons to erect a milldam "across the Elkhorn river, in the northeast quarter of section twenty-seven, township number twenty-two, north of range number six east of the sixth principal meridian, in Cuming county, Nebraska Territory." No dam was ever built at that point, but in 1870 a flour mill and dam were erected in another portion of section 27, the dam being the one complained of. There is no evidence to indicate that *ad quod damnum* proceedings were ever had, or that any damages were ever ascertained or paid to the owners of the land affected by the construction of the dam, so that whatever right the defendant may have to overflow the lands belonging to the plaintiffs has been acquired by adverse user since 1870, and not by express grant or condemnation. The appellants complain that the findings of fact made by the court are contrary to the law and the facts, and they insist that the great weight of the evidence sustains the allegations of the petition and entitle appellants to the decree prayed. This raises a very simple question, but one which requires a consideration of all the testimony in the record.

The defendant insists at the outset that the plaintiffs have a complete and adequate remedy at law, and therefore are not entitled in any event to the relief prayed for. In the view we take of the evidence, it is unnecessary to consider this point, but, if the allegations of the petition had been established, we doubt that adequate relief could have been afforded except by the interposition of a court of equity.

Before proceeding to a consideration of the evidence, it is well to premise that, in order to be entitled to relief in this case, it was incumbent upon the plaintiffs to prove, not only that their lands had been overflowed, but that the flooding of the property was had and caused by the raising of the height of the dam or embankments to a height greater than the defendant's rights by prescription warranted.

The first witness called for the plaintiffs was Mr. Heller, the county surveyor. He identified the situation of the plaintiffs' lands with reference to the river and dam, and produced certain maps and profiles, which were introduced in evidence, showing the meanderings of the river, the level of the water for several miles above and below the dam, and the height of the dam. He testifies that at the time he made the measurements in 1906 it was 9.68 inches from the surface of the water immediately above the dam to the surface of the still water immediately below. On cross-examination he testified that the elevation of the water in the mill-race and the elevation of the water above the dam was practically the same; that the levels were taken when the wheels were still, probably 25 feet back of where the water dips down to go over the dam; that on February 8, 1908, he made another measurement, and this measurement makes the dam 6 or 8 inches lower than the other; that the quantity of water going over the dam varies, and that if the river rose 2 or 3 inches it would affect the measurement. The witness further testified that, at the time he measured, the water above the dam at a low place ran into and through

Wisner lake into the river again below the dam, and that it is now flowing there, and has been doing so for a number of years; that the embankment at the low place is broken, and that this low place was formerly the bed of the river. He testifies that from 1867 to 1872 he lived near this locality; that he saw the Elkhorn river out of its banks before the West Point dam was built, and also after the dam was out; that he was there in the spring of 1881; that in 1881 he remembers seeing the waters all over the bottom; that the water was out of its banks at Wisner, 15 miles above West Point, last spring, and that this was not occasioned by the dam. He was also asked this question: "Q. Is it a fact that very often, without reference to dams at all in the Elkhorn river, in the spring of the year in times of high water the Elkhorn river goes out of its banks? A. Yes, sir. Q. And that the class of lands that the plaintiffs own is generally flooded at those times and on those occasions whether it is near the dam or not? A. Yes. The years we have exceptionally high water it is." The witness further testified that plaintiffs' land "is rather low, bottom lands. It is land that has been traversed by the Elkhorn river as time has passed on, and those parts of the land that I have mentioned, it has all been once used for the bed of the river which high water has shifted further and further, and it is what we call 'drift land.' It is full of little knolls and depressions, and, when the river gets so that two bends come together, it cuts off and it would form a new channel, and the lands that I have mentioned are of that kind of soil—sandy soil. It is a very productive soil, provided it is not overflowed. Of course, when the water becomes high it is all inlaid with sand, and it becomes very wet and becomes miry, while in the dry season, of course, it is very productive soil and produces very good corn." That Wisner lake gathers any surface water falling upon the territory west of it, and that the water of the lake which does not evaporate or sink into the soil runs into the river a mile or so below the dam; that still farther

above the dam there is a lake called McCarren's lake which is also a permanent lake. There was water in it when the witness first came to the country, and there has been water there ever since. It is fed from the river in times of high water, and the overflow from it runs into Wisner lake. He further testified that the water in McCarren's lake is now, and has been for the last two or three years, four or five feet higher than it used to be.

The plaintiffs themselves were witnesses. Their testimony substantially is that from 1892 to 1902 their lands were not damaged by high water; that in May, 1903, a flood covered the bottom lands, but the dam went out and relieved it; that in 1904, 1905, and 1906 their lands were again flooded; that in 1903 the flood came by the low place into Wisner lake; that in 1904 it came from the river; that, when the water comes from the river through McCarren's lake to Wisner lake, it takes a higher stage of water than otherwise; that their land is low and sandy and requires draining into the river, and that during the last five years it has not drained, but that the water has percolated the subsoil and made the land sour and unproductive; that prior to 1903 they raised fair crops, but now it can only be used for pasture; and that large trees growing near the river have died in the last five years. Mr. Stuefer says: "I think they died from water standing round them, or seepage water." Formerly the mill people kept up banks at low places along the river where the water would run out when the river rose into the lakes and low places, but of late years they have neglected this. Their evidence further describes specifically the appearance of the land during the several floods, how the waters reached the lands from the river, and the specific damage caused. As to the raising of the dam they testify substantially as follows:

Mr. Nolan: After the dam was repaired in 1904 the witness saw it. They had extended and widened it. In 1902 he told Mr. Benedict, who was in charge of the West Point mill, that they had raised the dam and the back water had injured his hay; that Benedict said first that they had not

raised the dam, and then admitted that they had raised it, but not sufficient to flood his lands, and that they would fix the depressions; that when he talked to Benedict he could tell from the changed appearance of the dam that it had been raised, but he did not notice any dikes or embankments above the dam. On cross-examination he could not say that in 1903 they had raised the place where the water came down to the wheel; that he did not see his place in 1904. In 1905 he went up the river after the water subsided, and he noticed flood marks on the grass and ground as far as Pilger, about 22 or 23 miles from West Point; that up to the time he talked to Benedict he had not noticed any water coming from McCarren's lake on his land; that there was a low place between McCarren's lake and Wisner's lake through which the water might come in at times of floods, and Mr. Benedict agreed that he would close this up, and he did so; that there was another low place where the water came from the river into Wisner lake which Benedict agreed to fill and did fill, but it washed out.

Mr. Paul Stuefer: He sees the dam from 10 to 12 times during the year, and sees the river above the dam almost every day. He cannot tell how much the dam has been raised, but thinks it was raised continuously ever since it was built, about 3 or 4 feet in all. That in 1903 he said to Mr. Benedict after the washout: "If you replace the dam you will damage our lands, especially my land, and if you raise it any higher than it used to be you will also damage it more." That they rebuilt the dam and raised that portion of it across the river from 10 to 12 inches. When they found that the bank was tearing away on the west side, they put in sand and brush and made those low places higher than the bank of the river.

Mr. Wisner: The mill-race filled with sand, and they had to raise the dam to get the water in. Mr. Neligh did not have the dam so high. The new company raised it. Cross-examination: Mr. Neligh banked up where the water comes into the lake. The new people didn't keep the

dike up. Benedict promised to do this, but did not do so. The dam has been raised in the last 20 years probably a foot.

Mr. Henry Schinstock: The land was flooded in June, 1905. It is on account of the dam; did not have fall enough to allow it to go down fast enough; drowned out about 15 acres of oats, and drowned out again the same year; looked at the dam last when it looked like it had been raised. It is pretty near as high as the bank of the river. Before it was raised it must have been five feet lower than the bank. Cross-examination: I never measured it at any time; do not know whether the flume has been raised or lowered; have known of the dam for over 20 years.

Mr. Herman Kaup: Moved on his land five years next March. The first year he was there the water came once out of the river into the lake. The last year it came out probably a dozen times, and last summer three times, when there was any high water. McCarren's lake is higher than it was five years ago, perhaps three feet. Every time it rained, after that, the water always became higher, and then they kept adding onto the dam. "Q. How do you know they kept on building the dam higher? A. We could see it on the trees and also on my neighbor's trees. * * * Q. You may state whether those trees five years ago were standing in the water? A. Yes, sir."

Several other witnesses for the plaintiffs testified that they had worked upon the dam in 1903, and subsequently, and that brush, straw, sod and dirt had been added to it so as to raise it in height and width almost every year. Other witnesses testified they had dug out silt and sand from the flume both above and below the wheel pit, and still others described the effect of the floods upon the land and crops. If this evidence were not assailed we think it might support the allegations of the petition, but upon a consideration of the testimony produced upon the part of the defendant, which we will now consider, its effect is materially weakened.

For the defendant, Mr. A. C. Ludwig testifies that he is

a carpenter and contractor; that in 1901 he reconstructed the headgate and flume for the West Point Milling Company; that the dam was left just as it was, the inlet was not changed nor the outlet, and no change was made in the height of the side walls of the flume, but another partition was run between the two old walls, making three walls instead of two. Cross-examination: This narrowed the flume about three feet. That is the only change that was made.

A. M. Ludwig worked for his brother repairing the flume. The new sills were framed to fit under the old one. The old floor was not changed, and the top and bottom joists were not disturbed. The new partition extended about 40 feet down the flume.

Roy N. Towl, a civil engineer, residing in Omaha, in August, 1907, made a map of the locality (exhibit 8) and measured the height of the dam. The difference between the water below the dam and above was 8.23 feet. About a foot of water was going over the dam at the time. The water appeared to be at a normal stage. He also took the level of Wisner lake and McCarren's lake. The water in Wisner lake was lower than the surface of the river, and there was water flowing into it not directly connected with the river, but coming from the direction of the river. He also took the level of McCarren's lake. The water in this lake was approximately 1.2 feet higher than the water of the river. There was a dike between the lake and river, but if the dike had been removed water would not have flowed from the river to the lake at that stage of water. The water in McCarren's lake was about 6 feet higher than the water in Wisner lake. Between McCarren's lake and the river the elevation of the ground was such that the water would have to rise two feet in the river before it could run into the lake. If the dam was raised it would necessarily raise the water in the flume.

Carl Zuehr: Has worked around the mill as repairman 23 years; the dam is no higher now than it was 23 years ago, and the flume has not been raised or lowered during

that time. The dam is a brush dam, and it settles more or less every year. He has put a little brush on it every year. Part of the dam has gone out four or five times since he worked there. In 1903, after the west side of the dam washed out, the dam was rebuilt wider and a little higher than before on account of the settling, but the next year it was lower than the old part. While the dam was being built teams drove over it, but the water then was running through the brush. He saw the Ludwigs repair the flume. They used the old floor and put in a partition. The tail-race has not been changed in any way. Twenty-five years ago when he first came there he saw the water running over the whole bottom. In 1886 or 1887 they had as high water in the river as they have had recently. Cross-examination: Never measured the dam. Could tell without making measurement whether the dam was higher by the height of the water at the wheel-house. He put brush and sod and dirt on the dam to repair it. He washed the silt out of the flume nearly every week. Filling up part of the race with silt stops the water and does not give quite the power. Have worked putting in dikes and embankments along the west side of the river, built them level with the other ground in the old river bed to keep the water from going in on Wisner's land; also to keep the water off Stuefer's land.

William Zobel: Worked for the milling company 21 years. Have helped repair the dam when it needed it. We raised the dam so as to give the same height of water in the wheel-house. Cross-examination: Don't know whether it is any higher now than it was two years ago. We fix the dam every year. In the fall we put on brush and sod, and in the summer when the water is low we make it a little higher with planks and dirt.

Nicholas Reuss: Worked for milling company 22 years. Have helped repair the dam every time it has been repaired. So far as I know the dam is just the same now as it was 20 years ago. Cross-examination: Never measured the dam. Helped to put brush upon the top of it every time, and sod and dirt.

W. F. S. Neligh: Prior to 1892 lived continuously at West Point 25 years. Son of John D. Neligh. Am familiar with the dam. My father was in charge of the construction of the mill and the labor that was performed there. The dam has been maintained for 40 years at its approximate height of to-day. In the earlier years I have gone all over that country in a boat. We started at the railroad track and could go clear across the bottoms. That was sometime in 1870 or 1880. McCarren's lake and Wisner lake have been there ever since I have known the country. We have had unusually high water for a period of the last ten years. In 1905 during the flood I went to McCarren's lake and made an examination to see where the water was getting into that lake. It was approximtely four miles above the dam. There was a stream probably 300 feet wide and a foot deep in the center. We came by boat across that land through McCarren's lake. The country south of town was overflowed to a considerable extent at that time. The dam settles every year, and the top has to be dressed every year. They usually do the work in the fall, put the brush on, then when it freezes over cover it with straw and then with sod. The repairs are usually made when the river is low. They determine the height of the repairs according to the flume. They build so as to make the top of the dam practically level and even across. If they should raise the dam it would have the effect to raise the water in the flume. Cross-examination: Never took any measurement of the height of the dam. Have seen the water in the spring of the year all over the bottoms from McCarren's lake to the Horse Shoe (Wisner's lake) practically solid, with one or two knolls in Wisner's pasture above water. The highest water is usually in May. I have seen water over the greater portion of these bottoms several times, as a rule in May and June; I think in 1881, and in 1885, 1888, and perhaps in 1889.

Harry Winger: Is manager of the milling company. Has lived at West Point since 1886. Has been employed

by the milling company since 1905. Since then has maintained about 8 feet of head water in the wheel-house, in low water about 7½ feet. The head of the water varies, especially during very low water. The photographs in evidence were taken in the spring of 1906. Part of the dam went out in 1906. Cross-examination: In 1905 and 1906 we could not run the mill in the spring on account of high water. Never measured the dam, but measured the water in wheel-house. If the water above the dam raised, it would raise the water in the wheel-house just that much. The water in the flume and above the dam is practically at the same level.

Mr. Benedict: Was employed from 1900 to 1905 as manager of the milling company. Repairs were made every year on account of the settlement of the dam. In the spring of 1903 the water washed around the dam. Filling the gap and repairing the dam cost about $5,000. The cost of repairing the dam during the years he was manager was from $1,000 to $1,500 a year. The dam was not raised during these years. The flume was repaired, but no change was made in its height, and the mill-race has not been raised or lowered. Cross-examination: Had no experience with dams before he came to West Point. The books will show the cost of repairs for those years. Am not a civil engineer. Don't know the height of the dam, but could tell by measuring the water in the flume. Always aimed to keep the water at the same height in the flume when the river was normal. The flume has a wooden floor, and there is no silt or mud in the flume. Think now the cost of repairs was from $600 to $1,200 a year. In 1903 the water cut around the dam, making a break about 160 feet wide and 3 feet deep; in other words, the river was changed, so that the water ran around the dam. The $5,000 was expended in forcing the water over the main dam. Denies promising Nolan not to raise the dam any more, but that he would fix up the banks of the river.

F. Koch: Is acquainted with the land belonging to plaintiffs. Has lived here 40 years. Recollects the water

coming on these pieces of land in the earlier years he lived here. "Q. State whether in 1868, or about there, there was any flooding of these lands. A. Well, there was every once in a while. Of course I don't remember the years, but one year especially I remember, that was in 1873, the June water." Testifies that one year he went twice up over the land owned by the Schinstocks and Paul Stuefer with a boat; also went over Mr. Wisner's land. Went as far as Mr. Kaup's and Mr. Nolan's and Mr. Wisner's with a boat. In 1873 he went up as far as Mr. Wisner's land, and came down the channel of the river over the dam. In 1881 or 1882 it was flooded about the same; not quite so high as in 1873. In these years the land was partly flooded. When there is high water that whole Elkhorn bottom is partly flooded.

John Elsinger: Has lived in West Point about 35 years. Has been familiar with all of the plaintiffs' land for about 20 years. The water was very high on these lands in 1880; every foot of Mr. Wisner's land was under water; also Mr. Nolan's. Had pretty high water in 1881 and 1882. All of this land was pretty much under water at that time because I have taken a boat and gone clean over to the McCarren place; could go over Wisner's, Nolan's and McCarren's land, Mr. Kaup now owns. In 1885 was the last time it flooded that country so much. It might have been 1886 or 1884. The low parts of that land the water does not have to be very high to flow over it. In the spring of 1888 it was pretty much all covered with water. Of course, there were knolls in it that stuck out. Cross-examination: Sometimes ice gorging in the river would have a good deal to do with throwing the water out on the land. It would stay on it from a week to three weeks, but would drain some. At that time there was none of that land that we thought fit to farm. The first man who farmed it was in 1892 or 1893. I haven't paid much attention to it between 1892 and 1902.

Andrew Rosewater: A civil engineer of 40 years' experience. If the water-wheels are not in operation, there

would be no difference in the level of the water above the dam and the level of the water in the flume. If the dam were removed entirely, the immediate effect would be to lower the water level for quite a distance up the river, but eventually the cutting of the banks and deposit of sand bars caused by the increased velocity would cause bends in the stream and equalize the flow, and the result would be to reduce the flow to the same as that of the river generally.

The remaining evidence is in the form of maps, plats and photographs. The photographs, taken in 1906, exhibit the process of repairing a break in the dam by piling in brush, and clearly show the loose texture until the brush has settled. While we do not consider that levels taken by a surveyor are always of equal weight with testimony as to the actual level of water as shown by water marks, yet evidence otherwise lacking is furnished by the plat showing the actual levels of the low portions of the plaintiffs' lands, of the surface of the water in McCarren's lake, in Wisner lake, and in the river. It seems that the plaintiffs' land would be better protected if the dike or obstruction in the low places where the water from the river flows into Wisner lake were repaired instead of demolished. This is what they say they requested of the manager of the milling company. In this action they pray for the removal of all dikes.

After considering all the evidence, giving due regard to the interest of the plaintiffs on the one side, and the influence which the fact of being employed by the defendant may possibly have on the testimony of its employees on the other, we are convinced that the plaintiffs, while undoubtedly being subject to greater damage from water in the past five years than in the ten-year period from 1892 to 1902, have not established by a preponderance of the evidence that the flooding has been caused by an increase in the height of the dam. No doubt, as they testify, the height has apparently been increased several times, but this is explained by the nature of a brush dam. The

positive evidence of the men who have worked on the dam for 20 years is that it is at the same relative height now that it has always been. The flume has been unchanged, and the testimony is uncontradicted that the height of water there in ordinary stages is the same as ever. Perhaps the circumstance that heavy floods occurred during the earlier years, that for a cycle or period of years they ceased, and then occurred again, may be explained by the fact, which is a matter of history, that about the time of early settlement, rains were abundant, that for a portion of the time from 1892 to 1902 droughts were frequent and crops were light in this locality, while in these latter years rainfall has been more profuse and crops correspondingly more bountiful.

Upon the whole case, we cannot say that we are satisfied that any act of the defendant within the last ten years has caused the damages complained of. The district court with the added advantage of seeing and hearing the witnesses so found, and we can find no fault with its conclusion.

The judgment of the district court is

AFFIRMED.

REESE, C. J., dissenting.

It is with regret that I find myself unable to agree to the opinion of the majority of the court in this case, and that this dissent becomes necessary. I think the proof clearly shows that the dam as at present maintained is higher than is permitted, either by the act of 1867 (territorial session laws 1867, p. 99; act approved February 6, 1867) or by user to the extent that the statute of limitations will afford complete justification. I furthermore think that it is sufficiently shown that the land of plaintiffs has been overflowed to a much greater extent than before the increase of the height of defendant's dam, and that a large tract of land which was valuable before is now rendered practically worthless. I do not believe that defendant has the right to construct its dam higher than

is permitted by law or prior usage in order that when it settles it may be of the proper height. It may require a month or a year to complete the settling process, and during which time plaintiffs' land is liable to overflow by reason of the increased construction. I admit that the proof as to the exact increase of the height of the dam is not as clear as might be, and that upon another trial that question could be finally put at rest and justice be administered between the parties, and therefore favor remanding the cause in order that further evidence may be produced if the parties can do so.

FAWCETT, J., concurs.

JENNIE E. BROWN, APPELLANT, V. O. W. WEBSTER, SPECIAL ADMINISTRATOR, ET AL., APPELLEES.

FILED NOVEMBER 16, 1910. No. 16,142.

1. **Descent and Distribution:** SUIT TO ENFORCE TRUST: PARTIES. The title to real estate at the death of the owner descends *eo instanti* to his heirs, subject to administration, and the contingency of the probate of a will disposing of the same, in which event the title of the devisees relates back to the time of death. Until probate of such a will, the title is *prima facie* in the heirs at law, and they are necessary parties to an action to enforce a contract made by the deceased by declaring a trust in the property inherited or devised.
2. **Wills:** PROBATE: JURISDICTION. The district court has no power in an original action either directly or indirectly to determine whether an instrument proposed for probate is the last will of a deceased person. Original jurisdiction in such matters is conferred by the constitution upon the county court alone.
3. **Trusts:** SUIT TO ENFORCE: WHEN MAINTAINABLE. An action to declare a trust and to require the devisees and legatees named in a will to convey the property devised to the plaintiff is premature if brought before the will is proved and allowed by the county court in proper proceedings for that purpose.

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

Field, Ricketts & Ricketts, for appellant.

Charles O. Whedon and *E. B. Perry, contra.*

LETTON, J.

This action is brought by the widow of Erastus E. Brown, deceased, against the special administrator of the decedent's estate and the devisees and legatees in a will executed by him shortly before his death. The purpose of the action is to enjoin the defendants from procuring or attempting to procure the probate of that instrument; that some of the defendants may be required to execute conveyances to plaintiff to part of the property; that the title to said real estate and to all the personal property of the estate may be quieted in the plaintiff; and the special administrator ordered to turn over to plaintiff all the property in his hands belonging to the estate. The petition, in substance, alleges that Erastus E. Brown died on the 15th of August, 1908, possessed of a large amount of real and personal property described in the petition, that he left no heirs, and that the plaintiff is his widow; that at the time of their marriage the deceased did not own property exceeding $1,000 in value, while the plaintiff received from her mother's estate about $20,000 in money, which was turned over to her husband and was managed, invested, and reinvested in his own name, and that the title to nearly all the property purchased from the proceeds was taken in his name and held and transferred as his own property; that some property was purchased in the plaintiff's name and held by her; that in January, 1896, as a result of these investments, plaintiff was the owner of real estate in her own name in the value of $40,000 or $50,000, and deceased was the owner of property of the value of $50,000 or $60,000; that at that time a parol contract was entered into between them, by which it was agreed that the survivor should, on the death of the other, become the owner of all the property

that should then be owned by the one who first died; that wills were executed in accordance with this agreement, placed in an envelope, and delivered to plaintiff for safe keeping, and they were placed by her in the family safe, where they remained until after the death of the deceased; that in reliance upon this agreement the plaintiff permitted him to deal with her property as if it were his own, and to use the plaintiff's residence for years as the family home without rent, while the income from the property of both was invested in the name of deceased; that deceased at no time notified the plaintiff that he wished to modify the agreement or to revoke the will executed in pursuance thereto; that in August, 1908, while her husband was dangerously ill at the home of his brother in Indiana, where he was visiting, and before plaintiff was able to reach him, deceased is said to have made and executed another and different will giving nearly all of his property to the defendants in this suit, who are his nieces and nephews; that this instrument is now filed in the office of the county judge of Lancaster county, Nebraska, and is proposed for probate as the last will and testament of Erastus E. Brown, deceased; that she had no knowledge of the execution of this instrument until after his death; that the will she executed in pursuance of the agreement was in full force and unrevoked at the time of her husband's death, and that the breach of the contract and attempted revocation of the 1896 will is a fraud upon her rights; that the probate of the will will cast a cloud upon her title to the property constituting the estate of deceased. She therefore prays as above stated. To this petition the special administrator filed a general demurrer. All of the other heirs except Kreitlow filed both special and general demurrers. Defendant Kreitlow answered, alleging a transfer of her rights to plaintiff, and disclaimed. The district court sustained the demurrers. The plaintiff refused to plead further, and the court dismissed the action, from which judgment the plaintiff appeals.

The plaintiff argues that there were no legal obstacles

preventing the deceased from making a valid obligation to leave his property to plaintiff; that the agreement was founded upon an adequate consideration; that the statute of frauds has no application; and, further, that the execution of will by each of the parties was a sufficient written memorandum of the contract, and that it was so far performed as to satisfy the statute of frauds.

The defendants say that specific performance will not lie because there is a defect of parties defendant, the action is premature, and the district court is without jurisdiction. They also contend that the alleged agreement is contrary to public policy, is within the statute of frauds, that there was no consideration, and there has been no party performance.

The question which lies at the very threshold of the case is: Can an action be maintained to enjoin the probate of a will, and also to compel the devisees named in the unprobated will to convey the property therein devised to them to plaintiff, the devisees not being the heirs at law of deceased? The petition shows that the legal heirs of the deceased are not made defendants in this action, and no interest in the property is shown to be possessed by the defendants except such as they may possibly derive in the future by virtue of the terms of the will which is proposed for probate, but which probate it is one of the purposes of this action to prevent. The petition does not allege what the fact in this regard is, and it is possible that when the 1908 will is offered for probate there may be objections filed upon the ground of undue influence, mental incapacity, or for other reason. By an experience of many years the writer has become convinced that, under circumstances similar to those alleged in the petition, such a contingency is within the bounds of probability. If such should be the case and the will be refused probate for any reason, then the only persons interested in the estate would be plaintiff, as devisee under the first will, and the legal heirs of the deceased, and whatever decree could be rendered in this action against the de-

fendants would be a vain thing. In such case similar questions might arise as to the probate of the 1896 will, which might make it doubtful whether the alleged rights of the plaintiff were based upon the will or upon the contract which is alleged to have preceded it, and the legal rights, duties, and liabilities of the interested parties might differ, depending upon whether the contract or the will was the foundation of the claim of the widow to all the property. Appellant says: "The only reason for making the devisees parties is to give them opportunity to protect their interests, if any. Their defense would neither be strengthened nor diminished by a probate of the will under which they claim." But, if the will is not probated, they have no interest in the estate, and the plaintiff has no right to vex them with an action predicated upon the contingency that at some future time, and upon the happening of what may be an uncertain event, they will have a title to the property. Appellant says that the heirs at law of the deceased are not necessary parties because "the allegations of the petition do not challenge the due execution of either the 1896 will or the 1908 will;" that all the beneficiaries in either of the wills are before the court, and that the equitable title to the property vested in the plaintiff immediately upon the death of Mr. Brown. But until a will is probated the title to the estate is *prima facie* in the heirs of the deceased, subject to administration. *Pratt v. Hargreaves,* 76 Miss. 955, 71 Am. St. Rep. 551; *Rakes v. Brown,* 34 Neb. 304; *Johnson v. Colby,* 52 Neb. 327. And, if the second will is not entitled to probate, then it is essential, in order to vest title in the plaintiff, either that the first will be probated or that she be successful in an action against the heirs at law to declare a trust in the property. If the second will is probated, then the question as to whether the devisees and legatees may be compelled to convey is open, but until the title vests in them such an inquiry is premature.

We have said that, where a person is entitled to the specific performance of an oral contract to convey, "equity

in such cases impresses a trust upon the property which will follow it into the hands of the personal representatives or devisees of the person obligated to convey the legal title." *Best v. Gralapp,* 69 Neb. 811, 815. And this is a well-established doctrine of the equity courts. But, before the property can be followed into the hands of either class, it must have reached either the one or the other. As matters now stand as respects the Brown estate, the *prima facie* title is in the heirs, subject to be vested in the defendant devisees and legatees if the 1908 will is probated. Equity consequently must be in doubt at this time which fork of the road to follow. We are of opinion that it should first be settled in whom the legal title rests before an attempt is made to declare a trust, and that all persons who may have an interest in the property be brought before the court at the same time so that the whole matter may be determined. *Best v. Gralapp, supra; Smullin v. Wharton,* 73 Neb. 667, 690; *Allen v. Bromberg,* 147 Ala. 317, 41 So. 771; *Pettit v. Black,* 13 Neb. 142.

Plaintiff says that, if she fail to establish her contract, it will be no impediment to the probate. True, but defendants have been put to the trouble and expense of defending an important lawsuit for fear of losing rights which they may never acquire if the will fail of probate. The plaintiff can lose nothing by waiting until the legal title vests, if it ever does, in those taking under the will, while the defendants may be troubled by litigation and put to what may be a useless and unnecessary expense.

The question remains, is the allegation that a deceased person by contract before his death made a disposition of his property other and different from that made by his last will a sufficient reason for the issuance of an injunction to restrain an attempted probate by the parties interested in the will? The purpose of the probate of a will is not to determine controversies as to title, but to settle whether the paper offered to be proved is the last will of the deceased. Of this proceeding under the Nebraska

constitution the county court has sole original jurisdiction. *Byron Reed Co. v. Klabunde*, 76 Neb. 801. The district court has no power in an original action to declare the 1908 paper to be a will, nor to declare that it is not the will of the deceased. *Loosemore v. Smith*, 12 Neb. 343; *Andersen v. Andersen*, 69 Neb. 565. If it cannot do this directly, it cannot do it indirectly by enjoining its probate in the proper court; otherwise, the whole field of controversy over the authenticity of wills might be taken from the county courts.

We are of the opinion that the action of the district court in sustaining the demurrer and dismissing the case was warranted. Its judgment is therefore

AFFIRMED.

SAMUEL G. STEVENSON, APPELLANT, V. OMAHA TRANSFER COMPANY, APPELLEE.

FILED NOVEMBER 16, 1910. No. 16,183.

1. Appeal: INSTRUCTIONS: REVIEW. Error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court.
2. ———: FINDINGS: CONFLICTING EVIDENCE. A finding of fact made by a jury upon conflicting evidence will not be disturbed unless manifestly wrong.

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

William N. Chambers and *Charles L. Dundy*, for appellant.

Greene, Breckenridge & Matters, contra.

LETTON, J.

This is an action to recover for personal injuries alleged to have been sustained by the plaintiff in consequence of the carelessness and negligence of an employee

of defendant. The plaintiff, who was a carpenter and contractor, was driving south on Sixteeenth street in Omaha with a horse and wagon. One of defendant's wagons being driven in the opposite direction collided with that of the plaintiff. The plaintiff was thrown from his seat, struck the pavement with great force, and was injured. The negligence charged is that "one of the teams and wagons of defendant, and driven by one of its employees, came up Howard street at a great and illegal rate of speed, swung onto the west side of Sixteenth street without slowing up, then swung back toward the east side of Sixteenth street, and at the alley between Howard and Harney streets ran into the wagon of the said plaintiff," and that the team was on the wrong side of the street. The answer was a general denial, coupled with an allegation of contributory negligence, which was denied by the reply. The jury found for the defendant, and judgment was rendered in its favor.

The only point argued in the brief is that the court erred in giving instruction No. 9. An examination of the motion for a new trial discloses that the giving of this instruction was not assigned as error therein. This being so, the settled practice of this jurisdiction is that the alleged error cannot be reviewed in this court. *Dunphy v. Bartenbach,* 40 Neb. 143; *Hedrick v. Strauss, Uhlman & Guthman,* 42 Neb. 485; *Phœnix Ins. Co. v. King,* 52 Neb. 562; *Tarpenning v. Knapp,* 79 Neb. 62.

The question of whether or not the defendant employee was negligent was submitted to the jury upon conflicting evidence under appropriate instructions, and the jury were evidently of opinion either that no negligence was shown or that the plaintiff's own negligence directly contributed to the accident. All the facts and circumstances surrounding the collision were detailed by the witnesses, and the evidence would have justified a verdict either way. The case seems to have been fairly tried. The judgment of the district court must be

AFFIRMED.

CLARK IMPLEMENT COMPANY, APPELLEE, v. JOHN L. WILTFANG, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,184.

Appeal: AFFIRMANCE. When a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court.

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

W. F. Moran, for appellant.

D. W. Livingston, contra.

LETTON, J.

This is an action in replevin. The petition as amended alleges that the plaintiff has a special property in a threshing machine separator, and other threshing machinery, by virtue of a chattel mortgage executed by the defendant in favor of the plaintiff to secure the sum of $250, payable on the 1st day of October, 1907, and three other notes falling due at later periods; that the defendant has failed to pay the note due October 1, 1907, and thereby has broken the condition of the mortgage; that demand was duly made for the possession of the property, but that defendant refused to deliver the same, to plaintiff's damage in the sum of $150. The plaintiff also pleaded that under the terms of the mortgage, upon default in the payment of any of the notes, all the notes might at the option of the mortgagee become immediately due and payable, and that the plaintiff elected to exercise this option and declared the whole debt due and payable. The answer was a general denial, except that defendant admitted the value of the property to be $1,500, as alleged in the plaintiff's petition. The case was tried to the court without the intervention of a jury, by agreement.

The court found that the plaintiff had a special inter-

est in the property by virtue of the chattel mortgage described, and was entitled to the immediate possession of the same, found that plaintiff's damages were 70 cents, and rendered judgment accordingly. A motion for a new trial was filed, the first four assignments of which were the usual formal assignments that the "verdict was not sustained by the evidence," "is contrary to the evidence," "is contrary to law," and for "errors of law occurring at the trial." The next five assignments are with respect to the admission in evidence of certain exhibits. The tenth assignment is that the court erred in not rendering judgment in favor of the defendant and against the plaintiff for the return of the property, or the value thereof in excess of the amount of the note first due. The same assignments of error are made in the brief. No oral argument was had.

1. It is stated in the defendant's brief that he asked the court to find the value of plaintiff's special ownership in the property, which the court refused to do. We have examined the record and find no such request.

2. It is next contended that the court erred in admitting certain exhibits in evidence. We have repeatedly held that, "when a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court." *Richardson v. Doty,* 25 Neb. 420. *Dewey v. Allgire,* 37 Neb. 6; *Lihs v. Lihs,* 44 Neb. 143. This point, therefore, is unavailing.

3. It is next argued that the evidence does not sustain the judgment for 70 cents damages. This item was for telephone charges incurred in instructing an attorney to bring this action. We think this was not a proper element of damage, but that, since plaintiff was entitled to nominal damages in any event, this error is not prejudicial to an extent worthy of notice, beyond requiring the plaintiff to remit the excess of 65 cents as a condition of affirmance.

The defendant moved for a judgment in his favor for $1,500, less the amount of the first note, or the return of the property, less the amount of this note. This motion was properly overruled. Under the conditions of the mortgage the whole debt became due and payable at the option of the mortgagee if default was made in the payment of any of the notes secured thereby. It exercised that option and attempted to take the property upon default. The taking being resisted, this action was brought to recover possession.

We find no error prejudicial to defendant in the record, and the judgment of the district court is affirmed, if plaintiff remits the sum of 65 cents within 30 days. Costs taxed to appellant.

AFFIRMED.

HERMAN H. HUETTE V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1910. No. 16,674.

1. **Indictment and Information: MOTION TO QUASH: WAIVER.** Under the provisions of section 444 of the criminal code, defects which might have been attacked by a motion to quash, or a plea in abatement, are waived when a defendant pleads to the general issue; and this is true as well when he pleads voluntarily as when he stands mute and a plea of not guilty is entered for him by the court. *Trimble v. State*, 61 Neb. 604.

2. **Intoxicating Liquors: UNLAWFUL SALE: EVIDENCE.** Proof that a defendant, who admits that he has no license to sell intoxicating liquors, was requested to procure liquor for another, received the money therefor, and shortly afterwards delivered the liquor to such person, is sufficient to make a *prima facie* case, and authorizes a conviction in the absence of any explanation or denial.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

A. E. Howard, W. W. Towle and *Price & Abbott,* for plaintiff in error.

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

LETTON, J.

Plaintiff in error, hereinafter called "defendant," was prosecuted for the sale of liquor in the city of Lincoln without a license. He was arrested and brought before the police judge of that city, whereupon he filed an affidavit for a change of venue, alleging the interest, bias, and prejudice of the police judge. The affidavit also ascribed the same disqualifications to both of the justices of the peace in the city and to another justice of the peace in the county, and alleged that the next nearest justice of the peace to whom the objections did not apply is A. J. Baker of Havelock, Nebraska, a justice of the peace of Lancaster county. The application for a change of venue was overruled, and the defendant bound over. On June 21, 1909, at the next term of the district court, information was filed by the county attorney. The record shows that the defendant was arraigned upon the 3d of July, 1909, and that, the defendant standing mute, the court entered for him a plea of "not guilty." The case was then continued until the next term of the court. At the next term of court a motion to quash the information was filed on the grounds that no preliminary examination had been had, and that there was a defect apparent upon the face of the record, in this, that the defendant was not granted a change of venue as provided by law. This motion was overruled, and afterwards the defendant was put upon his trial, found guilty, and a fine imposed.

The principal question presented is upon the overruling of the motion to quash the information. Section 444 of the criminal code provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue." We have repeatedly held that defects which should have been raised by a motion to quash or a plea in abatement are waived when a defendant pleads to the general issue. *Korth v. State,* 46 Neb. 631; *Reinoehl v. State,* 62 Neb.

619; *Goddard v. State,* 73 Neb. 739. In *Trimble v. State,* 61 Neb. 604, the facts were that the defendants, when arraigned, stood mute and refused to plead to the information. The court then entered for them a plea of not guilty. On the day of trial they filed a motion to quash the information, which the court ordered stricken from the files. It was argued that in such case the provisions of section 444, *supra,* did not apply. The court said: "Such action of the court was for the benefit of defendants, and they knew such a plea would be entered on the records for them, if they made no plea themselves, and when so entered it became their plea, which they could have withdrawn at any time, by leave of court, precisely the same as if they had made the plea in the first instance. We have no doubt that the provisions of the section quoted are applicable to this case." These cases are decisive of this question. The motion to quash in this case was presented while the plea in bar still stood, and was properly overruled.

It is also contended that the evidence is insufficient; that the defendant did not sell the liquor, but acted merely as a messenger for the buyer. It is shown that the witness Cook asked the defendant, who for some days had been in the habit of standing at or near the corner of Twelfth and O streets in the city of Lincoln, if he could get him something to drink, and gave him a dollar. In a short time defendant returned and handed Cook a bottle of whiskey. It was admitted in open court that defendant had no license to sell intoxicating liquors. No testimony was offered in his behalf. We think this evidence, unexplained, is sufficient to make a *prima facie* case. It is true that an explanation might have shown that the defendant was not guilty, and that he was merely acting as Cook's agent. It is said in 2 Woollen and Thornton, Law of Intoxicating Liquors, sec. 694: "While the burden is always on the prosecution to show beyond a reasonable doubt that the defendant made the illegal sale charged, yet the evidence may be such as to require him to account

for his actions if he desires an acquittal. As has been said, it is immaterial whether or not the defendant owned the liquor he sold, if he sold it as his own or without authority. So likewise a sale of liquor by a defendant, unexplained, raises the presumption that the liquor he sold was his own liquor." See, also, *Mack v. State,* 116 Ga. 546, 42 S. E. 776; *State v. Russell,* 6 Pennewill (Del.) 573, 69 Atl. 839; *Billups v. State,* 107 Ga. 766, 33 S. E. 659; 23 Cyc. 256*e*. Under the circumstances we are of opinion that the jury were warranted in finding the defendant guilty.

While the question is not directly involved, we think it not improper to say that the application for a change of venue should have been granted and the cause transferred to a justice of the peace in the city of Lincoln in accordance with the provisions of the Lincoln charter. The statute gives the police judge no discretion.

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

AFFIRMED.

STATE, EX REL. GEORGE SAYER, RELATOR, V. GEORGE C. JUNKIN, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 16, 1910. No. 16,898.

1. Statutes: INCORPORATION OF PROVISIONS BY REFERENCE. When the provisions of a statute prescribing a method of procedure are incorporated by reference in a later act, the provisions referred to become a part of the statute incorporating them, and if the first statute is repealed by the same act the rules of procedure incorporated continue in force as a part of the later statute.

2. ———: ———: REPEAL OF FORMER ACT. The provisions of section 5776, Ann. St. 1903 (laws 1897, ch. 31, sec. 13), having been incorporated in chapter 52, laws 1907, are still effective as a rule of procedure, even though this section is repealed by the same act.

3. Mandamus: ELECTIONS: CERTIFICATION OF CANDIDATES. An action to compel the secretary of state to certify the name of a candi-

date nominated to fill a vacancy in a primary nomination is premature if brought before the expiration of three days after the filing of the certificate of nomination.

ORIGINAL application for a writ of mandamus to compel respondent to certify the name of relator as a candidate for state senator. *Action dismissed.*

T. J. Doyle and *G. L. De Lacy,* for relator.

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

LETTON, J.

This is a mandamus proceeding to compel the secretary of state to certify the name of George Sayer as the candidate of the people's independent party for state senator for the Twenty-ninth senatorial district for the election to be held November 8, 1910.

The respondent admits that on the 24th of September, 1910, the relator was named at a meeting of the committee of the people's independent party for the Twenty-ninth senatorial district as the nominee of that party to fill an alleged vacancy caused by the alleged declination of one W. H. McGowan to run as the candidate for senator of said party in said district, and that, although requested, he as secretary of state has refused to place the name of the relator upon the official ballot or to certify the same to the county clerks of the respective counties comprising that district. It is also admitted that no names were printed on the ballots for the primary election as candidates of that party; that four persons each received one vote as the nominee of that party for that office at the primary, the name being written in; that the canvassing board practically cast lots, and that the choice fell on W. H. McGowan, who was at once notified of the result; that McGowan did not within ten days thereafter file an acceptance of the nomination, and has

never notified respondent in any way that he declined the nomination. Two certificates of nomination were filed with respondent. The first certificate filed was lacking in several essential particulars, and the respondent properly refused to act upon it. A second certificate complying with the statute was filed on the 27th day of October, 1910, and an amended petition based thereon was filed on October 29. It is unnecessary to discuss the defects in the first certificate.

The main contention of the respondent is that the mere fact that the name of a person was written in the primary ballot as a candidate of the people's independent party for the office of state senator did not constitute a nomination, without an acceptance within ten days; that McGowan did not accept, and therefore never became the candidate of the party; and, if he was not a candidate, there was no vacancy to fill. He further contends that, conceding that McGowan was nominated, the provisions of sections 11 and 13, ch. 31, laws 1897, with relation to the declination of and refusal to accept nominations were not complied with by Mr. McGowan, and hence the committee had no power to act. We are of opinion that section 4, ch. 50, laws 1909 (amending section 5869, Ann. St. 1907), which provides in substance that, should any person whose name is written in the ballot as a candidate for an office receive the highest number of votes at the primary election, and within ten days file an acceptance of the same, he shall be deemed the regular candidate of that party for the office, controls, and repeals by implication so much of the sections relied upon as are inconsistent therewith. That, when McGowan was declared the nominee by the canvassing board, he thereby became the nominee of that political party for that office; that he had the option of becoming the candidate for the office by filing his acceptance within ten days, but, failing to do so, the nomination became ineffective, the party had no candidate in the field, and a vacancy *ipso facto* occurred. This vacancy, under section 13, ch. 31, laws 1897, the

committee of that particular party was authorized to fill, and to certify the nomination to the secretary of state.

It is contended, however, that this section was repealed by chapter 66, laws 1905, or, if not affected by that act, by chapter 52, laws 1907. We think the 1905 act does not apply, since by its title the act provides only for primary elections in counties having a population of more than 125,000 inhabitants, and this section is only repealed "so far as the same conflicts with the provisions of this act." Chapter 52, laws 1907, specifically repeals section 5776 Ann. St. 1903, together with a number of other sections of this statute. Section 5776 is section 13 of ch. 31, laws 1897, relating to the filling of vacancies. In the absence of anything in the act to the contrary, this would be an effective repeal. However, section 27 of the same act (laws 1907, ch. 52) provides: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes, 1903."

It is a well-known principle of statutory construction that when a portion of an act is incorporated by reference in a later act, if the first act is repealed, it will not affect the later statute which by reference has embodied within itself the provisions of the former act. *Shull v. Barton*, 58 Neb. 741; *Schwenke v. Union Depot & R. Co.*, 7 Colo. 512; 1 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 257. Applying this principle, and construing the provisions of section 27, ch. 52, laws 1907, and of section 13, ch. 31, laws 1897 (Ann. St. 1903, sec. 5776), together, we are of opinion that the committee was authorized to fill the vacancy and certify the nomination to the secretary of state. This having been done upon the 27th of October, more than eight days before the election, it became the duty of that officer to certify the name of the relator to the county clerks of the respective counties comprising the Twenty-ninth senatorial district. The

statute (laws 1907, ch. 52, sec. 42), however, provides three days after the filing of a certificate of nomination within which objections to the placing of the name upon the ballot may be filed. Three days had not elapsed from the time of filing the certificate of nomination when the amended petition was filed, and hence the respondent was under no legal duty to issue the certificate at that time. We are of opinion, however, that at the expiration of the time limited, if no objections are filed in the meantime, it will be his duty so to do.

This action, being prematurely brought, is dismissed at the relator's cost.

DISSMISSED.

ANNIE C. SLABAUGH, APPELLEE, V. OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,067.

1. **Electric Light Companies: INJURY TO TREES: LIABILITY.** In the absence of a valid legislative act or municipal ordinance granting to public service corporations authority to trim shade trees growing in the streets of metropolitan cities without compensating the abutting owner for damages thereby inflicted, and enacted before the lot owner plants trees in that part of the street contiguous to his lot, an electric light company is liable to the owner for damages accruing to his lot by reason of such trimming.

2. **Limitation of Actions: INJURY TO TREES.** In such a case, the statute of limitations does not commence to run in favor of the electric light company until it trims the trees.

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

Weaver & Giller and *W. W. Morsman,* for appellant.

W. W. Slabaugh, Shotwll & Shotwell and *C. N. McElfresh, contra.*

ROOT, J.

This is an action for damages caused, as alleged by the defendant, in trimming shade trees in a street and contiguous to the plaintiff's lot. The plaintiff prevailed, and the defendant appeals.

There is no conflict in the evidence. In 1884 the city council of the city of Omaha granted to the defendant's assignor a franchise to transact a general electric light business in said city, and granted said assignor a right of way upon and over the streets, alleys and public grounds in said city for the purpose of erecting and maintaining the poles, wires and appurtenances necessary for the transaction of said business. In 1895 the plaintiff purchased a lot in said city. At that time two maple trees were growing between the sidewalk and the curb line in that part of Fortieth street contiguous to said real estate. About 1902 the defendant erected poles and attached wires thereto in the line of said trees in said street. At that time the wires were suspended above the trees. Subsequently limbs of the trees grew up to, among and above said wires and interfered therewith. In 1908 the building inspector of said city gave the defendant permission to trim the trees, and, without the plaintiff's knowledge or consent, its servants cut off the limbs within the center of the head of the trees some 15 feet below the tops thereof, thereby damaging them and depreciating the value of the plaintiff's property. The plaintiff charges that the defendant acted maliciously, unlawfully and wilfully in trimming her trees. The court instructed the jury that, if they found from a preponderance of the evidence that the defendant by trimming said trees damaged the plaintiff's lot, they should find in her favor.

The defendant does not argue that the damages are excessive, but its counsel contend that the evidence does not establish that the defendant acted maliciously or unlawfully, nor prove that the plaintiff's trees were trimmed more severely than was necessary to enable the defendant

to safely and successfully convey currents of electricity over its wires, and for these reasons the defendant is not liable for such damages as the plaintiff may have suffered. The defendant admits that the plaintiff's grantor had the right to plant, and she had the authority to maintain, the trees in question, but that the defendant also had authority to construct and maintain its poles and wires in said streets, and that the individual's right to maintain the trees is at all times subordinate to a superior authority on the part of the defendant to trim or remove them whenever such action might become necessary in the construction or maintenance of its electric light plant. It is further argued that, since the defendant's right to use the street was granted in 1884, the plaintiff's cause of action accrued at that date and the statute of limitations bars a recovery in the instant case.

1. It may be conceded that the proof fails to establish that the defendant's servants acted maliciously in trimming the plaintiff's trees, and yet there is sufficient evidence to support the verdict. The allegations with respect to malice and unlawful acts were and are immaterial; they could have been stricken from the petition, and were properly ignored by the court in its charge to the jury. The city of Omaha holds title to its streets and alleys in trust for the benefit of the public. *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631. The city council had authority to grant the defendant's assignor a right of way over the streets and alleys in the city for the construction and maintenance of the poles and wires in question, and the use of those streets for that purpose is a public use. *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460. If the defendant had the right under its franchise to trim the plaintiff's trees, but in the exercise of that authority it damaged her property, it should respond in damages under section 21, art. I of the constitution, which reads: "The property of no person shall be taken *or damaged* for public use without just compensation therefor." *Harmon v. City of Omaha*, 17 Neb. 548; *City of Platts-*

mouth v. Boeck, 32 Neb. 297; *City of Omaha v. Flood*, 57 Neb. 124; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631; *Bronson v. Albion Telephone Co.*, 67 Neb. 111; *Brown v. Asheville Electric Co.*, 138 N. Car. 533, 69 L. R. A. 631; *State v. Graeme*, 130 Mo. App. 138; *Daily v. State*, 51 Ohio St. 348.

The defendant's counsel argue with great force and learning that the owner of plaintiff's lot at the time the trees were planted was charged with notice that in the proper use of said street for a public purpose it might become necessary to trim or even remove the trees, and her property rights therein are subject to the greater right of the public, and that the defendant stands in the shoes of the public with respect to the acts referred to in the petition. There is no proof in the record that the city council of the city of Omaha ever enacted an ordinance for the purpose of controlling the planting or maintenance of shade trees upon the streets of said city, or providing that such trees might be trimmed or removed whenever they interfered with the public service, and without compensation to the lot owner, or that said trees were planted subject to any ordinance other than one directing that limbs of shade trees shall not be permitted to grow within a certain distance of the sidewalks in said city, nor is there any proof that the plaintiff in maintaining her trees in the condition in which they existed before defendant trimmed them violated any ordinance of the city. The defendant, therefore, must justify under the terms of its franchise and the constitution of the state. An application of the fundamental law to the record in this case amply supports the judgment of the district court.

2. To the argument that the plaintiff's cause of action arose in 1884, it is sufficient to say the owner of the plaintiff's lot could not know at that time that the defendant would erect the poles and string the wires in question, nor could the plaintiff have known when the wires were strung that defendant would years thereafter trim her trees, and thereby damage her property. It was feasible

to remove such wires to the alley, and it was possible they would be placed in conduits beneath the surface of the street before the necessity might arise for trimming the trees. The plaintiff's cause of action arose when her property was damaged, and the statute does not bar that action.

The judgment of the district court is right, and is

AFFIRMED.

LETTON, J., concurring in conclusion.

I concur in the affirmance, but do not agree to much that is said in the opinion. The petition alleges a wilful and malicious cutting, breaking, and injury of plaintiff's trees and damage to her property. The answer pleads defendant's franchise, and that it was necessary to trim the trees in order to carry on its business. The evidence for the plaintiff clearly showed a reckless and wanton mutilation of the trees. This evidence was not contradicted, nor was any proof offered to show that the wholesale cutting was reasonably necessary. The fact of the existence or nonexistence of malice as charged is immaterial. With the issues and proof in this condition, the verdict was justified. The court instructed the jury properly as to the measure of damages, and the general instructions as to the right of plaintiff to recover damages could not, under the proofs in this case, prejudice the defendant. The wires when erected were above and clear of the trees, and the growth of the trees extended the limbs among the wires. Under these circumstances I think the defendant had the right to trim the trees so often and to the extent that was reasonably necessary to exercise its franchise, but that this right should have been exercised in such a manner as to inflict as little injury as possible to the property; that if it neglected for years to trim and thus allowed the growth of large limbs the removal of which would mutilate and damage the trees, it would be liable for such damages to the property rights of the tree owner as might be thereby occasioned.

I am further of opinion, to quote the language of the opinion in *Southern Bell Telephone & Telegraph Co. v. Francis,* 109 Ala. 224, 31 L. R. A. 193, that, "if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury."

REESE, C. J., concurring.

I concur in the affirmance of the judgment of the district court. I do not believe that any corporation or person has any higher right to the property of another than has the owner himself, even though that corporation or person be in the enjoyment of a "franchise," or it be what is known as a "public service" corporation or person. The fact that the city has conferred upon defendant the right to use the streets for its poles and wires—and that is all there is of the so-called franchise—does not give it the right to injure or destroy the property of others without compensation any more than it gives a private individual the right to destroy or injure the property of his neighbor which happens to be in his way or renders the enjoyment of his own any the less. The trees were rightfully growing on and in connection with plaintiff's property at the time the alleged franchise was granted. According to the usual course of nature, those trees would grow *up.* As well might defendant have chopped them down in anticipation of their natural upward growth as to wait until they had become more valuable, and then, without consent or payment and by the force and authority of *might,* practically ruin them. The rights of *persons* ought to be held just as sacred as the rights of *property,* and of the single individual as sacred as those of the multitude.

SEDGWICK, J., dissenting.

The city has title to its streets, as stated in the majority opinion, and can, of course, regulate and control the use of the streets in planting and maintaining trees therein and in the use of poles and wires for public service. It is said in the opinion that the council had authority to grant a right of way over the streets for these poles and wires, and that the use of the streets for that purpose is a public use, and "if the defendant had the right under its franchise to trim the plaintiff's trees, but in the exercise of that authority it damaged her property, it should respond in damages under section 21, art. I of the constitution, which reads: 'The property of no person shall be taken *or damaged* for public use without just compensation therefor.'"

This, it seems to me, fails to decide the questions presented. Did the defendant have the right to occupy the space which the city had allowed it to take under its franchise to the exclusion of all except the city? If it did, should the plaintiff have prevented her trees from infringing upon that space, and, if she neglected that duty, would she thereby become a trespasser? If the defendant found the animals or trees of others trespassing upon its property and so injuring the service, would it have the right to remove such encroachments in a reasonable and prudent manner? These are the questions, as it appears to me, that ought to be decided in this case. If the defendant had a right to the space it occupied, and for that reason had the right to prevent the plaintiff from crowding into that space with her trees, the trimming of the trees is not taking or damaging them for public use any more than if the city should trim them to prevent them from interfering with the use of the sidewalk. As well hold that to drive trespassing animals from the capitol grounds would be damaging them for public use. It might, of course, be a great damage to them if they could not obtain feed elsewhere, but the act of driving them away

would not be within the constitutional prohibition. I understand the above language quoted from the majority opinion to mean that the court intends to hold that, because the original location of the lines and poles along this street cast an additional burden upon the adjacent property, therefore each trimming of the trees from time to time, to prevent their infringing upon these lines and poles, will be an additional damage or taking of the property for public use. I think I ought to protest against such holding.

If the occupation of the space in the street allotted to defendant and the proper maintenance of its lines and poles within that space to the exclusion of the owner of the adjacent lots in any way affected and lessened the value of the lots, damages to the lots so caused might be claimed or waived when the lines and poles were located and the burden thereof cast upon the adjacent lots. Afterwards damages caused by any improper or unlawful use of the space appropriated or by negligent or malicious conduct on the part of defendant in the use of its property and rights could be recovered by the party injured, but not damages caused by the original occupation of the street and the lawful use of the franchise and location granted to defendant by the city. Damages caused by the original location of the lines and poles or that necessarily resulted therefrom are presumed to have been received or waived at the time of the appropriation of the space allotted by the city for that purpose.

HENRY J. SENG, APPELLANT, V. JESSE O. PAYNE ET AL., APPELLEES.

FILED NOVEMBER 16, 1910. No. 16,163.

1. **Drains: PLEADING.** An allegation in a petition to county commissioners requesting them to locate and construct a public ditch according to the provisions of article I, ch. 89, Comp. St. 1909, that certain described tracts of land owned by the petitioners

will be drained by the ditch, is a sufficient statement that the petitioners' land will be benefited by the improvement.

2. ———: BOND: VALIDITY. A bond conditioned as required by the statute, signed by two individuals, if approved and accepted by the commissioners, is not void because signed by the petitioners only.

3. ———: ———: APPROVAL: PRESUMPTIONS. If the bond is filed in the office of the county clerk and the commissioners locate and construct the ditch, it will be presumed, 20 years thereafter, that the bond was approved, although no record was made of, and no witness testifies to, the precise fact.

4. ———: FINDINGS OF COUNTY BOARD: SUFFICIENCY. A finding made by the county board after a personal inspection of the line of the proposed improvement, and entered by the clerk on the journal of the board, that the ditch is necessary for the benefit of the traveling public, conducive to the good health of the vicinity, and the route prayed for is the most practicable route for the ditch, is a substantial compliance with the provisions of section 5, art. I, ch. 89, Comp. St. 1909.

5. Estoppel: DRAINS: LOCATION. Where the owner of real estate joins in a petition to the county commissioners to locate a public ditch upon his land, and subsequently, after the bond required by statute has been given and approved and findings have been made and entered on the record as the law requires before a public ditch is located, constructs the ditch under a contract with the commissioners and is paid therefor out of the proceeds of assessments levied upon his neighbors' land, he is estopped to deny the authority of the commissioners to locate and construct the ditch because of irregularities in their proceedings.

6. ———: PLEADING. If the facts constituting an estoppel are sufficiently pleaded by a defendant, he will be given the benefit of that defense, although the word estoppel does not appear in his pleading.

7. Easements: NOTICE. "One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate." *Arterburn v. Beard*, 86 Neb. 733.

8. County Commissioners: "DITCH FUND," USE OF. Section 25, art. I, ch. 89, Comp. St. 1881 as amended in 1891, authorizes county commissioners in their discretion to use money in the ditch fund to pay for removing obstructions from and for repairing the public ditches located in their respective counties under the provisions of article I of said chapter.

9. Equity: MULTIPLICITY OF SUITS. "A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation." *Buchanan v. Griggs*, 20 Neb. 165.

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

France & France, for appellant.

C. E. Sandall and *Power & Meeker, contra.*

ROOT, J.

This is an action to restrain the defendants from exercising an alleged right to enter upon the plaintiff's land for the purpose of cleaning out a ditch. The defendants prevailed, and the plaintiff appeals.

In 1882, the defendant Payne owned the northwest quarter of section 20, in township 9 north, of range 3, in York county, and one Hecht owned the west one-half of the northeast one-fourth of said section. Mr. Payne still owns his tract of land. The land in the northwest corner of said section is somewhat lower than the surrounding territory, so that before the ditch, hereinafter referred to, was constructed surface water after rainstorms would form a pond covering about 100 acres at said point. To remedy that situation Messrs. Payne and Hecht and other owners of the land in that neighborhood petitioned the county commissioners to locate and construct a public ditch eastward across said northwest quarter and across the greater part of Mr. Hecht's land so as to drain said pond. The commissioners located the ditch, and awarded a contract for its construction to Mr. Hecht and a Mr. Warren. These gentlemen dug the drain, and were paid for their labor out of the proceeds of a special assessment levied upon lands benefited by the improvement. So long as the ditch was kept open, it furnished an outlet for the surface waters that accumulated in said depression. At

the time this action was commenced, the ditch was partially filled, and in consequence after rainstorms the land near the corner of said section was submerged and the highways made impassable. By mesne conveyances the plaintiff, in 1903, became the owner of the Hecht land, and now asserts that the county commissioners did not have jurisdiction to construct the ditch, and he will not permit the defendants to repair said drain.

The plaintiff's counsel argue that the jurisdictional facts essential to authorize the commissioners to locate the ditch do not exist. The alleged fatal defects will be considered, so far as may seem necessary, in the order in which they are referred to in counsel's brief. Counsel contend that the petition filed with the commissioners does not contain an allegation that any of the signers own land to be affected by the proposed ditch. There is an allegation in the petition that the ditch will drain lands owned by the petitioners Payne, Warren, and Wilkes, and situated in definitely described sections. The petition is sufficient.

The plaintiff complains that the bond required by section 4, art. I, ch. 89, Comp. St. 1909, was not given. A bond conditioned that the makers thereof would "pay all cost that may occur in case the bord (board) of commissioners find against such improvement," signed by two of the petitioners, was produced by the county clerk as part of the files of his office in the matter of the location of the ditch. It appears that the bond was filed, but beyond this fact there is no record that the undertaking was approved. We are of opinion, however, that at this late day, in view of the action of the board in locating and constructing the ditch, the bond should be held to have been approved by the board, and that, although the board could have demanded sureties not petitioners for the ditch, yet they were not compelled to do so, and the bond under the circumstances of this case should be held sufficient. *Asch v. Wiley*, 16 Neb. 41; *Bingham v. Shadle*, 45 Neb. 82.

Counsel further assert that the county board did not

upon actual view find the proposed improvement was necessary and conducive to the health, convenience and welfare of the community. The record discloses that two of the three commissioners inspected the route of the proposed ditch, reported that fact, and found that the "ditch is necessary for the benefit of the traveling public and conducive to the good health of the vicinity; that the rout (route) prayed for is the most practicable rout (route) for such a ditch." The two commissioners constituted a quorum and could act in the absence of the other member. While the record does not show that the report was formally approved, we are of opinion that the conduct of the commissioners, in the light of all of the surrounding circumstances, warrants a conclusion that the report was treated by the board as a finding by it of the facts therein recited. If the record had been attacked in a direct proceeding by an interested person not responsible for the conduct of the board, it may be a court would have been justified in holding that the statutory findings had not been made by the board. But in the case at bar we think the subsequent conduct of Mr. Hecht justified the district court in sustaining the proceedings of the county board so far as Hecht and those in privity with him are concerned.

Finally, counsel say that notice was not given to Mr. Hecht. The statute provides that after the ditch is located the commissioners shall call to their aid an engineer, who shall go upon the line of the ditch as located by the commissioners, survey and level the drain, and apportion to each tract of land to be benefited by the improvement its proportion of earth to be excavated in the construction of the ditch, and shall also apportion the benefits to accrue to the several tracts of land and estimate the cost of the drain. After notice to the persons interested, the commissioners are authorized to equalize the assessments and levy them upon the tracts of land to be benefited by the improvement.

There is no proof that notice was served on Hecht, but

his land was not assessed. True, part of his land was taken for the path of the ditch, and there is no proof that he was paid therefor, but he applied for and was given the contract for constructing the drain, and after completing the work was fully paid therefor out of the assessments laid upon his neighbors' farms. We are of opinion that Mr. Hecht, by his conduct, is estopped from objecting to the jurisdiction of the commissioners in the matter of locating the ditch. *Callender v. Patterson,* 66 Cal. 356; *Roediger v. Drain Commissioner,* 40 Mich. 745; *Harwood v. Drain Commissioner,* 51 Mich. 639; *Rowe v. East Orange,* 69 N. J. Law, 600; *Prezinger v. Harness,* 114 Ind. 491.

In *Dakota County v. Cheney,* 22 Neb. 437, it is held that a person desiring to object to the construction of a public ditch should act promptly in urging an objection thereto, and should not wait, with full knowledge of the situation, until the improvement is completed before attacking the authority of the commissioners to act in the premises. *Darst v. Griffin,* 31 Neb. 668; *Gutschow v. Washington County,* 74 Neb. 794.

Before Mr. Seng purchased the land he inspected the farm and noticed the ditch, and it was apparent the drain had been constructed for the benefit of other tracts of land. If Mr. Seng had any doubt in his mind concerning his neighbors' rights in the premises, he should have inquired. Having failed to do so, the plaintiff is charged with notice of those rights. *Arterburn v. Beard,* 86 Neb. 733. The plaintiff's counsel argue that the defendants do not mention an estoppel in their answer. The facts supporting an estoppel are pleaded, and the defendants should be given the benefit of any defense supported thereby, whether by way of estoppel or otherwise. *City Nat. Bank v. Thomas,* 46 Neb. 861.

The plaintiff contends that, even though the county commissioners did locate and construct the ditch, they have no authority to repair it except upon a petition and according to the provisions of section 4 *et seq.,* art. III,

ch. 89, Comp. St. 1909. The proceeding outlined in the statute, *supra,* refers to drains established under chapter 115, laws 1903 (Comp. St. 1903, ch. 89, art. III), whereas the commissioners of York county were proceeding under chapter 51, laws 1881, and amendments thereto (Comp. St. 1909, ch. 89, art. I). The act of 1881 did not provide for removing obstructions from a county ditch, but in 1891 the legislature amended section 25 of that act so as to provide that money in a county ditch fund might be used, among other things, to pay for "the removal of any obstructions that may accumulate in any portion of any ditch." In our judgment the legislature by the amendment of 1891 intended to authorize county commissioners in their discretion to use money in the ditch fund to pay for removing obstructions from any public ditch constructed under the provisions of article I, ch. 89, Comp. St. 1909. In *Hall v. State,* 54 Neb. 280, cited by the plaintiff, the warrant which formed the basis for the relator's demand for a writ of mandamus was issued in 1889, and the opinion is correct as applied to the statute then in force.

Finally, the plaintiff urges that the allegations in the answer are insufficient to sustain that part of the decree giving the defendants affirmative relief. The defendants specifically prayed for the relief granted by the district court and the entire controversy between the parties was before it. The allegations in the petition and in the answer, taken together, present to the court the plaintiff's contention that he may lawfully obstruct or obliterate the ditch in question and his denial of the defendants' authority to repair the drain. The proof shows that the plaintiff has obstructed the ditch, and that he refuses to permit those in authority to remove such obstructions. The plaintiff has no right to do the things he is enjoined from doing, and he is not deprived of any legal right by the judgment of the court.

A court of equity, having obtained jurisdiction of a cause, should retain it for all purposes, and render such

a decree as will protect the rights of the parties before it with respect to the subject matter of the suit, and thus avoid unnecessary litigation.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

RAEGINALD J. MACK, APPELLANT, V. ARTHUR MACK, APPELLEE.

FILED NOVEMBER 16, 1910. No. 16,182.

1. Contract: VALIDITY: PUBLIC POLICY. A contract between a man and his stepmother, who is living apart from his father for cause sufficient to entitle her to a divorce, that, if she will return to and care for her husband during his natural life, the stepson will support her so long as she shall live, is not against public policy.
2. ———: CONSIDERATION. "The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom." *Faulkner v. Gilbert*, 57 Neb. 544.

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

Mapes & Hazen and *Allen & Dowling*, for appellant.

John A. Ehrhardt and *Andrew R. Oleson, contra.*

ROOT, J.

This action is prosecuted by the plaintiff against her stepson. The plaintiff, in substance, alleges that her husband became addicted to the excessive use of intoxicating liquors, and while intoxicated would assault, ill-treat and beat her so that she was compelled for her own safety, health and peace of mind to leave and live apart from him; that the defendant, while the plaintiff was thus living separate from her husband, orally promised her that, if she would return to her husband and care for him as

best she could during his natural life, the defendant would support her so long as she should live; that, in consideration of said promise, she returned to her husband and lived with and cared for him during his natural life, but that the defendant has repudiated his agreement. The defendant admits that the plaintiff and his father were married, and denies all other allegations in the petition. The court excluded all evidence offered to prove the contract, for the alleged reasons that it is against public policy, and is not supported by a consideration. The jury, in obedience to a peremptory instruction, returned a verdict for the defendant. For the purposes of this appeal, we shall assume that the promise was made and that the plaintiff acted thereon, and shall confine the discussion to the alleged illegality of the contract and the lack of consideration to support it.

In this state marriage is a social status which may be assumed by the agreement of parties competent to contract with reference thereto. *University of Michigan v. McGuckin*, 64 Neb. 300. A married woman in Nebraska may own, hold and control her separate estate, engage in business on her own account, and contract with her husband. Ordinarily a married woman's financial transactions with her husband will be upheld. *Currier v. Teske*, 84 Neb. 60. The marriage relation imposes upon the contracting parties obligations so well understood that it is unnecessary to enumerate them, but they are reciprocal, and no husband, as a matter of right, is entitled to his wife's society or services if he violates his part of their compact. If the husband becomes an habitual drunkard, or is guilty of extreme cruelty to his wife, she may procure a release from the bonds of matrimony (Comp. St. 1909, ch. 25, secs. 6, 7), or she may depart from his home and live separate and apart from him (*Kikel v. Kikel*, 25 Neb. 256; *Sample v. Sample*, 82 Neb. 37).

In the case at bar, if the statements made by the plaintiff in her petition are true, she had good grounds for a divorce from her husband at the time she separated from

him, and it follows as a necessary consequence that he had no claim in law to her services or society. Authorities are cited to sustain the argument that the contract is contrary to public policy, and therefore void. In so far as those cases refer to instances where the wife without just cause departed from her husband and refused to live with or perform her duty to him, they may state the law correctly, but the opinions that refuse to sustain a contract to restore cohabitation after it has been interrupted by conduct of the husband sufficient to justify a court divorcing him at the wife's complaint are not in our judgment based upon the principles of right and justice. Rather we approve the language of Justice Rapallo in *Adams v. Adams,* 91 N. Y. 381: "Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." See, also, *Phillips v. Meyers,* 82 Ill. 67; *Polson v. Stewart,* 167 Mass. 211; *Duffy v. White,* 115 Mich. 264.

The argument that there was no consideration must fail, if, as a matter of fact, the wife was living separate from her husband for reasons sufficient to entitle her to a divorce. In that event, by returning to him, she waived her right to a divorce and rendered him services she was not obliged under those circumstances to perform.

Neither can we assent to the proposition that because the stepson made the promise there was no consideration therefor. The consideration for a promise need not move to the promisor in order to constitute a valid contract, but a detriment suffered by the promisee in reliance upon the promise is sufficient. *Homan v. Steele, Johnson & Co.,* 18 Neb. 652; *Faulkner v. Gilbert,* 57 Neb. 544; *Henry*

v. Dussell, 71 Neb. 691; *First Nat. Bank v. Estate of Lehnhoff*, 77 Neb. 303. If, therefore, the plaintiff was so situated that she had a cause of action against her husband for a divorce and in reliance upon the defendant's promise she waived her right to live separately from her husband, but returned to and cared for him, there was a consideration sufficient to sustain the contract.

Upon the record, we are convinced the learned district judge erred in holding as a matter of law there could be no recovery upon the allegations in the petition. The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM D. TULLY, ADMINISTRATOR, APPELLEE, V. GRAND ISLAND TELEPHONE COMPANY ET AL., APPELLEES; FAIRMONT CREAMERY COMPANY, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,877.

1. **Holidays**: FILING MOTION FOR NEW TRIAL. The clerk of a district court has authority to receive and file a motion for a new trial on May 30.

2. ———: ———: PRESUMPTIONS. The court will not presume that the clerk's office was closed during May 30, nor assume that, because the last day within which a motion for a new trial might be filed fell upon Memorial day, the defeated litigant was unavoidably prevented from filing its motion within the time prescribed by law.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Motion to strike bill of exceptions overruled.*

Greene & Breckenridge, for appellant.

O. A. Abbott, A. G. Abbott, W. H. Thompson, Charles G. Ryan, F. W. Ashton and *B. H. Paine, contra.*

ROOT, J.

The plaintiff requests us to strike the bill of exceptions from the files because the motion for a new trial was not filed in the office of the clerk of the district court within three days after verdict. The motion is overruled. *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61. Counsel in their oral argument requested us to consider whatever error was committed by the district court in striking the motion from the files. The verdict was returned Thursday, May 26, 1910. May 29 was Sunday, the following day was Memorial day, and the motion was filed Tuesday, May 31. Section 316 of the code provides that motions for a new trial "must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." These provisions are mandatory. *Fox v. Meacham,* 6 Neb. 530; *Brown v. Ritner,* 41 Neb. 52; *Carmack v. Erdenberger,* 77 Neb. 592.

But the defendant insists that, since the third day after the verdict was returned fell upon Sunday, that day should be excluded in computing time, and, since the next succeeding day was a holiday, it also should be excluded, and that the motion was filed within the time provided by law. 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." In *Johnston v. New Omaha T.-H. E. L. Co.,* 86 Neb. 165, we held that the legislature intended by the enactment of section 895, *supra,* to establish a uniform rule with respect to legal procedure. Section 38, ch. 19, Comp. St. 1909, provides that, with certain named exceptions, no court can be opened, or judicial business transacted, on Sunday or on a legal holiday. Section 195, ch. 41, Comp.

St. 1909, provides that Memorial day shall be considered a legal holiday for the purposes of the negotiable instruments' act. Section 241*a* of the criminal code prohibits horse racing and other sports upon Memorial day. But there is no statute prohibiting or declaring illegal the transaction of ordinary business or the performance of ministerial official acts upon May 30. The act of a clerk in filing a motion for a new trial is ministerial, and not judicial. *In re Worthington,* 30 Fed. Cas., No. 18,051. Statutes commanding the suspension of official business upon holidays should be construed so as to prohibit only such acts as are in express terms or by clear implication within the purview of the act. *Whipple v. Hill,* 36 Neb. 720; 21 Cyc. 445; *Lord v. Gifford,* 67 N. J. Law, 193.

It does not appear that the clerk of the district court of Hall county was not in his office May 30, 1910, or that any attempt was made by the defendant to file its motion upon that day. Counsel do not argue that their client was unavoidably prevented from filing the motion on May 30, and there is nothing in the record to bring it within the exception of the statute.

The district court therefore committed no error in striking the motion from the files. We do not desire to be understood as holding or suggesting that a court may or may not transact judicial business on Memorial day. That question is not involved in this case.

MOTION OVERRULED.

MICHAEL WHELAN, APPELLEE, V. CITY OF PLATTSMOUTH, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,171.

1. **Pleading:** STRIKING OUT DEFENSE: WAIVER OF EXCEPTION. An exception to an order striking from an answer matter pleaded as an estoppel is waived, where defendant by leave of court repleads and goes to trial on an amended answer which omits all

reference to such matter and contains no statement indicating a purpose on part of defendant to save the exception.

2. Appeal: TRANSCRIPT: PRESUMPTIONS. Where appellant files in the supreme court a transcript omitting the record of the facts by which the district court acquired jurisdiction, and no diminution of the record is suggested, it will be presumed that court properly acquired jurisdiction.

3. Pleading: MUNICIPAL CORPORATIONS: DISALLOWANCE OF CLAIM: APPEAL. Where a city council disallows a claim for damages, and claimant, pursuant to the city charter, appeals to the district court and files therein a transcript showing that the claim was presented to the city and disallowed, it is unnecessary to state that fact in the petition in the appellate court.

4. Trial: VIEW OF PREMISES BY JURY. The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in absence of an abuse of discretion.

5. Appeal: HARMLESS ERROR. A judgment will not be reversed for harmless error in an instruction.

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

Basil S. Ramsey and *W. C. Ramsey,* for appellant.

D. O. Dwyer, contra.

ROSE, J.

Defendant lowered the surface of the street in front of two lots owned by plaintiff, and this is a suit to recover resulting damages. The liability of defendant and the extent of plaintiff's injury were issues properly raised by the pleadings. From a judgment on the verdict of a jury in favor of plaintiff for $150, defendant has appealed.

1. On motion of plaintiff the trial court struck from defendant's answer matter containing allegations to the effect that plaintiff advised, consented to and accepted the grading in front of his lots and was thereby estopped from claiming damages. There was an exception to this ruling which is now challenged as erroneous. In respect

to the question thus raised, however, it is sufficient to say that defendant's exception was waived in the following manner: After the motion had been sustained, defendant, by leave of court, filed a new or amended answer, omitting all reference to the principal facts which had formerly been pleaded as an estoppel, and went to trial on the amended pleading, which contained no statement indicating a purpose on part of the pleader to save the exception to the ruling on plaintiff's motion. The exception was therefore waived. *Papillion Times Printing Co. v. Sarpy County,* 85 Neb. 397.

2. At the opening of the trial defendant objected to the introduction of any evidence because plaintiff failed to state in his petition that he had filed with the city clerk his claim for damages and that it had been rejected by the city council. The overruling of this objection is the basis of another assignment of error. In the argument on this point defendant cites *City of Hastings v. Foxworthy,* 45 Neb. 676. Under the act in force when that case was instituted, a claimant was required to file a statement of his claim with the city clerk as a condition precedent to his right to maintain in the district court an original action for damages. The law has since been changed. When the claim of plaintiff in the present case arose, the Plattsmouth charter required him to file it with the city clerk and, in the event of its disallowance, to appeal from the city council to the district court. Comp. St. 1909, ch. 13, art. III, sec. 38. Under the former charter the district court acquired jurisdiction in an original action. Now jurisdiction is conferred by appeal from the action of the city council. The record of the proceedings of the district court was filed in this court by defendant. The transcript here does not disclose the jurisdictional facts. In this condition of the record submitted by defendant for review, it will be presumed that the case was appealed to the district court in the manner provided by the city charter, and that consequently there was filed therein a transcript showing that plain-

tiff presented his claim to the city clerk and that it was rejected by the city council. Comp. St. 1909, ch. 13, art. III, sec. 38. It was therefore unnecessary for plaintiff to allege those facts in his petition in the district court.

3. Complaint is also made because the trial court refused to permit the jury to view the premises alleged to have been damaged. The contention is not well founded. By means of photographs the parties acquainted the jury with the general appearance of the premises both before and after the street had been graded. The depth of the cut and the effect of the grading were shown by oral proofs. The record contains nothing to indicate that the trial court abused its discretion in refusing the request. It follows that in this respect error is not affirmatively shown. *Beck v. Staats,* 80 Neb. 482; *Reams v. Clopine, ante,* p. 673.

4. An instruction on the subject of special benefits shared by plaintiff in common with other lot owners is criticised as erroneous. While the particular instruction in question cannot be approved as a correct statement of the law, the record contains no evidence to make it prejudicial to defendant, when consideration is given to other parts of the charge in which the jury were directed to find for defendant, if the special benefits to plaintiff's lots, by reason of the grading, equaled or exceeded the damages thereto, and that the measure of such damages, if any, was the difference between the market value of the real estate immediately before and after the grading. An examination of all the evidence in connection with the entire charge leads to the conclusion that the error was not prejudicial.

5. A number of rulings, excluding testimony, are also assailed; but they have all been examined without finding a reversible error.

The evidence is sufficient to sustain the verdict, and the judgment is

AFFIRMED.

ROOT, J.

I concur in the judgment of affirmance, but do not approve applying to the instant case the principle announced in *Papillion Times Printing Co. v. Sarpy County*, 85 Neb. 397. The plaintiff does not invoke that principle, but argues that the district court was right in sustaining his motion to strike certain allegations from the defendant's answer. Clearly there was no error in that ruling. In effect the defendant pleaded as an estoppel that, while it was grading the street in front of the plaintiff's property, he consented thereto and requested the city's "officers, servants and employees to properly grade that part of said First street strictly in front of and adjacent to his said lots," and thereafter the plaintiff "accepted said grading for the purposes for which he requested and advised the same to be done." The defendant does not allege or contend that it would not have graded the street but for the plaintiff's conduct or that it was in any manner influenced thereby. The defendant had the right to enter upon and grade the street whether the plaintiff consented or objected thereto, and his acceptance or failure to accept the street thereafter would neither enlarge nor curtail the defendant's control over the highway.

It is elementary that a party is not estopped by acts or omissions which in no manner induced the conduct of him who invokes the principle of estoppel. *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176.

The Michigan cases cited by the defendant to sustain its argument upon this point were examined and rejected in *City of Beatrice v. Leary*, 45 Neb. 149. Section 21 of the Bill of Rights, which provides that private property shall not be taken or damaged for public use without just compensation therefor, protects the plaintiff, and his request that the defendant grade in a workmanlike manner the street it was improving upon its own initiative does not estop him from recovering his damages. *Hickman v. City of Kansas City*, 120 Mo. 110, 41 Am. St. Rep. 684.

I believe that the principle announced in the *Papillion Times Printing* case, *supra,* is unsound, and I am opposed to its application where the necessity does not exist.

LETTON and SEDGWICK, JJ., concur in these views.

JAMES F. McPARLAND, APPELLANT, V. HERMAN A. PETERS, APPELLEE.

FILED NOVEMBER 16, 1910. No. 16,191.

1. **Vendor and Purchaser:** UNRECORDED DEED: BONA FIDE PURCHASER. "A purchaser of real estate from one who has already sold and conveyed the same to another, whose deed is not recorded, cannot hold the land as an innocent purchaser unless he was at the time of his purchase without notice, actual or constructive, of the rights of the prior purchaser." *Dundee Realty Co. v. Leavitt, ante,* p. 711.
2. ———: ———: ———: EVIDENCE. The sufficiency of evidence to show that a purchaser of land had notice of a prior, unrecorded deed depends upon the circumstances of each case.
3. ———: ———: ———: QUIETING TITLE: EVIDENCE. In a suit to quiet title to a quarter-section of land, plaintiff is not entitled to relief as a purchaser without notice of defendant's rights under a prior, unrecorded deed, where the proofs show that at the time of the subsequent purchase defendant was using the land for grazing purposes and previously had been cutting therefrom annually about 40 acres of grass; that he had a fire-guard around the premises and a fence on the north line; that plaintiff was acquainted with the land, and, for the consideration of "one dollar and other valuables," procured personally from the common grantor who was not in possession a quitclaim deed on which he relies, after having been told by defendant that the latter owned the land.

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

Albert W. Crites, for appellant.

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

ROSE, J.

The subject of controversy is a tract of land in Sheridan county, described as the southeast quarter of section 18, township 28 north, of range 46. This is a suit to quiet the title in plaintiff. The patentee is the grantor of both litigants. Plaintiff relies on a quitclaim deed executed May 26, 1904, for the expressed consideration of "one dollar and other valuables," and recorded May 28, 1904. Defendant's claim rests on a warranty deed dated December 3, 1901, and recorded August 29, 1904, the purchase price being $100. The trial court found that plaintiff was not a *bona fide* purchaser and dismissed his petition. Plaintiff has appealed.

Plaintiff relies on the recording act, and argues that the finding against him is without justification in the proofs. The controlling question raised by the pleadings and presented by the appeal is: Did plaintiff, before procuring the quitclaim deed, have notice, actual or constructive, of the rights of defendant under his prior, unrecorded, warranty deed, within the meaning of the following provisions of statute: "All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded; Provided, that such deeds, mortgages, or instruments shall be valid between the parties." Comp. St. 1903, ch. 73, sec. 16.

The latest statement of the rules applicable to this inquiry is as follows: "1. A purchaser of real estate from one who has already sold and conveyed the same to another, whose deed is not recorded, cannot hold the land as an innocent purchaser unless he was at the time of his

purchase without notice, actual or constructive, of the rights of the prior purchaser. 2. The burden of proof is upon the party who alleges that he purchased without notice." *Dundee Realty Co. v. Leavitt, ante,* p. 711.

Plaintiff assumed the burden of showing that he purchased the land in good faith, and on this issue testified to these facts, in substance: He had been acquainted with the land 12 years and knew its condition both before and after he bought it May 26, 1904. It was open range. Ten acres had been broken for timber culture, but had been allowed to go back to grass. This was the extent of the improvements and of the cultivation. He had no knowledge whatever of an outstanding deed in the hands of defendant, and had never been told by any one that defendant had such a deed. After his quitclaim deed had been recorded, he first learned of defendant's warranty deed. He leased the land June 24, 1904, with the understanding that the lessee would plow a fire-guard around it to pay the rent. Lessee was at the time using the land —running cattle on it. Plaintiff afterward saw a fire-guard around the premises, but did not know it was the work of the lessee.

Part of the testimony of defendant may be summarized thus: He bought the land from Luther M. Mulford, patentee, paying $100. After he heard of plaintiff's quitclaim deed, he found upon investigation that his warranty deed had been recorded in Box Butte county instead of Sheridan county, the land being near the boundary line between the two. Before plaintiff procured his quitclaim deed, defendant plowed and afterward maintained a fire-guard around the premises and also had a fence on the north line. Prior to 1904 he used the land for pasturage. He has used it for the same purpose ever since, and has also cut from it annually about 40 acres of grass. Plaintiff's lessee never plowed any fire-guard around the land, and never used it except with defendant's consent. Plaintiff visited defendant's ranch in 1902. At that time defendant bought from plaintiff another quarter-section.

They then had a conversation about the land here in controversy, and in reference to what was said defendant was asked: "State whether or not you told him at that time that you had a deed from Mulford for the southeast quarter of 18." To this he answered: "I don't know that I told him I had a deed for it. I told him we owned the southeast quarter and wanted to buy the southwest." On cross-examination defendant repeatedly said he told plaintiff he owned the land, but admitted he didn't know whether he said he owned it or the company whom he represented.

Plaintiff testified in rebuttal that he visited defendant's ranch, that he had a conversation there, and that he sold him another quarter-section. He stated, however, that defendant did not tell him he had a deed to the Mulford land, and that he did not show him such a deed. Plaintiff did not positively deny that defendant told him he owned the land. He was asked this question: "He stated that he told you that he owned this Mulford land at that time. Did he say anything of that kind to you on that occasion?" The answer was: "Not to my recollection."

It is argued by plaintiff that the proof of actual notice of the unrecorded deed was too vague, indefinite and shadowy to bind him. In this connection, testimony that defendant told plaintiff he owned the land is condemned as wholly insufficient, and the distinction between such a statement and actual notice of the unrecorded deed itself is emphasized. The sufficiency of notice depends upon the circumstances of each case. Where there is notice of a claim of absolute ownership, it is not always necessary that the documentary evidence thereof should be disclosed. Knowledge of rights existing under a warranty deed may be as effective for the purpose of actual notice as knowledge of the instrument itself. Evidence sufficient to put a prudent person on inquiry is not limited by narrow or technical distinctions between knowledge of a deed and known rights existing thereunder. Such refinement is not essential to the enforcement of recording acts intended

to promote justice and prevent fraud, nor necessary to the protection of *bona fide* purchasers. The holder of an unrecorded deed may resort to any competent evidence to show that a subsequent purchaser had notice of the former's ownership. Wade in his text-book on the Law of Notice, after describing some of the sources to which a purchaser must look for knowledge, says: "Other circumstances or information coming to the knowledge of the purchaser of an interest, right or claim adverse to that of his vendor are facts which put the purchaser upon inquiry. And a party who is thus put upon inquiry, and fails to prosecute such inquiry in a proper manner, will be conclusively presumed to have obtained all the information he might have acquired by diligence, and will be charged with absolute notice of any adverse interests such inquiry would have disclosed." Wade, Law of Notice (2d ed.) sec. 65*a*.

In commenting on the character of evidence required to give notice to a purchaser claiming rights superior to a former purchaser from a common vendor, the supreme court of the United States, in an opinion by Chief Justice Fuller, said: "Lord Hardwicke observed in *Le Neve v. Le Neve,* Amb. 436; 3 Atk. 646; 1 Ves. Sr. 64: 'That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser;' and the notes to that case in 2 Leading Cases in Eq. 109, discuss at length the doctrine of knowledge, actual notice, express or implied, and constructive notice, with abundant citation of authority. The conclusion of the American editor is that actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice, while constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute." *Simmons Creek Coal Co. v. Doran,* 142 U. S. 417, 438.

In *Oliver v. Sanborn,* 60 Mich. 346, the report shows that plaintiff claimed to be a purchaser of lands without

notice of a prior, unrecorded deed in which Isaac L. Lyon was named as grantee. James L. Sanborn had cut timber on the lands, and in testifying to a conversation with him plaintiff in that case said: "The conversation with James L. Sanborn was that he had cut some timber on these lands, and I told him I had purchased the lands. He said he understood from Mr. Smith that Mr. Lyon owned the lands. I told him that Mr. Lyon didn't own the lands—there was nothing on the records." The effect of this testimony was stated in the opinion as follows: "Here is a definite admission by plaintiff that he had received information from one claiming under the owner of the unrecorded deed that Mr. Lyon owned the land, and surely was sufficient to put a prudent man upon inquiry as to the fact of such ownership by Lyon." The sufficiency of such a statement to impart notice was taken for granted in *Harper v. Runner,* 85 Neb. 343.

Under well-recognized rules, it was proper for the trial court in determining the issue of good faith to consider the proof of plaintiff's having been told of defendant's ownership. In reading the record, no convincing reason for disbelieving the statement of that fact has been suggested. Plaintiff argues, however, that it is not sufficient, when considered alone, to show actual notice; that the land was open range; that the person using it became his lessee, and that there was no distinct and unequivocal possession by defendant to put him on guard or to charge him with constructive notice. Plaintiff testified he was acquainted with the land when he negotiated for the patentee's interest therein. The land was being used at the time for grazing purposes and for the hay it produced. For the protection of that use there was a fire-guard around the premises and a fence on the north line. Plaintiff was told that defendant owned the land. Afterward he went personally to the patentee, who was not in possession, and for the consideration of "one dollar and other valuables" procured a quitclaim deed. Though the burden was on him to show his good faith in the transaction, and

though he testified in his own behalf, there is no proof that he made any of the following inquiries of his grantor: Whose fence was on the north line? Who plowed the fireguard? Who pastured the land? Who cut the hay? Why does Peters claim to be the owner? The proofs on behalf of defendant are sufficient to show that plaintiff had been fairly put upon inquiry. Having shut his eyes to ready sources of information, he is in no position to demand protection as an innocent purchaser. When all the circumstances are considered, the trial court was justified in finding the issue in favor of defendant, and the conclusion here is the same.

AFFIRMED.

CAMPBELL BOTHELL, APPELLANT, V. J. L. MILLER, APPELLEE.

FILED NOVEMBER 16, 1910. No. 16,181.

1. **Appeal.** "Parties will as a rule be restricted in this court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction." *Smith v. Spaulding*, 40 Neb. 339.
2. **Bills and Notes:** ACTION: BURDEN OF PROOF. In an action upon a written acceptance or bill of exchange a general denial puts in issue every material averment of the petition, and the affirmative is upon the plaintiff to prove the making and delivery of the identical instrument mentioned in the petition, and so continues to the close of the case.
3. **The findings** of the district court examined and set out in the opinion *held* sufficient to sustain the judgment.
4. **Evidence** examined and set out in the opinion *held* sufficient to sustain the findings of the district court.

APPEAL from the district court for Cheyenne county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright, Duffie & Wright, for appellant.

Williams & Williams and *G. J. Hunt, contra.*

FAWCETT, J.

From a judgment in favor of defendant in the district court for Cheyenne county, plaintiff appeals.

Plaintiff's action is based upon the following draft: "Four months after date, pay to the order of J. M. Converse the sum of ninety six and 75-100 dollars $96.75, at 131-133 Wabash Ave. Chicago, Ill. Value received, charge to account of J. M. Converse. To J. L. Miller, Bridgeport, Neb. (Stamped) Bridgeport Bank, Col. 3050. Bridgeport, Neb." (Indorsed across the left hand end:) "Accepted. J. L. Miller. (customer sign here.)" On the same day the draft is alleged to have been accepted, Converse indorsed it and sent it to his employer, the Rhode Island Manufacturing Company. The company subsequently indorsed and delivered it to plaintiff. The petition is in the ordinary form. The answer contains four paragraphs, the fourth of which was stricken upon plaintiff's motion. The three paragraphs remaining we will construe, as we think the parties upon the trial construed them, viz., as constituting a general denial and nothing more. A jury was waived and trial had to the court.

In their brief, counsel for plaintiff say: "The main question in this appeal is whether the court had as a matter of law any right to admit or consider and base his judgment upon evidence tending to show fraud in the execution and delivery of the bill of exchange or draft for the collection of which this action was brought." An examination of the bill of exceptions shows that plaintiff did not, at any time during the trial, object to any of the testimony offered upon the ground that it was not within the issues. On the contrary, the record shows that both sides went into the transaction had between Converse and the defendant at the time the alleged draft was accepted by the latter. Plaintiff took the deposition of Converse, in which he detailed all the particulars of the sale by him to defendant of a bill of jewelry and seven watches; the manner in which the draft was drawn; defendant's objec-

tion to signing it as first drawn; his explanation to defendant of the character of the paper, etc. Then, without any objection that the testimony offered was not within the issues, defendant testified in full as to the transactions in relation to the signing of a paper which defendant claims was simply an order, but which Converse testified was the draft in controversy. The parties, having tried their case upon this theory, cannot be permitted to change it now. In *Smith v. Phelan,* 40 Neb. 765, we said: "It is an established rule of this court that parties will be restricted to the theory upon which cases are prosecuted and defended in the trial court. *Smith v. Spaulding,* 40 Neb. 339." See, also, code, sec. 138. But, even if plaintiff had interposed the objection that the testimony offered was not within the issues, the objection would not have been good, as this court is committed to the doctrine that in a suit of this character a general denial puts in issue every material averment of the petition, and the affirmative is upon the plaintiff to prove the making and delivery of the identical instrument mentioned in the petition, and so continues to the close of the case. *Walton Plow Co. v. Campbell,* 35 Neb. 173; *Gandy v. Estate of Bissell,* 72 Neb. 356; *Ohio Nat. Bank v. Gill Bros.,* 85 Neb. 718.

The only points remaining are: Are the findings of the court sufficient to sustain the judgment? and is the evidence sufficient to sustain the findings of the court? In its findings the court, among other things, found: "The defendant took seven watches at the agreed prices of $96.75, to be paid in four months and upon the written provision or condition following: 'Provided purchaser does not sell enough of these watches to pay the entire bill by January 1, 1907, he may return all unsold that time in good order f. o. b. Chicago office.' * * * If the defendant signed the bill of acceptance sued upon, it was because of some trick or deception on the part of the drawer, J. M. Converse. The defendant did not intend to sign such bill and did not know that he had signed any

such bill until its presentment by the Bridgeport Bank for payment. * * * The court does not believe that the bill sued upon was ever knowingly or intentionally delivered by the defendant; that the evidence fails to show the intention on defendant's part necessary to constitute a complete delivery of the bill sued upon."

"It is therefore adjudged that plaintiff has failed to sustain his cause of action and this action is therefore dismissed at plaintiff's costs." We think the findings of the court are sufficient to sustain the judgment.

After detailing the conversation with Converse which led up to the signing of the alleged draft, defendant testified: "He says, 'We will just itemize them here upon the bill and put in the agreement and I will send it in.' After that was all over, he says, 'I have to straighten myself with the house if I leave these watches here because those are my samples, and I would not leave them, only, I am going to make a run into the house, and I will leave them and report this bill with them.' He says, 'I will have to have some signature to this to show that I have left them in your possession,' so he drew out of a pocket apparently a letter order book, and he started to write down the agreement between me and this house, stating that he had left such a number of watches with me, and that I was to sell each watch at such and such a price, and so on down the list, no more than an agreement between me and the house, then he asked me to sign it, and that is the extent of the signature here upon the acceptance. Q. Look at that instrument (indicating). A. That was not in that state at all. If the judge will look at this piece of paper he will see where it was pasted on. I do not deny that is my signature, I do not deny that part of it, but I do deny that I put it to any acceptance or note or anything of the kind. There was nothing said about a note, not a word. * * * Q. State to the court, what kind of an instrument, if any, was in front of you; what was the character of it, that you signed, or that you saw when your signature was written, or attached to this exhibit

'B.' A. It was no more than an agreement between me and the house that he had left these watches. (Objected to and sustained.) Q. Describe the instrument. Describe the paper. A. I cannot describe it definitely because it has been more than two years ago, but there was nothing more than an agreement. Q. State whether or not the contract you speak of, or memorandum, was in that form. A. No, sir. Q. Was that the form of it? A. No, sir. (By the court.) You may describe in what form it was. Describe it. A. He wrote it with a pencil, just the same as he did this other sheet he left with me. He had no pen at that time. It was no more than a book like that, an ordinary order book. I did not pay any attention to it. I know it was not a bill of exchange, or anything that looked like that one, but he wrote it there on the counter, it was a blank sheet when he started to write on it, with the exception of a little heading probably. Q. Look at exhibit 'B' and state whether or not the piece of paper you are describing, you found the word there J. M. Converse, as a witness on that piece of paper. A. No, sir; it was not there. Q. Did you see it at the time you wrote your signature here on the piece of paper you are telling about, did you see those figures there like that—$96.75? A. No, sir; it was not there. Nothing written on that sheet was crossways, but it was up and down to where I signed my signature at the bottom of it. Q. Then you never signed this bill of exchange or promissory note? A. No, sir. * * * Q. The statement was made by Mr. Converse, in his deposition, that he explained to you that he could not leave the watches with you without either having the cash less the discount or the paper; that he could use this paper in the place of it, and that he must have this as his capital was limited; that he only had a small amount of capital, and was carrying this business along as a side line, and must have either the cash or the commercial paper for these watches. State whether or not there was any such conversation as that. A. No, sir; there was no such conversation had. Q. Was there any

invoice made of these watches? A. Yes, sir; in with the contract I made."

Clyde Spanogle, a banker at Minatare, Nebraska, testified that in 1906 he was in the Bridgeport Bank as assistant cashier; that in January or February, 1906, the draft in controversy was sent to his bank for collection, and that he handled the item at that time. He testified as follows: "Q. State whether or not the purported acceptance there on that bill is made in the usual form of acceptances on bills, on bills of exchange or promissory notes or commercial paper. A. No; it does not seem regular. Q. State to the court in what way it differs from the usual commercial way of acceptances, and indorsements. A. In nearly all accepted sight drafts that I have handled, the acceptance is usually across the face of the draft somewhere near the center; it usually runs diagonally; that seems to be the customary form. * * * Q. When you received that bill and examined it, was there anything about it to attract your attention—anything out of the ordinary bill of exchange or acceptance or promissory note? A. Yes, sir. Q. What was it? A. Right across the end above where accepted, it seems to have been attached or pasted to this original item—a piece of paper has been attached there, which attracted my attention to it at the time to us for collection. I called Mr. Miller's attention to that. It looked rather peculiar at the time I presented it to him for payment." On cross-examination he was asked: "You speak of a piece of paper being pasted on the top; where is that? A. Right there (indicating); that is the way it appears to me. Q. It was not pasted upon there at the time you received it? A. No."

In the face of the foregoing testimony it would have been a travesty upon justice to have permitted plaintiff to recover in this action. *Bothell v. Schweitzer,* 84 Neb. 271, was a case by this same plaintiff to recover upon an accepted bill of exchange drawn by this same man, Converse, in a transaction similar to the one under considera-

tion here; and, taking the two cases together, we are inclined to think that the method pursued by Converse in these cases is, if not his common, at least his too frequent method of doing business. We are strongly impressed with the belief that defendant attached his name to what he was led by Converse to believe was simply a memorandum of their agreement which he, Converse, desired to send to his house to show what he had done with the watches; and that defendant never knowingly signed the draft in the form in which it now appears.

The judgment of the district court is right, and is

AFFIRMED.

NATIONAL BANK OF COMMERCE, APPELLEE, V. FARMERS & MERCHANTS BANK, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,186.

Banks and Banking: FORGED DRAFT: PAYMENT: RECOVERY. *State Bank v. First Nat. Bank, ante,* p. 351, reexamined, reaffirmed, and *held* decisive of this case.

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

Tibbets & Anderson and *F. B. Baylor,* for appellant.

Hainer & Smith, contra.

FAWCETT, J.

Appeal from the district court for Lancaster county.

Plaintiff's petition is as follows: "The plaintiff, a corporation duly and legally organized and existing under and by virtue of the banking laws of the United States, complains of the defendant, a corporation duly and legally organized and existing under and by virtue of the banking laws of the state of Nebraska, and for cause of action alleges that on July 7, 1908, said defendant, by

and through the clearing house of Lincoln, Nebraska, presented to the plaintiff and demanded payment of a certain instrument in words and figures following, to wit:

"'No. 2738. Nebraska Printing Company 348-322 South 12th street, Lincoln, Neb. July 3d, 1908. Pay to the order of P. Wall $24.46, twenty-four 46-100 dollars. Nebraska Printing Company, R. E. Wright. To National Bank of Commerce, Lincoln, Neb. United States Depository.'

"That on the back thereof appear the signatures of P. Wall and O. H. Hereford. That the said Nebraska Printing Company had an account with the plaintiff and funds upon which checks might properly be drawn. That R. E. Wright, a member and officer of said company, had full power and authority to draw on said funds by check by signing said name of 'Nebraska Printing Company—R. E. Wright.' That said instrument, purporting on its face to be a check issued by the Nebraska Printing Company by R. E. Wright, and drawn on the National Bank of Commerce, plaintiff herein, was and is in fact and in truth a false, forged and counterfeit check, and was not issued by or under the direction or authority or with the knowledge or consent of said Nebraska Printing Company or any of its officers. That plaintiff did not detect that the alleged signature of said R. E. Wright, which closely resembles the genuine signature of said R. E. Wright, was false, counterfeit and a forgery until after payment of the amount called for by said check, to wit, $24.46, to said defendant. That said defendant presented said check for payment, and the plaintiff, believing said false, forged and counterfeit signature appended thereto to be the genuine signature of said 'Nebraska Printing Company—R. E. Wright,' and having no knowledge or information to the contrary, did upon such request, made by defendant as aforesaid, duly pay to said defendant on said false forged and counterfeit check said amount, to wit, $24.46. That promptly upon the discovery of the forgery and that said check was false and a counterfeit, the plaintiff duly

demanded of said defendant that it repay to said plaintiff the amount so obtained on said false, fraudulent and counterfeit check, to wit, $24.46, but that said bank wholly failed, neglected and refused so to do, though often requested.

"Wherefore plaintiff asks judgment against said bank for the sum of $24.46 paid as aforesaid, together with interest thereon at 7 per cent. per annum from said 7th day of July, 1908, and for the costs of this action."

To this petition defendant interposed a general demurrer. The demurrer was overruled, and, defendant electing to stand thereon, judgment was entered for plaintiff for the amount of its claim. Defendant appeals.

This case is ruled by *State Bank v. First Nat. Bank*, *ante*, p. 351. The cases are exactly alike on every essential point. In that case counsel for the parties conceded that the negotiable instruments statute did not control, while here it is contended by counsel for plaintiff that the statute does control. We are all agreed that counsel is in error in this contention. The provisions of the negotiable instruments law which counsel claim apply are: "Every person negotiating an instrument by delivery or by qualified indorsement warrants: (1) That the instrument is genuine in all respects what is (it) purports to be. (2) That he has good title to it." Comp. St. 1909, ch. 41, sec. 65.

What is meant by "negotiating" an instrument within the meaning of the statute? Counsel answer that question by quoting section 30 of the negotiable instruments law (Comp. St., ch. 41) as follows: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." To "negotiate" is defined in the Century Dictionary: "To treat with another or others; * * * to arrange for or procure by negotiation; bring about by mutual arrangement, discussion, or bargaining; * * * to put into circulation by transference and assignment of claim by indorsement: as, to *negotiate* a bill of exchange;

* * * to dispose of by sale or transfer: as, to *negotiate* securities." In 5 Words and Phrases, 4771, it is said: "To 'negotiate' means to conclude by bargain, treaty, or agreement; * * * to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management. * * * The power to 'negotiate' a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder. * * * 'Negotiation' means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person." If A gives B a check on C bank, and B presents the check at the counter of C, no negotiation is necessary or had; he simply demands and receives payment; but, if B goes to D store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy, *for payment,* was not a "negotiation" of the check within the meaning of the statute quoted.

Nor do we think that the payment by a bank of a check drawn upon it constitutes such bank a "holder" within the meaning of the statute. Counsel cite 4 Words and Phrases, 3319, and *Bowling v. Harrison,* 47 U. S. 248, 12 L. ed. 425, in support of their contention that "holder" within the meaning of section 30, ch. 41, *supra,* includes the payee of a check. The paragraph from Words and Phrases reads as follows: "The holder of commercial paper is a person having possession of the paper and making demand, whether in his own right or as agent for another, and includes a notary or a bank holding the same for collection." *Bowling v. Harrison* was not an action upon a check, but was an action by the indorsee of a promissory note against the indorser. The note by its terms was made payable at a particular bank. The second paragraph of the syllabus states: "The term 'holder' includes the bank at which the note is payable, and the notary who may hold

the note as the agent of the owner for the purpose of making demand and protest." In this we concur. But the difference between that case and this is marked. In that case the fact that the note had been placed by the indorsee in the hands of the bank, where by its terms it was payable, did not constitute a discharge of the note; but it is a very different matter when a check is presented to the bank upon which it is drawn, and is paid by such bank. Such payment discharges the instrument (Comp. St. 1909, ch. 41, sec. 118) and the bank is not thereafter, within the meaning of the statute, a "holder" of such check.

No question of bad faith on the part of defendant bank arises in this case. It obtained the check from a well-known, reputable citizen of Lincoln in the regular course of business, and therefore is not within the exception in *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769. As stated in *State Bank v. First Nat. Bank, supra:* "We do not feel justified in expanding the rule announced in the *Orleans* case." We are entirely satisfied with our holding in *State Bank v. First Nat. Bank, supra*, and, upon the authority of that case, the judgment in this case is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurs in conclusion.

ALICE HANIKA ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1910. No. 16,787.

1. "The right of appeal did not exist at common law. This right is purely a statutory one, and unless expressly conferred does not exist." *State v. Bethea*, 43 Neb. 451.

2. **Appeal and Error:** CONTEMPT: MODE OF REVIEW. There being no provision in our statute for an appeal in a contempt proceeding, a conviction under such a proceeding can only be reviewed in the district court by the filing in said court of a petition in error as provided in chapter 1, title XVI, civil code.

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

Thomas L. Sloan and *Curtis L. Day,* for plaintiffs in error.

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

FAWCETT, J.

Plaintiffs in error were found guilty of a contempt of court in a trial before a justice of the peace in Thurston county, and were each sentenced to pay a fine of $5, and one-half the costs of prosecution. They then attempted to have the case reviewed in the district court upon appeal. In the district court they separately demurred to what they termed the complaint, and also filed motions to quash the same. Without ruling upon either the demurrers or motions, the district court dismissed their attempted appeal upon the ground that "the court did not have jurisdiction to hear said case upon appeal." The case is here for review. The only assignment of error which we deem it necessary to consider is that the district court erred in dismissing the appeal.

Counsel for plaintiffs in error base their right to appeal from the judgment of the justice upon section 324 of the criminal code, which provides: "The defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county." They contend that a contempt proceeding before a justice of the peace is a misdemeanor and punishable as such, and that therefore section 324 of the criminal code applies. In this we think counsel are in error. Plaintiffs in error were not proceeded against before the justice under section 324 or any other section of the criminal code. The proceeding against them was, clearly, under section 357 of the

civil code. The practice under these two sections is essentially different. Section 315 of the criminal code provides: "In all cases where the magistrate shall have jurisdiction to try and sentence or finally discharge, as described in the preceding section, the charge made against the defendant shall be distinctly read to him, and he shall be required to plead thereto, which plea the magistrate shall enter upon his docket. If the defendant refuse to plead, the magistrate shall enter the fact, with a plea of 'not guilty' in his behalf." Under the criminal code parties are arrested under a warrant issued upon a written complaint. In a contempt proceeding, such as the one under consideration, no written complaint is necessary. The court upon its own motion, or upon oral request of the prosecutor, when it is shown that a witness has been subpœnaed and has not appeared, may issue an attachment, commanding the sheriff, coroner or constable of the county to arrest and bring the person named therein before the court at a time and place to be fixed in the attachment, "to give his testimony, and answer for the contempt." Code, sec. 357. Under the criminal code the defendant must be arraigned and be required to plead, and if he stand mute the court is required to enter a plea of not guilty in his behalf. Such is not the rule in a contempt proceeding. In such cases we have held that defendant in contempt, who refuses to plead, may be treated by the court as admitting the charges contained in the information. *Toozer v. State,* 5 Neb. (Unof.) 182. "It is not necessary in a contempt proceeding that the defendant be formally arraigned." *Nebraska Children's Home Society v. State,* 57 Neb. 765. "As the proceeding is solely to protect public justice from obstruction the accused is not entitled to trial by jury." *Gandy v. State,* 13 Neb. 445. We have also held: "An appeal, in the technical sense of the term, is a remedy which exists only by force of statute and within the limits defined by statute." *Pollock v. School District,* 54 Neb. 171. "The right of appeal did not exist at common law. This right is purely a statutory one, and

unless expressly conferred does not exist." *State v. Bethea,* 43 Neb. 451. We find no provision in our statute for an appeal in a contempt proceeding. Plaintiffs in error should have proceeded under chapter 1, title XVI of the civil code, by filing a petition in error in the district court.

The judgment of the district court is right and is

AFFIRMED.

FRED CHRISTENSEN, APPELLEE, V. ROBERT J. TATE, APPELLANT.

FILED NOVEMBER 16, 1910. No. 16,178.

1. **Evidence: ADMISSIBILITY: CITY ORDINANCES.** City ordinances published in book form are not competent in evidence unless "purporting to be published by authority of the city." If the evidence shows that it is the revised ordinances of the city, and the book when offered is stated by counsel to show that it was published by the city council, and this statement is not challenged, the general objection that it is "incompetent, irrelevant, immaterial, and no foundation laid, and not in issue" will not be held sufficient to call the attention of the court to the question whether it purports to be published by authority.

2. **Municipal Corporations: USE OF STREETS: AUTOMOBILES: REGULATION BY ORDINANCE.** The law gives cities of the second class control of their streets, and an ordinance regulating the speed of motor vehicles in the streets will not be held void as in conflict with the statute on that subject, unless it appears that the limitation of speed is such as to prohibit the free use of the streets by such vehicles.

3. **Instructions** must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects.

4. **Trial: NEGLIGENCE: INSTRUCTIONS.** When the jury in one instruction is told that, in order to find for the plaintiff, they must first find that the damages complained of were caused by defendant's negligence, a subsequent instruction that, if they find for the plaintiff, the plaintiff would be entitled to recover the dam-

age he has sustained by reason of the negligence of defendant, is not erroneous as assuming that the defendant was negligent.

5. New Trial: NEWLY DISCOVERED EVIDENCE: DILIGENCE. A motion for a new trial on the ground of newly discovered evidence is properly overruled when the evidence submitted on the motion fails to show due diligence in endeavoring to produce such evidence upon the trial.

6. Appeal: REVIEW. It is found upon examination of the record that the evidence is sufficient to support the verdict and judgment.

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

E. C. Strode, D. C. Burnett, Maxwell V. Bechtol and *Courtright & Sidner,* for appellant.

F. W. Button, contra.

SEDGWICK, J.

Defendant was driving his automobile along one of the streets of Fremont, leading from the city at a point where the road turns at a right angle, and within the limits of the city he met the plaintiff, who was driving a horse with a single buggy. Plaintiff's horse became frightened and ran for some distance, overturning the buggy and throwing the plaintiff to the ground. The plaintiff suffered personal injuries and the horse and buggy were both damaged. Plaintiff recovered a judgment for his damages in the district court for Dodge county, and the defendant has appealed.

1. It is contended that the court erred in admitting in evidence the ordinance of the city of Fremont regulating the speed of automobiles upon the streets of the city. The objection to these ordinances as evidence is twofold. It is contended that no sufficient foundation was laid for their admission. The clerk of the city testified that the ordinances were published in book form, and that the book shown him was "the last revised ordinances of the city of Fremont"; that the ordinance appearing in that

publication in regard to the speed of automobiles had not been subsequently repealed or modified in any way. The plaintiff then offered in evidence two sections from the book in question, relating to the speed of automobiles, and stated in the offer that the same was published in book form by order of the city council and "published by authority of the city of Fremont, Nebraska." The offer was objected to "for the reason that it was incompetent, irrelevant, immaterial, and no foundation laid, and not in issue." The objection now is that there was no foundation laid for the introduction of these sections in evidence because it does not appear from this record that the book purported to be published by the authority of the city. The statute provides that the ordinances, "when printed or published in book or pamphlet form and purporting to be published by authority of the city, shall be read and received in evidence in all courts and places without further proof." Comp. St. 1909, ch. 13, art. III, sec. 46. In *Union P. R. Co. v. Ruzicka*, 65 Neb. 621, the specific objection was made that "there is no proof as to the validity or authority of the pretended ordinance." This circumstance is particularly mentioned in the opinion, and the conclusion that the admission of the ordinance in evidence required a reversal is expressly put upon that ground. There was no testimony in that case that the book offered was "the last revised ordinances of the city." If this book did not purport to be published by authority of the city it would of course not be competent as proof of the ordinances that it contained, but we think that under the circumstances of this case and the condition of the record, as above recited, the objection, "no foundation laid," should have been made more specific. It had been twice stated in open court that these ordinances were published by the city council, and that statement should have been directly challenged in order to avail the defendant of this objection.

It is also contended that these sections of the ordinance were void because in conflict with the statute. In 1905

the legislature enacted a law "requiring registration of motor vehicles and regulating their use or operation upon the highways or streets." Laws 1905, ch. 129. This law required owners of motor vehicles to obtain licenses from the secretary of state and made general provision in regard thereto. By section 8 of the act a speed limit was provided. The section contained the general provision that, "no person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person." It then provided specifically that "in the closer built-up portion of a city, town or village" such vehicle should not be operated at a greater rate of speed than one mile in 6 minutes, and in other portions of a city, town or village the speed should not be greater than one mile in 4 minutes, and outside of a city, town or village the speed should not be "at a greater average rate than twenty (20) miles per hour," and by section 11 of the act it was provided that "cities and towns shall have no power to pass, enforce or maintain any ordinance, rule or regulation * * * or exclude or prohibit any motor vehicle whose owner has complied with section two (2) or section four (4) of this act from the free use of such highways, and all such ordinances, rules or regulations now in force, are hereby declared to be of no validity or effect." Laws 1905, ch. 129. This chapter was substantially re-enacted in 1907, making some verbal changes in various sections, but not in matters above referred to, except that the word "average" was omitted from the limitation of speed outside of cities, towns and villages. Laws 1907, ch. 115. The ordinance in question was enacted in January, 1907, and provided that no automobile should be driven in the streets of Fremont at a greater rate of speed than 8 miles an hour, and that in turning a corner of any street or avenue, or crossing the intersection of any street or avenue, or in any alley of the city, the speed should not be greater than 4 miles an hour. It is insisted that the provision of the

statute that cities and towns shall not prohibit motor vehicles whose owner has complied with the statute from the free use of the streets is violated by this ordinance; that "when automobiles first came into use the prejudice and fear was greater than it is now, because of lack of knowledge on the subject. The people did not then know, as they do now, that an auto traveling at the same speed as a team and buggy can be stopped in one-fourth to one-tenth of the distance that a team can. Hence a great fear went up, and ordinances were passed in many towns and cities limiting the rate of speed to a pace so slow as to be ridiculous to one understanding the situation. * * *; that there are not over a half dozen cars in Fremont, and these of the newest model, which can run as slow as four miles an hour without use of the slow-speed mechanism of the car. The large majority, and all ordinary cars here, cannot go below six or eight miles an hour without the use of the slow-speed machinery. When this machinery is in use, the wheels go slow, but the machinery goes very fast. * * * In many cars, in this condition, while the car is moving very slow, the revolutions to some of the mechanism is between 2,000 and 3,000 a minute, or several times as fast as when the high speed gearing is in use, and the car traveling much faster. The effect of the use of the slow-speed gearing is not only to wear out and shake to pieces, but it does also what the auto people call 'burn up.' * * * Our blocks are 280 feet, and most of them have 16-foot alleys. Just imagine running 132 feet high gear, 16 feet low gear, 132 feet high gear, 80 feet low gear, and so on. With the number of autos we have now, the low-gear rattle-bang would drive people crazy, and we would find our city fathers passing an ordinance to abate the noise nuisance."

There is, however, no evidence in the record to which these suggestions are applicable. It is not shown that such regulations in effect prohibit the free use by such conveyances of the streets of the city. The city is by statute given general control of its streets. Of course,

this control of the streets is subject to the general laws of the state, and must not be so exercised as to violate those laws. The fact that the legislature has provided limitations upon the speed of such vehicles will not prevent further restriction by the city if the same are reasonable and are made necessary by special conditions and circumstances that were plainly not considered by the legislature, and do not prohibit or restrict the free use of the streets.

We cannot say that the court erred in admitting these ordinances in evidence.

2. Instruction No. 6, given by the court, is complained of. It is as follows: "If the jury believe from the evidence that the defendant met the plaintiff, as alleged in his petition, and defendant was at said time operating his automobile, and plaintiff at said time was exercising due care, and that by reason of the negligence of the defendant at the time in operating and running said automobile the plaintiff suffered injuries to himself, his buggy and his horse, then the defendant in this case would be liable for such damages as you may believe from the evidence plaintiff has sustained. If, on the other hand, the jury do not believe from the evidence that said injuries suffered by plaintiff, if any, to himself, his buggy, and his horse were caused by the negligence of the defendant, then in that case the plaintiff cannot recover, and your verdict should be for the defendant." The objection urged against this instruction is that it does not set out "the circumstances from which negligence may or may not be imputed," nor furnish any guide "by which the jury may know what is and what is not negligence." The instruction, if given alone, would no doubt be subject to criticism. At the defendant's request the jury were told that the plaintiff could not recover if "the defendant had his automobile under reasonable control and was running it at a reasonable rate of speed and in a reasonable manner, and * * * used ordinary care to prevent injury," and no doubt, if the defendant had requested it, the court would

have given an instruction defining affirmatively what constitutes negligence as well as the instruction stating negatively what is not negligence.

3. In the seventh instruction the court told the jury: "If you find for the plaintiff in this action, the plaintiff would be entitled to recover the damage he has sustained by reason of the negligence of the defendant;" then follows a statement of the elements of damage, and it is complained that in this language the court assumed that the defendant was guilty of negligence and that this was prejudicial. It is argued that "the manner in which the instruction was worded implies that the only question in the case is whether or not the plaintiff is to have damages," and assumes the real question as to whether the defendant was negligent. The jury had already been told that one of the material matters which they were to consider was whether the alleged injuries and damage of the plaintiff were caused by the negligence of the defendant, and that the plaintiff must prove that they were so caused or he could not recover, and so the jury could not find for the plaintiff without finding that the defendant was negligent, as alleged. It was therefore not prejudicial to instruct them that if they found for the plaintiff they should inquire what damage was caused by the defendant's negligence. Unless they first found that the defendant's negligence was the cause of the accident, they could not find for the plaintiff. While the instruction is not as comprehensive and definite as might be wished, we think that, in the absence of any proper request by the defendant for further instruction, the giving of this instruction was not erroneous.

4. A supplemental motion for new trial was filed on the ground of newly discovered evidence. Those parts of this proposed evidence that would seem to be of sufficient importance to be considered in this connection are such as would ordinarily be discovered and used upon the trial. The showing of diligence in this regard is not sufficient to justify the court in granting another trial.

5. It is also contended that the evidence is not sufficient to sustain the verdict and judgment. The evidence as to negligence on the part of defendant is not very satisfactory. The plaintiff testified that the defendant was driving his machine at about 18 or 20 miles an hour. He called three witnesses who saw the accident, and asked one of them: "What rate of speed would you say Mr. Tate was going?" And he answered: "I don't know what rate he was going, but he was going there and the accident happened." Another of these witnesses who saw the accident was asked: "How was the automobile running?" And he answered: "It was going along at a pretty good rate of speed. I don't know how fast, as I am no judge of speed. * * * I would not say it was going fast or slow." The third apparently disinterested witness was not asked as to the speed of the machine. The defendant testified that he first saw the plaintiff just as he, the plaintiff, turned the corner west onto Washington avenue, and that he, the defendant, was just turning the corner on the west side and just coming around a billboard that stood there. He then noticed that the horse "looked up as though he was going to be frightened," and he turned out into the ditch and gave the plaintiff the full road and stopped his machine; that he went clear down off from the grade to give the plaintiff the full road. The plaintiff positively denies that the defendant stopped his car at all. It was fully shown by many witnesses that at the place of the meeting in question 10 or 12 miles an hour would be a highly dangerous rate of speed. In view of the fact that the defendant was a witness in his own behalf and did not testify as to the rate of speed he was driving when he met the plaintiff, we cannot say that the finding of the jury is unsupported by the evidence.

The judgment of the district court is

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37. Assignments of error not set out particularly and not definitely discussed in the brief will ordinarily not be considered. *First Nat. Bank v. Hedgecock.* 220

38. Where in motion for new trial in district court there is no general assignment of "errors of law occurring at the trial," the supreme court will consider only errors specifically assigned in the motion. *First Nat. Bank v. Hedgecock* 220

39. Although ordinarily an error will not be considered on appeal unless specifically assigned and argued in the brief, yet where affirmance of a judgment may improperly dispose of school funds, prejudicial error referred to, but not specifically assigned, will be considered. *State v. Melcher.* . 359

40. Where, on appeal in an action in which the supreme and district courts have concurrent original jurisdiction, the parties neglect to have the cause advanced, and by reason of delay a decision cannot affect their substantial rights, the appeal will be dismissed on the court's own motion. *State v. Board of Supervisors.* 227

41. Where during trial both parties treat an affirmative defense as denied, it will be so considered in the supreme court. *Crilly v. Ruyle* 367

42. In reviewing a judgment on an award of arbitrators, every presumption is in favor of the award. *In re Arbitration of Johnson* 375

43. An appellate court will not reverse a judgment simply to give a litigant a remediless right. *Melvin v. Hagadorn.* . 398

44. Where, in a case within the jurisdiction of a justice, a judgment is entered in the county court, and on appeal the district court enters a similar judgment, the supreme

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court, finding no prejudicial error, will affirm the judgment. *Schlote v. Walker*..... 406

45. If the language of special findings of a jury is ambiguous, a construction that will make such findings agree with the general verdict will be adopted rather than reverse the judgment because of the inconsistency. *Havlik v. St. Paul Fire & Marine Ins. Co*..... 427

46. Where, on appeal in equity, the findings accord with the judgment of the district court, the judgment will be affirmed without discussing the evidence. *Draper v. Osterman* 436

47. Where the record presents no issue and contains no evidence from which to determine what relief appellant is entitled to, the judgment will be affirmed. *Oltmann v. Korus* 500

48. On appeal, a case must be considered upon the issues presented in the district court. *Nielsen v. Central Nebraska Land & Investment Co*..... 518

49. The supreme court will disregard any error or defect in pleadings or proceedings which does not affect substantial rights. *Smith v. Lorang*..... 537

50. Where appellant fails to exercise diligence in prosecuting an appeal, without reasonable excuse, his appeal will be dismissed. *Anderson v. Griswold*..... 578

51. An error or defect in the pleadings or proceedings, not prejudicial, is not ground for reversal. *Ward v. Holliday*, 607

52. A judgment will not be reversed for a variance, unless material and defendant has been misled thereby to his prejudice. *Westing v. Chicago, B. & Q. R. Co*..... 655

53. Unless the matter of variance has been brought to the attention of the trial court, it will not be considered. *Westing v. Chicago, B. & Q. R. Co*..... 655

54. Where judgment is entered against principal and surety in conformity to the surety's suggestion, he cannot complain of the form of the judgment. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*..... 684

55. Where a case is retried after reversal, the court, in construing an admission made at the former trial, should consider the situation of the parties and the circumstances at that time. *Burnham v. Chicago, B. & Q. R. Co*..... 696

56. Plaintiff, recovering an erroneous judgment under allegations which afford him no remedy, may rely on other allegations of the same petition on retrial after reversal

Appeal and Error—*Concluded.*

on appeal and remand generally. *Burnham v. Chicago, B. & Q. R. Co.* 696

57. Where appellant files transcript omitting record of facts showing jurisdiction, and no diminution of the record is suggested, it will be presumed the district court acquired jurisdiction. *Whelan v. City of Plattsmouth* 824

58. On appeal, parties will as a rule be restricted to the theory upon which the cause was tried below. *Bothell v. Miller* ... 835

Arbitration and Award. See APPEAL AND ERROR, 42.

1. Arbitrators are not required to make their findings more certain than juries. *In re Arbitration of Johnson* 375

2. Failure of arbitrators to state the facts found and the conclusions of law, separately, is a mere irregularity which the parties may waive. *In re Arbitration of Johnson* 375

3. By failing to ask the court to recommit an award for corrected or additional findings, a party waives such irregularities. *In re Arbitration of Johnson* 375

4. A general finding by arbitrators is sufficient, where special findings are not required by the submission or requested by a party to the arbitration. *In re Arbitration of Johnson,* 375

5. An award directing an executor to expend $300 for a monument *held* within the terms of a submission of a division of a testator's personalty, containing an agreement not to contest a will making provision for a monument. *In re Arbitration of Johnson* 375

6. The disputed ownership of devised land, the invalidity of a will, and the distribution of testator's estate, in view of an agreement not to contest the will, *held* subjects of arbitration under sec. 862 of the code. *In re Arbitration of Johnson* 375

7. An award *held* not objectionable as not being final. *In re Arbitration of Johnson* 375

Arson.

A tenant who burns a storehouse, the property of his landlord, of which the tenant is in possession, is guilty of arson under sec. 54 of the criminal code. *State v. Martin* 529

Attorney and Client. See EXECUTORS AND ADMINISTRATORS, 5.

Automobiles. See MUNICIPAL CORPORATIONS, 17, 18.

Banks and Banking.

1. Drawee of forged draft, after paying it to a holder for value, cannot recover back the money, unless he shows that the holder was negligent or withheld information. *State Bank of Chicago v. First Nat. Bank of Omaha* 351
National Bank of Commerce v. Farmers & Merchants Bank, 841

Banks and Banking—*Concluded.*

2. A purchaser in good faith of a forged draft is not required to inquire of the drawer whether the instrument was genuine, or of the drawee to learn whether it would be accepted. *State Bank of Chicago v. First Nat. Bank of Omaha* 351
National Bank of Commerce v. Farmers & Merchants Bank, 841
3. An indorsement by the holder of a forged draft *held* not a warranty to the drawee that the drawer's signature is genuine. *State Bank of Chicago v. First Nat. Bank of Omaha* 351
National Bank of Commerce v. Farmers & Merchants Bank, 841
4. A bank charged with the duty of collecting a draft is the drawer's agent. *Crilly v. Ruyle*..... 367
5. Payment by a bank of a check drawn upon it does not constitute such bank a "holder" within the negotiable instruments statute. *National Bank of Commerce v. Farmers & Merchants Bank*..... 841

Bigamy.

1. When in a prosecution for bigamy the state proves a prior marriage, and on cross-examination it appears that the parties were first cousins, the state must show a lawful marriage, in view of sec. 3, ch. 52, Comp. St. 1909. *Staley v. State*..... 539
2. Where two successive marriages occur, a lawful marriage must be established by proof. *Staley v. State*..... 539

Bills and Notes. See BANKS AND BANKING.

1. Sec. 1100*a* of the code relates only to cases before justices of the peace, and, in the county court, to cases within the jurisdiction of a justice. *First Nat. Bank. v. Hedgecock,* 220
2. In an action on a bill of exchange, a general denial puts in issue every material averment of the petition. *Bothell v. Miller* 835
3. In an action on a bill of exchange, findings *held* to sustain judgment of dismissal. *Bothell v. Miller*..... 835
4. In an action on a draft, evidence *held* to sustain findings for defendant. *Bothell v. Miller*..... 835
5. "Negotiating" within the meaning of the negotiable instruments law (Comp. St., ch. 41) defined. *National Bank of Commerce v. Farmers & Merchants Bank*..... 841

Bonds. See COUNTIES AND COUNTY OFFICERS, 3-6. DRAINS, 2, 3. MUNICIPAL CORPORATIONS, 13-16.

Boundaries.

1. Defendant *held* not estopped to claim to the true boundary

Boundaries—*Concluded.*

line by having by mistake agreed on an erroneous line. *Kimes v. Libby*..... 113

2. Where owners by mistake agree on an erroneous boundary line, they are not thereby concluded from claiming to the correct line unless the statute of limitations has run or equitable reasons exist. *Kimes v. Libby*..... 113

Brokers. See PRINCIPAL AND AGENT. STATUTE OF FRAUDS, 1, 2.

One who makes a contract with a broker, representing himself as owner of land, cannot avoid payment of commission because he is not the owner. *Valerius v. Luhring*..... 425

Burglary. See CRIMINAL LAW, 5.

Carriers. See STATUTES, 1.

1. A contract by a railroad company to furnish transportation to the proprietors of a newspaper in payment for advertising *held* to be in violation of sec. 14 of the railway commission act (laws 1907, ch. 90; Ann. St. 1909, sec. 10662). *State v. Union P. R. Co*..... 29

2. If the proprietor of one newspaper may receive transportation in return for such services, while another cannot, uniformity of charge does not exist. *State v. Union P. R. Co.* 29

3. A common carrier may not exchange transportation for services or property by way of barter. *State v. Union P. R. Co.* 29

4. The only standard measure possible to insure absolute uniformity in rates is money. *State v. Union P. R. Co*.... 29

5. When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, the liability of the carrier as an insurer of their safe delivery at once attaches. *Burrowes v. Chicago, B. & Q. R. Co*..... 142

6. One who installs passenger elevators in his building for the use of his tenants and the public is subject to the same degree of care as common carriers. *Quimby v. Bee Building Co.* 193

7. Common carriers of passengers should be held to the strictest accountability and be required to exercise the highest degree of care of which the human mind is capable. *Quimby v. Bee Building Co*..... 193

8. In an action for injuries to a boy caused by defendant's negligence in operating an elevator, evidence *held* to sustain verdict for plaintiff. *Quimby v. Bee Building Co*..... 193

9. Instruction as to duty of elevator conductor *held* properly refused. *Quimby v. Bee Building Co*..... 193

Carriers—*Concluded.*

10. Instruction as to liability of owner of passenger elevator *held* proper. *Quimby v. Bee Building Co*..... 193

11. A stock shipper, riding on a freight train caring for his stock, is entitled to the highest degree of care. *Otto v. Chicago, B. & Q. R. Co*..... 503

12. Persons in charge of a freight train *held* negligent in permitting a stock shipper to leave it while it is standing on an open bridge in the dark. *Otto v. Chicago, B. & Q. R. Co*.. 503

13. Whether a stock shipper injured in stepping from a freight train in the dark was guilty of contributory negligence, *held*, under the evidence, for the jury. *Otto v. Chicago, B. & Q. R. Co*..... 503

Chattel Mortgages. See INSURANCE, 1, 2.

A chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority over local attaching creditors by the courts of another state, to which the chattels are removed with the mortgagee's consent. *Pennington County Bank v. Bauman*..... 25

Constitutional Law.

1. The employer's liability act (Comp. St., ch. 21., sec. 3) *held* valid under the constitution of Nebraska, and not repugnant to the fourteenth amendment of the federal constitution. *Swoboda v. Union P. R. Co*..... 200

2. *Ex post facto* laws include enactments which alter the situation of accused to his disadvantage. *State v. McCoy*.. 385

3. Amendatory act increasing penalty of bond essential to suspension of sentence in prosecution for abandonment is *ex post facto* as to prior offenses. *State v. McCoy*..... 385

4. A curative act which attempts to take away property rights already vested is unconstitutional. *Helming v. Forrester* 438

5. Ch. 32, laws 1895, an act to validate decrees made under ch. 57, laws 1889, "Baker's decedent act," *held* violative of sec. 3, art. I, const. *Draper v. Clayton*..... 443

6. Ch. 32, laws 1895, an act to validate decrees made under ch. 57, laws 1889, *held* not to validate a decree assigning the fee in the homestead to the surviving spouse of the owner. *McFarland v. Flack*..... 452

7. The constitution and laws guarantee to every person a fair and impartial trial by an impartial jury, and the obligation to protect these rights devolves upon the courts. *Wilson v. State*..... 638

Contracts. See MECHANICS' LIENS. STATUTE OF FRAUDS, 2.

1. Where provisions of a building contract have been ignored by the parties and the architects, they will be ignored by the courts. *Campbell v. Kimball*..... 309
2. Parties to a written contract may change the time limit by oral agreement, and courts will refuse damages suffered prior to the date fixed by the change. *Campbell v. Kimball*, 309
3. A verbal change in a contract that does not vary its meaning nor affect the liability of the party to be charged is an immaterial alteration. *Blenkiron Bros. v. Rogers*..... 716
4. Correction of name in contract for sale of grain *held* an immaterial alteration. *Blenkiron Bros. v. Rogers*..... 716
5. A contract between a man and his stepmother that if she will return to and care for her husband the stepson will support her for life, *held* not void as against public policy. *Mack v. Mack*..... 819
6. The consideration of a contract need not move to the promisor, but a disadvantage to the promisee is sufficient. *Mack v. Mack*..... 819

Contribution. See LIFE ESTATES.

Corporations. See ELECTRICITY. EVIDENCE, 4.

1. A corporation having power to execute a lease for 25 years has power to cancel it with consent of lessee, and to execute a new lease for a longer term to another lessee. *Lancaster County v. Lincoln Auditorium Ass'n*..... 87
2. Stockholder in a corporation *held* estopped to sue to set aside the surrender of a lease for want of power in the directors. *Lancaster County v. Lincoln Auditorium Ass'n*.. 87
3. A corporation authorized to hold real estate in fee may become lessee in a lease whose term exceeds the term of its charter existence. *Lancaster County v. Lincoln Auditorium Ass'n* 87

Costs. See MUNICIPAL CORPORATIONS, 3.

Counties and County Officers. See ACCORD AND SATISFACTION, 2. DRAINS, 5. HIGHWAYS, 2.

1. A contract made in good faith by county commissioners within their powers cannot be interfered with merely because the county might have made a better bargain. *Lancaster County v. Lincoln Auditorium Ass'n*..... 87
2. In the absence of bad faith or a gross abuse of discretion, proceedings of county officers, if regular, will not be reviewed in a collateral action by a taxpayer. *Lancaster County v. Lincoln Auditorium Ass'n*..... 87
3. County treasurer *held* not liable on his bond for interest

Counties and County Officers—*Concluded.*
which he could not collect on the public funds. *Hamilton County v. Cunningham*..... 650

4. Where a contract for the construction of a courthouse requires the contractor to pay for materials used, a bond to secure performance of the contract inures to the benefit of a materialman. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*..... 684

5. In an action on a contractor's bond, materialman *held* not prejudiced by failure of supervisors to require the contractor to produce receipts before paying for the building. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*..... 684

6. In an action on a contractor's bond, if the bondsman admits execution and delivery of the bond, the materialman need not prove that it was formally approved. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*..... 684

Courts. See APPEAL AND ERROR, 46. CRIMINAL LAW, 14. WILLS, 10.

1. On an assignment that the judgment is not sustained by the evidence, it is sufficient if the opinion fairly reflects the evidence material to a decision on the assignment. *Burrowes v. Chicago, B. & Q. R. Co*..... 142

2. Where questions of law involved on appeal have been definitely settled by former adjudications, further review is not required. *Hoosier Mfg. Co. v. Swenson*..... 182

3. A county court has no jurisdiction to make an *ex parte* order confirming in a widow a title in fee simple to a homestead. *Helming v. Forrester*..... 438

4. A decree of the county court vesting in a widow absolute title to a homestead selected from lands of her deceased husband *held* void under sec. 16, art. VI of the constitution. *Draper v. Clayton*..... 443

5. A county court has no jurisdiction to assign a fee in a homestead to the surviving spouse of the owner. *McFarland v. Flack*..... 452

6. Where the evidence clearly sustains the verdict, the supreme court need not set it out in its opinion. *Holmes v. State*..... 710

7. Where objections to instructions are clearly without merit, the supreme court is not required to set out the instructions in its opinion. *Holmes v. State*..... 710

Creditors' Suit. See DIVORCE, 2.
The wife of a surety *held* estopped from claiming title to land held by her husband when he justified as surety on a depository bond of a bank. *Johnson County v. Taylor*..... 487

Criminal Law. See ARSON. BIGAMY. COURTS, 6, 7. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 12. ROBBERY.

1. It is error to unduly emphasize the fact that certain instructions are given at request of accused, and others on the court's own motion. *Jones v. State*..... 390
2. The presumption that the law of a sister state is identical with the law of Nebraska obtains in criminal prosecutions as well as in civil actions. *Staley v. State*..... 539
3. On a trial for robbery, where the evidence supported a conviction of larceny from the person, the credibility of the witnesses and the weight of their evidence *held* questions for the jury. *Bunge v. State*..... 557
4. An order permitting the examining magistrate to correct the transcript of his proceedings by changing the spelling of the complaining witness' name from "Adolph Hennig" to "Adolf Hennig" *held* not prejudicial. *Bunge v. State*... 557
5. In a prosecution for burglary, a plea of guilty at the preliminary hearing upon the advice of an officer *held* inadmissible. *Little v. State*..... 588
6. The names of witnesses for the state should be indorsed on the information as early as practicable, before the case is called for trial, and reasonable time thereafter should be allowed the accused to prepare for trial. *Wilson v State*, 638
7. Juror, in a criminal prosecution, *held* incompetent. *Wilson v. State* 638
8. One charged with a capital offense *held* entitled to ample opportunity, in the examination of jurors as to their qualifications, to ascertain the facts. *Wilson v. State*..... 638
9. In a prosecution for murder, *held* error to allow the state to show that accused was a deserter from the United States army. *Wilson v. State*..... 638
10. Where the evidence showed that accused, a married man, had agreed to marry another woman with whom he was on intimate terms, *held* improper to procure his wife to come from another state and to have her pointed out to the jury by a witness. *Wilson v. State*..... 638
11. Right of trial judge to interrogate witnesses, or the accused as a witness, stated. *Wilson v. State*..... 638
12. Language of prosecuting attorney in argument *held* improper. *Wilson v. State*..... 638
13. The district court has no jurisdiction to grant a new trial in a criminal case upon application by petition filed after the term. *Evers v. State*..... 721
14. A term of court at which only equity business is transacted is a "term of the court" under sec. 390 of the criminal code. *Critser v. State*..... 727

Criminal Law—*Concluded.*

15. Under sec. 390 of the criminal code, at the end of the second term after indictment found, the accused, if committed and not brought to trial, is entitled to a discharge, where the delay was not on his application. *Critser v. State* 727

Crops.

1. One raising grain for another *held* a cropper with no title to the crop. *Robinson Seed Co. v. Hamilton*..... 76
2. In replevin the burden is on a cropper to prove his right to sell a portion of the crop. *Robinson Seed Co. v. Hamilton* 76
3. In replevin by an owner against a cropper, evidence *held* insufficient to require submission of question of a division of the crop or an oral modification of a written contract to the jury. *Robinson Seed Co. v. Hamilton*..... 76
4. Owner *held* entitled to maintain replevin against a cropper without demand, or tender of the cropper's agreed compensation. *Robinson Seed Co. v. Hamilton*..... 76

Damages. See CONTRACTS, 2. INTOXICATING LIQUORS, 2, 3. MUNICIPAL CORPORATIONS, 6. VENDOR AND PURCHASER, 1. WATERS, 1.

Verdict of $10,000 for personal injuries *held* not excessive. *Olson v. Nebraska Telephone Co*..... 593

Deeds. See MORTGAGES, 7.

A deed may be reformed to include omitted lands, where it is clearly shown that the omission resulted from a mutual mistake. *Mitchell v. Griffith*..... 140

Descent and Distribution. See HOMESTEAD, 2.

1. Title to real estate at death of owner descends to heirs subject to administration, and the contingency of a will, in which event title of devisees relates back to time of testator's death. *Brown v. Webster*..... 788
2. Until probate of a will, the heirs are necessary parties to an action to enforce a contract made by decedent declaring a trust in his property. *Brown v. Webster*..... 788

Divorce. See MARRIAGE, 5.

1. In a suit for divorce for extreme cruelty, conditions caused by defendant which occasion and aggravate acts of cruelty should also be considered. *McGrew v. McGrew*..... 423
2. In a suit in aid of a decree for alimony, evidence *held* sufficient. *Cipera v. Chmelka*..... 482

Drains. See ESTOPPEL, 1.

1. An allegation in a petition to county commissioners to locate a public ditch under art. I, ch. 89, Comp. St. 1909,

Drains—*Concluded.*

held a sufficient statement that petitioners' land will be benefited by the improvement. *Seng v. Payne*..... 812

2. A bond of petitioners for a public ditch conditioned as required by sec. 4, art. I, ch. 89, Comp. St. 1909, *held* not void because signed by the petitioners only. *Seng v. Payne*, 812

3. A bond of petitioners for a public ditch filed with the county clerk will be presumed to have been approved after 20 years. *Seng v. Payne*..... 812

4. A finding by a county board in proceedings to locate a public ditch *held* a substantial compliance with sec. 5, art. I, ch. 89, Comp. St. 1909. *Seng v. Payne*..... 812

5. Sec. 25, art. I, ch. 89, Comp. St. 1909, *held* to authorize county commissioners in their discretion to use money in the ditch fund to pay for removing obstructions from and for repairing the public ditches located in their respective counties. *Seng v. Payne*..... 812

Easements. See VENDOR AND PURCHASER, 5.

1. The owner of a right of way over defendant's land may enjoin him from permanently obstructing it. *Ballinger v. Kinney* 342

2. It will not be presumed that the grant of an easement is in gross when the right can fairly be construed as appurtenant to some other estate. *Ballinger v. Kinney*..... 342

3. Title to a right of way appurtenant to land will pass as an incident to a deed for the dominant estate containing no reference to appurtenances. *Ballinger v. Kinney*..... 342

4. Where an easement is created by written instrument, it will not be cut down by the owner's failure for six years to compel the proprietor of the servient estate to remove permanent obstructions maintained thereon. *Ballinger v. Kinney* 342

Ejectment. See ADVERSE POSSESSION, 3.

One claiming title under a void tax deed, and making valuable and lasting improvements, paying taxes, etc., is entitled to compensation therefor. *Bresee v. Parsons*..... 327

Elections. See MANDAMUS, 5. MUNICIPAL CORPORATIONS, 11, 13-16.

Electricity. See LIMITATION OF ACTIONS, 3.

In the absence of legislative act or municipal ordinance, an electric light company is liable to the owner of trees for damages accruing to his lot by reason of trimming the trees. *Slabaugh v. Omaha Electric L. & P. Co*..... 805

Eminent Domain.

A tenant occupying school land under a lease from the state *held* entitled to claim damages on the opening of a highway

Eminent Domain—*Concluded.*
without joining the state as plaintiff. *Beste v. Cedar County* 689

Equity.
Equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it. *Seng v. Payne*..... 812

Estoppel. See BOUNDARIES. CORPORATIONS, 2. CREDITORS' SUIT. MORTGAGES, 3.

1. Owner of land who joined in a petition to locate a public ditch upon his land, and who constructed the ditch, *held* estopped to deny authority of the board to locate the ditch. *Seng v. Payne*..... 812
2. If the facts constituting an estoppel are sufficiently pleaded, defendant will be given the benefit of that defense, though the word "estoppel" does not appear in his pleading. *Seng v. Payne* 812

Evidence. See APPEAL AND ERROR, 6-25. CRIMINAL LAW, 9, 10. DRAINS, 3. FORCIBLE ENTRY AND DETAINER, 7. INTOXICATING LIQUORS, 1, 3, 5. MARRIAGE, 6-9. MASTER AND SERVANT, 8, 12, 13. MORTGAGES, 7. PAYMENT. RAILROADS, 5. TRIAL, 17-21. VENDOR AND PURCHASER, 6. WILLS, 5, 6.

1. The village record of a bond given by a saloon-keeper *held prima facie* evidence of the execution and delivery of the bond. *Pilkins v. Hans*..... 7
2. In an action for damages against a saloon-keeper, where a witness has stated all the facts as to the employment and habits of decedent, *held* not prejudicial error to refuse to allow him to answer as to whether he was an industrious man. *Pilkins v. Hans*..... 7
3. An unauthorized declaration of an agent made after the transaction to which it relates is not competent evidence against the principal. *Sheridan Coal Co. v. Hull Co*..... 117
4. An agent of a corporation having control of an inferior servant may testify to the scope of such servant's duties. *Sheridan Coal Co. v. Hull Co*..... 117
5. Certain entry in an order book *held* admissible. *Sheridan Coal Co. v. Hull Co*..... 117
6. Where a proper foundation has been laid, secondary evidence may be received of the contents of a document which cannot be produced. *Sheridan Coal Co. v. Hull Co*..... 117
7. Where the issue is as to the genuineness of an alleged signature, signatures admitted or clearly proved are admissible for comparison. *First Nat. Bank v. Hedgecock*..... 220

Evidence—*Concluded.*

8. Comparison of signatures may be made by an expert, but he must show himself qualified before testifying. *First Nat. Bank v. Hedgecock*..... 220
9. Where a contract is in writing, the writing is the best evidence of its terms, and must be produced, or its absence satisfactorily accounted for, where proof of its terms is offered. *First Nat. Bank v. Hedgecock*..... 220
10. In a jury trial, a question that calls for the conclusion of a witness on the issue being tried is incompetent. *Benson v. Peters* 263
11. Sufficiency of evidence as to statements made by a decedent many years before stated. *Cobb v. Macfarland*..... 408
12. Decree reforming an instrument and findings sustaining the decree *held* admissible in a suit on the instrument as reformed. *Blair v. Kingman Implement Co*..... 736
13. Where an appeal from a decree reforming a contract was admitted in the pleadings, the mandate of the supreme court showing affirmance of the decree *held* admissible as evidence in chief by plaintiff. *Blair v. Kingman Implement Co*..... 736
14. City ordinances published in book form *held* not competent in evidence under sec. 46, art. III, ch. 13, Comp. St. 1909, unless purporting to be published by authority of the city. *Christensen v. Tate*..... 848

Exceptions, Bill of.

1. Bill of exceptions *held* not submitted to adverse party or his attorney by leaving it at the residence of the attorney in his absence. *Pierce v. Chicago, B. & Q. R. Co*..... 208
2. The time for serving a bill of exceptions cannot be extended beyond 80 days from adjournment of term. *Pierce v. Chicago, B. & Q. R. Co*..... 208

Executors and Administrators.

1. Will construed, and widow, as executrix, *held* not required to account for the income from the estate. *In re Estate of Schuck* 46
2. Refusal of court to set aside appointment of administrator for want of sufficient notice sustained. *In re Estate of Brusha* 254
3. Allowance of claim against estate which on its face was barred by limitations *held* error. *In re Estate of Brusha*.. 254
4. Allowance of claim against estate, barred by limitations, set aside on petition of heir. *In re Estate of Brusha*..... 254
5. Where an administrator defended a suit to which there was

Executors and Administrators—*Concluded.*

no meritorious defense, that he followed advice of counsel is not sufficient; he must show that he acted reasonably. *In re Estate of Bullion*..... 700

6. An administrator defending a suit to which there is no meritorious defense is not entitled to credit for attorney's fees or expenses. *In re Estate of Bullion*..... 700

7. Where an administrator negligently or in bad faith unreasonably delays settlement of the estate, he is liable to the heirs and distributees for interest on moneys in his hands. *In re Estate of Bullion*..... 700

8. Where heirs and distributees without just cause sued the administrator in the federal court, *held* that he is entitled to credit for reasonable attorney's fees and expenses. *In re Estate of Bullion*..... 700

Forcible Entry and Detainer.

1. A justice of the peace has no jurisdiction of an action of forcible entry and detainer in which title to real estate is involved, and the district court on appeal has no jurisdiction and should dismiss the action. *Stone v. Blanchard*.... 1

2. An equitable title to real estate and possession thereunder may be shown as a defense in forcible entry and detainer, and a justice has no jurisdiction to try such title. *Stone v. Blanchard* 1

3. A mere claim of title will not deprive a justice of jurisdiction in a forcible entry and detainer suit; but he must ascertain from the evidence whether title is involved. *Stone v. Blanchard* 1

4. Forcible entry and detainer is an action to determine the right of possession only. *Stone v. Blanchard*..... 1

5. In forcible entry and detainer, if a legal or equitable title is involved, the justice must dismiss the action. *Stone v. Blanchard* 1

6. If title to real estate is involved in an action of forcible entry and detainer, a justice cannot decide a question of estoppel affecting defendant's right to assert such title. *Stone v. Blanchard*..... 1

7. In forcible entry and detainer, any competent evidence tending to show which party is entitled to possession is admissible. *Stone v. Blanchard*..... 1

8. Evidence *held* not to sustain an action of forcible entry and detainer. *Stone v. Blanchard*..... 1

Fraud. See PLEADING, 1. STATUTE OF FRAUDS, 1.

Fraudulent Conveyances.

An insolvent can employ attorneys and transfer property in payment of contemplated services, if he acts in good faith and the property transferred does not exceed a reasonable fee. *Yeiser v. Broadwell*..... 583

Gaming.

Money wagered on a horse race may be recovered from the stakeholder, if demanded before it is paid over. *Ward v. Holliday* 607

Guardian and Ward. See INSANE PERSONS.

A guardian's receipt for money as received in satisfaction of the ward's share of a surplus in the ancestor's homestead, in proceedings under the "Baker decedent act" (laws 1889, ch. 57), when the money was not received, *held* not to estop the ward from asserting his estate in the homestead. *Draper v. Clayton*..... 443

Habeas Corpus.

In habeas corpus, where the petitioner is charged with a bailable offense and the sureties on his recognizance have been released, the supreme court will remand him to the district court and require him to enter into recognizance in an amount fixed by the supreme court. *State v. Bauman*, 273

Highways.

1. Sec. 6162, Ann. St. 1909, does not apply to the owner of a private mill and appurtenances constructed on his own land in 1873, whose raceway is intersected by a highway in 1880. *Franklin County v. Wilt & Polly*..... 132
2. Where a county board allowed a claim for road taxes in favor of a city and issued a warrant for only one-half of the claim, *held* that there was nothing from which the city could appeal. *City of Crawford v. Darrow*..... 494

Holidays.

1. The clerk of a district court has authority to receive and file a motion for a new trial on Memorial day. *Tully v. Grand Island Telephone Co*..... 822
2. The court will not presume that because the last day within which motion for new trial might be filed fell upon Memorial day, appellant was unavoidably prevented from filing his motion within time. *Tully v. Grand Island Telephone Co.* 822

Homestead. See CONSTITUTIONAL LAW, 6. COURTS, 4, 5. QUIETING TITLE.

1. An *ex parte* order made upon a widow's application setting apart to her a homestead in lands of her deceased husband *held* not to estop his children who have not subsequently

Homestead—*Concluded.*
ratified the order or otherwise waived their right to object thereto. *Draper v. Clayton*..... 443

2. Upon the death of the owner of the fee in a homestead the estate descends to the surviving spouse for life, with remainder to the owner's children. *McFarland v. Flack*..... 452

3. In assigning a homestead to the widow, the value at the time of the death of the husband should be considered, and not its enhanced value created by the industry of the widow. *In re Estate of Jurgens*..... 571

Homicide. See CRIMINAL LAW, 6-12.
In a prosecution for murder, a conviction should be reversed for the erroneous admission of irrelevant evidence prejudicial to accused. *Jones v. State*..... 390

Husband and Wife. See CONTRACTS, 5. CREDITORS' SUIT. TRUSTS, 1. WILLS, 8.

Indictment and Information.
Under sec. 444 of of the criminal code, defects subject to motion to quash or a plea in abatement are waived where accused pleads to the general issue, or where he stands mute and a plea of not guilty is entered by the court. *Huette v. State*..... 798

Injunction. See WATERS, 4.

Insane Persons.
1. A sale of real estate by a guardian of an insane ward, under license to pay debts, is a proceeding *in rem*, and not adverse to the interests of the ward. *Hunter v. Buchanan* 277

2. Sec. 49, ch. 23, Comp. St. 1909, does not require service of notice of application for license to sell land to be made on insane ward. *Hunter v. Buchanan*..... 277

3. A sale of land of an insane ward will not be held void on collateral attack because the guardian's bond required by sec. 54, ch. 23, Comp. St. 1909, was not formally approved by the district judge. *Hunter v. Buchanan*..... 277

4. Guardian *ad litem* of insane ward has authority to appeal a cause to a court of last resort. *Hunter v. Buchanan*.... 277

Insolvency. See FRAUDULENT CONVEYANCES.

Insurance.
1. An unfiled chattel mortgage on an insured stock of goods to secure a guaranty of a debt of mortgagor *held* material to the risk. *Madsen v. Farmers & Merchants Ins. Co*..... 107

Insurance—*Concluded.*

2. Concealment of an unfiled chattel mortgage on insured goods *held* to avoid the insurance. *Madsen v. Farmers & Merchants Ins. Co.* 107
3. If a fire insurance company refuses to receive proof of loss on the ground that the policy was not in force, it waives proof of loss. *Havlik v. St. Paul Fire & Marine Ins Co.* 427
4. In an action on a policy where the insured had waived proof of loss, statements of the insured as to his interest in the property destroyed *held* inadmissible. *Havlik v. St. Paul Fire & Marine Ins. Co.* 427
5. A fraternal beneficiary certificate issued by an Illinois association transacting business under the laws of Nebraska will be construed and enforced according to the laws of Nebraska. *Pringle v. Modern Woodmen of America* 548
6. Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrears from members, to restore them to membership, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties. *Henton v. Sovereign Camp, W. O. W.* 552
7. A fraternal beneficiary association may be bound by the action of the clerk of a local camp in restoring a member to membership without demanding a health certificate required by the by-laws, and with knowledge that the member is sick, where there is no fraud on the part of the member. *Henton v. Sovereign Camp, W. O. W.* 552

Interest. See EXECUTORS AND ADMINISTRATORS, 7. MECHANICS' LIENS, 4.

Intoxicating Liquors. See EVIDENCE, 1, 2.

1. In action for damages against saloon-keepers, *held* proper to allege and prove that prior to day of death of decedent defendants had sold him liquors causing him to become an habitual drunkard. *Pilkins v. Hans* 7
2. In an action for damages against saloon-keepers plaintiff may recover all damages occasioned by the sale. *Pilkins v. Hans* 7
3. Sec. 18, ch. 50, Comp. St. 1909, *held* not to limit the measure of damages resulting from the sale of liquor, but to simplify the proof. *Pilkins v. Hans* 7
4. Where a saloon-keeper sells liquor knowing or having reason to believe that it was intended for decedent, he is liable as for a direct sale. *Pilkins v. Hans* 7
5. In an action for damages against saloon-keepers, certain evidence *held* admissible. *Pilkins v. Hans* 7

Intoxicating Liquors—*Concluded.*

6. In an action against a saloon-keeper for personal injuries resulting from the sale of liquors, plaintiff is required to prove only that intoxication caused by such traffic contributed to his injuries. *Smith v. Lorang*..... 537

7. Jurisdiction of an appeal from a grant of a liquor license is conferred on the district court by giving notice of appeal and filing a transcript immediately. *Leidy v. Storz Brewing Co.* 574

8. Appeal by remonstrant from a grant of a liquor license *held* properly dismissed for failure to give notice of appeal and file transcript immediately. *Leidy v. Storz Brewing Co.* 574

9. An applicant for a liquor license must be a person competent, willing and intending to carry on the business himself. *In re McDonald*..... 618

10. Application for a liquor license should be denied where the applicant is not the real party in interest. *In re McDonald*, 618

11. Evidence *held* sufficient to show that an applicant for a liquor license was not the real party in interest. *In re McDonald* 618

12. Evidence *held* to support conviction for selling intoxicating liquor without a license. *Huette v. State*..... 798

Judgment. See APPEAL AND ERROR, 54. COURTS, 4. MORTGAGES, 9.

1. In a suit on a replevin bond, the judgment in the replevin action is *res judicata* of all matters which were or might have been litigated therein. *Pennington County Bank v. Bauman* 25

2. A district court cannot vacate its own judgment after the term, except by petition in equity, or under sec. 602 of the code. *Hitchcock County v. Cole*..... 43

3. Demurrer to petition for want of a material allegation, and judgment of dismissal, *held* not a bar to another action to enforce the same right. *Welsh v. Sarpy County*.. 562

4. Petition in a suit to cancel a justice's judgment for false return *held* insufficient. *Kruse v. Johnson*..... 694

5. Where a decree reforming an instrument was affirmed on appeal, the instrument as reformed will, in an action thereon, be taken as the agreement between the parties. *Blair v. Kingman Implement Co*..... 736

Jury. See CRIMINAL LAW, 7, 8.

Justice of the Peace. See APPEAL AND ERROR, 2. FORCIBLE ENTRY AND DETAINER. JUDGMENT, 4.

Landlord and Tenant. See CORPORATIONS.

1. Where a tenant under a written lease for one year, with the option of releasing, holds over without exercising his option, his landlord may treat him as tenant for another year at the same rental. *Kuhlman v. Lemp Brewing Co....* 72
2. Where a tenant holding over claims the right to terminate his tenancy under conditions expressed in the lease, he must allege and prove the conditions and his compliance therewith. *Kuhlman v. Lemp Brewing Co.....* 72

Larceny. See CRIMINAL LAW, 3. ROBBERY.

Libel and Slander.

1. It is for the court to say whether language used was slanderous *per se*, but for the jury to say whether the defendant intended to convey the idea that plaintiff was guilty of the crime alleged. *Thorman v. Bryngelson.....* 53
2. Language charging one, in the presence of others, with stealing corn is actionable *per se* as a matter of law. *Thorman v. Bryngelson.....* 53
3. Whether defendant intended by his language to charge plaintiff with the crime of stealing corn is for the jury. *Thorman v. Bryngelson.....* 53
4. Petition *held* to state a cause of action. *Thorman v. Bryngelson .....* 53

Licenses.

1. Village trustees to raise revenue may by ordinance levy a tax on the occupation of practicing medicine within the village limits. *Village of Dodge v. Guidinger.....* 349
2. The words "occupation" and "vocation" defined. *Village of Dodge v. Guidinger.....* 349

Life Estates.

Rule to determine amount of contribution from remainderman to life tenant, who pays off a past due incumbrance upon the entire estate, stated. *Draper v. Clayton.....* 443

Limitation of Actions. See ADVERSE POSSESSION, 1. REMAINDERS.

1. Where an amended petition states a new cause of action, limitations run until filing of same. *Melvin v. Hagadorn..* 398
2. Where two causes of action are improperly joined, and afterwards one is eliminated by filing an amended petition, the filing of the original petition and service of summons thereon arrests the running of the statute of limitations as to the cause of action not eliminated. *McCague Savings Bank v. Croft.....* 770
3. Limitations do not commence to run in favor of an electric light company injuring abutting property by trimming

Limitation of Actions—*Concluded.*
trees until it trims the trees. *Slabaugh v. Omaha Electric L. & P. Co*..... 805

Mandamus. See MUNICIPAL CORPORATIONS, 11.

1. Mandamus to compel payment of a school district warrant for legal services will not issue, where it does not clearly appear that the school board acted in good faith. *State v. Melcher* 359
2. Where a demurrer was sustained to an amended application for a writ of mandamus, and the transcript does not contain a copy of the alternative writ, which under sec. 653 of the code is the pleading in the case, it will be presumed on appeal that, if an alternative writ was issued, it complied with the law. *City of Crawford v. Darrow*..... 494
3. Mandamus will not issue if relator does not establish a clear legal right to performance of the duty sought to be enforced. *Gutschow v. Ramser*..... 591
4. A stockholder of a mutual irrigation company who refused to pay his share of the maintenance fund, *held* not entitled to mandamus to compel the corporation to furnish him water for irrigation purposes. *Swanger v. Porter*..... 764
5. Under sec. 42, ch. 52, laws 1907, *held* that mandamus to compel the secretary of state to certify the name of a candidate nominated to fill a vacancy in a primary nomination is premature if brought before expiration of three days after filing certificate of nomination. *State v. Junkin*..... 801

Marriage. See BIGAMY.

1. A marriage prohibited by the laws of Nebraska is valid if celebrated elsewhere according to the laws of the place where celebrated, though the parties being residents of this state have gone abroad to evade the laws of Nebraska. *State v. Hand*..... 189
2. Marriage is a civil contract, and the rules to be applied thereto are, to a great extent, the same as are applied to other contracts. *Coad v. Coad*..... 290
3. If one party induces another to believe, in good faith, that a marriage contract is made and is binding, the law will hold the party taking such advantage to the full terms of the agreement. *Coad v. Coad*..... 290
4. A common law marriage, while criminal under the statute, is as valid as if solemnized under the forms of law, usage and custom, and is followed by exactly the same results. *Coad v. Coad*..... 290
5. Proof of a common law marriage, if sufficient to establish the relation, will sustain an action for divorce and alimony. *Coad v. Coad*..... 290

Marriage—*Concluded.*

6. While repeated indulgence in sexual intercourse is not conclusive proof of the marriage relation, it may be considered with evidence of the agreement to enter, *in præsenti*, into the matrimonial state. *Coad v. Coad*..... 290

7. Where there is evidence of a marriage agreement, valid at common law, and unquestioned proof of continued sexual intercourse, the law will presume the acts of the parties to have been lawful. *Coad v. Coad*..... 290

8. Where the evidence as to entry into relation of husband and wife by present agreement is conflicting, the subsequent conduct of the party sought to be charged may be considered. *Coad v. Coad*..... 290

9. Evidence *held* to establish a common law marriage. *Coad v. Coad* 290

Master and Servant. See CONSTITUTIONAL LAW, 1.

1. A servant assumes the ordinary risks of his employment, when such risks are known to him, or are obvious to persons of his experience and understanding. *Glantz v. Chicago, B. & Q. R. Co*..... 60

2. In an action for death of a trackman, who knew the dangers and assumed the risks of such employment, *held* error to charge that "it is the duty of the master to exercise reasonable care to provide a safe place for the servant to work." *Glantz v. Chicago, B. & Q. R. Co*..... 60

3. In an action for death of a trackman, instruction as to burden of proof as to assumption of risks *held* erroneous. *Glantz v. Chicago, B. & Q. R. Co*..... 60

4. The "department rule" as to fellow servants reaffirmed. *Hjelm v. Volz*..... 97

5. A millwright and an oiler *held* not fellow servants. *Hjelm v. Volz*..... 97

6. Whether a workman was guilty of contributory negligence *held* a question for the jury. *Hjelm v. Volz*..... 97

7. Whether a servant assumed the risk in going into a cylinder where he was killed *held* a question for the jury. *Hjelm v. Volz*..... 97

8. Evidence *held* to show that plaintiff at the time of his injury was engaged in construction or repair work of a railroad within the meaning of sec. 3, ch. 21, Comp. St. 1909. *Swoboda v. Union P. R. Co*..... 200

9. Railroad employee *held* not entitled to recover for injuries. *Sellers v. Chicago, B. & Q. R. Co*..... 322

10. A groundman of a telephone company advanced to the work

Master and Servant—*Concluded.*
of a lineman assumes all risks ordinarily incident to his new duties. *Olson v. Nebraska Telephone Co*..... 593
11. Where a servant undertakes new work involving unusual and unknown hazards, the master should exercise reasonable care to warn him of such dangers. *Olson v. Nebraska Telephone Co*..... 593
12. The burden is not upon the master to prove the servant was injured in consequence of a danger ordinarily incident to his employment. *Olson v. Nebraska Telephone Co*.... 593
13. Whether the violation of a city ordinance by a master is such proof of negligence as will support an action by a servant for injuries *held* a question for the jury. *Olson v. Nebraska Telephone Co*..... 593
14. A certain charge *held* proper in an action for injuries to a servant. *Olson v. Nebraska Telephone Co*..... 593

Mechanics' Liens.
1. Where a building contractor distributes portions of his contract to subcontractors, no contractual relation arises thereby beween the owner of the building and the subcontractor. *Campbell v. Kimball*..... 309
2. Where a contractor fails to pay subcontractors, the contractor, and not the owner, is liable for the amount due the subcontractors, and, also, for mechanics' lien fees paid by the subcontractors. *Campbell v. Kimball*..... 309
3. In an action by a contractor and subcontractors to enforce mechanics' liens, the subcontractors' mechanics' lien fees should be deducted from the sum due to the principal contractor. *Campbell v. Kimball*..... 309
4. The amount due from the owner to a contractor should draw interest at the legal rate, in the absence of a contract fixing a different rate. *Campbell v. Kimball*..... 309

Mortgages.
1. Summons in suit to foreclose mortgage on devised land pending probate of the will *held* to confer jurisdiction. *Shackley v. Homer*..... 146
2. On foreclosure of mortgage on land devised, confirmation of sale and sheriff's deed *held* to bar equity of redemption. *Shackley v. Homer*..... 146
3. Where the owner of a life estate attempted to convey title in fee, and took back a purchase money mortgage, *held* that the mortgagor and his grantees could not defeat the mortgage on the ground that the estate conveyed was only a life estate. *Nielsen v. Central Nebraska Land & Investment Co*..... 518

Mortgages—*Concluded.*

4. Remaindermen who recognized the validity of a deed by the life tenant purporting to convey the fee *held* entitled to foreclose a purchase money mortgage given to the life tenant, which they inherited. *Nielsen v. Central Nebraska Land & Investment Co*..... 518
5. It is the duty of the owner of land to pay the taxes, and he cannot defeat a prior mortgage by purchasing the property at a tax foreclosure sale. *Nielsen v. Central Nebraska Land & Investment Co*..... 518
6. A decree of foreclosure will not be reversed for want of direct proof to sustain the allegation that no proceedings at law have been had for the recovery of the debt, where defendant has not been prejudiced. *Nielsen v. Central Nebraska Land & Investment Co*..... 518
7. To vary a deed by parol testimony so as to make it a mortgage, the evidence must be clear and convincing. *O'Hanlon v. Barry*..... 522
8. A mortgagor who has conveyed the mortgaged property and is not in possession is not a necessary party to foreclosure. *Munger v. Beard & Bro*..... 527
9. The holder of a junior judgment lien who appears in a foreclosure suit, but does not assert his lien, is concluded by the decree. *Munger v. Beard & Bro*..... 527

Municipal Corporations. See EVIDENCE, 14. PLEADING, 14.

1. Sec. 80, art. I, ch. 14, Comp. St. 1909, requiring claims to be presented to the city council for allowance before suit, applies alone to those arising on contract. *Bayard v. City of Franklin* 57
2. Sec. 80, art. I, ch. 14, Comp. St. 1909, relating to presentation of claims to city councils, was not modified or repealed by chs. 15, 16, laws 1885. *Bayard v. City of Franklin*..... 57
3. Failure to present her claim to the city council *held* not to justify taxation of costs against plaintiff who recovered judgment against the city in a personal injury action. *Bayard v. City of Franklin*..... 57
4. A village is required to employ only reasonable diligence to keep its streets in a reasonably safe condition. *Walters v. Village of Exeter*..... 125
5. A city *held* not chargeable with negligence in not repairing defective walks, without notice for a sufficient time to make repairs, unless the defect had existed so long as to imply notice. *Wood v. City of Omaha*..... 213
6. In an action against a city for death from a defective sidewalk, instruction as to measure of damages *held* not prejudicial. *Wood v. City of Omaha*..... 213

Municipal Corporations—*Continued.*

7. In an action against a city for death from a defective sidewalk, certain instructions *held* proper. *Wood v. City of Omaha* 213
8. In an action against a city for death from a defective sidewalk, *held* not necessary to prove notice to the city of the condition of the sidewalk at the particular point where the accident occurred. *Wood v. City of Omaha*..... 213
9. In an action against a city for death from a defective sidewalk, certain evidence *held* admissible. *Wood v. City of Omaha* 213
10. Sec. 207, ch. 12*a*, Comp. St. 1907, requiring written notice of defective sidewalks to be filed with the city clerk five days before an injury, *held* not to apply to defects caused by the city's negligence. *Updike v. City of Omaha*..... 228
11. Under art. I, ch. 14, Comp. St. 1909, cities of the second class having no authority to elect councilmen at large, a canvassing board will not be required by mandamus to canvass the returns of an election of such officers. *State v. Neff*..... 615
12. Where a city fails to collect a special sidewalk assessment, it is liable for the contract price of the improvement. *Ward v. City of Lincoln*..... 661
13. Resolution of submission and notice of proposition for issuance of bonds under secs. 8994, 8995, Ann. St. 1909, *held* not dual, nor in the alternative. *Hurd v. City of Fairbury*, 745
14. Resolution of submission of bond proposition and notice of election *held* to sufficiently designate the polling places. *Hurd v. City of Fairbury*..... 745
15. In a suit to enjoin the sale of bonds on the ground that the submission and notice of election were void as submitting a dual and alternative question, *held* that the submission and notice were a sufficient compliance with sec. 8927, Ann. St. 1909. *Hurd v. City of Fairbury*..... 745
16. In cities of the second class, a submission of a proposition to issue bonds to provide light and water for use of the city may be made by resolution as well as by ordinance. *Hurd v. City of Fairbury*..... 745
17. An ordinance of a city of the second class regulating speed of motor vehicles in streets is not void as in conflict with a legislative act, unless the limitation of speed is such as to prohibit the free use of streets by such vehicles. *Christensen v. Tate*..... 848
18. In an action for personal injuries caused by the frightening of plaintiff's horse by an automobile, evidence *held*

Municipal Corporations—*Concluded.*
sufficient to support verdict for plaintiff. *Christensen v. Tate* 848

Names.
1. An admission in an answer in ejectment, in the absence of evidence to rebut it, *held* to raise a presumption of identity of name. *Bresee v. Parsons*..... 327
2. Identity of name is *prima facie* evidence of identity of person. *Bresee v. Parsons*..... 327
3. "Adolph" and "Adolf" are *idem sonans*, when used in both forms as the Christian name of the complaining witness in an information for robbery. *Bunge v. State*..... 557

Negligence. See APPEAL AND ERROR, 28. CARRIERS, 12, 13. MASTER AND SERVANT, 6, 13. MUNICIPAL CORPORATIONS, 5. PLEADING, 12. RAILROADS, 1-3. TRIAL, 16, 18.
Where different minds may reasonably draw different conclusions from the evidence, issues as to negligence and contributory negligence are for the jury. *Kafka v. Union Stock Yards Co*..... 331

New Trial. See APPEAL AND ERROR, 29, 35, 38. CRIMINAL LAW, 13. HOLIDAYS.
1. Upon a general demurrer to a petition for a new trial for newly discovered evidence, it will be presumed that the facts found on the former trial will be found the same on a new trial, unless the petition shows that additional evidence can be produced. *City Savings Bank v. Carlon*.. 266
2. Courts will not grant a new trial for newly discovered evidence unless it appears probable that a different result may be reached. *City Savings Bank v. Carlon*..... 266
3. Evidence that the prevailing party testified falsely *held* ground for new trial. *City Savings Bank v. Carlon*..... 266
4. Petition for new trial *held* to show due diligence. *City Savings Bank v. Carlon*..... 266
5. A motion for judgment on special findings notwithstanding the general verdict, and one for a new trial, may be filed at the same time, and decision of the former motion is not a waiver of the latter. *Kafka v. Union Stock Yards Co*... 331
6. Motion for new trial for newly discovered evidence *held* properly overruled where the evidence failed to show due diligence. *Christensen v. Tate*..... 848

Occupying Claimants. See EJECTMENT.

Parties. See DESCENT AND DISTRIBUTION, 2. EMINENT DOMAIN. MORTGAGES, 8.
Under sec. 46 of the code, where a controversy cannot be

Parties—*Concluded.*
determined without the presence of new parties, the court should order them brought in. *Phœnix Mutual Life Ins. Co. v. City of Lincoln*..... 626

Payment. See ACCORD AND SATISFACTION.
1. A general allegation of payment, if not attacked by motion before trial, permits evidence of payment. *Crilly v. Ruyle* 367
2. Where payment is the sole affirmative defense, evidence of accord and satisfaction should not be received over objection. *Crilly v. Ruyle*..... 367

Pleading. See BILLS AND NOTES, 2. DRAINS, 1. ESTOPPEL, 2. JUDGMENT, 4. LIBEL AND SLANDER, 4. PAYMENT. SALES, 2.
1. In an action for fraud of broker, petition *held* to state a cause of action. *Latson v. Buck*..... 16
2. Where the sufficiency of an answer to support a counterclaim is not questioned until after judgment, all reasonable intendments should be indulged in support of the pleading. *Sheridan Coal Co. v. Hull Co*..... 117
3. A general demurrer to a petition admits the truth of all allegations well pleaded therein. *Hallstead v. Perrigo*.... 129
4. Petition for services as broker *held* not demurrable. *Hallstead v. Perrigo*..... 129
5. The merits of a general demurrer to a petition must be determined from the allegations of the petition alone. *City Savings Bank v. Carlon*..... 266
6. Amended petition *held* to state a new cause of action. *Melvin v. Hagadorn*..... 398
7. Averments which are well pleaded are admitted to be true on demurrer. *City of Crawford v. Darrow*..... 494
8. In an action to recover for services in compounding medicine by a secret formula, a motion to make the petition more certain by setting forth the ingredients of the formula *held* properly overruled. *Cornell v. Haight*..... 508
9. Where objection that petition does not state cause of action is not interposed until after commencement of trial, the petition will be liberally construed. *Welch v. Adams*.. 681
10. Statement in an answer that defendant is not indebted to plaintiff raises no issue. *Welch v. Adams*..... 681
11. In testing the sufficiency of a petition, mere conclusions of law should be disregarded. *Kruse v. Johnson*..... 694
12. A general allegation of negligence is sufficient, if not assailed by motion. *Burnham v. Chicago, B. & Q. R. Co*... 696
13. Appellant *held* to have waived exception to order striking

Pleading—*Concluded.*

from answer matter pleaded as an estoppel by going to trial on an amended answer which omitted all reference to the estoppel. *Whelan v. City of Plattsmouth*..... 824

14. Where a city council disallows a claim for damages, and claimant appeals to the district court and files a transcript showing that the claim was disallowed, it is unnecessary to plead it. *Whelan v. City of Plattsmouth*..... 824

Principal and Agent. See EVIDENCE, 3. SALES, 4. TRIAL, 19.

1. Where a principal, who has given an agent authority to sell land, himself sells it before the agent procures a purchaser, the agent's authority is revoked. *Hallstead v. Perrigo* 128
2. A power not coupled with an interest may be revoked before performance. *Hallstead v. Perrigo*..... 128
3. Where an agent has rendered services and incurred expense before his authority was canceled, the principal will be liable. *Hallstead v. Perrigo*..... 128

Principal and Surety. See APPEAL AND ERROR, 54.

Process.

The mere sale of a coupon ticket *held* not to constitute a railroad company or its agent the managing agents of a connecting line without the state, upon whom service of summons might be made. *Ritchie v. Illinois C. R. Co*..... 631

Quieting Title. See REMAINDERS, 1. VENDOR AND PURCHASER, 7.

1. State courts will not pass on the question of ownership between rival homestead claimants until the government has issued a patent to one of the claimants. *Rupke v. Moran* 316
2. The district court may grant a restraining order to one who holds the receiver's final receipt to a homestead where necessary to protect his homestead rights. *Rupke v. Moran*, 316

Railroads. See MASTER AND SERVANT, 2, 3. PROCESS. TRIAL, 25.

1. A railroad company is not negligent for failing to fence its station grounds in a village, where it is not required by statute to do so. *Cox v. Chicago & N. W. R. Co*..... 136
2. Running a train at twelve miles an hour through an unincorporated village, where fencing of track was not required, *held* not of itself negligence. *Cox v. Chicago & N. W. R. Co.*, 136
3. The mere killing of animals on a railroad track on station grounds, where fencing was not required, *held* not to show negligence. *Cox v. Chicago & N. W. R. Co*..... 136
4. A railroad company operating a train on a city street must take precautions not necessary when operating trains on its own right of way. *Kafka v. Union Stock Yards Co*... 331

Railroads—*Concluded.*

5. In an action for damages clearly shown to have been caused by fire from an engine, the burden is on defendant to show that the engine was properly constructed, equipped, and operated. *Westing v. Chicago, B. & Q. R. Co*..... 655

Receivers.

A receiver is not an agent in the sense that each of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts. *City Savings Bank v. Carlon*..... 266

Reformation of Instruments. See DEEDS. EVIDENCE, 12, 13. JUDGMENT, 5.

Remainders.

1. Where a widow under a void decree claims title in fee to a homestead, an infant heir ordinarily may sue to quiet title under secs, 57-59, ch. 73, Comp. St. 1909, at any time within ten years after attaining his majority. *Draper v. Clayton*.. 443
2. Limitation of an action by a remainderman to recover possession of the estate does not begin to run until death of the life tenant. *McFarland v. Flack*..... 452
3. The right to sue for possession of land in the possession of a life tenant does not accrue to a remainderman until the termination of the life estate. *Helming v. Forrester*..... 438

Replevin. See CROPS. JUDGMENT, 1.

1. In replevin, where plaintiff has obtained possession of property and fails to prosecute his action, the defendant is entitled to a trial of his right of property or possession to establish his damages under sec. 190 of the code. *Pennington County Bank v. Bauman*..... 25
2. In executing a writ of replevin a sheriff is not authorized to seize the property in the hands of a stranger claiming to be the owner, but not protected by the replevin bond. *Singer Sewing Machine Co. v. Robertson*..... 542
3. Under sec. 186 of the code, a defendant in replevin may be held liable for the value of the property, if transferred by him in bad faith, though it was not in his possession or under his control when he was sued, nor taken under the writ. *Singer Sewing Machine Co. v. Robertson*..... 542

Robbery. See CRIMINAL LAW, 3. NAMES, 3.

1. Under an information charging robbery, accused may be convicted of larceny from the person. *Bunge v. State*..... 557
2. In a prosecution for robbery, where the jury are permitted to find accused guilty of larceny from the person after instructing them that the charge of robbery is not sustained

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by the evidence, instructions on the law of robbery should not be given. *Bunge v. State*..... 557

3. In a prosecution for robbery, *held* not error to refuse to submit issues as to simple assault and petit larceny, where the evidence failed to show that either of those offenses was committed. *Bunge v. State*..... 557

Sales.

1. Answer to offer for sale of coal, followed by delivery of major part of it, *held* an acceptance of the proposition. *Sheridan Coal Co. v. Hull Co*..... 117
2. In an action for the price of goods, defendant *held* entitled to counterclaim for certain damages. *Hoosier Mfg. Co. v. Swenson* 182
3. Where parties agree that weights of the seller shall be accepted by the buyer, the latter is concluded by such weights in the absence of fraud or mistake. *Crilly v. Ruyle* 367
4. Where an agent accepts stock with knowledge that they had been fed alfalfa, the purchaser cannot repudiate the seller's weights for violation of the agreement as to feed. *Crilly v. Ruyle* 367
5. Where parties disagree as to whether stock were to be fed between date of contract and delivery, and the purchaser accepts the stock, he cannot renounce the seller's weights unless he proves that the feeding worked to his prejudice. *Crilly v. Ruyle*..... 367
6. In an action to recover for sale of cattle, questions as to feeding, weights, and acceptance *held* for the jury. *Crilly v. Ruyle* 367
7. Where a vendor after a sale of corn to one resells it to another and executes a bill of sale for one-half to each, the first purchaser by accepting the bill of sale and waiving his right to one-half of the grain does not renounce his title to the other half. *Seldomridge v. Farmers & Merchants Bank* 531
8. Where a specified quantity of grain identical in kind is sold from a mass, a separation is not necessary to vest title where the intent of the parties that title shall pass is clearly manifested. *Seldomridge v. Farmers & Merchants Bank* 531
9. Whether title to personalty sold, but not actually delivered, passes to the purchaser depends upon the intent of the parties, which is a question of fact, a finding upon which will not be set aside, unless against the clear weight of evidence. *Seldomridge v. Farmers & Merchants Bank*.... 531

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10. An order by a purchaser to his banker not to pay a check drawn in payment for grain sold to him will not of itself work a rescission of the contract of sale. *Seldomridge v. Farmers & Merchants Bank*..... 531

Schools and School Districts. See APPEAL AND ERROR, 39. MANDAMUS, 1.

1. A rule adopted by the board of education of South Omaha *held* a reasonable exercise of the power delegated to the board by sec. 8415 *et seq.*, Ann. St. 1909. *State v. Melcher*, 359
2. Sec. 8430, Ann. St. 1909, *held* not to disable a board of education from employing counsel at the district's expense in addition to its regular attorney. *State v. Melcher*..... 359

Specific Performance. See STATUTE OF FRAUDS, 3.

1. In a suit against a widow and heirs for specific performance of a contract for the purchase of land, the title to which was taken by the ancestor as security for the purchase money loaned, evidence *held* to sustain decree for plaintiff. *Olson v. Hanika*..... 49
2. Where on sale of land the purchaser agrees to lease the buildings to the vendor, and by mistake the lease is not executed, equity will enforce the lease. *Jacoby v. Viele*.... 258

Statute of Frauds.

1. While an oral contract for the sale of land by a broker is void under sec. 74, ch. 73, Comp. St. 1909, yet if fully executed, and either party is defrauded, he has the same right of action as if the contract had been valid. *Latson v. Buck* 16
2. A contract between a landowner and a broker for the sale of land, limited as to time, may be extended by parol. *Hetzel v. Lyon*..... 261
3. The effect of sec. 6 of the statute of frauds (Comp. St. 1909, ch. 32) *held* to be to continue the practice by which courts of equity compelled specific performance of parol contract to convey land to prevent fraud where there had been part performance. *Cobb v. Macfarland*..... 408
4. Payment of the consideration, possession and making permanent improvements without any agreement as to the possession, *held* such part performance of a contract to convey land as to take it out of the statute of frauds. *Cobb v. Macfarland*..... 408

Statutes. See CRIMINAL LAW, 2. MUNICIPAL CORPORATION, 1, 2, 10.

1. The railway commission act (laws 1907, ch. 90), anti-pass act (laws 1907, ch. 93), and two-cent fare act (laws 1907, ch. 92) *held* to follow the mandate in sec. 7, art. XI of

Statutes—*Concluded.*

the constitution, and to be *in pari materia*, requiring them to be construed together. *State v. Union P. R. Co.*..... 29

2. Where provisions of a statute are incorporated by reference in a later act, they become a part thereof, though the first statute is repealed by the later statute. *State v. Junkin*... 801

3. The provisions of sec. 5776, Ann. St. 1903 (laws 1897, ch. 31, sec. 13), incorporated in ch. 52, laws 1907, *held* still in force as a rule of procedure, though the section was repealed by chapter 52. *State v. Junkin*..... 801

Taxation. See LICENSES. MORTGAGES, 5.

Trial. See APPEAL AND ERROR. CARRIERS, 13. CRIMINAL LAW. LIBEL AND SLANDER, 3. MASTER AND SERVANT, 3, 6, 7, 13, 14. MUNICIPAL CORPORATIONS, 6, 7. SALES, 6.

1. While it is erroneous to recite in an instruction certain disputed facts, omitting others bearing on the same point, such a recital of undisputed facts *held* not prejudicial. *Pilkins v. Hans*..... 7

2. On appeal, instructions will be considered together. *Sheridan Coal Co. v. Hull Co.*..... 117
Christensen v. Tate..... 848

3. A litigant cannot complain that an instruction is not clearly stated, where he did not request a proper instruction. *Sheridan Coal Co. v. Hull Co*..... 117

4. If instructions are not sufficiently specific, it is the duty of counsel to offer requests for instructions to supply the omission. *Christensen v. Tate*..... 848

5. Instructions covered by those given by the court *held* properly refused. *Quimby v. Bee Building Co*..... 193

6. It is proper for the court to further instruct the jury after submission of the issues, when necessary to enable them to correctly understand an issue submitted. *First Nat. Bank v. Hedgecock*..... 220

7. Refusal to direct verdict for defendant for want of evidence, *held* error. *Sellers v. Chicago, B. & Q. R. Co*..... 322

8. Where the court has fully instructed upon all issues and the law of the case, it is not error to refuse additional instructions. *Otto v. Chicago, B. & Q. R. Co*..... 503

9. The court should refuse to instruct on matters not in issue and on which he has refused to receive evidence. *Cornell v. Haight*..... 508

10. Where the court has submitted all questions in issue, it is not error to refuse additional instructions. *Cornell v. Haight* 508

Trial—*Continued.*

11. Instructions should be construed together, and if, taken as a whole, they do not prejudice appellant they will be held sufficient. *Smith v. Lorang* 537
12. An erroneous instruction *held* not prejudicial when considered with the whole charge. *Olson v. Nebraska Telephone Co.* 593
13. Where plaintiff had shown the amount of his damages, his omission while testifying to state the amount *held* not to require the court to comment unfavorably upon that fact. *Westing v. Chicago, B. & Q. R. Co* 655
14. The trial court is not required to submit a case to the jury unless the evidence supporting it would warrant a verdict. *Iowa Hog & Cattle Powder Co. v. Ford* 708
15. Where instructions by the court include in substance instructions refused, the correctness of those refused will not be investigated. *Blair v. Kingman Implement Co.* 736
16. Instructions *held* not erroneous as assuming that defendant was negligent. *Christensen v. Tate* 848
17. Questions of fact on conflicting evidence are for the jury. *Sheridan Coal Co. v. Hull Co* 117
18. Where different minds may reasonably draw diverse inferences from the same facts as to whether they establish negligence or contributory negligence, they are questions for the jury. *Walters v. Village of Exeter* 125
19. Where one's authority to represent another becomes material and the evidence is conflicting, the issue should be submitted to the jury. *Crilly v. Ruyle* 367
20. Unless an offer of proof shows that the question asked calls for competent evidence, it is not error to overrule it. *Havlik v. St. Paul Fire & Marine Ins. Co* 427
21. An offer of proof is required to show that the question put to the witness calls for competent evidence. *Havlik v. St. Paul Fire & Marine Ins. Co* 427
22. Mutilated pleadings should not be submitted to the jury, but their submission is not ground for reversal unless the complaining party has been prejudiced thereby. *Havlik v. St. Paul Fire & Marine Ins. Co* 427
23. Verdict against two defendants *held* not uncertain by adding thereto "to be assessed equally against each" of the defendants, but a joint verdict. *Olson v. Nebraska Telephone Co* 593
24. A correction of a verdict on the court's suggestion by striking out an apportionment of damages between two defendants, *held* not error. *Olson v. Nebraska Telephone Co* 593

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25. Whether an engineer could have stopped his train in time to avoid killing a horse *held* a question for the jury. *Burnham v. Chicago, B. & Q. R. Co.*..... 696

26. It will be presumed that the discretion of the court in not allowing the jury to view premises was properly exercised, where its abuse is not clearly shown. *Reams v. Clopine*... 673

27. Refusal to permit jury to view premises is not reversible error in absence of an abuse of discretion. *Whelan v. City of Plattsmouth*..... 824

Trusts. See DESCENT AND DISTRIBUTION, 2.

1. Where a husband takes title to his wife's land, a trust arises in favor of the wife as against the husband's creditors, unless they gave him credit on the faith of his being the owner. *Johnson County v. Taylor*..... 487

2. Suit to declare a trust in property and to require devisees and legatees to convey it to plaintiff is premature if brought before probate of will. *Brown v. Webster*..... 788

Vendor and Purchaser. See STATUTE OF FRAUDS, 4.

1. In an action for failure of title, the purchaser's measure of damages and the vendor's right of set-off stated. *Beetem v. Follmer*..... 514

2. Evidence *held* to show defendant chargeable with constructive notice of plaintiff's rights in a lot. *Dundee Realty Co. v. Leavitt*..... 711

3. Purchaser *held* not an innocent purchaser, unless he bought without notice, actual or constructive, of the rights of prior purchaser under unrecorded deed. *Dundee Realty Co. v. Leavitt* 711
McParland v. Peters..... 829

4. The burden of proof is on one alleging purchase without notice of prior, unrecorded deed. *Dundee Realty Co. v. Leavitt* 711
McParland v. Peters..... 829

5. One purchasing land burdened with a visible easement is ordinarily chargeable with notice thereof. *Seng v. Payne*.. 812

6. The sufficiency of evidence to show that a purchaser of land had notice of a prior, unrecorded deed depends upon the circumstances of each case. *McParland v. Peters*..... 829

7. In a suit to quiet title to land, evidence *held* not to show plaintiff a purchaser without notice of defendant's right under a prior, unrecorded deed. *McParland v. Peters*..... 829

Venue.

An action to recover money cannot be brought in a county

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against a nonresident before he enters the county, where he has no property or debts owing to him in the county. *Lamb v. Finch*..... 565

Waters. See HIGHWAYS, 1. MANDAMUS, 4.
1. In an action for breach of contract to supply water for irrigating practically unproductive land, plaintiff *held* entitled to recover only the difference between its rental value with water and without water, and not the value of what it might have produced. *Wade v. Belmont Irrigating Canal & Water Power Co*..... 732
2. An irrigation company *held* a mutual irrigation company as defined by sec. 6845, Ann. St. 1909. *Swanger v. Porter*.. 764
3. A stockholder in a mutual irrigation company who refused to pay his share of the maintenance fund, *held* not entitled to receive water. *Swanger v. Porter*..... 764
4. Injunction to restrain owners of milldam from increasing its height and overflowing plaintiff's land will be denied, where it is doubtful whether the height of the dam was the cause of the injury. *Stuefer v. West Point Milling Co*..... 773
5. Evidence *held* insufficient to show that overflow of plaintiff's land was caused by increase in height of defendant's dam. *Stuefer v. West Point Milling Co*..... 773

Wills. See ARBITRATION AND AWARD, 5, 6. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS, 1. TRUSTS, 2.
1. A will *held* to create a vested estate in fee, subject to defeasance in the event of the devisee's death before attaining the age of 25. *Shackley v. Homer*..... 146
2. A provision in a will that a mortgage on certain land shall be paid out of the estate is not inconsistent with a former contract by the testator to convey the land to another. *Cobb v. Macfarland*..... 408
3. To constitute an election between a devise and a right inconsistent therewith, there must be an intention to make an election or some decisive act that will prevent restoring the parties to the same situation as if such act had not been performed. *Cobb v. Macfarland*..... 408
4. What will constitute an election between a devise and a right inconsistent therewith stated. *Cobb v. Macfarland*... 408
5. That a subsequent will was made without proof of its actual contents is not sufficient to show revocation of a former will. *Williams v. Miles*..... 455
6. Evidence *held* insufficient to show execution or contents of an alleged will. *Williams v. Miles*..... 455

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7. Proof of the execution and contents of a lost will should be clear and convincing. *Williams v. Miles*..... 455
8. If husband and wife join in an instrument in form of a joint will, which desposes only of property of which the husband is the sole owner, it will be sustained as the will of the husband. *In re Estate of Hansen*..... 567
9. Where it is doubtful as to whether a fee or a life estate to testator's wife was intended, the fact that the property was a homestead and the law would give her a life estate therein will be considered in determining the meaning of the will. *In re Estate of Hansen*..... 567
10. The district court has not jurisdiction in an original action to determine whether an instrument proposed for probate is the last will of decedent. *Brown v. Webster*..... 788

Witnesses. See CRIMINAL LAW, 6, 11.

1. Where a witness is called to contradict testimony of a former witness, it is within the court's discretion to permit leading questions. *Sheridan Coal Co. v. Hull Co*..... 117
2. Plaintiff on cross-examination should not be required to give evidence as to matters not alleged in his petition or put in issue by the pleadings. *Cornell v. Haight*..... 508
3. In applying the statutory rule (code, sec. 329) as to competency of witnesses when the adverse party is the representative of a decedent, the real nature of the transaction should be considered. *Clark v. Fleischmann*..... 609
4. Exceptions to the statutory rule (code, sec. 328), that every human being of sufficient capacity to understand the obligation of an oath is a competent witness, should not be extended by construction beyond the import of the language used by the legislature. *Clark v. Fleischmann*..... 609
5. A surviving partner *held* not incompetent as a witness, under sec. 329 of the code, in a suit by decedent's devisee to recover land from one claiming title through the partnership. *Clark v. Fleischmann*..... 609
6. Where, at the time a statement is made, a witness makes a memorandum thereof and testifies that it is correct, he may testify therefrom, though he has no independent recollection of the statement. *Welch v. Adams*..... 681
7. Rights of a party as a witness, who is sought to be impeached on cross-examination, are the same as those of other witnesses. *Blair v. Kingman Implement Co*..... 736