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JAMES H. HART ET AL., APPELLEES, V. VILLAGE OF AINSWORTH, APPELLANT.

FILED MAY 23, 1911. No. 16,473.

Municipal Corporations: PLATTED LAND: VACATION OF PLAT: STREETS: REVERSION. When the recorded plat of an addition to a village, or some definite part thereof, has been duly vacated by a written instrument declaring the same to be vacated, duly executed, and recorded as the statute provides, and none of the streets laid out or described in such plat is a public highway laid out according to law, and no rights or privileges of other proprietors in said plat are abridged or destroyed, such vacation of the plat divests all public rights in the streets shown therein, and such vacated streets are the property of the proprietors of the adjoining lots.

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

William M. Ely, for appellant.

A. W. Scattergood, contra.

SEDGWICK, J.

The plaintiffs brought this action in the district court for Brown county to quiet their title to certain lands in the defendant village. There was a general demurrer to the petition, which was overruled, and, the defendant refusing to plead further, a decree was entered for the plaintiffs. The defendant has appealed.

The petition alleges that in 1884 one Nannie J. Osborne, who was unmarried, "made, executed, acknowledged and recorded her certain town plat whereby she laid out and platted a portion of land (describing it) into an addition to the village of Ainsworth, to be called and known as 'Osborne's Third addition' to said village," and that these plaintiffs were the owners of all the lots in certain blocks of said plat on the 18th day of November, 1908, and on that day duly vacated the same. The petition also alleges the vacation as the statute provides may be done, and that

the plaintiffs have been in the exclusive possession of the said lands, including the streets, for more than ten years prior to the commencement of the action, and that during that time none of the streets in question have ever been traveled or worked in any manner by the village, but have been occupied by the plaintiffs for agricultural purposes, and the defendants now claim to own the said streets, and have destroyed the plaintiffs' fence around the lands described and threaten to destroy it as often as it shall be built. No question is made as to the form of the action, and there is no controversy between the parties, except as to the ownership of the streets shown upon a platted addition to a village, which plat has been duly vacated by all of the lot owners.

It is contended by the defendant that, when the plat of an addition to a village is made and recorded, the village becomes the absolute owner of the streets shown upon the plat, and, if a plat is duly vacated under the provision of the statute, the village is the owner of the streets. Section 106, art. I, ch. 14, Comp. St. 1909, provides: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes." The following sections provide for vacating plats: Section 108. "Any such plat may be vacated by the proprietors thereof at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged, or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat. And in cases where any lots have been sold, the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid." Section 109.

"Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter; provided, such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat; and provided, further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law." Section 110. "When any part of a plat shall be vacated as aforesaid, the proprietors of the lots so vacated may inclose the streets, alleys, and public grounds adjoining said lots in equal proportion." The provisions of these sections seem to be plain. When any lots have been sold, the owners of the lots, if they all join, may vacate the plat in the same way that the original proprietor might have done, and the execution and recording of the writing vacating the plat by the proprietors "shall operate to destroy the force and effect of the recording of the plat so vacated, *and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat.*" Any part of a plat may be vacated in the same way by all of the owners of the lots, and the only restriction on so doing is that such vacation will not abridge or destroy any of the rights or privileges of any other proprietors in said plat, and must not close or obstruct "any public highway laid out according to law." It is further provided that after the plat has been so vacated the proprietors of the lots "may inclose the streets, alleys, and public grounds adjoining said lots in equal proportion." These provisions of the statute are clear and certain, and provide that when the plat is properly vacated the streets and alleys belong to the lot owners, except public highways laid out according to law.

As we have already seen, the petition plainly alleges that none of these streets are public highways or have been laid out or used as such. There would therefore be no apparent difficulty in the case, if it were not for the decision of this court in *Krueger v. Jenkins*, 59 Neb. 641, which is quoted and approved in *City of Wahoo v. Netha-*

way, 73 Neb. 54, and another provision of the statute in regard to streets in cities and villages which is cited in those opinions. Section 77, art. I, ch. 14, Comp. St. 1899, provides: "The city shall have power by ordinance to sell and convey all public squares, streets, and alleys within the cities or villages," with a proviso in regard to objections that may be made by parties who are interested. This statute is referred to in *Krueger v. Jenkins, supra,* and it is said in the opinion: "They own in fee simple the streets, alleys, and other public places within their corporate limits. See Comp. St. 1899, ch. 14, art. I, secs. 104, 106. They may maintain ejectment to recover possession of them, they may, speaking generally, vacate them either in whole or part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purposes." The action was by a landowner to enjoin the county commissioners from appropriating a certain piece of land for road purposes, and the question was whether the landowner could acquire a right to the land by adverse possession and occupancy for more than ten years. It was decided that she could so acquire the right to the land, and, to distinguish that case from former decisions in which it had been held that cities and villages were "subject to the operation of the statute of limitations," the court called attention to the difference in the statutes in regard to the rights of the public in streets in cities and villages and the statutes in regard to those rights in public roads outside of cities and villages. It was not necessary in that case to determine the force and effect of the various statutes in regard to the title to streets in cities and villages. It must also be considered that the statute in the case referred to relates to streets as such; that is, as public highways in the city or village, and not to such as are only nominal streets designated in the plats but never used as public highways. The sections of the statutes quoted in this opinion are continued by the same designation in the Compiled Statutes of 1909. Cities

and villages may lay out and open new streets, and for that purpose may purchase lands. They also may vacate streets and alleys. When they have purchased lands for such purpose or streets have been duly opened and have become thoroughfares, the statute protects the title which the city or village has so acquired. The vacation of the plat shall not "authorize the closing or obstructing of any public highway laid out according to law." Questions might arise upon these statutes as to ownership of vacated streets that are not presented by this record. In this case it does not appear whether the lands platted were within, or ever became a part of, the village. It does appear that none of the streets designated upon the plat had ever been accepted by the village, or used as a street. In such case the plat may be vacated, all owners of the lots joining, and such vacation operates "to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets," and the proprietors of the lots "may inclose the streets * * * adjoining said lots in equal proportion." If there were streets in this vacated plat that had been opened as such and were in use by the general public, it might be necessary to consider the apparent conflict in these statutes and to determine the rights of the public in such thoroughfares. No such condition, however, is presented in this case.

We think, therefore, that the petition states a cause of action, and that the judgment is correct. It is therefore

AFFIRMED.

NEWTON D. HEILMAN ET AL., APPELLEES, V. SAMUEL REITZ ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,400.

1. Wills: CONSTRUCTION. In construing the provisions of a will, the following rules must be adhered to: First, if the will is ambiguous, the law favors the heir in preference to one not related to the testator by blood; second, heirs will not be disinherited by

conjecture, but only by express words or necessary implication; third, actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor.

2. ———: ———. The will of the testator gave to his widow two-fifths of the net income of his estate during her life. It directed that after her death the property of the estate be sold by trustees and the proceeds divided among his three heirs and four church corporations, each taking one-seventh. This was all that was bequeathed to them by the will. Under this bequest they were entitled to nothing more. The three-fifths of the net income of the estate was not mentioned in the will nor bequeathed to any person or corporation. *Held*, That it descended to the widow and heirs under the statute as intestate property, each taking one-fourth thereof.

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

Field, Ricketts & Ricketts, for appellants.

Tibbets & Anderson, Clark & Allen and *George W. Berge, contra.*

REESE, C. J.

Jonathan Reitz, a resident of Lancaster county, died April 12, 1906, leaving as his widow the defendant Catherine L. Reitz, and as his children and heirs at law the defendants Samuel Reitz, David Reitz and Jonathan Reitz. He was the owner of an estate of the value of about $20,000, which consisted of a farm of 320 acres of land, in Lancaster county, and his homestead of much less than $2,000 in value, in the village of Waverly, in said county, and some personal property. On the 28th day of November, 1905, he executed his last will and testament, which after his decease was duly admitted to probate by the county court of Lancaster county. The will, with the exception of the formal parts, is as follows:

"First. I direct that as soon after my decease as practicable my executors shall pay off and discharge all of my indebtedness including my funeral expenses.

"Second. I give, bequeath and devise to my wife, Catherine L. Reitz, the exclusive use of the property located in Waverly, Nebraska, which is now occupied by me and my family as a homestead, during the period of her natural life.

"Third. I furthermore give and bequeath to my wife, Catherine L. Reitz, two-fifths of the entire net income of all the remainder of the real estate of which I may die seized, during the period of her natural life, the same to be paid to her by my executors and trustees as hereinafter provided.

"Fourth. After the payment of all my debts and obligations and costs and expenses of administration of my estate from the proceeds of my personal property, I give and bequeath to my said wife all of my household furniture and one-fourth of the remainder of my personal property.

"Fifth. As soon after the death of my wife Catherine L. Reitz as practicable, I direct that my executors and trustees, hereafter named, make sale of all of my property both real and personal, not heretofore disposed of, and which may be at that time remaining, and convert the same into cash, and for the purpose of accomplishing the provisions herein made, I hereby authorize and empower my said executors and trustees to give good and sufficient warranty deeds conveying the said real estate to the purchasers thereof, and to convey all and every title and interest thereto which I would have a right to convey if I were living.

"Sixth. After my said estate shall be turned into cash as above set forth, I direct that the same shall be divided into seven equal parts, and to each of the following named parties and corporations I give, devise and bequeath one of each equal parts, to wit: to my son Samuel Reitz, one part, to my son David Reitz, one part, to my son Jonathan Reitz, one part, to the Board of Church Extension of the General Synod of the Evangelical Lutheran Church of the United States, one part, to the Trustees of the Midland College at Atchison, Kansas, one part, to the Board of Home Missions

of the General Synod of the Evangelical Lutheran Church of the United States, one part, and to the Board of Foreign Missions of the Evangelical Lutheran Church of the United States, one part, and I direct that my executors and trustees pay the said bequests as above provided.

"Seventh. For the purpose of carrying on the provisions of this will I hereby name and appoint Newton D. Heilman and Samuel E. Heilman, of Lancaster county, Nebraska, as my executors and trustees, and give them full power to act in all matters necessary for the carrying out of said provisions."

The persons nominated in the will as the executors qualified and were duly appointed as such, settled up the estate, made their final report, were discharged, and entered upon their duties as trustees. In the management of the estate quite a fund has accumulated, mostly from the rentals of the farm, and which is in the hands of the trustees, with the exception of the two-fifths thereof which has been paid to the widow. The remaining three-fifths is claimed by the heirs as a portion of the estate undisposed of by the will, while the religious corporations named in the will insist that the fund, with its increase, should remain in the hands of the trustees until the decease of the widow, Catherine L. Reitz, when it, with the proceeds of the sale of the land, should be divided among the legatees named in the sixth clause of the will. If no part of the fund belongs to the legatees, other than the heirs, the heirs are entitled to it as it accumulates, and are entitled to the immediate payment of what is now in the hands of the trustees. The trustees being in doubt as to their duties, and for the purpose of their protection and of obviating the necessity for future litigation, filed their petition in the district court, making all legatees and the widow parties to the suit, and asking for a construction of the will and instructions as to their duties. All defendants answered setting up their claims, and making their demands in accordance with their contentions. The cause was tried to the district court, when a decree was entered finding generally in favor of

plaintiffs and the legatees, other than the widow and heirs, and against them. It was found that the trustees should continue to hold the net income of the estate, less the widow's two-fifths, until the death of the widow, and upon the happening of that event the fund should be divided into 7 parts and distributed according to the terms of the will. A decree was entered in accordance with the findings. Samuel Reitz, David Reitz, Jonathan Reitz, and the widow, Catherine L. Reitz, appeal.

At the time of the trial, which was in April, 1909, the widow was said to be about 65 years of age, possibly a little older. At the time of the death of her husband, the testator, her age was probably about 62 years. Assuming that she was in the enjoyment of normal health, her life expectancy was about 13 years. It would not be contrary to nature for her to exceed that time by 5 to 10 years, or even longer. Three-fifths of the annual rental is about $900 a year. At the time of the death of the widow, assuming that she should die at the end of her expectancy of life, the fund in the hands of the trustees would be not far from $12,000, to say nothing of its increase from investment. If loaned out each year as it accumulated, at the highest obtainable rate of interest, upon good security, it would, of course, be much more. There is no direct provision in the will disposing of this fund, nor authority to the trustees to invest it or cause it to increase by the accumulation of interest. If the contention of the church corporation legatees is the correct one, the trustees might, so far as the provisions of the will direct, hold the money in their possession until the death of the widow and the subsequent sale of the real estate and the conversion of the price into cash. There is no direct requirement that the property be sold for cash, and it would be quite reasonable that time should be given for the payment of a part of the purchase price. There is no provision in the will requiring the trustees to give bond or other security for the faithful accounting of the fund by them, nor do we find any direct provision for the possession and renting of the

real estate by the trustees, except as might be inferred from the clause requiring them to pay the two-fifths of the net income thereof to the widow, and the general clause at the closing part giving the executors and trustees "full power to act in all matters necessary for the carrying out of said provisions," which we think must mean the provisions requiring the sale of the property of the estate and the division of the funds arising therefrom.

In considering the construction of wills, there are certain fundamental rules which should be adhered to: First. If the will is ambiguous, the law favors the heir in preference to one not related to the testator by blood. *Pendleton v. Larrabee,* 62 Conn. 393; *Downing v. Bain,* 24 Ga. 372; *Miller v. Hirsch,* 110 La. 259; *Vail v. Vail,* 10 Barb. (N. Y.) 69; *Mullarky v. Sullivan,* 136 N. Y. 227; *Bane v. Wick,* 19 Ohio, 328; *Davis v. Davis,* 62 Ohio St. 411; *Malone v. Dobbins,* 23 Pa. St. 296; *Biddle's Estate,* 28 Pa. St. 59. Second. Heirs will not be disinherited by conjecture, but only by express words or necessary implication. *Wilkins v. Allen,* 18 How. (U. S.) 385; *Wright v. Hicks,* 12 Ga. 155; *Young v. Quimby,* 98 Me. 167; *Leigh v. Savidge,* 14 N. J. Eq. 124; *Bane v. Wick, supra; Crane v. Doty,* 1 Ohio St. 279; *Bender v. Dietrick,* 7 Watts & Serg. (Pa.) 284. Third. That actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor. *Wright v. Hicks, supra; Haralson v. Redd,* 15 Ga. 148; *Bourke v. Boone,* 94 Md. 472; *Zimmerman v. Hafer,* 81 Md. 347; *Hurst v. Von De Veld,* 158 Mo. 239; *Schauber v. Jackson,* 2 Wend. (N. Y.) 13; *Hitchcock v. Hitchcock,* 35 Pa. St. 393; 30 Am. & Eng. Ency. Law (2d ed.) 668.

With these rules in mind, we proceed to consider the provisions of the will. Two-fifths of the entire net income of the real estate is bequeathed to the widow during her life. (We do not deem it necessary to notice other bequests to her.) This is the only reference to the income of the real estate, but it is apparent that the testator had that income in mind. By the fifth clause of the will the

executors are to "make sale" of all "property, both real and personal," remaining, and "convert the same into cash, and for the purpose of accomplishing the provisions" made in the will, and in order that this purpose might be carried out, he gave authority to convey the real estate. By this language it is not apparent that the testator was considering the income of the real estate as a part of that property. Indeed, it seems clear that he was not, as that fund would be already in "cash" and no conversion would be necessary. By the sixth clause it is provided that after the estate "shall be turned into cash as above set forth" (meaning as set forth in the fifth clause), "the same (that is the cash resulting from the sale of property) shall be divided into seven equal parts," and one-seventh part is to be given "to each of the following named parties and corporations." The "parties" named are the three sons, Samuel, David and Jonathan, and the corporations are the ecclesiastical corporations named. This disposes of the fund arising from the sale of the property, but nothing more. There is nothing in the will which by any possible construction or implication gives to the church corporations anything in excess of that named in the sixth paragraph, and we cannot extend its provisions. A consideration which appeals somewhat to the reason of the writer is the fact that the testator had three sons and no other lineal descendants. He gave to his wife two-fifths of the income of the real estate. This left of that fund three-fifths undisposed of. Without a knowledge of the law of descent of personal property as it existed at that time, it would seem reasonable that he may have supposed that the three sons would receive each one-fifth, which would dispose of the whole fund, and therefore did not bequeath it to the church corporations. Whether the failure to make a complete disposition of that fund was an oversight of the testator, or of the scrivener who wrote the will, it is not necessary to inquire, as it seems clear that the three-fifths were not bequeathed to any one, and hence became intestate and descended to the testator's

heirs. By the law in force at the time of the death of the testator the widow of a decedent took the same interest in intestate property as a child of the intestate. The fund under consideration not having been disposed of by the will, and there being three children, she, with each, took one-fourth of the three-fifths of the net fund, and to which they are entitled as soon as the amount is collected and the shares can be ascertained, but subject to the payment of taxes on the land, making repairs thereon, and the necessary expense of administration.

Other questions, growing out of the application of the income fund, as to the payment of taxes and making repairs upon the homestead property, are presented, but as that net fund belongs to the widow and heirs, she to have two-fifths of the whole and one-fourth of the remaining three-fifths, it is thought no other questions need be discussed or decided. The parties have presented very able and exhaustive briefs upon the law of the construction of wills, citing many cases, but in our view of the case it is not deemed necessary to follow them, for the reasons herein stated. It is not the belief of the writer that there is any ambiguity in the will. The legatees not of the blood can take only what is given them, either by express words or necessary implication. The income of the land was not bequeathed to them and therefore goes to the widow and heirs; but, were we persuaded that there is any ambiguity, we should still hold that, as the law favors the heirs, they are entitled to have the fund follow the course prescribed by statute.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree commanding the trustees to pay out of that fund, first, the taxes and for repairs upon the property, from which the fund arises, necessary to maintain it in the condition in which it was at the time of the decease of the testator, together with the costs and expenses of administration; second, to pay the widow the two-fifths of the net income as directed by the will; third, to pay to the

widow and the heirs Samuel Reitz, David Reitz and Jonathan Reitz, each, one-fourth of the remaining three-fifths of the net income thereof; and that the costs of this proceeding be taxed to the Board of Church Extension of the General Synod of the Evangelical Lutheran Church of the United States, the Trustees of the Midland College at Atchison, Kansas, the Board of Home Missions of the General Synod of the Evangelical Lutheran Church of the United States, and the Board of Foreign Missions of the Evangelical Lutheran Church of the United States.

REVERSED.

GEORGE H. WHITESIDE, APPELLANT, V. ADAMS EXPRESS COMPANY ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,432.

1. **Bailment:** LOSS BY BAILEE: LIABILITY. An applicant for license to practice medicine in this state sent his diploma to the board of health with request that a license issue to him. The diploma was received by the secretaries, examined, passed upon favorably, and, as was their custom, placed in a mailing case, properly directed to the applicant, and delivered to the Adams Express Company, one of the leading and responsible express transportation companies in the state, having an office at Lincoln, the point of transmission, and at Superior, the place of delivery. The applicant had given no instructions as to the method of returning the diploma to him, nor had he furnished any postage or other funds to pay for its return. The method of transmission adopted by the secretaries for the return of the diploma to the applicant was the usual and customary method adopted by them for the return of diplomas to applicants for license. The mailing case was received by the applicant at the terminal point named in the directions indorsed thereon, but the diploma was not therein, and was lost. *Held*, That the selection of the carrier and the delivery of the diploma to it for return was not actionable negligence on the part of the secretaries rendering them personally liable in damages for the loss of the diploma.

2. **Damages:** INSTRUCTIONS: HARMLESS ERROR. In an action against an express company for damages for the loss of a medical diploma, the court properly instructed the jury, in substance, that,

if they found by a preponderance of the evidence the diploma was delivered to the express company for transmission and was not delivered to the consignee, their verdict should be for the plaintiff; but, if they did not so find, it should be for the defendants. By another instruction they were informed that, if they found in favor of the plaintiff, their verdict should be for an amount merely nominal, "five (5) cents only." The jury returned a general verdict in favor of the defendants. *Held*, That the latter instruction was erroneous, but, as the verdict was in favor of defendants, the erroneous instruction could work no prejudice to plaintiff.

3. **Evidence:** ADMISSIBILITY. In an action pending against an express company for the loss of a medical diploma delivered to it for transmission, one of the attorneys for the defendant company applied to the college which had issued the diploma for a duplicate copy to be furnished the plaintiff. The letter contained statements that the diploma had been lost in transmission, was of some value to its owner, etc. It was offered in evidence by plaintiff as an admission of the defendant company. *Held*, That it was properly excluded.

4. **Witnesses:** IMPEACHMENT: COLLATERAL ISSUE. The deposition of a witness offered to disprove a voluntary immaterial collateral statement of another witness in his deposition was properly excluded.

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

John O. Yeiser, for appellant.

Halleck F. Rose and *Greene, Breckenridge & Matters*, *contra.*

REESE, C. J.

This action was instituted by plaintiff against the defendant, the Adams Express Company and the secretaries of the state board of health for damages alleged to have been sustained by plaintiff by reason of the loss of his medical diploma issued to him by Harvard college in the year 1882. Separate answers were filed by the secretaries and the express company. The secretaries, by their answer, admit plaintiff's graduation from Harvard college,

and that he received his diploma as alleged in his petition. The express company admits that plaintiff is a physician duly admitted to practice in this state, but denies all other allegations, except as to its own organization and existence. It is not deemed necessary to notice the pleadings further at this time. A jury trial was had, in which it was shown that plaintiff had such a diploma; that he made application to the secretaries for a license to practice medicine, and, as required by their rules, he sent his diploma to them; that they passed favorably upon his application, and, as they represent and allege, they delivered the diploma, inclosed in a case, to the express company, properly directed, for return to plaintiff at Superior, Nebraska. It was shown that the case was received by him at the office of destination; but, upon opening the same it was empty, and, if the diploma had been placed therein and delivered to the express company by the secretaries, it had been lost in transportation. It was never afterwards found, although extensive search was made by the express company and, to some extent, by the secretaries. If the testimony of plaintiff and the statement of the express agent at Superior, that the diploma alleged to have been lost was not in the roll or mailing case when delivered to plaintiff by the defendant company, are true, there must have been inexcusable negligence somewhere, either on the part of the company, or the members of the board of health, who assert that the diploma was inclosed within the mailing case at the time the same was delivered to the express company. Each defendant, the express company on one hand, and the board of secretaries on the other, sought to exonerate itself, though apparently working harmoniously, with the desire of placing the blame upon the other.

At the close of the testimony, the court, on motion of defendant secretaries, instructed the jury to return a verdict in their favor, which was done, to which plaintiff excepted, and which is now assigned for error. We are not prepared to say that this instruction should not have been

given. Whatever the facts may have been, the evidence does not show sufficient want of care to render them personally liable. In fact no want of care is shown. It is true that they had no instruction from plaintiff to return the diploma to him by express, but he had furnished no postage for its return by mail, and it was the precautionary custom of the board to return diplomas as soon as examined in order to avoid their accumulation in the office and the danger of loss. The express company was one of the leading responsible common carriers of the state, with offices in Lincoln and Superior, and it was not of itself negligence to entrust the paper to that company for transportation. They (the secretaries) received no fee or other compensation for the custody or transmission of the diploma. The manner of redelivery was not specified, no direction having been given upon that subject, and a compliance with the usages and customs of business at the place where the bailment was made and terminated would seem to be all that was required of them. 5 Cyc. 201.

As would naturally be expected, the defendant company denied having received the diploma, and sought to maintain this defense. Plaintiff sought to show that the diploma was property of intrinsic value, and that the loss thereof was a real damage to him, while the defendant company sought to minimize that value. It appeared that a certificate had been made by the college certifying that, on the date shown in the records corresponding with the date of the issuance of the diploma, such diploma, showing the graduation of plaintiff, had been issued. Aside from the instruction directing the jury to return a verdict in favor of the secretaries, the court gave the following instructions to the jury:

No. 2. "You are instructed that if you find by a preponderance of all the evidence that the diploma in controversy was contained in the package which was delivered to the defendant, the Adams Express Company, on August 6, 1903, at the time of such delivery, then your verdict should be for the plaintiff and against the Adams

Express Company. If you do not so find, then your verdict should be for the defendants."

No. 3. "You are instructed that if you find for the plaintiff you may assess his recovery, under the pleadings and proof in this case, at an amount merely nominal, and that your verdict should be for five (5) cents only."

The verdict of the jury was a general finding for the defendants.

The last of the above instructions is sharply criticised, and we think with reason. There was some evidence showing that such a document in the possession of one who had earned it does have an actual intrinsic value. This would seem to be especially true since it is made clearly to appear that it is an inflexible rule of the college never to issue a duplicate under any condition. But we do not see that this instruction is before us for examination, for the reason that under the first of said instructions the jury found in favor of the defendants, which was, in effect, that the diploma was not lost by the express company, and therefore the question of its value and the amount of damages becomes an immaterial one.

The bill of exceptions is quite a volume and abounds in objections to offered evidence, rulings thereon, and exceptions to such rulings. The assignments of error filed in this court are that (1) the judgment is contrary to law; (2) it is contrary to the evidence; (3) is not sustained by the evidence; (4) the court erred in overruling the motion for a new trial; (5) error in instructing the jury to return a verdict for nominal damages; (6) in dismissing the case of each defendant; (7) "the court erred in each instance it sustained objections to evidence offered by defendant." The seventh assignment is too vague and indefinite to merit any attention here. Such has been the law of this state during its whole history. 1 Neb. Syn. Digest, p. 180 *et seq.* In the brief of plaintiff a page is headed "Assignment of Errors," in which the first, second, third, sixth and seventh of the assignments filed with the record are omitted, and the following added: (1) The

court erred in rejecting a letter by one of defendant's attorneys to the Harvard officers "in which was made certain admissions;" (2) in excluding evidence of one J. G. Green with reference to the use of diplomas for display and advertisement; (3 and 4) verdict not sustained by evidence and contrary to law; (5) in excluding testimony showing difficulty of compelling issuance of duplicate diploma. The giving of instructions to the jury is also assigned for error, but this doubtless refers to the same as the sixth assignment filed.

The letter referred to in the first above was written to the college by one of the attorneys for the express company seeking the issuance of a duplicate diploma. It was written after the suit was commenced, in which it is said the plaintiff had sued the company for $20,000, copying some of the averments of the petition, and stating that the diploma had been delivered to the company, and that plaintiff "claims he has never received it," that the attorney understood how such a diploma might be an asset to a practicing physician, that the company is asking for a duplicate, that it had a moral right to do so, etc. This letter was introduced as an admission of the fact of the delivery of the diploma to defendant for its transmission to plaintiff, its loss, and that it was of value. It was not written for the purpose of use on the trial, nor in any way giving direction to the procedure or influencing the action of plaintiff, nor was there any statement that the attorney had knowledge of the truth of what plaintiff claimed, nor was it made for the purpose of dispensing with formal proof of the facts claimed by plaintiff to exist. In 1 Greenleaf, Evidence (16th ed.) sec. 186, it is said that admissions made by an attorney must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. Other admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evi-

dence against his client. See, also, *Treadway v. S. C. & St. P. R. Co.*, 40 Ia. 526; Weeks, Attorneys at Law (2d ed.) sec. 223. It is difficult to conceive, on principle, any distinction between casual statements made to a third party orally, and such as are contained in a letter like the one presented, where the statement is incidentally made for the purpose of accomplishing a legitimate purpose, not a part of the real litigation. The letter was properly excluded.

As to the second ground, the deposition of one Dr. Charles M. Green, in charge of the college of medicine at Harvard, was taken, and the question of the value of a diploma was presented to him when he was asked, in substance, if a diploma was of any value to a physician? In the course of his answer of some length he stated that some liked to display their diplomas in their offices, when he volunteered the remark (possibly to show his wisdom): "In the west they do; but in this part of the world a man of any prominence would be ashamed to display his diploma in his office; would consider it a piece of poor taste." This would no doubt have been stricken out as an immaterial, voluntary statement displaying "poor taste;" but, instead of adopting that course, plaintiff took the deposition of Dr. Joseph G. Green, of Marblehead, Massachusetts, a city of near 40,000 population, for the purpose of disproving the statement of the other Green that such was not the practice in that part of the world. The witness interviewed a great number of physicians in Marblehead, and found that many of them *did* display their diplomas, giving the names and street number of those who exhibited the "poor taste" from the ill effects of which the other Green had exonerated them. This was a collateral question of no moment, and the court did right in refusing to admit the deposition in evidence. Had plaintiff objected to the "poor taste" part of the deposition of the other Green, his objection doubtless would have been sustained.

While to the mind of the writer the result of the trial was probably a miscarriage of justice, yet, no sufficient

foundation having been laid for a reversal of the judgment, it must be affirmed, which is done.

AFFIRMED.

GEORGE S. BILL ET AL., APPELLANTS, V. LYDIA WILLEY SWIFT ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,437.

Appeal: BILL OF EXCEPTIONS: CERTIFICATION. "The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the trial court." *State Bank v. Bradstreet, ante*, p. 186.

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

Miles & McIntosh, for appellants.

Wilcox & Halligan, contra.

REESE, C. J.

This is an appeal from a decree of the district court for Cheyenne county. The cause is said to have been tried upon an agreed statement of facts. By the recitals in the decree the cause was tried on the first day of May, 1909, on which day the decree was rendered. Forty days were given in which to prepare and serve a bill of exceptions. On the 9th day of June, 1909, an additional 40 days were given by the judge. What is said to be the stipulation of facts is upon two sheets of paper. On another sheet is the certificate of the reporter, the proof of service of a bill of exceptions, and the allowance thereof signed by the judge. None of these papers have been filed in the office of the clerk of the district court, nor is there any certificate by such clerk that the papers are the bill, either

the original or a copy thereof, as required by statute. This being true, we are left without any evidence that the bill presented contains the evidence upon which the case was tried and decided. *State Bank v. Bradstreet, ante,* p. 186.

We have examined the pleadings in the case, and find the averments sufficient to sustain the decree, and must presume that the findings of the court are supported by the evidence.

The decree of the district court is therefore

AFFIRMED.

CHARLES MULLER, APPELLEE, V. WM. F. STOECKER CIGAR COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,446.

1. **Gaming:** GAMBLING DEVICES: SLOT MACHINES. A slot machine so operated that the operator placing a coin therein and taking a chance on what will be the result of the deposit of the coin, whether to win or to lose, is a gambling device.

2. ———: ILLEGAL BUSINESS: SLOT MACHINES. A cigar store where such machines are set up for the use of customers and are used by them to the advantage of the proprietor of the store, either by the winnings or the stimulation of the trade by the chance of winning by the customer, is an illegal business.

3. **Contracts:** LEGALITY: RESCISSION: RECOVERY. A contract for the purchase of a store and business where a part of the goods and fixtures purchased consist of a number of slot machines kept in use in the store for the purpose of gambling and thereby stimulating and increasing the business is an illegal contract, and so long as the same remains executory may be repudiated and rescinded, and money paid thereon may be recovered back by the person paying the same.

4. **Estoppel** to be available as a defense to an action must be pleaded.

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

James W. Hamilton, for appellant.

A. S. Ritchie and *Charles L. Fritscher, contra.*

REESE, C. J.

This is an appeal from a judgment of the district court for Douglas county. The facts as shown by the bill of exceptions are substantially as follows: Plaintiff is a young man, a former resident of the city of Omaha, and at the time of entering into the contract, hereinafter described, was about 24 years of age. On the 20th day of November, 1905, the defendant, the Wm. F. Stoecker Cigar Company, was engaged in the business of wholesale and retail dealers in cigars, tobacco and smokers' articles, conducting one wholesale and retail business and two other retail stands in the city of Omaha, when plaintiff purchased a half interest in the business, paying in advance the sum of $500 in cash, when the parties entered into the following written agreement: "Omaha, Neb., November 20, 1905. Received by Wm. F. Stoecker as president of the Wm. F. Stoecker Cigar Company from Chas. Muller five hundred dollars ($500) earnest money to apply on purchase price of a one-half (½) interest in our wholesale and retail cigar, tobacco and smokers' articles business. It is understood that the stock and fixtures shall be figured at cost prices. Inventory to be taken not later than December 1st, 1905, and the above deal completed not later than December 5th, 1905, otherwise the above mentioned earnest money of five hundred dollars ($500) shall be forfeited. It is herewith mutually agreed that each of us will devote our full time to the business. If one of the parties hereto wishes to withdraw or sell part of his holdings after the first of January, 1907, the other party shall have the first right to buy such shares or holdings. Wm. F. Stoecker Cigar Co., W. F. Stoecker, Prest. Chas. Muller." The invoice was entered upon and continued until completed some days later. In making

the invoice a large number of devices known as slot machines were inventoried as a part of the stock. The number of those machines in the stores and in use is not clearly shown, but there were probably about 20 of them. No objection was made to them, and they were accepted by plaintiff as a part of the stock of merchandise purchased by him. The payment of the remainder of the purchase price was, by mutual consent, deferred for some days, owing to the absence from the city of plaintiff's father, whom plaintiff desired to consult, preferring that the purchase should receive the approval of his paternal ancestor before final payment. Upon the return of plaintiff's father, who disapproved of the purchase, plaintiff refused to complete the transaction, assigning as his reason therefor that his father had other plans for him. He demanded the return of the $500 paid. Defendant refused to comply with the demand and insisted that plaintiff comply with his contract.

Without entering upon a description of the slot machines in use in the business, we think it must be, and is, conceded that they were all gambling devices, used probably not so much as yielding a revenue to the stores in the way of winnings, but for the purpose of stimulating trade, the purchasers preferring to take a chance of heavier winnings rather than to buy goods directly at the regular and established prices. While, in the long run, the business may not have been so much the gainer from the winnings proper, yet by allowing others to play the hazard the sales were very much increased. That they were gambling devices is clear enough. It is also apparent that plaintiff offered no objection to them, and was in no way conscience smitten, either at the time of the purchase, or thereafter, until he learned by consultation with others that he might avoid his contract and recover back the money paid upon the theory that the purchase of the slot machines was against good morals and public policy, and which his then enlightened conscience could not withstand. He sued defendant for the return of the money

paid, instituting his suit in the county court as "for money had and received." Such proceedings were had as resulted in an appeal to the district court, where an amended petition was filed and in which is set out the whole transaction of the purchase of the half interest in the business, the presence and use of slot machines as gambling devices as a part of the purchase, the alleged illegality of the contract, that the business of defendant was illegal and unlawful, and that plaintiff was entitled to the repayment of the $500, for which he asked judgment.

The answer of defendant sets up the contract of purchase, the payment of the $500, the completion of the invoice, the promise by plaintiff to complete the transaction by the payment of the remainder of the purchase price by a date named, his failure to make the final payment, and that during the whole time of the negotiations, the invoice, and the payment of the $500, plaintiff well knew and understood the character of all the stock and fixtures, and the same was satisfactory to him. The reply is a general denial. A jury trial was had, and upon the completion of the evidence the court, on motion of plaintiff, gave the jury a peremptory instruction to return a verdict in favor of plaintiff for the full amount claimed, which was done, and upon which judgment was rendered. Defendant appeals.

The assignments of error are: (1) The verdict is not sustained by sufficient evidence; (2) the verdict is contrary to law; (3) errors of law occurring at the trial; (4) the court erred in sustaining the motion of the plaintiff directing the jury to return a verdict for the plaintiff; (5) the court erred in giving the instructions directing the jury to return the verdict for plaintiff; and (6) error in overruling the motion for a new trial.

There is no evidence in the record of any improper effort on the part of defendant to induce plaintiff to make the purchase of a half interest in the business. So far as the evidence discloses, no criticism can be made upon the conduct of defendant, its officers or agents, in the nego-

tiations leading up to and including the execution of the written contract, above set out, and the payment of the $500. The evidence is also clear that in making the purchase the plaintiff knew of the presence of the slot machines, the uses to which they were and would be applied, and that he was purchasing a half interest in them, and to which he offered no objection, and was entirely willing to make the purchase. At the time of the purchase the use of the slot machines was common in practically all the cigar stores in the city of Omaha, as well as elsewhere, and there seemed to be no thought among proprietors of establishments owning them that their use was in violation of law, or was subject to condemnation. But these considerations cannot enter into the case as controlling the rights of the parties, however much the course pursued by plaintiff may be condemned by fair-minded people as showing a want of the proper conception of business integrity. The contract of purchase was never executed. Nothing was done subsequent to the payment of the $500 and the invoice. It does not appear that plaintiff entered into possession, or took any part in the management of the business. The slot machines were so operated that the operator by placing his coin within and starting the action of the machine stood to win or lose by a chance. This constituted gambling and the machines gambling devices. *Lang v. Merwin*, 99 Me. 486; *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, annotated in 20 L. R. A. n. s. 239. It would therefore follow that defendant's business, at least to the extent of the use of the slot machines, was an illegal one. The machines constituted a part of the stock purchased by plaintiff. Their use constituted a part —an important part—of the carrying on of the business. It must follow that the contract of purchase was an illegal one. It seems to be the general holding of the courts that, so long as an illegal contract remains executory and the illegal purpose has not been put into operation, the one who has paid money thereon to the other party may repudiate the contract and recover back the money. *Stover*

v. Flower, 120 Ia. 514, and cases there cited; *McCall v. Whaley,* 52 Tex. Civ. App. 646, 115 S. W. 659.

It is urged by defendant that plaintiff having first repudiated the contract and demanded the repayment of the $500, not upon the ground of the illegality of the contract, but because his father so demanded, he cannot "mend his hold" by afterward assigning the illegality of the contract as his reason for his action, and that he is now estopped to defend upon the latter ground. Without deciding whether any estoppel could exist in this kind of a case, we think it sufficient to say that no such estoppel is pleaded in the answer. Estoppel to be available must be pleaded. 1. Neb. Syn. Digest, p. 1181.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

BARNES and SEDGWICK, JJ., dissenting.

We are unable to concur in the majority opinion. While there can be no doubt of the soundness of the conclusion that a contract to do an illegal thing may be rescinded by either party before it is completed, yet it is equally clear that one who attempts to avail himself of that rule must show that the contract which he seeks to rescind provides for the doing of some illegal act. It seems to us that the defendant failed to make such a showing. There is nothing in the agreement of sale or in the transactions which took place between the plaintiff and defendant, as disclosed by the record, which requires either party to do an illegal thing. The contract did not require the use of slot machines in the business after the sale to the plaintiff. He was at liberty to insist on the discontinuance of their use if such use was illegal, and the presumption is that their use would have been discontinued. The machines in and of themselves were harmless and could be legally sold. The contract between the parties is a simple one, and, so far as the substance of it is concerned, it is perfectly fair and legitimate. It is true that the defendant stated in his testimony as a justification of his past conduct in using

the machines that all others engaged in the cigar business did so, and that it had been a necessary part of the business, but it does not appear that when their use had been declared illegal the defendant designed to continue such use. The contract does not mention the slot machines. It simply appears in the evidence that there were such machines amongst the property and that they had been used in the business, and it seems that their use theretofore had not been considered unlawful by the defendant. After the completion of the sale plaintiff would have had equal authority with the defendant to control the manner of conducting the business, and there is nothing in the agreement that directly or indirectly binds either of them to continue the business in the same manner in which it had been transacted. There being no agreement in the contract for the use of the slot machines in the business, the parties did not agree to do an illegal thing, and we doubt whether the law will presume that they contemplated such a course. Even if they did at that time intend to use the machines, there was no binding agreement that they should continue to do so. The plaintiff could at any time put a stop to it, and the presumption is that he would do so.

To our minds the record clearly shows that the plaintiff is trying dishonestly to avail himself of an afterthought to avoid a perfectly legal contract which was entered into by both parties in good faith, and that his real reason for seeking a rescission and recovery of the money paid to bind the bargain is that his father persuaded him to engage in a different business at another place. No presumption of the illegality of the contract should be indulged in to enable him to recover the earnest money paid, which, so far as the record discloses, was not more than sufficient to indemnify the defendant for the interruption of his business and the time spent in taking the inventory which was made at plaintiff's request to ascertain the amount he was to pay for a half interest in the defendant's cigar and tobacco business.

To our minds the judgment of the district court was wrong and should be reversed.

ROSE, J., concurs in this dissent.

STATE, EX REL. JACOB L. HERSHISER, APPELLEE, V. HOLT COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,449.

1. **Judgment:** ASSIGNMENT: RIGHTS OF ASSIGNEE. The assignee of a judgment takes it subject to all equities and rights which the judgment debtor had against the judgment creditor before the assignment.
2. **Counties:** JUDGMENT: ASSIGNMENT: SET-OFF. Where a claim against a county was presented to the county board and rejected, and from which an appeal was taken to the district court, where plaintiff prevailed, it is within the power of the board, upon the presentation of the judgment as a claim for allowance and the issuance of a warrant, to deduct from the amount due any delinquent personal taxes due from the claimant, and that right cannot be destroyed or taken away by the assignment of the judgment.
3. ———: ———: SET-OFF. Section 4468, Ann. St. 1909, authorizing county boards to plead unpaid delinquent taxes as an offset in a suit against a county, is permissive and does not deprive the board from deducting the amount of the taxes due from a judgment rendered in the district court on a claim rejected by them when filed in the first instance.

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

Edward H. Whelan, for appellants.

R. R. Dickson, contra.

REESE, C. J.

For the years 1901 and 1902 the personal property taxes levied against M. A. McCafferty amounted to $226.69.

Prior to the 1st day of August, 1904, the said M. A. McCafferty filed her claim against the county of Holt with the county board for damages resulting from the establishment of a county road over and across her real estate in said county. The claim was disallowed, when she appealed to the district court, filing her appeal on the day named. Such proceedings were had in that court as resulted in a judgment in her favor against the county for the sum of $200, which, with interest and costs, on or about the 13th day of March, 1908, amounted to $13.90 more than the taxes, interest and costs standing against her. On the 11th day of February, 1908, she, for a valuable consideration, transferred the judgment to the relator in this case. He applied to the county board for the issuance to him of a warrant on the county treasurer for the amount due upon the judgment, when the board deducted the amount owing for taxes and issued and tendered a county warrant for the $13.90, the difference, and paid the taxes. Relator, whom we will designate as plaintiff, brought his suit in the district court for a mandamus against the officers of the county to compel the issuance of a warrant for the whole amount due upon the face of the judgment, without offsetting the taxes. Upon a trial to that court a peremptory writ of mandamus was awarded. The county appeals.

It is agreed by both parties to the suit that the only question involved and requiring a decision is whether or not the county had the legal right to apply the unpaid personal taxes of 1901 and 1902 as in satisfaction of the judgment to the extent of the amount due, after the transfer of the judgment to plaintiff. In other words, whether the judgment so far partakes of the quality of negotiability as to permit its transfer so as to cut off the right of the county to deduct the taxes due and unpaid. There is no doubt that a judgment, as any chose in action, is assignable. There is no doubt that the assignee of a judgment obtains no higher or greater right than his assignor had. In 2 Freeman, Judgments (4th ed.) sec. 427, it is said:

"The assignee of a judgment receives the same subject to all existing equities between the parties thereto; and it is immaterial whether he had notice of these equities or not. The assignee, by virtue of the assignment, occupies no better position than the judgment creditor would have occupied, in the absence of any assignment. Hence, he cannot deprive the debtor of the benefit of payments made before receiving notice of the assignment, and of the existence of which the assignee was ignorant. The power of the court to set off one judgment against another is not terminated by an assignment. A purchaser and assignee of a judgment, even for a valuable consideration, and without notice, takes subject to a right of set-off existing at the time of the assignment; for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor," etc. A number of cases are cited by the author in support of each proposition. True, cases can be found holding the other way, some of which are cited in the same section of Freeman; but it is believed that they depend upon special features which are not found in this case. See, also, 17 Am. & Eng. Ency. Law (2d ed.) 883; 23 Cyc. 1422.

Mrs. M. A. McCafferty, plaintiff's assignor, had formerly been engaged in the mercantile business in O'Neill, at which time the unpaid taxes were duly levied for the years above referred to. The law (Comp. St. 1909, ch. 18, art. I, sec. 48; Ann. St. 1909, sec. 4466) gives the county board authority to deduct delinquent personal taxes from the amount found due upon the claim. The assignee was conclusively presumed to know the law. The tax records of the county showed the amount of delinquent taxes due. The records were open to his inspection. Had no assignment been made, the deduction could have been made as against the assignor, none the less as against the assignee. By statute (Ann. St. 1909, sec. 10914) unpaid personal taxes are a lien upon the personal property of the tax debtor; and that lien was in full force at the time of the assignment, unless it had been waived by the board in not

setting up and offsetting the taxes in the suit in which the judgment was rendered. Section 4468, Ann. St. 1909, provides: "In any suit against a county, any delinquent personalty taxes assessed against the person in whose favor the cause of action accrued may be set off against any amount claimed in such action." The contention of the county attorney is that the provision of this section can apply only to suits on such claims and demands as may be instituted in the first instance in the district court, without first filing the claim with the county board and taking its judgment thereon, and from which appeals may be taken. Without deciding this point, we deem it sufficient to say that at most this section is merely permissive, and the remedy given is cumulative. The board may deduct the taxes from a claim allowed, or it may plead them as an offset. In the case of the claim out of which the judgment arose, the action of the board was to reject the claim. The members thereof evidently did not believe the claimant had any just claim against the county, else it would have allowed it in whole or in part. In that event they (presumably) would have deducted the taxes. It would have been an anomalous proceeding for them to deny any indebtedness and at the same time present an offset against that which they said and claimed the county did not owe. After judgment the claim would have to be presented for payment and the issuance of the warrant therefor. At that time, and before issuing the warrant, they could deduct the taxes and issue the warrant for the balance due. This seems to have been the course pursued. The orderly time for the deduction of the taxes would be when the claim based on the judgment was presented for allowance and the granting of the warrant for its payment.

The judgment of the district court is reversed, and the case is dismissed.

REVERSED AND DISMISSED.

MARGARET LUND ET AL., APPELLEES, V. NELS P. NELSON ET AL., APPELLEES; NELS A. RENSTROM, APPELLANT.

FILED JUNE 13, 1911. No. 16,463.

Tenancy in Common: ADVERSE POSSESSION. Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed, although not otherwise proved.

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

Henry E. Maxwell and *E. D. Pratt, Jr.*, for appellant.

J. A. Singhaus, contra.

REESE, C. J.

This is an action to quiet the title to the northwest quarter of section 3, township 21 north, range 8, in Burt county. As would be suggested by the great number of parties to the suit, the petition is of considerable length caused by the necessity of showing the chain of title from the representatives of deceased owners, heirs and other interested parties. As we view the case, it can serve no good purpose to set out even an epitome of the pleadings. It appears that plaintiffs are the widow and heirs of Hokan T. Lund, deceased, who held title to twenty-four twenty-fifths of the land in dispute by record title, the deed having been executed to him by defendant on the 14th day of April, 1890, who was the owner of the property conveyed—that is the twenty-four twenty-fifths thereof. We can detect no claim that plaintiffs' title to this portion of the property is questioned. The sole contention is as to the ownership of the remaining one twenty-fifth. It is not claimed by plaintiffs that they or the husband and father ever had title by deed to the one fractional

part. If they are not the owners of that interest by adverse possession and limitation, they do not own it, and defendant and his coheirs of a previous owner do. The cause was tried to the district court, which found in favor of plaintiffs, and quieted the title to the whole tract in them. Defendant Renstrom appeals.

The whole question arises upon the question of adverse possession and limitation. Hokan T. Lund purchased the twenty-four twenty-fifths interest on the 14th day of August, 1890, and immediately took possession of the whole tract; and he, up to the time of his death, a short time before the commencement of this action, and his family, since that time, have remained in possession, residing on and making it their permanent home, improving the land, constructing buildings, farming and fencing it, as owners, paying all the taxes, and receiving all the income therefrom. So far as is shown by the evidence, no one has ever made any claim of title to the one twenty-fifth, nor has any demand ever been made for a division of products, or the proceeds thereof, nor for the payment of rent. There has been no disturbance of the possession in any manner or at any time. During this period the names of the original owners of the one twenty-fifth interest were unknown, nor was it known by Lund where they could be found. Lund is deceased, and hence his testimony is lost; but the testimony of his family was taken, and his conduct and statements of claim of full ownership were shown.

But it is claimed that Lund and the owners of the one twenty-fifth interest were tenants in common; that the possession of one tenant in common is the possession of all, and therefore the statute of limitation could not run in favor of the tenant in possession until there had been an ouster of the other tenant or a denial of his right, which would be an equivalent. This is the general rule applicable to such tenancies, and the sole question is: Should it be applied to this case? Upon this we are not free from doubt. The authorities are not in entire har-

mony; but, as we view the case, guided by the best lights we have, the decree of the district court is probably correct. *Lodge v. Patterson,* 3 Watts (Pa.) 74; cases cited in *Warfield v. Lindell,* 30 Mo. 272. In *Thomas v. Garvan,* 4 Dev. (N. Car.) 223, it is held that the sole enjoyment of the property by one tenant in common is not of itself an ouster of his cotenant, the possession of one being the possession of all; but the sole enjoyment for a great number of years, without claim from another having right, and under no disability, becomes evidence of title and raises the legal presumption of an ouster. See, also, *Mehaffy v. Dobbs,* 9 Watts (Pa.) 363, 376; *Frederick v. Gray,* 10 Serg. & Rawle (Pa.) 182, 187; *Cloud v. Webb,* 4 Dev. (N. Car.) 290; *Lefavour v. Homan,* 3 Allen (Mass.) 354; *Laraway v. Larue,* 63 Ia. 407; *Knowles v. Brown,* 69 Ia. 11; *Feliz v. Feliz,* 105 Cal. 1; *Beall v. McMenemy,* 63 Neb. 70; Angell, Limitations (6th ed.) sec. 390.

The decree of the district court is

AFFIRMED.

ROOT, J.

I concur in affirming the judgment of the district court for the reasons following: As I understand the record, Nels A. Renstrom by purchase and by descent acquired title to an undivided twenty-four twenty-fifths part of the real estate. The other one twenty-fifth part vested in Gotfred Anderson, subject to the curtesy estate of his father. Gotfred Anderson is named as a defendant, and if in life, and jurisdiction was acquired over him or his interest in the land, the decree quiets that title in the plaintiffs. Nels A. Renstrom in 1890 conveyed by warranty deed to the plaintiffs' ancestor an undivided twenty-four twenty-fifths interest in this land. In the chain of title preceding this conveyance, some of the deeds describe the entire section, while others, after thus describing the land, recite: "Excepting and reserving in said deed of conveyance an undivided one twenty-fifth interest therein." None of these grantors ever acquired Got-

fred Anderson's interest in the land, so that, whether the deeds purported to convey the quarter section or reserved a one twenty-fifth part thereof, the grantor's title in the land, to wit, an undivided twenty-four twenty-fifths part, was conveyed. The appellant has no title to or interest in this land, is not a tenant in common, and the question of adverse possession does not arise in the case.

The decree of the district court is clearly right, and is properly affirmed.

HELEN GOODSON, APPELLANT, V. ABRAHAM E. GOODSON, APPELLEE.

FILED JUNE 13, 1911. No. 16,477.

1. Divorce: EXTREME CRUELTY: EVIDENCE. Action for divorce from bed and board and separate maintenance upon the ground of extreme cruelty. The prayer of the petition being denied by the district court, plaintiff appeals. The conclusions arrived at from reading the bill of exceptions are set out in the opinion, and it is found that, while the results of plaintiff's marriage with defendant have been most unfortunate, no sufficient reason is discovered why the decree of the district court dismissing plaintiff's petition should not be affirmed.

2. ———: AFFIRMANCE. No question of law being involved in the case, the decree of the district court is affirmed upon a review of the established facts.

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

Charles S. Elgutter, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This action, by the wife and against the husband, is for a decree of separation from bed and board and for maintenance. The petition was filed in the office of the

clerk of the district court for Douglas county on the 9th day of November, 1908, in which it was alleged that plaintiff and defendant were married in the city of Omaha on the 12th day of November, 1907, and that they lived and cohabited together until the 8th day of September, 1908, when, on account of the extreme cruelty of defendant to plaintiff, she left him, and since which time they have not cohabited together. The acts of alleged cruelty are set out in the petition, which, if established by proof, would entitle plaintiff to the relief sought. The marriage, at the time and place alleged, is admitted in the answer; but the several acts of cruelty alleged are specifically denied, and it is alleged that prior to the marriage defendant had been previously married and had two children of tender years, one of which was a boy, and the other a girl, the younger, all of which plaintiff well knew; that those children and plaintiff constituted defendant's family; that soon after the marriage plaintiff formed a dislike to one of defendant's children, the little girl, and within two months after the marriage threatened to leave defendant unless he sent the child away, which he did, by placing it with his mother; that he afterward caused the child to be returned to his home, when plaintiff left and has not since returned. The reply is a general denial, except as to the knowledge of defendant's previous marriage and of his two children. A trial was had to the court, which resulted in a modified finding against plaintiff, and a denial of the decree of separation. Plaintiff appeals.

There is no serious question of law involved; the contention of plaintiff being that the decision of the district court is not sustained by, and is contrary to, the evidence. The case was argued at the bar of this court, and the evidence has been elaborately briefed by counsel for both parties. We do not deem it necessary to set out, nor specifically review, the facts nor the testimony of the various witnesses, as no possible good could result therefrom, but choose rather to state our conclusions there-

from. Upon a thorough consideration of all the evidence, we are satisfied that the marriage has been a most unfortunate one for plaintiff. Prior to her marriage she was in good health, and a comparatively sound woman, but of a delicate nervous system and temperament. Soon after the marriage she became pregnant, and by reason thereof she lost her health, suffered great pain, and became very nervous, finally verging on to nervous prostration. The prostration of her nervous system continued after the birth of her child (which died the second day after its birth), and so continued up to the time of the trial of this case. There is no doubt of her apparent unreasonable dislike of, and her aversion to, defendant's little girl. But this, while unreasonable, is explained by the overwhelming proof as to her mental and physical condition, and which should have called forth the sympathy and charity of her husband, who, as he was closely connected with the medical profession, being a massage artist in the office of two prominent medical practitioners, should have extended his help, aid and assistance to her, and overlooked her unreasonable demands and her peculiarities, no doubt produced by her marriage to him, which he, to some extent, failed to do. As a provider for the household and his willingness to meet her every physical and financial demand he seems not to have been wanting. What he really lacked was charity and comradeship for his wife in her mental and physical distress. He seems to have been willing to supply all her physical wants, and sought to have her return to his home after her departure, yet, when inexcusably exasperated by her talk and demeanor, he sought and threatened to commit suicide. He never committed any violence as against her, nor, if his testimony is to be believed, threatened any; yet, since he was in a degree responsible for her weakened and distracted mental condition and her physical ailments, he seems to have withheld from her that sympathy, forbearance and fellowship he might and should have extended to her at that critical time in her life. In her

condition the very presence of the little girl in the home seemed to render her distracted, while she was warmly attached to the child's brother, a few years older, from the beginning. The whole of her married life was most unfortunate and distressing, and she is entitled to, and should receive, the active sympathy of all.

We are unable to see that the decree of the district court should be reversed. It is therefore affirmed, but at the cost of the defendant.

AFFIRMED.

FRANK W. WHEELER, APPELLANT, V. MILO F. ABBOTT, APPELLEE.

FILED JUNE 13, 1911. No. 16,499.

1. **Trial:** MOTION FOR VERDICT: ADMISSION. Where upon a jury trial, at the close of plaintiff's evidence, the defendant moved the court for a directed verdict in his favor, the motion must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted and all proper inferences to be drawn therefrom.
2. **Husband and Wife:** CRIMINAL CONVERSATION: ALIENATION OF AFFECTIONS: QUESTIONS FOR JURY. In an action of criminal conversation and for damages for the alienation and estrangement of the affections of a wife by a stranger, where the evidence submitted tended to prove improper conduct and undue familiarity between the wife and defendant, the questions of the weight of the testimony of the witnesses and the inferences to be drawn from the evidence are for the determination of the jury.
3. ———: ———: CIRCUMSTANTIAL EVIDENCE. The crime of adultery being seldom susceptible of direct proof by eye-witnesses, resort must be had to circumstantial evidence.

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

J. E. Willits, for appellant.

John C. Stevens, contra.

REESE, C. J.

This is an action by plaintiff, appellant, against the defendant, appellee, for damages for the alienation of the affections of plaintiff's wife and their alleged criminal conversation. The averments of the petition are stated in plaintiff's brief, and are here produced as there stated: "(1) That Mattie May Wheeler is the lawful wife of the plaintiff, and has been such ever since the 16th day of February, A. D. 1886. (2) That on or about the 1st day of March, A. D. 1905, and on divers other days between that date and the commencement of this action, the defendant Milo F. Abbott, wrongfully, wickedly, wilfully, maliciously and unjustly cohabited, associated and kept company with, and carnally and criminally knew, one Mattie May Wheeler, then and still being the wife of the plaintiff, and thereby the affection of said Mattie May Wheeler for the plaintiff was alienated and destroyed, and the plaintiff has been deprived of the comfort, fellowship, services, society, marital relation and assistance of his wife in domestic affairs, and has been brought into dishonor and disgrace, and has suffered great mental anguish and injured feelings, all to his damage in the sum of $10,000."

The answer of defendant is a general denial of each and every allegation contained in the petition. A jury trial was had, and at the close of plaintiff's evidence the court, on motion of defendant, instructed the jury to return a verdict in favor of defendant, which was done. A motion for a new trial was filed, overruled, and judgment of dismissal, with costs against plaintiff, was rendered. Plaintiff appeals.

There is but one contention presented by plaintiff, which is the general one that the court erred in giving the instruction complained of. This involves an examination of the evidence offered by plaintiff, as no testimony was offered by defendant. We have read all the evidence introduced as shown by the bill of exceptions. Upon the

oral argument much was said against plaintiff's character as a provider for his family, his lack of industry, etc.; but nothing of this kind is shown by the evidence. Upon the contrary, it appears that plaintiff has been under employment for many years at fair wages, having been in the service of the United States as mail carrier on a rural route for the last 7 years, devoting his income to the support of his family, consisting of his wife and four children. He and his wife were married in 1886, and lived happily together until the advent of defendant into the family. The home was finally broken up, the marital relations between plaintiff and wife interrupted, and finally terminated. While there is evidence of conduct on the part of the wife and defendant which cannot be approved, such as associating together of evenings and nights away from home, riding together, leaving plaintiff alone, her refusal to cohabit with him, and exhibiting a decided preference for the association of defendant, yet there is a possible explanation which tends to remove a suspicion, which might otherwise be well founded. Plaintiff and defendant are brothers-in-law; defendant's deceased wife having been a sister of plaintiff. There is no relationship by consanguinity between defendant and plaintiff's wife. They lived as one family at the home of plaintiff, eating at the same table. Defendant and plaintiff's wife had formed some kind of a partnership in the dairy and vegetable gardening business. Plaintiff's work upon the mail route required his absence from home during the day. As expressed by one witness, plaintiff "didn't seem to be very much in it," and the conduct of the family toward plaintiff was "as though he was an interloper." In the fall of 1907, the last week of August or the first week in September, defendant and plaintiff's wife were "down town here seven nights from 9 to 11 o'clock at night, and till 12 o'clock for seven nights during the two weeks," and other times that plaintiff could not remember. Other witnesses testified that their conduct toward each other was very familiar. It is not deemed necessary to follow this subject

further. Unexplained, the conduct of these parties might lead thinking right-minded people to but one conclusion, that is, as expressed by some of the witnesses, "there was something wrong." It may be that the suspicion and belief of plaintiff had no actual foundation in fact for their support, yet the evidence, if true, might lead to the opposite conclusion. There is no doubt of the estrangement of plaintiff's wife. It may be that the conduct of defendant toward her was not the cause of such estrangement and refusal on her part to cohabit with plaintiff; but, in the face of the evidence given, it would have been much better had explanations been made. Defendant knew of the estrangement, and was notified of the fact by plaintiff, and that plaintiff desired the relation between his wife and defendant to cease; but the request was unheeded.

It is true that there was no direct proof of the commission of the crime of adultery between defendant and plaintiff's wife; but, as said in *Smith v. Meyers*, 52 Neb. 70: "It was not indispensable to a recovery that the acts of sexual intercourse should have been established by the testimony of a disinterested eye-witness. Adultery would be very difficult of proof if such were the rule; but it may, like any other fact, be established by circumstantial evidence." The demurrer to the evidence must be held, for the purpose of passing thereon, as an admission of the truth of all material and relevant testimony. We do not express any opinion as to the merits of the case, nor as to the weight of the testimony of any witness, nor, indeed, as to any inference to be drawn from the facts proved. If the evidence tended to sustain the averments of the petition, the case was for the decision of the jury, under proper instructions, and not for the court. In causes tried to a jury, the jurors are the triers of questions of fact.

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

REVERSED.

FAWCETT, J., concurs in the conclusion.

HENRY MORGENSTERN, APPELLEE, V. INSURANCE COMPANY OF NORTH AMERICA, APPELLANT.

FILED JUNE 13, 1911. No. 16,491.

1. Insurance: PROOF OF LOSS: WAIVER: ACTS OF AGENT. The agent of a fire insurance company in charge of and having power to adjust a loss may, by his conduct, waive proofs of loss, notwithstanding the fact that the policy contains a provision that no person is authorized to act in any manner relating to the insurance unless duly authorized in writing.

2. ———: ———: ———: EVIDENCE. Evidence as to waiver of proofs of loss examined, and found sufficient to sustain the verdict of the jury on that question.

3. Appeal: INSTRUCTIONS: PREREQUISITES TO REVIEW. It is no doubt the duty of the district court in a civil action to state the substance of the issues to the jury, and this should be done without request; but, if the judge fails to do so, he should be requested to charge as desired, and, if he refuses to so charge, exception should be taken in order to predicate error for such failure.

4. ———: ———: BURDEN OF PROOF. Action on a valued policy of insurance. One of the defenses interposed was the alleged criminal destruction of the property by the assured. The evidence upon that point being wholly insufficient to sustain such a charge, *held* not reversible error for the court to refuse to instruct the jury that the burden of proof was on the plaintiff to show that the fire was not caused by his own criminal act.

5. Evidence examined, and found sufficient to sustain the verdict.

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

A. S. Churchill and *H. A. Lambert,* for appellant.

E. B. Quackenbush, contra.

BARNES, J.

Action upon what is known and described by section 43, ch. 43, Comp. St. 1909, as a "valued policy of insurance." The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that on the 6th day of November, 1906, the defendant issued its policy of insurance to the plaintiff, and thereby insured his buildings and property situated on certain lots in Auburn, Nebraska, and used as a lumber yard, for the sum of $1,000; that on the 10th day of the following March the property insured was destroyed by fire; that the defendant refused to pay the loss, and this suit was brought to recover the amount named in the policy and $150 as an attorney fee.

The petition, in addition to the usual averments in such cases, contained an allegation, in substance, as follows: That on or about the 15th day of March, 1907, plaintiff notified defendant in writing and verbally of said fire and the loss of said property thereby, and also notified the local agent of the said defendant of said loss, and requested him to notify the company. Thereafter, to wit, on or about the 16th day of April, 1907, defendant stated to plaintiff that there was nothing to do but to pay his loss under said policy, and requested the plaintiff to take a less sum than the amount called for by said policy; that subsequent to giving said notice, as above set forth, defendant sent its representative and adjuster to the city of Auburn, Nebraska, the scene of said fire, to examine into and investigate the same and the cause thereof; that on or about the 10th day of April, 1907, its representative did make such investigation, and after making the same said defendant absolutely and unconditionally refused to pay said loss, and absolutely and unconditionally denied any liability whatsoever upon said policy; that no objection was made by the defendant company to the sufficiency of notice or proof of loss, and no request was ever made upon plaintiff for any other or further notice of proof of loss, by reason of which said facts said defendant waived notice and proof of loss.

The petition concluded with a prayer for a judgment for $1,000, with interest and costs, and attorney's fee of $150. To this petition the defendant answered, admitting its incorporation, the issuance of the policy, the destruction of

the insured property by fire, but denied that such destruction was total, and alleged as an affirmative defense "that said fire was caused by and through the criminal fault of the plaintiff, and whatever injury, if any, sustained by the plaintiff, is the result of the plaintiff's own criminal fault in causing said fire." The reply was a general denial. Upon the issues thus presented the cause was submitted to a jury, and a verdict was returned in favor of the plaintiff for the sum of $1,010.21, upon which a judgment was rendered, as above stated.

The defendant has assigned numerous errors, which will be considered and disposed of, so far as may be necessary, in the order in which they were presented.

Defendant's brief contains 18 exceptions to the admission of the testimony of one C. O. Snow, its local agent at Auburn, who issued the insurance policy in question. It is first insisted that the district court erred in permitting Snow to answer question No. 37, found in the bill of exceptions, over defendant's objections. The following is the question: "During the 60 days immediately following the 10th of March, 1907, did you see Mr. C. M. Richards, the adjusting agent?" This question was objected to as immaterial, irrelevant and incompetent, and nothing to show that C. M. Richards had anything to do with this matter. The objection was overruled, and the witness answered, "Yes, sir." As above stated, Mr. Snow was the local agent of the defendant company, and the record discloses that before question No. 37 was put to him he had testified without objection, in substance, as follows: That he was the local agent of the defendant company at Auburn, Nebraska; that he had a recording agency; he had identified the policy in question, and testified that it was his signature at the bottom of it. He was then asked: "Do you know, Mr. Snow, who was the adjusting agent for the Insurance Company of North America, the defendant in this case, for this territory, during the years 1906 and 1907? I will confine it to 1907. A. I know who acted in that capacity. Q. Who was it? A. I don't be-

lieve I can give his initials; his name is Richards. Q. Have you anything to refresh your memory from? A. Yes. Q. State definitely if you can do so. A. Maybe I can refresh it right here, I don't know. C. M. Richards. Q. Where does he reside? A. At Omaha, Nebraska." Witness then testified that he notified the company by letter at its home office in Erie, Pennsylvania, and also notified special agent Richards of plaintiff's loss.

It thus appears that the witness had testified without objection that C. M. Richards was the adjusting agent for the defendant company in Nebraska at the time the loss in question occurred. His testimony was competent to show what action, if any, was taken by Richards for the company in regard to the adjustment or payment of the plaintiff's loss. It further appears that this evidence was competent as tending to establish the waiver of written proof of loss upon which plaintiff relied.

The remaining objections to the testimony of this witness were based upon practically the same grounds, and the foregoing is sufficient to dispose of all of them. It is only necessary for us to say that the object of this testimony was to show the waiver upon the part of the defendant company which the plaintiff had alleged in his petition, and upon which he had relied as a reason for not furnishing written proofs of loss within 60 days, as provided in his policy of insurance, and it tended to establish that fact.

It is next contended that the court erred in overruling defendant's objections to certain questions propounded to the plaintiff while upon the witness stand. Without discussing these objections separately, it is sufficient to say that the testimony was offered for the purpose of showing the conduct of the company by which it was claimed it had waived the requirement of written proof of loss. It related to interviews between the plaintiff and C. M. Richards, who it was claimed was the defendant's special agent and adjuster in charge of the loss in question. This testimony was competent and was properly received by the trial court for the purpose of establishing that fact.

We have carefully examined the record as to the assignments of error relating to the admission and exclusion of testimony in this case, and find no reversible error therein.

Defendant assigns numerous errors in the instructions. Its first assignment is that the court erred in not instructing the jury what the issues were, as made by the pleadings. An examination of the charge as a whole convinces us that it was sufficient to inform the jury of the facts which were in issue and which they were required to determine. It appears, however, that the defendant cannot successfully urge this assignment, because it made no request for an instruction of that kind. It no doubt is the duty of the court to state the substance of the issues to the jury, and this should be done without request; but, if the judge fails to do so, he should be requested to charge as desired, and, if he refuses to so charge, an exception should be taken. *Barney v. Pinkham,* 37 Neb. 664; *Sanford v. Craig,* 52 Neb. 483; *Helwig v. Aulabaugh,* 83 Neb. 542.

Complaint is also made of the refusal of the court to give instruction No. 1, requested by the defendant, which was, in substance, that the plaintiff had the burden of proof to establish that the fire was not the result of his own criminal negligence. There are some authorities which hold contrary to this view; but we are not required to determine the question. The plaintiff alleged, in general terms, that the insured property was totally destroyed by fire without criminal fault or negligence on his part. This the defendant denied; but not being content to rely upon the issue thus presented, it went further and alleged as an affirmative defense that the plaintiff by his own criminal act set the fire which destroyed his property. This specific allegation was denied by the reply, and upon this issue evidence was introduced which is not only sufficient to establish plaintiff's innocence of the charge, but is conclusive upon that point, and the jury could not have found otherwise. It follows that if the refusal to give the instruction requested was error, which we do not here

determine, it was error without prejudice. We have read all of the instructions tendered and refused, as well as those which were given to the jury, and are of the opinion upon that branch of the case that the record is without reversible error.

We come now to consider the question of waiver. This is the only point upon which the evidence is conflicting. The court instructed the jury that the burden of proof was on the plaintiff to establish the waiver alleged in his petition, and, unless he had established that fact by a preponderance of the evidence, they must find for the defendant. It is contended by defendant that there is no competent evidence in the record upon which to predicate a waiver, and it is insisted that there could be no waiver unless the same was indorsed in writing on the policy by some one who was authorized to make such indorsement. This contention cannot be sustained, for the more recent authorities hold that the company may, by its conduct, waive proof of loss when it has notice of the breach of such condition; that notice to the agent is notice to the company, and such waiver need not be in writing. *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559; *Billings v. German Ins. Co.,* 34 Neb. 502; *Hollis v. State Ins. Co.,* 65 Ia. 454; *Smith v. Home Ins. Co.,* 47 Hun (N. Y.) 30; *Harris v. Phœnix Ins. Co.,* 85 Ia. 238.

It is also well settled that the provision of an insurance policy requiring waiver to be in writing has no reference to proofs of loss and stipulations to be performed after loss. 10 Current Law, 394; *Reed v. Continental Ins. Co.,* 6 Pennewill (Del.) 204, 65 Atl. 569; *Wheaton v. North British & Mercantile Ins. Co.,* 76 Cal. 415.

Upon this point the bill of exceptions discloses that on the same day the fire in question occurred the plaintiff requested defendant's recording agent at Auburn to notify the defendant of his loss and request payment of the amount of his policy. The agent immediately notified the home office, and also notified C. M. Richards, who, the testimony shows, was defendant's special agent, with an

office in the city of Omaha; that Richards, within a day or two thereafter, visited Auburn, but did not call upon plaintiff. It further appears that about the 11th or 12th of April following Richards again went to Auburn to investigate the loss in question, and whether purposely or not, failed to interview the plaintiff in relation thereto; that the plaintiff, having ascertained the fact that Richards had been in Auburn and had failed to call on him, immediately went to Omaha and saw him at his office in the New York Life Building. Plaintiff testified that Richards told him at that interview that there was nothing to adjust; that his loss was total; that he also informed him, in substance, that, owing to a statement made by some persons in Auburn that plaintiff had set fire to his own property, he would not pay the loss; that Richards frequently asserted that he would do nothing about it. This testimony is disputed by Richards, who insists that he told the plaintiff that they were not going to do anything about it at present, that he desired to make further investigation in relation to the matter; but his testimony does not seem to be at all convincing, for it appears that he wrote a letter to the local agent in relation to the matter of the plaintiff's loss as follows: "Omaha, Neb. April 1, 1907. Mr. C. O. Snow, Agent, Auburn, Neb. Dear Sir: I am in receipt of a letter from Mr. Morgenstern asking me when I will be at Auburn to adjust his loss. If you can find it convenient I wish you would call up Mr. Morgenstern and say to him that in reply to his letter I have requested you to say that his loss will be taken care of as soon as it is possible to get there, explaining to him, of course, that losses on merchandise stocks and things of that kind, where the loss is partial, are given the preference as to time of adjustment, but that we will get to him as soon as possible. Kindly let me hear from you, and oblige, Very truly, C. M. Richards, Special Agent." It was shown that Snow communicated the information contained in that letter to the plaintiff. It was not claimed that defendant ever requested plaintiff to make any further or other

proofs of loss, and we are therefore satisfied that the evidence was sufficient to require the submission of the question of waiver to the jury. *Hartford Fire Ins. Co. v. Landfare, supra; Griffith v. Anchor Fire Ins. Co.,* 143 Ia. 88; *Nicholas v. Iowa Merchants Mutual Ins. Co.,* 125 Ia. 262; *Harris v. Phœnix Ins. Co.,* 85 Ia. 238; *Green v. Des Moines Fire Ins. Co.,* 84 Ia. 135; *American Ins. Co. v. Gallatin,* 48 Wis. 36; *Alexander v. Continental Ins. Co.,* 67 Wis. 422.

It is contended, however, that the evidence is insufficient to show that Richards had authority to waive proofs of loss. Defendant's local agent testified that Richards was the adjusting agent with whom he had always done business in his territory. In his conversations with plaintiff, Richards did not claim to be without authority to adjust the loss, but, on the other hand, led the plaintiff to believe, for a time at least, that his loss would be adjusted, although later on he refused to acknowledge any liability on the part of the company. These facts, together with the letter quoted above, seem to us to be amply sufficient to establish Richards' authority, and warrant the jury in finding that the plaintiff had established the waiver set forth in his petition. This was a question of fact for the determination of the jury, and was submitted to them under an instruction most favorable to the defendant. We are of opinion that the evidence on this point sustains the verdict. Authority to adjust carried with it the power to waive the formal proofs of loss. *Ruthven Bros. v. American Fire Ins. Co.,* 92 Ia. 316.

Finally, it is contended that the court erred by instructing the jury to deduct from the amount of the policy the value of that part of the platform scales which were situated upon the street, because they could not determine that amount. It is apparent from an examination of the verdict that they made the proper reduction. Otherwise the verdict would have been for $1,000, with interest from the 10th day of May, 1907, to the time of the trial, while it was for only $1,010.21. Therefore, upon this point the record is without error.

It satisfactorily appears that the cause was fairly tried, that the record contains no reversible error, and therefore the judgment of the district court is

AFFIRMED.

CHARLES H. SWALLOW, APPELLEE, V. EUREKA MANUFACTURING COMPANY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,497.

Appeal: PARTIES. A party to an action against whom no judgment has been rendered, or whose rights are not affected by the judgment of which he complains, cannot prosecute an appeal. *Cowherd v. Kitchen*, 57 Neb. 426.

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

Flansburg & Williams, George A. Adams and *Morning & Ledwith,* for appellants.

E. C. Strode, J. L. Caldwell and *Hall, Woods & Pound, contra.*

BARNES, J.

This is an appeal from a decree of the district court for Lancaster county appointing a receiver to take charge of the affairs of the Eureka Manufacturing Company, a domestic corporation, for the purpose of closing up its business, collecting and disposing of its assets and applying the same to the payment of its debts. The action was brought by the appellee, who was a large stockholder in the corporation, and who had indorsed its commercial paper and otherwise become liable for a large amount of its indebtedness, because of the insolvency of the corporation and the refusal of its officers and directors to recognize his rights as a stockholder. The plaintiff had

the judgment, and the corporation and its co-defendants, A. O. Taylor, John F. Kaufman, William Gray, William Leonard and R. C. Hunter, appealed.

It appears from the record that shortly after the decree in question was rendered the Eureka Manufacturing Company was, by the order of the district court of the United States for the district of Nebraska, adjudged a bankrupt, and the referee in bankruptcy took complete charge of its affairs for the purpose of winding up its business and distributing its assets in the payment of its debts under the federal bankruptcy laws. On a showing of that fact and a motion of the plaintiff, in accordance with the rule announced in *Matson v. Emerson*, 2 Neb. (Unof.) 190, and *Washington Mill Co. v. Lincoln Sash & Door Co.* (No. 16,495), not reported,* the appeal of the corporation was dismissed.

It thus appears that the only matters left for our consideration are the rights of the individual appellants above named. An examination of the decree appealed from discloses that no judgment of any kind was rendered against them, and therefore it would seem that there was nothing in the decree from which they could appeal. It is suggested, however, that they were entitled to a jury trial to determine the several amounts found due from the corporation to its intervening creditors. If the corporation was here making this claim, it would be proper for us to consider it; but as no judgment was prayed for, and none was ever rendered against the remaining appellants, their present condition presents nothing but a moot question for our determination. It was stated, however, on the oral argument, that the amounts found and adjudged to be due to certain of the creditors of the corporation may at some future time become a basis of an action against the stockholders to recover on their liability for unpaid stock subscriptions. This question does not require serious consideration. The findings and judgment of the bankruptcy court, which

* No opinion.

has exclusive jurisdiction of proceedings of that nature, must necessarily furnish the proper basis for determining the amount of the stockholders' liability. Therefore it seems clear that no substantial right of any of the remaining apellants is in any way affected by the judgment of which they now complain.

The decree of the district court is therefore

AFFIRMED.

BANKERS LIFE INSURANCE COMPANY, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,688.

1. **Taxation:** ASSESSMENT: CORRECTION OF RETURN: NOTICE. Sections 11012, 11031, Ann. St. 1909, relating to the public revenue, authorizes a county assessor to change the schedule of a taxpayer by adding thereto any taxable property which he finds to have been omitted therefrom, upon due notice of his intention to make such change.

2. ———: ———: ———: DUE PROCESS OF LAW. The taxpayer has a right to rely upon his sworn return made to the assessor, unless notice is given him of an intention to increase the amount thereof. A change of schedule without notice should be treated as a complaint made by the assessor to the board of equalization, and notice should be given of such complaint and an opportunity for a hearing should be afforded. Any substantial increase of the schedule without notice and an opportunity for a hearing amounts to the taking of the property of a citizen without due process of law, and is void.

3. ———: ———: ESTOPPEL. In case the taxpayer files a complaint before the board of equalization objecting to the change in his schedule, and is granted a hearing thereon, he cannot thereafter challenge the jurisdiction of the board over the subject matter of his complaint.

4. ———: ———: DOMESTIC INSURANCE COMPANIES. It is probable that under the general provisions of the revenue law of 1903 (laws 1903, ch. 73) domestic insurance companies may be required to list their capital stock for taxation; but, if the capital

stock is taxed, its value must be ascertained in the manner provided by section 10955, Ann. St. 1909, and when such value is ascertained there must be deducted therefrom the value of the real estate and other tangible property of the company otherwise taxed, and the remainder will furnish the amount upon which the tax against the corporation may be levied.

5. ———: DOUBLE TAXATION. An assessment of the property of a domestic insurance company for taxation which includes its capital stock, its surplus, its contingent reserves, its gross premium receipts mentioned in section 10960, Ann. St. 1909, together with all of its other tangible property, is excessive, and amounts to double taxation, and should not be sustained.

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

Frank M. Tyrrell, J. B. Strode and *N. Z. Snell,* for appellants.

Charles O. Whedon, contra.

BARNES, J.

The Bankers Life Insurance Company is a domestic corporation, with a paid up capital stock of $100,000, having its principal place of business and its home office in Lincoln, Lancaster county, Nebraska. It is what is known as an old line or legal reserve life insurance company. It appears that on the 31st day of May, 1909, the president of that company returned to the deputy county assessor a schedule of its property for taxation in accordance with the provisions of section 10960, Ann. St. 1909, which schedule contained a statement of the gross amount of the premiums received by the company for its Nebraska business for the year ending December 31, 1908, less the amount of premiums on the same business ceded to other companies as reinsurance during the year 1908, also less premiums returned on account of the cancelation of a part of the business above mentioned, together with its office furniture and other personal property, amounting to the sum of $6,133.82; that thereafter, and on the 14th day of

June, 1909, the county assessor, without notice to the company, indorsed on the schedule above mentioned the following: "Office of County Assessor, Lancaster County, Nebraska. D. R. C. Miller, Assessor, Lincoln, Neb., June 14, 1909. The Bankers Life Insurance Company having returned premiums on new business for Lancaster county business only and office furniture and fixtures, not accounting for their capital stock, contingent reserves or surplus, cash in office or bank, gross premiums received at the Lincoln office or other forms of property, I have therefore, this 14th day of June, 1909, valued the capital stock, surplus, contingent reserves and other forms of property at $611,000, and added thereto $3,175, their local return on premiums, making a total of $614,175, and assessed it at $122,835. D. R. C. Miller County Assessor."

After making the foregoing indorsement, the county assessor immediately returned the schedule to the county clerk as provided by law. On the 19th day of June, 1907, the insurance company made written complaint to the county board of equalization of the action of the assessor increasing the valuation of its property for taxation as above set forth, and prayed the board to reduce its schedule to the amount shown by its own return thereon, and for such other relief "as shall be just and equitable in the premises." After a hearing upon the complaint above mentioned, the board of equalization overruled the same, confirmed the action of the assessor, and valued and assessed the complainant's property at the sum fixed by that officer in the corrected schedule. The insurance company thereupon appealed to the district court, where the order of the board was reversed and set aside, and the county has appealed from that judgment.

The record presents two questions for our determination: First. Was the action of the assessor and the board of equalization by which there was added the amount of the capital stock and surplus of the complainant to its schedule void for want of jurisdiction? Second. Is a domestic life insurance company required by the present

revenue law of this state to list its capital stock, surplus and contingent reserves for taxation to the extent and in the manner as determined by the county board of equalization in the instant case?

Concerning the first question, we think it may be said that sections 11012 and 11031, Ann. St. 1909, are sufficient in form and substance to authorize a county assessor to change the schedule of a taxpayer, and add thereto such property as he finds to have been omitted therefrom, to the end that all taxable property in this state shall contribute its just share to the support of the government; but before making such change or addition to the schedule he must give notice to the taxpayer of his intention to do so, and thus afford him an opportunity for a hearing. It seems clear from the authorities that such change or addition made without notice and without an opportunity for a hearing somewhere along the line of procedure is void, for it amounts to "taking the property of the citizen without due process of law." *Stuart v. Palmer*, 74 N. Y. 183; *Central of Georgia R. Co. v. Wright*, 207 U. S. 127; *Horton v. State*, 60 Neb. 701; *Dixon County v. Halstead*, 23 Neb. 697. We are therefore of opinion that the act of the assessor in adding the amount of the capital stock and surplus of the insurance company to its schedule, as returned by the proper officer, was void; and, if the company had filed no complaint and made no appearance before the board of equalization, it could have successfully resisted the payment of any tax levied upon the increased valuation of which it complains.

It appears, however, that the company in some way became aware of the change in its schedule, filed its complaint before the county board of equalization, and thereby gave the board jurisdiction to determine the matters complained of. It appears that the case of *Dixon County v. Halstead, supra,* was one where the facts were on all fours with those in the instant case. There the addition made by the assessor to Halstead's schedule was treated as a complaint made by him to the county board of equali-

zation; and it was stated that, if the board had served notice on the taxpayer and had given him a hearing, it would have had jurisdiction to act thereon. According to the rule there stated, it seems clear that the change of schedule in this case should have been treated as a complaint by the assessor to the board of equalization, and, the insurance company having appeared before that tribunal and obtained a hearing, it should not thereafter be permitted to challenge the proceeding for lack of jurisdiction.

This brings us to the consideration of the second, and what seems to us to be the main, question in this case. It is contended by the appellant that the capital stock and surplus of domestic life insurance companies should be listed for taxation in the manner pursued in this case by the taxing officers. While, on the other hand, it is claimed by the company that by the express provisions of our present revenue law such companies can only be taxed upon the gross amount of their premiums on Nebraska business for the year preceding the one in which the tax is levied.

Section 10960, Ann. St. 1909, which provides for the taxation of domestic insurance companies, reads as follows: "Every life, fire, or accident insurance company, or surety company, organized under the laws of this state, except fraternal beneficiary associations, and mutual companies that operate on the assessment plan, have no capital stock, and make no dividends, and whose scheme of insurance does not contemplate the return of any percentage of earnings or profits to policy holders, shall be taxed in the county, town, city, village and school district where the agent conducts the business upon the gross amount of premiums received by it for all Nebraska business done within the state during the preceding calendar year, less amount of same ceded to other companies as reinsurance through regularly authorized agents in this state and less premiums returned on canceled policies. Such gross receipts, less reinsurance and cancelations, shall be taken

as an item of property of that value and be assessed and taxed on the same percentage of such value as other property. The agent shall render the list and be personally liable for the tax. If he refuse to render the list, or make affidavit that the same is correct, the amount may be valued and assessed according to the best information of the assessor."

The foregoing section contains the only provisions of our revenue law relating directly to the taxation of domestic insurance companies. It thus appears that it must have been the intention of the legislature to encourage and foster the organization of such companies by placing them, so far as possible, on an equal footing with foreign insurance companies in the matter of taxation. While this purpose was a laudable one and has, without doubt, resulted in retaining large sums of money in this state which would otherwise have been paid to foreign companies, still this fact would not seem to justify the legislature in disregarding the mandate contained in section 1, art. IX of the constitution, which reads in part as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." By this mandatory provision the legislature was required to provide a just and equitable method of taxing our domestic insurance companies, and it would seem that it has failed to perform its full duty in that matter. It is intolerable, however, to contemplate a situation by which the large amount of capital profitably invested in the insurance business by domestic companies may wholly escape taxation and remain exempt from contributing its just share to the maintenance of the protection afforded it by the state. Therefore, in view of the requirement of the constitution, we are inclined to the opinion that the other and more general provisions of the revenue law are broad enough to require such companies to pay a tax upon

their capital stock; but the tax must be based upon the actual value of such capital stock, which, in the present condition of the revenue law, may be ascertained by methods analogous to the manner provided by sections 10955, 10967, Ann. St. 1909, which define methods for ascertaining the value of the capital stock of certain corporations.

So far as the record in this case shows, neither the assessor nor the county board of equalization adopted the method provided by that section. It appears that the assessor added to the value of the gross premiums and tangible property returned for taxation by the insurance company $100,000 as the value of its capital stock, and $511,000 as its alleged surplus and contingent reserves, arbitrarily and without investigation, and the county board of equalization adopted and affirmed his action, thereby overruling the complaint of the company and disregarding its prayer for relief. In express terms section 10955, *supra,* provides that after ascertaining the value of the capital stock of the corporation in the manner therein described, there shall be deducted therefrom the value of its real estate and tangible property otherwise assessed, and the remainder is to be taken and considered as the taxable value of its capital stock. It is a fundamental truth, which needs no demonstration, that when the value of the capital stock of a corporation has been correctly ascertained such value embraces not only its surplus, but all of its property and assets of every kind and nature. It therefore appears from the record that the action of the assessor and the order of the county board of equalization were unjust and inequitable, and were made and pronounced without legal authority, for such action clearly falls within the ban of double taxation, which the law does not tolerate or permit.

Finally, the change of the company's schedule cannot be sustained as a penalty for the failure of its officers to return the proper schedule, for such return was made in exact accordance with the provisions of the revenue law

and the demand made by the deputy assessor. So it may be said that there was no justification for the action of the taxing officers, of which the insurance company made complaint, and the judgment of the district court in reversing the order of the board of equalization was correct. It may be said that the statute relating to appeals in such cases confers upon the district court the power to make full investigation and determine the merits of the question presented, and such action should have been taken by the trial court.

For the foregoing reasons, the judgment of the district court reversing the order of the board of equalization should be, and is, affirmed; but, as the proceeding should not have been dismissed, the cause is remanded to the district court for such further proceedings as may be desired in accordance with the views expressed in this opinion.

JUDGMENT ACCORDINGLY.

WESTERN FIRE INSURANCE COMPANY, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,689.

Taxation. For syllabus see *Bankers Life Ins. Co. v. County Board of Equalization, ante, p.* 469.

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

Frank M. Tyrrell, J. B. Strode and *N. Z. Snell,* for appellants.

Field, Ricketts & Ricketts, contra.

BARNES, J.

The Western Fire Insurance Company is a domestic corporation organized under the laws of this state, having its home office and principal place of business in Lincoln, Lancaster county, Nebraska. It appears that after it had made, verified and returned the schedule of its property for taxation to the deputy county assessor for the year 1909, in compliance with the provisions of section 10960, Ann. St. 1909, the county assessor, without notice, added to its schedule the sum of $53,900 supposed to represent its capital stock and surplus. Complaint was made by the company to the county board of equalization, where the action of the assessor was sustained and the complaint was overruled. The company thereupon appealed from the order of the board, the district court for Lancaster county reversed that order, and the board of equalization has brought the case here by appeal.

The questions of law and procedure involved in this controversy are, in substance, the same as those determined in *Bankers Life Ins. Co. v. County Board of Equalization, ante,* p. 469, and the opinion in that case disposes of all of the questions involved in this appeal without the necessity of further consideration or discussion.

The judgment of the district court reversing the order of the board of equalization is therefore affirmed and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

FARMERS & MERCHANTS INSURANCE COMPANY, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,690.

Taxation. For syllabus see *Bankers Life Ins. Co. v. County Board of Equalization, ante,* p. 469.

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

Frank M. Tyrrell, J. B. Strode and *N. Z. Snell,* for appellants.

A. L. Chase, contra.

BARNES, J.

The Farmers & Merchants Insurance Company is a fire insurance company organized under the laws of this state, having its home office and principal place of business in Lincoln, Lancaster county, Nebraska. It appears that after it had made, verified and returned the schedule of its property for taxation to the deputy county assessor for the year 1909, in compliance with the provisions of section 10960, Ann. St. 1909, the county assessor, without notice, added to its schedule the sum of $142,070 supposed to represent the value of its capital stock and surplus. Complaint was made by the company to the county board of equalization, where the action of the assessor was sustained and the complaint was overruled. The company thereupon appealed from the order of the board, the district court for Lancaster county reversed that order, and the board of equalization has brought the case here by appeal.

The questions of law and procedure involved in this controversy are in substance the same as those determined in *Bankers Life Ins. Co. v. County Board of Equalization,*

ante, p. 469, and the opinion in that case disposes of all of the questions involved in this appeal without the necessity of further consideration or discussion.

The judgment of the district court reversing the order of the board of equalization is therefore affirmed and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

JOHN N. FENTON, APPELLEE, V. TRI-STATE LAND COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,386.

1. **Waters:** IRRIGATION: CONVEYANCES: CONSTRUCTION. Where an irrigation company purchased the property of a former corporation which had constructed and was operating an irrigation canal under a deed which provided, "subject, however, to any valid rights under certain water-right contracts issued by the Farmers Canal Company for about two thousand (2000) acres of land to various parties owning land under said ditch or canal," and at the time there were on the line of the canal headgates, laterals, and other indicia of the rights of the contract holders, it will be held to have purchased subject to the rights of all claiming under such contracts, since the exception is general in its terms.

2. **Equity** looks at the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract.

3. **Waters:** IRRIGATION: CONVEYANCES: CONSTRUCTION. Where the intention of the owners of the stock in an irrigation company was to retain certain water rights, and at the same time to convey to other parties their canal and prior appropriation of water, and this was done by means of the transfer of stock and issuance of water right contracts, a court of equity will treat the transaction as it actually was, and not as it appeared to be, in order to protect the rights of the original stockholders.

4. ———: ———: CONTRACTS: VALIDITY. An agreement to pay for property in an irrigation ditch by annual payments or by waiving the right to assess the sellers (who were consumers under

the ditch) for the maintenance of the ditch is not necessarily invalid as against public policy

5. ———: ———: ———: ———. Under the facts stated in the opinion, a contract made in 1890 with an irrigation company, whereby it agreed to convey and deliver to the other party, his heirs and assigns a specified quantity of water by means of its canal, in perpetuity, conveyed an easement in the ditch, and was not invalid for the reason that the grant exceeded the term of its corporate existence.

6. ———: ———: PRIORITY OF RIGHTS. Where, in 1891, certain owners of an irrigation canal which was in operation for a distance of about ten miles conveyed the same, reserving to themselves a perpetual right to water under a common agreement, the court will apply the provisions of chapter 68, laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal beginning at the end of the ten miles already in operation.

7. ———: ———: ———. Under the 1889 act, portions of an irrigation canal may be severable as to the rights of consumers of water.

8. ———: IRRIGATION COMPANIES. A stock corporation formed for the purpose of constructing an irrigation canal, though private as to its manner of organization, is of the nature of a public service corporation. Its rights and duties are modified by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch. Its duties to the respective consumers may be modified and affected by the operation of rights of priority and by the operation of the police powers of the state.

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

Wright, Duffie & Wright and *Isaac E. Congdon,* for appellant.

Morrow & Morrow, contra.

LETTON, J.

This is an action to quiet the title of plaintiff to certain water rights, and to enjoin the defendant the Tri-State Land Company from closing or obstructing the plaintiff's

lateral headgate and preventing him from conducting through the canal and lateral headgate the amount of water specified in a certain water right contract. The plaintiff and certain cross-petitioners seeking substantially the same relief prevailed in the action, and from the judgment the Tri-State Land Company, defendant, appeals. The pleadings in the case are exceedingly voluminous, covering over 600 typewritten pages; but, since the questions presented are mainly questions of law, it will be unnecessary to do more than state the facts and the principles of law which the contending parties respectively contend are applicable.

In 1887 W. R. Akers, Charles W. Ford, and John Richards incorporated the Farmers Canal Company in Cheyenne county, Nebraska. The articles of incorporation provided that the general nature of the business should be "to acquire, construct, operate and maintain a canal, taking water from the North Platte river in said county and state, and diverting and appropriating water from said river, sufficient at all times to fill said canal, as may be necessary for the use of persons taking water therefrom, and conducting water through said canal, and leasing, selling, and otherwise disposing of water rights to persons owning lands under said canal, for the purpose of irrigation, domestic use, manufacturing and other useful purposes." The authorized capital stock was fixed at $80,000,in shares of $100 each. After the incorporation of the company, a notice of appropriation dated September 16, 1889, signed by the president and secretary of the corporation, was posted, setting forth that the company had appropriated a sufficient quantity of water to fill a canal 40 feet wide on the bottom and carrying water to the depth of 4 feet, and naming the point of diversion. Afterwards the incorporators with a number of other landowners in the vicinity subscribed for stock of the corporation. A small amount of the subscription price was paid in cash and the remainder in work upon the canal, for which receipts were given

by the officers of the corporation. W. R. Akers, who was a civil engineer of experience in irrigation matters, had selected what was then believed to be the most favorable location on the North Platte river in the vicinity of the proposed canal as the point of diversion. Little work was done upon the canal that year, but during the three following years nearly ten miles was excavated, a headgate put in, and water turned into the ditch. As originally constructed, the canal was 16 feet wide at the head and about 6 feet wide at the lower end, and was not large enough to water all the land that it was originally intended to serve. In the adjustment of the respective interests of the owners, the water was apportioned by the miner's inch, and it was provided that a 40-acre water right should be represented by one share of capital stock of $100, giving the right to 40 inches of water. In the fall of 1890 $5,700 of stock or receipts had been issued. The original books and papers have been lost, and the proof of these facts is from memory only. The intention of the original incorporators was that the canal should extend a long distance down the valley, and they believed that their rights were very valuable. They were unable to procure the funds necessary to carry out the undertaking. In the fall of 1890 certain negotiations were had between the stockholders and W. H. Wright and two associates. These men were desirous of obtaining the appropriation which it was believed the Farmers Canal Company had acquired, and the right to build a canal taking its water at the same point of diversion. After several meetings, it was finally agreed between those interested in the company and Wright and his associates that in consideration of the payment into the treasury of the company of $1,000 in cash to be expended in finishing the ten miles of canal already constructed so as to make the water therein available to the landowners interested, and the execution of contracts conveying to the individual stockholders of the company, in proportion to their shares or interests, preferred water rights, the old stockholders would surrender to Wright and his associates their stock

and the control of the company. After a tentative agreement had been made, a form of contract or certificate was agreed upon which was to be issued to the old stockholders. It was also agreed, upon Mr. Wright's suggestion, that, in order to save time, the business be conducted by the old officers until such time as the new parties were ready to make the change. After the agreement was made $1000 was paid over, and printed contracts according to the form agreed upon were executed and delivered to the respective stockholders, part of them by the old officers, John W. Weeks, president, and C. W. Ford, secretary, and part by the new officers, W. H. Wright, president, and D. D. Johnson, secretary. The money paid in was used upon the canal as agreed and for several years thereafter water was supplied to the owners of these contracts by the company. Soon after the new parties obtained control, they concluded that the nonassessable features of the contracts were void and unenforceable. They served printed notices upon some of the contract holders that, while they would furnish water they did not recognize the validity of these provisions of the contracts. It is shown, however, that, whether the contract holders were served with such notice or not, the company supplied the water free of charge to all stockholders and made no effort to collect any sum for maintenance. In 1896 the company became embarrassed financially, and the water-users were notified that, if they desired water, they would have to look after the ditch themselves. They met, formed an organization, and assessed themselves a sufficient amount each year to pay a ditch-rider who superintended the ditch and apportioned the water among them. The canal company bore no portion of this expense, but gave its consent to use the ditch under this arrangement.

Before this time (but after the plaintiff and others were taking water from the ditch under the contracts) the company executed a trust deed upon all its property and franchises to secure certain bonds. Default being made, the trust deed was in 1901 foreclosed in the circuit court of the

United States. The result of these proceedings was that the property was sold at foreclosure sale and purchased by one Roberts Walker. The sale was made subject to certain specified water-right contracts. In October, 1904, Roberts Walker, the purchaser at the foreclosure sale, acting as trustee for the bondholders, sold and conveyed all the right, title, and interest in the property acquired by such proceedings to the Tri-State Land Company, defendant. The deed contained the clause, "subject, however, to any valid rights under certain water-right contracts issued by the Farmers Canal Company for about two thousand (2000) acres of land to various parties owning land under said ditch or canal." The Tri-State Land Company took possession under this deed, and soon afterwards began to enlarge and extend the canal. In doing this, they took out the plaintiff's headgate in order to widen the ditch, and put in another one, making the inlet so high that afterwards no water flowed through it. Practically the same proceedings were had with respect to the water supply of the other contract holders. The contract holders claim the right to the use of water under the contracts upon land described in their cross-petitions lying under the first ten miles of ditch.

In the answer of the Tri-State Land Company, it insists and claims that it did not purchase the canal subject to these contracts and water rights and is not bound by the terms of the same; that the contracts are void; and that it owns the canal and appropriations unincumbered by any of these water-right contracts. Similar questions were raised, but not decided, in *Clague v. Tri-State Land Co.*, 84 Neb. 499. A number of matters of defense pleaded are not supported by the evidence and it is unnecessary to notice them. At the trial defendant announced, and it was made a part of the record, "the Tri-State Land Company has at all times, and now does, refuse to recognize, as valid and binding upon it, these water contracts, in the form, as drawn, providing for the preferential use of water, without assessments. But the company, * * * at all times and

now, is perfectly willing to recognize the contracts, as valid and binding upon it, so far as the granting of water rights is concerned to each one of these parties, without any charge therefor, but contends that that water right must be without preference and that the holders thereof must pay a reasonable maintenance charge per annum."

It takes a similar position in this court. This concession materially narrows the inquiry, and takes away the necessity of considering a number of the points argued in the defendant's brief. An interesting and elaborate brief has been filed by the defendant containing a summary of the legislation in this state with respect to irrigation. It is argued that, under the statutes of this state, an irrigation company has always been a public service corporation having the right of eminent domain, and that consequently it must serve the public upon equal terms and without preference or discrimination; that the contracts in controversy here, in so far as they interfere with this statutory duty, are *ultra vires* and beyond the power of the corporation to enter into; that it was the intention of the legislature to depart from the principles governing the use of water in the arid states to the west of us; that in these states there were always people and land waiting for water, but that in this state the first settlers were in the eastern portion and knew nothing of irrigation; that the legislature in the passage of the first act in relation to the subject in 1889 intended that a canal should be built in a new country as railroads had been built in a new country, and that settlement would follow the canal as it had followed railroads. On the other hand, the plaintiff claims that by the contract he acquired an easement in the canal for the purpose of conducting the amount of water specified in the contract to his land; that the consumer is the real appropriator from the natural stream and the canal company merely a common carrier of the water.

A number of interesting questions are presented and ably argued in the respective briefs, but it seems to us that the respective rights of the parties in this controversy may

be determined upon broad equitable principles, and that unless an emergency arises, which under the evidence as to the amount of water in the North Platte river and the capacity of the canal may never happen, it is unnecessary to consider or decide many of them at this time.

At the time that the Farmers Canal Company was incorporated, there was no statute in this state providing for the appropriation of water from the public streams of the state. The only statute then in existence was the act of 1877 (laws 1877, p. 168) which provided that corporations organized for irrigation or water-power purposes might acquire right of way necessary "in the same manner as railroad corporations may now acquire right of way for the construction of railroads," and that such canals are declared to be works of internal improvement. In 1889 a complete act (laws 1889, ch. 68) evidently intended to cover the whole subject of irrigation was passed. The transfer of ownership of the Farmers Canal Company from the incorporators to Wright and his associates was made after the passage of the latter act, and the legality of the contracts must be measured by the law as it then stood, subject of course to any limitations subsequently made under the police power of the state. Our attention has not been called to any provisions of the comprehensive statute of 1895 which denounce contracts of the nature of these, and hence we find it unnecessary to consider it, and have endeavored to determine the validity of the contracts under the law existing at the time that they were entered into.

It is an old and well-established principle that equity looks to the substance of things rather than the form. Even in a mandamus proceeding this court has looked at a stock corporation as being *de facto* a mutual irrigation company. *Swanger v. Porter*, 87 Neb. 764. It is clear from the evidence that it was the desire of Mr. Wright and his associates to obtain the advantage, either real or supposed, which the Farmers Canal Company had procured by its prior appropriation of water and of the particular place on the river most suitable as the point of diversion for a

canal intended to extend to a distance of many miles beyond the terminus of that already constructed. There was little inducement for any one not interested as a consumer of water to advance any money for the purpose of completing, or to acquire any interest in, the canal already constructed, unless as an opening for a larger enterprise. The land which the new parties desired to irrigate lay beyond the first ten miles, but the existing headgate, point of diversion, and right to take the water were evidently thought to be of great importance to the new scheme. The original stockholders desired to retain their right to the water to the extent they had acquired it, but they were willing that the canal should be enlarged and the existing right of way over their lands used for the purpose of carrying water beyond them. They might have retained the ownership of their canal and their right to the water appropriated, and yet on payment of an agreed compensation have permitted a new company to have the canal enlarged and to have water appropriated by it carried through the same headgate to a new canal beginning at the terminus of the original canal. A canal and the right to the water therein may be severable into sections. *Canal Co. v. Gordon,* 6 Wall. (U. S.) 561; *Reynolds v. Hosmer,* 51 Cal. 205. We have not been pointed to any statute or legal principle which would render a contract effecting the same purpose, but reaching the result by a different method, unlawful. If such a method as described had been followed, no one would assert consumers lying below the terminus of the first section of the canal and using the appropriation made therefor would be equal in right to the consumers under the original canal. Viewing the whole transaction as it actually was, and not merely with respect to its form, we see nothing illegal in the preservation by the original owners of their existing rights while at the same time permitting the new owners the right of enlargement and extension to reach new fields. *City of South Pasadena v. Pasadena Land & Water Co.,* 152 Cal. 579; *Orcutt v. Pasadena Land & Water Co.,* 152 Cal. 599.

Are the provisions of the contract exempting the holders from the payment of assessments against public policy and void? Conceding the contention of the appellant that a corporation owning a canal and carrying water for the purpose of irrigation occupies the same position with reference to the public and to water-users as does a railway corporation, we may inquire whether contracts somewhat similar in nature made by railroad corporations are not enforceable. Prior to the passage of the federal and state statutes prohibiting the issuance of free transportation, it was not infrequent that railroad companies in settlement of suits for damages, or in payment for right of way or for services rendered, contracted to deliver to individuals free transportation over the whole or a portion of their lines. *Atchison, T. & S. F. R. Co. v. English,* 38 Kan. 110. We are not aware of any instances prior to the enactment of the statutes referred to wherein such contracts were held invalid as being beyond the power of the railroad companies to enter into. In California, before the adoption of the constitution of 1879, irrigation corporations were at liberty to enter into contracts with reference to the price and use of water upon such terms as might be satisfactory, and whether the contract was well advised or not was not a question for the courts, in the absence of fraud, mistake, or other elements which render ordinary contracts void or voidable. *San Diego Flume Co. v. Souther,* 90 Fed. 164; *Fresno Canal & Irrigation Co. v. Park,* 129 Cal. 437; Wiel, Water Rights (2d ed.) sec. 419.

And so in Colorado, in the case of *Grand Valley Irrigation Co. v. Lesher,* 28 Colo. 273, which is very similar in its facts to this case, four landowners organized a corporation and constructed a ditch for the irrigation of their lands. Another corporation was later organized by other parties for the irrigation of a larger tract, diverting the water at the same point on the river. The incorporators of the original company then agreed that, in consideration of the surrender of their franchise to the latter company, they should each receive a certificate to a water right of a

definite number of inches from the ditch of the latter company free from all dues and assessments. The second company mortgaged its property. The mortgage was foreclosed and the ditch purchased by a third corporation. This corporation notified the owners of these certificates that they had no right to receive water free of cost, and threatened to deprive them of the use of water unles they paid the regular assessments thereafter. The action was then brought to quiet the title to the water rights obtained by means of these certificates. The court held that the action was one to quiet title of plaintiff to an alleged easement; that the acknowledgment of the obligation to deliver the specified quantity of water through the ditch was a conveyance in writing of an easement therein; and that, since the defendant purchased the ditch with knowledge of the existence of the certificates and the physical evidence conveyed by the cultivated land, the lateral ditches and the headgates, they purchased the property subject to the existing easement. The judgment of the district court quieting the title was affirmed. *Hargrave v. Hall,* 3 Ariz. 252; *Wutchumna Water Co. v. Rogel,* 148 Cal. 759; *Stanislaus Water Co. v. Bachman,* 152 Cal. 716.

Whatever the form of the transaction whereby Wright and his associates obtained possession of the property of the original appropriators and the right of way for their proposed canal, in substance it was really an agreement that in exchange for the property the canal company would release these parties from the annual assessments. Suppose that instead of making such contracts they had paid to each stockholder, or to the company for distribution to the individual stockholders in proportion to their shares, a sum of money which placed at interest would furnish an annual fund sufficient to meet the necessary assessments for the upkeep of the ditch, or had agreed in consideration of the transfer to pay a certain sum annually to each stockholder, could such transaction be said to be against public policy, or to be void as discriminatory? The testimony is that the appropriation, the partially constructed ditch,

the headgate, and the right of diversion at that particular point were worth a large amount of money. Practically the only consideration these contract holders received for all their interest in the corporation except their right to water was relief from the annual assessments. The $5,700 worth of labor and money spent was returned to them in water rights of that value, but nothing was paid for the value of the right to the location or for the appropriation of water in excess of that retained, except the relief from annual charges. What is there in the articles of incorporation or in the statute to prevent the corporation paying for property either by lump sum or by an annual contribution? Relief from an assessment is practically the same as if the company itself paid the necessary sums out of its treasury. We know no reason why either form of payment is not permissible. The immediate effect probably was to relieve the company from the payment of a large sum of money, and at a time when it was not easy to float enterprises of this nature. No consumer of water under the ditch is before the court complaining that by the enforcement of these contracts the necessary charges for his use of the canal will be excessive. The corporation alone complains, and the sole question is whether, after having purchased with notice of the existence of these contracts and with its eyes open, the defendant company can refuse to carry them out on the ground of public policy. This we are satisfied it has no right to do. The case is distinguishable from *Sammons v. Kearney Power & Irrigation Co.*, 77 Neb. 580. The contract considered in that case created a monopoly in the use of water for the generation of electric power, and the light company had no prior right to water.

The question as to the validity of the preference given may prove to be merely academic, but we think it proper to give it some consideration. The contracts are alike in providing that each contract holder shall have water "first in preference over any and all subsequent stockholders in the canal." Sections 12 and 13, act of 1889 (laws 1889, ch.

68), which were in force when the contracts were made, provide:

"Section 12. In case the volume of water in any stream is not sufficient to supply continually the wants for irrigating purposes of the owners or proprietors of land in any district or neighborhood in which customs exist for distributing the waters amongst such owners or proprietors, the waters diverted must in such case be held to be a common right in those accustomed to the participation in the use and enjoyment of such distribution, and such customs must be upheld in all courts as conferring such common right in the same. But this section does not affect any prior vested rights.

"Section 13. In case any person, company or corporation has constructed a ditch for the purpose of diverting the water of any river, creek, canyon, ravine or spring, for the purpose of selling the water thereof for irrigating purposes, the owners or cultivators of said land along the line of and covered by said ditch or canal, are entitled to and have the right to the use of water from said ditch or canal, for the purpose of irrigating said land, so owned or cultivated in the following order: First. All persons through whose land such ditch or canal runs are entitled to the use of the waters thereof in the order of their location along the line of said ditch or canal. Second. After those through whose land the ditch or canal runs, those upon either side of the line of the ditch or canal are entitled to the use of the waters thereof, those equally distant from the line of said ditch or canal are entitled to priority in the order of their location along the line of said ditch or canal; provided, that in times of scarcity of water the same shall be equally distributed to the consumers thereof."

Under these provisions it is plain that the rights of the original stockholders must be held to be a common right by virtue of their own previous custom and agreement, and that their priority, in the absence of any such agreement, would have been in the order of their location along the line of the canal. We must consider the contract holders

equal in priority as against subsequent consumers, whose lands lie beyond the ten miles of the original ditch, but perhaps subject to the statutory requirement that in time of scarcity the water shall be equally distributed. This, however, has not been argued and it is unnecessary to determine.

The argument that the corporation could not grant a perpetual water right we think is not tenable. The right to have the water from the river conveyed to the headgates of the respective contract holders and their assigns is of the nature of an easement in the ditch. This being so, it could be sold and conveyed, and may be granted in perpetuity. It is descendible and devisable, subject, however, to regulation under the police powers of the state, and appurtenant to the land for which it was appropriated or to which it has been applied. *Farmers H. L. C. & R. Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467; *Stanislaus Water Co. v. Bachman, supra.* In so holding, however, we must be understood as considering only the nature of the contract and the rights of the contract holders, and not the status of ordinary water users.

In conclusion, we believe the views expressed are in accord with the general principles adopted in the western states. In those states, as in this, a stock corporation formed for the purpose of constructing an irrigation canal, though private as to its manner of organization, is of the nature of a public service corporation. Its rights and duties are m ied by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch. Its duties to the respective consumers may be modified and affected by the operation of rights of priority and by the operation of the police powers of the state. *Cummings v. Hyatt*, 54 Neb. 35; *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*, 67 Neb. 377; *Farmers Canal Co. v. Frank*, 72 Neb. 136; Wiel, Water Rights (2d ed.) secs. 411, 413, 416; Kinney, Irrigation, sec. 307 *et seq.*; Pomeroy (Black's), Water Rights, sec. 194; Long, Irrigation, sec. 139.

The contention that the state of Nebraska has initiated a different system or adopted different principles with respect to the practice of irrigation we think is unfounded. The customs of settlers upon subarid lands in this state and the statutes enacted by the legislature are in most respects the result of the experience of irrigators in, and of laws upon the statute books of, states lying farther west. In these states the legal principles which have been evolved through the experience of more than half a century have been crystalized into statutes varying in administrative details, but alike in fundamentals. The progress of legislation is still going as practical experience shows the necessity of change—witness the several acts on this subject passed by the legislature of 1911. Laws based upon custom and experience, and not upon *a priori* speculation, are usually the wisest that the statute books contain. We take the view that our Nebraska laws should be interpreted in the light of the experience of others under somewhat similar conditions.

The district court found for the plaintiff and the cross-petitioners, that the contracts were valid, and that the preference right and the right of relief from assessments therein contained were binding on the Tri-State Land Company. The decree seems to allow the contract holders to take water at any point on the ditch, and does not seem to protect and reserve sufficiently the right of the Tri-State Land Company or of the state to regulate the use of the headgates so as to prevent waste of water. The contract holders are not entitled to the use of water to their contract quantity irrespective of a beneficial use.

We think the decree of the district court must be affirmed in the main, but modified so as better to preserve these rights.

AFFIRMED AS MODIFIED.

JOHN W. MCDONALD, APPELLANT, V. THOMAS COUNTY, APPELLEE.

FILED JUNE 13, 1911. No. 16,494.

Judgment: REVIVOR: INTEREST. A judgment, when revived, draws interest at the legal rate from the date of its rendition.

APPEAL from the district court for Thomas county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

S. L. Geisthardt, for appellant.

John H. Evans, contra.

LETTON, J.

This is an appeal from a judgment reviving certain judgments against Thomas county in favor of appellant, but denying interest after the same became dormant, and taxing the costs to the appellant. The question presented is whether a revived judgment draws interest from the date of the judgment to the time of payment, or whether interest is suspended during the period of dormancy.

A proceeding to revive is not, strictly speaking, an action. It is "a statutory proceeding, not for the purpose of recovering money, but for the purpose of restoring the judgment." *Farak v. First Nat. Bank,* 67 Neb. 468. The first paragraph of the syllabus to *Eaton v. Hasty,* 6 Neb. 419, is as follows: "A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition." The opinion cites and quotes *Irwin v. Nixon's Heirs,* 11 Pa. St. 419, 425. See, also, *Snell v. Rue,* 72 Neb. 571; *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170; *Farak v. First Nat. Bank, supra.* The effect of the revivor is to establish the original judgment in full force, with the same incidents as it originally had, except

as to its effect as creating or continuing a lien upon the property of the judgment debtor.

At common law interest was not recoverable upon *scire facias*. *Hall v. Hall,* 8 Vt. 156; *Berryhill v. Wells,* 5 Bin. (Pa.) 56. The statute governing interest on judgments is as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." Comp. St. 1909, ch. 44, sec. 3 (Ann. St. 1909, sec. 6752). This language is plain and unambiguous. Since the revivor merely reinstates an original judgment, we can see no reason why the statute is not equally as applicable to a judgment when revived as when it was originally rendered. The judgment amounts to a contract of record to pay the debt evidenced thereby with interest, and, while the failure to issue an execution for five years deprives it of validity as a lien, it does not affect the contract. An action could be brought upon it the same as if not dormant, and the full amount with interest recovered. *Snell v. Rue, supra.* The remedy provided by an execution has been suspended, but the date of its rendition remains the same. *Thornhill v. Hargreaves,* 76 Neb. 582, 590; *White v. Ress,* 80 Neb. 749. If the judgment debtor desired to stop the accrual of interest, it was within its power to do so at any time.

As to the matter of costs: The defendant resisted the revivor proceedings in the district court. Having put the plaintiff to the trouble and expense of a contest, he was entitled to recover costs.

The judgment of the district court is reversed and the cause remanded, with directions to render a judgment allowing interest upon the revived judgments from the date of their rendition, and taxing the costs to defendant.

REVERSED.

ROSS P. CURTICE COMPANY, APPELLEE, V. JAY KENT, ADMINISTRATOR, APPELLANT.

FILED JUNE 13, 1911. No. 16,496.

1. **Infants:** CONTRACTS: DISAFFIRMANCE. When an infant disaffirms a conditional sale contract, the parties stand in the same relation to each other and to the property sold as they would if it had been a disaffirmance of an ordinary sale. The title to the property bought by the infant remains in the vendor, and ordinarily the right to recover partial payments made, if any, rests with the infant.

2. ———: ———: ———. Where an action is brought to recover property sold to an infant, and infancy and partial payment is pleaded, the right to recover the property and the right of the infant to be repaid what he claims he has paid on the purchase price may both be tried in the same action.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed in part and reversed in part.*

Arthur G. Abbott, for appellant.

Fred W. Ashton, contra.

LETTON, J.

This is an action in replevin brought to recover a piano sold to defendant by plaintiff for $300 under a conditional sale contract whereby the title to the instrument was retained by the seller until it was fully paid for. Defendant was a minor 17 years of age at the time of the sale. He made default in certain monthly payments, and this action was brought to obtain possession. The piano was taken under the writ and delivered to plaintiff. Defendant pleaded infancy, that he had paid $106 on the piano, no part of which had been tendered or returned, and prayed for a return of the piano or for a judgment for the amount paid by him with interest. The cause was tried to the court without a jury. The finding and judgment were

for the plaintiff, with a further finding that the plea of payment of $106 made by defendant is not a triable issue in the case. From this judgment defendant has appealed.

There is no dispute as to the facts. The only question presented is whether the plaintiff was entitled to retake the piano without returning the amount paid upon the contract. The plaintiff, while conceding that an infant may repudiate a contract respecting personal property during his minority, and that the disaffirmance completely puts an end to its existence both as to him and as to the adult with whom he contracted, and that, before an infant disaffirming a contract can recover property from an adult, he must return what he has received under the contract, argues that, under the rule announced in *Schrandt v. Young,* 62 Neb. 254, the gist of an action in replevin is the right of possession, and the only damages that may be recovered are those arising from the unlawful detention, and insists that the district court properly held that the question of refunding the money paid cannot be determined in this action.

The plaintiff began this action relying upon the conditional contract. After it was begun the infant disaffirmed the contract, and by the act of disaffirmance effectually took away from the plaintiff any right it was then asserting thereunder. The parties then stood exactly in the same position with respect to the piano and the partial payments made thereon as if no conditional contract had ever existed. The contract being set aside by the disaffirmance, plaintiff, still being the owner of the piano, was in the same position as it would have been had it begun the action upon the rescission of an ordinary contract of sale. In such case, would it be permitted to obtain possession of the property in the infant's hands without returning the consideration paid? We think not. The rule is that one who in his minority obtained property which is still in his hands cannot after majority disaffirm and recover the property which he conveyed in exchange for it, unless he offer to return that which he has,

and thus place matters as nearly as may be *in statu quo. Englebert v. Troxell,* 40 Neb. 195, 26 L. R. A. 177, and note; *Jones v. Valentine's School of Telegraphy,* 122 Wis. 318; *Corey v. Burton,* 32 Mich. 30; Rodgers, Domestic Relations, sec. 683; *Wuller v. Chuse Grocery Co.,* 241 Ill. 398, 28 L. R. A. n. s. 128. The rule applies with greater force to an adult, especially if he seeks to take property by legal process from an infant. *Wagman v. Kessler & Co.,* 78 Neb. 263; *Baker v. McDonald,* 74 Neb. 595; *Tootle v. First Nat. Bank,* 34 Neb. 863. The plaintiff had no right after the disaffirmance to recover the property from the infant without tendering back the money it had received as a condition to recovery. Since the infant by his answer virtually conceded the right of plaintiff to recover the piano if a judgment for the money paid were rendered in his favor, we think the court would have been justified in treating the answer as being of the nature of a counterclaim, and in finding against plaintiff for the money paid and rendering judgment accordingly. The writer had some doubts as to whether a counterclaim for money could be set up in a possessory action, even under the liberal provisions of the code, but finds that such is not an unusual practice, and that it has received the sanction of other courts. It tends to the directness and certainty so much to be desired in legal proceedings, and does away with needless delay and circuity of action.

In an action to compel the delivery of certain bills of lading of goods and to restrain defendants from departing with the goods or from interfering with the merchandise which they represented, it was held in New York that a counterclaim for the price of the identical goods which were the subject of the action was a cause of action "arising out of the transaction," or at least "connected with the subject of the action," and is strictly a counterclaim within the provision of the code. *Thompson v. Kessel,* 30 N. Y. 383.

Where a horse was exchanged for land, and, it having returned to the possession of the original owner, an ac-

tion in detinue was brought for its possession, the defense that certain false representations had been made in order to induce the original transaction and asking to have the contract of exchange rescinded was held to be properly allowable as a counterclaim. *Walsh v. Hall,* 66 N. Car. 233.

Mr. Pomeroy says, in Code Remedies (4th ed.) sec. *791: "The practical question therefore is: When, if ever, may there be a counterclaim of money in an action brought to recover possession of chattels? In some exceptional cases such counterclaims have been allowed, and in my opinion properly allowed. For example, an answer stating the circumstances under which the goods demanded by the action came into the defendant's possession, that the plaintiff was indebted to him in a specified amount, that the chattels were delivered to him as a security for such debt, and that he held them by virtue of the lien thus created by the pledge, and demanding judgment for the debt itself, was adjudged a proper counterclaim." See, on general subject, 34 Cyc. 686; *Carpenter v. Manhattan Life Ins. Co.,* 22 Hun (N. Y.) 49; *Tower-Doyle Commission Co. v. Smith,* 86 Mo. App. 490; *Smith v. Fife,* 2 Neb. 10.

The claim made is one "existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and it is "connected with the subject of the action." It falls, therefore, directly under the provision of section 101 of the code. The principle is clearly distinguishable from that in *Schrandt v. Young, supra,* on which plaintiff relies.

We think the district court had the authority under the issues to determine whether defendant was entitled to the return of the money paid, and that its judgment should have been in favor of the plaintiff for the recovery of the piano upon its paying the amount the plaintiff had paid thereon, but without interest, since the use of the piano

would offset the use of the money. It was the duty of the court to protect the infant, and, if the guardian *ad litem* had not disaffirmed for him, the court would no doubt have directed it to be done. This being so, and the defendant disclaiming title to the piano, the costs should follow the judgment against the plaintiff for the money paid. The result seems hardly just to the plaintiff, but persons dealing with infants do so at their peril. The law is plain as to their disability to contract, and safety lies in refusing to transact business with them.

The judgment of the district court for the possession of the piano is affirmed, but that portion of the judgment denying defendant the right to try the issue as to the money paid is reversed and the cause remanded for further proceedings in accordance with this opinion; appellant to recover costs.

JUDGMENT ACCORDINGLY.

SEDGWICK, J. concurring.

I think that, under the evidence in this case, the defendant had a special interest in the property to the amount which he had paid to the plaintiff therefor. There seems to be no doubt that the infant could disaffirm his contract of purchase, and if his vendor should elect to take the property it could only be on condition of returning to the infant the amount which had been paid under the contract. The case then falls within sections 191 and 191*a* of the code. The finding should have been for the defendant, that he had the right of possession only and that the value of his possession was the amount which he had paid upon the contract before he disaffirmed. Then the judgment should have been in the alternative, either that the possession be returned to the defendant or that he be paid the "value of the possession of the same," as provided in section 191*a*. It does not seem strange that the trial court was misled by the opinion in *Schrandt v. Young*, 62 Neb. 254. In the whole learned discussion in that case it would seem that the fact that the defendant had a special interest in

the property by virtue of his contract was overlooked. It is said in the opinion that damages "may not be recovered except where there is a return." This is true where the defendant is found to be the general owner of the property, but it is not true when the defendant is found to have a special interest in the property. In such case, by section 191*a* of the code he is to have either a return of the property or payment of the amount of his special interest in it together with his damages, and his damages in such case would ordinarily be interest on the amount of his claim. It would seem that if the contract under which the defendant held possession of the property at the time the replevin action was begun was of such a nature that the defendant's damages could not be ascertained in an action of replevin, then replevin was not the proper remedy and the plaintiff should have been defeated for that reason. In such case the plaintiff should by an action in equity or some proper proceeding have the rights of the respective parties in the property determined. In other words, if the right of possession depended upon equitable considerations that could not be adjusted in an action at law, replevin would not be the proper remedy, and such action could not be maintained by the plaintiff. In the case at bar there seems to be no difficulty of this kind. The minor was not bound by his contract, but he could not retain the property he had received under it and at the same time disaffirm the contract. The plaintiff therefore might return the money which he had received from the minor and retake the property. Upon the disaffirmance of the contract the minor had an interest in the property to the amount of the advance thereon, so that it seems to me the action comes directly within the provisions of sections 191, 191*a* of the code.

FAWCETT, J., concurs.

OMAHA CATTLE LOAN COMPANY, APPELLANT, V. THOMAS C. SHELLY ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,164.

1. **Fraudulent Conveyances:** HUSBAND AND WIFE: EVIDENCE. If a man purchases real estate and causes the legal title to be vested in his wife, the law implies a gift from husband to wife; but in such a case, where the evidence proves that the husband was at the time engaged in a hazardous business in the name of a corporation of doubtful solvency whose debts to its principal creditors he had guaranteed, that the gift was out of proportion to his net worth, and that he subsequently controlled the property as his own, and under cover of the name of another corporation invested the proceeds of the sale of that real estate in other property which he controlled as his own, that property should be subjected to the payment of his debts in existence at the time of the transfer of title to his wife or which he then contemplated incurring.

2. **Limitation of Actions:** CREDITORS' SUIT. Ordinarily the statute of limitations will not run against an action in the nature of a creditor's bill, until the creditor's demand has been reduced to judgment.

3. **Creditors' Suit:** JUDGMENT AS EVIDENCE. In an action in the nature of a creditor's bill to set aside an alleged fraudulent conveyance so as to subject the property levied upon to the satisfaction of a judgment recovered by the plaintiff against a third person, the judgment, if regular on its face, is *prima facie* evidence of the validity and amount of the creditor's demand; but the defendant, if not a party or privy to the judgment, may, by pleading and proof, establish any just defense, in part or entire, to the demand which the judgment debtor might have interposed, but did not.

4. **Corporations:** ESTOPPEL. A person transacting business continuously for many years with an organization holding itself out as a corporation, and recognizing it as a corporation, will not ordinarily, in enforcing a demand arising out of those transactions, be heard to question the corporate capacity of his debtor.

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

W. A. Corson, for appellant.

McCoy & Olmstead, contra.

ROOT, J.

This is a creditor's bill prosecuted for the purpose of subjecting certain real estate in Douglas county to a judgment for $15,128.52, recovered September 30, 1907, by the plaintiff, as assignee of the Union Stock-Yards National Bank, against Thomas C. Shelly. The defendants prevailed in the district court, and the plaintiff appeals.

Omaha Cattle Loan Company is the plaintiff, and Thomas C. Shelly, his wife, Mattie E. Shelly, Chambers Academy Company, Williard E. Chambers and Ora P. Chambers are the defendants. The inquiry covers a wide range, and involves a consideration of the business transactions of several individuals, firms and corporations. The narrative cannot be other than extended, and, at best, many facts testified to must be omitted, while others that are immaterial, except as they seem to cast some light upon the motives of the principal defendants, should be stated. We have been materially assisted by the briefs, which evidence counsels' painstaking consideration of the evidence, although an occasional reference is made to facts not appearing in the record as we understand it.

In 1888 the defendant Thomas C. Shelly, while the owner of property worth from $20,000 to $30,000 became a resident of Douglas county, and engaged in the purchase and sale of live stock upon commission at the stock-yards in South Omaha. Prior to 1892 Shelly was a member of two different firms and furnished the greater part of the capital used in their business. In 1892 Shelly formed a partnership with Messrs. Blanchard and Rogers and continued in the commission business. All of these firms loaned money to live stock men, but this branch of the business was largely increased by the firm of Blanchard, Shelly & Rogers. The loans were evidenced by negotiable prom-

issory notes, bearing interest at the rate of from 7 to 10 per cent. per annum, secured by chattel mortgages which provided that the live stock should be shipped to the mortgagees to be sold on commission. These notes were discounted by the payee at various banks and financial institutions and the proceeds reloaned. In 1894 branch offices were opened and maintained in Denver and Kansas City. In 1898 the Blanchards withdrew from the firm, took over its business at Kansas City, and Mr. Shelly formed a partnership with Mr. Rogers, which continued until January 2, 1899, upon which date the corporation of Shelly-Rogers Company was formed, and it succeeded to the assets and the business of the partnership of Shelly & Rogers. The capital stock of the corporation, $50,000, was issued and delivered to the Messrs. Shelly and Rogers in consideration for the partnership's assets. Subsequently Shelly purchased from Rogers 75 shares of the capital stock, and, as we understand the record, paid him out of the corporation's assets. In May, 1903, Shelly-Rogers Company ceased transacting business. Out of its bills receivable notes of the face value of $117,561.16, indorsed by it as collateral security for money borrowed on the corporation's notes, proved worthless, and $32,676.48 of its paper negotiated and sold to the plaintiff could not be collected. Thomas C. Shelly contends, and there is an entry in a leaf cut out of the corporation's general ledger which may prove, that the corporation was also indebted to him in the sum of $20,704.26. The evidence does not prove that any other discounted Shelly-Rogers Company's paper could not be collected. So, therefore, giving the corporation the benefit of the presumption arising from this fact, when it ceased transacting business it owed about $67,000 it could not pay, and, after other creditors were satisfied, held about $118,000 of worthless commercial paper, some dating back to the days of Blanchard, Shelly & Rogers. In a little more than three years subsequent to this failure, the defendant Mattie E. Shelly and her relatives controlled and received the rents and profits from a dancing

academy located at the northeast corner of Twenty-fifth and Farnam streets in the city of Omaha, and from a three-story flat building, both constructed on the west one-half of lots 10 and 11, block 1, Henry & Shelton's addition to Omaha; and a valuable property in Douglas county, described as the "West Dodge street home," being the south 600 feet of the east 250 feet of the northeast corner of the northwest quarter of section 24, township 15 north, of range 12 east, except a part of Dodge street and a 33-foot strip on the east side for a road. Mrs. Shelly also has the legal title to the west 46 feet of lots 25 and 26, in block 8, Hanscom Place, an addition to Omaha. The legal title to the dancing academy and the flat property is in the Chambers Academy Company, which the defendants insist is, and the plaintiff contends is not, a corporation.

It is difficult to correctly state, within the limits of an opinion, the contentions of the respective litigants concerning the source from whence came the money to purchase and improve the real estate involved in this action and to outline their arguments to sustain those contentions. As we understand the record and the arguments, the defendants contend that Thomas C. Shelly, while solvent, made gifts to his wife of property which culminated in what is described as the "Thirty-second avenue property," lots 25 and 26, block 8, Hanscom Place; that, about the time Shelly-Rogers Company failed, and subsequent to that event, all of this property, other than the west 46 feet thereof, was converted into cash and used in connection with money borrowed from Mr. Shelly's mother and money borrowed from his sister to purchase and improve the lot upon which the dancing academy and the flats were constructed; that Willard E. Chambers, Mrs. Shelly, and a Mr. Hawk, Thomas C. Shelly's brother-in-law, furnished the money to promote the Chambers Academy Company; that this money and money borrowed upon, and the rents and profits arising out of, the real estate created the fund out of which all of these improvements were paid for.

Finally, the defendants say that the plaintiff's claim was created in November, 1902, and, since Mrs. Shelly received no presents from her husband subsequent to February, 1900, the plaintiff is without standing to question the transactions.

The plaintiff contends that the debt evidenced by its judgment had its inception as long ago as 1899; that Mrs. Shelly has at all times held the property she now claims as her own for the benefit of her husband; that Captain Hawk invested no money in the Chambers Academy, but that large sums of money, fraudulently withdrawn by Thomas C. Shelly from the assets of Shelly-Rogers Company, are invested therein; that the firm of Shelly & Rogers was bankrupt in January, 1899, when it transferred its assets to the corporation Shelly-Rogers Company, which was formed by Shelly and Rogers for the fraudulent purpose of avoiding personal liability on the indorsements of the commercial paper in which they dealt, and that the corporation at no time was a solvent concern; that the Chambers Academy Company was incorporated in furtherance of the fraudulent design conceived by Shelly when he incorporated the Shelly-Rogers Company, and that the property described in this opinion should be sold to satisfy the plaintiff's judgment.

As we have said, the evidence discloses that Shelly was worth at least $20,000 in 1888. We find little, if any, evidence to prove whether Shelly prospered prior to entering the firm of Blanchard, Shelly & Rogers in 1892. Shelly testified, in substance, that the profits of this firm aggregated $114,000 during the six years it transacted business. He does not say whether he deducted from the ostensible assets the uncollectible commercial paper accumulated by the firm during that time, but says that when the firm dissolved no money was paid to any of its members. Probably they divided the commercial paper in their possession. Thousands of dollars par value of this paper was uncollected and uncollectible in 1903 when Shelly-Rogers Company failed.

Messrs. Shelly and Rogers testified, in substance, that the firm's assets which were taken over by the corporation in 1899 were worth $80,000. The capital stock of the corporation was $50,000, so that it had an apparent surplus of $30,000. The day the articles of incorporation were signed there was a balance of $20,000 to the firm's credit at the bank where it maintained a general account; but there is no proof that this money was not the proceeds of the sale of cattle consigned to the firm and upon which it had no lien. The general tenor of the testimony of Shelly, of his brother Clarke, who became a member of the corporation and made many of the entries in its books, and of Rogers satisfies us that the firm's assets were represented by the promissory notes turned over to the corporation, the good-will of the firm, and its tangible property, which consisted of office furniture and saddle horses. Over $66,000 of the par value of the assets of Shelly & Rogers, as shown by such of the firm's books as were preserved, were charged to the corporation's profit and loss account or were assigned by it as collateral in the fall of 1902 and later found to be valueless. The members of the firm were also liable as indorsers on a vast amount of commercial paper at the time Shelly and Rogers signed the articles of incorporation. The testimony discloses that Shelly & Rogers transacted a business of from $3,000,000 to $5,000,000 a year in commercial paper which matured in from three months to six months from its date. At the time the corporation failed, $700,000 of its rediscounts was outstanding, so that it seems reasonable to say that in 1899, when the firm incorporated, its members were liable on their indorsements for at least that sum. That liability was not conditional, but direct.

Thomas C. Shelly, his brother Clarke and Mr. Rogers testify that none of this paper was in existence when the corporation failed, but we are of opinion that the record discloses that the debts represented by many thousands of dollars par value of those notes had not been paid in May, 1903. Thomas C. Shelly was the guiding and controlling

force in the firm of Shelly & Rogers and in the corporation of Shelly-Rogers Company. A record was made in discount registers of the pertinent facts connected with the notes acquired by the firm or by the corporation. Not all of these books have been preserved, but a history of many of the notes is recorded in the books in evidence in this case. Shelly sold his firm's and the corporation's paper to four customers in South Omaha, two customers in Fremont, Nebraska, one customer in Mendota, Illinois, one in Rockford, Illinois, one in LaSalle, Illinois, and some of the notes were negotiated by note brokers in Omaha. All of this paper was secured, or was supposed to be secured, by chattel mortgages upon live stock. At times the firm borrowed large sums of money on its notes, and subsequently the corporation borrowed money upon its notes. If the notes taken by Shelly & Rogers or Shelly-Rogers Company were not paid at maturity, they would take a renewal note, attach it to the original bill, and discount them to some customer who had not held the original instrument. By this course of business the corporation, until November 1902, maintained sufficient credit at the banks where it transacted business to take up at maturity every note negotiated by the firm or by the corporation. Within four months after the corporation was formed, to be exact April 25, 1899, two of its regular customers demanded and secured a personal guarantee from Thomas C. Shelly and Mr. Rogers of those creditors' demands, present or future, against the corporation, and on December 28, 1900, the plaintiff's assignor, the Union Stock-Yards National Bank, was also given a like guarantee to the extent of $25,000. November 25, 1902, Thomas C. Shelly called into conference representatives of three of Shelly-Rogers Company's principal corporate customers and one individual investor, and stated to them that he or Shelly-Rogers Company had misappropriated $50,000 of the proceeds of sales of cattle mortgaged to secure notes held by these customers, and that the corporation had suffered a loss of over $30,000 by reason of the conduct of a broker to whom they had de-

livered that amount of their paper duly indorsed, which he had sold, but had embezzled the proceeds. This broker died September 30, 1902, from a gunshot wound. Shelly stated that, if funds were advanced to tide the corporation over its financial difficulties, it would earn sufficient money within a few months to place it in good financial condition; whereupon the Union Stock-Yards National Bank accepted the note of Shelly-Rogers Company for $20,000, gave it credit on its books for that sum, and subsequently loaned Shelly-Rogers Company $13,000 more money. Other of the creditors accepted the corporation's notes, secured by collateral, to balance the misappropriated money to which they were entitled.

At this time a suit involving the right to the proceeds of the sale of a herd of cattle was pending between the Union Stock-Yards National Bank and Shelly-Rogers Company, and as a result of this conference the suit was dismissed. A supplemental contract for further support was made between the bank and Shelly-Rogers Company; but, an investigation having developed that in many cases the livestock mortgaged to secure the collateral put up to secure the borrowed money had been sold by Shelly-Rogers Company, the bank refused to advance more money, and Shelly-Rogers Company assigned what Shelly contends was all of its assets to the bank and went out of business May 2, 1903. A new commission firm succeeded to its business, and for a time the books and records of Shelly & Rogers and Shelly-Rogers Company were preserved and stored in the old office; but subsequently the sales books, the cash books, the ledger containing the trial balances, and the general ledger, with the exception of 12 leaves, were burned. It also seems probable that at least one discount register was destroyed. McCrea, a relative of Shelly's, kept books for Shelly-Rogers Company, and retained the same position under its successor in business. He telephoned Shelly that the new commission firm intended to burn the books and records, and at Shelly's request cut from the general ledger the 12 leaves which

exhibit the state of Shelly's personal account for about three months prior to the close of the corporation's business, one month's account of bills receivable, about nine months' record of the account of undivided profits, two months' record of the commission account, of the discount account, the interest account, Rogers' personal account, the expense account, and the account with the Union Stock-Yards National Bank. Some other minor accounts are also shown for a period covering three months prior to the failure. Shelly made no effort to prevent the destruction of the books and records. His counsel contend, however, that, since the records were delivered to the individual selected by the creditors to collect the assets of the corporation, Shelly had no control over the records, and is no more chargeable with their destruction than is the bank. Shelly seems to have been the only interested person to receive notice that the records were about to be destroyed, and there certainly is no presumption in his favor by reason of the fact that he selected and preserved so small a part of them and by his silence acquiesced in the destruction of evidence to establish the financial condition of the corporation and of the firm to whose business it succeeded. During all of the years Shelly & Rogers and Shelly-Rogers Company were in business, Thomas C. Shelly had no personal bank account, but transacted his private business through the firm, and later through the corporation. The Shellys both testify that Thomas C. Shelly at times deposited large sums of money with the firm or corporation to his personal credit, and that all of his disbursements on account of his private business and personal expenses were made by checks of the firm or of the corporation upon its bank account.

An examination of the records preserved and in evidence casts some doubt upon Shelly's contention that Mr. Voss, the note broker, was indebted to Shelly-Rogers Company at the time of his death. More than a month passed after the event before Shelly advanced that contention to his creditors, and the entries in the records before us show

that in the other transactions had with Shelly-Rogers Company, aggregating over $300,000 in amount and covering at least a year of time, Voss delivered his check for the notes at the time he received them from the corporation, and whenever he returned a note Shelly-Rogers Company gave him its check or other notes of equal value therefor. Voss gave Shelly-Rogers Company his check for a note purchased from it by him the day of his death. The check was not paid because presented subsequent to the drawer's death. No satisfactory reason is given for Shelly-Rogers Company demanding, and Voss giving, his check for this note while he held $30,000 of the corporation's paper for which he had not paid. Mr. Shelly's explanation that this condition was permitted to exist because the corporation did not need the money does not appeal to us as reasonable, in the light of the fact that the corporation at that time had misappropriated thousands of dollars of trust funds received by it from the sale of mortgaged cattle, which it should have paid, but did not pay and did not have the money wherewith to pay the rightful owners. The Day note included in the list of paper alleged to have been embezzled by Voss was, according to the entries in the Shelly-Rogers Company books, preserved and in evidence, paid for by Voss January 29, 1902, the day it was delivered to him, and on August 12, 1902, the day it matured, was satisfied by the corporation. A renewal note taken by Shelly-Rogers Company was sold to another party, who paid Shelly-Rogers Company therefor. The evidence also proves other facts tending strongly to discredit Mr. Shelly's contention that his corporation lost any money by reason of any act on the part of Mr. Voss. It is true that the deceased broker's legal representatives paid his creditors the proceeds of his life insurance policies, and the creditors of Shelly-Rogers Company received from that source about $7,500. It does not seem probable that payment would have been made upon a bogus claim; but it is also improbable that the evidence before us was accessible in the county court when the assignee of the

corporation made his proof in the Voss estate, which was made in good faith. The evidence on this branch of the case tends strongly to prove the insolvency of the corporation and the real ownership of the property in dispute.

December 13, 1889, Thomas C. Shelly acquired title to a part of lot 1, Coburn's subdivision of block 11, West Omaha, and subsequently resided thereon. In May, 1894, he traded this tract for lot 5, block 5, Hanscom Place addition to Omaha, a vacant lot, and the title was taken in his wife's name. This lot was mortgaged and a residence erected thereon, which the Shellys occupied as their home. The defendants' counsel argue that the money secured by this mortgage was invested by Mr. Shelly in the commission business for the benefit of his wife and earned her 10 per cent. annual interest; but Mrs. Shelly testifies that this money was used to pay for the house. April 25, 1899, the day that Shelly gave the South Omaha National Bank and the Cattle Feeder's Loan Company, two of Shelly-Rogers Company's customers, his unlimited personal guarantee of their demands, present and future, against the Shelly-Rogers Company, Thomas C. Shelly paid the mortgage last referred to. May 8, 1899, this property was sold for $7,500, and the money subsequently was used by Shelly in Shelly-Rogers Company's business. Both Mr. and Mrs. Shelly say that he held this money in trust for her; but there is no other evidence to this effect. The cash book and ledger of the Shelly-Rogers Company covering this period were not preserved, nor does any witness testify that a credit was given Mrs. Shelly in any book of the company for that sum or for any other amount. From all of the evidence upon this point, we strongly incline to the opinion that the title to this property was taken in Mrs. Shelly's name as a matter of convenience; that when the real estate was sold Mr. Shelly used as his own the money acquired thereby, and that Mrs. Shelly did not question his right to do so. July 27, 1898, Shelly purchased lot 20, block 5, Hanscom Place, subsequently built a house thereon, and sold the property February 27, 1900, for $4,750.

Mr. and Mrs. Shelly testify that this house was built for their daughter; but the gift was never consummated, and the property should be treated as Shelly's. February 27, 1900, Shelly purchased lots 25 and 26 in block 8, Hanscom Place, took the title in his wife's name, and subsequently constructed a valuable house upon the premises, which they occupied as their home. The total investment in this property was about $16,000. A building permit for this house is in Thomas C. Shelly's name; he employed the architect, paid all of the bills by checks on the account of Shelly-Rogers Company, and his subsequent control of the property purchased from the money secured by mortgaging this real estate and by a subsequent sale of the greater part thereof tends strongly to prove that he was the real owner.

In December, 1902, the defendant Willard E. Chambers, and the defendant Ora P. Chambers, the daughter of Thomas C. and Mattie E. Shelly, were married. Mr. Chambers is an adept dancing master, and was then, and still is, engaged in that vocation. The evidence tends strongly to prove that Mr. Chambers at this time had little, if any, of this world's goods other than his personal effects. The evidence also proves that Mr. and Mrs. Shelly, anticipating the failure of Shelly-Rogers Company, discussed with their son-in-law the advisability of constructing and maintaining a dancing academy in Omaha, and in the early part of April, 1903, took into their confidence upon this subject Mr. Shelly's brother-in-law, Captain Hawk, a resident of Sacramento, California, who was temporarily in Omaha. May 1, 1903, a mortgage was executed on lots 25 and 26, block 8, Hanscom Place, for $6,000, and after the broker's commission was deducted Mrs. Shelly received from him a check for $5,745.85. This check was taken to the Commercial National Bank of Omaha, where Mrs. Shelly had recently opened a general account, and exchanged for a cashier's check payable to her order: She indorsed and delivered the check to Mr. Chambers. The indorsee took the check to the First National Bank of Council Bluffs, Iowa, exchanged it for a demand certifi-

cate of deposit payable to his order, and immediately returned to Omaha. May 23, 1903, Chambers delivered the certificate, $2,450 in currency, and a check for $150 to Mr. Pritchett, from whom he purchased for $9,000 the lots upon which the academy and the flats were subsequently erected. We are satisfied that Chambers furnished but $720 of the money invested in this land. July 17, 1903, Mr. Chambers, his wife, his father, and his unmarried sister signed articles incorporating the defendant Chambers Academy Company, subsequently gave the notice required by law, and filed a copy of the articles with the secretary of state. Neither the elder Chambers nor his daughter invested any money in the corporation, but a share of stock was issued to the father. The capital stock was fixed at $30,000, of which $25,000 should be paid before the corporation could transact business; 62 shares were issued to Mrs. Shelly, 63 shares to E. L. Hawk, 62 shares to Ora P. Chambers, 62 shares to Willard E. Chambers, and 1 share to L. P. Chambers. This share was subsequently transferred to Thomas C. Shelly, but at all times he was in complete control of the corporation. Willard E. and Ora P. Chambers gave their several notes to the corporation for $5,840 for the unpaid purchase price of their stock, and the day it was issued assigned the stock as security for the payment of the notes. Subsequently the corporation borrowed on the security of its property an amount equal to these notes to pay the contractor for constructing the building and to equip it. Chambers and his wife promised the corporation to pay the borrowed money, and their notes were canceled and returned to them. Thereafter Willard E. Chambers became involved, and all but one share of his stock was canceled. This stock was issued to Mrs. Shelly.

Mr. Hawk testifies, in substance, that between the early part of April and the month of August, in 1903, he transmitted to the Shellys in Omaha, by drafts or checks, $6,300 for investment in the corporation. Hawk could not state the amount of any remittance or the date it was sent. He

had no book account or letters suggesting that any money had been remitted. He had no bank account and could not tell the source from whence the money came, except that it probably represented money paid for fruit grown upon his ranches and a check drawn on a bank in Butte, Montana. Mr. Hawk did not name the county where his ranches were situated, and it seems highly improbable that, if he were receiving an income of $5,000 per annum from this property and owned property worth $45,000, he would have no bank account. The Shellys did not produce any letters from Hawk referring to remittances from him, nor were they much more definite than was Hawk concerning the details of this transaction, except that Mrs. Shelly says the money given by her to Chambers, in addition to the proceeds of the loan upon her house, for the purpose of purchasing the academy lots, was sent by Hawk, and that she thinks she received one check or draft for $1,000 and another for $2,000 in April or May of 1903. In the corporation's books Hawk is given credit for $6,300 under date of July 13, 1903. We cannot accept the evidence produced as proof that Hawk invested any money in the corporation; he certainly could have given more of the details of a transaction involving nearly one-seventh of his entire estate if it be of the value testified to by him. Stubs of the checks issued by the corporation to pay the dividends declared in 1906 and in later years purport to evidence checks to Hawk; but the checks were drawn to the order of Thomas C. Shelly or to the order of Mattie E. Shelly, and in the latter event were indorsed by Thomas C. Shelly or Mattie E. Shelly by Thomas C. Shelly, and all of the proceeds of these checks passed under the control of Thomas C. Shelly, although they went into Mrs. Shelly's bank account. The Shelly book account from May, 1903, is in the name of Mattie E. Shelly, but many of the checks drawn thereon, aggregating thousands of dollars, were signed by Thomas C. Shelly.

The academy building did not cover all of the lot purchased from Pritchett, and in 1904 Shelly built a three-

story flat thereon. In 1904 Mrs. Shelly sold to Dr. Davis the greater part of lots 25 and 26, block 8, Hanscom Place. She only appears in this deal as the grantor. Mr. Shelly attended to the transaction and executed a bond to the grantee to secure him against an incumbrance which caused some difficulty between the parties. Dr. Davis paid, all told, about $9,700, and this money was invested in the flats. Subsequent to July 13, 1903, the date Hawk was given credit for the $6,300 which the Shellys testified was invested in the academy building, and prior to the time Dr. Davis paid any money to Mrs. Shelly, she deposited $2,200 in the Commercial National Bank. No satisfactory explanation is given of the source of this fund, and it is not improbable that some of it represented the assets of Shelly-Rogers Company. In the latter part of 1906 the Shellys acquired a tract of land on West Dodge street, and in 1907 a commodious residence was constructed thereon at a cost of about $6,000. The title to this tract is in Mrs Shelly's name. The property was paid for in part by the proceeds of a loan negotiated by Mrs. Shelly, and secured by a mortgage on the property, and in part from the income arising from the academy property.

At one stage of the trial Mr. Shelly testified, in substance, that the Chambers Academy Company did not keep a cash book for some time after its organization, but cut-out leaves of its cash account were produced. The entries therein do not correspond to the undisputed facts established by other evidence, and were made, as we believe, for the purpose of confusing the reader as to the source of the money paid, for the benefit of the corporation. Mr. Chambers testifies positively that the $9,000 paid Pritchett for the lot was the only money paid in prior to the time the first loan was negotiated, which, if true, eliminates the $6,300 credited to Hawk, because the evidence discloses that all but $720 of this money was furnished by Mrs. Shelly, and the first loan was negotiated by the corporation July 14, 1903, although the first

entry charging cash with the proceeds of a loan appears under date of September 8, 1903. Had Hawk paid $6,300 on or before July 13, 1903, according to the entries in this account, the academy company would have had a much greater balance after Pritchett was paid for the lot than its books disclose. The record exemplifies the difficulty experienced in dovetailing fiction with facts, and especially when the facts principally relate to dates and to figures.

We are of opinion that, when Shelly in 1900 purchased the Thirty-second avenue property and had the title placed in his wife's name, and when subsequently he expended about $8,000 in constructing improvements thereon, Shelly-Rogers Company was not only probably insolvent, but most of its assets were safe from execution. This we say in the face of the fact that chattel mortgages were taken up on live stock to secure payment of the notes payable to Shelly-Rogers Company, and inspectors in the corporation's employ were constantly inspecting and trying to keep in touch with the mortgaged chattels. Shelly-Rogers Company's operations extended to many counties in the western part of the state, into Wyoming, and into South Dakota. It sometimes happened that owners of mortgaged live stock sold it in markets other than South Omaha and did not account for the proceeds of the sale. In one case a train load of mortgaged cattle was thus sold and no account was made of the proceeds amounting to about $20,000. If the corporation were insolvent, Shelly was not solvent. When the corporation ceased transacting business, Shelly converted into cash the property in his wife's name, and this money, in connection with other funds from mysterious sources, has been so invested as to produce a substantial fortune over which Shelly exercises complete dominion. Deducting from the aggregate established value of this property the sum of the liens thereon, there is an equity therein equal to the value of Shelly's estate at the time he embarked in business at South Omaha, while his creditors hold an aggregate of over $40,000 in uncollectible claims against him.

The defendants' counsel insist that, while the evidence may establish a few isolated suspicious circumstances, it is insufficient to establish fraud. It seems to us that the proof has progressed from the realm of suspicion into the domain of fact. This court has ever scrutinized with care transactions between relatives which have a tendency to prevent creditors from collecting their just demands. *Plummer v. Rummel,* 26 Neb. 142; *Steinkraus v. Korth*, 44 Neb. 777; *Penn v. Trompen,* 72 Neb. 273. Fraudulent transactions are planned in secrecy, and proof of their details ordinarily is known to no one other than the actors. If the parties thereto in attempting to explain the transaction fail in their purpose, the presumption theretofore existing against them is necessarily strengthened. In this case the defendants, among other things, offer the following explanations: Mr. Shelly contends that his mother, Helen Shelly, loaned his wife $2,000, which was invested in the academy property. Mrs. Shelly testifies that she borrowed $1,000 from her mother-in-law; that all of the debt has not been paid, and that she borrowed about $400 from Mr. Shelly's sister, Maud. A lead-pencil memorandum in Mr. Shelly's handwriting containing a statement of debits and credits, as we construe the writing, credits Mr. Shelly with one-half of the academy property and all of the flats, and charges him, among other things, with "mother 800." There are checks and stubs of checks of the academy company in the record showing several payments to Helen Shelly, and later to Maud Shelly, in sums of $18 and $36, respectively. These checks are uniform in amounts of either the smaller or the greater sum, and are so dated as to suggest that they were paid in satisfaction of accrued interest. The first check is dated December 26, 1903. Upon the stubs there is a notation to the effect that the check is to apply on "note." Mr. Shelly testifies that after his mother died, and by an arrangement among her heirs, Helen Shelly's estate became the property of his sister, Maud. This fact accounts for the later checks having been drawn in favor

of Maud Shelly, and it appears with reasonable certainty that, unless the rate of interest upon the loan from the elder to the younger Mrs. Shelly was less than 4 per cent. per annum, the debt did not exceed $1,000, and probably was but $800, the amount indicated in the lead-pencil memorandum, *supra*. Although these interest payments were made by the Chambers Academy Company, they are not charged to Mattie E. Shelly or to Thomas C. Shelly, a circumstance tending to prove not only that Mrs. Shelly is not the real debtor, but that Thomas C. Shelly actually owns the property controlled by the corporation. Whatever probative value this evidence may have, it discredits the testimony of Mr. Shelly and the testimony of Mrs. Shelly in exaggerating the amount of money borrowed from his mother. Mrs. Shelly also testified to having received money from her mother and from her mother's estate; but whatever she thus received came into her possession before the Thirty-second avenue property was constructed and in no manner aids in accounting for the money invested in the Chambers Academy. We have noticed that the testimony to sustain the contention that Captain Hawk invested $6,300 in this corporation is so unsatisfactory that we are compelled to reject it. So, therefore, a consideration of the explanations offered by the defendants increases rather than diminishes the presumption which the law raises against the fairness and legality of the transactions which culminated in a fortune under Thomas C. Shelly's control, but safe from the demands of his creditors.

The conclusions we draw from the foregoing are: That in February, 1900, Mr. Shelly from his course of business expected to borrow in the name of Shelly-Rogers Company large sums of money from the plaintiff, from the Union Stock-Yards National Bank, and from dealers in commercial paper. His scheme to avoid personal liability as indorser of the firm's bills by incorporating had been largely frustrated by two of the corporation's principal customers insisting upon his personal guarantee of its

debts, which he had given. In the course of business he anticipated that this demand would be made by other of the corporation's customers. Shelly-Rogers Company, if forced to liquidate at that time, could not have paid all of its obligations, and Mr. Shelly knew that fact. Under these circumstances he withdrew from the capital employed largely in the name of the corporation the $16,000 invested in the Thirty-second avenue property, and did so for the purpose of hindering, delaying, and defrauding his creditors, present and future, and the transaction cannot lawfully be sustained. *Ayers v. Wolcott,* 62 Neb. 805; on rehearing, 66 Neb. 712. Furthermore, Mrs. Shelly holds, and at all times has held, title to this property for the benefit of her husband.

Considering Mr. Shelly's financial condition and the hazardous nature of his busines in 1900, and giving Mrs. Shelly the benefit of every reasonable doubt arising from a consideration of the evidence, these transactions should not be sustained further than to the extent of the homestead exemption of $2,000, the value of the property previously given her by Mr. Shelly, which should not be valued in excess of $5,000, the estate received by Mrs. Shelly from her mother valued at $1,000 and $1,000 borrowed from Mr. Shelly's mother. We make no allowance for increment to this fund by way of interest, because the Shellys have been supported out of no other fund since this property was sold. The homestead exemption is now attached to the West Dodge street property and should not be allowed elsewhere. We make no allowance for the alleged Hawk investment, because we find that he invested no money in this property. He is not a party to this action, and we do not presume to say that he will be bound by the decree that will be rendered herein; but for the purposes of this case he is eliminated as an owner of any of the property in litigation in this action.

We are of opinion that the plaintiff's contention that Shelly-Rogers Company should be treated as a partnership, and not as a corporation, cannot be sustained. Al-

though the assets of the partnership may not have equalled $50,000 in value, yet so far as we are advised, in incorporating, the partners violated no law. They evidently placed an exaggerated valuation upon the firm's assets and unwisely loaded the corporation with the liabilities of the firm and of its members as indorsers of the discounted commercial paper; but the Union Stock-Yards National Bank dealt with Shelly-Rogers Company as a corporation and exacted the personal guarantee of its stockholders for its debts. No part of the debt in suit was traced back to the date of the incorporation. There is some testimony of a general nature which tends to prove an opposite conclusion, but it does not identify any specific debt in existence in January, 1899, and trace it, or any part thereof, into the debt represented by the judgment which the plaintiff seeks to enforce by this action. Shelly-Rogers Company exercised the franchises of a corporation without objection by the state for four years before it gave up the ghost. The plaintiff, in suing Shelly and Rogers upon their guarantee, refers to Shelly-Rogers Company as a corporation, and we think the case is within the rule announced in *Kleckner v. Turk,* 45 Neb. 176. The point therefore must be resolved against the plaintiff.

The defense of the statute of limitations fails, because the proof is satisfactory that the plaintiff did not have knowledge of the facts justifying an inference of Thomas C. Shelly's fraud until within less than four years before this suit was commenced. Code, sec. 12. Furthermore, the suit was commenced within two years after the judgment sought to be collected was rendered and therefore is in time. *Ainsworth v. Roubal,* 74 Neb. 723.

It has come to our notice that, although the plaintiff during the pendency of the action in the district court upon Thomas C. Shelly's guarantee settled and dismissed the action as to Mr. Rogers, no credit was given on the claim in suit. There may be some lawful reason for this act, and there may be no justification therefor. If we

understand the evidence, Thomas C. Shelly, after Shelly-Rogers Company failed, conveyed to the Union Stock-Yards National bank, or to some one for its benefit, certain lots of the value of about $1,500. There is some evidence tending to prove that, as a result of the control this bank exercised over the assignee of the assets of Shelly-Rogers Company, a suit between that corporation and the bank over the proceeds of the sale of a herd of cattle was dismissed. If that claim were a just set-off, Shelly-Rogers Company should have had credit for it, and to that extent the liability of Shelly as guarantor would be diminished, and so also the value of the lots conveyed, and the amount realized from the settlement with Rogers probably should have been deducted from the demand upon which Shelly was sued. For some reason, Shelly made no defense to the action; possibly he had none; possibly he feared to antagonize the plaintiff or its assignor; and probably he believed himself to be execution proof. So far as Thomas C. Shelly is concerned, his wife is in a position to hold the property sought to be subjected to the satisfaction of the plaintiff's judgment. To that end, can Mrs. Shelly or the Chambers Academy Company go back of the judgment recovered against Shelly and show that the claim upon which it is based was satisfied in whole or in part at the time the judgment was rendered? If they cannot, it must be because they are concluded by the judgment as Shelly is concluded. This position is sustained by *Candee v. Lord,* 2 Comst. (N. Y.) 269; *Swihart v. Shaum,* 24 Ohio St. 432; *Scott v. Indianapolis Wagon Works,* 48 Ind. 75; *Strong v. Lawrence,* 58 Ia. 55; *Ferguson v. Kumler,* 11 Minn. 62. On the other hand, in *Troy v. Smith & Shields,* 33 Ala. 469, an equitable action in the nature of a creditor's bill, it is held that the judgment is proof only of its existence, and does not bind a fraudulent grantee. We think the better rule in such actions is that the judgment, if regular on its face, is *prima facie* evidence of the amount of the debt, but that the alleged fraudulent grantee may by pleading and proof

bring forward any just defense the defendant in the action might have interposed to defeat the judgment in whole or in part. *Gottlieb v. Thatcher,* 34 Fed. 435; *Lanata v. Planas,* 2 La. Ann. 544; *Inman v. Mead,* 97 Mass. 310. The principle is also recognized in *Citizens State Bank v. Porter,* 4 Neb. (Unof.) 73.

We have not overlooked the fact that the plaintiff has suffered a considerable loss because of its inability to collect all of the notes purchased from Shelly-Rogers Company; but it did not reduce that claim to judgment, and it is doubtful whether it had a lawful claim against Shelly therefor. In the instant case, the plaintiff's rights are those of the Union Stock-Yards National Bank, and a court of equity should enforce the demand as though it were being prosecuted by the bank. It would be unconscionable for a court of equity to enforce a judgment, bearing 10 per cent. annual interest, beyond the amount justly due the judgment creditor, and the fact that the defendants have not put forward that defense should not close the eyes of this court to the real equities of the parties.

The judgment of the district court therefore is reversed and the cause remanded, with directions to permit the defendants, other than Thomas C. Shelly, if they are so advised, to amend their answers so as to set up any payment made by Shelly-Rogers Company or Thomas C. Shelly to the Union Stock-Yards National Bank upon the debt represented by the judgment upon which this action is founded, and to plead any lawful set-off or counterclaim that existed thereto on the part of the said Shelly-Rogers Company or Thomas C. Shelly, and to try those issues, if so presented, but that in any event it enter a decree subjecting the property described in this action, the legal title whereof is in the defendant Mattie E. Shelly or in the defendant Chambers Academy Company, to the plaintiff's judgment to the extent that it shall be held to represent the lawful debt of the defendant Thomas C. Shelly, saving and excepting, however, to Mrs. Shelly,

first, $2,000 homestead exemption in the "West Dodge" street property; second, from all of the property $7,000 in value, which shall represent the money derived by Mrs. Shelly from her mother's estate, money borrowed by her from Helen Shelly and owing to Maud Shelly, and the gift from her husband. The decree to protect all persons holding valid liens upon the property, and to protect the interest of the defendant Willard E. Chambers, or his vendee, in the property of the Chambers Academy Company to the extent of the par value of one share of its capital stock.

REVERSED.

FAWCETT, J., not sitting.

PARISH OF THE IMMACULATE CONCEPTION, APPELLANT, V. WILLIAM MURPHY ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,394.

1. **Religious Societies:** GOVERNMENT: REVIEW BY COURTS. "Where a local church or parish is a member of a general organization, having general rules for the government and conduct of all of its adherents, congregations and officers, the final orders and judgments of the general organization through its governing authority, so far as they relate exclusively to church affairs and church government, are binding on the local associations and their members and officers, and courts will not ordinarily review such final orders and judgments for the purpose of determining their regularity, or accordance with the discipline and usages of the general organization." *St. Vincent's Parish v. Murphy*, 83 Neb. 630.

2. ———: POWER OF TRUSTEES: EXCOMMUNICATED PRIEST. The trustees of a religious corporation organized under section 40, ch. 16, Comp. St. 1899, and in conformity with the canons, discipline and faith of the Roman Catholic church, have no authority by virtue of their office to permit an excommunicated priest to occupy the corporation's church edifice which was consecrated by its founders to religious worship according to the canons and discipline and faith of that church, or to exercise the faculties of a priest therein.

3. ———: ———: INJUNCTION. If a majority of the trustees unite in diverting the temporalities of the corporation from the purposes to which they were devoted by its founders, a minority may maintain an action in the corporate name to enjoin such diversion.

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

C. E. Holland, for appellant.

Aldrich & Fuller, Norval Bros. and *J. J. Thomas, contra.*

ROOT, J.

This is an action in equity to restrain the defendant from exercising any of the rights, faculties or privileges of a priest of the Roman Catholic church within the plaintiff's church edifice, and from interfering with Father O'Brien, the alleged regularly appointed rector of the parish, in the discharge of his duties. Before answer day a motion was filed by seven gentlemen, including the defendant, to dismiss the petition for the alleged reason that a majority of the plaintiff's trustees had not authorized the commencement of the action, but, on the contrary, desired that it should be dismissed. A motion was filed in the plaintiff's name to strike from the files the motion to dismiss, and upon issues informally joined, if they were joined at all, and without answer to the petition, the court heard evidence upon the substantial controversy between the contending individuals and dismissed the action. The court made no findings, but it must have adopted the theory of Messrs. McGowan, McNally, Murphy, Ward, Timoney, Schmidt and Jakl that by an alleged amendment to the plaintiff's articles of incorporation they became entitled to control its secular affairs, and by virtue of that authority had employed the defendant to occupy the plaintiff's church edifice and to celebrate the rites of the church therein.

The defendant William Murphy was also defendant in

St. Vincent's Parish v. Murphy, 83 Neb. 630, and this litigation arises, as did the contention in the *St. Vincent* case, over the order made by the bishop of the diocese of Lincoln excommunicating the defendant. In 1897 the bishop appointed the defendant as priest of the Seward mission, which contains two parishes, St. Vincent's, at Seward, and the Immaculate Conception, at Ulysses. In 1900 the members of the Ulysses congregation organized as a religious corporation under the provisions of section 40 *et seq.*, ch. 16, Comp St. 1899. The document subscribed by the individuals is brief, and contains statements to the effect that the signers had organized under the statute, *supra*, as a religious society "in conformity with the canons, discipline and faith of the Catholic church," had adopted the name of the Parish of the Immaculate Conception, and had selected as *ex officio* trustees the bishop and the vicar general of the diocese for the time being, the rector of the parish for the time being, and two lay members, Messrs. McNally and McGowan. The lay members of the board of trustees were to be selected annually "in conformity with the canons of the Catholic church and to hold office until their successors are elected and duly qualified." The statement was certified, and sworn to, by the clerk of the meeting, and was filed in the office of the county clerk of Butler county. Thereupon the members of that congregation by force of law became a corporation aggregate. Father Murphy participated in the incorporation, and continued to minister to the spiritual wants of the members of the congregations within the mission until removed by his bishop, and subsequently excluded from the church and parsonage of St. Vincent's parish by the judgment of the district court, which was affirmed in this court on appeal. *St. Vincent's Parish v. Murphy*, 83 Neb. 630.

Thereupon, in May, 1909, the defendant explained to his congregation at Ulysses the result of that litigation, and read to them certain amendments, which he suggested should be made to the articles of incorporation. These amendments were adopted at a subsequent meeting of the

congregation after two weeks' notice given after mass. The proof is satisfactory that most of the members of the congregation were present at the time the notices were given and attended the meeting when the amendments were adopted without a dissenting voice. The original articles were not repealed, but the amendments provide that there shall be nine trustees who shall be elected by the members in good standing of the parish. There shall be no *ex officio* trustees, and no one is qualified for the office unless he has been for one year prior to his election a member of the parish in good standing. The bishop and the vicar general of the diocese and seven laymen were elected as trustees. This action was instigated by the bishop of Lincoln, the vicar general of the diocese, and Father O'Brien, who has been appointed by the bishop as rector of the plaintiff parish. The seven laymen united in asking that this case be dismissed, and all of them testify that, so far as they know, the congregation want it dismissed and desire Father Murphy to officiate as their priest.

The plaintiff is incorporated as a society in conformity with the canons, discipline and faith of the Roman Catholic church. The statute so permits. The evidence is undisputed that, according to that discipline and those canons, local congregations and inferior officers of the church are under the jurisdiction and subject to the decrees of the higher officials and judicatories of the church with respect to ecclesiastical affairs, that the bishop of the diocese has authority to dismiss a priest or transfer him from one mission to another, and is vested with power to excommunicate priests as well as laymen within the diocese. The decree of excommunication was not admitted in evidence, but sufficient appears to prove in this informal proceeding that the bishop exercised his authority to exclude the defendant from the priesthood and the church. We do not say that this proof will be sufficient if the defendant answers and the issue is tried on its merits, nor do we say that there is any such privity between the parties to this action and those in *St. Vincent's Parish v. Murphy,*

supra, that the judgment in that case will estop either party hereto.

In *Pounder v. Ashe,* 44 Neb. 672, we held that "where a local church organization is a member of an association of congregations having a set of general rules for the government and conduct of all its members and officers, and the orders and judgments of the association are binding upon the minor organizations or congregations composing it, its decisions, in so far as they relate exclusively to church affairs and goverment, are absolute, and will be so regarded by legal tribunals." In that case the annual conference of the Evangelical Association of North America, acting within its jurisdiction according to the discipline of the church, deprived Reverend Ashe of the right to officiate as a clergyman in and expelled him from the church, and it was held that he should be enjoined from exercising in a church of that denomination the faculties of a clergyman, and should be restrained from interfering with the minister entitled to that position. See, also, *Bonacum v. Harrington,* 65 Neb. 831; *St. Vincent's Parish v. Murphy. supra; Watson v. Jones,* 13 Wall. (U. S.) 679.

Father Murphy contends in the instant case, as he did in the *St. Vincent* case, *supra,* that the bishop had no authority to make the order of excommunication; that, however great the bishop's authority may be in matters spiritual, it does not extend to material things; and that the congregation of the plaintiff, acting through its trustees, may employ whomsoever they choose to minister to their spiritual wants, and have sole authority to commence, continue or dismiss any litigation prosecuted in the plaintiff's name. The defendant upon his cross-examination admitted that the diocesan court had authority, if rightfully exercised, to make the orders entered against him, but contended, as he did in the *St. Vincent* case, *supra,* that the order is void. If, upon the final hearing of this case, the proof shall be in the same condition that it was in the *St. Vincent* case, it will be the duty of the court to resolve this point against Father Murphy. The courts of the Ameri-

can Union are a unit in refusing to coerce any individual to worship according to any faith or creed or to worship at all, but they do not refuse to protect property rights because they may thereby interfere with the religious convictions of some individual or aggregation of individuals. The constitution of this state contemplates that the civil courts may be called upon to protect religious denominations in the peaceable enjoyment of their own form of worship. Section IV of the Bill of Rights provides: "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, * * * Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." The fact that a majority of the plaintiff's trustees prefer that Father Murphy should occupy its church edifice and control and use the vessels and vestments contained therein and consecrated to religious purposes according to the canons and faith of the Roman Catholic church does not oust the civil courts of jurisdiction, nor will a denial by the court of Father Murphy's asserted right to occupy control and employ that property contravene the fundamental law, *supra.*

The legislature in providing for the incorporation of religious societies, sects, bodies and denominations enacted section 167 *et seq.*, ch. 16, *supra,* which apply with peculiar force to the organization of the Roman Catholic church, but the bishop of the Lincoln diocese did not avail himself of this law. The legislature also enacted sections 40-44, ch. 16, *supra,* which afford the members of religious associations the right on their own initiative to incorporate. They may do so independently of any superior organization, and reserve exclusive control to themselves of such property as they may acquire, or they may organ-

ize in subordination to the discipline and rules of any greater body of which they may form an integral part.

In the instant case the members of the parish at Ulysses did not reserve to themselves the right to acquire, hold and enjoy property free from the discipline of the parent church, but specifically stated that they organized in subserviency thereto. The word "Roman" was not incorporated in the articles, but its presence should be implied. Section 42, ch. 16, Comp. St. 1899, specifically states that the trustees shall have authority to obtain, hold and enjoy such property, real and personal, as they may acquire, "for the purpose of carrying out the intentions of such society or association." The incorporators of the plaintiff plainly stated their intentions to organize "in conformity with the canons, discipline and faith of the Catholic church." The discipline and canons of that church do not permit, but, on the contrary, forbid under pain of extreme ecclesiastical punishment, an excommunicated priest to celebrate any of the rites of the church or to exercise any faculty of the priestly office. While the civil courts will not assume to generally restrain an exscinded priest from assuming to exercise the faculties of the priesthood, yet, if he insists in performing those functions in defiance of the mandates of his superiors having jurisdiction over him and in edifices which have been dedicated to the worship of the faith which he assumes to thereby represent, he perverts the trust which the law impresses upon property held for or dedicated to that worship, and the courts upon proper application will prevent that perversion. *Attorney General v. Welsh*, 4 Hare (Eng. Ch.) 572; *Miller v. Gable*, 2 Denio (N. Y.) 492; *Pounder v. Ashe, supra; Bonacum v. Harrington, supra.*

The trustees cannot authorize the diversion of the temporalities of the church from the purposes to which they were devoted by the founders. *Brunnenmeyer v. Buhre*, 32 Ill. 183. Litigation of this character has been sustained where so small a minority of an unincorporated association as one individual has complained that the temporalities of

a local congregation which formed part of a greater aggregation and was in subordination thereto were being applied to a purpose foreign and antagonistic to the discipline and faith of the parent organization. *Wiswell v. First Congregational Church,* 14 Ohio St. 31; *Attorney General v. Welsh, supra; Roshi's Appeal,* 69 Pa. St. 462. It is argued, however, that a majority of the plaintiff's board of trustees has the right to commence or dismiss suits, and the board, speaking through seven of the nine members and acting in accordance with the desires of practically all of the congregation, want Father Murphy to officiate as their spiritual consoler and minister and therefore this suit cannot be maintained.

We do not find it necessary to determine whether the amendments to the articles of incorporation are valid or otherwise, or whether a communicant of the church may or may not become a trustee unless the bishop of the diocese consents thereto. The bishop and vicar general are trustees of both boards, if it can be said that two boards exist, so that they are trustees of the plaintiff. In that capacity they have the right to institute and maintain any action which has for its purpose the vindication of the trust which the law impresses upon the property held in the plaintiff's name for use in conformity with the canons, discipline and faith of the Roman Catholic church. Such a suit may be maintained in the name of the corporation, and it does not lie within the power of a majority of the trustees, no matter how overwhelming, who are denying the authority of the church, to dismiss that action and thereby prevent the court from protecting the church from the intrusion of an excommunicated priest to the exclusion of a priest duly authorized by the ecclesiastical authority having jurisdiction over the subject. *First Reformed Presbyterian Church v. Bowden,* 14 Abb. N. Cas. (N. Y.) 356; *Mt. Zion Baptist Church v. Whitmore,* 83 Ia. 138, 13 L. R. A. 198. Nor is it material that nearly all of the present members of the plaintiff desire Father Murphy's ministrations. The original incorporators devoted the plaintiff's property to a

specific purpose involving a trust for the benefit of all those individuals of the congregation who then desired, or in future years might desire, to worship Almighty God according to the faith and agreeable to the canons and discipline of the Roman Catholic church. The mutations of time have changed that membership, some of the incorporators doubtless have gone to their reward and new members have been received, but no financial consideration sustains their right to participate in the secular affairs of the corporation or of the religious functions of the church. Received as communicants of the faith, they will not be permitted to use its edifices for unlawful services or exclude its rightful minister from the lawful use of that property. If they prefer Father Murphy to Father O'Brien or to any other appointee of the bishop, they have the absolute right to worship under the direction of their chosen leader, to absent themselves from the plaintiff's church building and to refuse to contribute to the support of Father O'Brien or of the church, and the civil courts administering the law of the land will protect them in the lawful exercise of that right, but they should occupy, for the purpose of their worship, buildings and employ chattels not consecrated to another purpose.

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

REVERSED.

REESE, C. J., dissenting.

I do not express any opinion upon the merits of the controversy between the officiating priest and the congregation at Ulysses, on the one side, and the bishop and other church officers upon the other. That the present conditions are unfortunate cannot be denied. But in the settlement of property rights involved in such controversies the courts are sometimes called into action and are compelled to settle and adjust such rights. They do not hesitate to discharge the duty when a proper case is presented for adjudication. Was such a case presented to the district

court and is such an one presented to this court? The real and underlying questions are: First. Is the church at Ulysses now operating under and governed by its amended articles of incorporation? Second. Is the present and acting board of trustees of that church the lawful board of trustees, or is the previous board, in existence before the adoption of the amended articles, the legal board? Third. Is the board which appeared and moved to dismiss this suit the lawful and rightful board of trustees? If they are, they had an absolute right to insist upon the dismissal of this suit, and the decision of the district court in dismissing the case was correct, and the only order which should have been made. In order to reach a proper decision of the controversy, it will be necessary to decide these questions, and in their decision the question of the title of the newer board to the office, which it is claimed they are usurping, is to be solved before the consideration of the relief to be granted can be entered upon. Can that question be settled in an action for an injunction, or must these questions of law be first adjudicated in a proper legal proceeding by an action in the nature of *quo warranto* or otherwise? It is my opinion that a court of equity has no power or jurisdiction to decide this question. *Sherman v. Clark*, 4 Nev. 138. It must be remembered that, strictly speaking, this is not a suit by or against the church corporation. It is not a suit against third parties who are invading the rights of the corporation, but it is a suit among those claiming to be officers, all of whom are members of the corporate body. There can be no adjudication without first deciding who are the legal trustees. This should only be done in and by a court of law. Until that question is decided, equity cannot interfere to try the rights of the claimants. In my opinion the decision of the district court was right and should be affirmed.

DODGE COUNTY ET AL., APPELLANTS, V. WILLIAM S. BURNS ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,450.

Taxation: INHERITANCE TAX: CREDITS OF NONRESIDENT. The right to take by will a credit payable in the state of New York, but evidenced by a contract of sale for real estate within Nebraska, executed by the vendor and at all times during his lifetime retained in his possession at his residence in the state of New York, is not, in the absence of extraneous facts, which do not appear in the instant case, subject to an inheritance tax upon the death testate of the vendor.

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

John W. Graham, A. Van Wagenen and *J. A. Van Wagenen,* for appellants.

C. E. Abbott and *F. Dolezal, contra.*

ROOT, J.

This is a controversy between certain counties in the state of Nebraska and the legal representatives of Ira Davenport, who in 1904 died testate a resident of the state of New York, over an inheritance tax. The representatives prevailed, and the counties appeal.

Ira Davenport at the time of his death had been for many years a resident of the state of New York, but owned land in the state of Nebraska. He also owned shares of stock in Nebraska corporations, and, as vendor, held contracts for the sale of real estate within this state. Subsequent to Davenport's death, his representatives paid an inheritance tax on the transfer of the title to the real estate and to the corporate stock. The taxing auhorities of the state of New York levied a like tax upon the succession to the credits evidenced by the real estate contracts. In all of the proceedings leading up to this appeal, the taxing

officers and the courts refused to tax the succession to these credits. We have not discovered any of these contracts or a copy thereof in the bill of exceptions, nor is the substance of any of them stated in or proved by the evidence. Counsel for the respective litigants, however, agree in their presentation of the case that we should consider the subject in dispute as though the contracts were real estate mortgages, and we therefore shall confine the discussion to that point of view.

The appellants succinctly state the issue: "The question in this case is this: Does a debt owed by a resident of Nebraska to a nonresident, a duplicate of the contract evidencing the indebtedness being situated in the state of Nebraska, have such an existence or situs in this state as will make it liable to the imposition of the inheritance tax?" The case of *Chicago, R. I. & P. R. Co. v. Sturm.* 174 U. S. 710, is cited to sustain the contention that the obligation of the debtor is a thing within the state of his domicile sufficient to sustain an action *in rem* by way of attachment and garnishment, although the debt is payable in a foreign jurisdiction wherein the creditor resides. Assuming this principle of law to be correct, it is argued that, if a debt or the debtor's obligation to pay his debt is property within the state of his residence for the purposes of attachment and garnishment, it also there abides as property within the meaning of section 10706, Ann. St. 1903, which, among other things, provides that "all property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, *which property or any part thereof shall be within this state,* * * * shall be and is subject to a tax at the rate," etc. (The italics are ours.) To the mind of the writer of this opinion the logic is sound, but we are confronted by our former decisions which compel a contrary conclusion.

In 1886, in the case of *Wright v. Chicago, B. & Q. R. Co.*,

19 Neb. 175, we held that a debt not payable in this state could not be seized by garnishing the debtor in this state. Subsequently, in 1893, we held in *American Central Ins. Co. v. Hettler*, 37 Neb. 849, that a debt due a resident of Nebraska from a Missouri insurance company maintaining a general office in Illinois could not be reached by attachment and garnishment proceedings in the state of Illinois. Thereafter, in 1900, in *Bullard & Hoagland v. Chaffee*, 61 Neb. 83, on the authority of the last-cited cases, it was decided that "it is the settled doctrine of this court that one can be garnished only in the state where the debt is payable, if that be the place of residence of his creditor."

Notwithstanding the fact that we have refused to require a resident debtor to pay his creditor's creditor a debt payable in a sister state, we have given full faith and credit to the judgment of the courts of our sister states holding to the contrary. *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; *Hadacheck v. Chicago, B. & Q. R. Co.*, 74 Neb. 385. We therefore are in the position of extending to nonresidents the benefit of their local exemptions, of refusing to assist a local creditor to collect his claims against a nonresident debtor, and at the same time of sustaining foreign judgments which seize debts payable to the citizens of Nebraska. And so it is that, had a creditor of Ira Davenport in that gentleman's lifetime brought an action aided by attachment in Dodge county and by garnishment proceedings had sought to compel the vendees to pay into court the matured and unpaid purchase money on these contracts to satisfy his claim, the courts would have refused him relief. Can it be that this property which was without the state during the testator's natural lifetime was by the process of his mortal dissolution imported into this commonwealth? We think not. We do not forget that for the purpose of satisfying creditors simple debts due from a resident of Nebraska to Ira Davenport would support an administration of his estate in the proper probate court of this state, but these are not simple debts. These written

solemn obligations have never been within the state, but at all times since their execution have been in the possession of the vendor in the state of New York or in that of his legal representatives appointed by the surrogate court of that state. There are no Nebraska creditors of the Davenport estate, nor any other unsatisfied creditors. There is no proof of facts in the record to give the capital represented by these contracts a local situs, nor do we think that any significance should be attached to the fact that each vendee has in his possession within the state of Nebraska a copy of the contract of sale. That copy is the vendee's muniment of a title, to which no representative of Ira Davenport succeeds.

If the facts established by the evidence in this case call for an application of the inheritance tax law, real estate mortgages, if of sufficient value, held by nonresidents of Nebraska are subject to that tax upon the death of their owner. The tax is imposed by the statute, although its amount is to be ascertained by facts not reflected from the recitals in the mortgage deed. The tax becomes a lien immediately upon the death of the individual in whom the property was vested at the time of death, and continues for at least five years. The executors and administrators are also liable for this tax, whether they reserve funds of the estate to pay it or not. To hold that the right to succeed to the title to mortgage credits payable to a nonresident in a sister state or in a foreign country is subject to our inheritance tax law will cloud the title to many tracts of land within this state, will involve executors of the wills of nonresident testators in controversy, and subject them and their bondsmen to an unexpected liability, to which they may with difficulty in some instances respond. Of course, if the legislature intended the law to be thus construed, the fact that to do so will work a hardship in some instances is not a good reason for refusing to so apply it; but, if it is probable that the legislature did not intend to give this property a local situs for the purpose of taxation, the argument is entitled to some consideration. At their

last session the legislature by enacting senate file 271 (laws 1911, ch. 105) provided that real estate mortgages and contracts like those considered in the instant case, executed subsequent to July 1, 1911, shall for the purposes of taxation have a situs in Nebraska, and directs the taxing officers to separately value and assess such property. It seems to us this legislation in a sense construes the inheritance tax law as contended for by the appellants.

A consideration of this legislation and of *Wright v. Chicago, B. & Q. R. Co.*, *American Central Ins. Co. v. Hettler*, and *Bullard & Hoagland v. Chaffee, supra*, convinces us that the district court was right, and its judgment therefore is

AFFIRMED.

FAWCETT, J., not sitting.

GUSTAVE A. FUCHS ET AL., APPELLEES, V. WILLARD E. CHAMBERS ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,480.

1. **Creditors' Suit.** Where it appears that a judgment creditor has exhausted his legal remedies, a court of equity will aid him in subjecting the interest of an insolvent debtor in a corporation to the satisfaction of his judgment.

2. ———: REVERSAL. The evidence in this case commented upon in the opinion, and *held* not to sustain the judgment of the district court.

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

McCoy & Olmstead, for appellants.

Duncan M. Vinsonhaler, contra.

ROOT, J.

This is an action in equity in aid of an execution to subject Willard E. Chambers' interest in a corporation, the defendant Chambers Academy Company, to the payment of a judgment. The plaintiffs prevailed, and the defendants appeal.

The record discloses that the defendant Chambers and certain of his relatives in 1903 organized a corporation, the defendant Chambers Academy Company, with a capital stock of $30,000, for the purpose, among other things, of constructing and operating a dancing academy in the city of Omaha. Two hundred fifty shares of capital stock of the par value of $100 each were first issued, and subsequently 50 other like shares were issued. The defendant Chambers subscribed for, and there were issued to him, 62 shares of this stock, for which he paid but $360 in cash, and his promissory note, which was subsequently canceled and returned to him. Chambers' wife also secured 62 shares in the same manner. Subsequently 13 additional shares of the stock were issued to Chambers and the same number to his wife. Chambers and his wife had neither capital in excess of $720 nor credit in any amount, so that the corporation borrowed and used in constructing its building $13,500 and secured the debt by mortgages upon its property. It was also compelled to give, and did give, the broker who negotiated these loans its notes for $1,500 secured by like mortgages. The money was borrowed to pay into the corporation's treasury the money due from Mr. and Mrs. Chambers upon their stock. They agreed with the corporation to pay the debts, and to secure their engagement, on the day the stock was issued to them, transferred it to the corporation or to T. C. Shelley for the corporation's benefit. After the corporation's building was completed, Chambers taught dancing therein, and in June, 1904, with his wife, entered into a contract of lease for five years with the corporation for the use of its property, and agreed to pay as rent therefor $4,000 per

annum. In 1905 Chambers was interested in the Lyric theater in Omaha, but the venture proved unprofitable, and out of that transaction the demands against him sought to be enforced by these proceedings were created. In April, 1906, Chambers was in arrears $3,550 in his payments of rent to the corporation, and during that month at a stockholders' meeting agreed to surrender to it all of his stock other than one share in consideration that the corporation release all of its claims against him. The proposition was accepted; the old certificates of stock were canceled, a new one for one share was issued to him, and the remainder of his stock, 74 shares, was issued to another stockholder who assumed his indebtedness to the corporation. In 1907 the plaintiff recovered a judgment against Chambers. One execution was issued and returned "no goods." Another execution was issued, and, as alleged, was levied upon the certificates of stock which had been canceled one year prior thereto. The court held that Chambers' shares of stock were worth $114 a share at the time they were transferred to the company, or a gross sum of $8,436, and exceed in value the amount of his indebtedness to the corporation by $1,722.52. To that extent the transfer was held fraudulent and void, and the corporation was directed to deliver the stock to the sheriff within 20 days to be sold as upon execution to satisfy, first, the plaintiff's demand; second, the demand of an intervening creditor. Some argument is advanced concerning the validity of the levy; but, since the judgment creditor is insolvent, has no property real or personal other than his interest in the corporation which was seized to satisfy his debts, and this is an action in equity, we are of opinion that whatever relief the plaintiff is entitled to may be given in this action. Code, sec. 532.

A consideration of the evidence convinces us that the decree of the district court cannot be sustained. Counsel for the plaintiff concede that the court omitted an item of $750 in favor of the defendants, but we are compelled to go further. The evidence is uncontradicted that Chambers

paid the corporation but $360 in money for his stock, and that when he settled with it in 1906 he was owing the academy company $3,550 for rent. He also was under obligation to pay it the money borrowed for his benefit in an amount equal to the unpaid purchase price of his stock, plus $750 commission thereon, with at least two years' added interest. The proof is undisputed that that debt with interest amounted to over $8,000 at the time the stock was transferrd, so that, if the stock was worth $114 a share at that time, this indebtedness plus the amount due for rent would more than equal the value of the stock.

The plaintiffs contend that the account between Chambers and the corporation copied from its books discloses a credit in his favor which should be considered, but we are unable to agree with them. There is no element of estoppel in this case. The corporation defendant has at all times had possession or control of Mr. Chambers' stock, and its claims against him are *bona fide*. In our judgment, the evidence will not sustain a finding of fraud with respect to the matters complained of in the petition. The share of stock owned by Willard E. Chambers is not specifically exempt from judicial sale, and should be delivered up to be sold upon execution in satisfaction of the plaintiffs' demand.

The judgment of the district court therefore is reversed and the cause remanded, with directions to modify the judgment so as to subject but the one share of stock of the defendant corporation held by the defendant Chambers to sale for the benefit of the plaintiffs; each party to pay his own costs in this court.

REVERSED.

SAMUEL P. JUSTUS, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED JUNE 13, 1911. No. 16,488.

1. **Master and Servant:** FELLOW SERVANTS. One who for the purpose of qualifying himself to serve a street railway company as a conductor is permitted to go upon its cars and perform such service as the conductor directs is the company's servant, notwithstanding he receives no wages from his master. The motorman upon the car is his fellow servant.

2. **New Trial:** RELIEF IN EQUITY. If in an action in equity to secure a new trial of an action at law it appears that the plaintiff's evidence in the law action did not establish a cause for action against the defendant, and that the court in that action fairly submitted the controversy between the parties, a new trial will not be granted, notwithstanding the plaintiff was prevented by accident from securing a transcript of the record of his law case until too late to give this court jurisdiction on appeal.

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

T. J. Doyle and *G. L. De Lacy,* for appellant.

Clark & Allen, contra.

ROOT, J.

In March, 1907, the plaintiff in order to qualify himself for the occupation of a street car conductor, and by the direction of the defendant's superintendent, accompanied one of its conductors upon a car. The conductor was to instruct the plaintiff in the duties incident to the vocation. The plaintiff was injured before daylight and at a time when no passengers were in the car. The conductor and the plaintiff were each reading a newspaper as the car approached a switch which, if opened, would permit the car to pass from one railway to another. The motorman shut off the greater part of the electric current,

opened the switch, and again applied the current so that the speed of the car was suddenly accelerated. In the meantime the conductor, evidently under the impression that the car had stopped at a railway crossing one block distant, said to the plaintiff: "He (meaning the motorman) is waiting for you to flag the crossing." The following is quoted from the plaintiff's testimony: "And so I got up and threw the paper down and went to the rear end of the car, and just as I went to step off the car the car started with a sudden jerk, and instead of being plumb still—I thought it was still, but evidently the motorman had opened the switch and the car was slowly moving, and there was another car coming on the south track at that time, coming right by and ringing the bell, and by the noise of this car I could not recognize the fact that this car was moving at all. I thought it was absolutely still, but it was not, as I learned later. When I went to step to the street, the motorman turned the current on heavier, and the car started with a sudden jerk that throwed me in the street." The plaintiff further testified, in substance, that the conductor theretofore told him the cars were always flagged over the railway crossings, that is, that the motorman would stop the car when close to the crossing, and it was the conductor's duty to alight, walk ahead until he had a clear view of the railway track, and, if there were no approaching trains, to signal the motorman to proceed. He also testified that the conductor "told me to never alight from the car or board the car when it was in motion until I learned the business, that I would get hurt if I did. He said there was danger in doing that, and always alight from the rear and get on the rear of the car when I went to get on the car."

The defendant's negligence pleaded in the plaintiff's petition in the law action is that the conductor told the plaintiff they were at the crossing, for him to get off the car and flag it, and that while he was obeying that order "the defendant negligently and carelessly through its employees started said car with a quick jerk and rapid

speed, throwing said plaintiff through said negligence and carelessness, violently to the ground." The court instructed the jury that the plaintiff and the motorman were fellow servants, and no verdict should be returned for the motorman's negligence, but that, if the conductor negligently directed the plaintiff to alight from the car and he was injured while obeying the order, they should find in his favor, unless they found from the evidence that he was guilty of negligence which proximately contributed to the injury. The court also told the jury that the plaintiff would be guilty of such negligence if he alighted from the car while it was in motion.

There is a difference of opinion between counsel as to whether the plaintiff was in the defendant's employ or whether he was a mere licensee or invitee. Upon this subject interesting briefs have been submitted. We conclude that the district court was right in instructing the jury that the plaintiff was the defendant's servant within the meaning of the law of master and servant. The plaintiff was under the defendant's control preparing himself for its service and actually performing parts of that service as he acquired knowledge of its details. The fact that he did not receive wages during his apprenticeship does not destroy the relation. The opportunity given him to acquire the knowledge and skill to qualify him for the position he desired was the compensation he received for the services performed. *Barstow v. Old Colony R. Co.*, 143 Mass. 535; *Ladd v. Brockton Street R. Co.*, 180 Mass. 454; *Weisser v. Southern P. R. Co.*, 148 Cal. 426; *Millsaps v. Louisville, N. O. & T. R. Co.*, 69 Miss. 423.

We do not understand that counsel for plaintiff complain of the court's instruction that the motorman and the plaintiff were fellow servants, if it be conceded that the relation of master and servant existed between the plaintiff and the defendant. Neither servant had any control over the other. Both under the control of the conductor were engaged in running the car and were fellow servants. *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb. 570;

Missouri P. R. Co. v. Lyons, 54 Neb. 633. Whether they were fellow servants or not, the evidence does not prove that the motorman did anything out of the ordinary in guiding his car from one track to the other or in accelerating its speed at the time and in the manner testified to by the plaintiff.

There then remains but the alleged negligence of the conductor for consideration. While it is pleaded in the petition that the conductor ordered the plaintiff to alight from the car and flag it over the crossing, and the plaintiff so testified, yet, when he repeats the language of the order, it is not a command, but a simple statement that the motorman is waiting for the plaintiff to flag the crossing. Construing the statement in the light of the instruction previously given, that it was the conductor's duty to alight and flag the car over the crossing, it may in reason be said that the conductor suggested that the plaintiff should alight. The conductor had also instructed the plaintiff not to board or alight from the car while it was in motion. In the absence of anything peremptory in the direction to flag the car, the statement should not be construed as an order to get off the car before it stopped. The plaintiff admits that the car was slowly moving when he started to step therefrom. If the plaintiff had grasped the handhold, he would not have been precipitated into the street, or, if he had followed the instruction to wait until the car stopped, he would not have been injured. The plaintiff had been instructed and warned about the danger incident to getting on or off of a moving car and knew there was a risk connected with such conduct. We do not believe that a dispassionate consideration of the evidence by a jury properly instructed concerning the principles of law that should control the case would result in a verdict for the plaintiff. In the light of the plaintiff's evidence, the court's charge is fair, and in our judgment should not be construed as contended for by the plaintiff's counsel.

Upon the entire record before us, we are constrained to

find that none of the rulings or orders made in the action at law were prejudicial to the plaintiff and that he has no cause for action against the defendant. The accident is to be regretted; it resulted in serious injury to the plaintiff, but the defendant is not by the law of the land made liable therefor. It would serve no good purpose to reopen the controversy, and a court of equity will not set aside a judgment for the sole purpose of permitting the defeated litigant to again press a demand which cannot be sustained.

The judgment of the district court therefore is

AFFIRMED.

DORA F. WALDEN, APPELLEE, V. BANKERS LIFE ASSOCIATION, APPELLANT.

FILED JUNE 13, 1911. No. 16,493.

1. **Insurance:** ACTION: DEFENSE OF SUICIDE: BURDEN OF PROOF. The burden is upon an insurance company to prove by a preponderance of the evidence a controverted defense that the deceased came to his death from poison self-administered.

2. ———: ———: ———: EVIDENCE. In such a case, the defense is not established unless the evidence so clearly and unmistakably points to the conclusion of suicide as to exclude all reasonable probability of death by accident or from natural causes.

3. ———: EVIDENCE. The evidence adduced in this case is referred to and commented upon in the opinion, and *held* sufficient to sustain a verdict for the plaintiff.

4. **Evidence:** WRITTEN STATEMENTS: ADMISSIBILITY. Where a written statement, alleged to have been found in the room where the corpse of an alleged suicide was discovered, is offered in evidence as part of the *res gestæ* of the transaction of his death, and it appears that several persons were in and about the room before the statement was noticed, and all of those persons were not called as witnesses, it is not an abuse of discretion for the district court to require proof that the statement or the signature thereto is in the deceased's handwriting before admitting the statement in evidence.

5. **Trial:** EVIDENCE: OFFER OF PROOF. In order that a party may avail himself of an error in rejecting the testimony of a witness on direct examination, he must make an offer to prove the facts he expected to show by such testimony.

6. **Insurance:** ACTION: EVIDENCE. The verdict of a coroner's jury that a person upon whose remains an inquest was held died as the result of poison self-administered is not competent evidence to prove that fact in an action to recover upon a policy of insurance upon the life of the deceased.

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

C. J. Beedle and *I. M. Earle,* for appellant.

H. M. Sinclair, W. D. Oldham, W. P. Hall and *T. F. Barnes, contra.*

ROOT, J.

This is an action to recover upon a certificate of insurance upon the life of the late J. Ranson Walden. The plaintiff prevailed, and the defendant appeals.

The defense is that the deceased committed suicide by the use of cyanic poison, which, if established, should defeat the action. The cause was tried to a jury. No exceptions were taken to the instructions given, nor to the rejection of those requested.

1. The most important assignment of error is that the evidence does not sustain the verdict. The burden is upon the defendant to establish its defense, and the presumption is that Dr. Walden's death was involuntary. *Travelers' Ins. Co. v. McConkey,* 127 U. S. 661; *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869. The presumption may be rebutted, and must yield to facts clearly inconsistent therewith, and, if competent proof of facts and circumstances surrounding the death so clearly and unmistakably point to the conclusion of suicide as to exclude all reasonable probability of natural death or accident, the presumption will be destroyed and the defense

sustained. *Hardinger v. Modern Brotherhood of America, supra.*

The material evidence upon this issue, as we understand it, is as follows: The sheriff of Phelps county testified, in substance, that during a conversation with Dr. Walden in his office, between 10 o'clock and noon of the day the doctor died, he told him, at the request of the father of a young lady, that he ought to leave this woman alone, but the doctor replied that the affair had gone too far, and that he expected to marry the woman after procuring a divorce from his wife, and that a Mr. Falk, who accompanied the witness, told Dr. Walden that if he were in the doctor's place he would either leave the girl alone or leave the town. The interview continued five or six minutes, and the witness departed from the office at 11 o'clock or a few minutes thereafter. There is no evidence other than this testimony to prove that this woman is in life, that she resided in the state, that she was acquainted with the deceased, or that they had been in each other's company. On the other hand, the evidence is undisputed that the deceased and his wife were devoted to each other, that she frequently assisted him in his office, and that on the morning of the day of his death, when departing for his office, he had kissed her good-by. If the insinuation that Dr. Walden was infatuated with this young woman is justified by the facts, more proof could have been produced than appears in the record upon that point, and the jury might well question the existence of such a condition. Whatever may be the fact, the sheriff made no threat to Walden, and nothing is testified to that would have alarmed a timid man or discouraged an adventurous one if engaged in the unholy quest it is argued Dr. Walden was pursuing. Subsequent to the time the sheriff testifies to having talked with Dr. Walden, the dentist purchased a money order and remitted it to Detroit to pay for an office jacket which was shipped subsequent to his death. Evidently the dentist had not then determined to shuffle off this mortal coil.

About 12:30 o'clock Dr. Walden purchased a small quantity of cyanide of potassium. Walden had been in the habit of using the drug as an ingredient of a bath for dental plates and also used it in connection with plating silverware. He told the druggist that he wanted the drug "to put in his plating bath." To this point there is nothing sinister in the proof. About 1 o'clock the occupant of an office in the building where the doctor's office was located noticed that persons coming to Walden's office did not gain admission. There is no direct proof that the office door was fastened, but the fact may be inferred from the evidence. The doctor's wife was notified, and some time after 2 o'clock his father and some other person, not identified by the witnesses, upon entering the office found the doctor's corpse upon a sofa. There is some conflict in the evidence, but we think it fairly appears that the doctor's shoes had been removed, otherwise he was completely dressed. The evidence is uncontradicted that Walden's lower limbs were not flexed, his arms were not distorted, and his features were composed as though he were asleep. A distance of from 18 inches to 2 feet from the sofa a glass containing particles of a white substance was found upon the floor. There is some testimony tending to prove that this substance may have been cyanide of potassium; but no tests were made to ascertain the truth, and there is considerable evidence tending to discredit the conclusion. The evidence is also uncontradicted that the doctor used a like glass for a cyanide bath to cleanse his dental plates. There is some testimony to the effect that there were traces of a white substance near the corners of the deceased's mouth; but other witnesses, who were in the office as early as were the witnesses who testified to the fact, testify unequivocally that they closely inspected the dead man's face and found no foreign substance thereon. The deceased while in life was subject to severe fainting spells, but the underlying cause is not testified to. The evidence is undisputed that the corpse of one whose death is caused by cyanic poison furnishes definite physical evi-

dence of the fact, and that in the instant case all of those indicia were absent. In cases where the issue is suicide, and death was caused by the application of external force, such as gunshot wounds, the proof is beyond question that death was caused by violence, and the sole question to determine is whether the deceased set the force in motion which destroyed his natural life.

In the case at bar there is no direct proof that Walden's death was unnatural; but the fact must be established, if at all, by inference from the other facts and circumstances in the evidence. The strongest proof seems to be Walden's probable written declaration found in his office upon one of his letter-heads. The evidence does not prove who first saw the communication subsequent to Walden's death, and some doubt is cast upon its authenticity by the fact that the sole witness to the identity of the handwriting is impeached to some degree by other witnesses and by facts and circumstances testified to by the witnesses. The statement is as follows: "Dear Wife and All: I am going to leave this earth. Good-bye, good-bye Jas. I am using cyanide of potassium KCN. Pray for me and may God forgive me." The doctor did not state he was taking cyanide of potassium, but that he was using it, nor did he write that he was about to commit suicide. He often used the drug in his laboratory, and it is possible that one of the fainting spells to which he was subject was approaching and he had a premonition that it would be fatal. We do not say that an inference that Dr. Walden intended to take his life by the use of cyanide of potassium cannot be logically drawn from this communication, but we do say other and innocent inferences may likewise logically be deduced therefrom. If Dr. Walden had declared that he was about to cut his throat or to blow out his brains, and there were no visible marks upon his corpse, the declaration might be accepted as proof of suicidal intent, but could not in reason be received as proof of death by the use of a revolver or of an edged tool. So in this case, in the state of the record, with positive and uncontradicted

evidence that not an indication of cyanic poisoning appeared in Dr. Walden's remains, and like proof that, had he died from the effects of that poison, those indicia would have appeared, the declarations, while evidence of suicidal intent, do not in our judgment either necessarily or logically prove that Dr. Walden destroyed his natural life by taking cyanide of potassium. The declarations were misleading and evidently untrue in some particulars. Why should the jury necessarily accept them as true in others? No physician or other witness, expert or layman, testified that Dr. Walden's death was not caused by natural means. The jury could not honestly have found that any of the invariable indicia of cyanic poisoning were present. Should nature's evidence be rejected and inferences deduced from facts not necessarily inconsistent with death from natural causes be accepted to work a forfeiture of the defendant's undertaking? We think not. If cyanic poison be not accepted as the cause of Walden's death, there is no proof of death by other unnatural means, or by any force set in motion by the deceased. In our opinion the jury had a right to say the defendant utterly failed to connect the assured's death with cyanic poison.

2. The defendant presents an instructive brief to sustain its contention that the written declaration just referred to and one other writing found in the same room, but upon another desk, were parts of the transaction whereby Walden came to his death and were admissible without proof that they are in his handwriting. The letters may have been written by the deceased and may have been lying upon the tables at the time his body was first discovered and before any one had an opportunity to place them in the position where they were found, yet these facts are not proved in the evidence. The evidence does not disclose who other than Dr. Walden first saw them subsequent to his death. No attention seems to have been given them until at least several persons had come and gone. The trial judge of necessity is vested with considerable discretion in determining whether a proper foundation has

been laid for the introduction of evidence purporting to prove the circumstances surrounding a transaction.

After the witness Kingsley testified that the letters were in Walden's handwriting, exhibit 6, which is set out in full in the first division of this opinion, was admitted and read to the jury. Exhibit 5, a copy of the other letter, was not offered, as we understand the record, although an attempt was made to prove its contents. The defendant made no offer of proof after the court sustained the objections to this oral testimony. Therefore no foundation was laid to present the alleged error for the consideration of this court. The authorities upon this point are collated in 3 Neb. Syn. Digest, p. 3136, and will not be inserted here. The original communications were delivered to Mrs. Walden, and had been destroyed or mislaid by her so they could not be produced at trial. In none of the cases cited by the defendant to sustain its proposition that the letters were part of the *res gestæ* of the transaction were the circumstances so nearly like those in the instant case that they should control us. We are satisfied that the court did not abuse its discretion in ruling as it did, and the assignment of error is not well taken. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456.

Error is assigned upon the court's refusal to admit in evidence the verdict of the coroner's jury. That jury found that Dr. Walden came to his death by cyanic poison self-administered. Authorities may be cited to sustain the admissibility of this evidence; but they are based upon an adherence to ancient law which gave great credit to those verdicts and held the coroner's inquest to be substantially an action *in rem*. *United States Life Ins. Co. v. Vocke, Adm'r*, 129 Ill., 557. But in this jurisdiction a forfeiture of a suicide's chattels to the state does not follow as a matter of law upon a finding by the coroner's jury that the deceased committed suicide. There is nothing in our institutions or in our written law to justify a holding that the legislature intended to incorporate this feature of the common law into the laws of this state, and we have no

hesitancy in declaring the verdict inadmissible as substantive evidence tending to sustain the defendant's defense that Dr. Walden committed suicide. *Germania Life Ins. Co. v. Lewin,* 24 Colo. 43; *Cox v. Royal Tribe,* 42 Or. 365; *Ætna Life Ins. Co. v. Kaiser,* 115 Ky. 539, 74 S. W. 203; *Wasey v. Travelers Ins. Co.,* 126 Mich. 119.

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

AFFIRMED.

SEDGWICK, J., dissenting.

The issue tried in this case was whether the deceased committed suicide or died from natural causes. The company alleged that deceased committed suicide. It had the burden of this issue; but it is a civil action, and the company was required only to produce a preponderance of the evidence. I do not believe that it will serve any useful purpose to recite and comment upon the proof of suicide contained in this record, some of which is stated in the majority opinion. If anything can be proved by human testimony to a moral certainty, this evidence, I think, proves suicide, and no good can result from denying insurance companies the equal protection of the law.

LETTON, J.

I concur in this dissent. If such decisions are made, it is useless for an insurance company to attempt to defend on the ground of suicide in any case.

STATE, EX REL. CITY OF OMAHA, APPELLANT, V. OMAHA WATER COMPANY, APPELLEE.

FILED JUNE 13, 1911. No. 17,095.

1. **Municipal Corporations:** WATER-MAINS: AUTHORITY OF CITY ENGINEER. The charter of the city of Omaha does not vest the city engineer with authority to compel the water company to elevate its water-mains.

2. ———: ———: AUTHORITY OF CITY. The fact that the city council and the mayor adopted plans prepared by its engineer for a city sewer does not in itself amount to an exercise of the police power, so as to require the water company to elevate a water-main unexpectedly encountered by the contractor in constructing the sewer according to those plans.

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

John A. Rine, W. C. Lambert and *Clinton Brome,* for appellant.

Stout & Rose, contra.

ROOT, J.

This is a proceeding in mandamus to compel the respondent to elevate a water-main at the point in Eighteenth street where it intersects the path of a proposed sewer. The respondent prevailed, and the relator appeals.

In January, 1910, the city council and the mayor of the city of Omaha approved plans theretofore prepared by its engineer for a sewer in Burt street in that city. Subsequently about nine feet below the surface at the intersection of Eighteenth and Burt streets the contractor encountered a 24-inch water-main. Thereupon the assistant city engineer served a written notice upon the respondent to elevate the main, so that the sewer might be constructed beneath. On the 24th day of that month the city engineer served upon the respondent a second notice of like import, but withdrawing a previous offer that the city would pay the expense incurred.

The return to the writ relates principally to the alleged expense of elevating the main, the public inconvenience that will follow a temporary loss of the use of the pipe to convey water to the respondent's customers, and the probability of accidents; that the sewer can be constructed so as not to interfere with its efficiency or with the water-main; and that the respondent is willing to comply, if in-

demnified against damages caused by the undertaking and will be paid by the city the expense incurred. The city officials do not seem inclined to yield to the respondent's suggestion that it is not necessary from an engineering standpoint that the water-main should be disturbed. If we should believe the uncontradicted evidence adduced by the respondent, the relator by changing the form of the sewer into an ellipse at the point where it passes the water pipe, but preserving the same area and floor level as obtain in other sections of the sewer, will have as efficient a drain as if the bore were circular. The water pipe is the main artery serving the city of South Omaha and parts of the city of Omaha with water. There seem to be no insurmountable difficulties in the way of elevating the water-main, although the expense will be considerable and some of the respondent's customers may be inconvenienced during the time water must be excluded while the change is being made. It would seem, under the circumstances, that the contending parties should act in harmony to serve the public interests with a minimum of expense.

We do not question the relator's right in a proper exercise of the police power to compel the respondent to change the position of its water-mains to accommodate sewers constructed by the city subsequent to the time the pipes were laid in the streets, but we fail to discover any allegation in the affidavit and motion, which seem to have been employed in the place of an alternative writ, that the city by ordinance or otherwise has exercised that power, nor do we find in the bill of exceptions any proof that this power was exercised in the instant case. We cannot accept the relator's argument that the mayor and the city council by approving the plans prepared by the city engineer exercised their authority to compel a change in the position of this water-main. A copy of the plans is in evidence, and no reference is made to the water-main. The engineer testifies, in substance, that the plans were prepared on the assumption that the sewer when completed would be beneath the water-main, and therefore no

scheme was adopted for elevating it. When the unexpected happened, the city engineer and his assistant evidently assumed that the engineer had authority by virtue of his office to compel the respondent to take the action demanded.

Sections 43-47, ch. 12*a*, Comp. St. 1909, specify the duties and authority of the city engineer. Section 43 provides: "He shall perform such other duties as may be required by this act or by ordinance." In section 47 we find the direct legislative grant of authority to the engineer with respect to the control of water-mains. It is as follows: "He (the city engineer) shall supervise all sewer work and the construction, maintenance, cleaning and repairing of public sewers, culverts, drains, conduits and subways. * * * He shall be empowered, where necessary for the furtherance of public works or the abatement of nuisance, to cause the temporary suspension of the use of water, gas, sewer, or other service, or to cause the temporary removal of or discontinuance of railway tracks, or street car or other travel. * * * He shall prepare plans, specifications and contracts to be approved by the mayor and council for all public works to be done under his supervision, and he shall change or modify such plans and specifications when directed by the mayor and council." No ordinance extending this authority is in evidence, nor do counsel argue that one has been enacted.

No highly technical skill is involved in removing railways from the surface of a street, whereas changing the position of water-mains forming part of an intricate system supplying a great city with water involves technical skill, the expenditure of considerable money, more or less inconvenience to customers dependent upon the water company for their supply of water, and something of a hazard to property interests. It is evident that the legislature did not intend to vest the control of the water system of cities of the metropolitan class in the city engineer. Since the city has not legislated on the subject and has not directed the respondent to elevate the water-main in ques-

tion, we conclude that the district court did not err in refusing to compel the respondent to obey the orders of the city engineer. Something was said in the argument about the alleged fact that the city is the beneficial owner of the water-works. No such an issue is tendered in the return, nor, as we are at present advised, is the fact material.

The judgment of the district court is

AFFIRMED.

GIRARD TRUST COMPANY, TRUSTEE, APPELLANT, V. MARILLA J. DIXON ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,402.

Limitation of Actions: MORTGAGES: ACKNOWLEDGMENT OF DEBT. Under section 22 of the code, signed and delivered letters written by a purchaser of mortgaged land to the holder of the mortgage arrest the running of the statute of limitations against foreclosure, where the letters, when reasonably and properly construed, contain an acknowledgment of the mortgage and of the existing indebtedness; no technical phrase or particular form of expression being required.

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

Albert Muldoon, for appellant.

Hoagland & Hoagland, contra.

ROSE, J.

Plaintiff is attempting to foreclose a 500-dollar mortgage on a quarter-section of land in Logan county. The trial court sustained a demurrer to the petition on the ground that the action is barred by the statute of limitations. From a judgment of dismissal plaintiff has appealed.

The note secured by the mortgage was dated February 10, 1892, and was due March 1, 1897. The suit was begun

September 9, 1907. The mortgage was executed by Abel Dixon and Marilla J. Dixon. The McKinley-Lanning Loan & Trust Company was mortgagee. Plaintiff is the holder of the mortgage. Through mesne warranty deeds duly recorded defendant John R. Penner acquired from the mortgagors the legal title to the mortgaged land. The deed in which Penner was grantee was dated September 22, 1897, and it contains covenants by the grantor therein as follows: "I am lawfully seized of said premises." "They are free from incumbrances, except a mortgage to the McKinley-Lanning Loan & Trust Company for the sum of $500." "I have good right and lawful authority to sell the same, and I, with my executors and administrators, shall warrant and defend the same unto the said John R. Penner, his heirs and assigns forever against the lawful claims and demands of all persons whomsoever, except the above described mortgage and taxes." This mortgage was the subject of correspondence between Penner and plaintiff's agent from January 21, 1906, until November 29, 1906, but the letters are too voluminous to be reproduced here. January 21, 1906, less than ten years after the debt had matured, Penner wrote a letter to plaintiff's agent in regard to the land and mortgage in controversy, saying, among other things: "I thought I would write you a few lines in regard to that piece of land you are agent here for. I just found out that you were the agent for it here. Write to me, if you come to some kind of terms as to the mortgage. There is more against it than it is worth." The same letter also contains the statement that the original mortgagor had offered to release the mortgage for $200, and continues: "I would like for you to see just what you can do about the matter, and let me know at once. If we can make a deal, it will be cash."

In reply to a letter demanding settlement in full by September 1, 1906, and threatening foreclosure, Penner wrote further, August 23, 1906: "I got my attorney to write you in regard to a settlement. He told me he could keep you out of the place for four years, but I would like

to make some settlement with you without any trouble. I can't pay you all this fall, for I got hailed out and I am hard up. I will pay you part and renew the mortgage, or, if you knock off some, I might borrow the money and pay it all."

Plaintiff made the following proposition to Penner, September 14, 1906: "If you will pay all the delinquent taxes, including the year of 1905, and remit us $115 for credit on the loan, we will make you a new loan on the land of $500, payable in three annual instalments with interest at the rate of 7 per cent., you to bear all the expense of the continuation of the abstract, recording of mortgage, etc. This is the very best and the last proposition we will make you. If it is not accepted within ten or fifteen days we will pay the taxes and commence foreclosure."

This was answered September 25, 1906, as follows: "I will accept the proposition you wrote me and I will send you $115 and pay one hundred taxes down and the rest later. I can't pay it all this fall. Fix out the papers and send and I will sign them." Because Penner did not agree to pay the taxes in full, the terms of his acceptance were rejected and plaintiff's former proposition was renewed as made. In reply Penner wrote: "Fix out the mortgage on that land and send it up, or come and I will pay the taxes. I believe you had better come or send a man."

June 21, 1907, plaintiff wrote another letter to Penner calling his attention to what appeared to be an error in the amount of interest due, and concluding: "We desire to arrange for a satisfactory settlement with you, and would be very glad to have you write us promptly."

The letters are set out in full in the petition, which states a cause of action, unless it shows on its face that foreclosure is barred by the statute of limitations. The action was commenced more than 10 years after the note matured, and the petition shows that nothing was paid on the debt or interest after March 1, 1894; but plaintiff insists that the bar of the statute has been removed under the

terms of section 22 of the code, which declares: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise."

After referring to the letters pleaded, Penner states his position as follows: "It is clear therefore the only inference that can be drawn from this correspondence is that there were negotiations pending between a party claiming to own an old mortgage upon the real estate and a person who claimed the ownership of the property, but who was not under legal obligations with reference to said mortgage, for a settlement and compromise of their controversy; that the owner of the land made an inquiry as to what kind of a settlement could be made, and the owner of the mortgage made a proposition of settlement, which after some controversy was accepted, and then the owner of the mortgage withdrew it. There is nothing in the letters of Penner unconditionally acknowledging a present subsisting debt upon this property in any definite amount, with a promise either expressed or implied to pay the definite amount, or admission that the land was liable for the payment of said definite sum. There was only a conditional agreement on his part to pay a certain sum to the plaintiffs in full satisfaction of their claim. There was nothing in the letters of Penner from which it may be inferred that he intended to prolong the time of legal limitation within which the plaintiffs might prosecute their action. When the plaintiffs by express letter repudiated the acceptance of their own proposition, the effect of this correspondence upon plaintiffs' cause of action was destroyed."

To prevent the barring of the action by an acknowledgment of the debt, a definite promise to pay it was unnecessary. In *Devereaux v. Henry,* 16 Neb. 55, the code was construed thus: "Section 22 of the civil code provides

three ways by which an action on contract may be taken out of the operation of the statute: (1) By the payment of part of the principal or interest. (2) By an acknowledgment in writing of an existing liability, debt, or claim, signed by the party to be charged. (3) By a promise of payment in writing, signed by the party to be charged. The statute does not require that all of those things shall exist before a cause of action is taken out of the operation of the statute, but only requires that some one of them shall exist; hence, if any one of these things transpires, then the cause of action is taken out of the operation of the statute."

In an opinion by the present chief justice, it was said: "While the statute requires an acknowledgment or promise, yet it is not necessary that either the word 'acknowledge' or 'promise' should be used by the party making the acknowledgment or promise. If the writing, by a reasonable and proper construction, amounts to an acknowledgment or promise, it is sufficient." *Rolfe v. Pilloud,* 16 Neb. 21. For the purpose of making such an acknowledgment, "no set phrase or particular form of language is required." *Harms v. Freytag,* 59 Neb. 359. In the case last cited it was held: "A letter in which a surety on a note states to the payee that he is informed that the note, describing it, is not paid, and asks the payee to collect the money due upon it, and declares that he 'will not longer be held good for the note' in case it be not promptly collected, is a sufficient acknowledgment of the indebtedness to arrest the running of the statute of limitations."

In *In re Claim of Bueker v. Estate of Korff,* 5 Neb. (Unof.) 194, the following rule was adopted: "A writing, to constitute an acknowledgment sufficient to take a debt out of the statute of limitations, must recognize the debt as existing, and contain nothing inconsistent with an intention on the part of the debtor to pay it."

Within the meaning of the code as construed by this court did Penner acknowledge the existence of the mortgage and of the debt secured by it? His letters must be

considered in the light of surrounding circumstances as disclosed by the petition. When he bought the land he accepted a deed in which the mortgage was recognized as an existing incumbrance. No part of the original debt has ever been paid. No interest was paid after March 1, 1894. Before the statutory period of ten years had run, and while the land was bound by the lien of the mortgage, Penner wrote to the holder thereof: "There is more against it than it is worth." This statement was in writing and refers to plaintiff's security for the debt. It was made when the lien was in full force, for the purpose of procuring for Penner's own benefit a release of the mortgage for less than the amount due thereon. The language, in the sense used, means that plaintiff's mortgage incumbers Penner's land for more than the land is worth.

Less than ten years after the debt matured Penner also wrote: "I got my attorney to write you in regard to a settlement. He told me he could keep you out of the place for four years." This, when construed with all the facts pleaded, is saying, inferentially at least, that plaintiff had a valid claim secured by mortgage which could be foreclosed after four years of litigation. The statements that "I can't pay you all this fall," that "I will pay you part and renew the mortgage, or, if you knock off some, I might borrow the money and pay it all," are of the same import as expressions in former letters and refer to what the writer thereof regards as an existing debt. When Penner's part of the correspondence is all considered, it clearly amounts to such an acknowledgment of the mortgage and of the debt secured as to arrest the running of the statute of limitations. The acknowledgment of the mortgage was an acknowledgment of the debt secured. *Foster v. Bowles*, 138 Cal. 346, 71 Pac. 494. In this view of the facts pleaded and of the law applicable thereto, the petition does not show on its face that foreclosure is barred. Cases announcing a different doctrine cannot be followed here under the code as construed by this court.

For the error in sustaining the demurrer, the judgment

below is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., dissenting.

The opinion in this case seems to be predicated upon section 22 of the code, but to my mind this section has no application to the case at bar. That section contemplates an acknowledgment of an *existing liability for the debt.* Penner was not liable for the debt, nor did he make any payment thereon. For the purpose of removing the lien of the mortgage from the land which he had purchased, but which mortgage he had not assumed or agreed to pay, he offered to himself execute a note and mortgage for a specific sum. While this offer was at first accepted, it was subsequently refused by plaintiff. Nothing whatever was done under it by either party. Under these circumstances I do not think there is anything in what he did which could operate to toll the running of the statute of limitations. I think the district court was right and the judgment should be affirmed.

FLOYD FLINN, APPELLEE, V. HENRY E. FREDRICKSON, APPELLANT.

FILED JUNE 13, 1911. No. 16,482.

1. **Assault and Battery:** JUSTIFICATION: DIRECTING VERDICT. Where justification is the only defense to a civil suit for assault and battery, the trial court should direct a verdict in favor of plaintiff, if the evidence is insufficient to sustain a judgment in favor of defendant on that issue.

2. **Chattel Mortgages:** UNAUTHORIZED SEIZURE OF CHATTELS. An unreasonable and arbitrary seizure of mortgaged chattels without cause for the purpose of foreclosing a mortgage securing an unmatured note cannot be justified under a clause authorizing mortgagee to take possession of the property, if he "should feel unsafe or insecure."

3. **Action:** MOTIVE. Where plaintiff has stated a valid cause of action for damages, his motive in bringing the suit is, at the trial, immaterial.

4. **Damages:** QUESTION FOR JURY. Where mental anguish, personal injuries and physical suffering are considered in determining compensatory damages, no method of exact computation can be devised, and the amount of the recovery must generally be left to the sound discretion of the jury.

5. **Appeal:** CONFLICTING EVIDENCE. A jury's determination of a fact upon conflicting evidence will not be disturbed unless manifestly wrong.

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

Lysle I. Abbott and *Ray J. Abbott,* for appellant.

Albert S. Ritchie and *Charles L. Fritscher, contra.*

ROSE, J.

The petition contains two counts. In the first plaintiff demands $2,000 for assault and battery, and in the second $1,430 for conversion of an automobile. The jury awarded him $650 on the first count and $369.40 on the second. From a judgment on the verdict for the sum of the two items defendant has appealed.

The first ruling of which complaint is made is the giving of the following instruction: "You are instructed that the defendant has failed in this case to establish the justification pleaded by him in defense of plaintiff's petition, and that under the pleadings and proofs it is your duty to return a verdict for the plaintiff upon both causes of action."

In answering the first count defendant pleaded justification, alleging in substance: November 19, 1907, plaintiff owed him $489.50, evidenced by three promissory notes, one for $50 payable March 1, 1908; one for $50 payable April 1, 1908; and one for $389.50 payable in weekly instalments of $25 each, beginning May 1, 1908. The notes were secured by a chattel mortgage on the automobile, and

while defendant was in lawful possession of it, April 4, 1908, for the purpose of foreclosing his lien, plaintiff attempted to remove it from defendant's garage. To protect his possession defendant took the automobile from plaintiff by force, using no more than was necessary, but while thus engaged was assaulted by plaintiff, and in defending himself forcibly put him out of the automobile, but used no unnecessary force in doing so.

It is shown without dispute, both by the pleadings and by the evidence, that defendant assaulted plaintiff and forcibly ejected him from the automobile. The proofs make it equally clear that defendant was the aggressor, unless at the time of the assault he had a lawful right to the possession of the chattel. Defendant sold the car when it was new for $1,370, and at the time of the assault, about a year later, the notes given by plaintiff for the remainder of the purchase price had all been paid except one for $389.50 payable in weekly installments of $25 each, beginning May 1, 1908. Defendant was a dealer in automobiles. Plaintiff kept the car in controversy for hire. After the 50-dollar note due April 1, 1908, had matured, and before plaintiff had been assaulted four days later, defendant telephoned to plaintiff for the automobile, falsely saying it was wanted at his garage for hire. It arrived a little later in charge of an employee of plaintiff, and defendant seized it and kept it in his possession under the chattel mortgage. A portion of defendant's own testimony may be summarized as follows: Plaintiff called at the office of defendant April 4, 1908, and said he wanted to pay the 50-dollar note due April 1. Defendant told him how much was due, and plaintiff wanted to know how he arrived at the amount, and was informed that it included $2 for a tank on the machine. Plaintiff refused to pay for the tank, and defendant made him a present of it. Plaintiff then paid the note due and interest, took the note, and before passing out of the office door said: "All right for you. You will be sorry for this. Get even with you." Two minutes later when plaintiff was running the automobile out of the

garage past the office, defendant jumped out and said: "Here! you can't take that car until you pay what you owe me on the mortgage." Defendant then pulled out the switch key, thus stopping the car, and returned to his office. A few minutes later the automobile with plaintiff in control was again in motion, heading toward the street. Defendant again rushed out, forcibly took possession of the automobile and ejected plaintiff. Defendant's cross-examination shows, also, that plaintiff paid the 50-dollar note with interest, and left without any demand having been made upon him for payment of the unmatured note, and that defendant at the time considered it was not due.

There is nothing to show that, from the time the note was paid until plaintiff started out of the garage with the car, defendant intended to detain it longer, or that he directed plaintiff not to take it away, or that the latter used any force in obtaining possession of it, or otherwise committed a breach of the peace in doing so. Had defendant a right to take the automobile a few minutes later? He attempts to justify his seizure under the chattel mortgage, which contains a clause authorizing him to take possession, if he "should feel unsafe or insecure." He knew when plaintiff executed the mortgage that the automobile was to be used for hire. He knew it was being used for that purpose. He had telephoned the falsehood that it was wanted at his garage for hire. There is nothing in the record to show an intention on part of plaintiff to use it for any other purpose. The debt had just been reduced $50. In 27 days $25 more would mature, and in default of payment thereof there would be nothing to prevent another seizure. When he saw the automobile rolling out of his garage with plaintiff in possession, he suddenly felt "unsafe and insecure," and rushed out, committed an assault, and took the property. The insecurity clause was never intended to serve such an unreasonable and arbitrary purpose. There must be a cause for feeling insecure. *Newlean & Hoard v. Olson*, 22 Neb. 717. Before the right to take possession of a chattel under an insecurity clause becomes operative,

the mortgagor must be about to do or must have done some act tending to impair the security. *Allen v. Cerny*, 68 Neb. 211; *Meyer v. Michaels*, 69 Neb. 138. In the present case there is no evidence tending to show that plaintiff was about to impair the security. The nature of his business was an inducement to keep the automobile in good condition.

Defendant further attempts to justify his possession through plaintiff's failure to comply with the following clause, which is also copied from the chattel mortgage: "Car to be insured by floating policy." It is urged by defendant that the failure to procure a floating policy was a breach of the mortgage and caused a feeling of insecurity. Both grounds are untenable. The clause is inserted in the mortgage with the description of the property, and failure to comply with its terms is not a stipulated cause for depriving mortgagor of possession at a time when there is no debt or interest due. For the purpose of creating a feeling of insecurity plaintiff's noncompliance is equally futile. The contract nowhere states which party was required to procure the "floating policy," and there is no pleading or proof of any custom controlling that obligation or showing the nature or purpose of the insurance risk contemplated. If it was plaintiff's duty to protect defendant's security by insurance, there is nothing in the record to show that it was not furnished in some form other than that described in the mortgage. Defendant's feeling of insecurity was not warranted by the proofs in support of his defense. It is clear that he had no right to the possession of the automobile when he forcibly took it from plaintiff. He committed an assault when he first pulled out the switch key and interfered with plaintiff's lawful purpose to use his own property and to transport his person to his place of business. The evidence would not justify a finding that plaintiff was the aggressor at any subsequent stage of the controversy. The trial court made no mistake, therefore, in charging the jury that defendant failed to establish the justification pleaded. Since

it is conclusively shown by the evidence that the right of possession was not in defendant at the time of the assault, the right of a mortgagee to forcibly seize the mortgaged chattels, where he is entitled to possession under the terms of the mortgage, will not be discussed or decided.

An instruction authorizing a recovery limited to the compensatory damages proved, if any, is criticised, because it does not direct the jury to take into consideration the facts in mitigation of damages. The instruction related to the assault and battery, and under this assignment defendant has not pointed out any evidence of mitigating circumstances which required such a direction, nor did he request an instruction conforming to his view of the law in that respect. There is nothing in the instruction itself, however, to require a reversal.

Exclusion of testimony tending to show that the action was brought to punish defendant rather than to establish plaintiff's rights is also assigned as an error. Testimony offered for such a purpose may be excluded. Where plaintiff has a valid cause of action, his motive in bringing suit is, at the trial, immaterial. *Jacobson v. Van Boening,* 48 Neb. 80.

The verdict of $650 for the assault and battery is assailed as excessive. The assault was committed in a public place as the automobile was passing out of defendant's garage over the sidewalk in front. If plaintiff told the truth, and of that the jury were the judges, defendant grabbed him by the throat, hit him in the face, took him by the leg and tipped him over on his head. Plaintiff lost a tooth, got a black eye, and his lips and nose bled. He got up, put on his hat, brushed himself, and went away, while defendant called him a thief and said he was stealing that automobile. The crowd laughed. This is his story and the jury evidently believed it. Where mental anguish, caused by a humiliating assault in a public place, personal injuries and physical suffering are considered in determining the compensatory damages sustained, no method of exact computation can be devised, and the

amount of the recovery must generally be left to the sound discretion of the jury. The verdict does not show on its face that it is the result of passion or prejudice, nor does the evidence on which it is based disclose a substantial reason for setting it aside as excessive.

It is insisted, further, that the verdict of $369.40 for conversion of the automobile is excessive. The purchase price of the car when new was $1,370. There is testimony that it was worth $950 at the time of the conversion, and that it then contained a chest of plaintiff's unmortgaged tools valued at about $60. The verdict is less than the difference between the sum of these last two items and the amount due on the mortgage. It is argued, however, that plaintiff, through an intermediary, bought the car at the foreclosure sale, and that, having thus obtained it, he is not entitled to substantial damages for defendant's conversion, since he practically discharged his debt when he paid his bid. If the proposition of law implied by this argument is sound, a point not decided, still defendant has failed to direct attention to an error, because the question of fact as to whether plaintiff purchased the car at the foreclosure sale was submitted to the jury on conflicting evidence and decided in his favor.

No reversible error appearing in the record, the judgment is

AFFIRMED.

FAWCETT, J., dissenting.

I think the recovery on both causes of action is excessive.

As to the first cause of action, I do not think plaintiff was justified in attempting to forcibly remove the automobile from the defendant's garage. Conceding all that is said in the majority opinion about the manner in which defendant obtained possession of the automobile, that would not justify plaintiff in attempting to regain posession of it by force, and thereby bringing on a disturbance of the peace and inviting the physical encounter which ensued. Defendant had obtained possession of the machine peaceably. Conceding that he had obtained that posses-

sion deceitfully, plaintiff was not justified in attempting to forcibly retake it. If entitled to the possession of the machine, replevin, and not force, was his remedy. To justify the course he pursued is to return to the "wild and woolly" period, when the motto of "might makes right" was the accepted code. The record impresses me with the thought that plaintiff went to defendant's place of business, seeking trouble as well as his machine. He got the former, but not the latter. The judgment of $650 for an assault, which in my judgment is not clearly proven, is grossly excessive.

As to the second cause of action, the evidence satisfies me that plaintiff at the sale of the machine under the chattel mortgage was the real purchaser, and he discharged his debt when he paid his bid. He should not be permitted to thus pay his debt and regain and keep the machine and at the same time recover a large judgment against defendant for conversion.

I think the case should either be reversed or plaintiff ordered to enter a substantial remittitur upon each cause of action.

HULDA A. ANDERSON, APPELLEE, V. AXEL W. ANDERSON, APPELLANT.

FILED JUNE 13, 1911. No. 16,362.

1. **Divorce:** EXTREME CRUELTY: CONDONATION. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned; and condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.

2. ———: ———: ———. A promise of forgiveness for past wrongs is not, alone, sufficient to constitute condonation. To have that effect such promise must be followed by a restoration of the offending party to all marital rights.

3. ———: ———: ———: EVIDENCE. Evidence examined and referred to in the opinion *held* insufficient to establish a condonation by plaintiff of the cruelty alleged in her petition.

4. ———: INSANITY: PLEADING. Insanity, to be available as a defense in a divorce suit, must be pleaded.

5. ———: EXTREME CRUELTY: EVIDENCE. Evidence examined and referred to in the opinion *held* sufficient to support the decree of divorce on the ground of extreme cruelty.

6. ———: ALIMONY: EVIDENCE. Evidence examined and referred to in the opinion *held* sufficient to sustain the decree on the question of alimony.

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

H. H. Bowes and *John W. Battin,* for appellant.

Alvin F. Johnson, contra.

FAWCETT, J.

From a decree of the district court for Douglas county, granting plaintiff a divorce and the custody of the minor child of the parties, and awarding plaintiff certain articles of household furniture and the sum of $25 a month for the support of herself and the minor child of the parties, payable monthly, from April 10, 1909, until June 6, 1925, which would be during the minority of such minor child, defendant appeals.

The errors assigned are: The insufficiency of the evidence; that the alimony is excessive; condonement by the plaintiff; and the mental irresponsibility of the defendant for the acts committed by him on which the decree of divorce is based. The evidence is voluminous. We could not set it out in any intelligible manner without extending this opinion to an unwarranted length. Moreover, we do not think a review of the evidence would serve any good purpose either to the profession or to any of the parties to this suit. It presents a series of cruel acts upon the part of defendant, which fully justified plaintiff in refusing to

continue the marriage relation. We therefore hold that the evidence of cruelty is amply sufficient to sustain the decree.

An examination of the record satisfies us that the cruelty of defendant was never condoned by plaintiff. It appears that when she first left his home she went with her babe to the Scandinavian Young Women's Christian Association Home, where she obtained a temporary shelter and home. Defendant made repeated visits to the Home for the purpose of endeavoring to induce plaintiff to return. She declined to see him. Finally, a conference was arranged between the parties in the presence of the president of the Home, the clergyman who married the parties, and another clergyman who appears to have been a half-brother of defendant. At this interview, defendant admitted his acts of cruelty, but attempted to justify them upon the ground of a weakened condition mentally and physically. This condition, such as it was, appears to have been the result of excesses both prior and subsequent to his marriage. It was concluded at this conference that the best thing would be for defendant to remain away from his wife for at least a year, and possibly two, under conditions where he could have rest and a chance for recuperation, defendant thinking that if he had such an opportunity his manhood would be restored, and he could then have his wife and child back with him and treat his wife as a man should. Plaintiff agreed that if he would go away and take treatment for at least a year until such time as his manhood should be restored and he would return home and treat her as a husband should treat his wife, she would then return to him. To this he agreed, stating that his family would furnish the necessary means. Within three hours after the interview defendant left Omaha and went to Lincoln, where some two or three days later he voluntarily entered a private sanitarium. While in the sanitarium he became ill, and, regarding his condition as critical, he wrote plaintiff a very penitent letter and begged her forgiveness for his past wrongs. She evidently was greatly

moved by this, and at once wrote him, assuring him that she had forgiven him. She immediately followed this letter up by going to Lincoln to visit him, where, as she testifies, she found him in substantially the same condition that he had been in before the separation. She was told by the physician in charge of the sanitarium that his condition was improving. She returned home. Shortly thereafter defendant wrote to her that he wanted to come home. She answered thus: "Omaha, Feb. 10, 1908. Dear Axel: I have just received your letter and must say that I am terribly grieved over the fact that you are going to leave there if you continue to get better, *because I stand by what I said in the presence of several witnesses that as long as you are not well I will not live together with you.* Now you can judge for yourself if we shall separate absolutely or you stay away until you get well which I have been advised is going to take about a year, but how soon that time would pass if we afterwards could be happy. In haste, Hulda." Notwithstanding his agreement to remain away, and in the face of this letter from his wife, he on February 28, only about two months after going to the sanitarium, returned to the home in Omaha, and desired to resume conjugal relations with his wife, which she refused, for the reason that he had not kept his agreement. He at first stated, in effect, that he had only returned home on a visit; but he kept putting off his return to Lincoln from day to day until finally he declared that he did not intend to return. He soon began repeating his ill treatment of plaintiff, finding fault with her, using profanity towards her, and finally struck her three or four times. He denies the striking. She thereupon took her child and again left him, never to return. Plaintiff never, after the first time she left home, and after the agreement which it is claimed constituted the condonation, cohabited or in any manner resumed conjugal relations with defendant. It is evident, therefore, that there never was any completed condonation; and, if there had been, defendant's subsequent conduct revived all of his former cruelty. *Heist v. Heist*, 48 Neb. 794.

As to the mental irresponsibility of defendant for the acts complained of, it is sufficient to say that insanity was not pleaded as a defense, and that in the course of the trial, when plaintiff offered to introduce testimony upon that point, defendant expressly disavowed insanity as a defense; but, if it had been pleaded, the evidence falls far short of showing any such mental condition on the part of defendant as to in the least excuse him for his acts of cruelty. He has at all times been able to transact business and has been regularly employed ever since his wife left home the second time. His testimony given upon the witness stand and his statements at the time of the conference at the Young Women's Christian Association Home all show that he fully understood and comprehended the wrongs that he had committed. It would be a farce to say that his condition was such as to excuse him for the treatment which he had accorded his wife, not only in their home, but upon the public streets.

As to the alimony, under defendant's own testimony he is now earning an average of $35 a month over and above his expenses and living, and receives $60 a month rent from his houses, making a total of $95 a month above the expense of his own living. He urges that nothing should be taken into account for the item of rent, as he claims he is indebted in an amount equal to the value of his real estate, and that it requires all of the $60 a month to pay his taxes and interest and enable him to save his property. A considerable portion of the indebtedness is due to relatives, who do not seem to be pressing him. However that may be, after paying the $25 a month for the support of his wife and child, and after securing his own living, he will still have left $70, or, after deducting water rents, $68 monthly income. We think it is not requiring too much to require him to take care of his indebtedness with that sum. The allowance of $25 a month will cease at the time his little girl becomes of age. It will require a large portion of that sum for her support. Should she die before that time, the court is open

for a motion by defendant to modify the decree. Ann. St. 1909, sec. 5339. If defendant cannot pay the sum allowed for the support of his wife and child and support himself and save his property out of his present income, we are at a loss to understand how he could save his property, maintain a home, and support his wife and child if they were to return to him, as in his answer he states it is his desire that they should do.

We think the defendant has fared well at the hands of the district court, and that he has no just cause for complaint.

AFFIRMED.

JOHN HAWE, APPELLANT, V. MICHAEL A. HIGGINS, ADMINISTRATOR, APPELLEE.

FILED JUNE 13, 1911. No. 16,433.

1. **Vendor and Purchaser:** JOINT PURCHASERS. One who furnishes money to a purchaser of real estate under an agreement that he shall receive as his compensation therefor one-half of the profit which the purchaser may realize upon such purchase, does not, by reason of that fact alone, become a joint purchaser of such property.

2. ———: ———. In order to constitute such person a joint purchaser, it must further appear that he is, in fact, to become invested with an interest in the title and actual ownership of such real estate.

3. **Trial:** SPECIAL FINDINGS. A special finding by a jury, though sustained by the evidence, must be disregarded when the fact established by it is irrelevant to the issues tendered by the pleadings and insisted upon by the adverse party during the trial.

4. ———: JURY: VIOLATION OF INSTRUCTIONS. It is the duty of a jury to find a verdict according to the law as given in the instructions of the court; and when they clearly violate this duty the court should set aside the verdict.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

A. M. Post and *George W. Wertz,* for appellant.

J. J. Sullivan and *W. M. Cain, contra.*

FAWCETT, J.

In this opinion we have simply considered and decided the case actually tried in the district court and presented to this court.

The petition alleges that on July 13, 1908, the parties entered into a contract, not in writing, whereby defendant agreed to sell and convey to plaintiff within a reasonable time thereafter a quarter section of land, described, for the consideration of $11,600; that on the 23d day of July defendant, pursuant to said contract, made and delivered to plaintiff a deed for such land; that thereafter, on July 27, "the defendant by fraud and force took and removed said conveyance from the possession of the plaintiff, and it is not now in the possession or under control of the plaintiff;" that plaintiff "has tendered to defendant the full agreed purchase price of said real property and demanded a deed of conveyance thereof, but the defendant has refused and now refuses to so convey said property, and has wrongfully and without plaintiff's consent rescinded the aforesaid contract of sale, to the plaintiff's damage;" that the land was during all of the times mentioned and now is of the value of $16,000, and prays judgment for $4,400.

The answer denies generally all allegations of the petition not admitted; expressly denies that defendant ever entered into any contract with plaintiff for the sale or conveyance to him of the lands in controversy; and alleges that on July 13 plaintiff and defendant engaged in a bantering conversation with reference to the taxation of farm lands in Colfax county; that in the course of such bantering conversation defendant "as a joke and a jest" offered to sell to plaintiff the lands in controversy at the assessed valuation for the year 1907, which was $72.50 an acre; that defendant at no time intended to sell the land to

plaintiff, which at all times plaintiff well knew; that at the time of making said jesting offer defendant informed plaintiff that, if there was to be any one connected with said transaction "as purchaser" except plaintiff alone, said offer was withdrawn, and the defendant would not make any deed warranting the title to said land; that on July 23, "falsely and fraudulently representing to defendant that there was no one connected with the transaction as purchaser except plaintiff alone, plaintiff falsely and fraudulently sought to take advantage of defendant's aforesaid jesting and joking offer by accepting same and treating it as an actual offer, and caused a deed of conveyance of said land to be prepared, which deed, contrary to the aforesaid jesting arrangement of said parties, contained a covenant whereby the grantor covenanted to warrant and defend the title to said lands against the claims of all persons whomsoever;" that "on said 23d day of July, 1908, defendant, still believing that said deed was in furtherance of the aforesaid jesting arrangement between himself and plaintiff, and believing plaintiff's false and fraudulent representations that he, said plaintiff, was the only person connected with said transaction as purchaser, and believing that said deed contained no covenant whereby the grantor therein warranted to defend the title to said lands against the claims of all persons whomsoever, signed same, never intending to sell or convey said lands to plaintiff."

The reply admits that defendant conveyed to plaintiff the property mentioned in the answer for the consideration of $72.50 an acre, and thereby covenanted to warrant and defend the title so conveyed, and denies each and every other allegation in the answer.

The following special interrogatories were submitted to and answered by the jury: "Q. 1. Did Higgins as a condition of the sale to Hawe stipulate that George Wertz should have no connection with the transaction? A. Yes. Q. 2. If you answer 'yes' to the foregoing question, state whether Wertz, without Higgins' knowledge, became connected with and had an interest in the transaction. A.

Yes. Q. 3. Did Higgins in negotiating with Hawe stipulate that the deed, which he was to give, should be a deed without recourse upon him? A. Yes. Q. 4. Did Higgins, when he signed the deed, which has been given in evidence, intend to make a deed which would be without recourse upon him? A. Yes." With these special findings the jury returned a general verdict for plaintiff for $38.33. Plaintiff thereupon moved the court to set aside and vacate the special findings for the reasons: "(1) Said findings and each thereof are contrary to law. (2) Said findings and each thereof are unsupported by the evidence. (3) Said findings and each thereof are foreign to the issues in this cause. (4) The court erred in submitting said special findings and each thereof." Plaintiff also filed a motion for a new trial in which the special findings were again assailed. Defendant entered no objection or exception to the general verdict and made no move for judgment upon the special findings. Plaintiff's motion for a new trial was overruled and judgment entered upon the general verdict. Plaintiff appeals.

We think plaintiff's assault upon the special interrogatories submitted to the jury is well grounded. No. 1 called for the finding of the jury as to whether or not defedant as a condition of the sale to plaintiff stipulated that George Wertz should have no connection with the transaction. The allegation in the answer is: "Defendant informed plaintiff that, if there was to be any one connected with said transaction as purchaser except plaintiff alone, said offer was withdrawn," etc. It will be seen that the question submitted to the jury was broader than the issue tendered by the answer. We do not think it can be claimed that one who lends money to a purchaser of land to enable him to make the purchase thereby becomes connected with the transaction "as purchaser." The issue tendered by the answer was that the offer would be withdrawn if any one besides plaintiff was interested "as purchaser;" that is, as owner. Conceding that defendant had a right to impose conditions, when he alleges in his answer

the conditions imposed, as a defense, he is limited to those conditions upon the trial of the case and in the submission of the same to the jury. No. 2 is assailed for the reason that there was no controversy upon the question involved in that interrogatory. It was not disputed, but was testified to upon the trial by plaintiff and his witnesses, that Wertz, without defendant's knowledge, became connected with and had an interest in the transaction, in that he furnished the money for plaintiff to make the purchase, and in consideration for so doing was to receive from plaintiff a division of whatever plaintiff might realize in the way of a profit out of his purchase of the land. There being no controversy upon that point, that interrogatory should not have been submitted to the jury. Interrogatory No. 3 is objected to for the reason that this suit is not based upon the deed; that the only purpose of the deed in this suit was to prove the contract of sale and save it from the statute of frauds. Specific performance is not asked. We are therefore constrained to say, as does plaintiff in his brief, "Why ask the jury this question?" No. 4 asks the jury to say whether when defendant signed the deed he intended to make a deed which would be without recourse upon him. Upon this there is no dispute, nor did plaintiff make any objection to the deed being so signed. When the deed was prepared by Mr. Folda, the words "without recourse," either before or after the line for the signature of the grantor, were not written in. When defendant was about to sign the deed, he called attention to this fact, and stated that the agreement was that the deed was to be "without recourse." Plaintiff made no objection to his signing it that way; whereupon, he signed the deed, and then wrote under his name the words "with recourse." When interrogated upon the subject, he said that it was his intention to sign "without recourse," and that the writing of the word "with" instead of the word "without" was simply a mistake; but that he intended to sign the deed, and that the mistake was simply in using the wrong word in the pro-

posed limitation. The deed had not yet been recorded, and the evidence shows that plaintiff was perfectly willing to have that correction made. But suppose he had refused, after the money had been paid over and the deed delivered, to consent to such correction, that would not give defendant the right to get the deed in his possession for examination and then carry it away and refuse to return it. We are unable to see any justification in the submitting of any of the special interrogatories to the jury.

While we are impressed with the argument that, when the negotiation between plaintiff and defendant began, it was largely in the nature of banter, as contended for by defendant, the evidence is overwhelming that it soon passed beyond the stage of banter and jest. Defendant stated that farm lands were assessed too high. Plaintiff combated that statement, whereupon defendant said that he would sell his land at its assessed valuation. Plaintiff said that he would take the quarter section in dispute at that valuation, which it was conceded was $72.50 an acre. Defendant answered that he would sell it to him at that figure. When asked how long a time he would give plaintiff to raise the money, he answered that he would give him ten days. Defendant testified that, when discussing where plaintiff would raise the money, plaintiff said he thought he could get it from Wertz; that he said, "I turned right to him, and said, 'I cut that man out. I will have no dealing with that man, or no deal that he is connected in.'" This testimony is contradicted by plaintiff, and by other witnesses who were present and heard the conversation. They all say substantially that no conditions were imposed. One witness testified that, when plaintiff asked defendant how long he would give him to raise the money, defendant said ten days, "and he said he did not care where he got the money so he got it." Another witness testified that he heard defendant say to plaintiff, "'You get the money and you can have the land;' Mr. Hawe answered him, 'You don't worry, I will have the money.' * * * Hawe was

saying, 'You can depend upon it I will be Johnny with the money;' " that Mr. Higgins answered, "That is all I want." The same witness testified that on the evening of the 23d he heard defendant say, " 'That the land was sold and he had more to sell the same way,' and Hawe said, 'If he had the money he would buy all he had to sell at that price.' " Plaintiff testified that the name of George Wertz was used in connection with his talks with defendant about raising the money. "Q. What did he say when you mentioned the name of George Wertz in connection with this case? A. Well, he said George Wertz' family and my family put together could not raise enough money to buy the land, and then he said that night, before the deed was made out, he stated something about his not wanting George Wertz' name to appear in it." The witnesses who heard the talk between plaintiff and defendant, and the banker to whom they went to have the deed drawn, all testified to the effect that they did not observe anything to indicate that the deal being discussed by plaintiff and defendant was not an ordinary transaction. The banker was asked, "Did you observe any evidence of jest or banter in the matter of this deal by either of the parties to the transaction? A. As I said, I think it was an ordinary deal. I observed nothing of a banter or jest about the matter." Defendant himself testified: "Q. And he said he would take this particular quarter in dispute in this action? A. Yes, sir. Q. And you said, 'All right, raise the money and you can have it'? A. Yes, sir. Q. Were you bluffing? A. Yes, sir. Q. And Mr. Hawe called your bluff? A. Yes, sir. Q. And he raised the money and you walked up to the captain's office like a man to make the deed? A. Yes, sir. Q. The joke was past then? A. Yes, sir." The evidence shows that on the evening of the 22d, one day before the expiration of the ten days defendant had given plaintiff to raise the money, Mr. Wertz deposited in the bank the purchase price, $11,600, to the credit of plaintiff; that in order to raise this money he had made a trip to Lincoln, had done considerable telephoning, and had put up his own

securities; that on the 23d plaintiff and defendant went to the bank and instructed Mr. Folda to prepare a deed. The deed was prepared and signed in the manner already stated. Plaintiff drew his check in favor of defendant for the consideration, $11,600. Defendant said he wanted the cash. The banker commenced getting out the money, some of it apparently in sacks of gold and silver, when defendant concluded that he did not want to carry the money away, and asked the cashier to give him a certified check, which was done. He then changed his mind again, and asked for a New York draft for the amount, which was drawn by the cashier. Defendant, who is a customer at the bank and in the habit of keeping private papers there, told the cashier to put the draft with his other papers. The deed was delivered to plaintiff, who was also a customer of the bank, and he handed it to the cashier, with the request that he keep it until he, plaintiff, called for it. The evidence further shows that plaintiff's arrangement with Mr. Wertz was that he would leave the deed in the bank until he made a sale of the land, which he intended to do at once, but no such statement was made or condition imposed at the time he delivered the deed to the cashier. The parties thereupon separated. Some two or three days thereafter defendant went to the bank, and asked Mr. Folda, the cashier, to let him see the deed. The deed was handed to him, he looked it over, put it in his pocket, and said he was going to take it and show it to his attorney; that it was not made out right; and upbraided Mr. Folda for the error in the deed, viz., the word "with" recourse instead of "without." When he left the bank, Mr. Folda left at the same time, and said he would go and tell Mr. Hawe that he, defendant, had taken the deed, and he did communicate that fact to Mr. Hawe. The deed was never returned to the bank nor again delivered to plaintiff. Instead of returning the deed to Mr. Folda, defendant asked him to figure up interest on the $11,600 for five days. Upon Mr. Folda's doing so, defendant gave him his check for the amount of such interest,

$12.90. Mr. Folda subsequently, on his own motion, and without the knowledge or consent of plaintiff, canceled the New York draft which had been issued to defendant, and testified that he is now holding the $11,600, as well as the $12.90 check. This conduct on the part of defendant brought about the present action by plaintiff. The evidence is ample to sustain a general verdict in favor of plaintiff.

In his instructions the court charged the jury, among other things: "9. If the jury believe from the evidence that the plaintiff and defendant entered into a contract for the sale of said land as set forth in plaintiff's petition, and the plaintiff has fully performed all the terms and conditions of said contract, and that the defendant has without just cause or legal excuse failed to perform his part of the obligations of said contract, then your verdict should be for the plaintiff.

"10. If the jury do not so believe, or if you believe from a preponderance of the evidence that said contract was made in a jest, and without any intention on the part of either party to comply with said contract, or if you do not believe from the evidence that the minds of the parties were fully in accord as to the terms of said contract, then your verdict should be for the defendant." Acting under these instructions, the jury returned a general verdict for the plaintiff.

Upon the question of the measure of damages in case the jury should find for the plaintiff, the court instructed the jury as follows: "8. If you find for the plaintiff in this case, the measure of plaintiff's recovery would be the profit that plaintiff would receive by reason of said purchase of said land. That is, the plaintiff would be entitled to receive as damages the market value of the land in question less the amount that he agreed to pay for said land. The market value of said land at said time must be determined by you from the evidence." The testimony of the witnesses on both sides placed the value of this land at that time at from $80 to $100 an acre. The lowest esti-

mate placed upon it by any one was that of defendant himself, who testified that it was worth and he could have sold it for $80 an acre. There was no evidence before the jury which would warrant them in fixing a value upon the land of less than $80 an acre; so that upon the undisputed evidence, and taking the lowest valuation which the jury had a right to consider, if they found for plaintiff, under the instructions of the court they could not return a verdict for less than $1,200.

It is evident, therefore, that the jury disregarded the evidence and the instructions of the court and arbitrarily undertook to adjust this case upon a basis of their own. They were expressly told by the court that in determining the amount of plaintiff's damages, in case they found for plaintiff, the same "must be determined by you from the evidence," an instruction which the jury clearly disregarded. The law is well settled that it is the duty of a jury to find a verdict according to the law as given in the instructions of the court, and that when they clearly violate this duty, the court should set aside the verdict. *Standiford v. Green & Co.*, 54 Neb. 10; *Westinghouse Co. v. Tilden*, 56 Neb. 129.

Plaintiff has assigned error on the part of the court in a number of instructions given and refused, and urges that those assignments should be passed upon for the future guidance of the trial court. We do not deem it necessary to do so, for the reason that in the light of the views herein expressed the trial court will have no difficulty in instructing the jury upon another trial. We are unable to discover any theory upon which the verdict and judgment in this case can be sustained. The transaction, in its inception, may have been an "executory" joke; but the trouble is it later seems to have become "executed;" and executed jokes ofttimes bear very real fruit.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROSE, J., dissents.

JAMES M. DUNKEL, APPELLEE, V. HALL COUNTY, APPELLANT.

FILED JUNE 13, 1911. No. 16,453.

1. Counties and County Officers: SHERIFFS: COMPENSATION. Under the amendment in 1907 of the statute in relation to the compensation of sheriffs and their deputies (Comp. St. 1907, ch. 28, sec. 6*a*). the sheriff of a county having 16,000 to 20,000 population is entitled to receive a salary of $1,500 per annum, as full compensation for all services rendered and duties performed as sheriff, payable monthly by warrant drawn on the general fund of the county.

2. ———: ———: ———. And the county board shall furnish the sheriff with such deputies as they may deem necessary, and fix their compensation, which shall also be paid by warrant drawn on the general fund.

3. ———: ———: JAILERS. Section 13, ch. 46, Comp. St. 1907, recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff.

4. ———: ———: ———: COMPENSATION. And if the sheriff in such a county performs the duties of jailer, in addition to his duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.

5. ———: ———: ———: ———. But if such sheriff elects to have the duties of jailer performed by some other person, selected by the county board, and appointed by the sheriff as deputy, and the county pays the deputy for actually performing such services the full compensation provided therefor, the sheriff is not entitled to the fees allowed for services as jailer, as provided in section 5, ch. 28, Comp. St. 1907.

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

J. L. Cleary, for appellant.

R. R. Horth, W. H. Thompson and *W. A. Prince, contra.*

FAWCETT, J.

Plaintiff filed with the county board of Hall county a claim for services as jailer from April 23, 1907, to January 5, 1909, at the rate of $1.50 a day; total, $934.50. The claim was disallowed by the board, and plaintiff appealed to the district court, where judgment was rendered in his favor for the full amount of his claim. The county appeals.

The evidence shows that the sheriff did not, during any of the time covered by his claim, reside in the jail or actually perform the duties of jailer, but that such services were performed by one Henry Mehlert for a portion, by Emil Schroeder for another portion, and by Harry Chesley for the other portion, of the time covered by the claim. The services were performed by these men under the supervision and direction of the plaintiff, who was sheriff of the county. The sheriff furnished the necessaries for the prisoners, such as food, bedding, etc., and was paid therefor. The three gentlemen named, in addition to cooking and caring for and looking after the prisoners and cleaning and caring for the jail and cells, also acted as firemen and utility men; that is to say, they attended to firing the furnaces which supplied the heat for the jail and courthouse, shoveled the snow from the walks in winter, and in summer cared for the lawn surrounding the courthouse and jail by mowing the grass and watering the same and by caring for and watering the flowers growing thereon. In all of this work they were assisted more or less by the prisoners in the jail. There were prisoners in the jail during all of the time covered by the claim, the number ranging from 1 to 25. In each instance these gentlemen first entered into a contract with the county board for a salary of $50 a month, which was paid by the board by warrants drawn against the general fund of the county, and in each case, after entering into the contract with the board, the plaintiff (sheriff) contracted with them to pay them an extra $10 a month, to compensate them for cooking for

the prisoners, and administered to each the oath as deputy sheriff. In addition to their salary, they were permitted to live in the jail, and were furnished their rent, heat and provisions free, the provisions being paid for by plaintiff. The question now presented is: Is the plaintiff, as sheriff, entitled to demand and receive from the county $1.50 a day for compensation as jailer, in addition to his salary as sheriff? The district court found that he was so entitled. Prior to April 6, 1907, the office of sheriff was what is termed a fee office, but the legislature of 1907 changed this office from a fee to a salaried office, and under the provisions of section 6*a*, ch. 28, Comp. St. 1907, fixed the salary of sheriff in counties having 16,000 to 20,000 population, which included defendant county, at $1,500 per annum, payable in monthly instalments at the end of each month by warrant drawn on the general fund of the county. By section 6*b* it is provided that the board of county commissioners or supervisors shall furnish the sheriff with such deputies as they may deem necessary, and fix the compensation of such deputies, who shall be paid by warrant on the general fund. Section 13, ch. 46 of the same statute, provides: "The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; *provided*, the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." Section 5, ch. 28, fixes the fees to be charged by a sheriff for the performance of his duties as such, among which fees are: "For guarding prisoners when it is actually necessary, two dollars per day to be paid by the county. Where there are prisoners confined in the county jail, one dollar and fifty cents per day shall be allowed the sheriff as jailer. For boarding prisoners fifty cents per day," etc., and concludes as follows: "Provided further, that the sheriff shall, on the first Tuesday in January, April, July and October of each year, make a report to the board of county commissioners or supervisors under oath

showing the different items of fees except mileage collected or earned, from whom, at what time and for what service, and the total amount of fees collected or earned by such officer since the last report and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer."

It is contended by defendant that under these provisions of the statute it was the intention of the legislature that the amount fixed as a salary "for their services" was intended to cover any and all services performed by such sheriff, and that all fees earned by him should belong to the county; and that if plaintiff were allowed the $1.50 a day as jailer's fees he would be required, under the terms of section 5, *supra,* to pay it over to the county treasurer. If that be a correct construction of section 5, then the sheriff would have to turn over all money collected by him for the 50 cents a day for boarding each prisoner, notwithstanding the fact that he had been obliged to previously advance his private funds in the payment for the provisions necessary for the furnishing of such board—expenditures which might eat up a very considerable portion of the salary allowed the sheriff for his services. We are unable to so construe this statute.

The other contention of defendant is not so easily disposed of, viz., that the sheriff in this case did not elect to act as jailer in person, as contemplated by section 13, ch. 46, *supra;* that the persons who performed the duties of jailer, as above set out, were duly sworn as deputies by the sheriff, and that the defendant board, as provided by section 6*b, supra*, fixed the compensation of such deputies at a sum in excess of $1.50 a day and duly paid them their salaries by warrants drawn upon the general fund. We think this contention is sound, and that the fact that these gentlemen, while acting as jailers, performed, with the assistance of the prisoners, other services for the county as utility men or firemen is immaterial. By section 13, ch. 46, *supra,* it is clear that the legislature recognized a distinction between the duties of the office of sheriff and

those of the position of jailer. It gives the sheriff the election to act as jailer in person, if he sees fit so to do, in which case he would of course be entitled to the compensation provided for the performance of the duties of that position; but, if he elects to have the duties of jailer performed by some other person, to be appointed deputy sheriff, it certainly never was the intention of the legislature that the county should pay the deputy for actually performing such services, and also pay to the sheriff the fees allowed therefor. If the sheriff performs the duties of jailer, in addition to his duties as sheriff, he is entitled, under the amendment of 1907, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.

Plaintiff places great reliance in *Kyd v. Gage County*, 38 Neb. 131. That opinion was handed down in 1893, at a time when the office of sheriff was a fee office, and what was there said is not applicable to the amendment of 1907. By that amendment a definite salary was fixed as full compensation for all services rendered and duties performed by a sheriff. With that salary plaintiff must be content. He cannot receive his salary for services rendered, and also recover for services which he did not render.

Summed up, the case stands thus: Plaintiff did not act as jailer. The three gentlemen named acted in that capacity. While they were selected by the board, they were sworn as deputies, and their services as jailer accepted by the sheriff. They earned the fees as jailer. The county paid them in full. The sheriff did not perform the services as jailer, and hence is not entitled to the fees provided therefor. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

TOM BRADSTREET, APPELLEE, V. GRAND ISLAND BANKING COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,486.

1. **Trial:** MOTION FOR VERDICT: WAIVER. Where, in a jury trial, a defendant, when plaintiff rests, moves for a verdict in his favor, and upon the overruling of such motion, without protest, proceeds with the trial and introduces evidence in support of the defenses set up in his answer, he thereby waives the right to assign error in the ruling upon such motion.

2. ———: INSTRUCTIONS. In the trial of a case to a jury, it is not error to refuse instructions requested by the parties, when the substance thereof is contained in the instructions given by the court on its own motion.

3. ———: ———: EXCEPTIONS. Instructions will not be reviewed by this court where no exceptions were taken by the party complaining until the filing of a motion for a new trial.

4. **Evidence:** SECONDARY EVIDENCE. On the question of the foundation required for the introduction of secondary evidence of the contents of a lost instrument, a wide discretion is left to the trial court. *Hapgood Plow Co. v. Martin*, 16 Neb. 27.

5. ———: ———. And where a copy of a lost telegram is prepared by the telegraph company, and the party who received the original thereof testifies that it is a true and correct copy, and that he delivered such original telegram to the adverse party, who upon demand and also upon the trial denies that he had ever received such original, it is not error to receive such copy in evidence. *Whitney v. State*, 53 Neb. 287.

6. **Appeal:** CONFLICTING EVIDENCE. A verdict on conflicting evidence, approved by the trial court, will not ordinarily be disturbed in the appellate court.

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

Charles G. Ryan, for appellant.

Harrison & Prince, contra.

FAWCETT, J.

The petition alleges that on and long prior to September 26, 1906, plaintiff had an open account with the defendant bank as a depositor; that on that date one James McMillan drew the following draft: "Grand Junction, Colo., 9-26 1906. Tom Bradstreet: Pay to the order of Grand Valley Nat. Bank $330.00-100, three hundred thirty dollars, value received and charged to account of J. A. McMillan. To Grand Island Banking Co., Grand Island, Neb;" that plaintiff never authorized McMillan to make the draft; that said draft came into the possession of defendant some time between September 26 and October 2, 1906, the exact date being unknown to plaintiff; that defendant claims to have paid said draft on October 2, but whether cashed or paid by defendant plaintiff has no knowledge; that defendant wrongfully, illegally and without any authority whatever charged the amount of said draft to the account of plaintiff; that before the time when defendant claims to have paid the draft, and on or about September 28, plaintiff verbally notified the bank not to pay the same; that plaintiff did not accept said draft or agree to pay the same, or at any time authorize same to be paid out of his deposits or charged to his account; that plaintiff did not discover that the amount of the draft had been charged to his account until on or about November 3, 1906, when it was returned to him as a voucher with checks which had been charged to him by defendant, and that immediately upon the discovery thereof he demanded of defendant that it correct said account, and has repeatedly demanded of defendant the sum charged against his account, which demand has been refused; that the account between plaintiff and defendant has been fully settled, except said sum of $330, which defendant still holds, and that it is therefore now indebted to plaintiff in said sum; that on July 5, 1907, he drew a check upon defendant for the amount of the draft, and payment thereof was refused.

The answer admits the dealings between the parties as

banker and depositor; admits the drawing of the draft by McMillan; and alleges that the draft was in due course of business received by defendant on or after October 2, 1906; denies that the draft was paid without authority or instruction from plaintiff; and alleges the fact to be that plaintiff instructed the defendant to pay the draft on its arrival, and, following such instruction and authority of plaintiff, defendant did, on October 2, pay the draft; and denies each and every other allegation in plaintiff's petition.

As a second ground of defense, it is alleged that McMillan was in the employ of and purchased horses for plaintiff in the west during the summer of 1906; that the draft in question was drawn by McMillan to pay for 19 particular horses which plaintiff received; that plaintiff also recovered $200 from the Union Pacific Railway Company as damages for the negligent handling of said horses in course of shipment, and in said action claimed that he was the owner of such horses; by reason of all which defendant claims that plaintiff is estopped to deny the authority of McMillan to draw the draft or to repudiate the authority of defendant to pay the same.

As a third defense, it is alleged that on or about October 11, 1906, plaintiff's account was duly balanced, and the book, showing said draft charged to his account, was, together with other checks and vouchers of plaintiff, given to plaintiff, and that he has ever since said time had the draft in his possession and made no objections or complaints or offer to return said draft until the month of June, 1907; that plaintiff continued thereafter to deposit money in defendant bank and check upon the same, and paid defendant large sums of money upon notes and other forms of indebtedness, which was all done with full knowledge that the draft in controversy had been charged to his account; that on January 15, 1907, a final and complete settlement of all accounts between the parties was had, which adjustment included the draft in controversy, and that plaintiff then paid defendant all of his indebtedness and received his final balances on his account.

For a fourth defense, it is alleged that plaintiff, with a full knowledge of all the matters, and while having the draft in his possession, adjusted and settled his accounts with McMillan and included in said adjustment the amount of the draft; that at that time McMillan was responsible and was doing business in Nebraska and owned property therein; that after such settlement with plaintiff, and while plaintiff had the draft in his possession, and before he had made complaint to defendant, McMillan closed up his business in Nebraska and left for parts unknown to defendant; that defendant, relying upon the authority of plaintiff to pay the draft, was deprived of all opportunity to recover the same from or to make any adjustment thereof with McMillan; that defendant is informed and believes that plaintiff and McMillan are in collusion for the purpose of cheating and defrauding defendant, and that this action is brought in consummation of such plan; that by reason of his acts, laches, neglect and delay, and by reason of the acceptance and retention of the draft and the receipt of the benefits therefrom, plaintiff is now estopped to deny defendant's authority to pay the draft.

The reply traverses the allegations of the answer; denies that plaintiff owned the horses; admits the institution of the suit against the railroad company and settlement of the same; alleges that the action was commenced by the attorneys of McMillan and conducted in plaintiff's name only for the reason that the horses were consigned to him as a commission salesman and that he was present and could maintain said suit, while McMillan was absent; alleges that the pass book was balanced some time during the month of November; admits that the draft was returned to him, but alleges that he did not examine his vouchers immediately; that some time later, the exact date being to him unknown (but which date is fixed by his testimony as some time in November), he discovered that the draft had been charged to him, and immediately took the same to the paying teller of defendant bank, who had charge of pass books and vouchers for defendant, protested

against the same and demanded repayment of the money; that the teller requested plaintiff to give him time to straighten out the matter, stating that it would make him, the teller, trouble in the bank in the event the same was brought to the notice of the cashier; that he admitted he had made an error in paying the draft and charging the same to account of plaintiff, and that the delay in final pressing for payment was occasioned by the repeated requests of the teller for further time to enable him to try to get the matter straightened out with either McMillan or the Grand Valley National Bank. There was a trial to the court and a jury and a verdict for plaintiff for the full amount of the draft, without interest, upon which judgment was rendered, and defendant appeals.

Upon the trial, when plaintiff rested, defendant moved for a directed verdict in its favor, which motion was overruled, and the first error complained of is this ruling of the court. When defendant's motion was overruled, it proceeded without protest and introduced evidence in support of the allegations contained in its answer. We think this is a waiver of any right to now insist that the court erred in the ruling referred to.

The second error complained of is the refusal of instructions 1 and 2 tendered by defendant. Both of these instructions are covered by No. 14, given by the court on its own motion; hence, it was not error to refuse them.

By assignments 4, 5 and 6 it is urged that there was error in giving instructions 12, 14 and 15, given by the court on its own motion; but, as no exceptions were taken to the giving of these or any other of the instructions given by the court they cannot now be reviewed.

By the eighth assignment it is urged that the court erred in admitting in evidence a copy of a telegram, marked "Exhibit F," for the reason that there was no identification of this message, as being a copy of the original, "by any one." Plaintiff testified that, when he received the original telegram, he pinned it to a letter which he had received from McMillan and took the

same to defendant bank, where he had an interview with one of the bank officials with reference thereto; that he offered to leave the letter and telegram with the bank, but the bank official told him that it would not be necessary to leave the letter, and removed the pin and handed plaintiff the letter and retained the telegram; that thereafter, when the bank officials denied ever having received the telegram, he went to the telegraph office and obtained the copy, "Exhibit F," and that exhibit F was a true copy of the original telegram which he claims to have left with defendant. Having testified that he had left his original with defendant, and the officers of defendant claiming that they had made a search for such a telegram, but had been unable to find it, and had never received it, it was not error on the part of the court to admit the copy. The copy did not require proof by any official of the telegraph company that it was a true copy. The testimony of plaintiff upon that point was sufficient.

The other assignments, of which there are several, all relate to questions of fact in relation to the various matters pleaded. Upon all of these questions there is a direct conflict in the evidence. The jury were specially instructed as to each of the three affirmative defenses interposed. The case was submitted to the jury upon instructions to which defendant took no exceptions.

The evidence is sufficient to sustain a verdict either way. The court and jury saw the witnesses upon the stand, heard their testimony, and the jury by their verdict resolved all of these disputed questions in favor of the plaintiff. This verdict received the approval of the trial court. Under such circumstances, it is well settled that the supreme court will not interfere.

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

AFFIRMED.

JOHN C. OWEN, APPELLANT, v. THOMAS W. SMITH, WARDEN, APPELLEE.

FILED JUNE 13, 1911. No. 17,113.

1. **Parole:** REVOCATION. Under the provisions of section 570 of the criminal code, a parole granted by the governor of the state to a convict in the state penitentiary may be revoked by the governor at any time, without notice or hearing, for any reason which he may deem sufficient.

2. **Constitutional Law:** REVOCATION OF PAROLE: REVIEW BY THE COURTS. Said section of the code having conferred upon the governor full power to retake and reimprison any convict so upon parole, his act of revocation is the exercise of a sole discretion, which is not reviewable by the courts.

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

Price & Abbott, for appellant.

Grant G. Martin, Attorney General, and *George W. Ayres, contra.*

FAWCETT, J.

Appellant, John C. Owen, filed in the district court for Lancaster county his petition for a writ of habeas corpus. The petition alleges that on May 1, 1909, appellant, after having been convicted of assault with intent to commit great bodily injury, was sentenced to a term of five years in the state penitentiary; that on May 4, 1909, he was delivered to the warden of said penitentiary; that on September 9, 1910, appellant received from Ashton C. Shallenberger, the then governor of Nebraska, a parole, a copy of which is attached to and made a part of appellant's petition; that on October 11, 1910, the said Ashton C. Shallenberger, who was then still governor, "did unlawfully, wrongfully and without authority, and without any complaint having been made charging your petitioner with the

violation of any of the parole agreements, and without giving this petitioner a hearing, did revoke the said parole and order your petitioner to be returned to the state penitentiary of the state of Nebraska, from which he had been paroled as heretofore set out;" that on October 12, 1910, appellee "T. W. Smith, the warden of the Nebraska state penitentiary, to whom the executive order of October 11 was directed," caused appellant to be reconfined and imprisoned in said penitentiary, where, it is alleged, he "is now unlawfully, wrongfully and without authority so deprived of his liberty." Upon a hearing in the district court, the application for a writ of habeas corpus was denied, the action dismissed, and appellant remanded to the custody of the warden of the state penitentiary. From such judgment this appeal is prosecuted.

The only question to be considered is whether the governor after having granted a parole to a convict, may, without notice and hearing, revoke such parole and order the convict to be apprehended and reimprisoned for the remainder of his term of imprisonment. Appellant cites some authorities from other states which at first blush seem to sustain his contention; but an examination of those cases discloses the fact that they are based upon statutes essentially different from ours. As opposed to the cases cited by appellant, the attorney general has cited authorities based upon statutes similar to ours, which amply sustain the action of the governor. We do not deem it necessary to consider any of these cases, for the reason that we think the judgment of the district court must be affirmed under the very terms of the parole itself, and of section 570 of the criminal code, under which the governor acted. The parole issued by Governor Shallenberger, after setting out certain conditions to be observed by the convict while at liberty, concludes thus: "6. He shall, while on parole, remain in the legal custody and under the control of the Governor of the State of Nebraska. 7. He shall be liable to be retaken and again confined within the inclosure of the state penitentiary for any reason or rea-

sons that shall be satisfactory to the governor, and at his sole discretion, until he receives a copy of his final discharge through the warden."

Section 570 of the criminal code provides: "That the governor shall have power in the case of any prisoner, who is now, or hereafter may be imprisoned in the state penitentiary under a sentence other than murder in the first or second degree, who may have served the minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted of felony and served a term in any penal institution within the United States of America), * * * to allow any such prisoner to go upon parole, outside of the inclosure of said penitentiary, to remain while on parole, within the state under the control and in the legal custody of the governor, and subject at any time to be taken back within the inclosure of said institution; and full power to retake and reimprison any convict so upon parole is hereby conferred upon the governor, whose written order shall be a sufficient warrant for all officers named therein, to authorize such officers to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process."

We think it is clear that under the terms of this section of our code, and under the terms of the parole itself, the governor acted clearly within his lawful powers; that he was not required to give any notice of his intention to revoke the parole of appellant, nor grant appellant any hearing before revoking the same. Any other construction of the law would not be a kindness to the inmates of the penitentiary; for, if the governor is given to understand that every time he grants a parole he thereby restores the convict to full citizenship to such an extent that he cannot revoke such parole except upon notice and a full hearing, he would be very loath to exercise the humane prerogative which the code now confers upon him. We think the provisions of the code were properly construed by the

district court. Appellant was at all times, while on parole, in the legal custody of the governor, and subject at any time, for any reason or reasons that should be satisfactory to the governor, and at his sole discretion, to be reimprisoned. He accepted a parole containing the conditions prescribed by law and must abide by them.

The judgment of the district court is

AFFIRMED.

LILLIAN E. GUNDY, ADMINISTRATRIX, APPELLEE, V. NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,189.

1. **Master and Servant**: DUTIES OF MASTER: QUESTIONS FOR JURY. It is the duty of an employer to furnish his employee a safe place in which to work, and to inform him of all latent dangers connected with the employment. If the inquiry whether the employer has performed his duty in this regard so as to be free from negligence on his part depends upon facts and conditions to be ascertained from conflicting evidence, its determination is for the jury under proper instructions.

2. **Pleading**: AMENDMENT: PREJUDICE: PRESUMPTIONS. If a party is allowed to amend his pleadings at the trial, it should be upon such terms as are reasonable and will avoid prejudice to the opposite party. Prejudice from such amendment will not be presumed. It must be made to appear.

3. **Witnesses**: CROSS-EXAMINATION: WRITINGS. It is ordinarily improper to introduce writings in evidence as a part of the cross-examination of a witness. It may under some circumstances become necessary to do so, and the matter is generally within the sound discretion of the trial court.

4. ———: IMPEACHMENT: WRITINGS. If a witness upon cross-examination identifies a letter as written by himself which contains statements tending to contradict or explain his evidence in chief, the latter is competent as impeaching evidence.

5. **Death**: MEASURE OF DAMAGES: EVIDENCE: HARMLESS ERROR. In an action by an administratrix to recover damages for causing the death of her husband, the measure of damages is her loss from a pecuniary standpoint by the death of her husband. Whether

she was left in poverty or with ample means is immaterial. In such action the plaintiff was allowed to testify that she had no other means of support than the earnings of her husband. The petition contains such an allegation, which was not objected to. The evidence was given in connection with her testimony as to the amount of such earnings, and the jury were correctly instructed as to the measure of damages. *Held*. That it does not appear that the defendant was prejudiced by this evidence so as to require a reversal of the judgment.

6. Trial: ACTION FOR DEATH: DAMAGES: INSTRUCTIONS. An instruction in such case that the jury "should allow such amount as will compensate plaintiff for such support and maintenance as they find from the evidence she *should* have received from" the deceased, together with the further instruction that the plaintiff would be entitled to recover "such damages as would compensate her for the injury that you may believe from the evidence she has sustained by reason of such death," will not be presumed to have been understood by the jury to mean that she could recover the amount of support and maintenance that she ought to have. The meaning, when considered in the light of the statement of the case and the other instructions, is that the verdict should compensate her for the loss, caused by the death of her husband, of such support and maintenance as she would have received from him if he had lived. The giving of this instruction is not reversible error; the defendant not having requested any more complete statement upon this point.

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

Edgar M. Morsman, Jr., and *Courtright & Sidner,* for appellant.

C. E. Abbott, contra.

SEDGWICK, J.

The plaintiff's husband, Melvin R. Gundy, was employed as a carpenter in building an elevator for the defendant. While so employed he fell and was instantly killed, and the plaintiff, as administratrix of his estate, brought this action in the district court for Dodge county, and ob-

tained a verdict and judgment for damages caused by his death. The defendant has appealed.

The principal question presented by the defendant is as to the sufficiency of the evidence to support the verdict. The answer was a general denial of negligence on the part of the defendant which was the proximate cause of the accident, and the allegation that the accident was caused by Mr. Gundy's own negligence and the negligence of a fellow servant, with the plea of assumption of risk. The elevator that was being constructed was 68 by 100 feet on the ground. It was divided into about 70 bins of various sizes. The bin in which the accident happened was 12 by 14 feet. The walls and partitions of the elevator were constructed by laying two-inch planks, one above the other, and spiking them securely together. At the foundation these planks were 8 inches in width, and so continued to about the height of 19 feet. They were then reduced to 6 inches in width, which continued through about 30 feet more of the elevation. After that 2 by 4's were continued for the partition wall. When the accident happened they were finishing these walls and partitions, and had reached about the height of 65 feet. In working on the walls and partitions the men stood upon stagings, which were raised from time to time as the work progressed. There were three of these for each bin of the size of the one in which the accident happened, and they appear to have been prepared at the time the building was begun. They were each a little less than four feet wide and a litle less than 14 feet in length. They were constructed of two-inch planks with three 2 by 4's securely spiked across them, and on the other side of the 2 by 4's dressed boards were securely nailed. A bracket was fastened with spikes in each corner of the bin as a support for these stagings, and two corners of each of the outside stagings rested upon these two brackets. The other corners of the outside stagings and the four corners of the inner staging were supported by lugs securely fastened in the partitions. These lugs were made of 2 by 8 timbers, 20 or 22 inches in length,

and were placed crosswise, with the center resting upon the center of the partition, and the corners of the stagings rested upon the ends of these lugs. There were about 70 men employed in building these walls and partitions, and they appear to have assisted each other, if necessary, so that the building would progress in height uniformly. When the walls and partitions were built about four feet above the stagings, the brackets and lugs were placed and secured, and the stagings were raised and placed upon them. Mr. Gundy was assisting in raising these stagings when the accident happened. In doing this five men worked together; one of them fastened a rope to each corner of the staging to be raised, and passed a rope to each of the four men standing above, one being at each corner of the staging to be raised. The staging was raised by these ropes and placed upon the brackets and lugs. They had raised and placed one of these stagings at the side of the bin, and had raised the center staging nearly to its place, when Mr. Gundy fell with the side staging which had already been placed. Mr. Gundy was standing at the corner of the staging which they were raising nearest to the one which had already been placed. In the adjoining bin the staging had already been raised, and appears to have kept its position. The jury might reasonably conclude that, if this staging which these men had placed had been secure, the accident would not have happened. The inquiry was: Would this staging have fallen if all parties interested had acted with reasonable care and caution; and, if not, was it the negligence of Mr. Gundy, or the negligence of his fellow servant or the negligence of the defendant that caused the accident? And, if the conclusion is that the accident is not to be attributed to the negligence of any one, did Mr. Gundy assume the risk as a necessary risk of the employment? Mr. Gundy was about 45 years of age. He had worked at the carpenter trade principally, but not entirely, for 10 or 12 years. He had never worked upon a grain elevator before, and the evidence does not show that he had ever been employed upon a large or high

building. He had been working about this elevator for perhaps two weeks. Most of this time he had been working on the ground preparing wedges with which to secure these stagings in position. For five or six days he had helped on these bins. He had worked upon no particular bin and with no particular set of men, but had been sent from place to place as his help might be needed. Mr. Couch, his immediate foreman, testified that he thought this was the first time Mr. Gundy had assisted in raising these stagings. The manner of securing these stagings in position was left entirely to the men. The same stagings were used in each bin throughout the progress of the work. They were not quite as large as the bins in the beginning. There was room between the stagings and the partitions to enable them to remove the brackets and saw off the lugs after the stagings had been placed upon the higher brackets and lugs. As they progressed through the work and laid narrower walls and partitions, there was still more room for the staging. The sides of the partitions were not always kept in a true perpendicular line. When this was discovered by the superintendent it was corrected, but the result was that in places this added still more to the size of the bins. While the evidence is not certain upon this point, the jury might reasonably have found that the staging which fell with Mr. Gundy slipped off of the side of the lug because there was too much room between the lug and the wall of the bin. The evidence is also uncertain as to who placed this lug and as to whether it was in the right position. There was apparently reliable evidence, if not a preponderance of the evidence, from which the jury might have found that Mr. Gundy, while helping to raise this staging at the time of the accident, was standing upon the partition wall between the bin in which he was working and the one immediately north, and, to prevent losing his balance because of the moving of the heavy staging that they were lifting, he placed his foot upon the corner of the staging which they had just put in place, which gave way under him and caused his fall. The superin-

tendent and foreman testify that they frequently warned these men to be careful and place their staging securely. The jury may have considered this a very proper, and perhaps necessary, thing to do, even with experts, who had been with the work from the foundation and had learned how to protect themselves before the building had reached such a height as to greatly increase the danger; but there is no evidence that any such general instructions had been given after Mr. Gundy commenced working in these bins. The stagings in the various bins were raised simultaneously, and when the foreman directed the men to raise the staging at this particular time he told them in a general way to make the staging secure because they had reached the top of the building and this was the last raising, but there is no evidence that these directions were given in the presence of Mr. Gundy or that he had any knowledge of such instructions. It does not appear that these directions had any reference to their manner of raising them or to the safety of the men in so doing. There is no evidence that Mr. Gundy had received any instructions in regard to the manner of doing this work or in regard to the danger connected with it. The foreman testified that Mr. Gundy had no such instructions so far as he knew.

The burden of proof was upon the defendant to show that Mr. Gundy was guilty of negligence that was the proximate cause of the accident. The jury have found that the evidence does not establish these defenses, and the evidence is not of such a nature as to require us to interfere with their finding. Was there negligence on the part of the defendant that was the proximate cause of the accident? The burden was upon the plaintiff to establish this negligence. Is the evidence sufficient to support such a finding? The evidence shows beyond a question that the stagings were suitable and were properly constructed, and there is no defect in the materials or appliances furnished by the defendant. Could defendant by prescribing a uniform method of raising and securing these stagings prevent such accidents? Were the conditions of

the work such as to require defendant to exercise greater care in securing the safety of the men? Was it the defendant's duty to know whether Mr. Gundy had had any experience in this sort of work, and whether he understood and appreciated the dangers connected with it? Were the persons in charge of this work entirely justifiable in sending him to the top of this structure to perform such duties? Should they under such circumstances see to it that he understood the nature of the work and the proper means of insuring his safety? To determine these and similar questions which are suggested by the circumstances recited, and many considerations to be derived from the evidence, is a complicated and difficult duty. These are not questions of law, but are to be determined by the jury, and, if properly submitted, this court cannot interfere with the verdict.

If the negligence of a fellow servant was the proximate cause of the accident, the plaintiff cannot recover. One of the men who had been in this part of the work from the beginning was helping to raise the staging when the accident occurred. He understood the work, and some of his evidence indicates that he was directing Mr. Gundy. Whether his negligence was the proximate cause of the accident is also a question of fact to be determined from a consideration of all of the conditions and surrounding circumstances. The evidence is not so clear and free from conflict upon these issues as to permit the court to dispense with the assistance of the jury and determine the case upon questions of law.

The defendant complains that the plaintiff was allowed to amend her petition before proceeding to the trial of the case. The petition was quite comprehensive, and stated the plaintiff's cause of action and the facts supposed to constitute the negligence of the defendant with great particularity. The change made in the petition by the amendment was in reality a material modification of the theory upon which the action was begun. It was possible that the change might seriously prejudice the defense, but these

considerations do not furnish ground to refuse to allow amendments under the liberal provisions of the code. Such amendments should be allowed under such terms as are reasonable and will prevent any unfair advantage to the party making the amendment. The defendant, however, made no showing of prejudice by this amendment, and did not ask for any delay in the proceedings or for any other relief that the court might grant. There was no action of the court that could be considered erroneous.

Mr. Miller was one of the men engaged with Mr. Gundy in raising the staging at the time of the accident. He was called as a witness by the defendant, and testified to certain matters very prejudicial to the plaintiff's case. Upon his cross-examination, he was asked if he had written a letter to the plaintiff's attorney in regard to the circumstances of the accident, and answered that he did not remember of doing so. He was then shown a letter purporting to be signed by him and addressed to the plaintiff's attorney, in which, among other things, he said: "I know all about it, and no one can give you the evidence I can. * * * It will pay you to come and bring her (the plaintiff) with you, or let her come alone and I will tell her all. I think you have a case." He then admitted that he wrote and mailed the letter. The plaintiff then offered this letter in evidence, which was objected to on the ground that it was not proper in cross-examination, and that it was incompetent and immaterial. The objection was overruled and the letter received in evidence. In this it is now insisted that the court erred. It is perhaps not usual to receive such documents in evidence during the cross-examination. However, under some circumstances this might be necessary, and the matter is generally considered to rest in the sound discretion of the trial court.

The principal objection to this evidence is that the letter does not contain any direct allegation of fact inconsistent with the evidence of the witness. The witness had testified that Mr. Gundy at the time of the accident was standing upon the lug upon which they were trying to

place the staging, which they were raising, in a very insecure and apparently dangerous position. In this he was contradicted by other witnesses, and his evidence upon this point, if true, was quite material as bearing upon the negligence of Mr. Gundy. The statement in the letter that he knew all about the facts, and that the plaintiff had a case, might reasonably be regarded as inconsistent with his evidence. In this view of the matter, we think the court might in its discretion allow the letter in evidence.

The plaintiff was allowed to testify that she had no other means of support than the earnings of her husband. This allegation was in the petition, and was not objected to by the defendant, but the defendant objected to allowing her to so testify, and now insists that the ruling was erroneous. It is said that the purpose was to show that the plaintiff was left destitute, and so arouse the sympathies of the jury. Of course, it was immaterial in this case whether the plaintiff was left in poverty or with ample means. The question was how much she had lost from a pecuniary standpoint by the death of her husband. It was proper to show what Mr. Gundy's earnings had been, and the manner in which he had supported his family. Under the instructions upon this point given to the jury by the court, it seems improbable that the jury should regard this evidence of importance except as tending to show that the earnings of Mr. Gundy were sufficient for the entire support of his family.

It is objected that the court improperly instructed the jury as to the measure of damages. In one instruction the court told the jury: "In determining such question, the jury should allow such amount as will compensate plaintiff for such support and maintenance as they find from the evidence she should have received from the said Malvin R. Gundy during his expectancy of life, not exceeding the sum of $5,000," and in the next instruction, "In such case the plaintiff would be entitled to recover such damages as would compensate her for the injury that you may believe from the evidence she has sustained by reason of

such death, which you should ascertain according to the evidence and rules laid down in these instructions." The defendant contends that the effect of these instructions is that "the measure of damages was the amount of her support and maintenance during the entire expectancy of her husband's life." We think that these two instructions, taken together, state the rule to be that the plaintiff should recover such damages as would compensate her for the injury, which would be compensation for the loss of the support and maintenance that she would have received from her husband, not such support and maintenance as she ought to have received. The language of the two instructions, when taken together, will not justify giving that meaning to the word "should" in the thirteenth instruction. The instructions, therefore, upon this point were not necessarily erroneous; and, if they were not as full and complete as desired, the defendant is not in a position now to complain, since it offered no instructions upon this point. There are no other objections to the instructions. The case appears to have been fairly and carefully tried.

The judgment of the district court is

AFFIRMED.

LETTON, J., dissenting.

Under the evidence in this case, I can see no legal reason for holding the employer liable. The opinion says: "The evidence shows beyond a question that the stagings were suitable and were properly constructed, and there is no defect in the materials or appliances furnished by the defendant." These stagings were to be placed upon projecting lugs put in position in the wall by the men themselves. The plank furnished for the lugs was proper, suitable, and not defective. The evidence is undisputed that one of the lugs was set a little too far from the corner of the building by another carpenter—a fellow servant—and the corner of the platform which should have rested on it went down when Gundy stepped upon it.

The general rule as to scaffolds in other jurisdictions, and in this state until this time (*Stevens v. Howe,* 28 Neb. 547), is that, "where the servant as part of his work is to construct a scaffold or other structure out of materials furnished by the employer, and the employer furnishes proper materials for that purpose, but the servant, by negligence either in putting the materials together or in selecting them, erects an unsafe appliance which results in injury to another servant, no negligence can be imputed to the master and he is not liable for the injury. In such cases the master's responsibility ends with the selection of suitable material and suitable men for the work." 20 Am. & Eng. Ency. Law (2d ed.) 82. 2 Labatt, Master and Servant, sec. 614; *Leishman v. Union Iron Works,* 148 Cal 274, 3 L. R. A. n. s. 500, and note.

The placing of lugs and the raising of the staging were performed by the carpenters as a part of their regular duties. Each carpenter assumed the ordinary risks of the business, among which was the carelessness of his fellow servant. Under the undisputed facts, the accident was not the result of any negligence on the part of the master, and as the law stood at that time no liability existed on his part. Since this occurrence the legislature, recognizing and realizing the unsatisfactory condition of the existing law, in the exercise of the police power, has wisely taken steps to protect workmen on such structures by the enactment of a law requiring safeguards. It is to be regretted that the act was not in force when this accident occurred. As the law then stood the employer was not liable.

BARNES and ROOT, JJ., concur in this dissenting opinion.

LESLIE D. SPENCE, GUARDIAN, APPELLANT, V. HARDIN U. MINER, SHERIFF, ET AL., APPELLEES.

FILED JUNE 13, 1911. No. 16,418.

1. **Insane Persons:** GUARDIANSHIP: JURISDICTION. The county court has original jurisdiction of the settlement of the accounts of guardians of insane persons. Const., art. VI, sec. 16. And by statute this jurisdiction is made exclusive. Comp. St. 1909, ch. 20, art. I, sec. 3.

2. ———: ———: ———. When the county court appoints a guardian for the estate of an insane person, it is his duty to take possession of and control of that estate, and in doing so he is an officer of the court and brings the estate under the jurisdiction of the court.

3. ———: ———: DUTIES OF GUARDIAN. It is the duty of the guardian to furnish the ward with the necessaries of life suitable to his condition out of the ward's estate.

4. ———: ———: JURISDICTION. Courts of equity may determine the equitable rights of a ward under guardianship in suits in the nature of actions *in rem* which affect the property rights of the ward. In personal actions to establish a claim against the estate of the ward for necessaries furnished during the guardianship, the county court which has taken jurisdiction of the estate by the appointment of the guardian has exclusive original jurisdiction.

5. ———: JUDGMENT: RELIEF IN EQUITY. A personal judgment rendered by a justice of the peace against an insane person under guardianship for necessaries furnished during the guardianship, in an action against the ward alone, the guardian having no notice of the proceedings or that such necessaries had been furnished, and the plaintiff having notice of the guardianship, will be vacated in equity at the suit of the guardian, and the sale of the ward's property upon an execution issued upon such judgment will be enjoined.

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

Hugh LaMaster, for appellant.

L. C. Chapman, contra.

SEDGWICK, J.

In October, 1902, David Duncan was appointed guardian of the person and estate of one William I. Young, incompetent and insane, by the county court of Johnson county. Afterwards, and during the guardianship of the defendant, Charles C. Reynolds sued the said ward before a justice of the peace in Lancaster county on account for board, and recovered a judgment for $73.70 and costs. Afterwards a transcript of judgment was taken to the district court for Lancaster county, and from that court to the district court for Johnson county, and an execution issued thereon and placed in the hands of the defendant Hardin U. Miner, sheriff of Johnson county, and the sheriff was about to levy the same upon the land of the ward in Johnson county when this action was brought by this plaintiff, who is the successor of the said Duncan as guardian, to restrain the levy and sale of the land upon the said judgment. A general demurrer was filed to the petition and sustained by the district court, and, the plaintiff electing to stand upon his petition, the action was dismissed, and the plaintiff has appealed.

The petition alleges the facts above stated, and that said Charles C. Reynolds well knew that said David Duncan was, during all of said time that William I. Young was boarding with said Charles C. Reynolds, the duly and lawfully constituted guardian of the person and estate of said William I. Young, and well knew that said David Duncan was ready, willing and able, during all of said time, to furnish all necessaries required by said William I. Young, but said Reynolds never requested said David Duncan to furnish necessaries for said Young, and said David Duncan never refused to furnish any necessaries for said Young, and said Charles C. Reynolds never made any demand or request upon the said David Duncan or upon this plaintiff for pay for said necessaries alleged to have been furnished to said Young; and that in fact there was nothing due to said Reynolds on said account.

The constitution of this state provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts." Const., art. VI, sec. 16. The statutes are not as complete as they might be in regard to the practice of county courts in matters of guardianship, but there are several provisions that are in harmony with the above quotation from the fundamental law. When the county court appoints a guardian for the estate of an insane person, it is his duty to take possession and control of that estate, and in doing so he is an officer of the court and brings the estate under the jurisdiction of the court. The personal property and effects of the ward are subject to the control and direction of the county court.

It is the duty of the guardian to furnish the ward with the necessaries of life suitable to his condition out of the ward's estate. When necessary, the district court may authorize the sale of his real estate, but only when the condition of his estate in the custody of the county court makes such course necessary. The petition in this case alleges that the guardian had no notice that any such liabilities were being incurred against the estate of his ward, or that there was any necessity therefor, or that any suit was begun against the ward, or that any such proceedings were contemplated until after the judgment was transcripted to Johnson county.

The statutes in regard to guardianship are not uniform in the several states, and there are various holdings in regard to the force and effect of judgments and decrees against a person under guardianship. It is generally, and perhaps uniformly, held that persons under guardianship may be sued in law actions as well as in suits that are in the nature of actions *in rem* which affect the property of the ward. He should be made a party defendant in various forms of actions, in which his interests are affected. In such cases the general guardian is also usually made defendant, and if he fails to appear to defend the

ward's interest in the property, or if there is no general guardian of an insane or incompetent person, the court will appoint a guardian *ad litem* to protect his interests. Such cases are to be distinguished from personal actions upon claims against the ward arising during guardianship when the estate of the ward is in the custody of a court which is given original jurisdiction to administer the same, and the general guardian has no knowledge of the action, there being no service upon him and no guardian *ad litem* is appointed. In this state the county court is by statute given exclusive original jurisdiction of the guardianship of insane persons and others. Comp. St., ch. 20, art. I, sec. 3.

Even where that is not the case, and several courts have concurrent jurisdiction, it is generally held that the court that first takes jurisdiction of the estate has exclusive control. *Johnstone v. Fritz,* 159 Pa. St. 378, 28 Atl. 148. In that case the court, quoting from another decision, say: "The latter court has exclusive jurisdiction of the account of the guardian. It cannot be deprived of that right by a judgment obtained against him before a justice of the peace." The opinion continues with the following: "But, even had there been no statutory bar, and the jurisdiction of the two courts been originally concurrent, that of the orphans' court, having first rightfully attached, must, in pursuance of the well-settled rule, have become exclusive. The possession and management of the estate having already passed into its grasp, and both guardian and minor under its control and direction, a wise public policy would have forbidden any interference with the exercise of its jurisdiction. Those who deal with either guardian or minor must deal subject to the approval or disapproval of this one tribunal, else there will be an end of intelligent administration, and a beginning of the evils resulting from conflict of jurisdiction. If the common pleas may take cognizance of questions of allowance, it may take cognizance of the conduct of the guardian and the settlement of his accounts, for the one involves the other. This the law will not permit."

The supreme court of Illinois refused to allow a bill in equity to enforce the payment of attorney's fees for services rendered a minor under guardianship out of funds that properly belonged to the estate of the minor. That court held that, where the probate court had appointed a guardian and taken jurisdiction of the estate, no other court would interfere and adjust certain items of account against the estate. Upon this point the court said: "Moreover, under paragraph 69, ch. 37, Rev. St., probate courts are clothed with original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and the settlement of their accounts. So far as the expenditure of the money in the hands of Martin Dougherty, Sr., guardian of Martin Dougherty, Jr., belonging to the ward is concerned, the probate court has full power and authority to make and enforce any necessary order. The law is well settled that a court of equity will not, except in extraordinary cases, take jurisdiction in the administration or settlement of estates. * * * It is also a well-established rule that where a court of equity assumes jurisdiction it will take the whole administration of the estate into its hands, and will not assume jurisdiction over a part." *Dougherty v. Hughes,* 165 Ill. 384.

The supreme court of California held that an action could not be maintained against the ward for legal services rendered the guardian in behalf of the ward's estate. *McKee v. Hunt,* 142 Cal. 526. The court said: "Both the administrator and the guardian are primarily liable to those whom they employ to aid them in the care, management, and protection of the estate, and the question as to the reimbursement of the administrator or guardian from the estate, for such necessary expenses as he may incur, is one solely between the administrator or guardian and the estate which he represents, and one which the court having jurisdiction of the estate has the sole power to determine."

In *Sturgis v. Sturgis,* 51 Or. 10, the law is stated in the

syllabus: "The property of the ward is in the custody of the law, and is not subject to attachment or execution, and the estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and payment of debts being specified in the statute."

In *Nolan v. Garrison,* 156 Mich. 397, the supreme court of Michigan, quoting from the opinion of Judge Cooley in a former case, said: "Complete jurisdiction over these subjects is conferred upon the courts of probate, and, if the interposition of equity is demanded, it must be for some purpose auxiliary to relief being sought in those courts. * * * But we think the circuit judge was entirely right in holding that whatever jurisdiction the court of chancery formerly had of these subjects is now conferred by our law upon the courts of probate. And we have no doubt that jurisdiction in those courts was meant to be exclusive, except as the court of chancery in exceptional cases might render them aid and assistance by means of such auxiliary remedies as might be needful to prevent wrong and injustice before the probate jurisdiction could be rendered effectual." In *Godde v. Marvin,* 142 Mich. 518, a bill in chancery was filed to vacate a judgment rendered against an insane person under guardianship. In the opinion the court states the general principle involved as follows: "It was conceded upon the argument that equity has jurisdiction of a suit of this character, and that the sole question for our determination was whether such injustice had been done as to authorize a court of equity to set aside the judgment of the court of law. 'It is well understood that before a chancery court will interfere with a judgment at law it must be made very clearly to appear that an injustice has been done,' " and concludes: "A decree will be entered vacating the judgment in that suit as to Richard D. Gregory, and avoiding all proceedings thereunder, or in enforcement thereof, as against him or his estate."

In that case the judgment vacated was upon a note

executed by the ward several years before he became insane and was placed under guardianship, whereas in the case at bar the judgment was for alleged necessaries furnished to the ward while under guardianship, and furnished by one who knew of the guardianship. The petition demurred to alleges that these necessaries had been fully paid for before the action was begun. There can, of course, be no doubt that under such circumstances the judgment against the ward was unjust. It was obtained in fraud of the right of the guardian to have notice and defend against it. The fact of the guardianship and the exclusive jurisdiction of the county court to adjust such claims would have been a complete defense if brought to the attention of the justice. There is no remedy for this plaintiff in the justice court nor by appeal. The demurrer to the petition should be overruled.

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

REVERSED.

ROSE, J., concurs in conclusion.

ROOT, J.

I concur in the conclusion of, but not in all that is said in, the majority opinion. Especially do I dissent from those parts of the opinion holding that the appointment of a guardian for an adult incompetent by a county court vests that court with exclusive original jurisdiction to determine claims against the ward's estate. At common law an incompetent might be sued after inquisition of lunacy and the appointment of a guardian or committee. *Anonymous*, 13 Ves. Jr. (Eng.) *590; 22 Cyc. 1224; *Van Horn v. Hann*, 39 N. J. Law, 207; *Baird v. Steadman*, 39 Fla. 40; *Ingersoll v. Harrison*, 48 Mich, 234.

The Michigan cases quoted from and commented upon in the majority opinion do not sustain that opinion.

In *Nolan v. Garrison*, 156 Mich. 397, cited in the majority opinion, the chief justice of that court speaking for

it, recognizes the right of a claimant to sustain an action in the circuit court against an insane person under guardianship, but says that the power of that court is exhausted by the rendition of the judgment, "and payment must usually be enforced by suit upon the guardian's bond." The last utterance of the Michigan court upon this subject may be found in *Love v. Merrill,* 130 N. W. (Mich.) 1123, wherein they say: "The mode of acquiring jurisdiction over the person of an insane defendant in an action at law or in a suit in equity is the mode prescribed by statute for obtaining jurisdiction over the person of a sane defendant."

In *Love v. Merrill, supra, Ingersoll v. Harrison, supra,* is cited with approval, so that the Michigan decisions not only do not sustain, but are at war with, the law announced by the majority of this court. Neither does *Sturgis v. Sturgis,* 51 Or. 10, sustain the majority opinion. Judge Eakin, writing the opinion of the Oregon court, said: "Without deciding whether an ordinary creditor of the ward's estate may, in the first instance, bring an action therefor, it appears that this is not a liability upon the contract of either the ward or the guardian; but, if there is a liability, it is statutory, and may be established *in any competent court by judgment against the ward.*" (The italics are ours.) The conclusion of that court is that an ordinary judgment recovered against an incompetent under guardianship is not void, but that it can only be enforced through the county court, and not by execution against his estate.

We do not challenge the law announced in the Oregon and Michigan cases, but it does not sustain the evident drift and purport of the majority opinion. Courts of last resort quite generally hold that a judgment obtained against an insane defendant is not void and subject to collateral attack, but, if so unjust that it would be against good conscience to enforce it, equity will interfere. *Withrow v. Smithson,* 37 W. Va. 757; *Johnson v. Pomeroy,* 31 Ohio St. 247; *Pollock v. Horn,* 13 Wash. 626; *Allison v.*

Taylor and Washburn, 36 Ky. *87, 32 Am. Dec. 68, and monographic note of Professor Freeman, p. 70. See, also, note to *Spurlock v. Noe,* 39 L. R. A. 779 (19 Ky. Law Rep. 1321). Neither the constitution nor any statute in precise language or by fair implication prohibits any court from entertaining suits against an incompetent, whether he be under guardianship or not. The fact that the county court has exclusive jurisdiction to settle the accounts of guardians does not seem to the writer to withdraw from every other court authority to litigate and determine causes of action asserted against a ward. The claimant may submit his demand to the county court for adjudication, and ordinarily such is the better course to pursue. In the case at bar the guardian was appointed by the county court of Johnson county, and as we understand resides in that county; his ward is an adult, and seems to have been permitted to go at large and to reside for a time in Lancaster county. If while residing there the ward was supplied with the necessaries of life under such circumstances that the law should bind his estate to pay therefor, the creditor ought to be permitted to sue him in Lancaster county, if he could be summoned therein, to determine the amount of that obligation. If a guardian *ad litem* were appointed to defend, and did defend, the suit, it is not, in the writer's opinion, the function of a court of equity to vacate the judgment, unless it is made to appear that the judgment was recovered in fraud of the ward's rights.

The demurrer admitted the truth of all of the allegations of fact well pleaded in the petition; those statements are sufficient to justify the relief prayed for; but, if the defendant in this action is permitted to answer, he may traverse those allegations and by proof establish the validity of his claim in whole or in part. In that event a court of equity should make its relief conditional upon the guardian doing equity by paying the reasonable value of the necessaries furnished the ward, less any payments or just set-offs that may exist in the ward's favor.

Neither the constitution nor any statute has abrogated the principles of equity in actions like the one at bar, and, if the district court is to aid the county court in vindicating its authority, it should go no further than it would in the case of any other creditor.

REESE, C. J., and LETTON, J., concur in this dissent.

LOTTUS P. KINDER, APPELLEE, V. CUSHMAN MOTOR COMPANY, APPELLANT.

FILED JUNE 13, 1911. No. 16,454.

Master and Servant: WAGE-CONTRACT: CONSTRUCTION. A written contract of employment provided that it "shall hold good only as long as both parties are satisfied," and that, if plaintiff continued in the employment for five years and produced certain specified results, he should have "a bonus of $200," in addition to specified daily wages, and, "if the parties become dissatisfied," the employee "shall receive in proportion of the bonus of $200 as he has worked of the five years." *Held*, That either party, if dissatisfied, could terminate the contract at will, and that, if the employer did so terminate the contract, the employee was entitled to a part of the $200 proportionate to the portion of the five years that he had been in the employment.

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

Flansburg & Williams and *Leonard Flansburg*, for appellant.

R. S. Mockett, contra.

SEDGWICK, J.

The defendant employed the plaintiff under a written contract as follows: "We, Cushman Motor Co., party of the first part, and L. Kinder, party of the second part,

agree as follows: That Cushman Motor Co. shall employ for five (5) years L. Kinder as foundry foreman. And L. Kinder agrees to work for the Cushman Motor Co. for wages as follows: $3.50 a ten-hour day, and in addition to that a bonus of $200 at the end of five years, provided at that time he is producing all castings not to exceed a cost of two cents a pound. This contract shall hold good only as long as both parties are satisfied. If the parties become dissatisfied, party of the second part shall receive in proportion of the bonus of $200 as he has worked of the five years." He worked for the defendant under this employment for a little more than one year and nine months, and was then discharged by the defendant. He brought this action in justice court to recover $70.20 under the last clause of the contract. The case was appealed to the district court for Lancaster county, where the plaintiff recovered a judgment for the amount claimed, and the defendant has appealed.

The defendant insists that it had a right to discharge the plaintiff if it became dissatisfied with his services, and that under the terms of this contract the company was under no obligation to show the grounds upon which its dissatisfaction rested. We think that this is the proper construction of the contract. The parties were neither of them under any disability, and were competent to make such contract as they saw fit to make. The provision is that the "contract shall hold good only as long as both parties are satisfied." When one party was dissatisfied, of course both parties were not satisfied, and the contract was at an end.

The defendant also insists that it was only in case both parties were not satisfied that the plaintiff was entitled to receive a proportion of the agreed bonus. The defendant admits that it was dissatisfied, and that, if the plaintiff had also been dissatisfied, he could have recovered the proportion of the bonus. The whole ground of the defense, then, is that the plaintiff was willing to continue in the employment. We do not think that the contract will bear

such interpretation. The clause, "If the parties become dissatisfied, party of the second part shall receive in proportion," etc., must be construed with the preceding clause, and as the contract continued only so long as both parties were satisfied, that is, it was abrogated and ended when that condition failed by either party becoming dissatisfied, the last clause must mean that, if the employment was ended because the contract was no longer satisfactory to both parties, then the plaintiff was entitled to a proportion of the agreed bonus. The defendant surely cannot complain of this, since it insists that it could terminate the employment at will by simply declaring its dissatisfaction with the contract, and, of course, by so doing absolutely prevent the plaintiff from earning the agreed bonus. It was a very reasonable provision of the contract that, in case the defendant should arbitrarily dismiss the plaintiff from employment, the plaintiff should have a proportion of the bonus. If the contract had continued for the five years, and the plaintiff had secured the full bonus agreed upon, it would be in effect an addition to his wages for the term, and, if he was arbitrarily discharged by the defendant during the term, it was reasonable that he should recover his proportion of wages. The defendant has so construed the contract in its letter to the plaintiff discharging him. That letter began with this language: "According to the contract between you and Cushman Motor Co., at any time either party is dissatisfied the contract becomes null and void." This being the proper construction of the contract, and it being admitted that the defendant exercised the option to terminate the employment, there could be no other verdict than the one rendered by the jury. Therefore any errors of law that might have been committed in the instructions to the jury were without prejudice to the defendant.

The judgment of the district court is right and is

AFFIRMED.

WALTER S. STRATTON, APPELLEE, V. MARTIN H. MCDERMOTT ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,478.

1. **Quieting Title:** NAMES: ESTOPPEL. The surname and an initial letter may constitute the full name of an individual, and, when a grantee is so named in his title of record, it will not be presumed that he has another name. If he conveys the land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name.

2. ———: ———: ———. A deed was taken in the name of H. Emerson as grantee. It was duly recorded, and the grantee took possession of the land thereunder. There was nothing upon the deed record indicating that the grantee had any other name. In the meantime the county brought an action against H. Emerson and others to forclose its lien for taxes which were delinquent for several years; the action proceeded to foreclosure and sale, and sheriff's deed issued, which it is stipulated also described him as H. Emerson. *Held*, That Emerson's grantee is estopped to allege, in an action to quiet his title against the purchaser at said sheriff's sale, that his grantor's true name was not H. Emerson.

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

L. E. Roach and *E. H. Evans*, for appellants.

Wilcox & Halligan, contra.

SEDGWICK, J.

The plaintiff claims a quarter section of land in Lincoln county through a quitclaim deed from one Harrington Emerson. The defendants claim the land through sheriff's deed upon foreclosure of delinquent taxes. The question presented is as to the sheriff's deed. The trial court found the sheriff's deed invalid and entered a decree canceling it. The defendants have appealed.

Emerson held a mortgage on this land, which was duly

recorded, and in which he was described as H. Emerson. He foreclosed the mortgage in an action in which H. Emerson was plaintiff, and was so described in all of the proceedings in that foreclosure. He was the purchaser in the sale upon the foreclosure of his mortgage, and purchased the land in the name of H. Emerson, and received a sheriff's deed in that name. He recorded his deed and held the land under it for more than six years, and was generally known and did business in the name of H. Emerson. Having neglected to pay the taxes on this land, the county began foreclosure proceedings in September, 1900. In the title of the action in this petition for foreclosure he was named as "H. Emerson, first name unknown," and his wife was named as "—— Emerson, his wife, first name unknown." It is stipulated by the parties that in all subsequent proceedings he was named "H. Emerson." He was not a resident of this state at that time, and service was obtained by publication. In the affidavit for service and in the publication of the summons he was named H. Emerson, without any other name or description, as well as in the findings, decree, return of sale and confirmation. The defendant Martin H. McDermott purchased the land, and upon confirmation received a sheriff's deed in 1901, and has since that time been in undisputed possession of the land. About seven years thereafter the plaintiff obtained a quitclaim deed, executed by Harrington Emerson, and began this action to cancel the defendant's deed and quiet the plaintiff's title. The defendant answered, alleging substantially the above facts, and alleged that Emerson "took the said lands by deed of record and held the same under the designation of H. Emerson, and as such and by such name he is deemed to have taken, owned and held said described lands, and by none other, and the said H. Emerson, Harrington Emerson, and his or their grantees are estopped by law from denying that said lands were taken, owned and held by him, the said H. Emerson, under the name of Harrington Emerson or any other name, appellation or designation, and is further es-

topped from denying that notice conveyed to him, in accordance with the laws of the state of Nebraska, under the name of H. Emerson is not a good and sufficient service of process on him, the said H. Emerson or Harrington Emerson."

Under these circumstances, are Emerson and his grantees estopped to allege, for the purpose of vacating the tax foreclosure proceeding, that H. Emerson was not the true name of the owner of the land? Section 148 of the code provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant."

As there was no statement in the verification of the petition in foreclosure nor in the summons that plaintiff could not discover the true name, the proceedings were not under this section of the statute. It is a familiar rule, which has often been applied by this court, that a defendant must be sued by his true name "if the same is known or can be ascertained by the party suing him," and that the name of a person consists of a given name and a surname. *Enewold v. Olsen,* 39 Neb. 59. "Statutes creating a method for bringing a defendant into court without personal service are strictly construed, where actual notice may never reach him." *Butler v. Smith,* 84 Neb. 78. It has been many times held by this court that an action in which the defendant is sued in the initial letters of his name only is irregular, and in the absence of personal service no valid judgment can be rendered. *Enewold v. Olsen, supra; Butler v. Smith, supra; Herbage v. McKee,* 82 Neb. 354; *Gillian v. McDowall,* 66 Neb. 814; *McCabe v. Equitable Land Co.,* 88 Neb. 453; *McNamara v. Gun-*

derson, ante, p. 112. These cases, however, do not decide the precise question involved in the case at bar.

The plaintiff contends that H. Emerson, who held the title to this land, is one and the same person with Harrington Emerson, from whom he obtained the quitclaim deed. The evidence tending to show this identity, it is urged, is not satisfactory; but we prefer to consider the evidence as sufficient upon this point for the purpose of this discussion.

The trial court made special findings of fact upon the issues presented in the petition, but made no findings upon the allegations of the answer upon which the estoppel against the plaintiff is predicated. We are for the first time called upon to determine whether the plea of estoppel constitutes a defense in such an action. It appears that this precise question has been before the courts of our sister states and, so far as we have observed, such estoppel has generally been held to constitute a good defense. In *Blinn v. Chessman*, 49 Minn. 140, defendant George Chessman had taken title to land by deed in which he was named "George Cheeseman." The deed was recorded. A few years later he left the state, and an action was begun against him and another "to determine their adverse claims to the property." In that action he was named, as in the deed, "George Cheeseman," and service was by publication only. The matter determined by the court is stated in the opinion as follows: "The principal question here presented is whether that judgment against Cheeseman was of effect as to this defendant Chessman, as respects his title to the land." The opinion contains a satisfactory discussion of the question of estoppel in such case. It holds that the defendant, by taking title in that name and placing his deed upon record, put himself in a position so that "he cannot well complain that the name in which he took the title, and which he put forth to the world, by the records, as the name of the grantee, should be employed in proceedings instituted for an adjudication concerning that title." The opinion is

quoted quite at length by the supreme court of California in *Emery v. Kipp,* 154 Cal. 83, 97 Pac. 17, a very recent case, decided in 1908. In that case the title to land was taken in the name of Louisa Munro, and the title deed was so recorded. The true name of the grantee, who was at that time an unmarried woman, was Madaline Louisa Munro. After this deed was taken and recorded, she married Mr. Emery, and still later an action to quiet title was prosecuted against her in which she was named Louisa Munro. It was claimed that the judgment against her obtained in that name was void and subject to collateral attack, but the court held otherwise, and discusses the question somewhat at length. The law governing the case is stated in the syllabus (97 Pac. 17) as follows: "If one takes title to land in any other than his true name, so far as that property is concerned, he has assumed the name in which he takes title, and he may be sued thereunder." The court cites, also, with approval *Elting v. Gould,* 96 Mo. 535, 9 S. W. 922. This latter case appears to present substantially the same question as the one presented in the case at bar. In that case Richard O. Elting was the owner of the land involved. He had taken the patent from the United States in which he was named R. O. Elting. The patent was duly recorded, and afterwards an action was brought to enforce a tax lien in which the defendant was named R. O. Elting. The service was by publication. The question was as to the validity of the judgment in those proceedings. In that state it has been held that "publication addressed to Q. R. Noland was not sufficient to give the court jurisdiction of Quinces R. Noland" (*Skelton v. Sackett,* 91 Mo. 377, 3 S. W. 874), the same doctrine to which this court has adhered in many prior decisions. The court distinguishes the case then under consideration from the former case cited in these words: "There is this difference between this case and that one, and we think the difference is material: There, the recorded patent showed title in Quinces R. Noland; here, the patent which was recorded in Barton county, and

which was the only evidence of title on record, showed that R. O. Elting owned the land. It is by this name and description that he is known in his own title papers, and it is an admitted fact that he was a nonresident of this state."

It is insisted that in the case at bar the defendant was not sued by his complete name, nor in any complete name; that, although his surname is stated in full, only the initial letter of his Christian name was stated. There is no just ground for this distinction. The law does not forbid the use of letters as names. This court has several times recognized that fact. In *Oakley v. Pegler,* 30 Neb. 628, this court said: "Whether an apparently initial letter will be treated as a name must depend upon the manner in which the question is raised." And in *Scarborough v. Myrick,* 47 Neb. 794, the rule is stated to be: "In the absence of a showing to the contrary, it will not be presumed, for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued." The court was considering a case in which the defendant had been named by initial, and it was held that the initial would be presumed to be his entire name, as the record "nowhere discloses that the defendant has any other Christian name than the initials by which he was sued." The supreme court of Colorado has discussed this point more fully, and in that discussion said: "Twelve authorities are cited in support of the proposition 'it is a presumption of law that every person has both a Christian and a surname.' No doubt that such is the legal presumption, but no authority is cited to show that 'M. H.' may not be the Christian name, and all there is of it." *Taylor v. Insley,* 7 Colo. App. 175, 42 Pac. 1046. The supreme court of Wyoming in *Perkins v. McDowell,* 3 Wyo. 328, 23 Pac. 71, said: "While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters 'J. M.' are not a name, and, as the petition does not disclose that the

letters 'J. M.' are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition in this respect."

We think that if one takes a title to real estate, and takes it in the name by which he is commonly known, and so records his title and holds possession and the use of the land under that record title, in an action to test his interest in the lands he may be named as he is named in his record title, and, if such action proceeds to judgment, he ought to be estopped to attack that judgment and the proceedings thereunder collaterally. A man's Christian name may consist of a letter only, and, if he is so named in his title of record, he ought also to be estopped in collateral proceedings to allege that the name so assumed is not his full name. *McCabe v. Equitable Land Co., supra,* and *McNamara v. Gunderson, supra,* are not inconsistent with this view. In the former the defendant was not sued in the name in which he held the title. In his deed he was named Rolland B. Ballard, and the action was against him in his initial only. The holding therefore in that case was in harmony with our former decisions. The latter case is clearly distinguished from the case at bar by the language of the opinion. It is said: "It is conceded that there is no element of estoppel in this case, and it is apparent that the record title to the land in question was in the railroad company at all times prior to the 5th day of November, 1906. Therefore the taxes which became delinquent and which were the basis of the foreclosure proceedings must have been assessed against that company. The record owner against whom the property was assessed was not made a party to the foreclosure suit." The defendant in the foreclosure proceedings had no title of record when that suit was begun nor until several years after final decree therein.

We think that in this case, under the facts stipulated by the parties, the plaintiff is estopped to say that the name in which his grantor took and held this land was not his true name.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree dismissing the action at plaintiff's costs.

REVERSED.

LETTON, J.

I concur in the conclusion for the reason that in my opinion section 77 of the code applies, and not section 148.

ROOT, J.

For the following reasons, I dissent from the majority opinion: The opinion, while professing to respect, actually overrules, *Gillian v. McDowall,* 66 Neb. 814, and the long line of decisions determined upon the authority of that case.

In *Gillian v. McDowall, supra,* a mortgagee was described in his mortgage, which was recorded, as J. P. Johnson. Subsequently a Mr. Cunningham foreclosed a tax lien upon the mortgaged premises, impleading Johnson as a defendant, and describing him in the pleadings, process and proceedings as "J. P. Johnson." There was substituted service of summons; Johnson did not appear, his default was entered, and a judgment rendered adverse to his mortgage estate. In the reported case it was held that this judgment was void as to Johnson and his interest in the land, because he had not been sued by his true name. This case cannot be distinguished in a substantial particular from the one at bar. The comprehensive declaration of the law that the judgment was void includes a negative of every argument that might be advanced to sustain its validity.

The legislature recognized the common law upon the subject as amended by acts of parliament subsequent to the independence of the colonies, by making few exceptions to the general rule that a natural person has one given and one surname, and, if sued in a court of justice, should be described by that name. The first exception is contained in section 23 of the code, which is as follows: "In all actions upon bills of exchange or promissory notes, or other

written instruments, whenever any of the parties thereto are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the first name or names, instead of stating the Christian or first name or names in full." This statute is practically the same as paragraph 12, ch. 42, 3 and 4 William IV, and evidences the intention of the legislature not to depart from beaten paths. Section 23, *supra,* does not authorize a plaintiff to implead a defendant by any other than his Christian name, except in the cases mentioned. *Elberson v. Richards,* 42 N. J. Law, 69.

Another exception is found in section 148 of the code, which provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown' and a copy thereof must be served personally upon the defendant." The defendant cannot invoke this statute for his protection because the county did not comply with its terms. There are no other exceptions in the code to the general rule, and they are good evidence that none other were intended unless granted by some other statute.

That this court is committed to that doctrine plainly appears from the discussion in *Butler v. Smith,* 84 Neb. 78. Our code was copied from the Ohio code, and upon a consideration of the sections of that code, identical with sections 23 and 148 of ours, the supreme court of that state held in *Uihlein v. Gladieux,* 74 Ohio St. 232, that substituted service of process against a defendant sued by a fictitious name is void, and that an allegation in the bill of particulars that the real name of the defendant is unknown is equivalent to a statement that the name em-

ployed is fictitious. The action in that case was at law, but the principle controls.

The action prosecuted by the county attorney was against "H. Emerson, first name unknown." This recital appears in practically all of the subsequent proceedings and is included in the sheriff's deed, so that all persons claiming thereunder knew that the owner of the real estate had been sued by a fictitious name.

The legislature, by authorizing the owners of certificates of tax sale to maintain an action against the land where its owner is not known, clearly indicated its intent not to further depart from the general rules in actions for the enforcement of tax liens. The law has been uniformly thus construed heretofore, and, if further exception is to be made, it should be authorized by the legislature. Of course, where the defendant appears or where process is served upon him personally, the reason for the rule fails, and decisions in those cases are without value in the instant one.

If the major premise in the majority opinion is accepted, the conclusion is not sound. That premise is that, where one accepts title to real estate by a name, fictitious or otherwise, he is estopped by the recitals in his deed to thereafter deny that his name is correctly stated therein. In other words, there is an estoppel by deed. A tax purchaser, however, does not claim under the former owner of the real estate, or under any deed other than the one executed by the individuals designated by law to convey, not the former owner's title, but an independent title to the grantee.

If, although the asserted estoppel is created by recitals in a deed, the uniform rules of law with respect to such estoppels are to be ignored, there is nothing in this record to create an estoppel. The action having been prosecuted by the county without an antecedent administrative sale was not authorized by law, although the decree could not be successfully assailed in a collateral proceeding. *Logan County v. Carnahan,* 66 Neb. 685. Harrington

Emerson was not responsible for the action; he was bound to anticipate that his land might be sold by administrative proceedings if he did not pay the taxes, or that after an administrative sale, but before deed, the holder of the certificate of tax sale might maintain an action against the real estate, but he should not be charged with notice that the county would maintain an action without legal authority whereby his land would be sold to pay that tax.

The record discloses that the defendant paid less than $2 an acre for the land. This court has carefully protected the owners of real estate against tax deeds executed in administrative proceedings. Why should it look with indulgence upon tax deeds issued in actions not authorized by law? Why should it strain the principles of estoppel to take from the plaintiff his property and give it to a stranger?

The decree of the district court protects the defendant by requiring the plaintiff to pay all money invested by the defendant in the land, whether to satisfy the taxes or to pay for improvements made thereon, with legal interest; it does equity between the litigants, and respects the former decisions of this court, and should be affirmed.

FAWCETT and ROSE, JJ., concur in this dissent.

FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES, V. FRANCIS D. COOPER ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,489.

1. **Appeal.** No appeal is allowed from findings of fact or conclusions of law. A party may appeal within six months after the entry of final judgment or overruling a motion for new trial.

Corporations: LIABILITY OF STOCKHOLDERS. Under section 136, ch. 16, Comp. St. 1891, the liability of stockholders upon the default of the corporation is limited to their unpaid subscriptions to capital stock, together with the amount of capital stock owned

by them. This applies also to liability accruing before the amendment of 1891.

3. ———: ———. In an action in equity to determine such liability of stockholders which accrued before the amendment of 1891 (laws 1891, ch. 13), the court entered a decree against them for an amount less than their statutory liability, and, after stating findings of fact, stated that the stockholders are jointly and severally liable for the full amount of judgments that had before that time been obtained against the corporation. *Held*, That this statement was merely a conclusion of law and erroneous, and that a judgment subsequently entered for a greater amount than the amended statute allows was also erroneous.

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

John C. Wharton and *William Baird & Sons*, for appellants.

Henry E. Maxwell and *Will H. Thompson*, *contra.*

SEDGWICK, J.

In February, 1892, the Omaha Brick & Terra Cotta Manufacturing Company was a corporation organized under the laws of this state, and as such had been doing business in Omaha for several years. The plaintiff, the First National Bank of Omaha, then began an action against these appellants and other stockholders of the said corporation, and alleged that it had before that time recovered a judgment against said corporation, and had caused an execution to be issued thereon, which execution was by the sheriff of said county duly returned unsatisfied for want of property whereon to levy, and alleged that the corporation had failed to comply with the requirements of the statute with respect to publishing notice of its indebtedness, and asked judgment against the several stockholders. The plaintiff, the United States National Bank of Omaha, and the Omaha Coke & Lime Company and others intervened and alleged causes of action similar to that of the plaintiff. The present plaintiff, Sunderland

Brothers Company, is the successor of the Omaha Coke & Lime Company. Such proceedings were had in that action that on the 21st day of March, 1893, upon hearing, the court found that there was due the plaintiff, the First National Bank, $4,063.25, and to the United States National Bank $2,900.45, and to the Omaha Coke & Lime Company $447.50, and also made the following conclusion and finding: "That for the amount of said several judgments with interest and costs the defendants served with summons and in court, to wit (naming these appellants and others) are jointly and severally liable under the provisions of chapter 16 of the Compiled Statutes of Nebraska, as the same stood in the year 1888, but that, in the first instance, an assessment shall be made on the amounts of stock respectively held by each of said defendants for the purpose of raising a fund for the payment of the amounts due the plaintiff and those in interest with it in this action." The following decree was entered: "It is therefore considered, ordered and decreed by the court that said last named defendants be and are hereby ordered to pay into this court the assessments upon their said several shares of stock in the Omaha Brick & Terra Cotta Manufacturing Company in the sums and amounts following, to wit: * * * (naming the several defendants and the amount of the decree against each) and that for said several sums, with interest at ten per cent. per annum from March 21st, 1893, and costs of this action taxed at $—, execution issue. * * * It is further ordered that this cause stand for further decree herein, in the event that said several defendants or any of them fail to pay the amounts herein adjudged to be paid by them and each of them." These appellants paid the amounts fixed and adjudged against them, but the defendants against whom there were larger amounts failed to make such payments. Afterwards several executions were issued and some smaller amounts collected, but nothing further was done in the hearing or trial of the case until the 26th day of October, 1908, when these plaintiffs filed a motion for judg-

ment in their favor, respectively, against the defendants as stockholders as before stated for the balance remaining unpaid upon their respective judgments against the corporation. Notice of this motion was given to these appellants and other defendants in the action, and upon the hearing the court entered an order sustaining the motion and a judgment against the defendants Alfred W. Phelps, Ernst Stuht, and William Kuhfall and other defendants in favor of the First National Bank of Omaha for the sum of $8,418.51 and interest, and in favor of the United States National Bank for $6,095.25 and interest, and in favor of Sunderland Brothers Company for $927.01 and interest. The defendants last named have appealed to this court.

Prior to the amendment of 1891, the corporation law provided: "Every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given." Comp. St. 1889, ch. 16, sec. 136. By the act of 1891 (laws 1891, ch. 13) the liability so created was limited "to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individual." That act provided that the amended statute "shall be held and taken to apply in any case now pending or hereafter brought in any court in this state." It has been held that this amendment is constitutional, and that the recovery upon causes accrued under the old law should be limited by the provisions of the new. *Kleckner v. Turk,* 45 Neb. 176; *Hogue v. Capital Nat. Bank,* 47 Neb. 929.

In the first decree the amount of stock held by each defendant, respectively, was ascertained, and they were ordered to pay assessments thereon, which they did as has been already stated. These defendants, under the law as it then stood, were liable for an amount equal to the stock held by them, respectively, and their unpaid subscriptions, if any, but the court concluded that "for the amount of said several judgments with interest and costs the defendants served with summons and in court, to wit (naming them) are jointly and severally liable under the provisions of chapter 16 of the Compiled Statutes of Nebraska, as the same stood in the year 1888, but that, in the first instance, an assessment shall be made on the amounts of stock respectively held by each of said defendants for the purpose of raising a fund for the payment of the amounts due the plaintiff and those in interest with it in this action." It is now insisted that this was a finding and an adjudication against these defendants, and that the time for appeal therefrom having passed they cannot now question their liability for the whole amount of the original judgments. It was upon this theory that the judgments now appealed from were entered against them. The first decree entered against them was for a sum specified against each of them, and these sums have been paid. Their liability is limited by the act of 1891, and the court in entering a further decree should be limited by provisions of that act.

The findings of fact upon the first hearing were justified by the law and the record in the case. They support the decree that was then rendered thereon. There was no cause for appeal. The conclusion of law that the defendants were jointly and severally liable for the full amount of the judgments against the corporation was erroneous. It was not justified by the pleadings and findings of fact. The statute provides that an appeal may be taken "within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for new trial in said

cause." Code, sec. 675. No appeal can be taken from findings of fact or conclusions of law. There must be a final judgment or decree ending the controversy, and adjudging a definite issue presented by the parties in the pleadings and evidence. The decree entered on the 26th day of October, 1908, was such an adjudication, and these appellants were entitled to the statutory time from the overruling of their motion for a new trial in which to appeal therefrom. This appeal was taken in due time, and neither the conclusion of law entered upon a former hearing, nor the decree finally entered, is supported by the pleadings and the findings of fact.

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

REVERSED.

JOHN H. CREIGHTON, APPELLEE, V. ALFRED KEENS ET AL., APPELLANTS.

FILED JUNE 13, 1911. No. 16,492.

Master and Servant: INJURY: ASSUMPTION OF RISK: NEGLIGENCE. Evidence examined and found to prove without substantial contradiction that the plaintiff, with full knowledge of existing conditions, assumed the risk, and that his own negligence was the proximate cause of the injury complained of. The judgment is therefore reversed.

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

J. B. Strode, for appellants.

Guile & Guile, contra.

SEDGWICK, J.

The defendants were contractors, and took the contract to paint the inside walls of the First Presbyterian Church in Lincoln. The plaintiff is a painter by trade, and was

employed by defendants in doing this work. While so employed, he fell and was injured, and brought this action against the defendants in the district court for Lancaster county to recover damages. Upon trial to the jury he recovered a verdict and judgment, and the defendants have appealed.

He alleged negligence on the part of the defendants as follows: "That it was the duty of the defendants to provide this plaintiff with suitable and proper scaffolding upon which to stand while doing the work for which he was employed, which defendants failed and neglected to do, and, in order to reach the interior of the gable of the said First Presbyterian Church, a temporary scaffold was erected by placing planks upon ladders, upon which it was necessary to use stepladders; whereas, had the defendants provided this plaintiff with suitable and proper scaffolding constructed by carpenters, it would not have been necessary for this plaintiff to have used the temporary scaffold complained of." He also alleged in his petition: "That, at the time plaintiff received the injuries herein complained of, he was in the exercise of due care and caution on his part, and that he was injured through the carelessness and negligence of the defendants in failing to furnish him with a safe place to work, and in not constructing a suitable and proper scaffold upon which this plaintiff could stand while so engaged as herein alleged."

The defendants in their answer admitted the employment and the accident, and alleged that "at the time of the injury complained of, and for a long time prior thereto, the plaintiff was in the employ of the defendants, and was familiar with the materials furnished by the defendants for the construction of scaffolds in places similar to the place where the accident occurred and the injuries complained of were received, and that plaintiff was familiar with the way scaffolds in such places were constructed, and that plaintiff superintended and assisted in the construction of the scaffold referred to in his petition as the one that fell and caused his injury, and defendants allege that

the dangers were obvious and apparent, and were known, or in the exercise of reasonable care ought to have been known, by the plaintiff, and that plaintiff assumed the risk of the dangers resulting in the injury complained of in the plaintiff's second amended petition. Defendants allege that said injury was caused by the negligence and want of ordinary care on the part of plaintiff, and was not caused by any negligence on the part of the defendants or either of them."

From the plaintiff's testimony it appears that he had worked as a painter and decorator for about 34 years, and during the last 25 years before the accident had followed that business in Lincoln. He had been in the employment of these defendants, or one of them, ever since "they had been in business." The defendants did not make a business of painting and decorating high walls and ceilings, and were not equipped for that work as those who follow that as special business are accustomed to be. The plaintiff testified that he was working with one Marsteller, who had recently been employed. The ceiling in the room in which they were painting was generally about 14 feet from the floor. There were, however, gables extending perhaps 4 or 5 feet higher. The defendants themselves were not present, and, so far as any one was in charge of the work, the defendants relied upon the plaintiff himself to direct the workmen. They all testified that they had "trestles" which stood 10 feet or 10½ feet from the floor. These appear to have been of an approved pattern, and would support a platform 6 or 8 feet wide. In order to reach the gables referred to, it was necessary either to use extension ladders, with which they were supplied, or to arrange a support some 4 or 5 feet higher than the platform supported directly by the trestles. The plaintiff and Marsteller, who was working under his direction, appear to have supported some planks at one end by one of the trestles, and instead of using a trestle to support the other ends of the planks they placed a stepladder there, and then upon the platform so formed they appear to have placed another

stepladder. The evidence is not very clear as to how this was arranged, but without doubt it was not satisfactory to the plaintiff. He testified: "I gave Marsteller orders to stand firm on the plank, but I don't think he did." Marsteller and another workman who was present testify that the cause of the accident was the using of the stepladder to support the planks instead of using two trestles, and that there was another trestle there that might have been used instead of the stepladder. The plaintiff himself upon this point was asked and answered as follows: "Q. If you had used the two trestles instead of one trestle and a stepladder, would the scaffolding have fallen? A. It might not. Q. It would have been safe to work on, then, if you had used the trestle, would it? A. I could not say it was safer than the other; it might have been more safer. Q. In your judgment, wouldn't it have been much safer than the platform you worked on? A. Well, I suppose it would. Q. Would have been very hard to have pushed that scaffolding as you did this one, if there had been two trestles under there instead of one trestle and a stepladder, would it not? A. Well, I suppose it might have been. Q. Isn't it your judgment now, Mr. Creighton, that if you had used the two trestles to build up your scaffolding instead of using one stepladder and a trestle this accident would not have happened? A. Yes, sir."

We see, therefore, that the plaintiff's own testimony established both defenses alleged in the answer without contradiction. He was perfectly familiar with all the appliances that were being used. He had more experience and was better qualified to judge of the danger of using them than were the defendants themselves. He planned these unstable supports and used them rather than to use the extension ladders, which the evidence shows without contradiction he might have used without danger. Whatever risk there was in so doing he clearly assumed upon his own responsibility. The evidence in regard to his own contributory negligence is equally conclusive. It is undisputed that there was another trestle furnished him

which he might have used instead of the unstable step-ladder as the foundation of his support, and he testifies himself that if he had done so the accident would not have happened. There was, therefore, no question of fact to be submitted to the jury, and under such circumstances the jury should have been instructed to render a verdict for the defendants.

The judgment therefore is reversed and the cause remanded.

REVERSED.

ROOT, J.

I concur on sole ground that plaintiff assumed risk.

TRUMAN SAMPSON, APPELLEE, V. LADIES OF THE MACCABEES OF THE WORLD, APPELLANT.

FILED JUNE 26, 1911. No. 16,483.

Insurance: APPEAL: CONFLICTING EVIDENCE. The action is upon a benefit certificate of membership insuring the life of the member in the sum of $1,000. There was a jury trial resulting in a verdict in favor of the beneficiary. The defenses presented were fraudulent representations in the application for membership, that the member committed suicide, which rendered the policy void, and that she died under the influence of a narcotic self-administered, which under the by-laws rendered the policy of no effect. The questions of fact were fairly submitted to the jury upon testimony which in effect was conflicting. *Held*, upon a review of the evidence, that the verdict could not be molested nor the judgment thereon be set aside.

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

E. C. Strode, M. L. Learned and *D. J. Flaherty,* for appellant.

George W. Berge, contra.

REESE, C. J.

This is an action by the beneficiary named in a certificate of membership issued by defendant upon the life of Pearle Sampson for $1,000, and in favor of plaintiff. The petition is in the usual form. The answer admits the corporate capacity of defendant as alleged in the petition; the issuance of the certificate of membership in plaintiff's favor in the sum of $1,000 upon the life of the assured; that the assured died at the time alleged; and that all dues and assessments had been paid in full at the time of the death of the member. It is alleged that decedent committed suicide by the use of poison administered by herself with the intent to destroy her life, and that by the terms of the by-laws, which are set out in the answer, and which were known and accepted by decedent, it is provided that "no benefit shall be paid on account of the death of a member who shall die by her own hand, while sane or insane," or who dies or becomes disabled while under the influence "of drugs or narcotics self-administered, whether with suicidal intent or not." It is also alleged that in the questions propounded to her by the medical examiner she was asked if she had "received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental diseases," and that she answered "No," when in fact she had been confined in the Nebraska Hospital for the Insane at Lincoln in the year 1905, and upon the strength of this representation, which was believed and relied upon by defendant, she was admitted to membership in defendant, when, had she stated the truth, she would not have been so accepted; that the certificate was obtained by fraud; that by reason of the above facts she forfeited and waived all right to the payment of the benefit certificate. All averments of the petition not admitted are denied.

The reply is quite lengthy, consisting of specific denials of the averments of the answer and of the binding force of defendant's by-laws, or that they were a part of the

insurance contract. The allegations of false statements made in answer to questions by the medical examiner are denied, and it is alleged that the medical examination papers were prepared by defendant and its agent, were never given to the decedent to read, the answers being prepared by defendant's agent as she saw fit, and that decedent did answer all the questions truthfully and honestly, but the answers written by defendant's agent consisted of her own interpretation of the answers made by decedent and of which decedent had no knowledge; that the answers are not those of the applicant, but of defendant's agent; that the assured was prevented from knowing the contents of the paper which she signed, and a fraud was practiced upon her by which defendant is estopped to claim or assert that she did not answer the questions truthfully. It is denied that she was at any time insane or that she was confined in the hospital for the insane at Lincoln for the treatment of any disease, either mental or physical, but it is alleged that she was an orphan, destitute, and was in said hospital for rest only, and for a brief period, for want of another suitable place, and of which she advised defendant's agent and examiner at the time the examination was made. This is also presented as an estoppel against defendant.

A jury trial was had. At the close of the evidence the parties each moved for a directed verdict in their favor. Both motions were overruled, and the cause was submitted to the jury, the result being a verdict in favor of plaintiff for the amount of the policy and interest, upon which judgment in favor of plaintiff was rendered. Defendant appeals.

1. There is no question of error committed by the district court, either during the trial or by instructions; the whole contention of defendant being that the verdict and judgment is not supported by the evidence and is against the same. This contention involves three questions submitted to the jury: One was whether the decedent had "ever had a surgical operation performed, or received treatment in

a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental diseases?" In the investigation of this question, it was claimed by defendant that decedent had been insane and was confined in the hospital for the insane and had been treated therefor. In support of this contention, it was shown that she had been charged with being insane, had been examined by the board of insanity of Cass county and found so to be, and had been committed to the hospital as an insane patient. On the other hand, it is contended that she never was insane, but that, by reason of a serious and depressing disappointment, she had become temporarily hysterical, and in that condition was sent to the hospital, where her excitement passed off in a very few days without special treatment, and, by the rest which the hospital afforded, her nervous excitement disappeared and her condition was normal. Upon this subject there was a sharp conflict in the evidence. The records for the hospital for the insane are contained in the bill of exceptions. By them the following facts appear: She was admitted to the hospital September 12, 1905. "Diagnosis—acute mania. Remarks: Received in ward 4. Was noisy and resistive. Given two teaspoonfuls of bromo-chloral at bedtime. September 13: Fell from her chair this morning, but apparently was hysterical only. Has been very much afraid and starts and gets out of reach if any one attempts to touch her. Is not rational, but calls for 'Mama' and 'Guy'. * * * September 15: Has been quiet and rational and was transferred to ward 3. Wants some work to do. September 20: Remains quiet, rational and self-controlled. Is working in the sewing room. September 25: Transferred to ward 2. Quiet. Helps in sewing room. Cheerful. October 14: This morning patient, who has remained well mentally, complained of being cold and was found to have some fever. Gave a history of epistaxis a few days earlier. That her bowels had not moved for four days although she had taken salts. Tenderness in right iliac region. Transferred to ward 5

and given calomel—3 grains. October 17: Diagnosis made of appendicitis. Widal test negative. October 22: It has been decided not to operate unless constitutional symptoms increase. October 31: Temperature normal. Pain and tenderness gone. December 30: Well and strong. Helps in laundry. 1906, February 15: Continues well. Is cheerful and apparently well mentally. April 16: Lost a pair of scissors a few days ago and has been kept upon ward in consequence. Health and mental condition good. April 24: Paroled. August 1, 1906: Discharged. Recovered."

Taken for what it is worth, this shows, probably substantially correctly, the history of the patient's condition during the whole time she was in the hospital. If the record be a true one, it is shown, as claimed by plaintiff, that her nervous and excited condition disappeared between the 12th and 15th of September, probably in three days' time, and there are no other indications of mental aberration during the whole of her stay in the hospital, unless the loss of the scissors may be so accounted for. We presume that that fact could hardly be maintained. She seems to have suffered at one time from the effects of constipation and something of an attack of bleeding at the nose. Otherwise her health was good. Taken in connection with the other evidence that her only ailment was hysteria and temporary nervous excitement, we are not prepared to say that the verdict finding the answer to the question was not so far unsupported as to be said to be untrue. So far as is shown, her recovery from the nervous tension would have resulted as quickly had she remained at home as in the hospital. Having no parents and no home but that of her uncle, she seems to have been content to remain where she was. Presumptions are in favor of sanity.

2. As to the process of examination for admission to the order, not much can be said in favor of its fairness. The attention of Miss Sampson was not specifically called to the questions, many of which were in quite fine print,

and, as the examiner testified, she herself wrote down "the sum and substance" of the answers, the examiner thus writing her own conclusions by "Yes" or "No." The examination is shown to have been perfunctory, the applicant not having had the opportunity to read over the questions, answers, statements and "warranties" which would have taken considerable of time. The law does not presume fraud in the examination, and, as the alleged insanity was considered by the jury, they must have found that neither the insanity nor the fraudulent representations were proved.

3. The next contention is that Miss Sampson committed suicide, and therefore the policy was forfeited. The sections of the by-laws bearing upon this subject we have quoted above. Did Miss Sampson die by her own hand? We think the evidence quite clearly establishes the fact that in a sense she did, but whether the result proved to be as intended by her may have been a matter not free from serious doubts in the minds of the jury. It cannot be that the section of the by-laws under consideration should be held to mean exactly and fully what the language expresses. The section bears the head-note "Suicide." Suicide in law is the act of taking one's own life voluntarily and intentionally—self-murder. Webster's New International Dictionary. This must be accepted as the sense in which the language of the by-law is used. If Miss Sampson took one tablet of hyoscine (a common and reasonable dose, and which, as testified, can usually be taken safely and without danger) without any intention of injury to herself, and the results turned out to be unexpectedly disastrous, we do not think the cause of her death could furnish a defense to a suit on the policy. It was shown by the evidence, and it is within common knowledge, that the action of remedies which are counted innocent, and are commonly used, may produce different effects upon persons differing in temperament and physical condition. The only evidence aside from symptoms that she took hyoscine at all is furnished

by her statement that she had taken one tablet of the medicine, which, as we have said, was a common, ordinary dose for the relief of nervousness, and to produce sleep. She had been employed as an undergraduate nurse in one of the principal sanitariums in Lincoln, and was familiar with the use of the drug and its effect upon the human system. She had some medicines with her and a box containing instruments. She is spoken of in the evidence as a nurse, and therefore the possession of the medicines in use by physicians and nurses is not of itself convincing evidence of a purpose to use them improperly. She was in a high state of nervous excitement resulting from a distressing disappointment, and for two or three days had been almost constantly weeping and unable to sleep, and was suffering from a headache. In the afternoon of the day before the night upon which she died, she had instructed the family with whom she was sojourning not to awaken her for dinner should she be asleep when that meal was ready to be served. When the meal was prepared, a messenger went to her room to call her if awake, but, finding her asleep, she was not molested. Later she was found to be awake, when she declared she was feeling well, her headache had left her, and she was comfortable and cheerful. This was in the early part of the night. She stated that she had taken a tablet of the hyoscine, and requested that the vial containing the remaining tablets be removed. Thereafter she became flighty, indulged in singing a song, would fall asleep, apparently, for a few minutes, and upon waking would seem somewhat delirious. Her symptoms grew alarming, and a physician was called in, who found her beyond aid, and about one hour after midnight she died. During the afternoon of the day before, she wrote a letter to her former fiance referring to the shock and sorrow she felt from being turned down, as she expressed it, referring to some articles of more or less value which she gave him, and in rather unmistakable terms indicated an intention to end her life. The lady with whom she was staying was

in the room occupied by her during the afternoon, but, on being called down to answer the telephone in a lower room, left her, but, on returning to the upper room, found Miss Sampson standing at the head of the stairs, with the letter and a small box of jewelry, etc., in her hand, prepared to go downtown. Upon a promise that both could go later on, she returned, tore up the letter, and remained in her room until her death as above stated. No post-mortem examination was made. The physician who attended her at the time of her death testified that in his opinion she died from hyoscine poisoning, which was probably correct, but not of itself conclusive of the theory of suicide. Without a further discussion of the evidence, we may say it is the opinion of some of the members of the court that Miss Sampson was never insane, and that she did not commit suicide; that is, intentionally take her own life. It is the opinion of others, and in which the writer coincides, that, had the question of suicide been submitted to them in the first instance as the triers of fact, they would have believed from the evidence that she did intentionally take her own life, but that there is sufficient evidence to the contrary to justify the submission of the question to the jury, and, the burden of proof being upon the defendant to establish the defense, the finding of the jury cannot be set aside. As the death was not by violence, as by shooting, cutting, hanging, or the like, many of the indications of self-murder are wanting. The jurors heard the evidence, saw the witnesses, and no doubt arrived at a conscientious verdict.

The by-laws of defendant provide that no benefit shall be paid on account of the death of a member "who dies * * * under the influence of drugs or narcotics self-administered, whether with suicidal intent or not." It is insisted that hyoscine is a narcotic (which is true), and that Miss Sampson died "under the influence" of the medicine "self-administered" (which is perhaps also true), and therefore plaintiff cannot recover. This contention is based on the strict wording of the by-law. In

the interest of our common humanity, the writer hereof, for himself alone, refuses to give his assent to the construction of this section as contended for by defendant, and, did he do so, he would not hesitate to say that such a provision would be against public policy and void. We are persuaded that no one could be found who would contend that were a person suffering the excruciating agonies which often precede death from accident, as by burning and such like, and should "self-administer" a narcotic or opiate without "suicidal intent" in order to obtain relief, and while under the solacing influence of the medicine should die from the injury, an insurance policy on the life of the person would thereby become void. However, this question does not necessarily arise under the issues in this case. The defense presented in that behalf by the answer is as follows: "Further answering, defendant represents and shows unto the court that the said Pearle Sampson died from the effects of hyoscine, hydrobromide, and other poisons self-administered and with suicidal intent, and that by said act of self-destruction she thereby forfeited all rights under said certificate of insurance, as section 414 of defendant's by-laws, which are a part of the insurance contract and govern the plaintiff's rights thereunder," etc. By this it will be seen that the defense presented is that the alleged poisons were self-administered "with suicidal intent" and that by "said act of self-destruction" she forfeited all rights under the policy, thus limiting the defense to the *intentional* self-destruction of the assured. The questions of suicide and "suicidal intent" were submitted to the jury, and their verdict negatives the idea that the decedent intentionally committed suicide.

All questions of fact involved in this case were properly submitted to the jury, and they have decided the matters in dispute, and we find no warrant to interfere with their finding.

The judgment of the district court is therefore

AFFIRMED.

ROOT, J., not sitting.

ELLEN RUSSELL ET AL., APPELLEES, V. MILES B. HAINES, APPELLANT.

FILED JUNE 26, 1911. No. 16,516.

Mechanics' Liens: SUIT TO CANCEL: EVIDENCE. In an action to cancel a record of the filing of a mechanic's lien for the construction of a building upon real estate, it was alleged that the lienor had been fully paid, and there was nothing due, and the lien cast a cloud on plaintiffs' title. In the answer the defendant claimed that the lien was valid, that the amount named in the statement for the lien was due, and sought a foreclosure thereof. The evidence is examined, the substance thereof is set out in the opinion, and it is *held* that it is not shown that the finding of the district court in favor of the plaintiffs is not sustained by the evidence.

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

Lafe Burnett, for appellant.

John M. Stewart and *D. H. McClenahan, contra.*

REESE, C. J.

This action was instituted by plaintiffs for the purpose of removing an alleged cloud cast upon their title to real estate, described in the petition, by the filing of a statement for a mechanic's lien thereon in the office of the register of deeds of Lancaster county. It is alleged in the petition that plaintiffs and defendant had entered into a contract in August, 1907, by which defendant had agreed to furnish material and construct a dwelling-house and certain outbuildings for plaintiffs for the sum of $1,075; that the buildings were constructed, but defendant had failed to pay for the labor and material employed in their construction, and plaintiffs had been required to pay for the same to an amount exceeding the contract price by the sum of $144.73, and nothing remained due defendant thereon; that defendant had wrongfully filed his claim

in the mechanic's lien record of the county for the sum of $242, alleged to be due for 60½ days' labor at the price of $4 a day. The purpose of the action is as above indicated. Defendant answered, in effect admitting the making of the agreement, which was oral, to construct a dwelling-house, the same to be a duplicate of one being then constructed in the neighborhood, for the sum of $1,075; denying that any outbuildings were provided for in the contract; alleging that plaintiffs had rescinded the contract, changing it in many particulars, and required much more to be done than was provided for in the original agreement and at much greater cost. The alleged changes are set out in the answer, but they need not be here noticed. The filing of the mechanic's lien is admitted, and it is alleged that the sum of $207.97 is still due defendant, and for which he asks a foreclosure of the lien. The reply is a general denial of all allegations of the answer, except those which admit the averments of the petition. A trial was had to the district court, which resulted in a finding in favor of plaintiffs and a decree canceling the record of the mechanic's lien. Defendant appeals.

There is no question of law involved. The whole controversy is upon questions of fact. The evidence is in sharp conflict upon every material issue. If plaintiffs' version of the contract and transaction is the true one, the contract price has been overpaid, and the decree is correct. If defendant's contention is correct, the decree should have been in his favor. A careful reading of the bill of exceptions has not impressed us with the reliability of the testimony of the parties on either side of the controversy, yet we presume each told the truth as they understood the facts to be. The case presents a strong illustration of the folly of entering upon such undertakings without reducing the contract to writing.

It is conceded that an oral agreement was made by which defendant undertook to furnish the material and construct a duplicate of another dwelling-house, but that other building was not yet completed. It was not fully

inclosed, and therefore not painted. The cellar was not bricked up, nor were the outhouses, consisting of a coal-house and toilet, built. Defendant now claims that his contract did not include the cellar walls, the painting of the house, nor the construction of the outhouses. Some changes were made in the dwelling-house as the work progressed, but each party claims that all changes from the plan of the house adopted as the model were made upon the will of the other; plaintiffs claiming that they were made without their consent, orders or agreement, while defendant insists they were made under the express commands of plaintiffs. The whole business was conducted in a slipshod, careless, and unsatisfactory manner. The method of payment pursued by the parties for material and labor renders it impossible for us to state the account between them, even if they could agree upon the contract, the cost of extras and changes. The husband of one of the plaintiffs was 94 years of age, and well-nigh deaf. He testifies in the most positive terms that he had nothing to do with the making of the contract, or in ordering changes, yet defendant testifies to conversations with him which contradict his statements.

Upon consideration of the whole case, we think that the judgment of the district court must be, and it is,

AFFIRMED.

STATE, EX REL. PETER MORTENSEN, V. WILLIAM J. FURSE.

FILED JUNE 26, 1911. No. 17,019.

1. **Officers:** FILLING VACANCIES. Under the provisions of section 20, art. III of the constitution of this state, vacancies in offices created by that instrument must be filled in compliance with the provisions of the general law upon the subject of filling vacancies, when no provision is made for that purpose in the constitution.

2. **Constitutional Law:** AMENDMENTS TO CONSTITUTION. When an amendment to the constitution is legally adopted, it becomes a

part of that instrument, and in its application to subsequent transactions must be considered precisely as though it had been originally adopted as a part thereof in its amended form.

ORIGINAL application in the nature of *quo warranto* to determine the right of respondent to the office of state railway commissioner. *Demurrer to petition sustained.*

J. B. Strode and *E. J. Clements,* for relator.

Albert & Wagner, contra.

REESE, C. J.

Relator filed his information in the nature of *quo warranto* in this court in the exercise of its original jurisdiction against defendant William J. Furse, in which, in addition to that of relator's eligibility, it is alleged, in substance, that on and prior to the 16th day of October, 1910, one William Cowgill was and had been duly elected and acting as one of the state railway commissioners of this state; that on the said 16th day of October he died, and his office then became vacant; that thereupon relator was duly nominated by petition as a candidate for said office to fill said vacancy; that the fact of the death of said William Cowgill and of the vacancy in the office caused thereby and of affiant's nomination to fill said vacancy were published in the various state and county papers throughout the state, and thus became matters of general knowledge to the people of the state on and before the ensuing election; that the secretary of state thereupon duly certified the name of relator as nominee for said office to the county clerk of each county of the state, and relator's name was duly printed upon the sample and official ballots used and cast at the general election (held on the 8th day of November, 1910) in nearly all of said counties; that at said general election there were cast 79,088 votes for the office of state railway commissioner to fill said vacancy, all of which said votes were received by relator; that said votes were duly certified to the secretary of state,

and by him to the speaker of the house of representatives, who, in accordance with law, on the 5th day of January, 1911, in the presence of both houses of the legislature then in session, opened and published the returns of the election of executive state officers when it was found and officially announced that relator had received 79,088 votes for railway commissioner to fill the unexpired term, there being no other votes cast or canvassed for said office; that thereupon relator accepted said office, qualified by taking the prescribed official oath, and filed said oath with the secretary of state; that on the 7th day of November, 1910, the governor appointed defendant William J. Furse to said office to fill said vacancy until the next general election after his said appointment, when defendant qualified, took possession of the office, and entered upon the duties thereof; that, notwithstanding relator's election and qualification and his desire to discharge the duties thereof, the defendant continues to hold said office and to usurp the same, and refuses to surrender to relator. The prayer is for judgment that defendant is not entitled to hold said office, that he be ousted therefrom, and that relator be installed therein.

To this information defendant has filed a general demurrer, the grounds therefor being that the facts stated in the information are not sufficient to constitute a cause of action, are insufficient to entitle relator to the relief prayed for, and are not sufficient to sustain a judgment of ouster. The case has been briefed and argued upon the demurrer and the questions of law presented.

The decision depends upon whether the clause or provision in section 1, art. VIII, ch. 72, Comp. St. 1909, providing that "the governor shall fill all vacancies in the office of railway commissioner by appointment, and the persons so appointed shall fill said office until the next general election after his said appointment," is to be held as complete within itself and exclusive of all other laws upon the subject of filling vacancies in said office by the governor, or whether, if valid, it is to be considered in

connection and *in pari materia* with the provisions of chapter 26, Comp. St. 1909, upon the subject of vacancies in office, and the filling of the same. By that chapter (section 103) it is provided that vacancies in state offices, except reporter of the supreme court, shall be filled by the governor where no other method is provided. By section 105 appointments "shall be in writing, and continue until the next election at which the vacancy can be filled and until a successor is elected and qualified, and be filed with the secretary of state." By section 107 it is provided that vacancies occurring in any state office "thirty days prior to any general election, shall be filled thereat." If this law is to be applied to the present case, since the death of Mr. Cowgill occurred less than 30 days prior to the next general election to be held November 8, of the same year, there would seem to be no question but that the appointment of defendant would continue until the next succeeding general election, which would be in November, 1911.

It is argued by relator that the provision of section 1, art. VIII, ch. 72, Comp. St. 1909, which we have herein above quoted, is complete within itself, containing all that is necessary for the guidance of the governor in filling the vacancy, and was not intended by the legislature as having any connection with, or relation to, the then existing law. Upon the other hand, this theory is combated by defendant for the reason that, if this should be held to be true, it cannot be applied, because the provision for filling vacancies is not within the title to the act, and is unconstitutional and void. This contention is not without reason in its support; but, as we view the questions involved in this case, we do not deem it necessary to pass upon that point, and it will not be decided. Should we hold that provision void as unconstitutional, we would have only what is contained in chapter 26, *supra,* as conferring authority upon the governor to make the appointment. Should we hold the provision valid, and that the two are *in pari materia* and to be construed together, the result would be

the same, except that it would appear that the legislature, by the quoted clause, intended to remove all doubt by recognizing the power of the governor to act. Should we hold that clause valid and exclusive, we would have to hold that, had Mr. Cowgill died three days before the election and the governor had filled the vacancy one day before the election, as he did in this case, and upon a petition being filed and the information given to the people of the state generally, as alleged in the petition, the appointment would only hold "until the next general election after his said appointment," which would be the next day. If no part of chapter 26 is to be applied, the appointee could not hold "until a successor is elected and qualified," and the direction that the written appointment should be filed with the secretary of state would have no application.

What about these details? If we cannot take them from the law as it existed prior to the enactment of the railway commission law, we are left without a guide. We agree with counsel for relator that the office of railway commissioner is, under the constitution, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument. *In re Railroad Commissioners,* 15 Neb. 679. The fact that railway commissioners are not provided for in the constitution until the amendment thereof by the adoption of the joint resolution of 1905 can make no difference, since the language of the constitution in the classification of the departments of the state government is broad enough to include all offices thereafter created, whether by the amendment of that instrument or by legislative enactment. The office under consideration being an executive office, and the clause contained in the railway commission law not providing for the details of appointments to fill vacancies, we must hold that, if valid, it must be treated as providing only in a general way that the duty of appointing a temporary successor to a deceased member of that commission devolves upon the governor, and con-

strued in connection with the existing law upon that subject, and therefore the power to elect a successor at the next general election does not exist unless the vacancy occurs "thirty days prior to any general election." If that length of time does not intervene, the vacancy must be filled by appointment, "and the person so appointed shall fill said office until the next general election after his said appointment."

In support of the contention by relator that the quoted clause in the railway commission law is exclusive upon the subject of filling vacancies in the office of such commission, we are cited to *State v. Walker,* 30 Neb. 501, and *State v. Rankin,* 33 Neb. 266. Judging by the syllabus of the former case, there was but one question before the court for decision, which was whether the appointment of a county attorney to fill a vacancy in that office was sufficiently made by entering the fact upon the records of the proceedings of the board, and failing "to make, sign and file with the county clerk a written appointment, separate and distinct from the record of their proceedings." It was held that, as the county clerk was the custodian of the records of the county board and such records were kept in his office, there was a sufficient compliance with the law. The discussion of the manner of filling vacancies as provided by section 105 of the election law seems to be aside from the true question involved, and we are unable to see how it can be said to control this case.

While we do not think that, were the questions decided in the latter case (*State v. Rankin,* 33 Neb. 266) before us in the first instance, we would have agreed to all that is said in the opinion, yet it seems to us that this case is to be distinguished from that one. However, it is our opinion that the general law providing for the filling of vacancies was intended as a regulation for all vacancies, and the fact that an office is created after the enactment of the law would be as much within its provisions as though it existed at the time the general law was passed, unless full provision were contained in the law creating the office.

To the holding that the appointee would hold until the expiration of the term for which the original incumbent was elected, without reference to how many general elections should intervene, unless specially so provided by the creating statute, we cannot give our assent. If such is the law, it would make no difference how long the unexpired tenure of office, the appointee would hold until the end of the term, which might be any number of years, notwithstanding the fact that a half dozen general elections intervened. This is so directly opposed to the spirit and policy of the state government as to challenge its correctness. It is the known policy of the state and its laws to permit the people to elect those who are to serve them as their officers. Hence the requirement that, if 30 days or more intervene between the occurrence of the vacancy and the next general election, the remainder of the term shall be filled by election. To hold that a general law can be applied only to conditions as they exist at the time of its enactment would be subversive of all rules of construction. The only provision in the law creating the office of county attorney for the filling of a vacancy in the office is that the county board shall appoint a successor who shall give bond and discharge the duties of the office until his successor shall be elected and qualified. This left all other details to be governed by the general law providing for filling vacancies. To the mind of the writer nothing could be plainer. The conclusion of the writer of that opinion is that, "the lawmakers having specially provided the method of filling vacancies in said office, the only conclusion we can reach is that it is exclusive of all others." This would be true had the legislature done so, but the application should be limited to what the lawmakers did, which was that the county board should appoint and the appointee should hold the office until the election and qualification of "his" successor. All other matters are left to the general law.

However, it is our opinion that a distinction can be drawn between that case and the present one by reason

of the fact that the provision for the filling of vacancies in the office of county attorney is contained within the act creating the office, and for that reason the decision might be sustained, while in this case the office was created by the constitution, and by virtue of that instrument the general law for filling vacancies should be applied. Section 20, art. III of the constitution, provides: "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution." It must be conceded that no provision is made in the constitution for the filling of a vacancy in the office of railway commissioner; it being silent upon that subject. The case is therefore brought within the provisions of the constitution last above quoted and must be governed by it, and the general law applied. The fact that the office of railway commissioner was created by a subsequent amendment to the constitution can make no difference, for, when adopted by the people, it becomes as much a part of that instrument as if contained therein when first adopted. In its relation to matters which have arisen subsequent to the adoption of an amendment the constitution must be construed as a whole, all of whose provisions are of equal validity. 4 Ency. U. S. Supreme Court Rep. 48. It is believed that the same rule should be applied as to an amendment of a statute, and we held in *Cass County v. Sarpy County*, 63 Neb. 813, that "an amended statute is to be construed, in its application to subsequent transactions, precisely as though it had been originally enacted in its amended form."

It follows that the demurrer to the petition must be, and is, sustained.

DEMURRER SUSTAINED.

SEDGWICK, J., not sitting.

SUNDERLAND BROTHERS COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 26, 1911. No. 16,485.

1. **Carriers:** TRANSPORTATION OF FREIGHT: LIABILITY. The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy.

2. ———: DESTRUCTION OF GOOODS: ACT OF GOD: CONCURRENT NEGLIGENCE. If the carrier needlessly delays the shipment or negligently fails to protect it from known or threatened danger, and the goods are overtaken in transit and are damaged or destroyed by an act of God, and such negligence or unreasonable delay is the proximate or concurring cause of the injury or destruction, the carrier is liable for the loss; and this rule applies whether the goods are perishable or nonperishable in their nature.

3. ———: EXCESSIVE RATES: EVIDENCE. Evidence examined, and *held* insufficient to sustain that part of the judgment which is based on an alleged excessive freight charge.

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

Greene & Breckenridge, for appellant.

Baldrige, De Bord & Fradenburg, contra.

BARNES, J.

The plaintiff commenced an action in the district court for Douglas county against the defendant, a common carrier, to recover damages for negligence and delay in the transportation of 12 car-loads of lime, which plaintiff alleged caused its destruction by the flood of June, 1903, while in the defendant's yards at Kansas City, Missouri. Plaintiff also commenced another action against the defendant to recover the amount of an alleged overcharge or excessive rate charged and collected for the transportation of certain cement from Hannibal, Missouri, to South

Omaha, Nebraska, in June and July, 1906. The actions were consolidated and tried together. The plaintiff had the verdict on both causes of action, and from a judgment on the verdict the defendant has appealed. The appeal is presented as though the record contained two cases, one designated as the flood case and the other as the rate case. We adopt the defendant's classification, and will consider the questions in the order in which they have been presented.

In the flood case, it is contended that the district court erred in refusing to direct the jury to return a verdict for the defendant at the close of all of the evidence. It appears that in May, 1903, the plaintiff purchased of the Western White Lime Company 12 car-loads of lime, put up in barrels and delivered to the purchaser f. o. b. the cars of the Saint Louis & San Francisco Railroad Company, commonly called the "Frisco" line, at Ashgrove, with express instructions from the plaintiff that the same be routed to its destination by way of Kansas City, and over that part of defendant's railroad known as the "K. C." line. Three cars of this lime were delivered to the defendant at its yards in Kansas City, Missouri, on the 26th day of May, 1903, and the remaining nine cars were delivered to and received by the defendant at that place from May 26 to May 30, inclusive; that during the time of such delivery the country drained by the Kaw river and its tributaries was being flooded by heavy rains, which continued from day to day until the 31st day of May, at which time an unprecedented flood of water reached Kansas City, completely flooding the defendant's yards, in which all of the cars of lime were situated, and which resulted in its complete destruction. The trial court instructed the jury that the flood above mentioned was so great, unprecedented and unusual as to amount to an act of God, and that, in order to entitle the plaintiff to recover, it was required to show that some act of negligence on the part of the defendant, which, concurring with the act of God, was the proximate cause of the loss and damage complained of.

It is contended, on the part of the defendant, that it was not guilty of any negligence, and that under the circumstances, as disclosed by the testimony, it was not chargeable with negligence in failing to seasonably forward the lime to its place of destination, and thus escape the flood above described. It appears, however, that as early as May 25 the weather bureau forecaster at Kansas City sent out warnings to the people and the railroad officials of the approach of the flood. This it continued to do from day to day and time to time, and on the 29th day of May the following warning was prepared on postal cards and mailed to all points between St. Joseph and Boonesville, Missouri. "May 30, 1903. Stage of Missouri river at 7 A. M. at Kansas City 25 feet and still rising. This is more serious than the flood of 1892, and only about one foot below the stage of 1881. Heavy rains in Missouri and eastern Kansas last night renders the situation more alarming for points below Kansas City." The transportation companies were also warned that it would be well for all interested to be prepared for emergencies. On May 31 it was stated by the weather forecaster at Kansas City: "No reports of any kind received. Cut off from telegraphic and telephonic communication except to the eastward. Nothing could be said except what was actually happening in this vicinity." Warnings were sent out to the heads of the railroads informing them of the increasing danger as early as May 28, stating that interests affected by high water should be closely guarded. It is admitted that those warnings were received by the officials and employees having supervision and charge of the traffic of the defendant's road at Kansas City. Notwithstanding such warnings and the daily newspaper reports of the magnitude of the approaching floods, the defendant took no steps to remove the cars containing the lime in question to higher ground, and failed and neglected to forward them to their place of destination, or in any manner remove them from flood danger. It appears that the traffic between Kansas City and Omaha by way of the Kansas City line was interrupted

for some of the time in question by washouts at or near St. Joseph, but it also appears that the defendant forwarded freight amounting to some 30 or 35 cars a day of what it called perishable goods from Kansas City to Omaha, and that it could have routed the lime in question by way of Chariton, Iowa, to its place of destination. Again, it is well known that by exposure to floods white lime is of a most perishable nature.

From the foregoing it appears that this case is fairly within the rule announced in *Wabash R. Co. v. Sharpe*, 76 Neb. 424, where the facts were practically the same as those in the case at bar. It there appeared that one Sharpe delivered to the railway company at La Fayette, Indiana, some household goods for shipment to Lincoln, Nebraska. The goods were shipped from La Fayette on the 21st day of May, 1903, and were delivered to the Missouri Pacific Railway company, the connecting carrier at Kansas City, on the 26th day of May, which was the same day that the first three cars of the lime in question herein were delivered to the defendant. The household goods were held in the yards by the Missouri Pacific Railway Company until May 31, when they were injured by the same flood that destroyed the plaintiff's lime. Action was brought to recover the value of the goods; the plaintiff had judgment, and on appeal to this court it was said: "It is claimed by the railroad company that they shipped the goods within a reasonable time, and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claims. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, excepting only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability. It may be conceded in

the present case that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus at fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by the act of God where the goods were exposed to injury by the carrier's inexcusable detention." In the instant case it would seem, in the absence of any reasonable showing to the contrary, that the delay of five days or more in the yards at Kansas City was an unreasonable delay in the transportation of the plaintiff's lime, and, when we consider the evidence that the officer in charge of the weather bureau at Kansas City from May 25 to May 31 daily and frequently notified the public and the railroad companies of the coming flood, of the constant and increasing rains throughout the territory drained by the Kaw river, upon the banks of which the defendant's yards at Kansas City are situated, there would seem to be no doubt of the negligence of the defendant in not removing the plaintiff's lime to higher ground as a place of safety, or in failing to forward the cars to Omaha, although it became necessary to do so over a different road than the one by which they were billed. It may be said, in view of the repeated warnings of approaching danger, that, if the defendant was unable to immediately forward the lime to its destination, it should have notified the "Frisco" line of that fact, and refused to receive it, which was the course pursued at that time by the other railroads centering in Kansas City, as shown by the testimony of the defendant's witnesses.

It appears that the flood of May, 1903, at Kansas City, Missouri, has resulted in a great many actions against the different railroad companies transacting business in that city; and it appears without exception that the courts

of last resort of the several states where such actions have been brought have held the transportion companies liable for its consequences. In *Pinkerton v. Missouri P. R. Co.*, 93 S. W. 849 (117 Mo. App. 288) the court said: "A carrier is liable for loss of freight from a flood, if it was aware of its approach in time to remove the goods to a place of safety by the exercise of ordinary care and diligence." It was held that the evidence in that case was sufficient to go to the jury on the question of the defendant's negligence in not taking the goods to a place of safety after it knew of the approach of the flood. To the same effect is *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269. In that case it was said: "It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on May 23, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from the defendant's yards on any day after its arrival prior to May 29, and, had this been done, the corn would not have been damaged. If the defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense." See, also, *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Ia. 123, which is another of the flood cases. We are therefore of opinion that the court properly refused to direct a verdict for the defendant.

Complaint is made of the court's fourth instruction, but, in view of the foregoing, this complaint is not well founded. We find no error in the record which affects the

verdict and judgment in what is called the flood case, and to that extent the judgment of the district court should be affirmed.

It appears that the so-called rate case was brought to recover the sum of $245.10, an alleged overcharge for the transportation of 13 cars of cement from Hannibal, Missouri, to South Omaha, Nebraska, in June and July, 1906. It was stated in the petition, in substance, that the cement was sold to and used by the Union Stock-Yards Company at South Omaha; that the published tariff of the defendant prescribed a rate of 7½ cents per hundred weight on cement in car-load lots where such cement is used for steam railroads, but that, disregarding this tariff, the defendant required the plaintiff to pay at the rate of 10 cents per hundred pounds for the transportation of this cement, and judgment was prayed for the amount of the alleged overcharge. The answer contains a general denial.

At the trial it was admitted that the published tariff (exhibit 14), as shown by the record, was in force at the time of the transaction complained of, and that the 7½-cent rate was limited to railway material and supplies for steam railroads only for their own use. The tariff sheet is unambiguous in its terms, and provides a rate for westbound railway material and supplies (except powder and high explosives, rails and fastenings) for steam railroads only C. L. 7½ cents, while the rate to others is fixed therein at 10 cents per hundred pounds. Upon the introduction of the evidence, it appears that the plaintiff was at the times mentioned a corporation existing under the laws of this state, engaged in commerce, and, among other things, in the purchase and sale of lime, cement, coal, and similar commodities, and had its principal place of business in Omaha, Nebraska. Mr. Sunderland testified that his company bought the cement and sold it to the stock-yards company. He further testified that the cement was bought by the company for its own commercial purposes, and that it was bought for resale. No claim is made that the tariff was discriminatory, and plaintiff seems to rely wholly on

the facts which it insists brings the transaction within the 7½-cent rate; while the defendant contends that it clearly falls within the 10-cent rate, and to that end requested the district court to instruct the jury to return a verdict in its favor. This request was denied, and the jury were instructed to return a verdict for the plaintiff. Obeying this instruction, a verdict was returned against the defendant for the sum of $323.30, which amount was included in the judgment complained of by the defendant.

It is contended that the court erred in refusing to give the instruction requested by the defendant, and to our minds this contention is well founded. It seems clear from even a casual reading of the tariff that the 7½-cent rate was limited exclusively to railway material and supplies for steam railroads only and for their own use; that the plaintiff purchased the cement in question for the purpose of resale, not to steam railways only, but to any one who might have use for that sort of material. By the terms of the tariff the defendant was entitled to charge and receive for transporting it 10 cents per hundred pounds. This rate was fixed and certain, and the company was entitled to know that such would be the compensation for its services. We are therefore of opinion that the plaintiff was not entitled to demand the lesser rate, which applied only to material billed to steam railways for their own exclusive use. It must be observed that this cement was shipped at the 10-cent rate, and the plaintiff does not contend that there was any express contract or arrangement with the defendant that the 7½-cent rate was to apply to this shipment. It simply makes this claim under its construction of the meaning of the tariff.

We think that neither the language of the tariff nor the facts warrant such a construction. It is urged that the Union Stock-Yards Company is a steam railway within the meaning of the tariff, and therefore plaintiff was entitled to the 7½-cent rate; but this contention is beside the mark, for, until the cement was actually received by the stock yards company, plaintiff could have diverted the

shipment and required its delivery to any other customer. On the other hand, it is contended by the defendant that, even if the Union Stock-Yards Company is to be considered a steam railway, still, as a matter of fact, the cement was not used for the purpose of railway construction. As we view the situation, it is unnecessary to consider these questions. We are of opinion that the defendant was entitled to receive and collect from the plaintiff the usual 10-cent rate for this shipment, and that the district court erred in refusing to direct a verdict in its favor upon this cause of action.

It follows that so much of the judgment of the district court as represents the recovery in the rate case should be reversed, and that cause of action should be dismissed; but, as to the so-called flood case, the judgment of the district court should be affirmed. The plaintiff is therefore allowed to file a remittitur with the clerk of this court for the sum of $323.30 within 40 days, and, upon the filing of such remittitur, the judgment of the district court will stand affirmed; but, upon the failure to do so, the judgment of the district court will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

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

RHODA GILLILAND, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 26, 1911. No. 16,385.

1. **Municipal Corporations: SIDEWALKS: NEGLIGENCE.** The existence of a step of about eight inches at the intersection of a crosswalk, which was safe and in good repair, with a sidewalk, which was also in good condition, does not of itself constitute actionable negligence.

. ———: ———: ———. A city is not liable to one who is familiar with the crossing, and who on a rainy evening, on account of the wet and slippery condition of a sound cross-walk, slipped in stepping a distance of about eight inches from the cross-walk to an intersecting sidewalk, which was also in good repair.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

John T. Cathers, contra.

LETTON, J.

In May, 1908, at the intersection of Pinkney and Twenty-eighth streets, in the city of Omaha, the plaintiff slipped and fell, causing a Colles fracture of her right arm. At the place of the accident there was a wooden cross-walk, extending across Pinkney street, laid upon the natural surface of the ground. Some months previous to this a permanent sidewalk had been laid along the south side of Pinkney street upon the established grade. In order to lay this, it became necessary to excavate to a depth of from 12 to 14 inches at the point where the cross-walk and permanent walk intersected. After the bed for the walk had been prepared and the brick laid, a difference of level existed between the top of the brick walk and the surface of the wooden cross-walk.

The plaintiff testifies that the surface of the cross-walk was about 8 to 10 inches higher than that of the sidewalk, while other witnesses estimate the distance in height at from 6 to 14 inches. In her notice to the city made a few days after the accident the plaintiff states that the difference in height is about 8 inches. A photograph taken a few days after the accident was received in evidence on behalf of the plaintiff, in which the end of the cross-walk is shown, as well as the top of the brick walk. Judging from this photograph, it would seem that the statement of the

plaintiff is correct, and that the height of the step from the brick walk to the cross-walk was about 8 inches at the time of the accident.

The allegations of negligence in the petition are, in substance, that the defendant laid a wooden cross-walk over Pinkney street on the west side of Twenty-eighth street; that this "was carelessly and negligently constructed several inches higher than the established grade of said street at said place, * * * said wooden cross-walk has been carelessly and negligently permitted to remain ever since in said faulty and dangerous condition; * * * that the defendant * * * in building and constructing said wooden cross-walk over and across Pinkney street above the established grade of said street, and leaving and permitting the same to remain (above the brick sidewalk at the south end thereof) in said dangerous and faulty condition, is guilty of gross carelessness and negligence." "It was the duty of the defendant to build and construct said cross-walk in a suitable and safe way, to keep and maintain it in such condition that it be reasonably safe for persons crossing over and along the same in the nighttime, and the defendant by reason of the faulty construction and dangerous condition of said cross-walk, to wit, being higher than the brick walk at their junction and which caused the plaintiff to fall and break her wrist, is liable to the plaintiff in damages," etc. Defendant filed what is substantially a general denial, and further denied that notice of the existence of the claimed defect had been given to the city the statutory length of time before the accident. The plaintiff recovered a judgment, from which the city appeals.

The evidence shows that pursuant to an order of the city council the owner of the abutting property caused the walk to be built at the place staked out by the city engineer. The natural soil in that locality consists of a stiff clay locally known as "gumbo," which, when wet, becomes very adhesive and slippery. The surface of the street being higher than the walk, in rainy weather water flowed

into the slight excavation, and the surface of the brick walk became covered with mud. This, however, is immaterial, since the plaintiff testifies that she did not slip upon the brick sidewalk. Her testimony as to the accident is that between 7 and 8 o'clock on the evening of May 4 she went to visit her son, who lived in the neighborhood; that in doing this she passed over this crossing. The night was cloudy. She stayed at her son's about an hour. When she came back, it was raining, and the walks were wet and slippery. She was well acquainted with the walk in that locality, being in the habit of passing over it several times a day. That the cross-walk was 8 to 10 inches higher than the sidewalk, though she had never measured it; that a street lamp which stood across the street was lighted, but the light was somewhat obstructed by a tree.

On cross-examination she testified: "Q. Now, when you came back that night, you walked in what direction? A. I walked south. Q. South? A. Yes, sir. Q. Looking out for this step-off? A. Yes, sir; I was looking out for the walk. It was slippery—the sidewalk, the crossing. Q. And you stepped from the cross-walk on the permanent brick walk. Is that right? A. As I stepped off of the cross-walk, my feet slipped and I fell over to the right. Q. Well, did your feet slip from the mud on the cross-walk or on the permanent walk? A. No, sir, didn't slip from the permanent walk, I slipped before I struck the permanent walk."

It is apparent that the accident was caused by the fact that the cross-walk was wet and slippery. So far as the evidence shows, both the cross-walk and the sidewalk were in perfect condition. The question presented is whether the city is in any event liable for damages to a foot passenger merely because there is a slight difference in level between a cross-walk and sidewalk, and the surface of the cross-walk is wet and slippery from recent rain. It would be imposing an unwarranted burden upon a city to require that all cross-walks and sidewalks for foot passengers should be constructed either upon a level or upon a uni-

form slope, and without steps, at the points where they intersect each other or reach the level of the drive-way. Moreover, if the court should hold that a difference of 8 to 10 inches in passing from a cross-walk to a sidewalk or from the level of a paved street to the edge of the curb constituted such a negligent manner of construction that the city would be liable for damages every time a person slipped in stepping up or down, this would certainly be laying an extraordinary and unjust tax upon the inhabitants of the city.

In the case at bar the plaintiff was thoroughly familiar with the conditions at this crossing. She knew that at the end of the walk there was a slight step. She says her foot slipped upon the cross-walk, but the cross-walk was not defective. The only negligence charged in the petition which is supported by the evidence is that the walks differed in level, and this we should be reluctant to hold constituted actionable negligence. The evidence shows that the city was engaged in the gradual improvement of this street; that more than a year before there were wooden sidewalks lying upon the natural surface of the ground, and that the city shortly afterwards graded the street. Suppose that in grading the roadway the street was left as far below the level of the sidewalk as the sidewalk at this time was below the cross-walk, could the existence of this step be said to be negligence? We think not.

The city was chargeable with the exercise of reasonable care as to the manner of the construction and connection of the walks, and the existence of the step was not incompatible with the existence of such care. The wet and slippery condition of the walk was not the fault of the city, but a condition which was to be expected under all the circumstances, and greater care on the part of a pedestrian should have been exercised on account of it. Differences of level are to be expected between sidewalks and cross-walks, and care is always necessary at such intersections. This is especially so in wet weather. We think the city is not liable under the proof. This is the view of courts

generally. *City of Chicago v. Bixby,* 84 Ill. 82, 25 Am. Rep. 429; *Morgan v. Lewiston,* 91 Me. 566; *Teager v. Flemingsburg,* 109 Ky. 746, 53 L. R. A. 791; *Shippy v. Village of Au Sable,* 65 Mich. 494; *Miller v. City of St. Paul,* 38 Minn. 134; *Robinson v. City of Omaha,* 84 Neb. 642.

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

REVERSED.

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

KATE MAURER, APPELLEE, V. JOHN REIFSCHNEIDER ET AL., APPELLANTS.

FILED JUNE 26, 1911. No. 16,414.

1. **Wills:** NUNCUPATIVE WILLS: VALIDITY. A nuncupative will is not effective to pass title to real estate in this state.

2. **Life Estates:** LIFE TENANTS: ADVERSE POSSESSION. The possession of land by a life tenant will not be construed to be hostile and adverse to a remainderman unless the knowledge is clearly brought home to the latter that the life tenant claims the entire estate in his own right, adverse and hostile to any claim or interest in the land by the remainderman or others claiming under him.

3. ——: ——: ——. The recording of a deed conveying the entire estate to a third person by a life tenant who remains in possession of the premises is not alone sufficient to start the running of the statute of limitations against an action to quiet title brought by the remainderman under sections 10868, 10870, Ann. St. 1909.

4. **Limitation of Actions.** Such an action does not accrue until knowledge that the life tenant in possession is claiming to own the entire fee is brought home to the owner of the remainder.

5. **Quieting Title:** EQUITY. In an action to quiet the title of a remainderman as against a life tenant in possession, equity will

require as a condition of relief that the plaintiff do equity by paying her proportion of a mortgage lien on the premises which existed at the time of the death of the common ancestor and which was paid by the life tenant.

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

A. R. Oleson and *Byron G. Burbank,* for appellants.

F. W. Button, I. L. Albert and *Henry M. Kidder, contra.*

LETTON, J.

In 1894 Frederick Stegelmann owned and resided on a farm of 80 acres in Dodge county, Nebraska. He also owned another tract of 80 acres near-by. Shortly before his death, which occurred on July 28, 1894, and while absent from home, he made a nuncupative will in the following form: "If I should die I will all my property over to my wife as she has helped to earn it and worked as hard as I have for it and I wish you to see to it that it should be that way." This declaration was made in the presence of three witnesses, and was afterwards reduced to writing, filed for probate, and allowed by the county court of Dodge county. Afterwards his widow, Emma Stegelmann, married John Reifschneider. Stegelmann left surviving him five brothers and two sisters, one of whom, Kate Maurer, is the plaintiff in this action. In 1897 and 1899 Emma Reifschneider conveyed all the real estate to her husband. The Reifschneiders paid off a mortgage upon the land which was given during the lifetime of Frederick Stegelmann, and afterwards executed another mortgage on the premises. Shortly after the death of Stegelmann and the probate of the nuncupative will, Adolph Stegelmann, Detlof Stegelmann and Christian Stegelmann, brothers of Frederick Stegelmann, deceased, together with their wives, executed and acknowledged certain instruments in writing, each of which recited that they for the consideration of $1, "and in further

consideration of the expressed wish of our late brother, Frederick Stegelmann, deceased, do hereby surrender, set over and assign unto Emma Stegelmann, his widow, all our rights, interest, and title in and to the estate both real and personal, of our said brother Frederick Stegelmann, deceased." These instruments are dated in August, 1894, and were recorded in April, 1896. The widow and her second husband have been in the possession of the premises either by themselves or by tenants since Stegelmann's death. They have paid the taxes, made some slight improvements, kept up the repairs, and enjoyed the rents and profits of the property. The plaintiff alleges that the widow has a life interest in the tracts; that her possession has not been adverse to that of plaintiff and the other heirs, but by consent, based upon her life interest; that the Reifschneiders now claim to be the owners of all the real estate and are attempting to sell and convey the same to other parties; that the conveyances to the husband were without consideration and constitute a cloud upon her title to the premises. She also alleges she has a quitclaim deed from Ernest and Henry Stegelmann and their wives to the real estate, and is the owner of an undivided three-sevenths interest therein, and prays that her title may be quieted to such interest.

The Reifschneiders answer setting up title by the nuncupative will; also a title by open, notorious, exclusive and adverse possession since June 8, 1895, which has been recognized by the plaintiff and the other heirs. The reply pleads that the nuncupative will could not pass the title to real estate; that defendants have recognized the title of plaintiff and the other heirs within ten years; that the plaintiff by such action has been lulled into the belief that the defendants claim to hold only as life tenants, and that defendants are now estopped to set up another title. Cross-petitions were filed by Christian, Adolph and Detlof Stegelmann, each praying that an undivided one-seventh interest in the real estate be quieted in him. The court found that the plaintiff was the owner of an un-

divided three-sevenths interest in the land; that the nuncupative will was ineffective to pass real estate; that Emma Reifschneider is a life tenant of the lands, and that she and her husband are the owners in fee simple of an undivided four-sevenths interest. The title to the three-sevenths interest was quieted in the plaintiff, except as to the life estate of Emma Reifschneider. From this decree the Reifschneiders have appealed to this court.

The appellants contend, first, that the title to the real estate passed to the widow by virtue of the nuncupative will; second, that they have good title to the lands by adverse possession; third, that the finding that the plaintiff is entitled to a three-sevenths interest in the land is not supported by the evidence.

1. The argument upon the first proposition is more ingenious than satisfactory. Section 4993, Ann. St. 1909, provides: "No nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of $150 that is not proved," etc. It is argued that the word "bequeathed" in this section is not to be taken according to the technical common law meaning, and that the word "estate" in this section cannot be said to apply to personal estate alone, for the reason that in a number of other sections in the same act the word "estate" is used by the legislature as inclusive of all kinds of property. It may be conceded that the word "estate" has been used to embrace within its terms property of all kinds, and that the word "bequeath" may under some circumstances and used in certain connections be held to be sufficient to pass real estate in a will; but these considerations alone we think are not sufficient to justify the court in holding that it was the intention of the legislature to set aside the statute of frauds as to oral wills (which was based upon actual experience of the dangers to estates arising from frauds, and perjuries incident thereto) in seeking to establish nuncupative wills. By statute this state has adopted "so much of the common law of England as is applicable and not inconsistent with the constitution of the United States,

with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory." Ann. St. 1909, sec. 6955. The temptation to the use of fraud and perjury which led to the enactment of that part of the statute of frauds relating to nuncupative wills (*Cole v. Mordaunt,* in note to *Mathews v. Warner,* 4 Ves. Jr. *196) is just as strong today as centuries ago, and, until the legislature by direct and unequivocal language removes the common law barrier to the transfer of title to real estate by oral wills we must hold that it still exists.

Our attention has not been called to a case from any state, except Ohio, in which it has been held that a nuncupative will is efficacious to pass the title to land. The soundness of that decision is to be doubted, and in that state the statute has since been changed. This court, as well as the courts of this country generally, does not look with favor upon oral testaments. *Godfrey v. Smith,* 73 Neb. 756; *Moffett v. Moffett,* 67 Tex. 642, 4 S. W. 70; Gardner, Law of Wills, sec. 15; Schouler, Wills and Administration, secs. 362, 363; *Prince v. Hazleton,* 20 Johns. (N. Y.) *502; 30 Am. & Eng. Ency. Law (2d ed.) 562, and cases cited in note.

2. As to the issue of adverse possession: At the time of Stegelmann's death the statute provided (Comp. St. 1905, ch. 23, sec. 30): "If he (the intestate) shall have no issue, his estate shall descend to his widow during her natural lifetime and, after her decease, to his father." The widow was also entitled to dower and homestead rights; but, since the statute of descent gave her a life estate in all the property, it is unnecessary to consider what other rights she may have had. Where a person is entitled to the possession of land by virtue of having a life estate therein, his possession will not be construed to be hostile and adverse to that of the remaindermen, unless the knowledge is clearly brought home to them that the person in possession claims the entire title in his own right, adverse and hostile to any claims of interest in the land by the remaindermen or others claiming through

them. We have recognized this principle repeatedly. *Larson v. Anderson*, 74 Neb. 361; *McFarland v. Flack*, 87 Neb. 452; *Helming v. Forrester*, 87 Neb. 438; *Palmer v. Mizner*, 2 Neb. (Unof.) 899. See, also, *Gindrat v. Western R. of Ala.*, 96 Ala. 162, 19 L. R. A. 839, and note.

It is insisted that the recorded deed conveying the entire estate from Mrs. Reifschneider to her husband, the mortgage executed by Reifschneider and wife with full covenants of warranty, and the probate of the nuncupative will were constructive notice to the remaindermen of an adverse claim to the land. The general rule is that the recording of an instrument is only constructive notice to those who claim through or under the person executing the same. *Traphagen v. Irwin*, 18 Neb. 195. The supreme court of California say: "The provisions of recording acts are for the protection of subsequent purchasers and incumbrancers from the common grantor, and do not affect the rights of strangers to the claim of title. *City of Chicago v. Witt*, 75 Ill. 211; *Losey v. Simpson*, 11 N. J. Eq. 246; *Traphagen v. Irwin*, 18 Neb. 195; *Ely v. Wilcox*, 20 Wis. *523; *Long v. Dollarhide*, 24 Cal. 218; 2 Pomeroy, Equity Jurisprudence (3d ed.) secs. 658, 701. Records are only constructive notice of a title of which they enable a party to obtain actual notice or knowledge by means of a search." *Garber v. Gianella*, 98 Cal. 527. See also, *Prest v. Black*, 63 Kan. 682; *Sensenderfer v. Kemp*, 83 Mo. 581; *De Yampert v. Brown & Johnson*, 28 Ark. 166. There was no obligation on the part of the remaindermen to stand guard over the records in order to protect their title. They were entitled to rest secure, so far as acts of the life tenant in possession were concerned, until the fact that she was claiming an adverse and hostile right was effectually brought home to them. It is true that in *First Nat. Bank v. Pilger*, 78 Neb. 169, it is said that the recording of a warranty deed from the widow to one Green was notice to the world "that the grantee claimed an interest in the land such as the deed purported to convey." The facts, however, in that case were that a grantee of the life

tenant went into possession and held possession hostile to the heirs, asserting he owned the entire estate under the deed executed by the life tenant. The case was properly decided, although some of the expressions used in the opinion are not as carefully made as might have been. In the case at bar the evidence is that the plaintiff was under the impression that Mrs. Reifschneider was occupying the premises as a life tenant, and had no knowledge of her claim to be the absolute owner in her own right until shortly before the action was brought. This being the case, we think the statute of limitations had not run at the time the action was begun.

3. It is further insisted that there is not sufficient proof that the plaintiff is the owner of a three-sevenths interest in the premises. It is admitted by the pleadings that she is one of the sisters of Frederick Stegelmann, and that Ernest and Henry Stegelmann, from whom she obtained title by a quitclaim deed, were brothers of Frederick Stegelmann. The quitclaim deed from the brothers to Kate Maurer is also in evidence. Each brother succeeded to a one-seventh interest in the lands of Frederick Stegelmann, subject to the rights of the widow.

So far we have considered only the issues between the plaintiff Kate Maurer and the defendants Reifschneider. Three of the other heirs who were made defendants in the case filed cross-petitions asserting title in themselves against the Reifschneiders, claiming that the instruments by which they released to Mrs. Reifschneider their interest in the estate had been fraudulently procured. The court found upon this issue for the defendants Reifschneider. Some question was made as to the right of these cross-petitioners to have this issue reviewed, since they did not file notice of appeal under the rules of this court. Strictly speaking, they probably have no standing in this court; but, nevertheless, in the course of the examination of the record, we have become convinced that the finding in the district court on this branch of the case was correct.

It is next contended that the plaintiff should be required

to do equity as a condition of the quieting of her title by requiring her to pay into court for the benefit of the life tenant her proportion of the mortgage debt which existed on the premises at the time of the death of the ancestor. We are inclined to think this is just. She should do equity if she receives it. The judgment will be modified so as to require plaintiff as a condition of relief to pay into court for the benefit of the defendants the sum equitably due as her share of the mortgage debt. This may be ascertained by the rule in *Draper v. Clayton,* 87 Neb. 443.

The judgment of the district court is modified and affirmed, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

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

JOHN HARSE, APPELLEE, V. OLIVER RAMER ET AL., APPELLANTS.

FILED JUNE 26, 1911. No. 16,455.

Ejectment: APPEAL: CONFLICTING EVIDENCE. Where in an ejectment case the evidence is sharply conflicting as to the true location of an original government corner and as to the question of adverse possession, and there is sufficient evidence on each point to sustain the verdict, this court will not interfere with the findings of the jury.

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

W. L. Hand and *Fred A. Nye, for* appellants.

N. P. McDonald and *John N. Dryden, contra.*

LETTON, J.

This is an action of ejectment to recover a strip of land about 10 rods wide at the east end and 12 rods wide at the west end, extending across section 8, township 12, range 18, in Buffalo county. Plaintiff claims that the strip is part of the north half of the section, which is his property, while defendants insist that it is part of the south half of the section, the title to which is in them. Defendants also assert title by adverse possession for more than 10 years. The reply was a general denial. The jury found for the defendants as to all the strip except that lying north of the east one-half of the southeast quarter of the section. As to this portion it found for the plaintiff. Since the true boundary line of the entire strip, according to government survey, was the same, the west three-fourths of the strip must have been awarded to the defendants on account of adverse possession for the statutory period, while the title to the east one-fourth of the strip must have been awarded to the plaintiff on account of the true line being as he contends. The dispute is as to the true location of the quarter corner between the northeast and the southeast corners of section 8. The government corner being missing, the lost corner was established at different points by different surveyors. The location of the northeast corner of the section is also in dispute, and, since the true location of the quarter corner depends upon the location of this corner, much testimony was taken as to this. The testimony with respect to the location of this corner at the intersection of sections 4, 5, 8 and 9 is conflicting. The plaintiff's case virtually rests upon the proposition that a corner stone at this point, which is denominated by him the "lagoon" corner, is the true government corner. The evidence on his behalf is that the quarter corner south of this was lost, and that it was afterwards established by dividing equally the distance between the northeast and southeast corners of section 8.

A great deal of testimony is in the record both by sur-

veyors and private individuals with respect to the true location of both of these corners. Some individuals testify that at the time of the early settlement of the county they actually saw the government monuments in place. Others testify that no monument ever existed between the northeast and southeast corners of section 8. Several surveyors agree with the plaintiff's contention as to the "lagoon" corner being the correct one. Others take a different view. One point of the testimony seems beyond dispute, and that is that Surveyor Webster made two surveys. Harse testifies that Webster established the quarter corner and placed a sandstone in an old road, and that on another survey he moved this stone 8½ rods north and 4½ rods east of where it was originally placed. He claims that the first location was correct, while Ramer asserts that the second is the true one. We think it unnecessary to attempt a detailed statement of the evidence. In fact, it would be impossible to do so without extending this opinion to an unwarranted length. The evidence is in such sharp conflict on material points that we must be satisfied with the verdict of the jury as to which of the lines is the correct one according to the original survey. Considering all the evidence in connection with the verdict, it seems clear that the jury found the true line to be where the plaintiff claims it is. It is evident that the Ramers and their father before them had actual possession claiming title to that portion of the strip awarded to them by the jury; part of it since 1885, and part of it since 1894, at which times, respectively, the father became the owner of the adjoining tracts. This possession they maintained up to the time of the trial.

The east quarter mile of the disputed strip, which was found to belong to the plaintiff, is in a different situation with respect to possession. On a portion of this strip Harse in 1883 planted 10 acres of trees. He could not find the quarter corner and was not able to determine just where his line was, but by standing upon a hill and looking eastward he observed trees set out and improve-

ments made by other settlers north and south of the line of a road which had previously been laid out in the center of the sections east, and he set out his trees by estimating as nearly as he could where his line would be with reference to the road. He had assisted in running this line, and testifies the surveyor had found original government corners in a straight line running west through several sections to a point a mile east of his land. He cultivated the trees as long as he was able to do so, and built a fence to the north of them, to protect them from his cattle, as he says. In 1892 one Keens was the owner of the east ½ of S. E. ¼ of sec. 8, which adjoins this on the south. Keens did not live upon the land. In October, 1903, Ramer purchased this 80 acres from Keens, and shortly afterward ran a fence with one wire through the trees which Harse planted, at the place Ramer claimed the true line should be. Some time afterward Harse put a fence on the south side of the trees and south of the wire put up by Ramer. This fence was in turn torn down by the Ramers, but a temporary fence was again put up by Harse's son in an irregular manner along the trees. If the jury were satisfied that plaintiff's contention as to the true line was correct, then the defendants could only be entitled to this, as well as to other portions of the disputed strip, by virtue of adverse possession. We are satisfied that the evidence as to the possession of Keens was not of such a character as to warrant the jury in finding that the defense of adverse possession for 10 years before the action was begun had been established. Ramer leased the 80 acres from Keens, but it is not shown that Keens ever made any attempt to occupy this strip adversely to Harse, or that he pretended to claim adverse possession of the trees or the land on which they stood. The fact that during a part of the time that Keens owned this 80-acre tract the Ramers, while tenants of his, cultivated part of the disputed strip is not sufficient to show that Keens' possession was hostile and adverse. It may have been permissive for all that the

evidence shows, and indeed the plaintiff's evidence would so indicate.

The defendants argue that the court should "consider the great public wrong that will flow from the location of the east and west section lines north of sections 8, 9, 10 and 11 to conform to the *lagoon* corner," and insist that it will affect all owners of property along this line. The manner in which the verdict of the jury may indirectly affect others not before this court cannot be considered. It is possible that, if controversies arise as to the true location of other monuments along the section lines, the evidence may be different. Each case must rest upon the facts which are before the jury in that particular case. This court has no power to determine, as the defendants' counsel requests, "that the *lagoon* corner is not the true corner, but that the true corner is 16 to 18 rods north" of the same.

The defendants complain that the tract awarded to the plaintiff by the jury is larger than that described in the petition. The petition claimed a strip about 10 rods and 8 feet wide at the east end, the north line being marked by a fence, and about 12 rods wide at the west end, though he claimed a smaller tract by adverse possession. The jury awarded a strip 179 feet wide between the true half-section line and the Ramer fence, and this is within the claim made in the petition. The fact that the plaintiff only recovered a part of the tract described in the petition is not material, and does not prejudice the defendants in any way.

Defendants complain that the costs were taxed against them by the district court. The plaintiff claimed about 24 acres of land. He recovered a judgment for about 5½ acres, and the defendants succeeded as to the remainder. Practically both parties succeeded in the action. In such a case it is proper for the district court to divide the costs. *Hale v. Young*, 24 Neb. 464; *McGillin v. Gleason*, 34 Neb. 694; 34 Cyc. 1557.

The judgment of the district court should be affirmed

in all respects, save with respect to the taxation of costs. These should be divided, each party paying his own costs in both courts.*

AFFIRMED.

STORZ BREWING COMPANY AND ANTON J. KASPAR, SHERIFF, INTERVENER, APPELLANTS, V. CARL F. HANSEN, APPELLEE.

FILED JUNE 26, 1911. No. 16,520.

1. Execution: SALE: WAIVER OF IRREGULARITIES. A purchaser of real estate at an execution sale, who after confirmation accepts the sheriff's deed, takes possession and afterwards conveys the same by warranty deed to a third person, thereby waives all errors and irregularities in the making of the sale and in the order of confirmation.

2. ———: ———: DISTRIBUTION OF SURPLUS. Where after confirmation of an execution sale of real estate it appeared that the bid which was accepted was made by the execution creditor, who also held a decree of foreclosure of mortgage against the property; that the execution debtor was insolvent; that the appraisement was of the gross value of the property without deducting liens; that the bid was made with the understanding of both sheriff and purchaser that the excess of the bid should be applied on the foreclosure decree, and no money was paid to the sheriff; a motion to require the officer to pay the amount of the bid over the execution debt into court for the benefit of the debtor should not be sustained, or, if sustained, the order not enforced until a reasonable opportunity is afforded the plaintiff by proper pleadings to set out the facts and apply for equitable relief.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed in part and remanded.*

James W. Hamilton and *George W. Wertz,* for appellants.

Frank Dolezal, contra.

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* September 25, 1911, order entered taxing costs to appellants.

LETTON, J.

The Storz Brewing Company held two mortgages upon certain real estate, the property of the defendant Hansen, one for $500 and the other for $1,800. It began foreclosure proceedings upon both mortgages, but afterwards dismissed the action as to the $500 mortgage. The action proceeded to decree upon the remaining mortgage, and the execution of the order of sale was stayed for the statutory period. Pending the expiration of the stay, judgment was obtained in an action at law upon the note for $500. Execution was issued upon this judgment and levied upon the mortgaged property. Appraisers were appointed, who appraised the property at the sum of $1,500 as the gross valuation; no certificates of liens being procured and no deduction being made. The property was sold by the sheriff to the plaintiff, Storz Brewing Company, upon a bid of $1,300. The sheriff made return of the sale, which was confirmed on March 2, 1909, and a deed made by the officer to the purchaser. Thereafter the brewing company sold the premises to John Metzger. On the 3d day of May a motion was filed by defendant Hansen to require the sheriff to pay into court for his benefit $745.75, being the proceeds of the sale after satisfying the execution. On June 14 the plaintiffs moved the court to grant leave to the sheriff to amend his return, so as to show that the property was appraised at the gross valuation of $1,500, that the bid was on the gross valuation, and that no cash was received by the sheriff. Affidavits were filed in support of this motion. On July 2 the motion to require the sheriff to pay to defendant the remainder of the proceeds was sustained, and the motion of plaintiff to grant leave to the sheriff to amend his return of the execution was overruled, to which rulings exceptions were taken. On September 16 the sheriff filed a motion to set aside the sale and order of confirmation, supported by affidavit setting forth in detail all the facts with reference to the foreclosure of the mortgage, the

existence of the mortgage decree against the premises, that by mistake he understood that the mortgage lien was subject to the judgment, and that the surplus of the bid over the amount called for by the execution might rightfully be applied on the decree of foreclosure, that the bid of $1,300 was on the gross value of the premises, and that it was understood that plaintiff might pay the remainder of the bid over the judgment debt by crediting the same on the decree. The motion also set forth that Metzger consented to the setting aside of the sale. Objections and affidavits in resistance to this motion were filed by Hansen, and also by Metzger, who denied that he consented that the sale should be set aside, and alleged his title by warranty deed from the Storz Brewing Company. The motion of the sheriff to set aside the sale and confirmation and for leave to amend his return was overruled. From these rulings, the Storz Brewing Company and the sheriff have appealed.

It is apparent from the affidavits that careless and slipshod methods of practice were indulged in with respect to the sale. It is equally apparent that neither the Storz Brewing Company nor the sheriff are entitled to have the sale set aside. Metzger has the legal title to the property, is not a party to this suit, and has not consented to the proposed action. Moreover, by the acceptance of the sheriff's deed and subsequent acts of control over the property, all irregularities were waived. *Hooper v. Castetter*, 45 Neb. 67.

While the district court was justified in refusing to set aside the sale and confirmation, we are convinced that the motion directing the sheriff to pay the money to Hansen should not have been sustained without at least reserving to the plaintiff the right to apply in equity to set off against this sum an equal portion of the mortgage debt. Hansen is insolvent; he owes the plaintiff over $1,800; still, by order of the court, plaintiff is compelled to pay to the sheriff for his benefit the sum of $745.75, as it alleges, by reason of a mistake made at the time of the sale.

We think that the motion of plaintiff, together with the affidavit of the sheriff and attorney showing the facts, would have justified the court in treating the same as being of the nature of an application to be allowed to credit the excess of the bid upon the foreclosure decree, and in directing proper issues to be made up and evidence taken in order to determine the rights of the parties in this regard. The court made no error, strictly speaking, in overruling the motion, but evidently there were rights claimed that it would have been better to settle at that time. It is even now not too late to allow this to be done. A reasonable opportunity should be afforded the plaintiff to make this proof. A case applying the principle is *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531. In that case we said: "It is not in every case that a court of equity will set off mutual demands which are distinct and independent of each other, but the insolvency of one party is a circumstance which strongly appeals to a court of conscience to apply the rule. If the result of the refusal would deprive one party of his property for the benefit of others to whom he is under no obligation, this will justify the granting of the relief prayed."

The order of the district court refusing to allow the sale to be set aside is right, and must be affirmed; but the judgment otherwise is modified so as to allow the plaintiff to make proper application herein to apply the proceeds of sale upon the foreclosure decree, for the court to try any issues raised upon such application, and to make such further orders in the matter as may be just. The cause is remanded to the district court to permit such application to be made, and for further proceedings, if necessary.

JUDGMENT ACCORDINGLY.

ROOT, J.

I concur in the conclusion of the majority opinion that the district court did not err in refusing to permit the sheriff to amend his return, but I dissent from that part of the opinion and the conclusion which modifies the

judgment of the district court and directs further proceedings to be had to permit a set-off of the debt represented by the decree against the money in the sheriff's hands.

The sheriff sold under execution whatever right Hansen had in the mortgaged premises, subject, of course, to the mortgage foreclosure, and the execution creditor paid $1,300 therefor. Now, if the $745.75 surplus be seized to satisfy a part of that decree in foreclosure, Hansen should to that extent be subrogated to the lien of the decree, and in the end the same result would obtain as will happen if the judgment of the district court be affirmed and Hansen be permitted to collect his money.

There is absolutely no justification in law for that part of the majority opinion to which I dissent.

FAWCETT, J., concurs in this dissent.

GUSTAF A. BLID, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 26, 1911. No. 16,505.

1. **Evidence:** DIRECT AND CIRCUMSTANTIAL. The competent relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless those circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true.
2. ———. The evidence in this case is commented upon in the opinion, and *held* insufficient to sustain the verdict of the jury.

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

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

J. E. Porter, contra.

ROOT, J.

This is an action to recover damages for the death of live stock caused, as alleged, by the defendant's failure to maintain lawful cattle-guards at a highway crossing. The plaintiff prevailed, and the defendant appeals.

The sole question for our determination is whether the evidence sustains the verdict.

At the point where the cattle were killed, the course of the highway is north and south and that of the railway is approximately east and west. The cattle were killed by an east-bound stock train about 11 o'clock A. M., November 15, 1907. The evidence adduced by the plaintiff to sustain his allegation that his cattle went upon the defendant's right of way because of insufficient cattle-guards may fairly be summarized as follows:

Early in the forenoon the cattle were confined in a pasture from whence they subsequently escaped into the highway. The defendant's fences were in good repair, but the cattle-guards were insufficient to turn live stock. In the afternoon the plaintiff, in company with a Mr. Canfield, went to the scene of the accident, found the carcass of the bull about 60 feet east of the crossing at the bottom of the six-foot fill upon which the railway is laid, and found the carcass of the cow several feet further eastward at the bottom of and on the other side of the grade; 150 feet further eastward a crippled calf was found. For six to ten feet westward from the points where the carcasses lay, the witness found evidence that the bodies of the animals had been pushed or had slipped over the rails and the ties.

The defendant produced the fireman and the engineer in charge of the train, and they testify positively that, as the locomotive emerged from a cut at the end of a curve, the cow, the bull and the calf were standing in the highway on the planks between the rails; that the stock alarm was sounded, and, so soon as it was evident that the cattle did not intend to move, the air brakes were applied, so

that the speed of the train was decreased to 15 or 18 miles an hour as it passed over the crossing, but that it was impossible to stop the train and avoid a collision with the cattle, which occurred either right at the traveled way or between it and the cattle-guards; that the bodies of the cattle were carried on the pilot over the cattle-guard and beyond for a space until they rolled or fell off of the engine. The engineer testified that in his experience bodies of cattle have been thus carried for 100 yards before they would become disentangled and fall from the pilot. Two other witnesses testified that there were no cattle tracks on the railway grade east, but that there were such tracks on the highway between the rails west, of the cattle-guards; that hair was found upon the cattle-guards and occasionally from thence eastward to the point where the carcasses were found, but no blood stains were observed along the route.

The plaintiff in rebuttal produced a witness who testified, in substance, that he was familiar with the operation of railway trains, and on three different occasions witnessed collisions between locomotive engines and live stock, and that from his experience he did not believe that the cow, the calf and the bull could have been carried upon the defendant's locomotive engine as testified to by the fireman and the engineer.

The plaintiff contends that, although the sole eye-witnesses to the transaction testify that the cattle were in the highway at the time of the collision, the inferences that may logically be drawn from the facts and circumstances testified to by the other witnesses are sufficient to overcome the direct testimony, which, it is argued, is so inherently improbable that the jury were justified in rejecting it, and that the verdict should not be disturbed.

Circumstantial evidence may be received to establish a fact in contradiction to the positive testimony of alleged eye-witnesses to the transaction; but circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circum-

stances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Asbach v. Chicago, B. & Q. R. Co.*, 74 Ia. 248; *Lopez v. Campbell*, 163 N. Y. 340; *American Freehold Land Mortgage Co. v. Whaley*, 63 Fed. 743.

The defendant's witnesses admit that one of its engines collided with the plaintiff's live stock. Does it reasonably appear by inference or otherwise that the collision occurred within the defendant's right of way and without the highway? The fact that no cattle tracks were found upon the railway grade between the points where the carcasses were found and the cattle-guards, and that such tracks were found upon the grade within the highway, tends strongly to discredit the inference that the cattle voluntarily crossed the guards. The fact that the tracks were noticed on the grade and within the highway refutes the argument that the ground was so hard and dry that cattle would make no impression by walking thereon. The suggestion that the cattle may have entered the right of way at another crossing some distance eastward seems improbable in the light of all of the evidence. There is no proof that the cattle-guards at that crossing were out of repair or insufficient; there is no evidence that cattle tracks were found upon the grade east of the point where the carcasses were found, nor is there any evidence that the cattle ascended the grade within the defendant's right of way, but outside of the highway. The fireman and the engineer are the only persons having absolute knowledge of the facts, and we detect nothing improbable in their statements. The momentum of the train moving at the rate of 15 or 18 miles an hour was such that the plaintiff's cattle were as mere straws in the path of the train, and the locomotive in three seconds of time moved the 50 or 70 feet intervening between the point of collision and the points where the cattle rolled down the grade. It seems to us that every fact testified to by the plaintiff's witnesses is consistent with the testimony of the fireman

and the engineer, so that upon a consideration of all of the evidence there is no substantial conflict therein. Unless the established facts from which the plaintiff deduces the fact that his cattle had crossed the guards before the collision cannot in reason be reconciled with the testimony of the engineer and that of the fireman, they do not contradict that testimony and will not sustain a verdict in the plaintiff's favor. As we have said, not only do those facts not contradict the direct testimony, but they are consistent therewith.

The defendant's motion at the close of the evidence for a directed verdict should have been sustained.

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

REVERSED.

JENNIE FITZGERALD, APPELLEE, V. EDWARD E. YOUNG, APPELLANT.

FILED JUNE 26, 1911. No. 16,465.

1. **Appeal:** REVIEW. Affidavits in support of a motion for a new trial cannot be considered on appeal, unless made a part of the bill of exceptions.

2. **Libel and Slander:** EVIDENCE. Where plaintiff in a suit for slander pleads that words actionable *per se* were spoken of plaintiff by defendant in presence of a third person named and others, proof that the words were spoken to such person alone will sustain a recovery.

3. **Appeal:** VARIANCE. On appeal a judgment will not be reversed for an immaterial variance between an allegation in the petition and plaintiff's proofs.

4. **Libel and Slander:** EVIDENCE. To say of a woman in her profession of school teacher that she "is crazy and not fit to teach school," or that she "is crazy and is an unmerciful liar and is unfit to teach school," is actionable *per se*, if the words are spoken to and heard by a third person.

5. ———: SPECIAL DAMAGES: PLEADING. In a suit for slander, pleading

and proof of special damages are unnecessary, where the imputation is actionable *per se*.

6. ———: INSTRUCTIONS. Where words actionable *per se* are proved as pleaded in an action for slander, the trial court should not sever the words or phrases composing the defamatory matter and instruct the jury that the dismembered parts are not defamatory.

7. ———: EVIDENCE. In proving a slander composed of several phrases, a witness is not required to state in an answer to a single question all of the defamatory matter pleaded, but it is sufficient for him to testify in several answers to all of the phrases composing the whole and state facts showing that they were published in one conversation in the sense alleged in the petition.

8. Appeal: BRIEFS: REFERENCE TO BILL OF EXCEPTIONS. If criticism of an instruction is based on particular testimony, such testimony should be specifically pointed out in the brief by a correct reference to the page or pages in the bill of exceptions where it may be found.

9. Libel and Slander: PUBLICATION: LIABILITY. A defamer who publishes a slander may be held liable for the consequences of later publications naturally resulting from his act.

10. Appeal: REVIEW. On appeal appellant cannot predicate error on a ruling in his own favor.

11. Libel and Slander: MALICE: EVIDENCE. Where malice is an issue in an action for slander, the plaintiff may show that defendant repeated the slanderous words both before and after the commencement of the suit. *Bloomfield v. Pinn*, 84 Neb. 472.

12. ———: PRIVILEGE: PLEADING AND PROOF. In an action for slander, the defense of privilege, to be available, must be proved.

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

Tibbets & Anderson and *J. B. Strode,* for appellant.

George W. Berge, contra.

ROSE, J.

This is an action for slander resulting in injury to plaintiff in her profession of teacher. She had been regularly employed at a salary of $45 a month to teach in a

public school near the village of Panama for nine months, beginning September 10, 1906. The defamatory expressions attributed to defendant are: (1) "Miss Fitzgerald is crazy and is an unmerciful liar and is unfit to teach school." (2) "Miss Fitzgerald is crazy and not fit to teach school." According to the petition, both statements were made "in the presence and hearing of Frank A. Phillips and divers other citizens," the first having been published at Panama, on or about December 1, 1906, and the second on a public highway near plaintiff's school, on or about December 15, 1906. The answer was a general denial. The jury rendered a verdict in favor of plaintiff for $3,500, but to prevent the granting of a new trial she filed a remittitur for half of that sum, and from a judgment against defendant for $1,750 he has appealed to this court.

Failure to grant a new trial on account of newly-discovered evidence is urged as a ground of reversal, but the ruling assailed cannot be reviewed because the affidavits relating to the evidence discovered after the trial are not in the bill of exceptions. They appear in the transcript, but that is insufficient to show they were presented to and considered by the trial court. *Rosecrans v. Asay,* 49 Neb. 512.

Complaint is made of an instruction reading thus: "This is an action for slander. Words spoken falsely of a woman school teacher, that she is crazy and an unmerciful liar and unfit to teach school, when coupled together, are actionable in themselves, or *per se,* and in an action of slander against the person who made such a charge it is not necessary to either allege or prove special damages in order to maintain the action. The law implies that such words were maliciously spoken. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, on or about the 1st and on or about the 15th of December, 1906, or either of said dates, the slanderous words as alleged in the petition, in the presence and hearing of one Frank A. Phillips, or other per-

sons, then the plaintiff would be entitled to a recovery in this action."

One criticism is that the instruction is inapplicable to the issues and proofs, since the petition charges that the defamatory statements were made "in the presence and hearing of Frank A. Phillips and divers other citizens," while the evidence shows that Phillips alone heard them. Phillips was a witness on behalf of plaintiff, and testified that the slanderous words pleaded were uttered by defendant in his presence in a store in Panama. He states also that others were present, and that some of them might have been within a few feet of defendant; that afterward the story was common report in the neighborhood; that there were groups of people in the village discussing it; that it was discussed by patrons of the school and others; that only half the pupils attended school; and that plaintiff had difficulty in finding a boarding place. On cross-examination defendant admitted that he had a conversation with Phillips about December 1, 1906, in the store in Panama; that he had talked about plaintiff in her professional capacity, and that he had said she was "queer." He denied that others heard his statements, but qualified his denial by saying that he did not remember of others having heard what he said. It thus appears that there is direct proof that the defamatory matter was published in the presence of Phillips, and there is at least a strong inference that others heard it. In any event, the evidence indicates that by some means it spread over the neighborhood. The instruction did not relate to the measure of damages, but it directed the jury that plaintiff would be entitled to recover, if they believed from the evidence that defendant, at the time alleged in the petition, spoke of and concerning her in the presence of Phillips, *or other persons,* the defamatory words pleaded. In proving a publication, plaintiff was not required to show that the slander was made known to the public generally. For that purpose it was enough to show that it was orally communicated to a single person other than

plaintiff. *Adams v. Lawson,* 17 Grat. (Va.) 250; *McLaughlin v. Schnellbacher,* 65 Ill. App. 50; *Luick v. Driscoll,* 13 Ind. App. 279. Actionable words spoken may be proved by any one who heard them, though it is alleged they were uttered in the hearing of a person named and others. *Bradshaw v. Perdue,* 12 Ga. 510; *Ware v. Cartledge,* 24 Ala. 622, 60 Am. Dec. 489; 2 Greenleaf, Evidence (16th ed.) sec. 414. The injury for which plaintiff demands redress resulted from the publication of the actionable words. If the patrons of her school or others afterward collected in groups and discussed the story that she was crazy and a liar, the fact of the publication became more important than the names of the persons to whom it was told. The code recognizes this principle, and provides that in an action for slander it is sufficient to state generally in the petition that the defamatory matter was spoken of the plaintiff. Code, sec. 131. Under the statutory rule it is not necessary to allege the name of the person to whom the words were spoken. *Ware v. Cartledge* 24 Ala. 622, 60 Am. Dec. 489. To establish her right to recover, plaintiff was only required to prove that the slanderous statements were spoken to a person other than herself. This proof was adduced. If there was a variance between an unnecessary allegation of the petition and the testimony, it was immaterial, within the meaning of section 138 of the code, which declares that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice." It follows that a reversal cannot be based on that part of the instruction permitting a recovery, if the defamatory words were spoken to Phillips or others.

The instruction is also criticised because it contains a ruling that the charges pleaded are actionable *per se.* The petition and evidence show that defendant spoke of plaintiff in her profession of teacher. If his statements were true, she should not be engaged in teaching, and school officers should not employ her. The circulation of

such reports would injure, if not ruin, her professionally. That they are actionable *per se* is not open to controversy. *Lindley v. Horton,* 27 Conn. *58; *Price v. Conway,* 134 Pa. St. 340, 19 Am. St. Rep. 704; *Williams v. Davenport,* 42 Minn. 393, 18 Am. St. Rep. 519; *Danville Democrat Publishing Co. v. McClure,* 86 Ill. App. 432; *Totten v. Sun Printing & Publishing Ass'n,* 109 Fed. 289. The words being actionable on their face, pleading and proof of special damages were unnecessary. *Boldt v. Budwig,* 19 Neb. 739. It follows there is no prejudicial error in the instruction quoted.

Other assignments of error are based on the failure of the trial court to instruct separately upon request of defendant that "calling one 'an unmerciful liar' was not defamatory"; that "to speak of a person as 'crazy' is not defamatory"; that "to speak of a person as 'unfit to teach school' was not defamatory." These requested instructions did not state the law applicable to the issues and the proofs, and were properly refused. The expressions pleaded were actionable *per se,* and plaintiff's evidence tended to show that they were published as alleged. The petition stated, and the testimony on behalf of plaintiff tended to show, that she had been slandered in her profession of teacher, and the rejected instructions disregarded this feature of the case. The trial court properly declined to sever the different phrases or words for the purpose of eliminating from the dismembered parts the sting of slander. There was nothing in the testimony to justify the course suggested by defendant in the requested instructions. While Phillips did not in a single answer to a question repeat on the witness-stand all the words of an entire slander as pleaded, he repeated in several answers all the words constituting both slanders, and testified to facts showing that they were spoken of and concerning plaintiff in a single conversation, as alleged in the petition. This was sufficient proof of the publication of the defamatory expressions attributed to defendant. 2 Greenleaf, Evidence (16th ed.) sec. 414; *Iseley v. Love-*

joy, 8 Blackf. (Ind.) *462. It follows that the trial court did not err in refusing to charge the jury as requested.

A direction to the jury to consider in a limited sense evidence relating to plaintiff's troubles with the school board and the county superintendent is the subject of another assignment. Defendant in discussing the instruction has not specifically pointed out the particular testimoney which, from his standpoint, makes the charge erroneous. In the bill of exceptions there are 759 pages of type-written matter, and they will not be searched on this point, since defendant has disregarded the rule that "each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief." 80 Neb. xi, rule 9, par. *h.* The discussion of some of the other instructions relating to evidence is subject to the same infirmity.

It is further argued that the trial court erred in refusing to instruct, in substance, at the request of defendant, that plaintiff's right of recovery, if any exists, is limited to the words spoken to Phillips. The argument seems to be that plaintiff was permitted to recover for mental suffering and for other elements of damage not traceable to the original publication. Testimony requiring such an instruction is not pointed out in the manner required by the rules of this court, but the instruction requested did not state the law of slander applicable to the present controversy. A defamer is not permitted to speak actionable words to a single person, when others are near, and call upon the court in an action for slander to protect him from the consequences of later publications which naturally result from his act. The rule is that "one who puts a libel in circulation is liable for any subsequent publications which are the natural consequence of his act." *Schmuck v. Hill,* 2 Neb. (Unof.) 79. Whether subsequent publications were the natural consequences of the original slander was a question for the jury. The original publication was fairly proved. That the slander was common report afterward was shown without objection. Plaintiff

was permitted to testify that the publications caused her mental suffering. This was not prejudicial error. *Laing v. Nelson,* 40 Neb. 252. Viewed in any proper light, the instruction should not have been given.

A number of affidavits copied from the record of another suit appear in the bill of exceptions, and defendant insists they were erroneously admitted in evidence. The record, however, shows the objection to their admission was sustained. Of course, he cannot predicate error upon a ruling in his favor.

Defendant also complains because the trial court allowed a witness to testify that defendant, when at the Burlington station in Lincoln, February 9, 1907, published to persons then present statements similar to those alleged in the petition. The defendant was permitted to defend as though the alleged slanderous words were uttered under such circumstances as to make them qualifiedly privileged, and the evidence challenged was responsive to this feature of the case. By an instruction the jury were only allowed to consider this testimony for the purpose of showing malice. The law applicable was recently stated as follows: In an action for slander, the plaintiff may show a repetition by the defendant of the slanderous words both before and after the commencement of the suit to prove the existence of malice. *Bloomfield v. Pinn,* 84 Neb. 472.

Defendant seeks protection from the judgment on the ground that the communications were privileged. This defense is based on the fact that he was a member of the school board which employed plaintiff. The occasion was not a privileged one. Phillips, the person who heard the imputations, lived in another school district and was not a member of any board, court or other tribunal having authority to investigate plaintiff's conduct or qualifications as a teacher, or to remove her from her position or to grant other relief, if the charges made by defendant were true. The store and the public highway, in the absence of school officers, were not privileged places to pre-

fer charges under the circumstances disclosed. It does not appear that Phillips was a magistrate or a commissioner of insanity who should be advised of the conduct and condition of plaintiff in her own interests or for the public good. It is not shown that Phillips was a confidential adviser of defendant. The defense of privilege is not shown in any way. Besides evidence indicating malice was submitted to the jury.

No reversible error has been found, and the judgment is

AFFIRMED.

ALFRED T. STALEY V. STATE OF NEBRASKA.

FILED JUNE 26, 1911. No. 17,105.

1. **Bigamy:** INTENT. In a trial for bigamy under a statute which does not make intent an element of the crime, it is no defense for accused to prove he acted in good faith on advice of counsel that a former marriage to his cousin was void, and that a deputy county attorney threatened him with prosecution for living with her, where such former marriage is valid.

2. **Criminal Law:** APPEAL: ADMISSION OF EVIDENCE. The admission of evidence not prejudicial to accused is not a ground of reversal.

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

George A. Adams and *W. W. Towle,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROSE, J.

In a prosecution by the state, Alfred T. Staley, defendant, was convicted of bigamy, and for that offense was sentenced to serve a term of one year in the penitentiary.

As plaintiff in error, he is now seeking a reversal of the judgment against him.

This is defendant's second conviction for the same offense; the first having been reversed as erroneous. *Staley v. State,* 87 Neb. 539. A statute declares that a marriage in this state between first cousins is void. Comp. St. 1909, ch. 52, sec. 3. Though that relationship exists between defendant and Hettie Bixler, they were married in Council Bluffs, Iowa, in 1907, when they were residents of Omaha. Under the laws of Iowa the marriage is valid there, and consequently it is likewise valid here. *State v. Hand,* 87 Neb. 189. They lived together as husband and wife until February, 1908, when he left her in Omaha, where they were at the time residing. Without procuring a divorce, defendant was married to Pearl Stoner, in Lancaster county, August 7, 1909, though his former wife is still living. These facts and conclusions are not in dispute.

Defendant argues that the conviction should not be permitted to stand for the following reasons: In entering into the second marriage, he did not intend to commit a crime. He believed in good faith that his marriage with his cousin was void, and that a divorce or an annulment of the marriage was entirely unnecessary. He was so advised by three lawyers and conscientiously relied upon their advice. A deputy county attorney of Douglas county told defendant the marriage was void, and threatened him with prosecution if he did not abandon his unlawful relations with his cousin. During the trial defendant offered to prove these facts, and the exclusion of proof offered for that purpose is his principal ground of complaint. Can he excuse his bigamy by showing that he was cowed by the threat of the officer and that in good faith he acted on the advice of counsel? The validity of the marriage with his cousin was a question of law, and not of fact. Ignorance of facts, where there is no criminal intent, often excuses offenses, but this rule does not in general extend to ignorance of the law. That one accused of crime had endeavored to ascertain the law and had been misled

by counsel or a magistrate is not generally a defense. 1 Bishop, New Criminal Law, sec. 294; *State v. Goodenow*, 65 Me. 30; *Weston v. Commonwealth*, 111 Pa. St. 251. This principle applies to offenses against the marriage relation. Bishop, Statutory Crimes (3d ed.) sec. 662; *State v. Goodenow*, 65 Me. 30; *State v. Sherwood*, 68 Vt. 414; *People v. Weed*, 29 Hun (N. Y.) 628. Courts and text-writers recognize the fact that hardships sometimes result from the enforcement of the ancient maxim, "Ignorance of the law excuses not"; but it cannot be abandoned without serious consequences to society. The people in adopting the constitution fully appreciated the possibility that injustice in exceptional cases would result from the enforcement of laws enacted to prevent crime and to punish criminals. To afford protection in such instances was one of the purposes in view when the pardoning power was conferred upon the governor.

That defendant was free from the criminal intent essential to a crime is the principal feature of an able argument in his behalf. The statute denouncing bigamy does not make intent an element of the crime. It provides: "That if any married person, having a husband or wife living, shall marry any other person, every person so offending shall be imprisoned in the penitentiary not more than seven years nor less than one year." Criminal Code, sec. 201. Malice may be implied from a wilful violation of the statute and a reckless disregard of existing marital relations. Both defendant and his cousin-wife testified there never had been any domestic trouble to suggest a separation. There is proof that he knew that she was pregnant when he left her. Under such circumstances he had an accusing conscience when he formed the purpose to abandon her, unless he was devoid of all marital sentiment and of every worthy instinct of paternity. These natural impulses of the human heart ought to have given a warning signal, even if the statutes had been silent on the subjects of bigamy and divorce. To the threatened prosecution in a court of justice, his valid

marriage would have been a complete defense. If, however, he was intimidated by threats of prosecution, he could have lived apart from his wife in safety during the time required for the determination of his social status in a court of justice. The state is interested in the consequences of the relation created by marriage. *Willits v. Willits,* 76 Neb. 228. For the good of society and for the protection of the family, marriage is carefully guarded by law. After becoming the husband of his cousin, his obligations to her, to his unborn child, and to society required care and diligence on his part before leaving his wife and marrying again without a divorce. He knew it was at least doubtful whether the marriage was void. Otherwise he would not have asked the advice of counsel. The deputy county attorney was the prosecuting officer of the state, and not the attorney for defendant. Counsel may give advice, but the duty of adjudicating whether a marriage is void is a function of the courts. Lawyers and laymen alike know this. In civil controversies involving property rights only, individuals often refuse to act without an order of court; but, if the evidence on behalf of the state is believed, defendant, on the mere advice of counsel that his marriage was void, was willing to abandon his wife as an adulteress and leave her with the prospect that she would become the mother of a bastard child. The obligations of one who has voluntarily entered into the marriage relation require a greater degree of care than that exercised by defendant. He acted on the advice of counsel at his peril, and under the law it is no defense in this case.

It is further insisted that the state was erroneously permitted to introduce testimony that a child was the issue of defendant's marriage with his cousin. Defendant himself testified to that fact, and it is perfectly plain on the face of the record that he was in nowise prejudiced by such proof in his attempt to establish the defense already outlined.

It is suggested, further, that the court erred in admit-

ting in evidence an Iowa statute showing that it is not unlawful for cousins to marry in that state. An examination of the record shows that the ruling assailed is sanctioned by former holdings of this court. No prejudicial error has been found, and the judgment is

AFFIRMED.

SEDGWICK, J., took no part.

OTTO HEINK, APPELLEE, V. THEODORE F. LEWIS, APPELLANT.

FILED JUNE 26, 1911. No. 16,501.

Evidence examined and set out in the opinion *held* insufficient to sustain the verdict of the jury.

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

Martin Langdon and *Howard B. Smith,* for appellant.

Charles W. Haller, contra.

FAWCETT, J.

Plaintiff alleges that on or about February 17, 1906, he made an oral agreement with defendant that plaintiff should take charge of a certain brewery at Crete, Nebraska, and perform the duties of superintendent, manager, and brewmaster, and receive from defendant $75 a month therefor, which amount defendant agreed to pay; that he duly performed his part of the agreement and worked steadily from said date until January 1, 1907, when it was orally agreed between plaintiff and defendant that plaintiff should receive from defendant for said services $125 a month, which defendant agreed to pay, and that plaintiff fulfilled his part of said new agreement

until June 17, 1907; that defendant paid to plaintiff on account of the foregoing $75, $35 and $10; that during the year 1906 plaintiff at the oral request of defendant furnished money in the payment of help at said brewery and at a new one then building, and to pay for materials, in the sum of $750, no part of which has been paid. The answer denies all of the allegations of plaintiff's petition, and alleges "that the Western Brewing Association, the brewery referred to in plaintiff's petition, is a corporation duly organized according to the laws of the state of Nebraska, and located at Crete, Saline county, Nebraska;" that said association leased the old brewery from the estate of one Kobes; that plaintiff was chief promoter of said brewing association and became its president and was a stockholder and director of said brewing association; and that "(9) this defendant further states that he was not the owner of said brewery, and that he had no interest in the same, except as a stockholder; that he was not authorized by said association, nor did he have any authority, directly or indirectly, to hire any party or parties, as superintendent, brewmaster or otherwise, to work for said brewing association." The reply denies paragraph 9 of the answer, and denies that plaintiff was the chief promotor of said association. The jury returned a verdict for plaintiff for $500, upon which judgment was entered, and defendant appeals.

Some minor questions are discussed in briefs of counsel, but, having reached the conclusion that the judgment must be reversed for the reason that it is not sustained by the evidence, such other questions need not be considered.

The record shows that on June 1, 1905, plaintiff, Otto Heink, together with P. A. Gavin and A. L. Knabe, organized and incorporated the Western Brewing Association of Crete, Nebraska. The articles of incorporation provided that its capital stock should be $100,000, to be divided into shares of $10 each; "said capital stock when subscribed for and issued shall be fully paid and non-

assessable." Of this capital stock 1,700 shares were issued to Mr. Heink, who was made president of the association, and 1,700 shares to Mr. Gavin, who was made secretary and treasurer. Just how much was issued to Mr. Knabe, who was made vice-president, is not shown. Neither Heink nor Gavin paid anything for their stock. Subsequently Knabe was substituted as treasurer, and Gavin became vice-president, in addition to his secretaryship. All three became directors, and, so far as the record shows, continued as such unless Mr. Lewis, when he later became a member of the association, succeeded Mr. Knabe in that capacity. The evidence upon this point is not very clear. It is clear, however, that Heink and Gavin were directors from start to finish. The original incorporators having paid nothing for their stock, there was no money in the treasury, so that it was a corporation on paper, but without funds. Mr. Knabe was a friend of defendant Lewis, and occupied the same office with him in the New York Life Building in Omaha. At the beginning of their business career Mr. Knabe and Mr. Gavin, who seemed also to have been acquainted with defendant, borrowed money from him from time to time. Among other sums they borrowed $2,500 with which to furnish a site for a brewery, and gave him therefor the association's note. Instead of building a brewery, they finally decided to lease the Kobes brewery at Crete, after which they entered upon the brewery business and also conducted a saloon in that city. After they had been borrowing for some time, Heink asked Mr. Knabe from whom they were borrowing money, and finally about July 1, 1906, Heink was introduced to Mr. Lewis by Knabe. Mr. Knabe testifies to this positively, and says that Heink had never met Lewis prior to the time of this introduction. Shortly thereafter, the exact date not being shown, defendant was induced to purchase a block of the association's stock, for which he paid into the association $5,000 in cash. The brewery burned in June, 1907, and the books of the association were burned in that fire. Plaintiff does not testify as to

the proceeds of sales of beer. Gavin, who, according to the testimony of plaintiff, was to receive $100 a month as business manager, was unable to state the amount of such sales. Knabe testified that as treasurer he went over the books with the plaintiff, and that the books as made up by plaintiff showed that plaintiff had received from sales of beer about $6,900. This, with the $5,000 cash paid in by defendant for his stock, made $11,900. This was not sufficient, however, to keep things going, so the association borrowed $6,000 more from defendant, making $11,000 in all that defendant paid into the treasury of this association. Plaintiff testified that between July, 1905, and February 17, 1906, he and Gavin and defendant met on numerous occasions in Omaha and Crete "and talked and planned about engaging in the brewery business at Crete." According to his statement, these interviews began a month after the corporation had been formed, and ended nearly five months before Knabe says Heink and Lewis had ever met. Plaintiff further testified that on or about February 17, 1906, the three met again in the office of the association in Crete, and that it was there mentioned that the income from the business would not be sufficient to pay plaintiff and Gavin, and that they both stated that they would have to have money for their services, or "we could not live;" that defendant then said, " 'Of course, you two men have families to support, and I will pay your salaries out of my own pocket.' He, Lewis, at that time, agreed to pay me out of his own means $75 a month for my services as superintendent and brewmaster of the business, and to pay Patrick Gavin $100 a month for his services as manager of the business. Under this promise of Lewis I went to work." If the testimony of Knabe be true, then plaintiff commenced to work 4½ months before he had ever met defendant. Plaintiff says that he continued to work under that agreement until January 1, 1907, when he told Lewis that he had an offer of $125 a month from a brewery at Wilber; that unless his salary was raised he would quit and

go there; that Lewis then agreed to pay him $125 a month for his services, and that under this oral agreement he worked steadily from January 1, 1907, to June 17, 1907. He testifies that the only money he ever received from Lewis was $75, $35 and $10, or a total of $120, covering a period of time when, according to his testimony, he would have earned from Lewis nearly $1,500.

Keeping in mind the declaration which he said he made to defendant that he would have to have money for his services or he could not live, we are next met with the remarkable testimony by plaintiff that defendant told him in January, 1906, which was before the company had commenced to do business, that if he, plaintiff, would advance moneys for work, labor, material, and expenses in the business and construction work, as the payments came due, defendant would personally pay back all the money he had so advanced, and that, pursuant to that agreement, he advanced from time to time in 1906 and 1907 $750. The first time, according to his testimony, that he made any demand upon Lewis to pay him the salary which had been accruing was in December, 1906, at which time he says defendant told him that when he sold his Dakota and Kansas land "he would pay me, and pay me everything back." He further testifies that on January 10, 1907, defendant showed him all the papers in his proposed land deal in Dakota and Kansas; that these papers were already made out to transfer the property; that defendant then told him that when he got the money from these lands he would pay him. He testifies: "I told him that I would not wait any longer, and went out. He came and called me back into the office, and told me if I would stay he would pay me, and also pay me extra for the trouble I had been put to." He also testifies that Knabe and Gavin were there at the time. Knabe flatly denies any such conversation. Weber, a man who worked at one time for the association, testified to having two interviews with Lewis in Omaha in March or April, 1907. He says: "I telephoned Lewis, and he said he was ready to close the land deal and he was to come down and

pay us off;" that by "us" and "we" he meant Heink and himself. He further testified that the work he did was for the association; that the association paid for part of his services, and Lewis promised to pay the rest of it, if he stayed; that President Heink paid part of his services; and on redirect he was asked, "Do you know from whom all the money came," to which he answered, "Most money came from the bar and saloon up in town." Gavin testified that he was present when Lewis and Heink talked about Heink's salary as brewmaster about April, 1906, and in January, 1907; and that "Mr. Lewis told Mr. Heink that he would pay his wages and not wait for results, or returns. Q. Can you give the exact language? A. That is all I can. I can only say what Lewis said, that he would pay his wages, $75 a month, and that was very distinct." He fixed the date of the second conversation as very early in January, 1907, at which time he says Heink came down to Omaha and wanted his wages; that the interview was in Mr. Lewis' office; that Mr. Lewis answered him "and said he did not have the money just yet, that he had papers made up;" that he said, "I will pay you as soon as I sell this land of which I got the papers ready," and that he showed them the papers. He also testifies that at the time Heink was talking about leaving Mr. Lewis said, "Mr. Heink, I cannot afford to have you leave me now at any price, and I will give you $125 if you will stay, because it will ruin me if you should quit now;" that that conversation was in the early part of January, 1907. He also testifies that neither he nor Heink got any salary from the brewing association; that they paid out the money they took in for help and material, and did not retain anything for themselves.

For the defense, defendant himself denied ever having in any manner agreed to pay the salaries of Heink or Gavin out of his personal funds. He admits that he was present at some of the times testified to by Gavin, but positively states that he made no promises to pay personally any of those accounts; that he subscribed

$5,000 for stock and paid the same in full, and that he paid that money to the association; that during all of the time Heink was in the absolute control of the brewing association at Crete; that there was a saloon connected with the brewing association; that he never collected any of the money that came into that saloon; that he borrowed money on his farm in South Dakota to the amount of $4,000 and turned that over to the association; that the whole amount he turned in would reach the sum of $11,000, $5,000 of which was for stock and the other $6,000 a loan; that the talk between himself and Heink and Gavin was that they should receive their salaries from the income of the brewing association at Crete. "Q. What did they say to you about getting their salaries from the brewing association? A. I was furnishing money to the brewing association. I was trying to raise some money. I told them as soon as that money was raised I would pay it into the association and they could be paid. That was all there was to it. That is the whole conversation that occurred between us." These statements by Mr. Lewis are fully corroborated by Mr. Knabe, who also testified that Heink never at any time intimated to him that Lewis was to pay his salary; that at the time Heink had the proposition from the brewery at Wilber they talked the matter over, and Heink said he had been offered a salary of $125 a month, "and he said in the same conversation that he did not like to accept that salary, inasmuch as he had been connected with this brewing association, and had been one of it, and I told him that I did not think it would be right for him to do that, and he said he did not think so either. So he said, however, that instead of accepting that salary which they had offered at Wilber, if the brewery at Crete could pay him $75 a month he could get along, and he would get along and continue as brewmaster;" that at that time witness was vice-president. He says further: "I told him that, if it was satisfactory to him, to accept the $75 a month, that I thought that the brewing company would pay him

that amount, and that I would at once send him his half-month's salary, which I did. I sent that to him myself." He then testified that he purchased a draft at the United States National Bank for $37.50 for the half-month's salary and sent it to plaintiff; that in two weeks from that time he sent him another draft from the same bank for a like sum. He also testifies that the $75 and $35 and $10 which plaintiff claims to have received from Lewis were sent to plaintiff by the witness, the $75 in the two drafts above noted; that he gave him $35 in cash at another time, and sent him a check for $10, which check was introduced in evidence, and that this money was sent to him on the part of the Western Brewing Association; that Heink had charge of the brewery and collected all of the moneys, with one or two exceptions, when Mr. Gavin made the collections and deposited the same in the bank; that the $750 deposited in the bank by Heink was money which Heink had collected from the sale of beer, and that Heink never at any time told him that he had advanced $750 of his own money for the benefit of the association; that he had a number of conversations with plaintiff about his salary, and that plaintiff at all times expressed himself as satisfied with the arrangement. He testifies: "He was still satisfied that the business was going along all right, and in the end it would be a profitable business for him and for all of us. * * * He never mentioned anything to me that he was dissatisfied. * * * He was not so much interested in the salary as he was in the business, that the business would be a success, that the brewing company would be a success. He was not so much interested in the salary. * * * Q. Did he in any of those conversations make any claim that Mr. Lewis should pay his salary, or at any other time? A. No, sir; never. Q. But it was to come from the brewing association? A. Certainly;" that plaintiff worked for the association until May or June, 1907. "Q. And that was, as you testified, $75 a month? A. Yes; that is the arrangement we had. He talked to me about it and said he had to have some-

thing to live on, and I told him I thought that the company might be able to spare that much out of the business, and afterwards I talked with Mr. Gavin about it. It seemed to be agreeable to everybody, to both Mr. Gavin and I." The witness was then shown two papers purporting to be copies of the minutes of two meetings of the company, one dated July 10, 1905, and the other November 18, 1905, each of which recited that the directors present were "P. A. Gavin, Otto Heink, T. F. Lewis." He was asked if they were in his handwriting. He answered that they were, but testified that Lewis was not present at those meetings; that those copies were drawn at the request of Mr. Gavin, who stated that he wanted to use them in connection with a case at Wilber where the brewing company had a suit, and that he made them as suggested by Gavin; that Gavin dictated the form; that they were not correct copies of the minutes so far as Lewis was concerned, as "he was not there;" that he did not copy them from any book or from any writing of any kind, but prepared them in the form desired by Mr. Gavin. These papers were received and read in evidence. Mr. Lewis was recalled and testified that he was not a director at any time during 1905, that he was not present at either of the meetings referred to in the two exhibits, and that he never at any time paid any money to plaintiff on his salary as brewmaster of the association. Mr. Gavin, being recalled by plaintiff, testified that the two exhibits referred to were prepared to show in court at Wilber that the corporation was in existence; that they were made from a copy of the minute book; that the testimony of Mr. Knabe that he, Gavin, suggested the contents of the exhibits was not true; that Knabe got the contents of exhibits 4 and 5 from the minute book of the association; that Mr. Lewis was present at the two meetings of July 10, 1905, and November 18, 1905; that the others present were Heink and himself; that Lewis was always in the company from the very start.

The above, in substance, is the testimony given upon the trial, and it is now insisted by plaintiff that this tes-

timony was conflicting, that there is ample testimony for the plaintiff to sustain the verdict, and that this court cannot disturb the same. So far as the oral testimony of the witnesses for the respective sides is concerned, this contention is sound, and, if the case had to stand upon this testimony alone, the judgment of the district court would have to be affirmed; but there are facts and circumstances established by the evidence given by plaintiff and his witnesses which thoroughly impeach their testimony, viz.: (1) Plaintiff who, as a foundation for his claim, testified that he told defendant that he would have to have a salary or he could not live, according to his own testimony continued to work from February 17, 1906, to June 17, 1907, until he had earned nearly $1,500 in salary, and during all that time received from defendant only $120. (2) Without any money to pay for his stock, and without any money to live upon while performing the services as brewmaster, he claims to have advanced $750 in cash for the association. (3) That defendant, after paying the $5,000 in cash for stock, and after having loaned the association $6,000 in money in addition thereto, agreed to pay out of his own private funds the salary of the two highest priced officials in the association. This testimony is so incredible and so contrary to every human probability as to carry with it its own refutation. It is beyond belief that any man of sufficient business ability and sagacity to accumulate an estate which would enable him to advance $11,000 to this association would in addition thereto enter into so improvident and absurd an arrangement; and this, too, in the face of the fact that he must have known that, as testified by Mr. Gavin, the association was then taking in about $400 a month for the sale of beer. The injustice of this claim is too patent to be overlooked by this court. The testimony of the witnesses, when considered in the light of the facts and circumstances disclosed in the record before us, satisfies us that plaintiff and Gavin and Knabe organized this brewing association purely upon "high finance" lines. They organized it without money, first borrowed

money from defendant, then induced him to become a member, obtained all the money possible from him, amounting to $11,000, collected all the money from the sale of beer, amounting to nearly $7,000 more, and now, after the brewery has been destroyed by fire and their high finance bubble thereby exploded, they seek to fasten upon defendant compensation, under the guise of wages, for the period of time when they were conducting the affairs of this association, which, as testified by Mr. Knabe, at that time had "nothing except prospects." We think the facts and circumstances above outlined, together with the testimony of defendant and of the witness Knabe, when viewed in the light of reason and common sense, completely outweigh the testimony given in support of plaintiff's claim, and that Mr. Lewis stated the whole case in a nutshell when he testified, "I was furnishing money to the brewing association. I was trying to raise some money. I told them as soon as that money was raised I would pay it into the association and they could be paid. That was all there was to it. That is the whole conversation that occurred between us." Moreover, it is incredible that plaintiff, who, according to the uncontradicted testimony, had sole charge of the business at Crete and collected nearly $7,000 from the sales of beer, would, in his impoverished condition, go from February 17, 1906, to June 17, 1907, without using any portion of the moneys received from such sales, as his own compensation, when all that he had received from both defendant and Knabe during all that time was the pittance of $120. We are satisfied that the jury never took into account the strong corroboration of defendant's testimony by .the facts and circumstances above outlined. Had it done so, it seems clear to us that they never would have arrived at the verdict returned in this case. Even though the oral testimony in a case be sufficient to sustain the verdict of the jury or a finding by the court, when such verdict or finding is so at war with common experience and surrounding circumstances as to render it unworthy of belief, an appellate court is not bound by such

verdict or finding, and will not hesitate to reverse the same. *Richardson v. Richardson*, 45 Ill. App. 362.

This court is ever loath to interfere with the verdict of a jury which is based upon competent evidence and has received the approval of the district court; but, where an examination of the oral testimony presented, and of the undisputed facts and circumstances surrounding the transactions testified to, satisfies us that such verdict is unjust, and that the jury must have arrived at their verdict by considering the oral testimony alone, to the exclusion of such facts and circumstances, it is our duty to interfere and grant a new trial.

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

REVERSED.

JOHN EVERSON, APPELLANT, V. JAMES M. HURN ET AL., APPELLEES.

FILED JUNE 26, 1911. No. 16,512.

1. **Wills:** CONTEST BY INFANT: ATTORNEY'S FEES. Where an infant son has been disinherited by the will of his father, deceased, it is proper for the mother or other near relative to institute proceedings in the interest of the minor to contest such will, and to employ counsel therefor; and in the event of such contest proving successful the estate acquired for the minor thereunder is properly chargeable with a reasonable compensation for the services of the attorney in such proceeding.

2. ———: ———: ———. But where in such a case the persons employing such attorney agree with him that he shall receive for his services in that behalf one-third or one-half of the recovery in such contest proceeding, such agreement will not be sustained and the estate recovered for such minor charged therewith, unless it appears that such proportion of the recovery does not exceed a reasonable compensation for the services so performed by such attorney.

3. **Infants:** ATTORNEY'S FEES. And in such a case it is the duty of the court, even if no defense is interposed in behalf of such minor,

on its own motion, to protect the interest of such minor by refusing to permit a recovery for more than a reasonable compensation for the services so rendered by such attorney.

4. Attorney and Client: RIGHT TO MORTGAGE: INFANTS. And where in such a case it appears that such contest was compromised for $1,500, and that the attorney received in consummation of such agreement a mortgage aggregating in principal and interest $1,215 and a note for $285, and that by the terms of the settlement of such contest it was agreed that said mortgage was to be the property of the minor, and that the attorney was to receive the proceeds of said note for $285 as full compensation for his services, and that said note upon its maturity was paid to said attorney, his possession of such mortgage is simply as attorney for said minor, and he does not, by such possession, become vested with any interest therein, nor does he thereby acquire any right to maintain, in his own name, a suit for the foreclosure of such mortgage.

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

John Everson, pro se.

J. G. Thompson and *Thomas & Shelburn, contra.*

FAWCETT, J.

Plaintiff is a practicing attorney. Lee C. Willits was the father of defendant Edward L. Willits, who is a minor five years of age. The father departed this life, testate, in September, 1907. Prior to his death he had been divorced from his wife, the mother of Edward L. By his will he disinherited his infant son. The will named defendant Conklin as executor, who duly qualified as such. Among the assets which came into the hands of the executor was a mortgage for $1,200 executed by one Hurn and his wife. Hurn subsequently sold the property covered by the mortgage to defendant Dow, he assuming and agreeing to pay the mortgage debt. Dow was appointed guardian for the infant defendant, Edward L. Willits. After the death of Willits, Sr., plaintiff was employed by one Simpson, grandfather of Edward L. Willits on his mother's side, to

contest the will of Lee C. Willits, the mother of the infant defendant consenting thereto. It is alleged by plaintiff that when he was so employed by Simpson it was understood and agreed that he was to receive for his services from one-third to one-half of the recovery in such contest. Plaintiff filed objections to the will in the county court, but on the hearing offered no evidence in support of his objections and the will was sustained by that court. Thereupon plaintiff appealed the contest proceeding to the district court. Before any hearing was reached in that court, the contest instituted by plaintiff was compromised and settled between plaintiff, acting for the minor, and the executor and his attorneys, acting for the estate of Lee C. Willits, and the determination of what constituted the terms of that settlement determines this case. The amount which the executor and his attorneys agreed to pay in such settlement was $1,500, which was paid to plaintiff by delivering to him the mortgage above referred to, upon which there was $15 accrued interest, and the personal note of Dr. Conklin, the executor, for $285.

After this settlement had been made, plaintiff claims that the grandfather, Simpson, and the mother of the minor called at his office, and it was then and there agreed that of this $1,500 Edward L. Willits should have $800 with accruing interest thereon, and that plaintiff was to have the other $700 with interest accruing thereon; that plaintiff was to hold the mortgage and collect the same and then pay over the $800 and the interest so agreed upon as the portion of Edward L. Willits. The $285 note given by Dr. Conklin was to run for 60 days, and was paid by him to plaintiff at its maturity. The mortgage was allowed to run for a year or so, and when plaintiff demanded payment thereof from Dow payment was refused upon the ground, as stated by Mr. Dow, that plaintiff had already been paid more than his services were worth. Plaintiff thereupon, in his own name, instituted the present suit to foreclose the mortgage, setting out substantially the facts above recited, and praying that the

mortgage be foreclosed, the property sold and the money distributed in the proportion as contemplated by his agreement with Simpson and the mother of the infant defendant. Defendant Dow answered, admitting his agreement to pay the note secured by the mortgage and that the same had not been paid, and alleged that he was ready and willing to pay the same, but had received notice that plaintiff was not the legal owner and had no interest in said note and mortgage. J. G. Thompson, Esq., as guardian *ad litem* for the minor defendant, Edward L. Willits, answered, alleging that said minor defendant "is the owner of said note and mortgage," and denied all other allegations in the petition. The reply was a general denial. Upon a trial to the court, the court found that the minor defendant, Edward L. Willits, is the owner of the note and mortgage, and that plaintiff has no interest therein, dismissed plaintiff's suit, and entered a decree of foreclosure in favor of the minor defendant, Edward L. Willets. Plaintiff appeals.

Several questions are strenuously argued by plaintiff in his brief, but, as the judgment of the trial court must be affirmed upon one controlling point, we deem it unnecessary to consider any of the other questions presented. When the settlement of the contest was made, the executor turned over to plaintiff the note and mortgage above described. Plaintiff testified substantially to the matters set out in his petition, and upon cross-examination expressly denied that the $1,200 mortgage was to be the sole property of the minor, Edward L. Willits, or that he (plaintiff) was to accept the $285 note as full compensation for his services. For the defendants, J. G. Thompson and Gomer Thomas, the attorneys who represented the executor in the will contest, and the executor himself, Dr. R. E. Conklin, all three testified that by the terms of the settlement of the will contest the $1,200 mortgage was to go to the minor, Edward L. Willits, and that plaintiff was to look to the excess over that mortgage for his services in the litigation then concluded; that, instead of re-

ceiving such excess in cash, he took Dr. Conklin's note for $285, due in 60 days, which note was at its maturity paid to plaintiff by Dr. Conklin. It was upon this testimony that the trial court found that plaintiff had no interest in the note and mortgage. In this we think the trial court was right. The agreement of the grandfather and mother of Edward L. Willits to pay plaintiff one-half of the amount recovered, or within $50 thereof, could not bind the minor, unless it were established by a preponderance of the evidence that such an allowance for attorney's fees was reasonable. While it was perfectly proper for the grandfather and mother of the minor to institute proceedings to contest the will of Lee C. Willits in the interest of his minor son, who had been disinherited by him, they could not bind the minor, or any estate which he might acquire through such contest proceedings, for anything more than reasonable compensation to the attorney so employed; and it is the duty of the court in such a case, where proceedings are instituted to recover for services so performed, even if no such defense is interposed, on its own motion, to limit the recovery of the plaintiff in such a proceeding to a reasonable compensation for the services rendered. The evidence shows the services performed by plaintiff, and that he had been paid the sum of $285 therefor; and by a clear preponderance of the evidence it was established that he agreed to accept that sum as full compensation for such services. It was likewise established by a clear preponderance of the evidence that he accepted the note and mortgage in controversy, as attorney for the minor, Edward L. Willits, and that in receiving such mortgage there was no understanding and agreement by any one authorized to so bind the defendant Edward L. Willits, that plaintiff should have any interest in such mortgage.

It follows that in holding that plaintiff had no interest in the note and mortgage in controversy and in dismissing his action the district court was right, and its judgment is

AFFIRMED.

WILLIAM J. AINLAY V. STATE OF NEBRASKA.

FILED JUNE 26, 1911. No. 17,002.

1. **Criminal Law:** ADMISSION OF EVIDENCE: HARMLESS ERROR. "The reception of incompetent evidence tending to establish a certain fact is not prejudicial error when the same fact is conclusively established by competent evidence." *Fike v. Ott*, 76 Neb. 439.

2. ———: WITNESSES: EXAMINATION: DISCRETION OF COURT. "How far, if at all, a party shall be permitted to cross-examine, or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624.

3. ———: EVIDENCE. In a prosecution for gambling, where the case for the state rests largely upon the testimony of witnesses who have been guilty of a like offense, and the court properly instructs the jury as to the weight to be given the testimony of such witnesses, and the testimony given by such witnesses is sufficient to sustain the verdict of the jury rendered thereon, the verdict will not ordinarily be disturbed in this court, even though such testimony be contradicted by the accused.

ERROR to the district court for Gosper county: ROBERT C. ORR, JUDGE. *Affirmed.*

E. T. Grunden and *Ritchie & Wolff*, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

FAWCETT, J.

Defendant was convicted in the district court for Gosper county of the crime of gambling, and sentenced to pay a fine of $150 and costs of prosecution, from which he prosecutes error to this court.

The giving of instruction No. 7 is assigned as error upon the ground that "there is absolutely no evidence to justify, or even excuse, submitting such an issue." By

this instruction the jury were told: "If you find from the evidence in this case that the defendant has endeavored to prevail upon any witness to abscond, or has procured his absence, or has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution, such conduct on the part of the defendant is an incriminating circumstance to be weighed by the jury in determining the question of his guilt." Plaintiff was accused of gambling in the house of John Collier. Collier was himself arrested for keeping a gambling house, pleaded guilty and paid a fine. Immediately thereafter, and while a warrant was out for defendant, Collier and his son, Walter, suddenly left Elwood. The county attorney had a subpœna issued for them, but it was returned unexecuted. The evidence of young Collier shows that he and his father went first to Holdrege, where they saw defendant, and then to the town of Funk, arriving there shortly before noon. They put up at the hotel, where they had dinner, supper and lodging. In the morning they were advised that they were wanted at the telephone. Young Collier answered the call. He testified that the substance of the call was that they "had better come back to Holdrege," because the party thought they "would be subpœnaed on the case." The testimony of the father and of the hotel-keeper is that the two Colliers left before breakfast. They started on foot and walked about four miles, when they were met by defendant in a buggy, who took them to Holdrege and to his home, where they remained that day and night, and then went to the town of Wilcox, where they remained from one to two days, and then returned to Holdrege. When asked why they went to Wilcox, young Collier answered, "Because we wanted to go there." No other reason is given for their trip to Holdrege, Funk or Wilcox. When asked if he was surprised when defendant met him with the buggy, he answered: "No." "Q. So you were expecting to see him, were you? A. Yes, sir. Q. He told you that he would meet you with a

team, didn't he? A. I think it was stated that he would." When they got back to Holdrege from Wilcox, they learned that defendant's preliminary examination was over, and they then returned to Elwood. We think this evidence was ample to warrant the giving of instruction No. 7. Counsel objects to this instruction for the further reason that the court told the jury that such conduct on the part of the defendant "is an incriminating circumstance to be weighed by the jury in determining the question of his guilt." It is argued that this submitted only the question of defendant's guilt, and not that of his guilt or innocence. In other words, that the words "or innocence" should have been added. We think this criticism is without merit. The words "in determining the question of his guilt" are tantamount to saying "in determining the question as to whether or not he is guilty."

It is further urged that the court erred in permitting the county attorney, while upon the stand as a witness, to testify that he went to the telephone office in Elwood and examined the record of calls from Elwood to defendant at Holdrege on the afternoon of February 20, the day the Colliers first reached Holdrege, and that the book in the telephone office for that date showed a call to defendant at Holdrege from one McDonald, who it is claimed participated with defendant in the poker game for which defendant was being prosecuted. We think this evidence was improperly received, but its admission was not error, for the reason that this same matter had already been properly shown by the operator in charge of the telephone office on that day. *Fike v. Ott,* 76 Neb. 439.

Instruction No. 5 is objected to for the reason that it submitted the issue that "defendant did unlawfully play a game of cards for * * * other property of value." It is urged that this is wholly unsupported by evidence; that this instruction permitted finding defendant guilty of playing with any person; that its first paragraph reads, "Milton Winslow *or* other persons," while the information charges him with playing with "Milton Winslow *and*

with others to affiant unknown." This contention is not worthy of serious consideration.

The trial court is severely arraigned by counsel, who states in his brief: "The action of the court at 1489 in intimidating the witness and conveying to the jury his desire that they convict." The witness upon the stand was troubled with a very defective memory. To nearly every question asked him he answered that he couldn't remember. The record shows: "Q. Did you play poker during that time—the year 1908—or any other card game for money with Mr. Milton Winslow or William J. Ainlay? A. Not that I remember of. Q. Did you or did you not? A. I can't recollect. I don't remember. Q. I want an answer to that question, one way or the other. (Witness hesitates.) 1489. The Court: I want you to answer that question. You may take all of the time you want to think it up." This is the language used by the court which causes counsel to say that the court was trying to intimidate the witness and to convey to the jury his desire that they convict. The action of the court at 1491 and 1492 is also assailed. After the court had told the witness at 1489 that it wanted him to answer the question, but that he might take all the time he wanted to think it up, the record proceeds: "Well, I can't remember. 1490. That is not the answer. Will you say that you did or did not in Collier's place or house in Elwood, Nebraska, during the year of 1908, play cards or a game of poker or any other game for money with Milt Winslow or William Ainlay? Now, answer that question by yes or no." This was objected to, when the court said: "Now, I want you to answer that question." Counsel excepted to this statement of the court. By the witness: "Well, I can't answer it by yes or no, because I don't remember. Q. I insist on getting an answer to that question before he leaves the witness-stand. The Court: Have you any further answer to make to that question?" He was then asked by counsel for the state to say yes or no, when he answered: "I can't when I don't know."

This closed the incident. It is trifling to urge that the court was guilty of any misconduct in what we have just narrated.

In attempting to make out the case for the state, counsel was obliged to rely upon witnesses friendly to defendant, and who, the evidence fairly indicates, were in the habit of engaging in "games" themselves, and in the course of their examination he subjected them to what would ordinarily be termed quite rigid cross-examination. This is strenuously objected to; but under the peculiar conditions surrounding this case we do not think the court abused its discretion in that regard. The question as to how far, if at all, a party shall be permitted to cross-examine or put leading questions to his own witnesses where they appear to be hostile or unwilling is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624; *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Welsh v. State,* 60 Neb. 101.

The petition in error contains over 800 other assignments of error, which time forbids considering in detail. Suffice it to say that we have carefully read the entire record and the briefs of counsel, and are unable to discover any reversible error in the rulings of the court upon the trial.

Finally, it is urged that the verdict is not sustained by the evidence. The conviction in this case rests quite largely upon the testimony of one Harry Sugdon, who admitted that he had been arrested for running a gambling room, and that the county attorney had promised him that, if he would testify in this case against the defendant, he would not be fined or imprisoned. Defendant positively denied the testimony of Sugdon, but the latter is corroborated to a considerable extent by other witnesses in the case, as well as by the action of defendant in aiding the Colliers to keep away from Elwood until after the preliminary examination. In charging the

jury, the court properly advised them as to the weight to be given to the testimony of the witness Sugdon, in the light of the admissions made by him as above outlined; and also carefully advised them as to the weight of the testimony of any witness who claimed to have played for money with the defendant. The jury, with these matters fully explained to them, found the defendant guilty, and we are unable to say from the record before us that their verdict is not sustained by sufficient evidence.

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

AFFIRMED.

MATILDA STRUBLE, APPELLEE, V. VILLAGE OF DEWITT, APPELLANT.

FILED JUNE 26, 1911. No. 16,235.

1. **Appeal:** LAW OF THE CASE. Upon the first trial of the case defendant objected to an instruction given by the court, and prepared and offered an instruction in lieu thereof. Upon appeal this court reversed the judgment for error in the instruction given, and in refusing the requested instruction. Upon a second trial the court gave the instruction formerly requested by defendant and approved by this court. *Held*, That upon second appeal of the same case this court will not reverse the judgment because of alleged error in said instruction.

2. **Damages:** INJURY TO MARRIED WOMAN. A married woman who is accustomed to receive compensation for services rendered and work performed for others than her own family may contract for medical services or other necessaries for herself and family, and in an action by her to recover damages for personal injury it is not error to instruct the jury that she can recover "such amount as she has necessarily expended for medical care," and that they should include "such reasonable charges as she has incurred and become obligated to pay."

3. **Evidence:** NONEXPERT EVIDENCE: PERSONAL INJURY. Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe,

and such witnesses may testify whether a person who has been injured, and with whom they were familiar, appeared to be suffering pain, the appearance of her injury, and similar matters observed by them tending to show the nature and extent of the injury.

4. **Damages:** PERSONAL INJURY: QUESTION FOR JURY. When the evidence is conflicting as to whether physical conditions existing some time after a personal injury were caused or affected by such injury, the question should be submitted to the jury upon all of the evidence.

5. **Witnesses:** CONFIDENTIAL COMMUNICATIONS. When part of a confidential communication between physician and patient is put in evidence by one party, the other party may give the whole communication "on the same subject." The trial court must determine whether the evidence offered is on the same subject, and its ruling will not be regarded as erroneous unless there is a clear abuse of discretion.

6. **Municipal Corporations:** DEFECTIVE SIDEWALKS: CONTRIBUTORY NEGLIGENCE: DIRECTING VERDICT. In an action against a municipal corporation for injuries sustained by a fall upon a defective walk, the fact that the person injured had passed over the same walk several times before the accident, and might have avoided the danger by taking another way, and was in a delicate physical condition, and was carrying articles which made it more difficult to avoid the accident, will not constitute such evidence of contributory negligence as to require a peremptory instruction for the defendant.

7. **Damages:** EVIDENCE. A verdict for $25 for "medicine, doctor's bills and nurse's bills" will not be set aside as unsupported, although there is no evidence that any nurse's bills have been incurred, the evidence being sufficient to support a verdict in that amount for "doctor's bills" incurred.

8. ———: ———. A verdict for $200 for "permanent injuries" will not be set aside as unsupported if the evidence justifies a finding of damages in that amount for injuries sustained as alleged.

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

Ralph D. Brown and *Venrick & Green,* for appellant.

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

SEDGWICK, J.

The plaintiff obtained a verdict and judgment in the district court for Saline county against the defendant for damages resulting from a fall upon a defective walk in the defendant village. The defendant has appealed.

1. The first contention of the defendant is that the court erred in giving the following instruction: "The defendant is not required to have the sidewalks so constructed or maintained in such condition of repair as to secure absolute immunity in using them, nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution." The criticism is that the jury should not have been told that the village was required absolutely "to see that its sidewalks are reasonably safe," but the village is only required to use reasonable diligence in that regard. If the instruction complained of was the only one defining the duty of the village there might be some ground for this criticism. The court, however, correctly instructed the jury as to the necessity of notice to the defendant of the defective condition of the walk, or circumstances which would imply such notice, and that the plaintiff could not recover unless the jury also found from the evidence that the defect in the sidewalk was caused "by the failure of the officers of the defendant village to use reasonable diligence to keep the walk upon which plaintiff received her injuries in a reasonably safe condition for use by persons passing over it using ordinary care and prudence."

It must also be considered that an instruction in the language complained of was approved by this court in *City of Lincoln v. Smith*, 28 Neb. 762; *City of Beatrice v. Reid*, 41 Neb. 214; *City of Aurora v. Cox*, 43 Neb. 727, and in *Anderson v. City of Albion*, 64 Neb. 280.

From the opinion in this case upon a former appeal (81 Neb. 504) it appears that upon the first trial in the district court the defendant village requested the court to give the

identical instruction now complained of, and in considering the instruction this court in the opinion said that this instruction, and another one there mentioned, "correctly stated the law, were in point, and should have been given." The trial court accordingly upon the second trial gave the instruction which had been requested by the defendant and had been approved by this court, and the defendant cannot now insist in this case that the court erred in so doing.

2. It is contended that the court erred in instructing the jury as to the measure of damages. That part of the instruction objected to is as follows: "The measure of her damages is such amount as she has necessarily expended for medical care and nursing and medicines. As to these items it is not necessary that she should actually have paid them, but you are entitled to include such reasonable charges as she has incurred and become obligated to pay." The plaintiff is a married woman, and it is stated in the brief that "the testimony fails, absolutely, to show that she was possessed of any separate estate." This, it is said, brings the case within the rule laid down in *Pomerene Co. v. White,* 70 Neb. 177, and the following is quoted from the syllabus and opinion in that case: "In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might become liable therefor. * * * As the testimony in this case fails to show the existence of a separate estate owned by plaintiff, or that she has actually expended any money for medical services, under these circumstances, we are compelled to conclude that the right of action for medical services inures to plaintiff's husband and not to her, and that the instruction submitting this element of damages to the jury is unsupported by the testimony."

The defendant says that the testimony shows that the plaintiff had contracted a doctor's bill of considerable amount, and that a part of it at least was unpaid at the time of the trial, and that it was error to allow her to re-

cover for these items without showing that she had actually paid them. The services of the physician are necessary for one who is injured or ill, and by our statute both husband and wife are liable for such services when rendered for a member of the family. Undoubtedly, when it is attempted to hold a married woman liable as surety or on some contract not beneficial to her, it is necessary to show that she had some separate estate at the time, to which such contract might relate, as held in *Kocher v. Cornell*, 59 Neb. 315. Our statute provides that a married woman may carry on any trade and business and perform any services on her own and separate account, and that her earnings from such business or services shall be her sole and separate property. Ann. St. 1909, sec. 5320. And that any property which she acquires by purchase or otherwise shall remain her sole and separate property. Section 5317. In *Riley v. Lidtke*, 49 Neb. 139, this court said: "Earnings acquired by the wife as a laundress and seamstress for others than her family do not belong to the husband, but are the sole and separate property of the wife," and it was said that the fact that such earnings were applied to the support of her family did not change the rule. The evidence in this case shows that the plaintiff performed services as a laundress for her physician who attended her and for others, both before and after the injuries complained of, and that she applied some of these earnings in payment of the physician's services rendered at the time of this injury. These earnings would be her separate property and she was competent to contract with reference thereto. The instruction complained of is to be distinguished from the one criticised in *Pomerene Co. v. White, supra*, in that it limits her recovery for unpaid medical services to "such reasonable charges as she has incurred and become obligated to pay." There is sufficient evidence in the record from which the jury might find that she had incurred and become obligated to pay for the services of the physician incident to the injury complained of. The instruction therefore was not erroneous.

3. The next contention is that the court erred in receiving evidence objected to by the defendant. About four and one-half months after the injury complained of, the plaintiff gave birth to a child, which lived for only a few minutes, if at all. The physician testified that the child was stillborn. The plaintiff was allowed to testify to her condition at the time of its birth. This testimony was objected to on the ground that there was no evidence tending to show that the conditions then existing were caused by or resulted from the injury complained of. Dr. Wiggins, who was one of the trustees of the defendant village at the time of the accident, at first testified that he did not know what was the cause of the death of the child, but afterwards testified that he did not think that it was in any way caused by the injury complained of, and there was evidence that the plaintiff had at a former time suffered a miscarriage. The plaintiff and several other witnesses who had assisted in caring for her after her injury, but who had no expert knowledge, testified to certain circumstances and conditions resulting from the accident from which the jury might have found that the injury complained of was the cause of her subsequent misfortune. This evidence was objected to upon the ground that the witnesses had not sufficient knowledge to testify, but we think the evidence was properly admitted. The testimony of these witnesses does not relate to matters that require expert knowledge. They testified to circumstances and conditions that any person of ordinary intelligence might observe and understand. The affidavit of Dr. Love appears to have been in evidence, in which he stated that he examined the plaintiff; that he found injuries caused by some violent and external force of such a nature as to render it likely that she could not afterwards give birth to a fully formed child. This question was properly submitted to the jury.

4. It is insisted that the court erred in excluding evidence offered by the defendant. Dr. Wiggins was her attending physician from the time of her injury to the birth of her child. As a witness for the defendant he was asked:

"Q. Now, at any one of those visits at that time did you have any conversation or was anything said as to any previous miscarriages?" The plaintiff's attorney objected to this question on the ground that it related to a privileged communication. The contention is that this was not a privileged communication, because the plaintiff had herself testified to conversations with the physician in regard to her injury, and the condition that resulted therefrom, and as to his treatment and directions. The defendant relies upon the provision of the statute that "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. * * * And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Code, sec. 339. The trial court evidently thought that the matter inquired into by this question was not the "same subject" of conversation testified to by the plaintiff, and that it was not necessary to explain that conversation. A considerable latitude must be allowed a trial court in such matters, and we do not think that this was such an abuse of discretion as to require a reversal.

5. The next contention of the defendant is that the plaintiff was guilty of contributory negligence. It is said in the brief "that different minds could not honestly reach different conclusions without reasoning irrationally." It appears from the evidence that the plaintiff had passed over this walk "possibly twice before" the accident, and it is argued that she must have known the condition of the walk and should have walked in the road, as the road was in good condition and she had during a part of her walk, where there was no sidewalk, followed the road. The plaintiff was also carrying several packages, and the burden of these packages may have contributed to her accident. It is difficult to believe that the defendant's counsel is serious in these contentions. If these circumstances

afforded any evidence whatever of contributory negligence, the most that can be said is that it was a question for the jury.

6. The final objection is that the evidence is insufficient to sustain the verdict. The verdict was for "$25 for medicine, doctor's bills and nurse's bills, and $200 for permanent injuries." The record does not show that any nurse was employed, except perhaps plaintiff's sister or some member of the family, but it does show that the physician attended her for a considerable time and made many visits. The physician was not allowed to testify as to the amount of his charges. The plaintiff testified that the physician made 30 or 35 visits altogether, and there is evidence indicating that about half of these visits were at the time or directly connected with the injury complained of. The evidence justified the finding that the plaintiff's liability to the physician was at least the sum of $25. The amount of damage allowed for permanent injuries is not large. The first jury found greater damages. The verdict is amply sustained by the evidence.

We have found no reversible error, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF WILLIAM GRIFFIN.

MARGARET GRIFFIN, APPELLANT, V. JANE BAILEY ET AL., APPELLEES.

FILED JUNE 26, 1911. No. 17,093.

Death: DAMAGES: DISTRIBUTION. The money recovered or received by an administrator under sections 1, 2, ch. 21, Comp. St. 1909, must "be distributed to such widow or widower and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

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

William Baird & Sons, for appellant.

Greene & Greene, contra.

SEDGWICK, J.

The defendant, W. T. Graham, was by the county court of Douglas county appointed administrator of the estate of William Griffin, deceased. The deceased was killed in an accident on the railroad, and under the direction of the county court the administrator settled with the company and received $3,750 in full payment for the damages caused by the death of his intestate. As administrator he filed his petition in the county court showing that the deceased left no children or descendant, but left a widow, the plaintiff, Margaret Griffin, and asked the court for an order directing the distribution of the money in his hands. The defendant, Jane Bailey, who is the mother of the deceased, appeared in the county court and asked for one-half of the money in the hands of the administrator as next of kin. The court ordered an equal division between the widow and the mother of the deceased, after payment of the expenses of administration. The widow appealed to the district court, and upon hearing in that court the order of the county court was sustained. From the judgment of the district court sustaining the order of the county court she has appealed to this court.

Sections 1, 2, ch. 21, Comp. St. 1909, are as follows: "That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death

shall have been caused under such circumstances as amount in law to felony. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow or widower and next of kin of such deceased person, and shall be distributed to such widow or widower and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the widow or widower and next of kin of such deceased person; provided, that every such action shall be commenced within two years after the death of such person."

There appears to be no dispute in regard to the facts. The only question presented is as to the proper distribution of the funds. There is no proof in the record that Mrs. Bailey, the mother of the deceased, was in any way dependent upon her son for support, or that he had ever furnished her any pecuniary aid. The administrator offered to prove that Mrs. Griffin, the widow of the deceased, "was the only person who was dependent upon said decedent for support, or who received any support from him during his lifetime." This evidence was objected to, and the objection sustained and the evidence excluded. The appellant concedes that if the deceased had been furnishing his mother with support and maintenance, or under the conditions of the family was required to do so, she would have had a pecuniary interest in his life and would have been entitled to her share in the funds in question; but it is contended that it was not the intention of the legislature that the mother is entitled to one-half of the fund merely because she is the next of kin. Such a construction, it is urged, would defeat the beneficent purpose of the statute. "It would enable the next of kin, whether lineal or collateral, whatever

their conditions, to share with the widow the fund, without any reference to the pecuniary injuries which such next of kin might sustain, or without reference to the fact that such next of kin sustained no pecuniary injury. If, in this case, instead of leaving his mother as next of kin, Griffin had left a brother or uncle as his next of kin who was wealthy and in no way dependent upon him for support, present or prospective, can it be possible that it was the intention of the legislature to deprive his widow of any part of the fund in question and give it to such brother or uncle? If the construction which the county court and district court have given to this statute is correct, it follows as a logical conclusion that any widow who is dependent upon her husband for support and maintenance would be deprived of one-half of the fund collected, without any reference to the proximity or dependence of the next of kin." (Brief of appellant.)

It is undoubtedly true that the construction of the statute complained of might in some cases result in injustice. Where the widow is left without any means of support, and the next of kin are in more fortunate circumstances and had no need of any pecuniary assistance from the deceased in his lifetime and have ample means for their own support and maintenance, the purpose of the statute, as manifested in the act itself, would seem to indicate a different basis of distribution. The measure of damages is prescribed in the statute in these words: "In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the widow or widower and next of kin of such deceased person." The widow in such case may suffer much more pecuniary damage than any or all of the next of kin, and this damage is the basis of the recovery, and, if practicable, it would seem reasonable that the money realized should also be distributed on this basis. It does not, however, necessarily follow that the mother has not suffered any pecuniary injury because she has not heretofore re-

ceived pecuniary assistance from the deceased, nor even because she is not now so situated as to be in need of such assistance. A mother is entitled to support and maintenance from her son when she needs it, and, in view of the uncertainties of human affairs, the right to such assistance when needed may be considered of pecuniary value. In some of our sister states the law provides that the jury shall determine in what proportion the damages awarded shall be distributed to the widow and next of kin. This is a difficult and delicate duty and it would perhaps be desirable that the legislature should provide, if practicable, a definite rule. It was held under a statute providing that the jury might determine as to the distribution that, in case the jury failed in its verdict to determine the matter, the statute which required the money to be paid "according to the statute of distribution" must be followed by the courts. *Powell's Adm'x v. Powell,* 84 Va. 415, 4 S. E. 744. See, also, *Grotenkemper v. Harris,* 25 Ohio St. 510, and *Illinois C. R. Co. v. Barron,* 5 Wall. (U. S.) 91. Both of these cases construe statutes identical with our own. The question here is wholly as to the interpretation of our statute. It might be in the interest of justice to make it the duty of the court or jury trying the case to determine the proportion in which the damages recovered shall be distributed, but that is for the consideration of the legislature and not of the courts.

The appellee insists that the court erred in its allowance to the administrator. The case is presented here upon a printed abstract prepared under the recent act of the legislature. It does not appear from this abstract that there was any cross-appeal. The appellee therefore is not in position to question this ruling of the district court.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. MINDEN-EDISON LIGHT & POWER COMPANY, PLAINTIFF, V. HARRY S. DUNGAN, DEFENDANT.

FILED AUGUST 22, 1911. No. 17,266.

1. **Injunction:** SUPERSEDEAS. A temporary restraining order granted upon an application for an injunction is authorized by statute for the purpose of a hearing when necessary before granting a temporary injunction. An order restraining a party absolutely, without providing for a hearing upon the application, is not a temporary restraining order. It is an injunction, and an order dissolving it may be superseded.

2. ———: PETITION: JURISDICTION. A mere technical defect in a petition for injunction will not deprive the court or judge of jurisdiction to determine whether a temporary injunction should be granted. If the allegations of the petition show that the plaintiff's cause of action is within the jurisdiction of the court and is of such a nature that an injunction would be an appropriate remedy, the court or judge is not without jurisdiction. Although the order granting the writ may be irregular or erroneous, it is not necessarily subject to collateral attack for want of jurisdiction of the subject matter.

3. ———: NOTICE: INDORSEMENT ON SUMMONS. When a temporary injunction is granted at the commencement of an action, it is not necessary to give any other notice than to indorse the summons, "Injunction allowed," as required by statute. Such indorsement is a sufficient compliance with a condition of the order that it shall take effect when the defendants are notified thereof.

4. ———: AFFIDAVIT: SUFFICIENCY. The affidavit for a temporary injunction failed to show that the judges of the supreme court were absent from the county in which the application was made. *Held*, That the order of the county judge granting the writ was not for that reason void for want of jurisdiction.

5. ———: PETITION: PRAYER: AMENDMENT. If the prayer of a petition for injunction does not ask for a temporary order, it is irregular to grant such order without amendment of the petition in that respect. Such defect is not jurisdictional, and the plaintiff may supersede an order dissolving such temporary injunction.

6. ———: POWERS OF COUNTY JUDGE. A county judge cannot grant a perpetual injunction. If the language of his order purports to do so, it should still be regarded as a temporary injunction, and should not be treated as absolutely void for that reason.

7. **Mandamus:** TEMPORARY INJUNCTION: SUPERSEDEAS: REVIEW. **In an action of mandamus in this court to require a judge of the district court to fix the amount of an undertaking to supersede his order dissolving a temporary injunction, this court cannot consider the merits of the controversy in the original action for injunction. Under the statute, a temporary injunction may be continued in force until the final hearing by giving the proper undertaking.**

ORIGINAL application for a writ of mandamus to compel respondent to fix the amount of a supersedeas bond. *Objections to application for writ overruled.*

J. L. McPheely, for plaintiff.

C. P. Anderbery, contra.

SEDGWICK, J.

On the 11th day of July, 1911, an election was held in the city of Minden, a city of more than 1,000 and less than 5,000 inhabitants, upon the question of issuing bonds of the city in the sum of $15,000 "for the purchase, construction and establishment of a lighting system in and for said city." The election having resulted in favor of issuing the bonds, this plaintiff began an action in the district court for Kearney county to enjoin the issuing of the bonds and for other relief. An order was made by the county judge enjoining the defendants as prayed in the petition. A few days later a motion was filed by defendants to "dissolve or vacate the injunctional order issued against these defendants" upon four several grounds stated in the motion as follows: "First. For that said injunctional order issued by the county judge is void and of no effect for the reason that the prayer of the petition does not ask for either a temporary injunction or a temporary restraining order. Second. For that said injunctional order was issued upon the condition that notice was to be given to these defendants, which was not done other than the regular summons served on them. Third. For

that said injunctional order so issued by the county judge is void in that it is uncertain and indefinite in its terms. Fourth. For that the petition does not state facts sufficient to state cause of action for the issuance of any injunctional order." A hearing was had upon this motion before the judge of the district court at chambers, who found that "the facts stated in the petition do not constitute a cause of action," and that the affidavit for the injunction was insufficient because it did not show "that there were no supreme judges or judge in said county" when application was made to the county judge, and "that there was no prayer for a temporary order of injunction, or temporary restraining order in the petition," and, for these reasons, the county judge was "without jurisdiction to issue any temporary order of injunction on the affidavits, prayer and petition of plaintiff." Upon these findings, the judge of the district court made the following order: "Wherefore it is ordered, adjudged and decreed that said temporary order of injunction be and the same is hereby declared to be void and of no effect, and that the petition does not state facts sufficient to constitute a cause of action, and the same is therefore dissolved and said petition hereby be and the same is dismissed, to which findings and orders the plaintiff excepts." The plaintiff then asked the judge "to fix a bond superseding said temporary order of injunction." The judge refused "to fix any bond superseding said injunctional order," and stated as a reason therefor that "the said order issued by the county judge was for the reasons hereinbefore set out void and of no effect." The plaintiff then applied to this court for a writ of mandamus to require the judge to fix the amount of a supersedeas bond. Upon agreement of the parties briefs have been filed and oral arguments were heard upon this application.

The provision of the statute relied upon in this application is as follows: "That in case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction, which has been or may

hereafter be granted, the court or judge, so dissolving or modifying said order of injunction, shall at the same time fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act, or acts, the commission of which was, or may be, sought to be restrained by the injunction so dissolved or modified." Code, sec. 679. The code also provides that under certain circumstances the county judge may grant a temporary injunction. "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." Code, sec. 252. The action of the judge of the district court in refusing to fix the amount of the supersedeas bond, it will be seen from the foregoing statement was upon the theory that the county judge was without jurisdiction to make the order allowing the writ. It was also contended upon the argument that, if it should be found that the county judge had jurisdiction to make the order, then the order as made must be construed to be a temporary restraining order only, and in that case the judge of the district court might refuse to continue it and the plaintiff would not be entitled to a supersedeas.

1. The first question, then, which we will consider is as to the form of the order entered by the county judge. If it is considered that the county judge had jurisdiction to make the order, should that order be construed as a temporary restraining order only or as an order granting a temporary injunction? It has been held that if the effect that should be given to the order of the county judge is doubtful, or if the language of the order will admit of such construction, then it should be considered as a temporary restraining order only. *State v. Graves,* 82 Neb. 282. This holding seems to be upon the theory that it

cannot ordinarily be necessary that the county judge should do more than restrain the acts complained of until a hearing can be had in the district court, which has complete jurisdiction of the matter. The condition of the statutes upon this subject suggests the possibility that, if the attention of the legislature had been challenged directly to the matter, the confusion resulting from the improper granting of temporary injunctions by county judges would have been avoided by limiting their jurisdiction to the granting of temporary restraining orders only. The court, however, must take the statute as it finds it and ascertain, if possible, the intention of the legislature. It has been considered and determined in very many cases that the legislation upon this subject has made a definite distinction between a restraining order and a temporary injunction. The earlier decisions have also established some rules which must be adhered to by the courts in the absence of further legislation. In *State v. Baker*, 62 Neb. 840, the following rule was established: "The chief distinguishing feature of the two writs is that the temporary restraining order contemplates a further hearing on the application for a temporary injunction upon notice to and a hearing by the adverse party on such application." In *State v. Graves*, 82 Neb. 282, this rule was adhered to and stated perhaps in more definite terms as follows: "An injunctional order which does not contemplate a hearing as to whether a temporary injunction shall be allowed is of itself a temporary injunction, and must be so treated. An order dissolving such injunction may be superseded." The order of the county judge in this case is absolute, and does not contemplate any hearing as to whether a temporary injunction should be allowed, and is therefore within the rule established in the cases quoted, and clearly is not a temporary restraining order. If it was made with jurisdiction, and is to be given any force and effect, it must be regarded as a temporary injunction. If the order amounts to a temporary injunction, and the county judge has jurisdiction to make it, the plaintiff was,

of course, entitled to continue it in force until the final hearing of the cause, and for that purpose was entitled to an order of the district judge fixing the amount of the bond to be given to supersede his order of dissolution. Section 679 of the code is clear and positive, and is to that effect.

2. As a reason for supposing that the county judge was without jurisdiction in this case, it was urged that the petition for the injunction fails to state a cause of action. It must be conceded that, if the character of the petition was such that under no circumstances could an injunction be allowed upon such a supposed cause of action, there would be no jurisdiction to grant the writ, but a mere technical defect in the pleading, which, unless remedied, might be fatal upon the final trial, would not deprive the court of jurisdiction of the action. If the substance of the petition was such that the district court would have jurisdiction of the action and to grant an injunction thereon, although the order of the county judge might be irregular and erroneous, still it could not be said that he was without jurisdiction to determine whether the petition stated a cause of action, and whether the plaintiff was entitled to the writ, and, having determined those matters, whether correctly or incorrectly, the plaintiff would be entitled to a final hearing thereon, and for that purpose to supersede the order of the district judge in setting aside the order granting the writ. It is not necessary to set out in this opinion the allegations of the petition, as they clearly show that the plaintiff's cause of action was within the jurisdiction of the district court, in which an injunction might be an appropriate remedy. The contention, then, that the order of the county judge was void because of defects in the petition cannot be sustained.

3. The order of the county judge was conditional that notice be given the defendants and undertaking entered into as required by law. It is objected that the order was void because notice was not given as contemplated

therein. No question is raised as to the form and sufficiency of the undertaking. The summons was indorsed: "Injunction allowed." The statute provides that this shall be sufficient notice of the granting of an injunction. When the summons served is so indorsed the defendant must take notice of the terms of the order, as well as of the allegations of the petition.

4. The statute quoted provides that an injunction may be granted "by the supreme court or any judge thereof, the district court or any judge thereof, or in the absence from the county of said judges, by the probate judge thereof." In this case the affidavit stated that the judge of the district court was absent, but did not mention the judges of the supreme court. It is, of course, apparent that no order of injunction can be allowed until an affidavit has been filed in substantial compliance with the statute. We are required, then, to consider whether it must in all cases be shown by the affidavit that none of the judges of the supreme court is present in the county where the order is made. The section containing this provision is in the revised statutes of 1866, which was approved on the 9th day of March, 1866. Another section of the same act, which is still in force, provides: "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may, in the meantime, restrain such party." Code, sec. 253. The constitution gives the supreme court original jurisdiction in certain specified matters. It would seem from the various provisions of the statute that in an action to be brought in this court within its original jurisdiction, in which an injunction would be a proper remedy, the county judge might, in the absence of all of the judges of this court and the judges of the district court from the county, allow a temporary injunction. In such case the county judge could not act unless all of the judges of this court were absent from

the county. The statute in question would have direct application to a matter of that kind. The judges of this court have declined to allow injunctions in actions pending in the district courts of the various counties in the state, and their jurisdiction to allow such injunctions may well be doubted under the provisions of the constitution. The question was stated, but not determined, by this court in *Calvert v. State,* 34 Neb. 616, and Judge MAXWELL, who wrote the opinion in that case, has suggested an approved form of affidavit upon which to apply for an injunction in the district court, and in which no reference is made to the judges of this court. Maxwell, Pleading and Practice (6th ed.) p. 655. It appears to have been for many years accepted as the proper construction of the statute under our constitution that the affidavit for injunction, in actions pending or to be brought in the district court, is not defective so as to deprive the court of jurisdiction, because of failure to allege that the judges of this court were absent from the county in which the application was made. The order allowing the temporary injunction must be reviewed upon the final trial of the case, and may then be dissolved by the district court as improvidently issued. It seems unreasonable to suppose that it was intended that orders made in an action by a judge or judges of this court should in the same action be reviewed and set aside by the district court. This would be the necessary result, however, if the judges of this court should allow orders of injunction in actions pending in the lower courts. The objection to the affidavit in this case is purely technical. There was no attempt to show, nor was there any suggestion, that any of the judges of this court were in Kearney county when this application was made. The application for injunction contained allegations showing that the plaintiff was "entitled thereto." We should avoid, if possible, a construction of the law that might defeat meritorious causes of action upon objections so technical. We conclude that the county court was not without jurisdic-

tion because of the absence of this allegation in the affidavit for the order.

5. There was no prayer in the petition for a temporary order of injunction. The prayer was that the defendants (naming them) "be forever enjoined * * * and that upon final hearing of this case said injunction be made perpetual and for such other and further relief as may seem just and equitable in the premises." The county judge had no jurisdiction to grant a perpetual injunction. The power given to him was to grant a temporary injunction that should be enforced until the matter could be finally heard upon its merits, and, if he thought necessary, he might require notice of the application for the temporary injunction to be given the defendant before granting the same, and in the meantime might restrain the acts complained of until such application should be heard. This last-named order restraining the defendants in the meantime has been by the courts denominated as a temporary restraining order, as distinguished from a temporary injunction. There is a conflict in the authorities as to whether a temporary injunction may be awarded in an action for perpetual injunction and without any prayer for temporary relief. It may also be said that the courts are not unanimous as to whether a prayer for general equitable relief will without amendment support an order granting a temporary injunction, but the courts quite generally hold that, if facts stated in the petition will justify the granting of a temporary injunction, the prayer of the petition which fails to ask for such relief may be amended when objection is first made upon that ground, and a temporary injunction be allowed. If the order allowing the temporary injunction is made, the objection that the petition, which states facts justifying such order, does not ask for such relief is purely technical, and, under our liberal provisions for amendment of pleadings and proceedings, such amendment ought to be allowed for the purpose of supporting that order whenever it is assailed. We think, therefore, that this technical

objection to the pleading ought not now to defeat the jurisdiction of the county judge. This court upon request would, under the circumstances in this case, allow an amendment to the prayer even upon appeal. The constitution gives the unqualified right to be heard in the court of last resort, and the statute, to preserve that right, commands the district court in positive terms to fix the amount of the bond to be given by the plaintiff to supersede the order of that court dissolving an injunction which has been granted in a cause.

6. The county judge apparently attempted to allow a perpetual injunction. The language of his order is that "the defendants herein (naming them) be, is forever and are each and severally hereby enjoined," etc. There is no reference in the order to any hearing in the district court, nor any suggestion that any final determination of the matter by that court is necessary. The conclusion of the county judge, however, was that the defendants ought to be enjoined upon the facts stated in the petition. He granted an injunction which in its terms is too broad. He cannot go beyond his jurisdiction, and the law will limit his order accordingly. To hold that, because he tried to do too much, his order, so far as it is within his jurisdiction, must be disregarded would be to act upon a technicality not affecting the merits of the controversy or any substantial right of the parties. It is the duty of the courts to do justice, and the substantial rules of the law designed to protect the rights of litigants must be observed, but this does not require us to hold that this irregularity in the order of the county judge is jurisdictional.

7. Much is said in the briefs, as was also in the oral argument, as to the merits of the controversy in the injunction suit, but with this the court has nothing to do in this mandamus proceeding. That case must be tried upon its merits, and in the manner provided by the statutes. When a temporary injunction is allowed in a cause, the statute in unqualified terms gives the party in whose

favor it is granted the right to continue it in force until the final determination of the cause. The courts cannot change these statutes. The great delay and embarrassment sometimes caused by improvident injunction orders are serious matters. No such orders should be made without careful investigation and consideration, and only when it is reasonably clear that the order is necessary and will prevent wrongs and injury otherwise unavoidable without itself causing greater injuries. It is seldom, if ever, necessary that a county judge should allow an injunction as distinguished from a temporary restraining order. The legislature has given that officer the power to do so, and when he acts within the authority given him by statute his orders have the same force as similar orders of the court having complete jurisdiction of the action.

After the alternative writ was issued, the defendant filed an answer to the original petition which was in the nature of a demurrer on the ground that the application for the writ itself shows that the county judge was without jurisdiction to issue the writ, and that because of irregularities the writ is void. By agreement the cause was submitted as upon the defendant's objection to the original application in this court for the allowance of the writ of mandamus, and has been so considered by this court. These objections are not well taken, but it will not be presumed that a peremptory writ will be necessary, and none will be issued except upon application and showing of the necessity thereof.

The defendant's objections to the application for the writ are overruled; each party to pay his own costs.

OBJECTIONS OVERRULED.

REESE, C. J., and BARNES, J., absent and not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1911.

L. A. WILSON, APPELLEE, V. ANNA J. WILSON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,422.

1. **Divorce:** DISMISSAL OF SUIT. "Upon an application for a divorce, where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill." *Nagel v. Nagel*, 12 Mo. 53.

2. **Attorney and Client:** MISCONDUCT OF ATTORNEY. Where the wife is charged with the crime of adultery with her attorney, who is made corespondent in an action for a divorce, it is against the ethics of the legal profession for such corespondent to act as both attorney and witness for the wife. His testimony being necessary in the denial of the adultery, he should not appear in the case as counsel.

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

W. G. Hastings and *R. D. Stearns*, for appellant.

O. E. Bozarth, W. S. Morlan and *Ritchie & Wolff*, *contra.*

REESE, C. J.

This is an action by plaintiff and against defendant for a divorce on the ground of adultery. Upon a trial to the district court, the issues were found in favor of plaintiff and the divorce granted. Defendant appeals.

It is alleged in the petition that the parties were married on the 21st day of October, 1904, and that since that time plaintiff has "conducted himself toward the defendant as a kind, loving and providing husband." It is further alleged that defendant, regardless of her marital duties and obligations, on the 12th day of December, 1908, at Holdrege, Nebraska, committed adultery with one Lafe Burnett, and plaintiff has not cohabited with defendant since the discovery of such offense; that there were no children born to said marriage; that defendant had been twice married before her marriage to plaintiff; that plaintiff had not been theretofore married; that defendant is the owner of personal property to the amount of about $2,500. The prayer is for divorce and the recovery of costs. What is evidently an amended answer and cross-petition was filed by defendant, in which is admitted that defendant is the owner of personal property, but of much more value than the amount alleged in the petition; that said property is held by plaintiff, and defendant is without means with which to conduct her defense. The averment in the petition that plaintiff had conducted himself toward defendant as a kind, loving and providing husband is denied, and it is alleged that plaintiff has been guilty of extreme cruelty toward defendant by personal violence, and by fraudulently confining her in a hospital for the insane in Council Bluffs, Iowa, as well as fraudulently causing her to be imprisoned in the hospital for the insane in this state, without care, attention, concern, or inquiry on his part, from the 27th day of March, 1905, until the month of November, 1908, where she was wholly neglected by him, and after her discharge from said hospital failed and refused to contribute anything toward her support or maintenance, notwithstanding he had a large amount of her property in his possession, he well knowing of her destitute condition; that after her said discharge he had threatened to have her re-examined on a charge of insanity, and again incarcerated in said hospital. The charge of adultery is denied.

By way of cross-petition a divorce from plaintiff is demanded on the ground of extreme cruelty, and it is alleged, in substance, that at the time of the marriage, and thereafter, defendant was the owner of a large amount of property, consisting of real estate and personal property, and for the purpose of depriving defendant thereof and securing it to his own use, ownership and possession, and contriving to defraud her out of the same, he caused her to be confined in a hospital for the insane, took possession of her property, caused and procured himself to be appointed as her guardian, thereby obtaining the custody and control of her property, caused and procured a mortgage for a small amount on her real estate to be foreclosed and the land purchased for him by another, who afterward conveyed the land to him, thereby contriving and intending to defraud her of the whole thereof, and abandoned defendant, leaving her practically penniless. Descriptions of the property, real and personal, are set out in the answer and cross-petition, but for the purposes of this decision they will not be noticed here. It is alleged that she is wholly guiltless of the crime of adultery, but that the charge has been made against her in furtherance of the cruelty and designs of plaintiff.

By the reply the averments of the answer and cross-petition, not specifically admitted, are denied. The charge of adultery is reaffirmed. Her insanity is alleged as the reason for her confinement. It is averred that the real estate referred to was the property of William A. Scales, a former deceased husband of defendant, and upon his death the fee thereof descended to his child, Gladys Scales, as his sole heir. The payment to defendant of certain sums of money as temporary alimony and otherwise is alleged; prayer that the cross-petition of defendant be dismissed, and that a decree of divorce be granted as prayed in the petition. The result of the trial was as above indicated.

A number of questions are presented for decision; but, as the decision of one will control the disposition of the

case, we will consider that one alone. The trial court, believing and acting upon the theory that the cruelty alleged in the answer, and of which proof was offered, could not constitute any defense to a charge of adultery, excluded, in the main, all evidence offered in support of the cross-petition. Many objections by plaintiff to depositions and oral testimony offered by defendant were based upon the ground that "neither abandonment nor extreme cruelty is a sufficient recriminatory defense to a charge of adultery in a divorce proceeding," and which objections were sustained by the court over the exceptions of defendant. The whole record shows conclusively that this was the view of the court, and some authorities may be found supporting the doctrine, in the abstract, that cruelty may not constitute a defense; but, when considered in the light of the averments of the answer and cross-petition and evidence tendered, we doubt if a well-considered case, decided since the abandonment of the jurisdiction of the ecclesiastical courts of England over the subject of divorce, can be found sustaining the holdings of the district court in this case. We do not deem it necessary to examine or discuss the history or development of this phase of the law, but shall be content with the citation of the more modern decisions upon the subject in connection with a glance at what we conceive to be the reason for, and justice of, these more modern holdings. In the beginning, it should be noted that, if the averments of the answer and the offers of proof upon the trial are true, the case is one of extreme cruelty. Those charges may be untrue, but we have no means of knowing all the facts until the subject is fully and impartially investigated. If they are untrue, nothing could be plainer than it would be the duty of plaintiff to himself and his own reputation to throw open the door of inquiry and allow their falsity to be shown and his good name vindicated. Such seems not to have been the course pursued by him and his counsel. If they are true, he has no possible right to a divorce based upon the fact of branding

his much abused, defrauded and neglected wife as an adulteress.

Defendant was a widow living upon and managing a farm of practically half a section of land, well stocked with live stock and farm implements, holding, as we are justified in inferring, at least a life interest in the real estate, and apparently in a prosperous condition. Plaintiff married her, moved on and occupied the farm and property. If the averments and proffered evidence are true, within from two to three months after their marriage defendant was taken violently sick while at a meal at the table, and was soon thereafter sent to a hospital at Council Bluffs, and confined in an insane ward, where she remained eleven weeks. She returned to her home one day, was not invited to remain, and went to a neighbor's, where she was entertained for two or three days. Then a charge of insanity was preferred against her, and she was sent to the hospital for the insane at Lincoln, where she was confined and held, with more or less freedom, from the month of March, 1905, until November, 1908, during which time no attention or regard was paid to her by plaintiff. When we consider the testimony of Dr. Hay, who was either an assistant physician or superintendent of the hospital during the time of her confinement, and other physicians in charge, as well as those with whom defendant associated, which is preserved in the bill of exceptions (though much of it was rejected by the trial court), we are led to entertain serious doubts as to her insanity. After her discharge no attention was given her by plaintiff, except that at one time he furnished her $10, which he charged up against her estate, the property of which was then in his possession. She was thus thrown upon her own resources after her discharge from the hospital, and was compelled to earn her own living. Within four months after defendant's incarceration, plaintiff applied to the county court for letters of guardianship of the person and property of defendant, alleging her to be incompetent, and his appointment was

accordingly made, when he received and maintained charge of her personal property of the appraised value of $1,528.90. There was a mortgage of some $900 upon defendant's land, but by failure to pay either the principal or interest thereof it was allowed to go to foreclosure and sale, notwithstanding his apparent ability to pay the same out of defendant's property. At the time of the decree and sale of the land under the foreclosure proceedings, plaintiff was the guardian of defendant and her property, but he allowed the land to be sold to the wife of the attorney for plaintiff in the foreclosure suit. The decree of foreclosure was entered on the 6th day of September, 1905. We are unable to find the date of the issuance of the order of sale, but the sale occurred on the 6th day of November, 1905, showing that no stay was taken, and, to that extent at least, that no effort was made by him to protect the rights of defendant. The deed was made to the purchaser at sheriff's sale on the 5th day of February, 1906, and is signed by plaintiff as sheriff of Gosper county. On the next day (February 6, 1906) the purchaser at the sheriff's sale (her husband joining in the deed) conveyed the land to plaintiff, who, so far as is shown by this record, is now in the peaceable possession of the half section of real estate, and his wife is deprived of its enjoyment, its income and the provision it affords for her declining years. In addition to this, the allegation is made that, while plaintiff was making his home with defendant as her husband, he assaulted her and otherwise mistreated her personally. As we have said, we have no means of knowing as to the exact truth of the allegations and offers of proof, for the reason that much of the offered evidence was excluded. We find the records of the decree of foreclosure and deeds in the bill of exceptions.

If the allegations and offered proof are true, is plaintiff entitled to a decree, even if the adultery of defendant be conceded? Our answer is, most certainly not. By section 7, ch. 25, Comp. St. 1909, extreme cruelty, whether practiced by using personal violence, or by any other

means, utter desertion for the term of two years, or when the husband, being of sufficient ability to provide suitable maintenance for his wife, shall grossly or wantonly, and cruelly refuse or neglect so to do, are made distinct and separate grounds for divorce, either from the bonds of matrimony, or from bed and board. If the averments of the answer and cross-petition and offered evidence are true, any one of the causes provided by statute would have given defendant a divorce long before any charge of adultery was preferred against her.

In 14 Cyc. 650, it is said in the text: "By the weight of authority, the offense pleaded in recrimination need not be of the same nature as the offense which defendant has committed. Any misconduct on the part of complainant which constitutes ground for divorce bars his suit, without reference to the nature of the offense of which he complains, although in some states a contrary rule prevails by statute or otherwise and the two offenses must be of the same character. Accordingly in most jurisdictions adultery may be set up in recrimination to a suit based on defendant's cruelty, defendant's desertion, or defendant's commission of an infamous crime. So cruel conduct, if made a ground of absolute divorce, may be shown in recrimination of a charge of adultery. And desertion will bar a suit based either upon an act of adultery subsequently committed by defendant, or upon defendant's cruelty"—citing many cases sustaining the different propositions suggested by the paragraph. As bearing upon the sentence that "cruel conduct, if made a ground of absolute divorce, may be shown in recrimination of a charge of adultery," the author cites *Nagel v. Nagel,* 12 Mo. 53, *Reading v. Reading* (N. J. Ch. 1886) 5 Atl. 721, *Church v. Church,* 16 R. I. 667, and *Pease v. Pease,* 72 Wis. 136, which we have examined, and they are found to fully sustain the text. In 2 Bishop, Marriage and Divorce (6th ed.) sec. 84, the question is propounded: "Where the divorce is from bed and board, as it was formerly in England for adultery and cruelty, respect-

ively, is the former English rule whereby cruelty is not a bar to the adultery suit to be followed?" The answer is: "No. The correct rule is that, where each of the married parties has committed a matrimonial offense which the law has made ground for divorce in favor of the other, so that when one asks for this remedy the other is equally entitled to the same, whether the offenses are the same or not, the court can grant the prayer of neither," etc. In section 90 the question is asked: "Will ill conduct for which the law has provided only the limited divorce bar a suit to dissolve the marriage?" The answer is: "Yes." And the reason for the rule is given by the author. Again, in section 93, the question is asked: "In any suit for dissolution, will any conduct for which the law provides the same consequence be adequate in bar, whether otherwise of the same sort or not?" The answer is: "Yes. And the reasons given in the solution of the first and second questions (heretofore quoted) show equally, and still more forcibly, this to be so also." The reasons for this rule are also given by the author with cases cited in their support. The same subject is discussed in 2 Bishop, Marriage, Divorce and Separation, ch. 11, and with the same conclusion. In section 340 it is said: "Recrimination in divorce law is the defense that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony. It bars the suit founded on whatever cause, whether the defendant is guilty or not." In summing up the whole matter it is said in section 365: "It is a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complained-of *delictum* transpired, the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort." The subject is discussed in 9 Am. & Eng. Ency. Law (2d ed.) 816 *et seq.*, and the same rule is drawn from the authorities cited. At page 818 it is said: "The doctrine of recrimination is applicable to all the causes for divorce. The legislatures having

provided the same legal effect for each cause for divorce, the courts refuse to measure the gravity of the several causes, but hold each effectual as a bar in recrimination." It is not deemed necessary to pursue this subject further. The doctrine here stated is the acknowledged rule in nearly, if not quite, all the states of the Union.

Much is said and many cases are cited in the "Rejoinder Brief of Appellee" upon the subject of the attitude of one of the counsel for defendant, in that he is the corespondent, an important witness for defendant, and assumes principal charge of the cause of defendant on trial. We fully agree with the criticism of plaintiff's attorney. While the law does not prohibit it, the course pursued is against the ethics of the legal profession, is unseemly, and no doubt weakens defendant's case. The position should be abandoned at once, and the cause placed in the hands of proper counsel, and the one charged as corespondent withdrawn from the case. If such course be pursued, we would no doubt be provided with a better record should this case appear again before us.

The decree of the district court is reversed, and the cause is remanded, with directions to retry the case upon the issues presented, and if both parties be found guilty of such conduct as, under the statute, would entitle each to a divorce, that the petition and cross-petition be each dismissed.

REVERSED.

ROOT, J.

I concur in that part of the majority opinion holding that the plaintiff should not be divorced if he has been guilty of conduct which in itself entitles the defendant to a divorce, but I dissent from that part of the opinion which questions the sufficiency of the evidence to sustain a finding that the defendant was guilty of adultery, and dissent from the part of the judgment directing a retrial of that issue.

There is not sufficient proof in the record to sustain

any of the defendant's allegations of cruel treatment. Possibly, if the evidence excluded by the district court had been received, the result would have been otherwise. The defendant did not file a motion for a new trial, nor assign as error the exclusion of that evidence, but has appealed to this court upon the evidence received.

Applying the ordinary rules of practice to this case, it should be determined upon the record presented by the appellant; but, since there may be some reason to believe that she would have made proof of facts sufficient to defeat the plaintiff's cause of action, I concur with the majority of the court in saying she should be given that opportunity. Nothing, however, can be gained by a retrial of the charge of adultery. The evidence is convincing on that score. It was sufficient to convince beyond all reasonable doubt the two juries which tried the defendant's paramour, and his conviction was affirmed by this court. The proof is satisfactory that the defendant and her paramour were registered at a Holdrege hotel under fictitious names as husband and wife; that in the defendant's presence her companion stated to the hotel clerk, "We might just as well get a room and go to bed right;" that about two hours thereafter the officers of the law gained access to this room and discovered the co-respondent engaged in putting on his trousers, while the defendant was in bed attired solely in a *robe de nuit* and an abbreviated undergarment. The bed gave every evidence of having been occupied by two persons, and the defendant defiantly stated to the officers that they would have done as her companion had if given the opportunity. The defendant's paramour exclaimed at the time that nothing would save him from the penitentiary.

There is also other evidence in the record tending strongly to convince the impartial mind that the defendant had broken her marital vows. The defendant does not say that she can produce any other competent evidence to sustain her denial, and to the writer it seems an uncalled for waste of time to retry the issue.

The cause should be reversed, with directions to hear evidence upon the defendant's charges of extreme cruelty, and, if found true, the petition and the cross-petition should be dismissed, otherwise a decree of divorce should be rendered in the plaintiff's favor.

CLARK IMPLEMENT COMPANY, APPELLANT, V. CLIFTON JAY ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,506.

1. Appeal: CONFLICTING EVIDENCE. In a jury trial, all questions of fact depending upon conflicting evidence are for the decision of the trial jury, and, unless manifestly wrong, the verdict cannot be set aside.

2. ———: REVIEW. In the instant case there is no controlling question of law involved, no objection being made to the instructions given the jury by the trial court. The evidence is examined, but not set out in the opinion, and no reversible error is found.

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

H. N. Marshall and *H. H. Mauck,* for appellant.

R. D. Sutherland, S. W. Christy and *L. E. Cottle, contra.*

REESE, C. J.

This action is founded upon a promissory note for $390 executed by the defendant Clifton Jay, as principal, and S. J. Boomer, as surety. The petition is in the usual form. The answer admits the execution of the note, but alleges as a defense thereto that it was given as a part of the purchase price of a threshing machine or traction engine which it is alleged plaintiff sold to defendant Jay, the price of which was $780, evidenced by

two promissory notes of $390 each, and, in addition thereto, one second-hand engine of the "Kitten" Manufacturing Company's make; that the contract of sale and purchase was made in writing, and provided for the sale and delivery of "one 16-horse compound engine No. 9,581, rebuilt job, Council Bluffs, Iowa, and in good running order when shipped;" that, in consideration of the warranty and agreement and delivery of the engine, the defendant executed the two notes and delivered to plaintiff the said second-hand "Kitten" engine of the value of $225. The substance of further averments of the answer is that the engine was, to the knowledge of plaintiff, purchased for the purpose of operating a threshing machine separator of a certain size, then owned by Jay, and that he attempted to use the engine in furnishing power for the propelling of his said separator, but that upon the test by defendant, who was accustomed to handle steam engines, the engine in question was found to be inadequate —was not of 16-horse power, nor in good running order when shipped, nor at any time thereafter, and was a failure in every respect; that, upon notice to plaintiff of the failure of the engine to meet the required conditions, plaintiff sent experts to place the engine in order, but that it could not be made to perform, nor was it in the condition warranted, and was finally returned to plaintiff; that the consideration for the notes and engine furnished plaintiff had failed, or, rather, was never received. The prayer is for the dismissal of the action, and for an affirmative judgment in favor of Jay for $225, the value of the engine furnished plaintiff. The reply is quite lengthy, but is, in effect, a denial of all defensive matter set up in the answer. There was a jury trial, which resulted in a verdict in favor of defendant and an assessment of "the recovery of the defendant Jay at the sum of $225, and cancelation of note." A motion for a new trial was filed, overruled, and a judgment rendered against plaintiff and in favor of defendant for the said sum of $225, and the costs of suit. Plaintiff appeals.

There is no controversy as to the value of the "Kitten" engine furnished plaintiff by defendant, it having been agreed upon the trial that its value was $225. There is no contention by plaintiff that there is error in the instructions of the trial court to the jury. The errors assigned here are that the verdict is not sustained by sufficient evidence and is contrary to law, errors of law occurring during the trial, and the court erred in overruling plaintiff's motion for a new trial. We have read the bill of exceptions throughout, and have considered all the evidence with care. In the introduction of evidence on the part of defendant, the court held the investigation of the facts well within the issues presented by the pleadings, and we are unable to see where plaintiff has any just ground to complain as to the rulings of the court upon the questions raised during the trial.

The principal contention by plaintiff is that the verdict is not sustained by sufficient evidence. We cannot see that it would serve any good purpose to review the evidence in detail, nor even to set out its substance. There is no doubt but that, had the verdict been the other way, it would have been sustained, for under the conflicting character of the evidence there was sufficient to support a verdict either way. The jury, however, being the sole judges of the weight of the evidence, and every fact having been fairly submitted to them, we are unable to say that the verdict is so clearly wrong as to require a reversal of the judgment. One of the contentions of plaintiff is that of the alleged incompetence of defendant Jay, who had charge of the engine during the time of his effort to use it, as a traction engineer. The evidence shows that he had had experience with steam engines, and his examination as a witness showed quite a degree of experience with steam as an engineer. If we should assume that the testimony of plaintiff's witnesses as to the condition of the engine when delivered to defendant and its condition when inspected by them after his efforts to use it was all true, we could probably say that the verdict should not

stand, but of this the jury were the sole judges. They have given credence to defendant and his witnesses, both as to his competency as an engineer and the condition and alleged uniform failure of the engine to render the service required of it, and we must be content with their finding. All questions presented by plaintiff have been examined, but we find no legal grounds for interfering with or setting aside what has been done.

The judgment of the district court will therefore be affirmed, which is done.

AFFIRMED.

JOHN CLARENCE V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1911. No. 16,985.

1. **Criminal Law:** CHANGE OF VENUE. "A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and, unless there has been an abuse thereof, its ruling on the motion cannot be disturbed." *Sweet v. State*, 75 Neb. 263.

2. ———: ADMISSION OF EVIDENCE: HARMLESS ERROR. The erroneous admission of evidence offered by the state in a criminal prosecution which can have no prejudicial effect upon the rights of the defendant will not, as a general rule, require the reversal of a judgment of conviction.

3. ———: HOMICIDE: TRIAL. The information charged the commission of the crime of murder in the first degree. Upon a trial of the accused he was convicted of murder in the second degree. The cause was removed to the supreme court by proceedings in error for review. The judgment of conviction was reversed and the case remanded for further proceedings. At the commencement of the second trial the defendant moved the court to require the county attorney to put him upon trial for manslaughter only, as he had been acquitted of murder in the first degree upon the former trial, and the supreme court had reversed the judgment of conviction of murder in the second degree. The motion was overruled. *Held*, No error, as the reversal of the judgment placed the accused in the same position he was prior to the former trial.

4. **Instructions**, given and refused, examined, and no error found.

5. Homicide: EVIDENCE: SENTENCE. The evidence submitted upon the trial is examined and found sufficient to sustain a verdict for manslaughter, but of a low grade, and the sentence is reduced from ten to two years in the penitentiary.

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

William Deles Dernier and *John C. Watson,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

Plaintiff in error was prosecuted in the district court for Cass county for the murder of John P. Thacker. Upon the first trial he was found guilty of murder in the second degree. The cause was removed to this court by proceedings in error, when the judgment was reversed and the cause remanded for further proceedings. The case is reported in 86 Neb. 210. Upon a second trial the accused was found guilty of manslaughter and sentenced to ten years in the penitentiary. He again brings error to this court.

The facts disclosed upon the second trial are substantially the same as upon the first, and the statement thereof as contained in our former opinion will, to a considerable extent, relieve us from its repetition here. Such of the assignments of error, now presented, as seem to merit consideration will be taken up substantially in their order.

Before entering upon the trial, plaintiff in error (whom we will hereafter designate as the defendant) filed his motion for a change of venue from Cass county on the ground of the bias and prejudice of the people of said county. In support of this motion he filed between 30 and 40 affidavits from citizens of the county as well as his own and those of his attorneys, which tended to sustain

his claim of the existence of such bias and prejudice. The state filed between 70 and 80 counter-affidavits, which, to a considerable extent, contradicted those filed by defendant, and tended to show that little was said or thought about the case, and that there was no such bias and prejudice as would prevent him from having a fair and impartial trial. The motion for the change of venue was overruled, and the ruling is assigned for error here. The alleged crime was committed on the 15th day of January, 1909. The motion and affidavits were filed in October, 1910. The length of time intervening between the alleged killing and the second trial seems to have been sufficient to have decreased, if not entirely removed, whatever of feeling may have existed immediately after the homicide, and this fact, no doubt, was taken into consideration by the court in connection with the statements contained in the affidavits. Applications for change of venue are directed to the sound discretion of the court to which they are made, and the ruling of the court thereon will not be reversed, except in case of the abuse of that discretion. *Sweet v. State*, 75 Neb. 263. We can detect no reversible error in the ruling of the court upon that motion.

During the introduction of evidence in chief by the state, the prosecution was permitted to prove, over the objection of defendant, that for a long time before the killing of Thacker he (defendant) was in the habit of carrying a revolver, and that in some instances it was strapped or belted to his body under his coat and thus concealed. This evidence tended strongly to show that defendant had for many years, almost constantly, carried a revolver, but that fact was not concealed by him and was known by practically all with whom he was acquainted. We can see no good reason why the prosecution insisted upon making this proof, as it was a fact freely admitted by defendant, and his crippled condition and the business he was engaged in were assigned as a justification for carrying arms. The evidence could have but one logical effect, which was to sh(w, beyond question,

that the possession of the pistol at the time of the homicide was not the result of a special preparation for the particular occasion with the purpose of taking the life of decedent. Stronger evidence of the lack of preparation and premeditation could scarcely have been produced. While the admission of this testimony was erroneous, yet it could work no prejudice to defendant and was decidedly in his favor, and he cannot be heard to complain upon that account. The contention that, technically, the purpose of the evidence may have been to prove the commission of an offense under the provisions of section 25 of the criminal code can have no bearing upon this case, since it was abundantly shown by the state's witnesses that he did not conceal his pistol, and therefore no offense was committed, and the law, as it then stood, was not violated. Even had he concealed the weapon, his well-known crippled condition would probably have furnished his justification under the statute.

An unusual and seemingly unnecessary number of photographs were introduced in evidence, some of which were offered by defendant. We have failed to find any objection or exception to those offered by the state. The bill of exceptions is a large one, and there is no mention in the briefs of the pages thereof where such exception can be found, as required by the rules of this court. We have searched the record and find none.

At the commencement of the trial defendant moved the court for an order requiring "the county attorney to put defendant on trial for manslaughter only." The reasons assigned have reference to the former trial—that defendant had been acquitted of murder in the first degree; that the judgment of conviction of murder in the second degree had been reversed by the supreme court; that no new or other witnesses had been indorsed upon the information, and the same state of facts as at the former trial would be presented, and that the supreme court had reviewed the evidence produced upon the former trial, etc. This motion was overruled, and the ruling is now assigned for

error. It is clear that the court did not err in overruling the motion. The information charged the crime of murder in the first degree. The reversal of the judgment of guilty of murder in the second degree and the remanding of the case for another trial placed defendant in the same position with reference to the information and the issues thereunder that he would have been had no former trial been had, and the whole case was open for investigation. *Bohanan v. State,* 18 Neb. 57. Had the evidence been sufficient to sustain a verdict finding defendant guilty of murder in either degree, and the verdict found him guilty thereof, there is no legal reason why sentence might not have been imposed accordingly.

A number of instructions to the jury were asked which the court refused to give, and it is contended that in this action the court erred. An examination of these instructions in comparison with those given by the court upon its own motion shows that the substance of all, which should have been given, was given, and some of them in practically the language requested. With two exceptions they related to the law of self-defense, which was sufficiently given in the court's instructions. The eighth instruction asked and refused was to the effect that the jury might find defendant guilty of assault and battery, if they believed the evidence so warranted. This was properly refused, as there was no evidence which could require the instruction to be given. The eleventh instruction asked and refused was to the effect that words spoken could not justify an assault. This was given by the court in the twenty-fourth instruction. We find no reversible error in the matter of instructions.

The most serious and perplexing question presented is in the contention that the verdict of guilty of manslaughter is not supported by sufficient evidence. Had it not been for the crippled and almost helpless condition of defendant at the time of the tragedy, we would have no hesitation in affirming the judgment to the full extent of the sentence imposed. But in the consideration of the

case this subject is one which is entitled to weight. Defendant took the witness-stand in his own behalf. On the part of the state Lee Thacker, son of decedent, was produced and examined. The two did not vary in their version of the affair to any great extent, and, from the reading of their testimony, we are impressed with their apparent candor and truthfulness. In some particulars they differed, but to no greater extent than would naturally be expected when we consider the length of time they were on the stand and the care and searching character of the examination and cross-examination of each. On the morning of the tragedy, a brother of decedent accosted defendant and informed him that decedent had expressed himself as desiring an opportunity to assault and "beat up" defendant. So far as the evidence shows, this was the first intimation defendant had that decedent entertained any animosity toward him, if any such existed. Their personal relations had been friendly, so far as appeared. It is true that a witness testified that on a previous occasion defendant made use of language which would indicate that, had he received treatment from decedent similar to that imposed upon another, he would have effectually resented it, but this was denied by defendant. However, were the statement made at the time testified to, it was so long prior to the time of the killing as to have but little weight in considering defendant's purpose on that occasion. On the next day after the tragedy, and at the time when decedent had little, if any, hope of recovery, he made a statement of his version of the affair, which was to the effect that, when he advised Carter Albin to slap the young man with whom he was quarreling, defendant said to decedent, "Keep your damn nose out of that business or I'll shoot hell out of you;" that he, decedent, then started around the head of the horses (evidently going toward defendant), and, when some 12 to 14 feet from defendant, defendant shot him in the leg; that decedent then picked up a stick and struck defendant over the head, then seized the cane which de-

fendant had and struck him with it, when defendant shot decedent two other times; that decedent thought he had struck defendant "hard enough to knock an ox down, but he had to knock him down with his fist;" that he thought it was no use to try to run away, for defendant would "shoot him to pieces," so he thought he would try to get the gun away from him; that another person, named, had shot at him once before, and he thought the gun defendant had was the little one the other person had and he knew he could "eat" that one, but knew it was not when defendant commenced to shoot. This statement is written in the third person, and was not skillfully drawn. It was not signed by decedent, but by the bystanders, or those who had heard him state his version of the difficulty. There is a conflict in the evidence as to the exact language used by defendant at the time decedent advised the assault upon one of the persons in the quarrel. It appears that no word was spoken by either decedent or defendant after defendant ordered decedent not to interfere in the quarrel between the other two, nothing having been said by decedent to defendant during the whole time. There was sufficient evidence, whether true or not, to sustain the finding of the jury that defendant ordered decedent to keep his mouth out of the quarrel between the other two, or he would shoot him; that thereupon decedent started toward defendant, and, when 12 to 14 feet from him, he stooped down to pick up a stick or board; that at that moment of time defendant shot at decedent, striking him in the leg, the ball passing through the flesh above the knee, but not fracturing the bone; that decedent then closed in on defendant and struck him on the head with the stick or board, when defendant raised his cane, either for offensive or defensive purpose, which decedent took from him and struck him one or more violent blows upon the head; that the cane was then dropped. In the statement made by decedent, he is represented as saying that he knocked defendant down with his fist. This is not sustained by any other testimony,

but defendant testified that after receiving the blows he could not say in detail what did occur. It is clear that about that time, in fact at the moment, decedent caught defendant around his body, standing to his left side and somewhat in the rear, when another shot was fired taking effect in the lower part of the body of decedent, when both fell to the ground, decedent upon defendant, and that while falling or immediately after striking the ground the fatal shot was fired, the ball passing downward through the stomach of decedent. The parties were separated, when decedent was taken to his home in a carriage, and defendant procured his horse, rode to Plattsmouth, inquired for and found an officer and surrendered to his custody. There was no quarrel between defendant and decedent, the only remark having been made by defendant when ordering decedent to keep out of the controversy between the other two. The jury probably found that in that order there was a threat to shoot decedent in case he interfered further. If the jury found that at the time of the firing of the first shot there was no sufficient reason or ground for defendant to fear an assault by decedent, of such a character as to endanger his life or inflict great bodily harm, their conclusion might be that he invited and induced the attack, and for that reason he could not plead self-defense to the extent of justifying his acquittal, and therefore he was guilty of manslaughter. This view of the case would justify the verdict, but, probably, by quite a narrow margin. From a careful consideration of the evidence, we do not see our way clear to hold, as matter of law, that the verdict is unsupported by the evidence. However, we all agree that the sentence imposed by the court was excessive under the peculiar circumstances as shown by all the evidence. When we consider the size, strength and disposition of decedent, his apparent willingness to engage in the contest, his severe and violent assault upon defendant after the firing of the first shot, and the almost helplessness of defendant in his hands, we are constrained to say that, while we are un-

able to set aside the verdict, we do not hesitate to very materially reduce the sentence.

The sentence will therefore be modified to the extent of reducing it to two years' confinement in the penitentiary at hard labor, but without solitary confinement, and the payment of the costs of prosecution, and, as thus modified, the judgment is

AFFIRMED.

NATHAN RAY FORSHA, APPELLEE, V. NEBRASKA MOLINE PLOW COMPANY, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,411.

1. **Master and Servant:** EXISTENCE OF RELATION. "A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work so that the relation of master and servant arises between them, even though the general employer may have an interest in the special work." *Westover v. Hoover*, 88 Neb. 201.

2. **Appeal:** JOINT TORT-FEASORS: INCONSISTENT VERDICT. Where two persons are sued jointly for damages caused by the alleged negligence of a third person, and the evidence shows that such third person was the general agent of one of the defendants, and at the time his negligent acts occurred was acting for and in the special business of the other defendant, a verdict against his general employer, which at the same time exonerates the defendant in whose service he was specifically or specially engaged, is so inconsistent as to require a reversal of the judgment rendered thereon.

3. **Trial:** REFUSAL OF INSTRUCTIONS. It is reversible error to refuse to give a requested instruction which is applicable to the evidence where the proposition contained therein has not been covered by any other instruction given by the court.

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

Rich, O'Neill & Gilbert, for appellant.

Stubbs & Stubbs, H. N. Marshall and *H. H. Mauck, contra.*

BARNES, J.

Action by Nathan Ray Forsha, a minor, by his next friend, to recover damages for personal injury sustained by reason of the alleged negligence of the defendants. A trial in the district court for Nuckolls county resulted in a verdict against the Nebraska Moline Plow Company and in favor of Murdock & Son. From a judgment on the verdict the plow company has appealed.

It appears that the plow company is a Nebraska corporation having its principal place of business in the city of Omaha, and is a manufacturer and jobber of agricultural implements; that Murdock & Son were engaged in the hardware and implement business at Hardy, in Nuckolls county, prior to and during the year of 1906; that in August of that year the defendants Murdock & Son ordered and purchased of the defendant plow company a National Manure Spreader for the purpose of resale to their trade; the plow company being the exclusive agents or jobbers handling that machine in the territory which included the state of Nebraska. The spreader was shipped to and received by Murdock & Son, and shortly before the 13th day of October, 1906, they requested the plow company to send them an expert to exhibit and demonstrate the machine. The reason for choosing that date was a public sale of horses to be held at that time and place. The request was complied with, and an expert by the name of Bartlett, who was regularly employed by the plow company for that and other purposes, was sent to the Murdocks to make the desired demonstration. On the morning of October 13 Bartlett and the Murdocks erected upon the principal street of the village of Hardy, and adjacent to the Murdock hardware store, a temporary platform on which to place the spreader

so that its hind wheels, which were geared to run the mechanical parts of the machine, would turn without touching the ground. Murdock & Son furnished a gasoline engine as power, a belt was placed on one of the hind wheels of the spreader and the pulley of the engine, and a demonstration was conducted during the forenoon of that day. After the horse sale was concluded, the Murdocks requested further demonstration, and one of the Murdock boys took a position in the seat of the spreader to handle the lever which controlled the gears, Clyde Murdock took charge of the gasoline engine, while Bartlett proceeded to demonstrate the working part of the machine to those who were present out of curiosity or as prospective purchasers. The engine was started and the demonstration had proceeded a short time, when, as stated by the witnesses, there was a sudden crash, one of the slats which revolved around the drum at the rear end of the spreader broke, and part of it flew off and struck the plaintiff, who was standing on the sidewalk, causing the injuries complained of.

From the foregoing statement of facts, if Bartlett, the expert, was for the time being in the employ of Murdock & Son and under their directions, they would be responsible to an innocent third party for his negligence, and the plow company could not be held liable, unless it was also responsible for the negligence of Bartlett, which was the proximate cause of such injury. The evidence is that at the time of the demonstration Bartlett was in the employ and under the control of Murdock & Son, and this evidence does not seem to be contradicted. Therefore the plow company could not be held liable for Bartlett's negligence, unless it was interested in, and was actually promoting, the demonstration which was going on. However, it may be inferred from the evidence that the plow company was interested in the sales of spreaders, because that company could alone furnish them to the trade, and therefore would realize a profit on each spreader sold. In that case the plow company would be

indirectly interested in promoting such sales. Whether this indirect interest would be sufficient to make it liable for the negligence of Bartlett it is not necessary to determine in order to make a proper disposition of this case. It appears that the trial court, by paragraph 7 of his own instructions, charged the jury that if they found that the plow company was engaged in selling spreaders and other farm machinery, and employed Bartlett as its agent as an expert for the purpose of assisting the retail dealer in setting up, operating, advertising and demonstrating said machinery for the purpose of making sales thereof, and that he was engaged with the defendants Murdock in operating the machine by the direction of the plow company, and that company was jointly interested by reason of their relations in promoting the sale of the machine, then Bartlett was the representative of the company, and the company was chargeable with his negligence. There seems to be no evidence upon which such an instruction could be predicated.

Again, the defendant plow company requested the court to instruct the jury that, if Bartlett was at the time of the injury under the control of the Murdocks and subject to their direction, then he was the agent of the Murdocks, and plaintiff could not have a verdict against the plow company. This instruction was refused, and the court on his own motion instructed the jury, in the closing part of paragraph 7, as follows: "But, on the other hand, if he was not so acting, but was at the time of the accident entirely out of the control of the defendant Nebraska Moline Plow Company, and entirely under the control of the defendants Murdock, then his acts were not attributable to the defendant Nebraska Moline Plow Company, and it should not be charged with responsibility by reason of anything he may have done." As we view the evidence contained in the record, it was error to give this instruction, and to refuse the one requested.

In the cross-examination of some of the plow company's witnesses an attempt was made to show, and it

is probable that it substantially appears, that Bartlett was not only generally an employee of the plow company, but was sent to Hardy and could be recalled by that company; that is, he could be taken from the service of the Murdocks if the company desired to do so; that he was not entirely out of its control, and was not entirely under the control of the Murdocks. It was not necessary, however, that he should be entirely out of the control of the plow company in order to relieve that company from liability for his negligence. It was sufficient if he was acting, in the particular work which he was doing, under the direct control of the Murdocks. If one lends an employee to the service of another person, he is, while performing that service, under the control of, and is the agent of, that other person. But it is only in the performance of that particular service that he is controlled by the person to whom he is lent, and he cannot be said to be entirely out of the control of his employer. It therefore seems clear that the instructions complained of were generally misleading, and were not a correct statement of the law.

It is further contended by the defendant plow company that the verdict in this case is in irreconcilable conflict with itself, and amounts to a declaration that the material allegations of the petition are both true and false; that two inconsistent findings of a jury upon the same issue, if based upon conflicting evidence, nullify each other, and such findings will not support a judgment. In support of this contention counsel cite *Gerner v. Yates*, 61 Neb. 100, and *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 580, where it was so held.

The evidence shows that Clyde Murdock at all times during the demonstration operated the gasoline engine which furnished the power for that purpose. It further shows that Carl Murdock, the brother of Clyde, and the younger son of Robert Murdock, sat in the seat of the spreader and operated the levers during the demonstration. It seems clear from the evidence that the negli-

gence which caused the accident and resulted in the injuries sustained by the plaintiff was the placing of the spreader in an insecure manner upon the temporary platform erected for that purpose, and in running the machine at too high a rate of speed. Therefore it would seem that, if any of the defendants were liable in this case, it is because of the negligence of Bartlett, the expert, who, as we have above stated, seems to have been acting more particularly as the agent and in the employ of Murdock & Son, and incidentally for the benefit of the defendant plow company. This being so, we are unable to see how Murdock & Son can be held blameless and the plow company at the same time be held liable for Bartlett's negligence. Such a finding, under the circumstances disclosed by the record before us, is so inconsistent as to entitle the plow company to a new trial.

Without further comment, and for the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

REESE, C. J., dissenting.

I cannot agree with the opinion of the majority in this case. I believe from the evidence that Bartlett was the agent of the plow company throughout the demonstration of the machinery, which was then on exhibition, and not the agent or employee of Murdock & Son. He was sent there by his employer to exhibit the spreader *in action* in order to create a demand for it, thus increasing its sales. He was not employed by the Murdocks, nor in any sense under their control. The preparation for exhibition was wholly under his control and direction, notwithstanding some, possibly the most, of the manual labor was performed by the Murdocks, and the power furnished by them. The manner of setting and adjusting the spreader, by which the accident occurred, was certainly under his direction. By his negligence in setting it up, the plaintiff, who, with all the people generally, was invited to witness the action of the machine, was

most seriously hurt. The Murdocks may have been guilty of negligence and thus become joint tort-feasors, but they were in no sense the masters of Bartlett. It is possible that their negligence contributed to the injury complained of, but of that the jury were the judges, and they have said such was not the case. The reversal of this judgment may deprive plaintiff of his right to recover and throw the whole burden of the loss and injury upon him, while at the same time he has a meritorious action against the plow company for his damages. The fact, if true, that the Murdocks were joint tort-feasors with the plow company does not, in law, release it from a judgment against itself alone. The plaintiff had his action against any one or all of the wrongdoers. *Hayden v. Woods,* 16 Neb. 306. They are jointly and severally liable for their wrongful acts, if any such were shown. *Scott v. Flowers,* 60 Neb. 675. The erroneous discharge of one participant in a joint wrong affords no ground of complaint to his codefendant. *Cleland v. Anderson,* 66 Neb. 252. I am unable to detect any error in the instructions. I am fully persuaded that in all that occurred Bartlett was the employee of appellant and in no sense of the Murdocks. *Harding v. St. Louis Nat. Stock Yards,* 242 Ill. 444; *Driscoll v. Towle,* 181 Mass. 416.

In any view of the case, as presented by this record, the judgment of the district court should, in my opinion, be affirmed.

FAWCETT, J., concurs in this dissent.

LIZZIE M. SMITH, ADMINISTRATRIX, APPELLEE, v. WILLIAM COON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,518.

1. **Negligence:** CONFLICTING EVIDENCE: DIRECTING VERDICT. In an action to recover damages for death by wrongful act, where the

evidence as to the negligence of the defendant and the contributory negligence of the deceased is conflicting, it is the duty of the trial court to refuse to direct a verdict for the defendant.

2. Highways: OPERATION OF AUTOMOBILE: CARE REQUIRED. The driver of an automobile when approaching a street crossing in the main business part of a city, at a time when the streets are occupied by other vehicles and pedestrians, should have his automobile under control, should keep a sharp lookout, and should manage his car as to its rate of speed and otherwise with due regard to the safety of others, and should stop if necessary to avoid injuring any one who for any cause is found to be in a place of danger.

3. Negligence: CONTRIBUTORY NEGLIGENCE. One who becomes frightened and bewildered at the near aproach of an automobile while crossing a public street, and for that reason fails to avoid a collision, is not as a matter of law guilty of contributory negligence.

4. Venue: CHANGE OF VENUE: DISCRETION OF COURT. In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion.

5. Damages. Evidence examined, and found sufficient to sustain the verdict, and that the amount thereof is not excessive.

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

William Sykes, Carlton C. Marlay and *Lionel C. Burr*, for appellant.

C. O. Whedon and *Morning & Ledwith, contra.*

BARNES, J.

Action to recover damages for death by wrongful act. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the defendant was driving his automobile on Twelfth street, in the city of Lincoln, on the 29th day of April, 1908, and, while going north over the crossing where that street intersects with O street, his

car struck and killed one Nellie Smith. The plaintiff was appointed administratrix of the estate of the decedent, and brought this action to recover damages sustained by her next of kin by reason of her death. On the hearing of this appeal there was some criticism of the allegations of plaintiff's petition, but we are satisfied from an examination of the record that the averments of negligence, which are somewhat general in their nature, are broad enough to sustain the verdict and judgment of which the defendant complains.

Defendant's first assignment of error is that the trial court erred in not sustaining his motion to instruct the jury to return a verdict in his favor, and in giving instructions numbered 12, 13 and 14. If we were to view this assignment in a technical sense, it could be disposed of under the rule that, where errors are assigned in a group, if any of the matters complained of are correct, the whole assignment must fail. We have concluded, however, to treat them together as a single assignment, and in the order presented in defendant's brief. It will be observed that at the very outset this assignment raises the question of the sufficiency of the evidence to sustain the verdict, for, if the evidence is insufficient, then it was error to overrule the defendant's request to direct a verdict in his favor.

It appears, without dispute, that the deceased and her sister Lizzie were at the store of Miller & Paine, situated on the corner of O and Thirteenth streets, in the city of Lincoln, at about half past 12 o'clock on the day when the accident occurred; that they were both employed by the Griswold Seed Company at its establishment on the corner of Tenth and N streets, and were on their way to their place of employment when the deceased was killed; that together they proceeded west along the south side of O street; that, when they reached a point on the Twelfth street crossing about half way between the curb line and the east rail of the Citizens Street Railway track, they saw the defendant's automobile approaching

them from the south at a distance of about 75 feet; that the speed of the approaching car frightened and bewildered them; that they hesitated and stepped back and forth in an effort to determine which way the automobile would turn in order to pass them; that as the car came on they failed to avoid it, and the deceased was struck upon her left side and thrown violently to the pavement, sustaining injuries of which she died within half an hour; that the crossing where the accident occurred is situated in the main business part of the city, and is at all times, and especially at the noon hour, congested by passing vehicles and by pedestrians on their way to and from luncheon; that this was the condition at the time in question, and therefore the killing was witnessed by a large number of persons who have testified for and against the defendant. The plaintiff, who was with the deceased at the time when she was struck by the defendant's car, locates their position as just west of the center of the space between the east rail of the street car track and the curbing when they discovered the approaching car. She testified that the car was north of the alley and just south of the crossing over which they were passing, and was coming directly towards them at such an excessive rate of speed as to frighten and bewilder them; that they hesitated and moved slightly east and west in an attempt to determine which side of them the defendant would pass, and before they could get out of the way the car, without slacking its speed, struck her sister and lifted her up and threw her some distance; that her head struck the pavement, and thus were inflicted the injuries of which she immediately died; that when her sister was struck they were facing towards the car, the deceased being east of the plaintiff, and that the car grazed plaintiff as it passed; that she heard no warning, and her attention was called to the approaching automobile by reason of its excessive speed.

One Hall, who at that time was crossing O street diagonally from the corner of the Burr block to the corner

of the Funke building, stated, in substance, that he saw the deceased and her sister on the crossing; that he also saw the car approaching them, and ran to the west side of the car tracks in order to reach what seemed to him a place of safety; that the deceased and her sister were in a direct line between him and the approaching car when he first discovered it, and that the car was coming directly towards them at a speed of at least 15 miles an hour, and was about 75 feet distant from them when he saw the deceased and her sister bewildered and hesitating upon the crossing in an apparent effort to avoid being struck by it; that he heard the thud of the car when it hit the deceased, and the noise made by her head when it struck the pavement; that he heard no gong or horn or warning of any kind; that the car, after striking the deceased, turned slightly to the right, ran about 75 feet to the northeast, and was stopped upon or just north of the street car track upon O street; that the defendant backed the car towards the south curb of that street, and that he heard him say, "She saw me coming. Why didn't she get out of the road?"

A Mrs. Crosse saw the accident. She testified that the car was south of the alley, going very fast, when she first discovered it; that she saw the deceased and her sister upon the crossing; that the car came on without any apparent slacking of its speed; that she heard a scream and thud when it struck the deceased.

One Doctor Brown, at the time of the accident, was at or near the southwest corner of the Burr block on O street. He saw the car approaching from the south, and testified that it was north of the alley when he first discovered it; that it was going about 10 or 15 miles an hour; that he heard no warning; that he saw the two ladies, one of whom was killed; that the car was approaching them in a direct line, and they seemed bewildered and did not know which way to go to get out of the way; that the deceased was struck and thrown to the pavement, and that it was all over in an instant; that the car ran about 70 feet after it struck the deceased.

Ray Elliott testified, in substance, that he saw the machine going past his place of business, which is situated on the east side of Twelfth street and south of the alley running east and west through that block; that it was going twice as fast as automobiles usually go when passing his store. He estimated the speed at that point at about 20 miles an hour. That he heard no warning of any kind.

J. W. Johnson was on the west side of Twelfth street, between the alley and the O street crossing. He testified, in substance, that he saw the defendant's automobile pass; that it was going so fast towards the people on the crossing as to cause him to fear an accident; that he saw the woman struck; that the automobile ran partly across O street and stopped north of Young's cigar store; that he estimated the speed, when it passed, at about 12 miles an hour; that it did not seem to slacken speed; that he heard no alarm sounded.

A Mrs. Goetting saw the accident, and her testimony as to the existing conditions and speed was, in substance, the same as that given by Ray Elliott.

One Grover Archer saw the accident, and testified in substance that the automobile was going faster than they usually go. He estimated its speed at 15 miles an hour, which was not diminished as it approached O street, and that he heard no alarm sounded.

W. H. Carson was standing on the curb at the northwest corner of Rector's drug store, which is situated on the corner of Twelfth and O streets and on the east side of the Twelfth street crossing. He stated that he saw the defendant's machine north of the alley which is situated south of the drug store; that it was about 75 feet from the deceased at that time, and was going at least 15 miles an hour; that its speed was what attracted his attention to it; that he spoke to a companion, and just then some one cried "He has struck a girl." His testimony was corroborated by his companion.

A Mrs. Garvey was at or near the place where the ac-

cident occurred; she heard a scream, and turned around quickly; she testified that a lady was lying on the pavement, and the driver was trying to stop the machine; that the auto passed her and went to the front of the barber shop, which is situated under the Burr block.

A Mr. Turner, by his testimony, also corroborated the plaintiff and her other witnesses as to the description of the accident, the speed of the automobile, and other essential particulars.

It is unnecessary to further review the plaintiff's evidence. The defendant testified that he saw the deceased when his automobile struck her; says he was going from 8 to 10 miles an hour when he crossed N street, which is a block south of where the accident occurred; that the machine was coasting; that he had it under perfect control, and had his hands on the wheel for the purpose of steering it wherever he wanted to go; that he was going only about 3 or 4 miles an hour when he reached the Twelfth street crossing; that he went over the crossing in the center of the space between the street car tracks and the east curb; that he saw the deceased and her sister when they started to cross the street about the time he crossed the alley; that he did not see them after he saw them crossing in front of his machine until he was within about two feet of the deceased, and at that time she was trying to get in front of his machine; that she ran against the machine and was knocked down. He also testified that at the rate of speed at which he was going he could have stopped the machine in from 6 to 10 feet.

Professor Richardson of the state university testified that he saw the accident, but was unable to fix the rate of speed; thought the machine was not going over 5 to 8 miles an hour. The defendant also succeeded in getting some testimony into the record to the effect that, in the opinion of the witnesses, if the deceased and the plaintiff had kept right along on their way towards the west side of Twelfth street, they would not have been struck; and, if they had turned back and gone to Rector's drug store

corner, the deceased would not have been killed. This testimony, while incompetent, was no doubt considered by the jury.

It thus appears that the evidence was conflicting, and therefore the question of the defendant's negligence was peculiarly one for the determination of a jury. It is quite probable, however, that the jury did not consider the defendant's testimony either convincing or persuasive. As a matter of law the deceased and the defendant were possessed of equal rights to the use of the crossing at the time the accident occurred, and if the deceased and her sister became frightened by reason of the negligent and excessive rate of speed at which the defendant was approaching them, and were thus rendered unable to get out of his way and avoid the accident, then it was his duty to stop his machine and thus avoid injuring them. *Simeone v. Lindsay,* 6 Pennewill (Del.) 224, 65 Atl. 778. To avoid liability defendant claimed that he did not see the deceased until she attempted to get in front of his car, but the jury must have concluded that it would not do for him to say that he did not see her, for the testimony is conclusive that from the time he crossed the alley until the deceased was struck she was directly in front of his machine, and he cannot avoid liability by saying that he did not see her. It was his duty to see her, and while driving his machine over a street crossing like the one in question, which was congested by the traveling public, to so approach it as to avoid injury to any one, and this is the meaning of that part of section 6248, Ann. St. 1909, which provides that the driver of an automobile, "upon approaching a crossing of intersecting public highways, or a bridge, or a sharp curve, or a steep descent, and also in traveling such crossings, bridges, curves, or descent, a person operating a motor vehicle shall have it under control and operated at a rate of speed less than heretofore specified, and in no event greater than is reasonable and proper, having regard to the traffic then on such highways and the safety of the public." It is quite apparent

that the defendant in this case failed to comply with the plain provisions of the statute above quoted, and we are therefore of opinion that the evidence in this case was sufficient to establish actionable negligence on his part, which was the proximate cause of the injury complained of, and the district court did not err in refusing to direct the jury to return a verdict in his favor.

Considering that part of this assignment which attacks instructions numbered 12, 13 and 14, it may be said that, if any one of the instructions complained of was correct, the assignment must be disregarded. However, we find, upon an examination of those instructions, that they are without error. They relate to the question of the defendant's negligence and the contributory negligence of the deceased, and it appears that those questions were fairly submitted to the jury.

It is strenuously insisted, however, that the deceased was guilty of such contributory negligence as precludes a recovery in this case. The evidence discloses that when the accident occurred the plaintiff and her sister were on their way to their place of employment, and were attempting to pass over the Twelfth street crossing; that when they reached a point half way between the curb and the east rail of the street car track, and as they were proceeding westerly, they saw the defendant's car directly approaching them at a rate of speed so excessive as to frighten and bewilder them; that they hesitated in their attempt to determine whether they should proceed or retrace their steps in order to reach a place of safety; that, while so hesitating, the deceased was struck and killed by reason of the fact that the defendant did not materially slacken the speed of his car or turn sufficiently to the right or left to avoid the impending collision. Under such circumstances, the question of contributory negligence was properly submitted to the determination of the jury, and their verdict seems to be fully supported by the evidence and the adjudicated cases.

In *McFern v. Gardner*, 121 Mo. App. 1, which was an

action brought by the plaintiff for damages on account of the death of her husband caused by a collision with the defendant's automobile, it was said: "In such case, although the deceased turned to the left instead of to the right, he was not therefore guilty of negligence as a matter of law because he was confronted with a sudden danger in the near approach of the automobile and could not in the emergency be required to exercise the best judgment."

In *Navailles v. Dielmann,* 124 La. 421, the court said: "The act of a pedestrian in running in front of an automobile as a result of terror, caused by discovering the automobile near him, is not voluntary, and it is not negligence." In that case it was held that "where a pedestrian, because of terror, ran in front of an automobile, and the operator saw the danger to the pedestrian in time to avoid the accident by stopping, but he failed to do so, and ran over the pedestrian, the operator was liable under the last chance doctrine."

Berry, Law of Automobiles, in sec. 163, under the heading of "Mutual Rights and Duties," says: "One has the right to assume that others will exercise care and caution to avoid injuring him, but there is imposed upon him a corresponding duty to use due care for the safety of others. Thus, one in charge of an automobile is bound to exercise care commensurate with the risk of injuries to others. It is his duty to keep a vigilant watch ahead for vehicles and pedestrians, and on the first appearance of danger to take proper steps to avert it."

In *Benoit v. Miller,* 67 Atl. (R. I.) 87, the facts were that an automobile was moving southerly on a street 72 feet away from where a pedestrian had started easterly and across the same street, and, when beyond the middle of the street, the pedestrian stopped and looked backwards towards the sidewalk and was immediately struck by a lamp on the automobile, and it was held that he had reached a point where he had a right to suppose the

automobile would avoid him, and consequently was not guilty of contributory negligence.

From the foregoing, we are of opinion that the evidence in this case was sufficient to warrant the jury in finding that the deceased was not guilty of contributory negligence.

We think the foregoing sufficiently answers all of the defendant's assignments of error, excepting his contention that the verdict of which he complains was excessive.

It appears from the Carlisle table of expectancy, which was introduced in evidence, that at the time the deceased was killed she had a life expectancy of 25 years; that she was earning $60 a month, with every prospect of continuous employment; that she spent about $100 a year upon her clothing and personal expenses, and the remainder of her wage, amounting to $680 a year, was turned over to her mother for the support of herself and family; that at that time the life expectancy of her mother, who was her next of kin, was between 11 and 12 years. Deducting from the total prospective earnings of the deceased for that period her personal expenses, her board at $3.50 a week, and her car fare of $36 a year, and we have a net balance of more than $5,000, which she would have contributed to her mother's support during the remaining period of her life. It follows that the verdict, which was for $4,500, cannot be said to be excessive.

It is also urged that the district court erred in refusing to grant defendant a change of venue on account of the alleged bias and prejudice of the inhabitants of the county of Lancaster against drivers of automobiles. It appears that this question was submitted to the trial court upon affidavit evidence, and the motion for a change of venue was thereupon denied. It has been frequently held, where this question has been fairly submitted to and determined by the trial court, that, unless it clearly appears that there has been an abuse of discretion in refusing to grant a change of venue, the ruling of that court will not be disturbed. From a careful examination of the

record in this case, we are of opinion that the order of the district court in refusing to grant a change of venue was the proper one.

Finally, it appears that the defendant had a fair and impartial trial; that his contentions were fairly considered, and his matters of defense were submitted to the jury under proper instructions; that the evidence is amply sufficient to sustain the verdict; and the judgment of the district court is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

FREDERICKA BLADO, APPELLEE, V. THOMAS DRAPER, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,524.

1. **Negligence:** INJURY TO PEDESTRIAN: OPERATION OF AUTOMOBILE. The driver of an automobile upon a public street or highway, who, in attempting to pass a carriage from the rear, so carelessly and negligently handles his car as to strike the carriage and injure the occupant thereof, who is without fault, is liable for the injuries caused by such negligent act.

2. **Appeal:** FINDINGS: REVIEW. Where the district court has properly submitted a controverted fact to the jury for their determination, their finding thereon should not be set aside by a reviewing court, unless it can be said to be clearly wrong.

3. **Trial:** REFUSAL OF INSTRUCTIONS. If the district court has, on his own motion, fairly and fully instructed the jury on defendant's theory of the case, it is not error for the court to refuse defendant's request for additional instructions thereon.

4. **Evidence:** OPINION EVIDENCE: SPEED OF AUTOMOBILES. It is not reversible error to permit a witness, who is well skilled in the use of automobiles and is accustomed to handling and driving them, to testify as to the distance in which such a machine may be stopped when going at different rates of speed, where on the trial of a cause that question is or may become material.

5. **New Trial:** NEWLY DISCOVERED EVIDENCE. A new trial should not be granted upon the ground of newly discovered evidence where

such evidence appears to be merely cumulative or is of a doubtful or equivocal character.

6. **Damages.** Evidence examined, and found sufficient to sustain the amount of the judgment rendered by the district court.

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

George A. Adams, for appellant.

George W. Berge, contra.

BARNES, J.

Action in the district court for Lancaster county to recover damages sustained by the plaintiff which are alleged to have been caused by defendant's negligence in driving his automobile upon one of the public streets of the city of Lincoln. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that on the 1st day of March, 1908, the plaintiff and her husband were driving south on Eleventh street in the city of Lincoln with a single horse and carriage, and were overtaken by the defendant who was driving his automobile; that, when they were a short distance north of the alley between A and B streets, the defendant, in attempting to pass their carriage, which was within four or five feet of the west curb and on the right-hand side of Eleventh street, and without any warning, struck the left hind wheel of their carriage with the front fender of his machine. The force of the collision lifted plaintiff's buggy bodily from the ground, bent the axle-tree, broke the reaches, and threw the plaintiff forward upon the dashboard and at least partially out of the carriage, and thus inflicted the injuries of which she complains. The foregoing facts relating to the accident are not seriously disputed by the defendant and may be taken as the basis for our consideration of his appeal.

1. Defendant's first contention, as stated in his brief, is that the judgment is not supported by the evidence.

From an examination of the bill of exceptions, it seems clear that defendant was negligent in not turning his automobile sufficiently to the left in attempting to pass the plaintiff's carriage so as to avoid the collision; and, unless there was some immediate and intervening cause which prevented him from so doing, it must be conceded that his negligence was such as would support the verdict and judgment of which he now complains.

To avoid liability, it was contended by defendant at the trial, and is now urged on his appeal, that when he was in the act of passing the plaintiff's carriage he was suddenly confronted by a little girl riding a bicycle directly in front of his machine, and, in order to avoid striking and killing her, he was compelled to turn suddenly to the right, and that this was the cause of his striking plaintiff's carriage. It appears that this was one of the facts litigated in the trial court and which was there submitted to the jury; that on that question there was a conflict of evidence, with a preponderance of the testimony against defendant. The jury found against him on that question, and we cannot say that the evidence was insufficient to sustain the verdict. From reading the record, it is apparent that the jury believed that the defendant was guilty of negligence in carelessly and recklessly driving his automobile at such a rate of speed as to cause the injuries complained of, and we are not at liberty to overturn their verdict.

2. The defendant's second complaint, as expressed in his brief and argument, is that the district court erred in failing to instruct the jury on the law of unavoidable accident as set forth in the fifth, sixth, seventh and eighth instructions requested by his counsel. It is conceded that an instruction was given on that branch of the case, but it is insisted that it was not sufficient and did not contain a full and correct statement of the law on that subject. An examination of the transcript discloses that by the fourth, fifth and sixth paragraphs of the instructions the trial court, on his own motion, fully and fairly informed

the jury of the legal effect of any unavoidable accident, and correctly submitted to their consideration the defendant's contention that the accident was occasioned by his attempt to avoid running down or striking the child whom he claims was riding a bicycle in front of his machine. Having so instructed the jury, it was not error to refuse defendant's requests.

3. Defendant's third contention is that the trial court erred in permitting witness E. E. Mockett to testify as to the distance in which an automobile could be stopped while running at different rates of speed upon Eleventh street, in the city of Lincoln. While this evidence was not very material, still defendant has failed to cite any authorities which tend to support his contention, and it is not at all probable that the reception of this evidence resulted in any prejudice to his substantial rights. The witness clearly qualified himself as an expert handler, driver and dealer in automobiles, and we are satisfied that the evidence complained of was properly admitted. The same may be said as to like evidence given by other witnesses, of which defendant also complains.

4. It is further contended that the district court erred in refusing to grant the defendant a new trial for and on account of newly discovered evidence. We have carefully examined the affidavits upon which the claim of newly discovered evidence is founded, and find that such evidence is at most merely cumulative; that it is also of equivocal and doubtful character, and the most that can be said in relation to it is that it sets forth the name of a little girl, whom it is claimed was seen near the place of the accident; but no such girl has been found, and none of the affiants state that they saw her in front of defendant's automobile at the time the accident occurred. Therefore we are unable to say that the trial court erred or failed to exercise a sound legal discretion in refusing to grant a new trial upon that ground.

5. Finally, it is contended that plaintiff was not seriously injured, and therefore the judgment is excessive.

In disposing of this contention, it is sufficient for us to say that the evidence as to the nature and extent of the plaintiff's injuries and her present and probable future physical condition is to some extent conflicting; but it is clearly shown that she was seriously injured by the collision in question. It appears that the jury estimated her damages at the sum of $3,000, which, upon a careful review of the evidence, the district court deemed excessive to the extent of $1,000, and ordered a remittitur of that amount, and rendered a judgment against the defendant for the sum of $2,000. We do not think we should attempt to substitute any opinion of our own for the verdict of the jury as finally approved by the trial court. That tribunal heard the evidence and saw the witnesses as they gave their testimony in open court, and we are unable to say that the judgment as finally rendered by that court is excessive.

Having disposed of all the defendant's contentions as they are presented in the brief of counsel, and finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED

SEDGWICK, J., not sitting.

ISABELLE MCHENRY TOMSON, APPELLEE, V. IOWA STATE TRAVELING MEN'S ASSOCIATION, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,564.

Former opinion modified, and the plaintiff awarded judgment for $2,500, with interest thereon at 7 per cent. from February 18, 1902, on condition of filing a remittitur.

REHEARING of case reported in 88 Neb. 399. *Former judgment vacated, and case affirmed on condition.*

BARNES, J.

The defendant has filed a motion for a rehearing, and contends that the opinion should be modified in so far as it holds that for its failure and refusal to file its constitution or articles of incorporation and by-laws with the auditor of public accounts, as provided by section 112, ch. 43, Comp. St. 1909, the defendant was not entitled to the use of its by-laws in making its defense in this case. It is probable that this portion of the opinion should be explained or modified, for it was not our intention to overthrow the well-established rule that, where the plaintiff introduces a part of the by-laws in evidence in order to establish his claim for indemnity, the defendant may read in evidence the other parts of such by-laws relating to that subject.

It is also contended that plaintiff's petition does not state facts sufficient to sustain a judgment in her favor. This matter was fairly disposed of by our former opinion, and the rule therein announced should be adhered to.

Complaint is also made because the ruling upon the defendant's motion to require the plaintiff to elect upon which cause of action contained in the petition she would rely was not disposed of. We think the opinion fairly holds that the petition contained but one cause of action, and that is our present view of the matter, and that a prayer for a judgment for $5,000 on account of the death of the assured did not vitiate the right of the plaintiff to recover on the ground of total disability.

On the other hand, counsel for the plaintiff has filed a motion asking for a modification of our former judgment to the extent of allowing the plaintiff to recover the sum of $2,500 with interest thereon from the 18th day of February, 1902, at the rate of 7 per cent. per annum for the total disability of the assured caused by the accident described and set forth in her petition.

From a careful re-examination of the record, it appears that the defendant is a fraternal beneficiary asso-

ciation insuring traveling men against accident, disability, and death by accident, and was formed, organized and carried on for the sole benefit of its members and beneficiaries, and not for profit. It also appears that plaintiff's husband, Hays B. Tomson, was a member of the association, in good standing at the time the accident occurred, and had paid all assessments made against him from the year 1892 to the day of his death; that he had performed all of the conditions of the contract on his part to be kept and performed. The petition also sets forth that the accident occurred on the 18th day of February, 1902, and it is described in language which had our approval in *Western Travelers Accident Ass'n v. Tomson,* 72 Neb. 674. A copy of the benefit certificate was set out in the petition, and it was alleged that the terms and conditions of the same had become broken and the defendant had become liable for the total disability of the assured caused by said accident. It was further alleged that the deceased was on the 18th day of February, 1902, totally and permanently disabled by said accident; that he never recovered therefrom, and died from its effects; that the accident was the sole and proximate cause of his death.

It is true that the plaintiff prayed for a judgment for $5,000 on account of the death of the assured, but that fact did not invalidate the allegations of the petition which showed a right of recovery for $2,500 on account of permanent disability. It is now conceded that the plaintiff was not entitled to recover for the death of the assured, because such death took place more than 26 weeks after the accident occurred.

Upon the trial, that portion of the defendant's by-laws which provide for an indemnity of $2,500 to be paid to the beneficiary in case of the permanent disability of the assured was introduced in evidence as a part of the deposition of one Deets who was secretary of the defendant company. All of the by-laws bearing upon this question were introduced in evidence, either by the plaintiff or

the defendant, and therefore the record contains sufficient evidence to sustain a judgment for that amount. It clearly appears that under the evidence and the pleadings the plaintiff is entitled to recover the sum of $2,500, with interest on the same from February 18, 1902, on the ground of permanent disability caused by the accident. While the plaintiff's petition is not artistically drawn, still it was not attacked either by motion or demurrer, and, under the well-established rule that after judgment a pleading will be liberally construed, we deem it sufficient to sustain a verdict for that amount; and the error in instructing the jury on the theory of liability for a death loss was, under our present view of the case, error without prejudice.

This being the second time that this case has been before us, and it being quite evident that defendant is liable to plaintiff for $2,500 for the total disability of the assured, together with interest thereon from the date of the accident in question, we deem it advisable and proper to terminate this litigation, and therefore our former judgment reversing the cause is set aside, and it is ordered that, if the plaintiff file a remittitur of all of the present judgment except $2,500 and the interest thereon from February 18, 1902, to the present time, within 40 days from the filing of this opinion, the judgment of the district court to that extent will be affirmed, otherwise the judgment will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

FREDERICK H. BLAKE, APPELLEE, V. LAURENTINA A. WEST, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,789.

1. **Adverse Possession:** ENTRY BY PERMISSION. Where the possession of real estate is the result of an entry upon the premises by per-

mission of the legal owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title.

2. ———: ENTRY UNDER CONTRACT TO PURCHASE. One who enters into the occupancy of real estate under an oral contract to purchase it cannot afterwards obtain title thereto by adverse possession without showing that his occupancy had assumed an adverse character, and continued as such during the statutory period.

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

L. H. Bradley, for appellant.

Henry E. Maxwell, contra.

BARNES, J.

Action in ejectment to recover lot 3, in block 13, Briggs' Place addition to the city of Omaha. The plaintiff's petition contained the usual averments in such cases, and the answer was a general denial. Both parties waived a jury and the cause was tried to the court. The plaintiff had the judgment, and the defendant has appealed.

Appellant contends that the judgment is not sustained by the evidence, and this is the only question presented for our determination. It appears from the printed abstract that the plaintiff established a complete paper title to the property in question, and this fact is not disputed by the appellant. It also appears that the real defense which was interposed by the appellant was adverse possession for more than the statutory period of ten years next before the commencement of the plaintiff's action. To establish her defense, she testified that she resided on lot 4, which adjoins the lot in question; that she went into possession of both lots in September, 1894, and that she bought the lots of one Erastus Benson on contract, in 1894, and was to pay in monthly payments; that she moved her barn onto lot 3, and that she had been in pos-

session of the lot ever since that time; that she set out trees, cut the grass, and seeded it down; that she was away for a time, and the weeds were allowed to grow; and that she paid the taxes for the years 1894 to 1897, inclusive. On cross-examination she testified that she never had any written contract for the purchase of either of the lots; that she obtained her deed to lot 4 in 1896; that she was to pay $1,000 for lot 3 in instalments of $30 a month, but that she had never made any payments thereon; that Mr. Benson told her to pay the taxes; that she paid them up to 1897, but had paid nothing since; that the lot had been sold for taxes before 1897, and also since that time. It appears that the barn in question was not placed on a brick foundation, and that the judgment in plaintiff's favor gave the defendant ample time to remove it. It further appears that shortly before the commencement of this action the plaintiff's attorney saw the defendant several times in order to see if some arrangements could not be made to obtain possession; that she then stated that she had a contract for lot 3, but had never made any payments except a few years' taxes; that when she heard of the foreclosure suit (through which the plaintiff's grantor obtained his title) she stopped paying taxes; that she moved off from the lot, and that some three months later she changed her mind and moved back again. She also requested that the bringing of this action be deferred until she could see Mr. Briggs, who was plaintiff's grantor, and get a deed to the lot from him; that her request was granted, and delay was had until it became apparent that she did not intend to take any steps to obtain the title, when this suit was commenced.

From this testimony it is apparent that defendant's claim of adverse possession really dated from the time alleged in the plaintiff's petition. It also appears, without dispute, that when the defendant first took possession of that portion of lot 3, upon which her barn was situated, she did so by permission, and therefore from that time on until she evinced a determination to maintain her

possession as against the owner of the lot her possession could not be said to be adverse. *Lanham v. Bowlby*, 79 Neb. 39; *Johnson v. Butt*, 46 Neb. 220; *Smith v. Hitchcock*, 38 Neb. 104; *Beer v. Dalton*, 3 Neb. (Unof.) 694.

A careful examination of the record satisfies us that the judgment of the district court was right, and it is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

JOSEPH H. EDMONDSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 25, 1911. No. 17,020.

1. Embezzlement: DEFENSES: GUARDIAN AND WARD. A guardian of the person and estate of a minor, who converts the money and estate of his ward to his own use, thereby violates the provision of section 121 of the criminal code; and the fact that he has failed to report to or make final settlement in the county court, after being served with a citation to make such settlement, is not a bar to a prosecution for the crime of embezzlement as defined in that section.

2. ———: CONVICTION: SUFFICIENCY OF EVIDENCE. The voluntary admissions of a guardian that he has used the money belonging to his ward as his own, has expended it for his own private purposes, and is unable to replace or repay it, are admissible in evidence against him, and if supported by other competent evidence are sufficient to sustain his conviction of the crime of embezzlement.

3. ———: PLEADING AND PROOF: GUARDIAN AND WARD. Under an information charging a guardian with having embezzled a certain amount of money belonging to his ward, without describing it as being a part of any particular or specific fund, proof that the defendant has converted any money to his own use belonging to the ward will sustain the charge as laid.

4. ———: DEFENSES: GUARDIAN AND WARD. When a guardian has converted his ward's money to his own use, the fact that he would be justly entitled to a small portion of the money so converted as compensation for his services is not a complete defense to a prosecution for embezzlement.

ERROR to the district court for Hamilton county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

John A. Whitmore and *O. A. Abbott,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

BARNES, J.

The plaintiff in error, hereafter called the defendant, was charged with the crime of embezzlement of money belonging to his wards, under the provisions of section 121 of the criminal code. His trial in the district court for Hamilton county resulted in his conviction. By the judgment of the district court he was sentenced to be confined in the state penitentiary at Lincoln for a period of two years, and he has brought the case to this court by petition in error.

His principal contention is that the evidence is not sufficient to sustain the verdict. The record discloses that in 1895 the defendant was, by the order of the county court of Hamilton county, appointed guardian of the persons and estate of Fred Smith, Grace Smith and Goldie Smith, who were the minor heirs of one Fred Smith, deceased; that he duly qualified, gave proper bond, and took charge of the estate of his wards, which was of the value of about $8,000; that thereafter he performed his duties as such guardian, and furnished the money to pay for the education and maintenance of his wards out of the funds in his hands belonging to their estate until the youngest of them became of age, which event occurred in the year 1909; that thereafter they requested him to make settlement, and insisted that he should at once pay over to them the remainder of the funds in his hands belonging to their estate. The defendant failed to comply with this demand. A citation

was issued by the county court, and served upon him, requiring him to make his report to, and settlement with, that court, as provided by law, but defendant disregarded the citation, and therefore no settlement has ever been made, and the amount due from him to his wards has never been definitely fixed or determined by the order of the county court. Without further attempt to compel defendant to make such settlement, the county attorney of Hamilton county commenced this criminal prosecution and filed an information against him charging him with the crime of embezzlement.

The first count of the information charged plaintiff with having embezzled and converted to his own use $3,776.25, and by the second count he was charged with having embezzled and converted to his own use the sum of $2,200, the money and property of his wards. The jury found him not guilty on the first count and guilty as charged in the second count of the information. We find upon an examination of the bill of exceptions that it was clearly shown that the defendant had actually received and from time to time had taken into his possession the money and property of his wards amounting to at least $8,000; that according to his own testimony, given in his defense, he has used for his own purposes a part of that money amounting to much more than $2,200, which was the sum the jury found he had converted to his own use.

It was argued that until the county court had, by the settlement of defendant's accounts, found the amount due from him to his wards, a civil action on his bond would not lie, and, therefore, until after such settlement, no criminal prosecution could be maintained. We think that this argument is unsound. That part of section 121 of the criminal code upon which this prosecution was based reads as follows: "Or if any executor, administrator, guardian, or assignee for the benefit of creditors shall embezzle *or convert to his or her own use* any money, property, rights in action, or other valuable

security or effects whatever, belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian, or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken, or secreted, or of the value of any sum of money payable or due upon any right in action so embezzled." It thus appears that it is not the failure of the guardian to make settlement or pay over to his wards the amount of money found due them which constitutes the offense; it is the fact of his conversion of such money to his own use which renders him guilty of the crime defined by the statute upon which the information in this case was founded. It is the use by the guardian, as his own, of the trust fund committed to his care which renders him criminally liable and for which a criminal prosecution may be maintained. While it is quite probable that, if the defendant had been able to replace the amount so used by him, such fact might have been successfully urged as a defense to the criminal prosecution; still the use of the fund as his own would be sufficient to constitute the crime of embezzlement as defined by section 121 of the statute above quoted. That the defendant so used at least as much or more than $2,200 of the trust fund which had been committed to his care in this case seems to have been made clear by his own testimony and admissions, and we are therefore unable to say that the evidence does not sustain the verdict.

It is also contended that, the state having charged the embezzlement of a certain or specific fund in each count of the information, it was bound to prove the charge as laid beyond a reasonable doubt. In answer to this contention, it is sufficient to say that we do not so understand the information. It is true that the embezzlement of two certain sums of money was charged, but no specific money or fund was designated or described, and

proof that the defendant converted any of the money belonging to his wards to his own use and to the amount charged would be sufficient to sustain the verdict. We therefore hold that this contention is not well founded.

It is further contended that, so long as there was due the defendant any fees or compensation for his services as guardian, he had a lien upon the fund belonging to his wards, and therefore could not be convicted of embezzlement until such amount had been ascertained by the judgment of the county court. In support of this, counsel cite *Van Etten v. State,* 24 Neb. 734, and *McElroy v. People,* 202 Ill. 473. We think that those authorities have no relation to the facts of this case. In *Van Etten v. State* the defendant was the attorney of the complaining witness and had collected certain money for his client as such attorney. There was an unadjusted account between them for collection fees and for other services due from the complaining witness to defendant, and it was not contended that defendant had fraudulently converted the money in question to his own use, because he was claiming it as his own in payment for his services. The statute gave him a specific lien upon the particular fund in his possession, and it is clear that, while the amount of his compensation was being litigated, defendant could not be convicted of embezzling the money in question. In the Illinois case it appeared that the defendant was entitled to retain certain commissions out of the money there in question and was authorized to withhold the payment of it to her principal until such commissions were adjusted and paid, and it was held that, under that state of facts, she could not be convicted of the crime of embezzlement. In the case at bar the defendant was not entitled to a specific lien upon the fund of his wards, and he had no such interest in the trust fund as would give him the right to convert any portion of it to his own use. Again, it appears from his own testimony that after allowing him everything he claimed in the way of fees, disbursements, and compensation for services, he had con-

verted to his own use a much larger sum of money belonging to his wards than the amount of the verdict of which he now complains.

Finally, it is contended that the court erred in receiving in evidence the defendant's admissions made to the witnesses Henning and Sidner. No authorities are cited in support of this contention, and, in view of the well-established rule that the voluntary admissions of one charged with a criminal offense can be used in evidence against him, we are satisfied that this evidence was properly received. A careful examination of the entire record satisfies us that the defendant had a fair trial, and, no reversible error appearing therein, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

SOUTHERN REALTY COMPANY, APPELLEE, V. DANIEL HANNON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,515.

1. Contracts: CONSIDERATION. A consideration does not necessarily consist of a direct advantage to the promisor, but may consist of a direct disadvantage to the promisee.
2. ———: CONSTRUCTION. Evidence examined, and *held* that section 341 of the code should be applied.

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

Murdock & Pancoast, for appellant.

J. D. Ringer, contra.

LETTON, J.

This action was brought to compel the defendant to

remove certain iron shutters or hoardings which he had placed over six windows in a party wall built upon the line between the respective properties of the plaintiff and defendant, and to restrain him from maintaining the same.

The facts are that in the fall of 1906 the plaintiff began the erection of a brick building on a certain lot in the city of South Omaha adjoining the lot belonging to defendant. Previous to this time plaintiff's grantor and the defendant had entered into a written party-wall agreement afterwards assigned to plaintiff, by the terms of which the wall was to be constructed, one-half upon the property of each, and when the wall was used by the defendant he should pay to the other party one-half of its actual cost. Plaintiff began the erection of the building, and after the foundation was built the defendant began the construction on his lot of a building which was longer than the plaintiff's building. He used the party wall to a distance of about 39 feet from the front, then left an air space or light well three feet in width the entire length of the plaintiff's building, and beyond this built a wall, one-half on each lot extending to the alleyway. There was no agreement as to the construction of the latter wall as a party wall. In building the party wall the plaintiff left six windows above the first story opening into the air well or light shaft before referred to. The buildings were completed about the 1st of May, 1907. Mr. Hall, the president of the plaintiff corporation, testifies that no objections were made by Mr. Hannon, the defendant, to leaving these window openings in the party wall, although he was around the buildings constantly during their erection. After the completion of the building Mr. Hall presented a bill to defendant for the cost of his one-half of the party wall. The defendant refused payment, for the reason that the party wall was not a solid wall on account of the window openings having been left in it. The plaintiff then procured brick and mortar and employed men to close the

window openings. They had begun this work when one McAuley, who was occupying rooms whose windows would be closed if this were done, requested the defendant to allow the windows to remain open. After some parley between Hannon and McAuley this request was granted, if McAuley would stain the windows. So far the facts are undisputed.

Plaintiff testifies that at this time he was informed by McAuley of this conversation; that he then called Mr. Hannon by telephone, and told him that he had men employed and material on hand to close the windows, but that if Hannon would consent to them remaining open he would discharge the men and pay their charges; that Hannon then told him that he might leave the windows open, and that, relying upon this agreement, plaintiff paid the men for the hauling, for the mortar wasted, and for their time, which amounted in all to $9. On the other hand, the defendant denies ever holding any conversation over the telephone or otherwise in which Hall informed him of his intention to close the windows and of his having men and materials on hand ready to do so, and denies giving him permission to let the window openings remain. He further testifies that before the buildings were erected he tried to make an agreement with Hall that each should leave a space for light and air, but that Hall refused, saying he could get all the light he needed from skylights. He admits, however, that he knew the openings were being made after the erection was begun, but says that he never consented to the windows being placed in the wall.

Afterwards plaintiff began suit in county court against defendant to recover $625.62 as the cost of his share of the party wall. Pending the action, negotiations were had between the parties and their attorneys as to the settlement of their differences. The points in dispute seemed to be the erection of the extension wall by defendant upon the lot line without agreement, also a claim by defendant for the building of an additional 18 inches in

height upon the party wall to correspond with the remaining walls of his building, and the matter of the window openings in the party wall. A settlement was reached, and in accordance therewith, on the 13th of September, a new party wall agreement was entered into covering the wall constructed by plaintiff under the original party-wall agreement and also the new and additional wall constructed by the defendant. At the same time the action in the county court was settled by written stipulation. This recited that the defendant had paid the plaintiff $593.27, with $2.85 costs, in full settlement for one-half the party wall in controversy, in accordance with the first party-wall agreement; that the plaintiff had paid defendant by credit on the claim $19 for one-half of the fire wall built by defendant above the party wall constructed by plaintiff. The stipulation also contained the following provision: "And further agreed that the plaintiff has allowed as a credit on the claim in the above entitled cause, on account of the windows in the portion of the party wall in controversy, the sum of thirteen and 35-100 dollars ($13.35) and that this cause is fully settled."

The rights of the parties in this case depend to some extent upon the construction to be given this clause in the stipulation. If it is intended to mean, as the plaintiff insists, that all matters in dispute between them, including the right to retain the window openings in the wall, were adjusted and settled, then the plaintiff must prevail. On the other hand, if, as defendant contends, the only purpose and meaning of this clause was to evidence the fact that the plaintiff had allowed him as a credit at that time one-half the estimated cost of filling the openings, and it was understood that he would not be compelled to pay the same until the windows were filled with brickwork, it would be a strong circumstance tending to show that the defendant had no intention to abandon his contention that the party wall should be a solid one.

Some months after the making of this stipulation and the dismissal of the suit, a sharp dispute arose with respect to the disposition of rain-water falling upon the roof of defendant's building. McAuley afterwards moved out of the rooms, and then defendant closed the windows by nailing sheets of iron over the openings. To remove these obstructions and compel defendant to leave the windows open is the purpose of the suit. Defendant answered, and prayed affirmatively that plaintiff be required to make the wall solid and close the openings. The district court found upon the facts for the plaintiff and granted the relief prayed. The court found substantially that, as a consideration for allowing the windows to remain, the material was hauled away and the expenses incurred were paid by the plaintiff, and that in the settlement entered into it was agreed that the windows should remain open for light and air.

Defendant contends that there was no consideration for the first agreement (even if made, which he denies), and that he understands the law to be that there must be some advantage moving from Hall to Hannon or some valuable thing passing to him as a consideration for permitting these openings to remain. It may be said, however, that a consideration does not necessarily consist of a direct advantage to the promisor, but may consist of a direct disadvantage to the promisee. If Hall, with Hannon's knowledge and consent, paid to a third party money which he would not have paid except on account of Hannon's agreement to forego his right to have the windows closed, this was as much a consideration as if he had paid the money to Hannon himself. *Faulkner v. Gilbert,* 57 Neb. 544. The evidence on this point is directly conflicting, but it seems reasonable that Hall would not have discharged the men and paid the money unless some agreement had been made with Hannon whereby he was induced to change his purpose, which was so far executed that work had been begun to remove the woodwork in the openings.

We are further of opinion that all matters in dispute were intended to be settled at the time the stipulation was entered into and the new party wall agreement made. At least, this was the view taken by the plaintiff's attorney, Mr. Baird, and by plaintiff himself. While defendant and his witnesses say the matter settled as to the windows was only the cost of filling them, plaintiff's witnesses say it was the intention to settle the whole controversy. Plaintiff testifies he paid the same amount for the openings to the contractor as if the wall had been solid, and that in the settlement he allowed the defendant the credit named therein as a consideration for, and to settle the dispute as to, his right to keep them open. The code, section 341, provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." We think defendant had reason to believe from all the circumstances that the language of the stipulation was understood by plaintiff to settle the whole matter as to his right to keep the windows open, and under the code provision the sense in which plaintiff understood it must prevail. At the beginning of this controversy defendant no doubt had the better right, but by his assent to the payment and discharge of the workmen and by his subsequent settlement he waived his right to insist that the windows be closed.

The judgment of the district court appears to us to be justified by the law and the evidence, and it is

AFFIRMED.

STATE, EX REL. LOUIS HUTTER, SR., APPELLEE, V. PAPILLION DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 17,177.

Highways: DUTY OF DRAINAGE DISTRICT TO CONSTRUCT CROSSINGS. It is the duty of a drainage district under the provisions of sections 110 to 113, inclusive, ch. 78, Comp. St. 1909, to make and keep in good repair good and sufficient crossings wherever the drainage ditch crosses the streets of an incorporated city or village.

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

Courtright & Sidner, for appellants.

James T. Begley, contra.

LETTON, J.

This is an appeal from a decree awarding a writ of mandamus against the Papillion Drainage District requiring it to build and maintain bridges across its ditch where the same crosses certain streets in the village of Papillion.

The relator, Louis Hutter, Sr., pleaded and proved that by reason of the excavation of the ditch he was prevented from having access by way of Addition street to his land lying to the south of the ditch, whereon his slaughter-house was situated, and prayed that a writ of mandamus be issued compelling the respondent to build a bridge or crossing on that street. The respondent's answer admitted the existence of the street and its refusal to build a bridge, pleads that it acquired a right of way by condemnation across the streets of the village and has paid damages to the village therefor. It is further pleaded that it is not feasible or practicable to build bridges across the streets for the purpose of connecting the village with the territory to the south, but that the "reason-

able, practicable and economical remedy" is to lay out a new street from Washington street, where a bridge now exists, along the south margin of the ditch to connect with Addition street. After the answer was filed the village of Papillion filed a petition in intervention, setting forth substantially the crossing of four streets, including Addition street, by the ditch, the obstruction of the streets thereby, and the necessity for bridges, and praying that the respondent be compelled to erect approaches and bridges on each of the streets. The answer to this petition in intervention is substantially the same as to that of the relator. The court found that the streets had been obstructed, that bridges were necessary, and that it was the duty of the respondent to erect sufficient crossings over the ditch at the points named. It further found that the allegation that a more practical remedy was to lay out a new street was immaterial and constituted no defense. From this judgment respondent appeals.

The appellant contends that the statute (Comp. St. 1909, ch. 78, secs. 110-113) by its terms does not apply to drainage districts, and that the title is not sufficiently broad to include such districts. The title reads, "An act to compel railroad corporations and others to make and keep in repair crossings." Section 110 provides: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary, within their right of way." It is argued that under the doctrine of *ejusdem generis* the words, "and others," apply to corporations or persons of a similar nature to railroads, and that, since we have held that a drainage district is of a purely public and administrative character, it is not of a similar character to a railroad corporation. It is further said that a drainage district does not "own and operate" a ditch, and that the

title and the language of the act show that it was only intended to apply to profit-sharing corporations. This argument is ingenious, but hardly convincing. We think it plain that the intention of the legislature was to place in the same class "railroad corporations and others" engaged in similar acts with reference to the highway; that is, other persons and corporations "who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road." The classification is based, not upon the manner of the organization of the corporation or whether created for pecuniary profit or not, or whether the corporation is public or private, but is based upon the effect that its operations must necessarily have upon the highway. It merely imposes a duty upon whoever—whether natural or corporate individual does not matter—obstructs a highway by the building of a railroad, or the excavation of a canal or ditch, to restore the way to a condition suitable for travel. We think that a drainage district is clearly one of the "others" named in the title.

The principal argument of appellant is that, since a drainage district is formed for public benefit, and not for private gain, it should not be compelled to spend its funds in the building of bridges; that it can only raise the necessary funds to carry on its operations by virtue of special assessments, which can only be levied to the extent of special benefits conferred upon each tract of land, and that in many cases, if the cost of building bridges were to be added to the cost of the ditch, the total expense would exceed the special benefits conferred, and that to so hold would defeat the beneficent purpose of the law permitting the organization of drainage districts. We think such a result may perhaps be possible, but it hardly seems probable, and, even if so, the legislature should be appealed to for relief, and not the courts. This statute has previously been considered in this court in the following cases: *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412; *Burlington & M. R. R. Co. v. Koonce,* 34 Neb. 479;

State v. Farmers & Merchants Irrigation Co., 59 Neb. 1; *Missouri P. R. Co. v. Cass County*, 76 Neb. 396. The opinions in these cases plainly indicate the view this court has heretofore taken as to the validity of the law. It was pointed out by Judge ROOT in *Franklin County v. Wilt & Polly*, 87 Neb. 132, that, independent of a statute, the duty of one who excavates a canal across a highway to restore the way by the construction of a bridge and crossing seems to be well established. See cases cited in the opinion, also *Cleveland v. City Council*, 102 Ga. 233, 29 S. E. 584; *Town of Conewango v. Shaw*, 52 N. Y. Supp. 327. The district court held that the plea that another route was more feasible for public travel was no defense, and in this no mistake was made. It was not for those who invaded the streets to say to the village, "There is a better way elsewhere." Probably by negotiation in a friendly spirit the necessity of bridges at the points specified might be done away with, but legal rights are in question here, and not matters of accommodation. We see no reason to say that the statute does not apply to the facts in this case, or that it is invalid.

The case of *Heffner v. Cass and Morgan Counties*, 193 Ill. 439, cited and relied upon by respondent is not in point. In that case it was held that a statute which imposed upon a county the duty of replacing a bridge removed by the commissioners of a drainage district did not violate the constitutional provision that property shall not be taken for public use without compensation, for the reason that county bridges were public, and not private, property. The court properly held that, since the legislature had power to provide by law for the construction, control and disposition of public bridges, it had the power, if it became necessary for a public purpose to widen a stream and to build a new bridge, to require the public road authorities instead of the drainage officers to construct the bridge. But, even if this case were in point, some of the language in the opinion has been modified by the later cases of *Commissioners of Union Drainage*

District v. Commissioners of Highways, 220 Ill. 176, *Morgan v. Schusselle*, 228 Ill. 106, *Commissioners of Highways v. Commissioners of Lake Fork Special Drainage District*, 246 Ill. 388, and *Bradbury v. Vandalia Levee and Drainage District*, 236 Ill. 36, in which cases the Illinois court takes substantially the same view of a like statute that we take in this case.

The legislature has control of the public highways, and also has control of the manner of construction of public ditches; it has the right to say as to which of the respective public bodies concerned shall construct a bridge where a ditch crosses a highway.

The judgment of the district court awarding the writ is correct, and is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

EDWARD PERRY, APPELLANT, V. A. B. CLARK, APPELLEE.

FILED SEPTEMBER 25, 1911. No. 16,408.

Waters: DRAINAGE OF SURFACE WATERS: INJUNCTION. A court of equity will not enjoin an upper proprietor from draining surface water from his land through tile drains in the natural course of drainage into the natural channels which nature has provided, and onto the land of a lower proprietor.

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

M. D. Tyler and *A. R. Davis*, for appellant.

George R. Wilbur, contra.

ROOT, J.

This is an action to restrain the defendant from collecting surface water and discharging it upon the plain-

tiff's premises. The defendant prevailed, and the plaintiff appeals.

The respective farms of the parties are separated solely by a north and south public highway. A valley or draw approximately 325 feet in width, having a fall of 25 feet to the mile, runs in a general northwest and southeast course through these farms, and continues thence southeastward to Dogtown creek. There is a fall of about two feet from the base of the hills to the line of lowest depression in the valley. The draw is about four miles in length, and furnishes a way for surface waters and melting snows. Little, if any, water appears upon its surface after ordinary rains in the summer season, but the soil is so saturated with moisture that cultivated crops cannot be successfully grown therein without drainage. At intervals along the line of lowest depression in the plaintiff's premises, flowing water has washed out well-defined ruts or shallow gulleys, and beneath the culvert in the highway and extending on both sides to within the fields of the respective litigants the water has formed a gulley or washout. The plaintiff owns the lower farm. Four years before this suit was commenced the defendant dug an open ditch about two feet wide and 18 inches deep the length of the valley upon his farm. In August, 1908, the defendant commenced to tile-drain this valley so far as it lay within the boundaries of his farm, and laid one line of six-inch tile parallel to the open ditch and a line of four-inch tile across the valley near his eastern boundary, so that the water collected in all of the tiles would discharge into the open ditch, and from thence pass into and across the highway onto the plaintiff's farm at the point where water always appeared when it flowed over the surface of the draw. The defendant intended and was prepared to lay one other line of six-inch and two other lines of four-inch tile parallel to the six-inch tile now in position, so as to concentrate the water collected therein at the point where water discharges from the tiles now in position. A temporary order of

injunction interfered with the completion of the tiling. The case was tried 14 weeks after the petition was filed, and the proof is undisputed that at that time the tile drains discharged a stream of water 1½ inches deep and 9 inches wide into the ditch, and from thence onto the plaintiff's farm, and that no water appears upon the surface of the valley above the point of that discharge.

The plaintiff contends that the defendant's tile drains concentrate surface water diffused through the soil and discharge the water out of its natural course upon the plaintiff's premises in such unusual quantities as to materially injure his farm. The defendant asserts that the water within the valley, whether above or below the surface, by the force of gravitation tends toward the line of lowest depression, and thence proceeds downward to the creek; and that he may in the interest of good husbandry accelerate that flow without becoming liable to the plaintiff. In a sense the entire valley is a drain provided by nature for the drainage of a considerable territory. When flood waters are at their height the valley is the bed of a stream. As the flood waters subside, and after heavy rains in the drier seasons of the year, the water covers a narrow strip of land coincident with the line of lowest depression. We think it is clear that the water flowing from the tiling is not forced or influenced out of the natural course of drainage.

There is considerable evidence to the effect that, after the tiling shall have completed its office by draining the soil above the bed of the drains, no more water will pass from one farm to the other than if the tiles had not been laid, and that at the most the plaintiff at a slight expense may lead this water from the point where it enters his premises to the washed-out gulley on his farm. In any event the plaintiff's inconvenience will be so trifling that a court of equity should not interfere. The language of Deemer, J., in *Dorr v. Simmerson,* 127 Ia. 551, is so pertinent that we quote it: "In view of known conditions in this state, we are quite ready to hold that the owner of

the dominant estate has the right by ditches or drains to drain his own land into the natural and usual channels which nature has provided even though the quantity of water cast upon the servient estate may be somewhat increased." See, also, *Vannest v. Fleming,* 79 Ia. 638; *Wharton v. Stevens,* 84 Ia. 107; *Obe v. Pattat,* 130 N. W. (Ia.) 903; *Aldritt v. Fleischauer,* 74 Neb. 66; *Flesner v. Steinbruck, ante,* p. 129; *Peck v. Herrington,* 109 Ill. 611; *Lambert v. Alcorn,* 144 Ill. 313.

The judgment of the district court is right, and is

AFFIRMED.

NEIL H. MAPES ET AL., APPELLEES, V. HENRY BOLTON, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,523.

1. Waters: OBSTRUCTION OF DRAINAGE. A lower proprietor may not unnecessarily obstruct a natural drain upon his own premises without the upper proprietor's consent, so as to collect surface water and cast it back upon his neighbor's farm where it would not appear but for that obstruction, and to the injury of his neighbor's crops and land.

2. ———: ———. Section 1, art. III, ch. 89, Comp. St. 1909, which authorizes a proprietor to drain his land by tile or open ditches so constructed as to discharge water into any depression or draw upon his own premises, does not authorize him to dam up and permanently obstruct a natural drain, so as to prevent assembled surface water from flowing therein in the natural course of drainage, and so as to injure his neighbor's crops and land.

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

C. J. Phelps, for appellant.

W. M. Cain, contra.

ROOT, J.

This is an action to enjoin the defendant from obstructing a natural drain within the boundaries of his farm. The plaintiffs prevailed, and the defendant appeals.

A public highway running north and south divides the respective farms of the plaintiffs and the defendant, which are within the valley of the Platte river. A natural drain, described as a "draw," which heads some distance northwest of the plaintiffs' farm, runs southeastward across that farm and the farm of the defendant until intercepted by a drainage ditch. The draw is 3½ miles in length, from 20 feet to 100 feet wide, and its average depth is 2½ feet. Several individuals whose farms are crossed by the draw have plowed its banks and bed so as to grow annual crops thereon. At other points cattails and willows grow in the draw and the native sod remains unbroken. There is some conflict in the testimony, but it fairly proves that after heavy rains the surface water from a considerable area collects in and runs off through the draw, which at times is bank-full of flowing water.

Prior to the commencement of this action the defendant and other individuals owning land northward from his farm caused a ditch to be constructed upon his farm parallel to its western boundary, and southward across the draw to another draw upon the farm, and the defendant constructed a dam across the draw first referred to, and in line with the east bank of the ditch. One civil engineer testifies that not to exceed one-half acre of the plaintiffs' farm will be overflowed should the dam back up the water flowing in the draw, while another engineer testifies that between 10 and 11 acres will be thus flooded. For the sake of argument, we may accept the testimony of the witness first referred to as the more accurate.

The defendant contends that the ditch is constructed according to an agreement between himself and his neighbors, including the plaintiffs; that he was merely protecting his premises from the ravages of surface water,

and that he has acted within the provisions of section 1, art. 111, ch. 89, Comp. St. 1909. All of the witnesses testifying to the alleged contract say that nothing was said about obstructing the draw. The evidence is clear and satisfactory that the surface water from a considerable territory assembles in and flows through the depression in question. Five bridges, to accommodate public travel at points where highways cross the draw, have been constructed and are maintained by the public authorities, and one-half mile below the dam the Union Pacific Railway Company constructed and maintains a substantial bridge 15 feet in length to permit storm and flood waters to pass on in the bed of this draw.

The broad general rule that a proprietor may protect his premises from the flow of surface water has many qualifications to be considered whenever it is invoked to protect an individual from the complaint of his neighbor injured by interference with or diversion of surface water flowing in the natural course of drainage in a natural drain. In any event, the lower proprietor in excluding surface water from his premises must exercise ordinary care so as not to unnecessarily injure his neighbor. In the instant case the draw at the point of obstruction is 64 feet wide; the ditch from the draw northward is 20 feet wide, whereas from the draw southward the ditch is but 10 feet in width. We are inclined to accept the simple and unchangeable principles of mathematics and of hydraulics in coming to a conclusion that the ditch from the draw southward will not carry off the combined flood waters of the ditch to the north and of the draw, rather than to adopt opinions to the contrary given by some of the witnesses. There is no proof that it was necessary, in the exercise of good husbandry or for the purpose of protecting the defendant's premises, to prevent the ditch water from flowing eastward in the first draw, and it is plain that a sufficient way was not provided from the first draw southward for the combined waters that will flow in the draw and down the ditch from the north. In

our judgment, and under the circumstances of this case, it was not necessary for the defendant's protection that he should obstruct the draw, and in making his improvements he has not exercised that care which a due regard for the plaintiffs' right requires him to observe. *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380; *Flesner v. Steinbruck, ante,* p. 129. The statute, *supra,* authorizes a landowner to drain his land in the natural course of drainage by constructing tile or open ditches so as to discharge water into any depression or draw upon his own premises, but it has no application to this case. It is the dam within the natural drain, and not the ditch which the defendant assisted in digging, that damages the plaintiffs.

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

AFFIRMED.

SEDGWICK, J., took no part in this decision.

GEORGE T. STEPHENSON, TRUSTEE, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 16,742.

1. Appeal: CONFLICTING EVIDENCE: JUDICIAL SALE: APPRAISEMENT. A finding of the district court based on conflicting evidence that real estate sold at judicial sale was not appraised too low will not ordinarily be disturbed on review.

2. ———: ———: ———: ———: PREPONDERANCE OF EVIDENCE. A finding of the district court based on conflicting evidence, overruling a contention that the appraisers did not in fact view and appraise the property described in the decree, will be sustained in this court if the evidence preponderates in favor of that finding.

3. Judicial Sales: OBJECTIONS TO CONFIRMATION. The fact that the sheriff did not sell one lot described in the decree is not ordinarily a good objection to the confirmation of the sale of other lots therein described.

4. ———: ORDER OF SALE. In a sale made by authority of a decree in equity, the court is the vendor and the sheriff its agent. An order of sale is not necessary to clothe the sheriff with authority to make the sale, and, if issued, will not control the decree.

5. ———: CONFIRMATION: REVIEW. The clerk has no authority to withdraw from the operation of a decree part of a parcel of land therein ordered to be sold; but, if he does so, an order of confirmation will not be reversed if it appears that the defendants were not prejudiced thereby.

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

E. O. Kretsinger, for appellants.

A. D. McCandless and *E. N. Kauffman, contra.*

ROOT, J.

This is an appeal from orders overruling objections filed by the defendants to a judicial sale and to the confirmation thereof. The plaintiff prevailed, and the defendants appeal.

The action is in equity, and the decree directs the sale of definitely described tracts of real estate to satisfy the plaintiff's demand.

The objection that the property was appraised too low was overruled by the district court upon a consideration of conflicting affidavits, and the preponderance of the evidence upon this issue seems to be with the plaintiff. *Andrews v. Lindley,* 63 Neb. 692.

Likewise the defendants failed to sustain their contention that several tracts were viewed and appraised by the appraisers under an erroneous impression that they were described in the decree, whereas those thus described were not viewed or appraised. An objection that one tract of land described in the decree was not appraised or sold should not, under the circumstances of this case, prevent a confirmation of the tracts fairly appraised and sold.

The important contention is that the decree directs the

sale of a tract containing 21 acres and described as lot 16. After the decree was entered, but before the property was advertised for sale, the plaintiff moved the court to modify the decree by excluding from its operation so much of lot 16 as had theretofore been sold by the plaintiff to a Mr. Rawlins, amounting to three acres, and that without a ruling on the motion the plaintiff procured the clerk of the court to issue an order of sale wherein this part of lot 16 was excluded from the decree. The defendants objected to the sale, objected to the appraisement and to the confirmation, and now insist that their objections are good. The clerk had no authority to direct the sheriff not to sell a part of lot 16. The decree, and not the order of sale, was the sheriff's authority to sell. *Parrat v. Neligh,* 7 Neb. 456; *Jarrett v. Hoover,* 54 Neb. 65; *Passumpsic Savings Bank v. Maulick,* 60 Neb. 469. An order of sale cannot lawfully limit the power conferred by the decree. *Jarrett v. Hoover, supra.* Should the court have refused to confirm the sale? The court was the vendor and the sheriff its agent to carry its decree into execution. By confirming the sale, the court ratified its agent's actions. This it should not have done to the defendants' prejudice.

The proof is convincing that the 18 acres of lot 16 sold by the sheriff brought its fair and reasonable value. If the three acres excluded should have been sold, the sale may yet take place. It may be, as the plaintiff contends, that the three-acre tract had been theretofore sold and by an error of the draughtsman of the decree was not excluded therefrom. In that event the motion to correct the decree may yet be sustained.

We cannot understand why counsel did not procure a ruling on this motion before causing an order of sale to be issued. It appearing that the defendants were not prejudiced by the orders they complain of, the appeal is controlled by section 145 of the code, which commands us to disregard any error or defect in pleadings or proceedings which do not affect the substantial rights of the litigants.

The judgment of the district court is therefore in all things

AFFIRMED.

SEDGWICK, J., took no part in this decision.

J. A. ROSSBACH, APPELLANT, V. GRAHAM MICKS, APPELLEE.

FILED SEPTEMBER 25, 1911. No. 16,527.

1. Mortgages: EXECUTION OF SECOND MORTGAGE TO CORRECT MISTAKE. Where parties to a recorded mortgage execute a second one on the same realty for the same amount to secure the same debt for the sole purpose of correcting a mistake in the first, and so express themselves in the body of the second instrument, its effect, when recorded, is to supersede the first, and the two constitute one mortgage, nothing having intervened to impair mortgagee's security.

2. Specific Performance: SALE OF LAND: NONPERFORMANCE OF CONTRACT. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract.

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

J. B. Barry, I. L. Albert, J. J. Sullivan and *Willis E. Reed,* for appellant.

J. R. Swain, T. P. Lanigan and *J. M. Lanigan, contra.*

ROSE, J.

Specific performance of a contract obligating defendant to convey to plaintiff a half section of land in Greeley county, or the recovery of damages for failure to do so, is the relief sought in the petition. The contract was dated

October 20, 1906, and may be summarized thus: Defendant agreed to convey by warranty deed title in fee simple, clear of all incumbrances. The purchase price was $12,000, plaintiff paying $250 down and agreeing to pay the remainder, subject to a mortgage of $6,000, March 1, 1907. These payments were conditions precedent to the conveyance, and the failure of plaintiff to make either was defendant's authority to declare a forfeiture of the contract and to retain as liquidated damages all payments made. Plaintiff did not pay or tender as purchase money any sum except the cash payment, and defendant did not execute the deed required by the contract. Under issues raised by the pleadings, the trial court, upon consideration of the evidence of both parties, found that plaintiff did not perform his part of the contract, and that by reason of such default defendant declared a forfeiture thereof. A decree dismissing plaintiff's action followed, and defendant was allowed to retain as liquidated damages the amount received by him on the purchase price. Plaintiff has appealed.

Before the time for performance had expired defendant submitted to plaintiff an abstract of title. It contained a reference to a mortgage executed by defendant in favor of John M. Hardy for $3,000, in addition to the incumbrance of $6,000 mentioned in the contract of purchase pleaded in the petition. In this connection plaintiff argues: March 1, 1907, and afterward, the record of the additional mortgage was a defect which prevented defendant from conveying the title purchased. Plaintiff was ready and willing to pay the purchase price, but was not required to do so or to make a tender thereof, since defendant refused to perfect his title and allowed it to remain in the condition described. The additional mortgage should have been released of record or canceled by a decree of court. By refusing to convey the title purchased, defendant was in default and could not require payment or a tender. Unless plaintiff is right in the position thus taken, there is no merit in his appeal.

The abstract of title submitted to plaintiff is in the record. Entry 26 relates to the 3,000-dollar mortgage in controversy. Defendant and wife are grantors and John M. Hardy is grantee. In the column under remarks this note is inserted: "Substituted by 27." Entry 27 is a duplicate of 26, with these exceptions: "James Hardy" instead of "John M. Hardy" is grantee, and the date of acknowledgment and the name of the notary are different. The remarks in entry 27 are: "Made to take the place of 26. See note 1 on back." The note last cited reads thus: "Clause contained in 27—mortgage from Graham Micks and wife to James Hardy: 'This mortgage is made in lieu of and to take the place of another certain mortgage of the same date, on the same land, for the same amount, by the same parties, to John M. Hardy, whose real and correct name is James Hardy, and the real and true mortgagee in both instruments.'" Both mortgages were made by the same parties to secure the same debt, and the second was executed to correct a mistake in the first. It was the purpose of the parties to substitute the second mortgage for the first, and the effect was to release the erroneous lien. The mortgage records so show. Plaintiff, however, argues: The parties to the corrected mortgage could only bind themselves by their contract, and there is nothing on the public records except their agreement to show that a John M. Hardy is not in fact the original mortgagee instead of James Hardy. If he is, he cannot be deprived of his lien by the contract of the parties to the later mortgage. This argument is refuted by evidence adduced at the trial. Defendant testified without objection that he was ready, able and willing to convey a good title March 1, 1907; that he would have done so had the purchase price been paid; that he had a conversation with plaintiff's attorney in relation to the mortgages and told him that the man who drew the first mortgage made a mistake, there being in fact only one mortgage; that defendant told him he had the mortgages and notes in his posses-

sion to show there was really only one mortgage. When asked what the attorney said, defendant replied: "He said that was all right; and of course he expected, when we made the deal, I would turn these notes and mortgages over to him." Defendant also testified that he notified plaintiff March 2, 1907, to put up at least $1,000, giving him until March 5 to do so. There is no reason to disbelieve this testimony and it is accepted as the truth. It is sufficient to show, when considered with both mortgages, that the first would not prevent defendant from conveying a good title. By refusing to make the stipulated payments or a deposit or a tender, plaintiff was in default and is not entitled to specific performance or to damages. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. Under this elementary principle plaintiff's suit was properly dismissed.

The trial court also ruled correctly in allowing defendant to retain as liquidated damages the 250-dollar payment on the purchase price. Defendant believed in the good faith of plaintiff, procured an abstract of title, and prepared to vacate his farm. He sought a new home, sold part of his stock in contemplation of the change, and was otherwise damaged.

AFFIRMED.

SEDGWICK, J., not sitting.

OTTO DETTMAN, APPELLANT, V. G. K. PITTENGER ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,713.

1. Highways: OPENING: SUFFICIENCY OF PETITION. In a petition or a proceeding to open a county road, a description, though indefinite in some particulars, which will enable a surveyor or a person familiar with the locality to locate the line with reasonable certainty is sufficient in that respect for the purpose of conferring jurisdiction on the county board and of resisting a collateral attack by injunction to prevent the opening of the road.

2. ———: ———: WAIVER OF IRREGULARITIES. In a proceeding to open a county road, a person whose land will be taken for that purpose waives irregularities not affecting the jurisdiction of the county board, where he files a claim for resulting damages.

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

C. E. Spear, H. C. Vail and *F. J. Mack,* for appellant.

O. M. Needham and *W. F. Critchfield, contra.*

ROSE, J.

This is a suit to enjoin the county board and a road overseer from opening a county road through a quarter-section of land owned by plaintiff in Boone county. The injunction was denied, and plaintiff has appealed.

Plaintiff bases his right to an injunction on the ground that in attempting to open the road the county board acted without jurisdiction, its order for that reason being void. The jurisdictional infirmities presented are: In the petition for the road the description is insufficient and the report of the viewer or commissioner does not supply the necessary information. The petition for the opening of the road contains the following description of the proposed route: "Commencing at a point 80 rods west of the southeast corner of section 28, township 20,

range 8 west, running thence north one mile and nearly a half, thence west 80 rods or joining the Old Ridge road that formerly ran to Akron, and following in a northwesterly direction the old survey as nearly as practicable through the northwest quarter of section 21, and through section 16 and section 19 and terminating at the northwest corner of section 9, township 20, range 8 west." The report of the viewer or commissioner appointed to report on the expediency of the proposed road is: "I have carefully viewed the ground specified in the foregoing road petition, and found nothing in the way to prevent its being a first-class wagon road with little, if any, expense to the county. There are no bridges to be put in or cuts or fills." The viewer also filed a plat showing the line through plaintiff's quarter-section, but courses and distances were not indicated by letters or figures. The county board made a formal order establishing the road. Plaintiff insists that a portion of the line cannot be definitely located by means of the language, "running thence north one mile and *nearly a half,* thence west 80 rods or joining the Old Ridge road," and that the viewer left no record supplying the necessary information or describing with reasonable certainty that portion of plaintiff's land required for the use of the public. The report of the viewer or commissioner being as indefinite as the petition, was the description sufficient to confer on the county board jurisdiction to open the road in the proceeding commenced by the filing of the petition for that purpose? Plaintiff had notice of the proceedings, but did not remonstrate against the opening of the road or object to the jurisdiction of the county board or to the report of the viewer, or in any other manner raise in that tribunal the questions now presented. Instead, he filed with the county board a 2,500-dollar claim for "damages by reason of the location of a county road over and across" the quarter-section of land in controversy, stating: "There is now a road on two sides of this quarter. The proposed road runs through the center of

the quarter on the best land in the quarter." In passing on his claim the county board allowed him $300, and he appealed to the district court, where the matter is still pending.

In *Warren v. Brown,* 31 Neb. 8, 18, it was said: "The proceedings to create a highway should be so definite and certain that a competent surveyor could, with the record before him, point out its location." In that case the starting point was uncertain, and the description in other respects was indefinite. In describing a proposed county road, however, the highest degree of certainty is not required. The generally accepted rule is: "If places are designated which will enable a surveyor or persons familiar with the locality to locate the way with reasonable certainty, the description will be deemed sufficient." 1 Elliott, Roads and Streets (3d ed.) sec. 380. This rule has been applied to descriptions requiring as high a degree of certainty as that required in petitions for highways. *Owen v. Chicago, B. & Q. R. Co.,* 86 Neb. 851. The description in the petition filed with the county board does not show on its face that a person familar with the locality cannot locate the way with reasonable certainty, nor is that fact established by a preponderance of the evidence. The road in controversy is not on a section-line. The law did not require defendants to open it along the exact route described in the petition. The county board had authority to make changes in the line after acquiring jurisdiction. According to the statute the viewer or commissioner "is not confined to the precise matter of the petition, but may inquire and determine whether that or any road in the vicinity answering the same purpose, and in substance the same, be required." Comp. St. 1909, ch. 78, sec. 7. When plaintiff received notice of the petition, he knew, therefore, that a road of the statutory width, varying in places from the location originally contemplated, might eventually be opened through his land. It follows that the rule which does not require technical accuracy in the description is

in harmony with the spirit of the statute, which permits changes in the line actually described. In *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98, it was held: "Where a petition for appraisers to assess damages on account of the appropriation for right of way purposes of a strip 100 feet wide through a particular tract of land refers for a more specific description to an accompanying plat, which shows the location of the road through such tract, but without letters or figures to indicate courses and distances, such description will be held sufficient when assailed in a collateral proceeding."

In the present case the description is not so uncertain as to invalidate the entire proceeding before the county board, but is sufficient to resist plaintiff's collateral attack. The uncertainty in the petition and in the report of the viewer is an irregularity which plaintiff waived by filing his claim for damages on account of the establishment of the road. *Hoye v. Diehls*, 78 Neb. 77; *Davis v. Commissioners of Boone County*, 28 Neb. 837. Plaintiff has not established a right to an injunction. No error has been found, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

REESE, C. J., concurring.

I concur in the decision in this case upon the ground that by filing his claim for damages and appealing from the award of the county board the plaintiff has voluntarily placed himself in a position which deprives him of the right to the equitable remedy of injunction. He cannot demand damages for the location of the road and at the same time deny the jurisdiction of the board in establishing it. He is not entitled to both remedies.

I agree that the filing of the petition, although defective, conferred jurisdiction upon the board. I also agree with the holding that a proper report by the com-

missioner to view the proposed road would have cured the defect. But it appears that the commissioner failed to perform his duty in that regard, and it is still in doubt as to where the change in direction "one mile and nearly a half" north of the initial point would occur. It may be at the quarter east and west line in section 21, or it may not. Other descriptions appear to be in compliance with the law. The county board should have rejected the report of the commissioner and caused him or some other person to establish the point of change in direction by proper measurements, or other apt description. This may yet be done, and the exact location of the road made a matter of record in order that future complications may be obviated. If this has not been done, the board should see that it is accomplished without further delay.

ROOT, J.

I concur on the sole ground that, since the plaintiff does not allege there is any difference between himself and the highway officials concerning the land embraced within the highway as located by the commissioner, the plaintiff by filing a claim for damages and appealing from the award is estopped to maintain this action.

LETTON, J., concurs in above.

EMIL MUDRA ET AL., APPELLANTS, V. HERMAN GROELING, APPELLEE.

FILED SEPTEMBER 25, 1911. No. 16,521.

Acknowledgement, Authority to Take. M., being indebted to various banks and individuals who held chattel mortgages upon all of his personal property, sold his homestead, consisting of

160 acres of land, to G., and, his wife joining, executed a deed therefor to G. At the time of negotiating the sale, and prior to the execution of the deed, M. directed G. to pay the consideration for such sale, less certain incumbrances upon the land, to the creditors of M. One of the creditors of M. was D., who, as a notary public, took the acknowledgment of M. and wife to their deed to G. D. was in no manner instrumental in causing the sale of the land or the giving of such oral directions by M. to G., but immediately prior to taking such acknowledgment D. was informed of such sale and oral directions. After the execution of the deed, G. paid the full amount of the net consideration of his purchase of the homestead to such creditors of M., including D. *Held*, That D. was not disqualified to act as notary in taking such acknowledgment.

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

J. F. Green and *W. A. Meserve*, for appellants.

J. H. Berryman and *Calvin Keller*, *contra.*

FAWCETT, J.

Plaintiffs brought suit in the district court for Knox county to set aside a deed to their homestead, consisting of 160 acres of land in said county, and to quiet their title thereto, and from a decree of the district court dismissing their suit and quieting defendant's title to the land in controversy they prosecute this appeal.

It is not disputed by plaintiffs that on January 22, 1909, they signed the deed in controversy, but they contend, first, that at the time they signed the deed they thought it was a mortgage; and, second, that T. A. Drayton, who took the acknowledgment, had such an interest in the transaction as disqualified him from taking the same. In other words, that the deed was never acknowledged in accordance with the statutes of this state relating to the conveyance of a homestead. The latter point is the only one argued in plaintiffs' brief, and hence is the only one that will be considered here. Owing to the unfortunate condition in which the decree of the district

court leaves the plaintiffs, we have examined this case with great care. The writer has twice carefully read the entire record. It would serve no good purpose, and would unnecessarily extend this opinion, to set out the evidence of the respective parties in detail. We think a clear preponderance of the evidence shows that on January 20, 1909, plaintiff Emil Mudra was to all intents and purposes a bankrupt. He was heavily indebteded to two banks at Orchard, Nebraska (which, for brevity's sake, we will designate as the Farmers Bank and Citizens Bank, respectively), and to certain individuals who were officers and stockholders in those banks. The only security held by the banks consisted of chattel mortgages upon the personal property of Emil. He was also indebted to the defendant in the sum of approximately $900, a portion of which was also secured by a chattel mortgage. On the day named a representative of each of the two banks together visited the farm of the plaintiffs for the purpose of checking up their several chattel mortgages and ascertaining whether or not plaintiffs actually had the live stock purporting to be covered thereby. They were unable to find all of the stock upon the farm, but were told by Emil that something like 30 head of the stock was at another place about 15 miles distant. The representatives of the banks had obtained an abstract from the county clerk of the chattel mortgages which had been given by plaintiffs. Their examination satisfied them that their security was insufficient, also that there would be some difficulty in determining the rights of the several mortgagees on account of the careless manner in which plaintiff Emil had listed the stock when giving the various mortgages. While they were at the farm the question of a public sale of all of plaintiffs' personal property was discussed. Plaintiff Emil says the sale was suggested by the representatives of the banks, but they say that it was suggested by plaintiff. However that may be, the representatives of the banks insisted upon a new chattel mortgage, running

jointly to a representative of each of the two banks, covering the entire stock. Such a chattel mortgage was drawn, and signed by plaintiff Emil. It was then agreed that a public sale should be held in the near future and all of the property sold; that representatives of the two banks should act as clerks at that sale and handle and distribute the proceeds among the creditors *pro rata.* After the chattel mortgage had been signed, the representatives of the banks prepared a mortgage upon the homestead, subject to two prior mortgages, one for $1,600 and the other for about $200, as additional security to their loans. Plaintiff Emil signed this mortgage, but Mrs. Mudra refused to join, insisting that the personal property ought to pay the banks what was due them. Thereupon the bank representatives started home. On their way they stopped at the home of defendant, whose farm adjoined that of the plaintiffs, where they remained for supper. During their interview with defendant they asked him how much of a claim he had against plaintiffs. Defendant was unable to state the exact amount, but gave it approximately. The bank representatives then asked defendant if plaintiff had 30 head of stock at another place 15 miles distant. Defendant answered to the effect that it was possible plaintiff had such stock, but that he had never heard of it, and doubted his having the same. It was then agreed between the representatives of the bank and defendant that, so far as they could consistently do so, they would act together in trying to protect their mutual interests. On the next morning, January 21, defendant appeared at the home of plaintiffs, and said to plaintiff Emil: "You're a deuce of a fellow to claim to have 28 or 30 head of cattle out north; you are making things worse in place of better, and they are talking about sending you over the road." Defendant also said that he would like to help them out if there was any way he could do it. Mrs Mudra testified that defendant said he would lend them $800 or $1,000 and take a second mortgage on their homestead. Defendant denies this, and says

his offer was to purchase the farm for $4,000, with an agreement that they might have it back any time within a year if they would repay him his money with interest; that Mrs. Mudra was not satisfied with one year, but wanted to make it three years; that he objected to three years as being too long a time, but finally agreed to give them two years; that he told plaintiffs to think the matter over and telephone him that evening as to their decision, and, if they decided to accept his offer, to come over the next morning and they would go to town together and close the matter up; that some time that evening some one from plaintiffs' home telephoned to some member of defendant's family that they had decided to accept his offer, and would be over the next morning to go to town with him; that on the next morning, January 22, plaintiffs appeared at the home of defendant, and informed him that they were ready to go to town to carry out the arrangement; that he got into the buggy with them, and they started for Orchard; that he rode with them about two-thirds of the way when they were overtaken by a neighbor, and, on account of the crowded condition of the buggy in which they were riding, he rode the rest of the way with the neighbor; that while they were all riding together plaintiff Emil said to him, "Now, being as I have sold the place, I don't want to sell all of my personal property; I will keep out several of the best horses and some cows," evidently under the supposition that the proceeds of the sale of the land would reduce his indebtedness to such an extent that it would not take all of the personal property to pay the remainder. Plaintiffs deny that Emil made this statement. However that may be, when they arrived at Orchard, defendant went to the Farmers Bank, and told the cashier that he had bought Mudra's farm; that they had come to town for the purpose of executing the deed; and that under his arrangement with Mudra he was to turn over all of the cash coming to the Mudras from this sale to Mudra's creditors. Mudra went to the Citizens Bank, and made substantially the same

statement to the cashier of that institution. Mr. Drayton, the cashier, then telephoned to the Farmers Bank that the Mudras were there, and for them to come over. Thereupon, the cashier of the Farmers Bank and defendant went to the Citizens Bank, where matters were talked over by the cashier of the Farmers Bank, the president and cashier of the Citizens Bank, and the Mudras. Mr. Thornton of the Farmers Bank prepared a deed to the land from the Mudras to defendant. The deed was signed by both Mr. and Mrs. Mudra, and the acknowledgment taken by T. A. Drayton, cashier of the Citizens Bank. There is some conflict in the evidence as to whether or not the deed was read to the Mudras, but we think a clear preponderance of the evidence shows that, while the entire deed was not read to them, the description was read, the consideration, etc., and that the acknowledgment was formally taken by Mr. Drayton. After the deed had been signed, Mrs. Mudra spoke about the agreement that they should have a certain time within which to get the land back. Thereupon, Mr. Thornton prepared, and defendant signed, a written defeasance as follows: "Orchard, Nebr., Jan 22 1909 I Herman Groeling, having this date bought of Emil Mudra the N W of 30-30-7 for $4,000 in hand paid to said Mudra, do hereby agree to permit the said Emil Mudra to redeem said land at any time within two years from this date for the sum of $4,000 with interest at 10% and on payment of any improvements which the said Herman Groeling may put on said property. (Signed) H. Groeling. In the presence of T. A. Drayton." This paper was given to Mrs. Mudra. Mrs. Mudra testified that, when she signed the deed, she thought she was signing a mortgage; that the written defeasance was not read to her, and that she did not know its contents until she returned home that evening, when she then discovered from the reading of that instrument that the paper which she had signed that day was a deed. instead of a mortgage. After the deed had been signed, defendant asked the bankers if they wanted the cash, or

if they would take his notes, as he was a little short of cash at that time. They replied that they were perfectly willing to take his notes. As they were unable then to determine the exact amount of the liens upon the land, defendant executed to Mr. Drayton, of the Citizens Bank, a note for $600, and to Mr. Thornton, of the Farmers Bank, a note for $400. Some 10 or 15 days thereafter, after the exact amount of the mortgages upon the land with interest and the amount of taxes had been ascertained, it was discovered that the incumbrances were a little less than they had supposed, and that it would be necessary for defendant to pay to the banks a small amount in excess of the notes which he had previously given, whereupon new notes were given for the increased amounts, which was less than $100 in each case. These notes were subsequently paid by defendant. At the time these transactions were had, the Citizens Bank, of which Mr. Drayton was cashier and a director, and, as we think the evidence fairly shows, a stockholder, held for collection one of the notes which it had held against Mudra, but which it had rediscounted at the First National Bank of Norfolk. It further appears that at the time this note was rediscounted at the Norfolk bank T. A. Drayton personally guaranteed the payment of the note, and this personal guaranty was still outstanding at the time of the transactions above set out. A portion of the money received by Drayton from defendant as a part of the consideration for the purchase of plaintiffs' land was indorsed by Drayton upon this note, which he had personally guaranteed. This fact, together with the fact that Drayton was also interested as a stockholder in the Citizens Bank, form the basis of plaintiffs' contention that Drayton was disqualified to act as notary in taking the acknowledgment of the plaintiffs to the deed in question; and upon this point the case turns. The district court held that he was not disqualified, and in this holding we think the court did not err.

It will be seen from what has been stated that neither

Mr. Drayton nor his bank had anything to do with the purchase of the land from plaintiffs by defendant. That was purely a matter between them. Drayton was not advised of the sale and purchase until after its terms had all been agreed upon and the parties appeared at Orchard for the purpose of executing the deed. Nor does it appear that he was in any manner instrumental in the verbal direction given by Mudra to defendant to turn over to the creditors, of which Drayton was one, the cash consideration which otherwise would have been payable to plaintiffs. We are unable to see how the fact that plaintiff gave defendant this direction and subsequently permitted it to be carried out can be held to disqualify Mr. Drayton as a notary in taking the acknowledgment. The direction of Mudra to defendant to turn the money over to the creditors was verbal. It was not induced by Drayton, and, being for the proceeds of the sale of a homestead, could not, under our statute, have been enforced by him against defendant, if the Mudras, after executing the deed, had changed their minds, canceled their verbal direction to defendant, and demanded of him that he turn the money over to them. If they had taken that course, defendant would have been obliged to comply with their demand and pay them the money, and neither Mr. Drayton nor any of the bank officials could have prevented his doing so. That the Mudras knew defendant was going to pay the money over to the creditors, including Drayton, is beyond question, and we think a clear preponderance of the evidence shows that they knew when they signed the deed that it was in fact a deed, and not a mortgage. If they did not know it then, they at least knew it, according to their own testimony, that evening when they read the written defeasance which defendant had given Mrs. Mudra. After having read that paper and then learned that they had executed a deed to defendant for their farm, and knowing that he was going to pay the consideration of the sale to the creditors, they took no steps to prevent the consummation of the deal by defendant until the

commencement of this suit three weeks later. Defendant lived on the adjoining farm, and we think it is a fair inference that, if upon their return home that evening they found they had been deceived into executing a warranty deed when they thought they were only giving a mortgage, they would have appeared at defendant's home bright and early the next morning to repudiate the entire transaction. It may be said that they acted promptly in commencing this suit three weeks later, but there is another significant circumstance in the case which explains the commencement of the suit without any previous protest. As we have said, it was agreed between the representatives of the banks and plaintiff Emil at the time the representatives visited his farm and took the last chattel mortgage covering all of the property, which was two days prior to the execution of the deed, that they would have a sale and sell off all of the personal property; plaintiff stating that he wanted to sell everything and pay his debts. It was then arranged that the bank representatives should get out the sale bills and engage the auctioneers. This was done and the sale made on January 28. The sale of the personal property netted $3,093.41, which was evidently much less than plaintiffs expected to realize therefrom. The proceeds of the sale of the land, after deducting the incumbrances, added to the amount realized from the sale of the personal property, did not entirely pay all of plaintiff's liabilities; so that he found himself, after the sale on January 28, without either farm, farm implements, or stock. It then evidently dawned upon plaintiffs that they had made a mistake in turning over their homestead, and it was after that that they probably consulted counsel and brought the present suit in an effort to regain it. We greatly sympathize with the unfortunate plight in which plaintiffs were left, but we are unable to discover any evidence of fraud, misrepresentation or overreaching on the part of the creditors. It was patent to plaintiffs on January 22, when they executed the deed, that they had made a failure of farming, that they would

in any event have to give up all of their personal property, and that all they would have left would be the farm which was incumbered for about one-half of its value. They evidently indulged the hope that, if they sold the land to defendant and applied the money which would be coming to them from such sale upon their indebtedness, they would have a surplus at the time of the sale of the personal property, which would enable them to retain some of the horses and cows, or that they would have a cash surplus coming to them. However that may be, and however unfortunate the final outcome of their transactions has proved to be, we are unable to see how we can give them any relief.

In *Wilson v. Griess,* 64 Neb. 792, cited by plaintiffs, a national bank, which held for collection a note of another bank of which it was a large stockholder, took a renewal thereof and included in the renewal note its own unsecured debt against the maker, and at the same time obtained a mortgage upon the homestead of the debtor, signed by himself and wife, to secure the new note, and we held that the assistant cashier, who was a director and stockholder of the bank, was disqualified to act as notary in taking the acknowledgment. In *Chadron Loan & Building Ass'n v. O'Linn,* 1 Neb. (Unof.) 1, we held that a mortgage upon a homestead, acknowledged by a notary who was likewise an officer and stockholder of the corporation, mortgagee, is invalid. In each of the above cases it will be observed that the notary was an officer and stockholder of the corporation named as grantee in the instrument acknowledged. We are unable to see how those cases can be considered as authority in this. In *Horbach v. Tyrrell,* 48 Neb. 514, the notary who took the acknowledgment was shown to be secretary and treasurer of the corporation, mortgagee, but it was not shown that he was a stockholder in the corporation, and we held that he was not disqualified. In *Watkins v. Youll,* 70 Neb. 81, the deed was acknowledged before one Barnum, who was acting as an agent for the purchaser

Watkins; his contract being that for each quarter section deeded to Watkins he should have a commission of $50. It will be seen that in that case Barnum was the active agent who made the purchase of the land for Watkins—a very different position from that occupied by Drayton, in the case at bar, who had nothing whatever to do with the bringing about of the sale of the land from plaintiffs to defendant. The above are all of the cases cited by plaintiffs from this court. The cases from other courts, cited, show that in each of them the person taking the acknowledgment, or the corporation in which he was a stockholder, was named in the instrument acknowledged as a beneficiary. Such cases are not in point.

We have not only examined the authorities cited by plaintiffs as shown above, but have also made an independent examination ourselves, and have been unable to find a case in any court which goes to the extent of justifying us in holding that Mr. Drayton, under the circumstances shown in this case, was not a competent officer to take the acknowledgment of plaintiffs to their deed to defendant. Upon the whole record, we are constrained to hold that the judgment of the district court is right, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

GEORGE E. PRITCHETT, APPELLANT, V. GEORGE J. S. COLLINS ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,801.

Appeal: CONFLICTING EVIDENCE. In an action at law all questions of fact, depending upon conflicting evidence, are for the jury; and, unless manifestly wrong, the verdict should not be disturbed on appeal.

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

George E. Pritchett, pro se.

Jefferis, Howell & Tunison, contra.

FAWCETT, J.

Action for rent of a building. Counter-claim for damages caused by a leaky roof. Verdict and judgment for defendants. Plaintiff appeals.

The only error assigned and argued in plaintiff's brief is the insufficiency of the evidence. Plaintiff concedes that there is a conflict in the oral testimony given by himself and the defendant Collins, but insists that his testimony is so strongly corroborated by undisputed facts that it should be believed as against "the story told by Collins." This argument should have been, and doubtless was, addressed to the jury. While we might have arrived at a different conclusion from that reached by the jury, had we been sitting as triers of fact, we cannot say that the verdict is manifestly wrong. In such case we should not interfere.

AFFIRMED.

SEDGWICK, J., not sitting.

WILLIAM BOYD, SR., APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 25, 1911. No. 16,468.

1. Appeal: ISSUES: PLEADING. Upon appeal the same cause must be presented in this court that was tried in the court below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficently pleaded, such objection will not be considered in this court as ground for reversal.

2. ———: EVIDENCE: SUFFICIENCY. The objection in this court that the verdict is not supported by the evidence will not justify a reversal, unless the failure of evidence is so manifest that all

reasonable men, acting upon the evidence alone, must agree that it is insufficient.

3. Damages: GROWING CROPS. Immature, growing crops are not generally considered as having a market value. In such case the reasonable value under all the circumstances may be shown in determining the damages caused by an injury thereto.

4. Trial: OBJECTIONS TO EVIDENCE. An objection to evidence on the ground of insufficiency of the petition in alleging damages is in the nature of a demurrer, and should challenge the court's attention directly to the condition of the pleading; a general objection that the evidence is incompetent is insufficient.

5. Appeal: DAMAGES: INSTRUCTIONS. If growing, immature crops are totally destroyed, the measure of damages is the reasonable value of the crops before the injury. In such case an instruction that the "market" value of crops "damaged or destroyed" is the measure of damages is erroneous, but is prejudicial to plaintiff alone, when the evidence is conclusive that such crops were totally destroyed and had no market value, and the reasonable value is clearly shown.

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

James E. Kelby and *Halleck F. Rose,* for appellants.

A. G. Wolfenbarger and *George W. Berge, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for Lancaster county against these defendants for damages which he alleged he sustained by reason of his lands being overflowed by water in the seasons of 1907 and 1908, caused by the negligence of the defendants in making certain improvements in their roadbed and track immediately west of the city of Lincoln. The defendants have appealed.

1. The first contention of the defendants is that the pleadings and evidence do not support the verdict and judgment. In making these improvements the defendants constructed a new grade for their tracks, running directly west through the valley adjacent to the city of

Lincoln, between three and four miles in length. Middle creek flows through this valley in an easterly direction, entering into Salt creek near the east end of this new grade. The course of Middle creek was substantially on the south side of the new grade, but at three different points the grade interfered with the old channel, and at each of these points a new channel for the creek was cut along the south side of the grade. One of these new channels is at the east end of the grade, another near the west end, and the third is located between these two. It is the third or middle channel that is described in the petition, and is alleged to have been improperly constructed, so as to prevent the free and natural flow of the water. The plaintiff introduced evidence attempting to show the negligence and improper construction of this middle channel, and also introduced evidence tending to show that this new grade, which is several feet higher than the general level of the land, caused the damage complained of. The contention of the plaintiff in that regard was that before this grade was constructed, in seasons of high water, the general course of the water over the valley was towards the north and east, and that the slope of the land in that direction was such that the water flowed freely away from the plaintiff's land, which was located on the south side of this grade, and so the plaintiff's land was not overflowed, and that owing to the construction of this grade without openings the water was gathered on the south side thereof, which was one of the causes of the plaintiff's land being overflowed. The defendants in their briefs contend that no such cause of action is stated in the petition; that the evidence in regard to the obstruction of the water caused by the grade was wholly incompetent under the allegations of the petition, and should not have been admitted or considered. Of course, the plaintiff must prove the cause of action which he alleges. He cannot sue upon one cause of action and recover upon another not alleged.

The grades, new tracks and trackage are mentioned in

the petition, and it is alleged that the defendants "built high grades and embankments to the north and east of said premises," to the great injury and damage of the plaintiff, and that in making these improvements the defendants "performed the work in a negligent, reckless, careless and unnecessary manner," and that, "because of the dams, high grades and embankments aforesaid, the banks of said Middle creek were overflowed." All of these allegations of the petition, however, are, by language that is not at all uncertain, directly referred to the new channel which the defendants had cut for Middle creek about one-half mile below the plaintiff's premises. It is not directly alleged that the construction of the grade and tracks resulted in diverting the waters of Middle creek and causing them to be turned aside from their bed and channel, and no other injurious effect from these grades and tracks is anywhere alleged in the petition. There is no allegation in the petition that the water, before this grade was made, could escape across this land to the north and east of this grade, so that this circumstance would relieve the plaintiff's land from inundation, or that this grade in any manner prevented this water from so escaping; and, to make it certain and beyond question that the plaintiff's cause of action was the improper construction of this unnatural channel for Middle creek, it is emphatically alleged in the petition "that the said Middle creek, if allowed and permitted to occupy and flow in its natural and usual bed and channel, would not have overflowed at all in the vicinity of and on said premises, even in times of heavy rains and freshets, and would not have overflowed in the month of June, 1907, but for the wrongful acts, negligence and doings of said defendants, and the injury and damage suffered and sustained by plaintiff as hereinafter set forth was wholly on account of the negligence, carelessness and unnecessary acts and doings of said defendants in filling in, damming up and diverting the waters of said stream as aforesaid." The parties, however, have tried the case upon the issues now con-

tended for by the plaintiff. Plaintiff's first witness gave evidence as to the general conditions obtaining in the valley before and after the grade, dikes and other improvements were made, and also as to the form and construction of the improvements in general. Many objections were made to his testimony on various grounds, but we find no suggestion by defendants that the allegations of the petition were insufficient to support the widest investigation of the character of the improvements as a whole and their effect upon flood conditions existing in the valley. In similar testimony of subsequent witnesses examined by plaintiff, we find general objections. The plaintiff's son John was asked: "Tell whether the water was higher on the north and west side of the Denton cutoff than on the south and east?" and the objection interposed was: "The defendants object as wholly immaterial, and it is not a condition that could in any manner affect the flooding of his father's land below." When this question was put in a somewhat different form so as to apply specifically to a point some distance above plaintiff's land, the objection interposed was: "The defendants object as incompetent, immaterial, irrelevant, and as having no bearing upon the issues." The defendants also in their evidence went fully into the whole matter of the improvements there and the effect upon flood conditions The case was tried as though the allegations of the petition covered the whole situation, and the objection to the petition comes now too late.

2. The principal question, then, presented in the case is as to the sufficiency of the evidence to support the verdict and judgment. The evidence in the bill of exceptions covers nearly 700 pages of typewritten matter. The plaintiff asserts in the briefs that this evidence is sufficient, and asserts that it is the duty of the defendants who challenge the sufficiency of the evidence to analyze the same and show wherein it is deficient. No attempt is made by the plaintiff to abstract or analyze the evidence or to point out those parts of the evidence which it is claimed suffi-

ciently support the verdict. The defendants have referred to some parts of the evidence which it is claimed show a proper and necessary construction of the improvements, and that the verdict is unsupported.

With such assistance, then, as we have had from the briefs, we have tried to analyze this mass of testimony to ascertain whether the judgment against the defendants is justifiable. The improvements are quite extensive and must involve a large outlay on the part of the defendants. They were in process of construction at the time of the floods in question. It is conceded that the particular new channel, described in the petition, which the defendants had constructed for the flow of Middle creek was incomplete. The old channel at this point was covered by the new grades for the tracks, and was therefore wholly obstructed. There is some conflict in the evidence as to the condition of the new channel. The defendants' engineer testified that the bed of this new channel at the west end, and where it was intended to receive the water of Middle creek, was only two feet higher than the natural bed of Middle creek at that point. Other witnesses testified that it was from four to six feet higher; and one witness, whose testimony upon that point probably is not very reliable, made the obstruction much larger. The non-expert witnesses for the plaintiff testified that the width of the new channel was not nearly as great as the width of the former channel of the creek, but they have made no measurements. The engineers of the defendants testified to the width and depth of the new channel, but they had failed to measure the width of the old channel at the point of their conjunction. The jury might find from this evidence that the natural channel of Middle creek was very much obstructed by the work of the defendants, so as to force the water from the creek and cause it to overflow the surrounding lands in large quantities. Not far from the plaintiff's land the defendants have built on the north side of the grade a dike or embankment, extending north from the grade several hundred feet, the purpose of which

was to turn the water to the south side of the grade and into the channel of Middle creek. Several witnesses testified that the effect of this was, together with the principal grade extending east and west a distance of about 3½ miles, to confine the water on the south side of the grade, and to prevent the general flow to the north and east, as had formerly been the course of the water. There was also testimony that the water during the whole period of the flood was very much higher on the south side of the grade than it was on the north side, so much so that it forced passages through the grade, but not sufficiently to allow a free flow of water and so prevent the damage to plaintiff's land complained of. There was evidence, apparently reliable, tending to show that the flood of 1908 was of such magnitude that the whole valley, both north and south of this new grade, was covered with water from the "hills on the north to the hills on the south," and for a great distance up the stream beyond the plaintiff's land. The evidence is uncontradicted that at the lower or south end of this new grade the water was higher than it had ever been before, so much so that it flooded the station used by the defendants and the depot grounds, which had never occurred on any other occasion; but Mr. Bignell, upon whose testimony this latter point principally depends, was not able to say, when questioned upon cross-examination, that the water on the south side of the new grade was not higher than on the north side, or that the flood of the station grounds was not caused, partly at least, by this new grade which it was claimed carried the body of the water down to the vicinity of the station and prevented it escaping to the northeast below the station grounds. He shows that there were several breaks in the grade caused by the flood water, but to what extent this lowered the water on the south side of the grade, or tended to equalize the volume of water with the water on the north side of the grade, he does not attempt to say. We are not called upon to determine this question of fact *de novo*, as in equity cases. Unless the evidence is so clear and cer-

tain that all reasonable men acting upon the evidence alone must conclude that this damage was not caused by the negligence of these defendants, we cannot interfere with the verdict of the jury. Applying this rule, we have concluded with some hesitancy that the verdict of the jury is sufficiently supported.

3. The witnesses were allowed to testify as to the value of the crops destroyed. The defendants insist that the inquiries should be limited to the market value. This is undoubtedly the rule when the articles in question have a market value. Immature, growing crops cannot be said to come within that rule. *Fremont, E. & M. V. R. Co. v. Crum,* 30 Neb. 70; *Kansas City & O. R. Co. v. Rogers,* 48 Neb. 653; *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698, 714; *Berard v. Atchison & N. R. Co.,* 79 Neb. 830; *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657; *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745; *Thompson v. Chicago, B. & Q. R. Co.,* 84 Neb. 482. Certain kinds of crops, if mature and capable of proof as to quantity and quality, may have a market value. The evidence does not appear to show such condition of the crops in question. We think the ruling of the court in this respect was right. While it may be difficult to ascertain the real damages sustained, the defendants cannot escape liability for that reason.

Chicago, B. & Q. R. Co. v. Mitchell, 74 Neb. 563, and *Smith v. Chicago, B. & Q. R. Co.,* 81 Neb. 186, are cited by the defendant as holding that the evidence must be limited to the market value of the crops destroyed. It does not appear from the opinion in either of these cases that the court was discussing the question here presented. In the former the question discussed was as to the sufficiency of the evidence to establish the amount of damage recovered, although the evidence is not quoted at length. The instruction given by the trial court, in which it is stated that the measure of damage is "the fair market value of the crop just before the land was flooded, in the manner above alleged, if proved, and immediately there-

after," is quoted, and it is said that this was the proper measure. It is, however, evident that the writer of the opinion had in mind the time to which the proof should be limited in considering the value—that is, before and after the injury complained of—and was not discussing or considering the effect to be given to the word "market" in the instruction, an effect which, as in this case, would be prejudicial to the plaintiff, and not to the party complaining of the instruction. In the latter case the point determined was that when the crop was totally destroyed the measure of damage would be the value of the crop before the injury. Here the word "market" was inadvertently used. The language used in these opinions in discussing other propositions of law was not intended to change the general rule of law in such cases.

4. It is also urged that the court erred in admitting testimony of damage to the plaintiff's pasture land. The allegations of the petition in regard to these supposed damages are somewhat indefinite. If pasturage is considered a crop, the general language of the petition may be considered sufficient for this purpose. The objection to this evidence was not on the ground of variance from the allegations of the petition. The principal witness on this matter was asked, "What was the fair and reasonable value, per acre, of this pasture land of your father's before July 5, 1908, before the flood, in the condition it was before the flood?" and the objection interposed was: "The defendants object as incompetent, and no foundation laid, and not the proper measure of damage, and the witness is not qualified." The point now urged, that the damage to the pasture is not sufficiently alleged in the petition, is not presented by this objection. The reason is stated in the objection for the assertion that the evidence called for is incompetent, and no reference is made to the supposed insufficiency of the petition. If it was intended to obtain a ruling upon that point, the trial court would be misled by the form of the objection. The case was tried by both parties upon the theory that the loss of this pasturage was one element of plaintiff's damage.

5. The eleventh instruction given by the court is complained of. It tells the jury that they should find "the fair market value of crops damaged or destroyed," and that "the measure of damage is based on the value of the growing crops." The damages caused by injury to growing crops are measured by the difference in value in the growing crops caused by the injury, and, if the crops are totally destroyed, the measure is the value before the injury. The evidence upon this point was furnished by plaintiff's witnesses. They testified that the crops were entirely destroyed, and the defendants offered no opposing evidence. The instruction, then, is technically erroneous in requiring the jury to find the "market" value, and in suggesting that some of the crops were damaged only. In other respects the instruction is correct, and in these two particulars it is prejudicial to the plaintiff, and not to the defendants.

The judgment of the district court is

AFFIRMED.

MAX COHN, APPELLEE, V. CHARLES D. BUTTERFIELD, APPELLANT.

FILED SEPTEMBER 25, 1911. No. 16,526.

1. Officers: REMOVAL: RIGHT OF APPEAL. The plaintiff and appellee began an action in the district court by petition in error against this defendant and appellant to reverse an order of the governor removing appellee from the office of notary public upon complaint of appellant, and obtained a judgment for costs against this appellant and an order reversing the decision of the governor. *Held*, That the appellant has such interest in the proceedings in the district court as to enable him to appeal from the judgment and order therein to this court.

2. ———: ———: REVIEW. Upon petition in error in the district court to reverse an order of the governor removing a notary public from office, the plaintiff in error is not entitled to a trial *de novo* and it is error to order the reversal of the decision of the gov-

ernor for want of prosecution in the district court and to enter judgment for costs against the defendant in error.

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

Pitzer & Hayward, D. W. Livingston and *Edwin Zimmerer,* for appellant.

John H. Ames, F. T. Ransom and *Hall, Woods & Pound, contra.*

SEDGWICK, J.

Charles D. Butterfield, who is named as defendant in this case, filed a complaint before the then governor, John H. Mickey, charging Max Cohn, who is named as plaintiff and who was then a duly qualified and acting notary public, with malfeasance in office as notary public. The proceedings were brought under section 14 of the notary public act. Comp. St. 1909, ch. 61, sec. 14. The proceedings before the governor were entitled "Charles D. Butterfield v. Max Cohn." The governor appointed a referee, who took evidence and duly certified and returned the same to the governor. Mr. Cohn was duly notified, and upon consideration of the evidence and argument the governor found that the charges in the complaint were sustained, and made an order removing him from the office of notary public.

Thereafter, and on the 26th day of April, 1907, Mr. Cohn filed a petition in error in the district court for Lancaster county to reverse the order of the governor. In this petition he named himself as plaintiff in error and Mr. Butterfield as defendant in error, and alleged that Mr. Butterfield was complainant before the governor, and as such "procured an order and judgment removing this plaintiff from his said office of notary public." A summons in error was issued and served upon Mr. Butterfield as defendant in error. On the 17th day of July, 1909, his petition in error having been pending for more than

two years, and nothing having been done in the case by either party, Mr. Cohn filed a motion to "sustain the appeal in the above entitled cause of action and to reverse and set aside the findings and order of the Honorable John H. Mickey, formerly governor, and to reinstate the plaintiff in error to his official position as notary public." The ground stated in the motion for the relief asked was that the petition in error had been pending and summons in error duly served as above stated, and that "defendant in error has entered no appearance and filed no pleadings of any kind." Three days thereafter the court made an order reciting that "it appearing that the defendant in error has had due notice of said motion and he has failed to appear, the court hereby enters a default against him for his failure to appear in said cause as to said motion," and ordering that "the said appeal is sustained in the above entitled action, and the finding and order of the Honorable John H. Mickey, aforesaid, is hereby reversed, set aside and held for naught, and that the plaintiff in error recover his costs herein." The defendant in error, Charles D. Butterfield, has appealed to this court.

1. The appellee presents questions to this court in the following words: "Has this court any litigable question before it? Has the appellant any legal interest in the controversy? Is he in any sense a party to the proceeding, or has he been such in any of its stages? In our opinion all of these questions must be answered in the negative." This, plainly, is not the correct answer to these questions. The governor is authorized to appoint such number of persons to the office of notary public in each county "as he shall deem necessary (Comp. St., ch. 61, sec. 1), and, when charges of malfeasance in office are brought to the governor against a notary public, he must have the evidence taken, and certain formalities must be complied with, and, if he is satisfied from the evidence that "the charges are substantially proven, the governor may remove the person charged from the office of notary public." Comp. St., ch. 61, sec. 14. This case is not in substance

the same as *Munk v. Frink*, 75 Neb. 172, 81 Neb. 631, although the proceedings may be somewhat analogous. An appointee to office has no such right therein as against the public or the appointing power as a physician has in his profession. In this country it is not unusual for the legislature to provide that the appointing power may remove the appointee at pleasure. Sometimes, as in this case, notice and a hearing with opportunity to defend are necessary. Generally no appeal is allowed unless provided for by statute. In this state no doubt a review may be had, as pointed out in *Munk v. Frink, supra,* and *Mathews v. Hedlund,* 82 Neb. 825, but, as said in those cases, the court will not weigh conflicting evidence to ascertain whether the order of removal is sustained. This plaintiff began proceedings in the district court against this defendant to reverse an order which he alleged this defendant had obtained against him. On his motion the court reversed the order complained of, and adjudged costs against this defendant and in favor of this plaintiff. Surely he cannot now be heard to say that defendant had no interest in that order and judgment.

2. Did the district court err in reversing the governor's order and adjudging costs against the defendant? The plaintiff was the moving party in the district court. It devolved upon him to show to the court upon the record presented that there was such error in the proceedings before the governor that the order was invalid. The court is not authorized to try the cause *de novo*, and the fact that the defendant in those proceedings had "entered no appearance and filed no pleadings" did not render the order of the governor erroneous. If the district court did not have jurisdiction of the cause for want of proper parties, the result here would be the same; a judgment against the defendant under such circumstances would be erroneous.

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

REVERSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

FILED SEPTEMBER 25, 1911. No. 16,707.

1. **Railroads:** CROSSINGS: POWERS OF RAILWAY COMMISSION. The power to open streets and to regulate and control railway crossings over the same in incorporated cities and villages is given by statute to the municipal authorities. The state railway commission has general jurisdiction of such matters outside of cities and villages.

2. **State Railway Commission:** POWERS. Whether the state railway commission has any duty to perform in case the proper municipal authorities wilfully refuse to act in regulating railway crossings of streets in cities and villages, or has any supervising power of such crossings to safeguard the passengers and employees on trains, is not involved in this case, and is not decided.

3. Former decision adhered to.

OPINION on motion for rehearing of case reported in 88 Neb. 239. *Rehearing denied.*

SEDGWICK, J.

It was held in the opinion in 88 Neb. 239, that the village authorities have exclusive original jurisdiction of the matters determined in this case, and that the action of the state railway commission was therefore without jurisdiction. The statement of law in the syllabus is conceded in the brief upon the motion for rehearing to be correct, if no street has been laid out or ordered to be opened. The contention seems to be that the proceedings of the village authorities opening the street were found by the railway commission to be regular and valid, and in such case the commission has jurisdiction. It is, however, admitted that the only defense of the railway company was with reference to the validity of those proceedings. The pleadings and evidence and rulings before the commission and in court upon appeal all show that the sole question in dis-

pute is whether the public road in question is necessary and ought to be opened. This is a question for the village authorities under subdivisions XXI, XXVII, sec. 69, art. I, ch. 14, Comp. St. 1909.

If those provisions of statute are constitutional, and the village authorities have proceeded regularly and ordered the street opened over the right of way and tracks of the company, and a proper crossing constructed, the courts will enforce such order, as they will the orders of the railway commission in matters within its jurisdiction. The village is not required to wait for the approval of the railway commission, but is entitled to immediate obedience of its proper order in that regard. If the railway commission can review and approve the findings and orders of the village authorities, it can, of course, also annul them, and, both being administrative bodies, the right to open and control the streets and regulate railroad crossings within the village would thereby be taken away from the local authority and conferred upon the state commission, which is contrary to the plain letter of the statute.

The railway commission is given jurisdiction of railway crossings in general outside of cities and villages, but we do not want to be understood as holding that it has authority to inspect crossings within cities and villages, with a view to safeguard the lives of passengers and employees upon its cars, or for any other purpose, for no such question is presented by this record. And it must not be inferred from any language used in the former opinion that, in supervising crossings outside of cities and villages, the commission is under less obligation to safeguard the public who use such crossings than it is to protect those who are carried in its trains.

Our former decision reversing the judgment of the district court and dismissing the proceedings before the railway commission is adhered to. Motion for rehearing

OVERRULED.

REESE, C. J., dissenting.

If the commission has jurisdiction over the subject matter, its authority, although in a sense advisory only, should be upheld. It is contended that the village board has jurisdiction and authority to order the track to be planked between and on the outer side of the rails, so as to render the way passable and safe, and, in case of a refusal on the part of the railroad company to comply with the order, an action in the form of mandamus could be instituted by the village authorities in the district court, whereby the duty could be coerced, and that that right could not be taken away. To this I fully agree. The doors of the courts are and must be open at all times for the enforcement of the performance of the duties imposed. It may be conceded that that would be the better and more effective course to be pursued, for there are many arguments in its favor. While all this may be conceded, yet it does not follow that the commission, to the extent of its powers, may not have concurrent jurisdiction over the same subject matter, but based upon a rather different foundation. The constitution (amendment, 1906) provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law." By section 2, art. VIII, ch. 72, Comp. St. 1909, the commission is given power to regulate the rates and services of, and to exercise a general control over, all railroads; to examine and inspect, from time to time, the condition of each railway or common carrier, its equipment, and the manner of its conduct and management, with regard to the public safety and convenience in the state; and, if any part thereof is found in an unsafe and dangerous condition, said commission shall immediately notify the railway company whose duty it is to put the same in repair, which shall be done by it within a reasonable time after receiving such notice, etc. The duty of making and keeping a crossing in repair is imposed upon railroads by section 110, ch. 78, Comp. St.

1909. This section has been held valid in numerous cases, among which are *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412; *Burlington & M. R. R. Co. v. Koonce*, 34 Neb. 479; *Missouri P. R. Co. v. Cass County*, 76 Neb. 396. By these provisions, and others, in the statutes, it is clear that the commission has a control, oversight and superintendency over all railroads within the state, "with regard to the public safety and convenience in the state," and for that purpose must, of necessity, have jurisdiction over every foot of railroad track in the state, without reference to whether the track is located within an incorporated village or city or in the open country. Wherever "the public safety and convenience" is overlooked or ignored by a railroad company in the condition of its tracks, the commission has the power, and it is its duty, upon complaint being made, to order the repair or correction. Should the authorities of a city or village fail or refuse to require the tracks to be rendered safe and convenient for the use of the public, the authority of the commission cannot thereby be ousted, and the people be left to shift for themselves, and be compelled to seek other means and places of crossing the tracks. It is manifest that they would not be permitted to enter the right of way of a railroad company and plank crossings in order to render the way passable. The safety of the traveling public, as well as of the railroad company itself, requires that the duty of making grade surface crossings safe and convenient must be with the railroad company.

The bill of exceptions shows beyond any question that Walnut street from the east to the west lines of the corporation is, and has been, open since the settlement of the village, the only obstruction being the railroad crossing; that on either side of the railroad track residences are established, and sidewalks have been constructed in front of the lots fronting on Walnut street to near the right of way of the railroad company; that the school house and some residences are located on the east side of the track, and the major portion of the residences and the

village church on the west side; that there are two street crossings in the village, both of which are frequently blocked by standing of freight trains; that at the point where the crossing is desired, and evidently needed, the railroad track is in a cut from 2 to 2½ feet deep; that the citizens and village authorities have stood ready to do the grading at their own expense, and the fact is stipulated in the record. The contention of the railroad company that the street in question has never been legally opened is a mere pretense, and entitled to no consideration. Without discussing the evidence at length, I am unable to see any good reason why the crossing should not be made, but many why it should, and that without further delay. It is clear that the safety and convenience of the public, of which the citizens of Hallam form a part, require that the railroad track be improved as ordered by the railway commission. In my opinion, the decision of the district court in dismissing the appeal was right, and should be affirmed.

ROSE and FAWCETT, JJ., concur in this dissent.

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13. Where defendant had reason to believe that plaintiff understood a stipulation in a certain way, the sense in which plaintiff understood it must prevail, under sec. 341 of the code. *Southern Realty Co. v. Hannon* 802

Corporations.

1. A person transacting business for many years with an organization as a corporation, in enforcing a demand against it, cannot question its corporate capacity. *Omaha Cattle Loan Co. v. Shelly* 502
2. Under sec. 136, ch. 16, Comp. St. 1891, the liability of stockholders on default of the corporation *held* limited to their unpaid subscriptions to capital stock, together with the amount of capital stock owned by them. *First Nat. Bank v. Cooper* 632
3. In a suit to determine the liability of stockholders for obligations which accrued before the amendment of 1891 to sec. 136, ch. 16, Comp. St. 1889, a finding that the stockholders were jointly and severally liable for the full amount of such obligations, and a judgment for a greater amount than the amended statute allowed, *held* erroneous. *First Nat. Bank v. Cooper* 632

Counties and County Officers.

1. The county board can deduct from a judgment against the county delinquent personal taxes due from the claimant prior to an assignment of the judgment. *State v. Holt County* 445
2. Sec. 4468, Ann. St. 1909, *held* not to prevent a county board from deducting unpaid personal taxes from a judgment ren-

Counties and County Officers—*Concluded.*

dered in the district court on a claim rejected by the board. *State v. Holt County* 445

3. Sheriff, in county having 16,000 to 20,000 population, *held* entitled to extra compensation for performance of duties as jailer. *Dunkel v. Hall County* 585

4. Sheriff, in county having 16,000 to 20,000 population, who has duties of jailer performed by deputy, *held* not entitled to fees for services as jailer provided in sec. 5, ch. 28, Comp. St. 1907. *Dunkel v. Hall County* 585

Courts. See INJUNCTION, 5. INSANE PERSONS, 1, 4, 5.

Where, on granting a divorce, the custody of a minor child is given the mother, the husband to pay a fixed sum for its maintenance, the probate court has no authority to increase the amount fixed by the district court. *In re Estate of Rusch* 265

Creditors' Suit. See LIMITATION OF ACTIONS, 3.

1. In a creditor's suit to subject property to satisfaction of a judgment against a third person, defendant, if not a party to the judgment, may establish any defense which the judgment debtor might have interposed. *Omaha Cattle Loan Co. v. Shelly* 502

2. Where a judgment creditor has exhausted his legal remedies, equity will aid him in subjecting the interest of an insolvent debtor in a corporation to satisfaction of his judgment. *Fuchs v. Chambers* 538

3. In a creditor's suit, evidence *held* not to sustain decree for plaintiffs. *Fuchs v. Chambers* 538

Criminal Law. See BIGAMY. CONSTITUTIONAL LAW, 1. EMBEZZLEMENT. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. PARDON.

1. It is not error to refuse an instruction the substance of which has been given. *Schultz v. State* 34

2. Where there was no evidence to support a requested instruction, *held* proper to refuse it. *Schultz v. State* 34

3. A general exception to a charge is unavailing unless the entire charge is erroneous. *Goff v. State* 287

4. An instruction given as requested by accused, though erroneous, *held* not ground for reversal. *Coffman v. State* .. 313

5. The giving of an instruction by the court similar to one given at request of accused, though erroneous, *held* not ground for reversal unless clearly prejudicial. *Coffman v. State* 313

Criminal Law—*Concluded.*

6. Admission of evidence not prejudicial to accused is not ground for reversal. *Staley v. State* 701
7. Reception of incompetent evidence of a fact is not prejudicial where the fact is established by competent evidence. *Ainlay v. State* 721
8. Cross-examination of hostile witness *held* to be within the discretion of the trial court, where no abuse of discretion is shown. *Ainlay v. State* 721
9. In a prosecution for gambling, a conviction will not be disturbed where the evidence sustains it, though it is contradicted by the accused. *Ainlay v. State* 721
10. Error in admission of evidence offered by the state which was not prejudicial will not require reversal of conviction. *Clarence v. State* 762
11. A motion for change of venue is addressed to the discretion of the court. *Clarence v. State* 762
12. Where one charged with murder in the first degree was convicted of murder in the second degree, and the conviction was reversed, *held* not error for the court on a second trial to refuse to require the state to try him for manslaughter only. *Clarence v. State* 762

Crops. See APPEAL AND ERROR, 31. DAMAGES, 10, 11.

Damages. See APPEAL AND ERROR, 14, 31. ASSAULT AND BATTERY, 1. DEATH, 1, 2. TRIAL, 18.

1. Ordinarily a sum of money to be paid for the nonperformance of a contract is a penalty covering damages sustained from a breach of the contract. *Haffke v. Coffin* 134
2. In an action on a bond of indemnity, plaintiff must plead and prove the amount of damages. *Haffke v. Coffin* 134
3. In an action against an express company for loss of a medical diploma, *held* that an instruction authorizing nominal damages, though erroneous, was not prejudicial. *Whiteside v. Adams Express Co.* 430
4. Where mental anguish, personal injuries and physical suffering are considered, the amount of recovery must be left to the jury. *Flinn v. Fredrickson* 563
5. Where the evidence is conflicting as to whether physical conditions existing some time after a personal injury were caused by such injury, the question should be submitted to the jury. *Struble v. Village of DeWitt* 726
6. In an action for personal injury by a married woman accustomed to compensation for work performed for others, *held* not error to charge that she may recover for medical services. *Struble v. Village of DeWitt* 726

Damages—*Concluded.*

7. Evidence *held* to support verdict for $25 for medical services. *Struble v. Village of DeWitt* 726
8. Verdict for $4,500 for death by automobile *held* not excessive. *Smith v. Coon* 776
9. Judgment for $2,000 for personal injuries *held* not excessive. *Blado v. Draper* 787
10. Immature, growing crops not having a market value, the reasonable value determines the damages caused by an injury thereto. *Boyd v. Lincoln & N. W. R. Co* 840
11. The measure of damages for growing crops totally destroyed is their reasonable value before the injury. *Boyd v. Lincoln & N. W. R. Co* 840

Death. See APPEAL AND ERROR, 14. DAMAGES, 8.

1. In an action for death of husband, recovery of $5,000 *held* excessive. *Swanson v. Union Stock Yards Co* 361
2. In an action for death of husband, the measure of damages is the pecuniary loss to plaintiff; her financial condition being immaterial. *Gundy v. Nye-Schneider-Fowler Co* 599
3. Money recovered by an administrator under secs. 1, 2, ch. 21, Comp. St. 1909, *held* properly distributed between the widow and mother of decedent. *In re Estate of Griffin* 733
4. In action for death caused by automobile at street crossing, evidence *held* to sustain verdict for plaintiff. *Smith v. Coon* 776

Deeds.

1. Deed from grantor to her sister *held* procured by undue influence of grantee. *Miller v. Worth* 75
2. A deed procured by undue influence as a gift from a person who is weak mentally *held* not validated by ratification. *Miller v. Worth* 75
3. No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation. *Winslow v. Winslow* 189
4. The presumption is against the validity of a deed from an aged parent to one of several children. *Winslow v. Winslow* 189
5. Evidence *held* insufficient to overcome presumption against validity of deed from mother to son. *Winslow v. Winslow,* 189
6. A grantor *held* competent to execute a deed. *Hacker v. Hoover* 317
7. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Hacker v. Hoover* 317

Deeds—*Concluded.*

8. Evidence *held* to show that a grantor was competent to execute a deed. *Hacker v. Hoover*..... 317
9. Evidence *held* to support decree canceling deeds as procured by undue influence. *Bosley v. Laverick*..... 415

Descent and Distribution. See DEATH, 3.

1. Under sec. 29, ch. 23, Comp. St. 1887, lands of which a married woman died seized descended to her surviving husband as tenant by curtesy, subject to sale for her debts. *Miller v. Hanna*..... 224
2. The interest of a vendee in possession of school lands under a contract of purchase descends to his heirs, and not to his administrator. *Mauzy v. Hinrichs*..... 280

Divorce. See COURTS. HUSBAND AND WIFE, 1.

1. Unjustifiable conduct which destroys the objects of matrimony may constitute extreme cruelty. *Miller v. Miller*.... 239
2. That a husband and wife are living apart when false charges of adultery are wantonly made by one against the other does not of itself prevent such charges from constituting extreme cruelty. *Miller v. Miller*..... 239
3. The fact of separation *held* relevant in determining whether false charges of adultery caused great mental suffering. *Miller v. Miller*..... 239
4. The district court has discretionary power during the term to open a decree of divorce and allow further evidence. *Howell v. Howell*..... 243
5. Evidence *held* not to support findings that defendant was guilty of extreme cruelty. *Howell v. Howell*..... 243
6. In a suit for divorce from bed and board and maintenance, for extreme cruelty, evidence *held* to support decree dismissing plaintiff's petition. *Goodson v. Goodson*..... 452
7. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. *Anderson v. Anderson*..... 570
8. Promise of forgiveness, to constitute condonation, must be followed by a restoration of the offending party to all marital rights. *Anderson v. Anderson*..... 570
9. Evidence *held* insufficient to establish condonation of cruelty. *Anderson v. Anderson*..... 570
10. Insanity, to be available as a defense, must be pleaded. *Anderson v. Anderson*..... 570
11. Evidence *held* to support decree of divorce for extreme cruelty. *Anderson v. Anderson*..... 570

Divorce—*Concluded.*

12. Evidence *held* to sustain decree for alimony. *Anderson v. Anderson* 570
13. Where both parties to a divorce suit are found guilty of any of the enumerated offenses for which a divorce may be granted, the suit will be dismissed. *Wilson v. Wilson* .. 749

Drains. See HIGHWAYS, 4. WATERS, 1-8.

1. On appeal from the assessment of benefits to land in a drainage district, *held* not reversible error to charge that the burden of proof is on the district to show that the lands assessed will be benefited. *Drainage District v. Bowker* .. 230
2. Under ch. 161, laws 1905, prior to amendments of 1909 (laws 1909, ch. 147), *held* not reversible error to submit to a jury the amount of benefits to land in a drainage district. *Drainage District v. Bowker* 230

Ejectment.

1. Under a general denial in ejectment, defendant may show that a deed in plaintiff's chain of title was a forgery. *Martin v. Harvey* 173
2. Under a general denial in ejectment, defendant may prove any fact which will defeat plaintiff's action. *Martin v. Harvey* 173
3. In an action in ejectment, evidence *held* to sustain a finding that a deed in plaintiff's chain of title was a forgery. *Martin v. Harvey* 173
4. Where, in ejectment, the evidence is conflicting as to the location of a government corner and as to adverse possession, the verdict will not be set aside. *Harse v. Ramer* 680

Elections. See SCHOOLS AND SCHOOL DISTRICTS.

1. A ballot, though marked in a peculiar manner, should be counted in accordance with the voter's intent, if ascertainable. *White v. Slama* 65
2. An irregularly marked ballot will not be presumed so marked to identify the elector. *White v. Slama* 65
3. A ballot marked with a line or lines within a party circle should be counted, where there is no evidence that they were traced to identify the ballot. *White v. Slama* 65
4. A ballot marked with a well-defined cross within a party circle should not be rejected because of marks without that circle, where the intent of the elector is manifest. *White v. Slama* 65
5. Where no more ballots are cast than the number of electors voting, a regularly marked ballot found upon a re-

Elections—*Concluded.*

count in an envelope marked "rejected" should be counted. *White v. Slama* 65

6. Certain facts *held* insufficient to show that a person voting at an election was a resident within sec. 1, art. VII of the constitution. *White v. Slama* 65

7. Circumstantial evidence *held* competent to prove which of two candidates received the benefit of illegal votes cast. *White v. Slama* 65

Embezzlement.

1. A guardian who converts the estate of his ward to his own use is guilty of embezzlement under sec. 121 of the criminal code, though he has not made final settlement. *Edmondson v. State* 797

2. Voluntary admissions of a guardian are admissible in evidence against him. *Edmondson v. State* 797

3. Under an information charging a guardian with having embezzled a certain amount of his ward's money, proof that he has converted any money to his own use will sustain the charge. *Edmondson v. State* 797

4. That a guardian would be entitled to a small portion of money converted for his services is not a defense to a prosecution for embezzlement. *Edmondson v. State* 797

Eminent Domain.

Where there are no unpaid claims against the estate, a devisee has right to condemnation money of land of decedent as against a foreign executor not in possession. *McManus v. Burrows.* 250

Equity. See INJUNCTION, 1. INSANE PERSONS, 4, 6. QUIETING TITLE, 6. TRUSTS. USURY, 2.

Equity will endeavor to carry out the real intent and purpose of parties to a contract. *Fenton v. Tri-State Land Co.* 479

Estoppel. See BROKERS, 4. QUIETING TITLE, 4. TAXATION, 11. TRUSTS, 5. VENDOR AND PURCHASER, 8.

1. A recital in an indemnity bond to secure performance of a contract for exchange of land for personal property, that the chattels are of an agreed value, does not estop either party from proving their actual value. *Haffke v. Coffin* 134

2. Estoppel to be available as a defense must be pleaded. *Muller v. Stoecker Cigar Co* 438

Evidence. See APPEAL AND ERROR, 4-21. BILLS AND NOTES, 1. CONTRACTS, 4, 6-8. CRIMINAL LAW, 6-10. DEEDS, 8, 9. DIVORCE, 3, 5, 6, 9, 11, 12. EJECTMENT. ELECTIONS, 7. EM-

Evidence—*Concluded.*

BEZZLEMENT, 2, 3. HUSBAND AND WIFE, 3. INSURANCE, 5-14. LARCENY, 1, 2. LIBEL AND SLANDER, 2, 4, 6-8. TAXATION, 5, 6. TRIAL. TRUSTS, 7, 8. WITNESSES.

1. In an action on a benefit certificate, where certain letters written by plaintiff were introduced by defendant, the meaning of which was ambiguous, *held* not error to permit plaintiff to explain the circumstances and the language used. *Lillie v. Modern Woodmen of America* 1
2. A transcript of the record of conviction of the beneficiary *held* not admissible, in an action on the benefit certificate, as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary. *Lillie v. Modern Woodmen of America* 1
3. Entries in docket of police judge *held* ordinarily conclusive in an action against him for charging excessive fees. *Downey v. Coykendall* 21
4. Owner *held prima facie* qualified to testify to the value of his property. *Hawkins v. Collins* 140
5. In an action against an express company for loss of a medical diploma, letter of attorney for defendant to the college issuing the diploma for a duplicate copy *held* properly excluded. *Whiteside v. Adams Express Co.* 430
6. In an action on a life policy, where a written statement of decedent is offered as part of the *res gestæ*, *held* not an abuse of discretion to require proof that the statement or the signature thereto is in decedent's handwriting before admitting it in evidence. *Walden v. Bankers Life Ass'n* .. 546
7. Foundation for introduction of copy of lost telegram *held* sufficient. *Bradstreet v. Grand Island Banking Co.* 590
8. Competent, relevant testimony of unimpeached witnesses cannot be contradicted by circumstantial evidence, unless the circumstances cannot be reconciled with the conclusion that the direct evidence is true. *Blid v. Chicago & N. W. R. Co.* 689
9. Nonexpert witnesses may testify whether an injured person with whom they were familiar appeared to be suffering pain, and as to the appearance of her injury. *Struble v. Village of DeWitt* 726
10. One skilled in the use of automobiles may testify as to the distances in which such a machine may be stopped when going at different rates of speed. *Blado v. Draper* .. 787

Exceptions, Bill of. See APPEAL AND ERROR, 41, 42.

Execution.

1. Purchaser at execution sale *held* to have waived all errors and irregularities in the sale and the order of confirmation. *Storz Brewing Co. v. Hansen* 685
2. Where the execution creditor, who also held a decree of foreclosure of mortgage on property of an insolvent debtor, purchased it at execution sale, *held* that motion to require the officer to pay amount of bid over execution debt into court for benefit of the debtor will not be sustained. *Storz Brewing Co. v. Hansen* 685

Executors and Administrators. See EMINENT DOMAIN.

1. The proceeding to sell land of a decedent for his debts provided by sec. 67 *et seq.*, ch. 23, Comp. St. 1909, partakes of the nature of a proceeding *in rem*. *Miller v. Hanna* 224
2. Where an order to sell land of a decedent for debts does not comply with the statute, the court should refuse to confirm the sale. *Miller v. Hanna* 224
3. The care and judgment which a man of average capacity exercises in his own business is what is required of an administrator. *In re Estate of Bush* 334
4. Where an administrator mingles funds of the estate with his own and uses them for his own benefit, he is chargeable with interest. *In re Estate of Bush* 334
5. An ancillary administrator *held* entitled to recover court costs and attorney's fees where a claim in suit was settled by compromise. *In re Estate of Bush* 334
6. The county court can allow a reasonable amount as a claim against an estate to attorneys employed by executors, where those in control of the estate refuse to pay the claim. *Hazlett v. Estate of Moore* 372
7. Parties *held* to have waived the right to object to report of referee on the ground that his findings of fact were insufficient. *In re Estate of Holloway* 403

Fees. See EVIDENCE, 3. JUDGES, 1. JUSTICE OF THE PEACE, 1. STATUTES, 1.

Fences.

1. An oral agreement as to a boundary line, acquiesced in for more than ten years, *held* binding on the parties and their successors with notice. *Meyer v. Perkins* 59
2. Neither proprietor can remove his portion of a division hedge fence, except as provided by sec. 10, art. II, ch. 2, Comp. St. 1889. *Meyer v. Perkins* 59

Fences—*Concluded.*

3. Where adjoining proprietors cannot agree concerning the trimming of a division hedge, they should submit the matter to the fence viewers, whose order is binding. *Meyer v. Perkins* 59
4. Equity has authority to enjoin the unlawful destruction of a hedge fence. *Meyer v. Perkins* 59

Food. See CONSTITUTIONAL LAW, 5.

1. Ch. 33, Comp. St. 1909, requiring branding of food packages, *held* to impose no obligation on a manufacturer in another state. *In re Agnew* 306
2. The pure food law (Comp. St., 1909, ch. 33) *held* to be confined to the regulation of intrastate commerce. *In re Agnew* 306
3. A wholesale manufacturer of lard in package form *held* not exempt from the requirement of secs. 8, 22, ch. 33, Comp. St. 1909, as to marking weight on packages. *Freadrich v. State* 343
4. Under sec. 8, ch. 33, Comp. St. 1909, a package of cottoline, sold for use in Nebraska, must bear a statement on the label of its net weight or measure, unless it contains the other brands and marks provided in the first or second subdivisions of the proviso. *Lichtensteiger v. State* 356

Fraud.

A buyer is justified in relying on a representation made as a positive statement of fact, where an investigation would be required to discover the truth. *Brucker v. Kairn* 274

Fraudulent Conveyances. See TRUSTS, 5.

Conveyance by husband to wife *held* fraudulent as to existing creditors and as to debts which he contemplated incurring. *Omaha Cattle Loan Co. v. Shelly* 502

Gaming. See CONTRACTS, 11. CRIMINAL LAW, 9.

1. A slot machine *held* a gambling device. *Muller v. Stoecker Cigar Co.* 438
2. Conducting a cigar store where slot machines are set up for the use of customers *held* an illegal business. *Muller v. Stoecker Cigar Co.* 438

Guardian and Ward. See EMBEZZLEMENT. INSANE PERSONS.

Habeas Corpus.

In an original application for a writ of habeas corpus, the applicant must show that his detention is unlawful. *In re Page* 299

Highways. See NEGLIGENCE, 3, 4. RAILROADS, 3.

1. One-half of money collected by a county for a road fund on property of a city or village *held* to belong to such city or village, and that the officers of such city or village have no power to compromise the right to such money. *State v. Bisping* 100
2. Certain allegation *held* too indefinite to furnish a basis for a compromise between a county and a city as to a road fund. *State v. Bisping* 100
3. Duty of driver of automobile at street crossing stated. *Smith v. Coon* 776
4. Under secs. 110-113, ch. 78, Comp. St. 1909, a drainage district must maintain crossings wherever the ditch crosses streets of an incorporated city or village. *State v. Papillion Drainage District* 808
5. Petition to open a county road *held* sufficiently definite as to description of line of road. *Dettman v. Pittenger* 825
6. One filing a claim for damages waives irregularities in proceedings to open a county road. *Dettman v. Pittenger* 825

Homicide. See CRIMINAL LAW, 12.

1. Information for causing death in automobile collision *held* sufficient to charge manslaughter. *Schultz v. State* 34
2. In a prosecution for manslaughter by operating an automobile at an unlawful rate of speed, *held* proper to define an unlawful rate of speed in the language of sec. 147, ch. 78, Comp. St. 1909. *Schultz v. State* 34
3. One who wilfully and negligently drives an automobile at a rate of speed forbidden by statute, and thereby causes the death of another, is guilty of criminal homicide. *Schultz v. State* 34
4. Contributory negligence *held* no defense to a prosecution for manslaughter. *Schultz v. State* 34
5. Where one wilfully and negligently operated his automobile at a rate of speed in violation of sec. 147, ch. 78, Comp. St. 1909, and ran into another automobile, killing deceased, negligence of the driver of such other automobile *held* no defense to a prosecution for manslaughter. *Schultz v. State.* 34
6. Evidence *held* to support conviction of manslaughter. *Schultz v. State* 34
7. Requested instruction that the court could find accused guilty of assault *held* properly refused; there being no evidence to sustain it. *Clarence v. State* 762
8. Evidence *held* to sustain conviction of manslaughter, but of low grade, requiring reduction of sentence from ten to two years. *Clarence v. State* 762

Husband and Wife. See DAMAGES, 6. FRAUDULENT CONVEYANCES. TRUSTS, 1-3.

1. A married woman who has no separate estate may make a binding contract to compensate an attorney to prosecute or defend a suit for divorce. *Tyler v. Winder* 409
2. In an action for criminal conversation and alienation of a wife's affections, the weight of the evidence and inferences to be drawn therefrom are questions for the jury. *Wheeler v. Abbott* 455
3. Adultery may be proved by circumstantial evidence. *Wheeler v. Abbott* 455

Indictment and Information. See HOMICIDE, 1.

Where a statute states the elements of a crime, it is generally sufficient in an information to describe the crime in the language of the statute. *Goff v. State* 287

Infants. See WILLS, 6, 7.

1. Where an infant disaffirms a conditional sale contract, title to the property remains in the vendor, and right to recover partial payments rests with the infant. *Curtice Co. v. Kent*, 496
2. In replevin, where the defense was infancy and partial payment, *held* that the right of property and right of the infant to recover money paid could both be tried in the same action. *Curtice Co. v. Kent* 496
3. It is the duty of the court to protect the interest of a minor by refusing to allow more than reasonable attorney's fees for services in contesting a will. *Everson v. Hurn* 716

Injunction. See FENCES, 4. MANDAMUS, 8. RELIGIOUS SOCIETIES, 3. WATERS, 5, 6.

1. Equity may enjoin a police officer from transferring money taken from burglars who stole it from a bank, and may restore it to the owner. *Ætna Indemnity Co. v. Malone* 260
2. Service of summons indorsed "Injunction allowed," as required by statute, *held* sufficient notice of granting temporary injunction, and a sufficient compliance with a condition of the order requiring notice. *State v. Dungan* 738
3. Order of county judge granting temporary injunction *held* not void for want of jurisdiction because the affidavit failed to show that the judges of the supreme court were absent from the county. *State v. Dungan* 738
4. Irregularity in granting temporary injunction for want of prayer therefor in petition *held* not a jurisdictional defect preventing plaintiff from superseding an order dissolving such temporary injunction. *State v. Dungan* 738

Injunction—*Concluded.*

5. A county judge having no power to grant a perpetual injunction, an order purporting to do so will be treated as a temporary injunction, and not void. *State v. Dungan*.... 738
6. An order restraining a party absolutely, without providing for a hearing, is not a temporary restraining order, but an injunction, and an order dissolving it may be superseded. *State v. Dungan*..... 738
7. Technical defect in petition for injunction *held* not to deprive the court of jurisdiction to determine whether a temporary injunction should be granted, nor to render an order granting the writ subject to collateral attack for want of jurisdiction. *State v. Dungan*..... 738

Insane Persons.

1. County courts have original jurisdiction of settlement of accounts of guardians of insane persons by Const., art. VI, sec. 16. *Spence v. Miner*..... 610
2. It is the duty of guardian of estate of insane person to take possession and bring the estate under jurisdiction of the court. *Spence v. Miner*..... 610
3. It is the duty of guardian of insane person to furnish him with the necessaries of life suitable to his condition out of his estate. *Spence v. Miner*..... 610
4. Courts of equity may determine equitable rights of insane person under guardianship in actions *in rem*. *Spence v. Miner* 610
5. County courts have exclusive original jurisdiction of personal actions for necessaries against estates of insane persons. *Spence v. Miner*..... 610
6. Personal judgment by justice of the peace against an insane person under guardianship for necessaries will be vacated in equity at suit of guardian, and execution sale thereon enjoined. *Spence v. Miner*..... 610

Insurance. See EVIDENCE, 1, 2, 6. TRIAL, 10.

1. Receiver of insolvent insurance company cannot join in one action for unpaid assessments resident and nonresident policy-holders of a county. *Burke v. Scheer*..... 80
2. A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company for the separate liability of each policy-holder for unpaid assessments. *Burke v. Scheer*..... 80
3. Sec. 121, ch. 43, Comp. St. 1909, fixes the maximum liability of members of mutual hail insurance companies. *Burke v. Scheer*..... 80

Insurance—*Concluded.*

4. Agent of a fire insurance company *held* to have power to waive proofs of loss, notwithstanding provision in policy that authorization to act in any manner relating to the insurance must be in writing. *Morgenstern v. Insurance Co.*. 459
5. In an action on a valued policy of insurance, *held* not reversible error to refuse charge that the burden of proof was on plaintiff to show that the fire was not caused by his criminal act, in view of the pleadings and evidence. *Morgenstern v. Insurance Co*..... 459
6. Evidence as to waiver of proofs of loss *held* to sustain finding for plaintiff. *Morgenstern v. Insurance Co*..... 459
7. Evidence *held* suffient to require submission of question of waiver of proofs of loss to the jury. *Morgenstern v. Insurance Co*..... 459
8. The question of the murder of the assured by the beneficiary suing on the policy being one of fact for the jury, their finding on conflicting evidence is conclusive. *Lillie v. Modern Woodmen of America*..... 1
9. The fact, if true, that the beneficiary had murdered the assured *held* a defense to an action on a benefit certificate. *Lillie v. Modern Woodmen of America*..... 1
10. Verdict of a coroner's jury that insured died as the result of poison self-administered *held* not competent evidence in an action on the policy. *Walden v. Bankers Life Ass'n*.... 546
11. The burden is on an insurance company to prove defense that deceased came to his death from poison self-administered. *Walden v. Bankers Life Ass'n*..... 546
12. Defense of suicide *held* not established unless evidence excludes all reasonable probability of death by accident or from natural causes. *Walden v. Bankers Life Ass'n*..... 546
13. In an action on a life insurance policy, evidence *held* to sustain verdict for plaintiff. *Walden v. Bankers Life Ass'n*..546
14. In an action on a benefit certificate, verdict for plaintiff on conflicting evidence sustained. *Sampson v. Ladies of the Maccabees of the World*..... 641
15. In an action on benefit certificate, plaintiff *held* entitled to recover $2,500 for permanent disability, with interest thereon from date of accident. *Tomson v. Iowa State Traveling Men's Ass'n*..... 791

Interest. See EXECUTORS AND ADMINISTRATORS, 4. JUDGMENT, 6.

Judges.

1. A police judge sued under sec. 34, ch. 28, Comp. St. 1909, for taking excessive fees cannot justify on the ground of

Judges—*Concluded.*

mistake, ignorance, absence of corrupt motive, or agreement with the party injured. *Downey v. Coykendall*..... 21

2. An attorney, by presenting a question of law in the district court, is not disqualified from sitting in a case on appeal presenting the same question, he having become a member of the supreme court. *Hamilton County v. Aurora Nat. Bank* 256

Judgment. See DIVORCE, 4.

1. Decree quieting title and canceling a mortgage as barred by limitations before the expiration of ten years after maturity of the debt *held* erroneous. *McCarthy v. Benedict*, 293
2. Decree quieting title and canceling a mortgage *held* not binding upon the then holder of the note and mortgage unless he were a party to the suit. *McCarthy v. Benedict*.... 293
3. In a suit to enjoin a mortgage foreclosure sale by one having a decree quieting title and canceling the mortgage, it is incumbent upon him to show that the holder of the mortgage was a party to such suit. *McCarthy v. Benedict*..... 293
4. Several actions may be brought and several judgments recovered against several wrongdoers, though but one satisfaction can be had. *Fitzgerald v. Union Stock Yards Co*.. 393
5. The assignee of a judgment takes it subject to equities which the judgment debtor had against the judgment creditor. *State v. Holt County*..... 445
6. A judgment, when revived, draws interest from the date of its rendition. *McDonald v. Thomas County*..... 494

Judicial Sales. See APPEAL AND ERROR, 18, 19.

1. That the sheriff did not sell one lot described in the decree is not a good objection to confirmation of the sale of other lots therein described. *Stephenson v. Murdock*..... 818
2. An order of sale is not necessary to clothe the sheriff with authority to make the sale under a decree. *Stephenson v. Murdock* 818
3. An order of confirmation will not be reversed because the clerk withdrew a parcel of land from the operation of the decree. *Stephenson v. Murdock*..... 818

Justice of the Peace. See INSANE PERSONS, 6.

1. Rule for fixing fees stated where a complaint is filed against several persons. *Downey v. Coykendall*..... 21
2. Where on appeal from a justice it appears that he inadvertently omitted a portion of the proceedings from the transcript, the district court should permit the transcript to be amended. *Summers v. Chisholm*..... 324

Justice of the Peace—*Concluded.*

3. On appeal from justice court, filing of reply *held* not to change the issues. *Summers v. Chisholm* 324

Landlord and Tenant.

Acts of defendant held a ratification of a lease procured by duress. *Howell v. Bowman* 389

Larceny.

1. Evidence *held* to support a conviction of larceny. *Nixon v. State* 109
2. That property stolen was taken without the consent of the owner may be proved by circumstantial evidence. *Nixon v. State* 109
3. Sentence to the penitentiary for three years for stealing property of the value of $50 *held* excessive. *Nixon v. State* .. 109

Libel and Slander.

1. To say of a school teacher that she is crazy and an unmerciful liar and unfit to teach school is actionable *per se*. *Fitzgerald v. Young* 693
2. In an action for slander, pleading and proof of special damages are unnecessary, where the imputation is actionable *per se*. *Fitzgerald v. Young* 693
3. Where words actionable *per se* are proved as pleaded, the court should not sever the words or phrases composing the defamatory matter and charge that the other parts are not defamatory. *Fitzgerald v. Young* 693
4. A witness need not state in one answer all defamatory matter pleaded, but he may state it in several answers, and show that it was published in one conversation in the sense alleged. *Fitzgerald v. Young* 693
5. A defamer who publishes a slander may be held liable for the consequences of later publications resulting from his act. *Fitzgerald v. Young* 693
6. In an action for slander, the defense of privilege, to be available, must be proved. *Fitzgerald v. Young* 693
7. Where plaintiff pleads that slanderous words were spoken to a third person and others, proof that the words were spoken to such third person alone will sustain a recovery. *Fitzgerald v. Young* 693
8. Where malice is an issue, plaintiff may show that defendant repeated the slanderous words both before and after commencement of suit. *Fitzgerald v. Young* 693

Life Estates. See LIMITATION OF ACTIONS, 5.

1. Recording of deed conveying the entire estate by a life tenant who remained in possession *held* not to start running

Life Estates—*Concluded.*

of limitations against action to quiet title by remainderman under secs. 10868, 10870, Ann. St. 1909. *Maurer v. Reifschneider* 673

2. Possession of land by life tenant *held* not adverse to remainderman, unless knowledge is clearly brought home to him that the life tenant claimed the entire estate. *Maurer v. Reifschneider* 673

Limitation of Actions. See LIFE ESTATES, 1. TENANCY IN COMMON.

1. Where the right to sue to recover land is barred by limitations during the lifetime of one claiming title, the right of his heirs is also barred. *Keleher v. Kelly* 127
2. Items of a running account *held* not barred by the statute of limitations. *In re Estate of Holloway* 403
3. Ordinarily limitations will not run against a creditor's bill until the demand is reduced to judgment. *Omaha Cattle Loan Co. v. Shelly* 502
4. Under sec. 22 of the code, letters written by purchaser of mortgaged land to mortgagee *held* to arrest the running of limitations. *Girard Trust Co. v. Dixon* 557
5. Suit by remainderman to quiet title *held* not to accrue until knowledge that life tenant is claiming the fee is brought home to him. *Maurer v. Reifschneider* 673

Mandamus.

1. Where demurrer to application for mandamus or to the alternative writ is overruled, the respondent should ordinarily be allowed to answer. *State v. Bisping* 100
2. Where a substantial issue of fact is presented in mandamus, the alternative writ should be returnable to the county where the action is pending. *State v. Bisping* 100
3. The alternative writ must contain all of the facts upon which relator relies. *State v. Bisping* 100
4. The writ and return or answer thereto constitute the issues in mandamus. *State v. Bisping* 100
5. Where no substatial issue of fact is presented by the objections of respondents, the court may issue a peremptory writ of mandamus. *State v. Bisping* 100
6. If a general denial to the application for mandamus is inconsistent with other allegations in the answer, such general denial should be disregarded. *State v. Bisping* 100
7. Certain denial in answer *held* to constitute no defense in mandamus. *State v. Bisping* 100
8. Certain allegations *held* to constitute no defense in mandamus. *State v. Bisping* 100

Mandamus—*Concluded.*

9. In mandamus in supreme court to require judge of district court to fix amount of undertaking to supersede order dissolving temporary injunction, merits of controversy in original action will not be considered. *State v. Dungan*..... 738

Master and Servant.

1. Employment in the service of a common master *held* not alone to constitute two men fellow servants. *Nocita v. Omaha & C. B. Street R. Co.* 209

2. One qualifying as a street railway conductor, though he reeives no wages, held a fellow servant of the motorman. *Justus v. Lincoln Traction Co*..... 542

3. A trackman working where he could not see cars shunted on the track has a right to rely on his foreman's custom to watch and warn him of approaching cars. *Swanson v. Union Stock Yards Co*..... 361

4. A trackman injured by a moving car *held* not guilty of contributory negligence. *Swanson v. Union Stock Yards Co*.. 361

5. It is the duty of an employer to furnish his employees a safe place in which to work, and to inform him of all latent dangers connected with the employment. *Gundy v. Nye-Schneider-Fowler Co*..... 599

6. Where the evidence is conflicting, it is for the jury to determine whether an employer has furnished a safe place to work and informed employee of latent dangers. *Gundy v. Nye-Schneider-Fowler Co*..... 599

7. Contract of employment construed, and employee *held* entitled to part of bonus provided therein. *Kinder v. Cushman Motor Co*..... 619

8. Evidence *held* to show that plaintiff, with full knowledge of existing conditions, assumed the risk, and that his own negligence was the proximate cause of an injury. *Creighton v. Keens*..... 637

9. Where two persons are sued jointly for negligence of a third who was general agent of one, and at the time was acting for the other, a verdict against his general employer, but exonerating the other, *held* inconsistent. *Forsha v. Nebraska Moline Plow Co*..... 770

10. One in the general employment of one person may be temporarily in the service of another so that the relation of master and servant arises, though the general employer may have an interest in the special work. *Forsha v. Nebraska Moline Plow Co*..... 770

Mechanics' Liens.

1. Foreclosure of mechanic's lien will not be denied because of omissions in details of work or time of completion. *McGowan v. Gate City Malt Co* 10
2. Substantial compliance with contract *held* sufficient to enable subcontractor to enforce his lien. *McGowan v. Gate City Malt Co* 10
3. In a suit to cancel record of filing of mechanic's lien, *held* that finding for plaintiffs was sustained by the evidence. *Russell v. Haines* 650

Mortgages. See ATTORNEY AND CLIENT, 8. JUDGMENT, 1-3.

1. A provision in a mortgage that the debt and interest should become due upon failure to pay interest *held* optional with the mortgagee. *McCarthy v. Benedict* 293
2. A second mortgage executed to correct a mistake in the first supersedes the first. *Rossbach v. Micks* 821

Municipal Corporations. See CONSTITUTIONAL LAW, 2-4. HIGHWAYS, 1-4. NEGLIGENCE, 3, 4.

1. The legislature may require cities of the metropolitan class and first class to pension superannuated firemen and to pay the pensions from the funds of the fire department. *State v. Love* 149
2. A city fireman who had served more than 21 years *held* entitled to a pension under ch. 39, laws 1895. *State v. Love,* 149
3. A city fireman *held* entitled only to the service pension provided by law at the time of his retirement. *State v. Love* 149
4. Vacation of a recorded plat of an addition to a village *held* to divest rights of the public in the streets shown therein, and that such vacated streets revert to the proprietors of adjoining lots. *Hart v. Village of Ainsworth* 418
5. Charter of city of Omaha *held* not to vest the city engineer with authority to compel the water company to elevate its water-mains. *State v. Omaha Water Co* 553
6. Adoption of plans for a sewer by the mayor and council of a city *held* not an exercise of police power, so as to require a water company to elevate a water-main unexpectedly encountered in constructing a sewer. *State v. Omaha Water Co.* 553
7. Existence of a step at intersection of cross-walk with a sidewalk *held* not to constitute actionable negligence. *Gilliland v. City of Omaha* 668
8. City *held* not liable to one who slipped and was injured in stepping about eight inches from a cross-walk to an intercepting sidewalk. *Gilliland v. City of Omaha* 668

Municipal Corporations—*Concluded.*

9. In an action for injuries from a defective walk, evidence *held* not to show such contributory negligence as to require a peremptory instruction for defendant. *Struble v. Village of DeWitt* 726

Names. See PROCESS. QUIETING TITLE, 5. VENDOR AND PURCHASER, 8.

Negligence. See BAILMENT. CARRIERS. MASTER AND SERVANT, 4, 8. MUNICIPAL CORPORATIONS, 8. TRIAL, 1.

1. One who sets out a fire on his own premises without taking reasonable precautions to prevent it from spreading is negligent. *Hawkins v. Collins* 140
2. Where evidence as to negligence and contributory negligence is conflicting, the court should refuse to direct verdict for defendant. *Smith v. Coon* 776
3. Pedestrian bewildered by the approach of an automobile at a street crossing *held* not, as a matter of law, guilty of contributory negligence. *Smith v. Coon* 776
4. An automobile driver who in passing a carriage from the rear on a public street strikes it and injures the occupant is liable for injuries caused by his negligence. *Blado v. Draper* 787

New Trial. See APPEAL AND ERROR, 35.

1. The statute requiring a written motion for new trial to be made at the term and within three days after rendition of verdict *held* mandatory. *Summers v. Chisholm* 324
2. Where, in a suit for a new trial of an action at law, it appears that plaintiff's evidence in the law action was insufficient, a new trial will not be granted, notwithstanding plaintiff was prevented by accident from securing a transcript in time for an appeal. *Justus v. Lincoln Traction Co.*, 542
3. A new trial will not be granted for newly discovered evidence, merely cumulative or of doubtful character. *Blado v. Draper* 787

Notice. See ATTORNEY AND CLIENT, 4. TAXATION, 1, 4, 8-10. WILLS, 1.

Officers.

1. Under sec. 20, art. III of the constitution, vacancies in offices created by the constitution must be filled under the general law, where no provision is made therefor in the constitution. *State v. Furse* 652
2. Where the governor removes a notary from office, he is not entitled to trial *de novo* on error to the district court, and it is error to order a reversal for want of prosecution, and enter judgment for costs against defendant in error. *Cohn v. Butterfield* 849

Pardon.

1. Under sec. 570 of the criminal code, a parole granted by the governor to a convict may be revoked at any time, without notice or hearing. *Owen v. Smith* 596
2. Revocation of parole by the governor under sec. 570 of the criminal code is an exercise of discretion, not reviewable by the courts. *Owen v. Smith* 596

Parties. See INSURANCE, 1. QUIETING TITLE, 3.

Partition.

Where proceedings in partition are amicable, the court may allow an attorney's fee to be paid by the parties in proportion to their interest. *Harper v. Harper* 269

Physicians and Surgeons.

Information for practicing medicine without license *held* not to negative the fact that a license may have been filed with the county clerk of the county where the accused resides. *Wilson v. State* 258

Pleading. See APPEAL AND ERROR, 27, 37, 38, 40. CONTRACTS, 9, 10. DAMAGES, 2. DIVORCE, 10. ESTOPPEL, 2. JUSTICE OF THE PEACE, 3. LIBEL AND SLANDER, 2. MANDAMUS. QUIETING TITLE, 1, 2. SALES. TRIAL, 9. TRUSTS, 3.

Leave to amend pleadings at the trial should be granted only on terms which will avoid prejudice to the opposite party. *Gundy v. Nye-Schneider-Fowler Co* 599

Prisons. See COUNTIES AND COUNTY OFFICERS, 3, 4.

Process.

To be ignorant of either the given name or surname of a person is to be ignorant of his name within sec. 148 of the code. *McNamara v. Gunderson* 112

Quieting Title. See JUDGMENT, 1-3. LIFE ESTATES, 1. LIMITATION OF ACTIONS, 5.

1. Answer in suit to remove mortgage as cloud on title *held* not subject to general demurrer. *Frederick v. Gehling* 93
2. Answer in suit to remove mortgage as a cloud on title *held* to state a defense as against a general demurrer. *Frederick v. Gehling* 93
3. In suit to remove mortgage as a cloud on title, the owner of the fee may intervene and contest plaintiff's title and assert the homestead character of the land. *Frederick v. Gehling* 93
4. Grantee in deed *held* estopped, in action to quiet title, as against purchaser at tax foreclosure sale, to allege that his grantor's true name was not as stated in the deed to the grantor. *Stratton v. McDermott* 622

Quieting Title—*Concluded.*

5. The surname and initial letter may constitute the full name, and, when a grantee is so named, it will not be presumed that he has another name. *Stratton v. McDermott*.. 622

6. In suit to quiet title of remainderman as against a life tenant, equity will require as condition of relief that plaintiff pay her proportion of mortgage lien on premises at death of common ancestor paid by life tenant. *Maurer v. Reifschneider*..... 673

Railroads.

1. Defendant *held* liable for horses killed by reason of defendant's failure to maintain a fence as required by sec. 1, art. I, ch. 72, Comp. St. 1909. *Larson v. Chicago & N. W. R. Co*.. 247

2. Evidence *held* insufficient to sustain verdict for plaintiff for killing of live stock. *Blid v. Chicago & N. W. R. Co*.. 689

3. The power to open streets and control railway crossings in incorporated cities and villages is given by statute to the municipal authorities, and the authority of the state railway commission is limited to crossings outside of cities and villages. *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*..... 853

Reference. See APPEAL AND ERROR, 12. EXECUTORS AND ADMINISTRATORS, 7.

Reformation of Instruments. See BILLS AND NOTES, 2, 3.

Religious Societies.

1. Decrees of governing authority as to church government are binding on local associations, and courts will not ordinarily review them. *Parish of the Immaculate Conception v. Murphy*..... 524

2. The trustees of a religious corporation organized under sec. 40, ch. 16, Comp. St. 1899, and in conformity with the canons and discipline of the Roman Catholic church cannot authorize an excommunicated priest to occupy the corporation's church edifice or to exercise the faculties of priest therein. *Parish of the Immaculate Conception v. Murphy*.. 524

3. If a majority of the trustees of a religious body unite in diverting the temporalities of the corporation from the purposes of its founders, a minority may sue in the corporate name to enjoin such diversion. *Parish of the Immaculate Conception v. Murphy*..... 524

Remainders. See LIFE ESTATES. LIMITATION OF ACTIONS, 5.

Replevin. See INFANTS, 2.

Sales.

1. Petition in action for breach of contract *held* not demurrable. *Omaha Cooperage Co. v. Central States Cooperage Co.* 221

2. Petition *held* sufficient in an action for damages for false representations in sale of horse. *Brucker v. Kairn* 274

Schools and School Districts.

1. Under sec. 3, subd. XV, ch. 79, Comp. St. 1909, an election on the issue of school district bonds without a petition therefor is invalid. *Allen v. School District* 205

2. An election to vote on the issue of school district bonds for "building *and furnishing* a new school house" *held* invalid where the petition called for bonds "to build a new public school building." *Allen v. School District* 205

Specific Performance.

Where failure to convey land is due to refusal of the purchaser to pay purchase price, he is not entitled to specific performance. *Rossbach v. Micks* 821

Statutes. See FOOD.

1. Statutes giving fees will be strictly construed and not extended by implication. *Downey v. Coykendall* 21

2. Proviso defined. *Lichtensteiger v. State* 356

Stipulations. See TRIAL, 3, 4.

Supersedeas. See INJUNCTION, 4, 6.

Taxation. See ABANDONMENT. CONSTITUTIONAL LAW, 2. COUNTIES AND COUNTY OFFICERS, 1, 2.

1. Proof of publication of notice of time of redemption from tax sale by affidavit sworn to before one without authority to administer oaths renders void a tax deed issued thereon. *Lanning v. Haases* 19

2. In foreclosure of tax lien without an administrative sale, where there was no personal service or appearance, and the land was not made a party, and there was no compliance with sec. 148 of the code, *held* that the court was without jurisdiction to render a decree depriving the owner of his right of redemption. *McNamara v. Gunderson* 112

3. A county treasurer's return of public sales of lands for taxes must be certified and signed by him. *Tate v. Biggs* .. 195

4. Treasurer's notice of tax sale *held* invalid. *Tate v. Biggs* .. 195

5. Comp. St. 1903, ch. 77, art. I, secs, 220, 221, construed, and *held* that a tax deed is not conclusive evidence of all matters not recited in sec. 221. *Tate v. Biggs* 195

Taxation—*Concluded.*

6. Sec. 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) *held* not to mean that a tax deed shall be conclusive evidence of all matters not recited in that section. *Gallatin v. Tri-State Land Co* 235
7. A county treasurer must make return of his public sales of real estate for taxes to the county clerk, as provided by sec. 205, art. I, ch. 77, Comp. St. 1903, before he can sell lands at private tax sale. *Gallatin v. Tri-State Land Co.* 235
8. County treasurer's notice of tax sale must contain substantially all matters specified in the statute. *Gallatin v. Tri-State Land Co* 235
9. Secs. 11012, 11031, Ann. St. 1909, *held* to authorize a county assessor, on notice, to add to schedule of taxpayer any taxable property which has been omitted. *Bankers Life Ins. Co. v. County Board of Equalization* 469
10. Any substantial increase of the schedule of a taxpayer without notice *held* the taking of property without due process of law, and void. *Bankers Life Ins. Co. v. County Board of Equalization* 469
11. Where a taxpayer files complaint before the board of equalization, objecting to change in his schedule, and has a hearing thereon, he cannot thereafter challenge jurisdiction of the board over the subject matter of the complaint. *Bankers Life Ins. Co. v. County Board of Equalization* 469
12. Method to determine value of capital stock of domestic insurance companies stated. *Bankers Life Ins. Co. v. County Board of Equalization* 469
13. An assessment of a domestic insurance company, which includes its capital stock, surplus, contingent reserves, gross premium receipts mentioned in sec. 10960, Ann. St. 1909, and tangible property, *held* excessive and double taxation. *Bankers Life Ins. Co. v. County Board of Equalization* 469
14. The right to take by will a credit payable in New York, but evidenced by a contract of sale for land in Nebraska in possession of the vendor at his residence in New York, *held* not subject to an inheritance tax under sec. 10706, Ann. St. 1903. *Dodge County v. Burns* 534

Tenancy in Common.

1. Limitations will begin to run in favor of a cotenant in possession claiming title as soon as knowledge of his adverse claim is brought home to other cotenants. *Keleher v. Kelly* 127

Tenancy in Common—*Concluded.*

2. Where one tenant in common enters upon the whole estate, improves it, pays the taxes, and claims it for more than the period of limitation, an actual ouster will be presumed. *Lund v. Nelson* 449

Torts.

1. Settlement with one of several joint tort-feasors *held* not a defense to an action against another, unless it was agreed that such settlement should be in full of all damages. *Fitzgerald v. Union Stock Yards Co* 393
2. Payment of damages in full settlement by one joint tort-feasor releases all. *Fitzgerald v. Union Stock Yards Co* .. 393

Trial. See APPEAL AND ERROR. ASSAULT AND BATTERY, 2. ATTACHMENT. CARRIERS, 1. CRIMINAL LAW. DAMAGES, 4, 5. DRAINS, 2. HUSBAND AND WIFE, 2. INSURANCE, 5, 7. LIBEL AND SLANDER, 3. MASTER AND SERVANT, 6, 9. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 2. VENUE, 2.

1. It is for the court to say what act or omission is evidence of negligence, but for the jury to say whether the evidence established negligence. *Nocita v. Omaha & C. B. Street R. Co* 209
2. It is for the court to determine whether evidence of a confidential nature offered by defendant is a part of subject matter testified to by plaintiff. *Struble v. Village of DeWitt* 726
3. An agreed stipulation of facts should contain nothing but the material facts in issue. *In re Page* 299
4. Certain exhibits referred to in an agreed stipulation of facts *held* part of the evidence. *In re Page* 299
5. If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. *Fitzgerald v. Union Stock Yards Co* 393
6. In order to predicate error on rejection of testimony on direct examination, complainant must make offer to prove facts he expects to show by such testimony. *Walden v. Bankers Life Ass'n* 546
7. A special finding, though sustained by the evidence, must be disregarded when the fact established is irrelevant to the issues. *Hawe v. Higgins* 575
8. Where the jury fails to find a verdict according to the law as given in the instructions, the court should set it aside. *Hawe v. Higgins* 575
9. Objection to evidence *held* insufficient to raise the question that damage to pasture land was not sufficiently pleaded. *Boyd v. Lincoln & N. W. R. Co* 840

Trial—*Concluded.*

10. In an action on a benefit certificate, an instruction that the result of a criminal prosecution for the murder of the assured by the beneficiary was not to be considered, *held* properly given. *Lillie v. Modern Woodmen of America*.. 1
11. Where no question of fact is to be determined, *held* not error to direct a verdict. *Downey v. Coukendall*..... 21
12. If an affirmative defense is supported by sufficient competent evidence, it is error to withdraw it from the jury. *Hoover v. DeKlotz*..... 146
13. Where both parties request a directed verdict, they waive the right to have any question of fact submitted to the jury. *Martin v. Harvey*..... 173
    Howell v. Bowman..... 389
14. A motion by defendant for a directed verdict admits the truth of all material evidence submitted and inferences to be drawn therefrom. *Wheeler v. Abbott*..... 455
15. Where defendant introduces evidence after the overruling of motion to direct verdict, he waives right to assign error in the ruling. *Bradstreet v. Grand Island Banking Co.* 590
16. It is not error to refuse instructions covered by instructions given. *Bradstreet v. Grand Island Banking Co*..... 590
17. Instructions will not be reviewed where no exceptions were taken until filing of motion for new trial. *Bradstreet v. Grand Island Banking Co*..... 590
18. Instructions in action for death as to measure of damages *held* not erroneous. *Gundy v. Nye-Schneider-Fowler Co*.... 599
19. Refusal of instruction applicable to the evidence not covered by those given *held* error. *Forsha v. Nebraska Moline Plow Co*..... 770
20. Where the court has given full instructions on defendant's theory of the case, *held* not error to refuse additional instructions thereon. *Blado v. Draper*..... 787

Trusts.

1. Where title to land paid for by a husband is taken in the name of the wife, a resulting trust arises in favor of the husband. *Woodward v. Woodward*..... 142
2. That property paid for by a husband, with title in the wife, was purchased upon an oral agreement of the wife does not destroy the resulting trust arising from the transaction. *Woodward v. Woodward*..... 142
3. In a suit by a husband to establish a resulting trust against his wife, she may plead a judgment for alimony by supplemental answer, and impress the trust estate with a lien to satisfy the judgment. *Woodward v. Woodward*..... 142

Trusts—*Concluded.*

4. Where a purchaser of land has the title taken in the name of another, the grantee holds it in trust for the purchaser, and if the trustee, at the owner's request, devises the property, the devisee holds it in trust for such owner. *Cowles v. Cowles* 327
5. Where a purchaser of land, not the subject of fraudulent alienation, has the title taken in the name of another to avoid payment of a judgment, such purchaser is not estopped from suing to recover title. *Cowles v. Cowles* 327
6. In a suit in equity to enforce a constructive trust as to stolen property, fiduciary relations between the parties *held* not essential to jurisdiction. *Ætna Indemnity Co. v. Malone* 260
7. In a suit in equity to recover stolen funds from a police officer, only a preponderance of evidence is required. *Ætna Indemnity Co. v. Malone* 260
8. Evidence *held* to sustain a finding that other money taken from burglars at the same time an identified coin was taken from them was a part of a certain sum of money stolen from a bank. *Ætna Indemnity Co. v. Malone* 260

Usury. See BILLS AND NOTES, 1.

1. Copartner assuming partnership debt *held* entitled to plead usury, though he has renewed it in his own name. *Bolen v. Wright* 116
2. A borrower asking relief in equity from a usurious contract should be required to pay the principal and lawful interest. *Bolen v. Wright* 116

Vendor and Purchaser. See SPECIFIC PERFORMANCE.

1. Parties to a written contract for the sale of real estate may by oral agreement destroy the writing and rescind the contract. *Sicker v. Sicker* 123
2. Ordinarily there is an implied agreement that the vendor will transfer a good title. *Justice v. Button* 367
3. "Good title" defined. *Justice v. Button* 367
4. Unreleased trust deed executed to secure a debt *held* defect in title excusing acceptance of it, though limitations may have barred foreclosure of the trust deed. *Justice v. Button* 367
5. A purchaser, while the contract remains executory, may recover the purchase money, if the vendor's title be defective. *Justice v. Button* 367
6. One who furnishes money to a purchaser of land in consideration of one-half of the profits *held* not a joint purchaser. *Hawe v. Higgins* 575

Vendor and Purchaser—*Concluded.*

7. To constitute one furnishing money for purchase of land a joint purchaser, it must appear that he is to become invested with an interest in the title and actual ownership. *Hawe v. Higgins* 575
8. If one conveys land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name. *Stratton v. McDermott* .. 622

Venue. See CRIMINAL LAW, 11.

1. Test stated for determining whether an action is rightly brought in one county against a defendant, so that other defendants may be served in another county. *Polenske v. Ennis* 88
2. A motion for change of venue is addressed to the discretion of the court. *Smith v. Coon* 776

Waters.

1. Every interference by one landowner with natural drainage to the injury of the land of another is unreasonable, if not made in the reasonable use of his own property. *Flesner v. Steinbruck* 129
2. Construction of a dike across a natural drain upon farm lands to prevent the flow of unpolluted water from a neighbor's land *held* not a reasonable use of one's property. *Flesner v. Steinbruck* 129
3. A lower proprietor *held* to have no lawful cause for complaint because an upper proprietor dug ditches to change the course of drainage on his own premises, so long as the water flowed onto the servient estate in a natural drain. *Flesner v. Steinbruck* 129
4. An upper proprietor who accelerates the flow of surface water through a natural drain onto his neighbor's land *held* not liable therefor. *Flesner v. Steinbruck* 129
5. A landowner may enjoin the maintenance of a ditch whereby surface water is diverted from its natural course and poured onto his lands. *Hagedorn v. Maly* 370
6. Equity will not enjoin an upper proprietor from draining surface water into natural channels onto the land of a lower proprietor. *Perry v. Clark* 812
7. A lower proprietor may not obstruct a natural drain, so as to cause surface water to back onto his neighbor's land. *Mapes v. Bolton* 815
8. Sec. 1, art. III, ch. 89, Comp. St. 1909, does not authorize the proprietor to obstruct a natural drain, so as to injure his neighbor's crops and land. *Mapes v. Bolton* 815

Waters—*Concluded.*

9. Where stockholders in an irrigation company transferred their stock with intent to retain certain water rights, equity will protect such rights. *Fenton v. Tri-State Land Co.* 479
10. Agreement to pay for property of irrigation company by annual payments or by waiving right to assess the sellers for maintenance of ditch *held* not invalid as against public policy. *Fenton v. Tri-State Land Co* 479
11. Contract with irrigation company to convey a specified quantity of water by means of its canal in perpetuity *held* to convey an easement, and not invalid as a grant exceeding the term of its corporate existence. *Fenton v. Tri-State Land Co* 479
12. Where, in 1891, stockholders of an irrigation canal conveyed it, reserving perpetual water rights, the court will apply ch. 68, laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal. *Fenton v. Tri-State Land Co* 479
13. Under ch. 68, laws 1889, portions of an irrigation canal *held* severable as to rights of consumers of water. *Fenton v. Tri-State Land Co* 479
14. Nature, rights and duties of stock corporation formed to construct irrigation canal stated. *Fenton v. Tri-State Land Co* 479
15. An irrigation company *held*, under its deed, to have purchased the property of another company subject to the rights of all parties holding water rights under the latter company. *Fenton v. Tri-State Land Co* 479

Wills.

1. Under sec. 140, ch. 23, Comp. St. 1909, notice of hearing an application for probate of will may be given by publication, though all relatives of decedent reside in the county where the application is made. *In re Estate of Sieker* 216
2. Certain legacies *held* specific legacies. *In re Estate of Bush* 334
3. Rules stated for construing provisions of a will as to the rights of heir. *Heilman v. Reitz* 422
4. Will construed, and three-fifths of the net income of the estate *held* to descend to the widow and heirs as intestate property. *Heilman v. Reitz* 422
5. A nuncupative will is not effective to pass title to real estate. *Maurer v. Reifschneider* 673
6. Where an infant son has been disinherited by his father's will, and the mother successfully contests it in his interest,

Wills—*Concluded.*

his estate is chargeable with reasonable attorney's fees. *Everson v. Hurn* 716

7. Agreement for more than a reasonable amount for services of attorney of minor in contesting a will will not be enforced. *Everson v. Hurn* 716

Witnesses. See CRIMINAL LAW, 8. EVIDENCE, 4, 9, 10.

1. Where the representative of a deceased person is a party to an action, one having an interest in the controversy cannot identify checks drawn by him and delivered to decedent. *In re Estate of Holloway* 403
2. Evidence offered to disprove a collateral statement in a deposition *held* properly excluded. *Whiteside v. Adams Express Co* 430
3. A letter of a witness identified by him on cross-examination *held* competent as impeaching evidence. *Gundy v. Nye-Schneider-Fowler Co* 599
4. Reception of writing in evidence as part of the cross-examination of a witness is within the discretion of the trial court. *Gundy v. Nye-Schneider-Fowler Co* 599