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JOHN TIGER, APPELLEE, V. BUTTON LAND COMPANY ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 17,006.

1. **Deeds**: EXECUTION BY ATTORNEY IN FACT. As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly signed by such attorney by his subscribing and affixing thereto the name of his principal alone.

2. ———: ACKNOWLEDGMENT BY ATTORNEY IN FACT. But in such a case he cannot complete the execution of such deed by an acknowledgment which recites that the principal personally appeared before the notary and acknowledged the execution of the deed to be his voluntary act. Such acknowledgment must state the truth, and recite that it is made by the attorney in fact, in his representative capacity.

OPINION on motion for rehearing of case reported, *ante*, p. 63. *Rehearing denied. Former opinion modified.*

FAWCETT, J.

Defendants have filed a motion for rehearing, or rather for a modification of our opinion, *ante*, p. 63. We are asked to modify the following language in our opinion: "The evidence also shows that the deed from H. E. Gibson to plaintiff for the Colorado lands was never signed by Mrs. Gibson, but that the name, 'H. E. Gibson,' was signed by A. L. Button, who admitted upon cross-examination that he may have attempted to imitate the handwriting of H. E. Gibson in making the signature. The deed is acknowledged before one Nellie Sheehy, notary public, who certified that 'H. E. Gibson (single)' personally appeared before her and acknowledged the execution of the deed to be 'his' voluntary act and deed. Miss Sheehy was an

employee of the Buttons. Mr. Button attempts to justify his action in signing the deed as was done, by testifying that he had a power of attorney from his sister, H. E. Gibson, authorizing him to sign her name to deeds and other instruments, and that he supposed that it was all right to sign that way. It is incredible that, after transacting business as a real estate dealer for about 20 years, in seven states and territories, with offices in something like 15 cities in those states, he should be ignorant of the fact that his power of attorney did not give him authority to sign a deed in any such manner." Counsel state that, while the above is "probably dictum and entirely unnecessary to the decision of the case, yet it is now urged upon the attention of this court, as a rule of law, in the brief of counsel in another suit soon to be presented at this bar." This statement impels us to consider and definitely determine the question now.

Counsel argue that, as Mr. Button had a power of attorney from H. E. Gibson to sign her name to deeds, he had a perfect right to sign the deed in controversy, as was done, and cite *Devinney v. Reynolds,* 1 Watts & Serg. (Pa.) 328; *Forsyth v. Day,* 41 Me. 382; *Berkey v. Judd,* 22 Minn. 287, 302, in support of their contention. In the last sentence of the quotation from our opinion above given the word "execute" should have been used instead of of the word "sign," so as to include the acknowledgment as well as the signing, which the quotation from the opinion shows was what was under consideration. We concede that the weight of authority is to the effect that where A. B. has a written power of attorney from C. D. to sign deeds for the latter, he may sign the deeds "C. D.," without adding "by A. B., his attorney in fact," but he cannot complete the execution of that deed by an acknowledgment which recites that "C. D." personally appeared before the notary and acknowledged the execution of the deed to be his voluntary act. Such a recitation would be false, and a deed so executed would not be good even under the authorities cited by defendants.

In *Devinney v. Reynolds, supra,* the deed recited: "Know ye that Michael Hollman, by William M'Allister, his lawful and regularly deputed attorney in fact, for and in consideration of," etc., and concludes: "In witness whereof, the said Michael Hollman, by his attorney aforesaid, hath hereunto set his hand and seal." The deed was simply signed "Michael Hollman. (Seal.)" The certificate of acknowledgment recited: "Personally came William M'Allister, attorney as aforesaid, and acknowledged the foregoing deed poll as the act and deed of the said Michael Hollman," etc. It was in reference to that kind of an instrument that the court in the syllabus held: "It is not necessary to the proper execution of a deed by an attorney in fact that he should sign his name to it; the name of the principal alone is sufficient."

In *Berkey v. Judd, supra,* the opinion states: "It is recited in the body of the deed (exhibit C) that it is an 'indenture between Albert H. Judd' and others therein named as principals, 'by their attorney in fact, Orange Walker, and Orange Walker, parties of the first part,' and the said Greeley & Ludden of the second part. The deed purports to be signed and sealed by said first parties as follows: 'In testimony whereof the said parties to these presents have hereunto * * * set their hands and seals,' etc. 'Albert H. Judd, Caroline Judd, Asa Parker, Geo. B. Judd, Mary Ann M. Judd, Hiram Berkey, Georgiana E. Walker, Orange Walker.'" To the right of the first seven names there was drawn a single bracket, and written opposite the bracket are the words "By their attorney in fact." The opinion, after setting out the signatures as above, states: "As appears from the certificate of acknowledgment, Walker personally acknowledged the execution of said deed by himself as 'his individual act and deed,' and also as 'his act and deed as attorney in fact as aforesaid,' and 'for and on behalf of the said Albert H. Judd,' etc., 'as their true and lawful attorney in fact.' The name of Orange Walker subscribed to the deed is clearly indicated by its position and seal as his individual

signature as one of the grantors, and not as an agent. So far as he is concerned as one of the parties of the first part to the indenture, it was properly and legally executed and acknowledged. As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone. *Devinney v. Reynolds,* 1 Watts & Serg. (Pa.) 328; *Forsyth v. Day,* 41 Me. 382. In this case the deed purports on its face to be the indenture of the principals, and not that of the agent. It fully discloses that it was made for them and in their name by their attorney in fact, Orange Walker, who had full authority so to do. Its execution was properly acknowledged by him as such attorney in fact, and for and on behalf of his said principals. The neglect to sign his own name to the words 'by their attorney in fact' was a purely technical omission, devoid of any legal effect whatever." This leaves only *Forsyth v. Day, supra,* as apparently supporting the contention of defendants. In that case *Wood v. Goodridge,* 6 Cush. (Mass.) 117, is quoted from as follows: "It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for that purpose. It is not enough that the attorney in fact has authority, but it must appear by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves." The writer of the opinion then states: "No case, I apprehend, can be found in the books which will sustain the rule so broadly

laid down by the learned judge in the case of *Wood v. Goodridge.*" In the case under consideration by the Maine court, the instrument in controversy was a promissory note. In the latter part of the opinion, it is said: "From these considerations it results that all the notes introduced in this case, dated subsequent to the note in suit, and all other notes introduced, the existence of which was not proved to have been known to Daniel at or before the inception of the note in suit, were not competent evidence from which a jury would be authorized to infer original authority from Daniel to Adoniram to place his name on the note in suit, and for that specific purpose should have been excluded. Were these same notes competent evidence from which the jury could legitimately infer the adoption or ratification of the one in suit? The ratification of an act is equivalent to the original grant of authority." The court then proceeds to consider the case upon the theory of ratification, and finds that the notes were not competent evidence even for that purpose, and a judgment for plaintiff upon the note was reversed. An examination of this case shows that its criticism of *Wood v. Goodridge, supra,* was not only mere dictum, but that it has no application to an instrument which requires a formal acknowledgment as a part of its execution. It is no answer to this proposition that a deed as between grantor and grantee is good without any acknowledgment. Such is not the usual course of business, and it will not be contended that plaintiff in this case could have been required to accept from the defendants an unacknowledged deed. It is suggested in brief of counsel that *Wood v. Goodridge, supra,* has been practically overruled in Massachusetts. They do not cite any cases to that effect, nor has the writer been able, after diligent search, with the aid of Shepard's Notes, to find a later case in Massachusetts in any manner overruling *Wood v. Goodridge.* It has been cited and followed in a number of cases upon other points. The only case which we have been able to find, which would seem to even criticize it, is *Hunter v. Giddings,* 97 Mass.

41. That suit was based upon an instrument in writing, by which defendant agreed to cut and haul to plaintiff's paper mill 600 cords of wood. In the opinion it is said: "The ruling of the learned judge at the trial was probably made upon the authority of some of the expressions used in the case of *Wood v. Goodridge,* 6 Cush. (Mass.) 117. But, without considering the precise accuracy of all the observations found in the opinion in that case, upon a point which was not necessary to its decision, we do not think it applicable to the case at bar. The contract upon which this suit is brought was a contract, not under seal, for the sale of personal property. It was not essential to its validity that it should be in writing. Some memorandum in writing, signed by the defendant, was originally requisite to enable the plaintiff to enforce it, under the statute of frauds; but the contract itself might have been oral. Upon such a contract, if made by the agent in the name of the principal, without indicating the agency, the principal might be held, if he had afterward recognized and acted upon it. *Merrifield v. Parritt,* 11 Cush. (Mass.) 590. The oral contract between the parties, if the plaintiff's signature was treated as a nullity, would support his action."

The authorities cited upon the question of ratification or subsequent adoption of an unauthorized execution of a deed, and as to the proof required to establish a lost deed, are not in point.

We think further discussion is unnecessary. To the extent of substituting the word "execute" for the word "sign," as above indicated, our former opinion is modified, but in all other respects it is adhered to, and the motion

OVERRULED.

JOHN H. MURTEN, APPELLEE, V. ALBERT F. GARBE, APPELLANT.

FILED MAY 13, 1912. No. 16,676.

1. **Malicious Prosecution: PETITION: SUFFICIENCY ON APPEAL.** If the allegations of a petition charge both a malicious prosecution and a false imprisonment in one count or cause of action, and there is no objection on that ground until after trial and judgment, such objection will not be considered upon appeal.

2. ———: JUSTIFICATION. If one makes use of a criminal statute to bring about the unlawful arrest and imprisonment of another, without probable cause for so doing, he cannot justify such arrest and imprisonment on the ground that the statute is unconstitutional or is so defective that there could be no conviction under it.

3. **Embezzlement: SUFFICIENCY OF COMPLAINT.** In a prosecution under chapter 170, laws 1907, it is not material when the relation of landlord and tenant began, or will terminate. It is sufficient in that regard if the defendant was the tenant, and as such tenant was in possession of the property when embezzled by him.

4. **Appeal: ASSIGNMENT OF ERRORS: REVIEW.** Alleged errors not specifically assigned in the motion for new trial will not ordinarily be considered in this court, especially in civil cases.

5. ———: SUFFICIENCY OF EVIDENCE: BRIEFS. When it is contended that there is no evidence upon some particular issue, and the record is voluminous, the brief should refer to all evidence in the record bearing upon the point in question. Unless it is clear that some issue of fact essential to the finding and judgment is substantially unsupported, the judgment will not be reversed for a failure of evidence.

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

Charles O. Whedon and *H. P. Wilson,* for appellant.

Charles H. Sloan, F. W. Sloan and *J. J. Burke, contra.*

SEDGWICK, J.

This is an appeal by defendant from a judgment of the district court for Fillmore county.

The petition alleges that the defendant, "without reasonable or probable cause therefor, charged the plaintiff before the Honorable W. R. Fulton, County Judge of Fillmore county, Nebraska, with the crime of felonious embezzlement." The petition then alleges that the defendant, "falsely and maliciously and without probable cause therefor," caused the county judge to issue a warrant and this plaintiff to be arrested on such charge "and to be forcibly brought before" the county judge, and that he was obliged to give bond for his appearance at a later day; that the case was then heard and the plaintiff discharged and the prosecution ended, with allegations of damage, general and special. The defense alleged will be considered hereafter so far as is necessary for an understanding of the questions presented.

1. The first objection is that the petition does not state a cause of action. The principal contention in support of this objection is that the statute under which the prosecution against this plaintiff was brought is unconstitutional, and is otherwise so defective as not to create any crime, and that therefore the complaint did not charge any offense. The statute in question is chapter 170, laws 1907, which is as follows: "If any tenant or lessee shall without the consent of his landlord take, embezzle, dispose of, or convert to his own use the share or portion or any part thereof of the crop or products belonging to his landlord with intent to defraud the landlord thereof such person or persons shall be punished in the manner prescribed by law for feloniously stealing property of the value of the article or articles so embezzled, taken, disposed of or so converted." And the criminal complaint alleged the facts necessary to constitute an offense if the statute is valid. We do not consider it necessary to enter upon a critical discussion as to the validity and the scope and effect of this statute. The petition, as above indicated, sets out in general what are alleged to be the facts in regard to the transaction. It does not designate the action as for malicious prosecution or false imprisonment, and there

was no motion or attempt in any way to require him to do so. If the defendant made use of the provisions of this statute to bring about an unlawful arrest and imprisonment of the plaintiff, and without any probable cause for so doing, he is not now in position to rely upon the alleged unconstitutionality of, or defects in, the statute which he so used. "The defendant in an action for malicious prosecution will not be permitted to urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action." *Minnesota Threshing Machine Co. v. Regier,* 51 Neb. 402. *Hackler v. Miller,* 79 Neb. 209.

2. There is no merit in the objection that the statute is *ex post facto* as relates to the transactions involved herein. It is immaterial that the lease under which this plaintiff held the premises was executed before the statute in question took effect. The criminal complaint alleged that at the time of the alleged conversion of the property the relation of landlord and tenant existed, and, that being true, it is immaterial when that relation originated or how long it was to continue.

3. The third and fourth assignments of error relate to the giving of two several instructions. These supposed errors were not so assigned in the motion for new trial as to entitle them to consideration, nor do they seem to possess much merit.

4. The remaining objections relate to the sufficiency of the evidence to support the verdict. The defendant says in the brief that "there is not a syllable of testimony that Garbe did not tell all of the facts" to the attorney whom he consulted and upon whose advice he relied in bringing the prosecution. "In the absence of any conflict in the evidence, therefore, on this point, Garbe had probable cause to file the complaint. The question as to probable cause was one of law, and the court should have instructed the jury to find for the defendant." The plaintiff says: "The question of probable cause and the matter of full disclosure was fairly submitted to the jury in the charge of the court, and the instructions presented by appellant

on this subject are substantially incorporated in said charge. The evidence of the appellant was conflicting and unsupported either by the county attorney or by his private counsel, H. P. Wilson, who assisted in the trial, and, as the same was flatly denied, the jury were entitled to discredit his testimony, if they found the same not to be credible." There is no abstract of the record, and there is no reference to the record in either brief in support of the respective assertions of the attorneys. From our investigation of the record upon this point, it seems that it is not so clear that the defendant in good faith made a full and correct statement of the facts to his attorneys and relied upon the advice of counsel in commencing the prosecution as to require the court to determine that matter as a question of law.

We do not find any error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

ALMA ALBRECHT, ADMINISTRATRIX, APPELLEE, V. GEORGE MORRIS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 16,677.

1. **Negligence**: SUFFICIENCY OF EVIDENCE. Evidence examined, as indicated in the opinion, and found sufficient to support the finding that the injuries of the deceased were caused in the manner alleged in the petition.

2. ———: ———: CUSTOM. A custom of leaving trenches uncovered when located in inclosed premises would not constitute a complete defense against an allegation of negligence in so doing, if the conditions and circumstances were such as to cause a reasonably prudent and cautious man to believe that human life or safety were endangered thereby.

3. **Appeal**: SUFFICIENCY OF EVIDENCE. When the evidence is substantially conflicting, this court cannot set aside the finding of the jury. Evidence examined and found sufficient to support the

finding that the injuries complained of were the proximate cause of death.

4. **Negligence**: ACTION FOR DEATH: INSTRUCTIONS: HARMLESS ERROR. In an action to recover damages for negligence causing the death of plaintiff's intestate, it is erroneous to instruct the jury that "by contributory negligence is meant negligence on the part of plaintiff." But if the jury is also told that contributory negligence on the part of the deceased would prevent a recovery, and it appears from the whole charge that the word "plaintiff" was inadvertently used, and that the jury must so have considered it, the error will be regarded as without prejudice to the defendant.

5. ———: ———: ———: ———. In such action it is erroneous to instruct the jury that if "the injury to the deceased was caused by the negligence of the defendants, and that such injury caused *or contributed* to the death of the deceased, then you should find for the plaintiff." But if the jury are told that plaintiff cannot recover unless such injuries were the proximate cause of the death, and it appears from the instructions that the jury must have understood that plaintiff could not recover unless the injuries contributed in such a degree as to be in fact the proximate cause of the death of the deceased, the error will be disregarded.

6. ———: ———: PRESUMPTIONS. If a person is killed through the negligence of another, and there is no evidence as to negligence or due care on the part of the deceased, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety.

7. **Evidence**: COMPETENCY. A physician and surgeon, who attended professionally an injured person who afterwards died of his injuries, may testify to the condition of the deceased as disclosed by his professional examination immediately after the injury, and to statements of deceased as to pain suffered by him and necessary to the determination of the location and extent of his injuries.

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

Montgomery & Hall, for apellants.

W. W. Slabaugh and *J. W. Battin, contra.*

SEDGWICK, J.

The plaintiff, as administratrix of the estate of her de-

ceased husband, Adolph Albrecht, prosecuted this action in the district court for Douglas county to recover damages for the death of the deceased, caused, as she alleges, by the negligence of these defendants. The defendants have appealed from the judgment in her favor.

1. In May, 1908, the plaintiff and her husband were living in a rented house on Nineteenth street in the city of Omaha. The defendant Cardell, in the employment and under the direction of the other defendants, dug trenches for water pipes upon the premises, and, as it is alleged, carelessly uncovered one of these trenches, into which the deceased fell and received injuries which disabled him for several months, and which injuries finally caused his death. It is contended that the defendants were under no obligation to cover these trenches, since they were on the inclosed premises of the deceased and it is not customary to cover such trenches under those circumstances; and, further, that there is not sufficient proof that the deceased received his injuries by falling into the trench, or that the injuries complained of were the cause of his death. There was another residence about ten feet distant from that of the deceased, and a narrow walk along the side of the deceased's residence. Along the side of this walk the trench was dug in three parts, each part being 6 or 8 feet in length, about 5 or 6 feet in depth, and from 16 to 24 inches in width. These openings were several feet apart, the intention being to tunnel from one to the other for the water pipes. On Friday evening at the close of the day's work Mr. Cardell was about to leave these trenches open, and the plaintiff insisted that they should be covered; that on account of the location of the walks there would be danger of people falling into them. Mr. Cardell thereupon covered them with boards and planks, one of them being covered with two planks each a foot in width. On the next evening, while the deceased and this plaintiff were away from home, Mr. Cardell finished another part of the trench in the street, and, considering that it should be guarded, he removed one of the planks

for that purpose, leaving a part of the trench in the yard covered with one plank only, which he says he placed in the center of the trench, leaving a small opening on each side of the plank. The deceased, who was a man about 78 years of age, was accustomed to return home at about 5 or 6 o'clock in the evening, and on that evening the plaintiff returned home at about 10 o'clock. She testifies that there was a storm of wind and rain during the evening, which had ceased at the time she arrived at home, and that she found the deceased in the house lying upon a couch in his shirt sleeves and slippers, and suffering extreme pain from injuries recently received. She was not allowed to testify as to his statements in regard to the cause of his injuries, but she testified that his leg was bruised from his foot to his knee, and his knee was badly bruised and painful, and that one of his shoulders was injured and that he was suffering great pain in other parts of his body; that there were marks on the side of the trench that had been left covered with one plank only, indicating that some one had fallen in, and that deceased's foot and clothing were discolored with clay similar to that composing the side of the trench; that his coat and umbrella were dry, indicating that he had not been in the rain. She also testified that there was a window in their house just opposite this trench, and that when she went away from home early in the afternoon she closed the window, but left the outside blinds open, and that when she returned that night she found the blinds closed; the theory of the plaintiff being that the deceased, on the approach of the storm, attempted to close the outside blinds, and in doing so fell into the partly uncovered trench. The defendants say that this evidence is insufficient to justify the jury in finding that the deceased fell into the trench. Some of this testimony by the plaintiff was contradicted by other witnesses. She was, however, examined and cross-examined at great length, and appears to be a candid and reliable witness. It was for the jury to determine as to the truth of her statements, and we must therefore, for the purpose of this

objection, consider the circumstances as testified to by her. If, therefore, we consider these circumstances as fully established by her testimony, we think they are sufficient to justify the jury in finding that the injuries of the deceased were caused by falling into this trench, as alleged.

2. The contention that the defendants were not negligent in partly uncovering this trench cannot be sustained. If they had established a custom of leaving such trenches open in inclosed premises, still, considering the surroundings and the possible danger of accidents, it would be for the jury to determine whether such a custom was reasonable under all the circumstances; and, if the defendants had been warned that there would be danger in leaving the trench uncovered, it would be for the jury to determine whether it was reasonable and the exercise of due care to remove this covering in the evening and without any warning to the occupants of the premises.

3. The contention that these injuries were not the cause of the death of the deceased is likewise untenable. Dr. Walker was called very soon after the injuries, and testified fully to the condition of the deceased and to the extent of his injuries; that the deceased was confined to his room for some time, and afterwards for a short time walked with much difficulty, and that his condition continually grew more serious until the time of his death, which the doctor testified was due primarily to the injuries complained of. When the evidence upon the material issues of the case is substantially conflicting, we cannot disturb the verdict of the jury.

4. The court instructed the jury: "By contributory negligence is meant negligence on the part of plaintiff directly contributing to the cause of his injury." The objection to this instruction is that it excludes the idea of contributory negligence on the part of the deceased. If this were the only instruction given on the subject of his contributory negligence, the objection would be serious. However, the court, in at least three other instructions, plainly instructed the jury that contributory negligence

on the part of the deceased would prevent recovery, and in the instruction complained of the use of the masculine pronoun indicates that the word "plaintiff" was inadvertently inserted in the instruction. Considering all of the instructions together, it does not appear that the jury were misled in this respect.

5. The court also instructed the jury as follows: "The jury are instructed that if you find from the evidence that the injury to the deceased was caused by the negligence of the defendants, and that such injury caused *or contributed to* the death of the deceased, then you should find for the plaintiff, provided you find from the evidence that the deceased was not guilty of negligence which contributed to his injury." Again, it may be said that, if this instruction was the only one upon this point, the jury might have been misled. It is not sufficient that the negligence of the defendants "contributed to the death of the deceased." Such negligence must be the proximate cause of the injuries which caused the death. It is an imperative rule of law that an erroneous instruction upon a material issue cannot be corrected by a contrary instruction inconsistent with the first. The instruction complained of does not inform the jury to what extent the negligence of the defendants must contribute to the death of the deceased. It is therefore not necessarily inconsistent with the several other instructions given by the court in which the jury were plainly told that the negligence of the defendants must be the proximate cause of the injuries resulting in the death of the deceased. The instructions given by the court were full and comprehensive upon this point, as well as upon the other issues involved, and we cannot say that the jury were misled by the language of this instruction complained of.

6. The court instructed the jury: "You are instructed that where a person is injured through the negligence of another, and such injured person thereafter dies, and there is no witness to the happening of the injury, the law presumes that such injured person was exercising reasonable

and ordinary care at the time of his injury with a view to his safety." The objection to this instruction is that it left the jury in doubt whether "the presumption of due care was conclusive or merely evidentiary." It would have been quite proper to inform the jury that this presumption was not conclusive if there was other evidence bearing upon that question. The jury must determine whether the circumstances and evidence tend to show contributory negligence on the part of the deceased, and only indulge in the presumption which the law raises in the absence of other evidence. The record does not show that the court was requested to so modify or explain the instruction, and the instruction as given is technically correct.

7. The court gave the jury the following instruction: "You are instructed that certain evidence was introduced by certain witnesses as to exclamations and statements of the deceased as to his physical condition. Such elements were introduced and received for the purpose only of showing his physical condition and pain and suffering at the time of such exclamations and statements, and as pertaining to the question whether or not the injuries complained of caused or were proximate to the death of the deceased." The objection urged is that this instruction allows the jury to consider the "exclamations and statements" of the deceased "as pertaining to the vital question in the case, to wit, the proximate cause of his death." There seems to be no ground for this objection. All statements of the deceased in regard to the cause of the accident were rigidly excluded by the court. In his examination by the physician the deceased made statements as to the location of the pain which he suffered, and similar statements which were admitted as a part of the physical examination made by the physician. If these tended to show the extent of his injuries, they would pertain to the question whether such injuries were of such a nature and degree as to be regarded as the proximate cause of his

death. The instruction was necessary in the interest of the defendants, and was not prejudicially erroneous.

The judgment of the district court is

AFFIRMED.

EDWIN D. YORTY, APPELLEE, V. J. I. CASE THRESHING MACHINE COMPANY, APPELLANT.

FILED MAY 13, 1912. No. 16,696.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISKS. The plaintiff's employment required him to handle and move separators in the building used for storing them. There was not sufficient room to handle them there with "a tongue or other appliance to guide them," and plaintiff was accustomed to handling them without such "appliance." *Held*, That plaintiff must be considered to have assumed the risk, if any, arising solely from so handling them.

2. **Appeal:** PLEADING AND PROOF: VARIANCE. The scope and purpose of the rule that the allegations and proof must agree is to enable the party complained against to know what issue he will be called upon to meet. A judgment will not be reversed for a technical violation of the letter of the rule, if it appears from the whole record that the party complaining has not been prejudiced thereby.

3. **Master and Servant:** INJURY TO SERVANT: SPECIAL DAMAGES: EVIDENCE. In an action for personal injury, plaintiff cannot recover damages sustained in some special occupation or employment unless such special damages are alleged and proved. Evidence that plaintiff's regular trade for a number of years had been that of a boiler-maker is incompetent without such allegation in the pleadings, and questions as to how plaintiff's injuries interfered with that occupation under such circumstances should not be allowed; but, if the answers to such questions relate wholly to the extent of the injury, such evidence is competent, and the judgment will not be reversed because of the erroneous form of the questions, if it appears from the whole evidence that the defendant has not been prejudiced thereby.

4. ———: ———: PLEADING AND PROOF: VARIANCE. The defendant alleged that the plaintiff executed a release of all damages, and

plaintiff replied that the paper was procured by fraud and misrepresentation, setting out fully the transaction, and also alleged that defendant's agent "misread said receipt and paper to plaintiff and fraudulently misstated the contents thereof to plaintiff while pretending to read said receipt and paper, and, in misreading said receipt and paper, represented to plaintiff, and plaintiff understood, that it was simply a receipt for his medical and surgical attention, and had nothing to do with any claim for damages, and in reliance upon such understanding and representation he signed the receipt and paper." The evidence was that the agent did not read the paper at all, but, holding the paper in his hands, stated to plaintiff the contents and nature of the same. *Held*, That such variance between the allegation and the proof was immaterial.

5. ———: ———: LIABILITY OF MASTER. An employer is liable for damages caused by the negligence of his employees while engaged in the ordinary work of their employment. The fact that one employee, sued jointly with the employer, was found not to be liable will not prevent a recovery against the employer, if the negligence of other employees was the proximate cause of the injury complained of.

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

Burkett, Wilson & Brown, for appellant.

Wilmer B. Comstock, contra.

SEDGWICK, J.

This plaintiff alleges that while he was in the employ of the defendant he suffered a personal injury and serious damages caused by the negligence of the defendant. He recovered a judgment in the district court for Lancaster county, and the defendant has appealed.

1. The first contention is that the evidence does not support the allegations of the petition; that is, that there is such a variance between the allegations and the proofs that the judgment cannot be allowed to stand. The petition alleges that the defendant was "engaged in the business of manufacturing, storing, selling and shipping threshing machines. * * * On the sixth day of June,

1908, the defendants had negligently and carelessly stored in said warehouse a threshing separator, the king-bolt, ball, or third wheel of which was broken, defective and out of repair, which fact was well known to defendants, but of which plaintiff had no knowledge. On the date last mentioned, the defendant Randall negligently and carelessly ordered and commanded the plaintiff to remove said separator from said warehouse. The defendants negligently and carelessly failed to provide any tongue or other appliance by which to draw or push said separator, and made it necessary in the removal thereof for the plaintiff to take hold of and place his hands upon the front wheels of said separator to guide and move the same. Said separator was a heavy and ponderous piece of machinery, weighing many tons. On the date aforesaid, the plaintiff, in obedience to the commands aforesaid, undertook to remove said separator from the warehouse, and to guide the same placed his hands upon one of the front wheels thereof. While so engaged, and while in the exercise of due care, and on account and by reason of the joint and concurrent negligence of the defendants, as aforesaid, in negligently and carelessly permitting said separator to remain in said warehouse with said broken king-bolt, ball, or third wheel, and in negligently and carelessly failing to provide any tongue or other appliance to guide said separator, and negligently and carelessly ordering plaintiff to move said separator in its broken and defective condition aforesaid, the heavy and ponderous portion of said separator above the running gear and wheels thereof fell upon plaintiff's left hand, and pinioned and held said hand between said ponderous and heavy portion of said separator and the front wheel thereof for several minutes and until a lifting jack was procured to raise it up and release plaintiff's hand. Plaintiff's hand and wrist were crushed and mangled, the bones, muscles, tendons, ligaments and tissues of his left hand and wrist so crushed, lacerated and torn as to entirely destroy all use of said hand and wrist."

The allegation that "defendants negligently and carelessly failed to provide any tongue or other appliance by which to draw or push said separator" was entirely unsupported by evidence. The plaintiff testified that there was not room in the store-room to "put a tongue in and operate it in the house," and it appears that the separators were for that reason necessarily kept in that respect as this one was. This condition was well known to the plaintiff, and he must be held to have assumed the risk, if indeed there was any risk, caused solely by the absence of "any tongue or other appliance to guide" the separators in the store-room.

It is contended that the gist of the allegation of negligence upon which the plaintiff's recovery, if any, must depend was in permitting the separator to remain in the warehouse with the broken "king-bolt, ball, or third wheel," and that the evidence "shows that the break in the king-bolt had nothing whatever to do with his injury." The testimony of the plaintiff himself, as well as all other testimony in the case, was that the "bolt or ball" was not securely fastened in its place, "and this machine, the socket not being tightened up, there was nothing to hold the ball in there, and it just slipped out and let the machine down on my hand." Without stating in detail the conditions that caused the accident, it is sufficient for an understanding of the question thus presented to say that the record shows that the coupling between the front axle and the framework of the separator became separated at the forward axle; this allowed the axle to revolve forward, which suddenly lowered the body of the separator upon plaintiff's hand as it rested on the wheel. The coupling was formed by the ball and socket spoken of in the evidence. If the socket had been properly bolted, it would have held the ball securely, and the coupling could not have separated. The allegation was that "the king-bolt, ball, or third wheel" was broken, defective and out of repair. The proof was that the ball slipped from the socket because the socket was not properly bolted.

Does this constitute such a variance between the allegation and proof as to defeat a recovery? The defendant is entitled to know what issue he will be called upon to meet. He prepares and brings into court the evidence to meet the facts alleged against him, and not some other matters that may be within the knowledge of the parties, but which the plaintiff has not called upon him to answer in court. This is the scope and purpose of the rule that the allegations and proof must agree. The rule is a necessary one and in the administration of justice must always be observed in its true spirit and meaning. It has been somewhat variously applied in different jurisdictions. Some courts have gone to the extreme of literal application without regard to the purpose of the rule, and apparently without considering whether the defendant could possibly have been misled by the variance. See *Wabash W. R. Co. v. Friedman,* 146 Ill. 583. A technical violation of the letter of the law ought not to work a reversal of a judgment, otherwise free from error, if it appears from the record that the defendant was not prejudiced thereby. The substance of the complaint was that, through the negligence of the defendant, the coupling became separated, which caused the forward part of the separator to fall. Whether the ball escaped from the socket because the ball was broken, defective or out of repair, or because the socket itself was defective or out of repair, not being bolted together, is not so material as to have seriously misled the defendant in the light of the evidence in this record.

2. The second objection is that incompetent evidence was received bearing upon the measure of damages. The plaintiff testified that his regular trade for a number of years had been that of a boilermaker, and when on the witness stand was questioned and answered as follows: "Q. In the pursuit of the business and occupation of a boilermaker, to what extent did you use your left hand? * * * A. I can't use it to do any good. * * * Q. What has been the effect of the injury upon the functions

of your left hand in the pursuit of boilermaking? * * * A. I couldn't use it at all. * * * Q. Just explain to the jury in what way it has been impaired for use in boilermaking. * * * A. I don't just understand that. Q. Well, in what way has its use been affected for boilermaking? * * * A. Well, it is all shriveled up, and there is no strength in it, not enough to hold a tool, and I haven't fingers enough to hold a tool." These questions and answers were objected to as incompetent, irrelevant and immaterial, and exceptions taken to the ruling of the court. The plaintiff had for some time been in the employ of the defendant, and there was no allegation in the petition that he was ever engaged in the occupation of a boilermaker or that he suffered any damages in that occupation on account of his injuries. It must be conceded that the questions were incompetent, but the question is whether the evidence was of such a nature as to be prejudicial to the defendant, requiring a reversal. There is very little evidence as to the nature of the occupation of a boilermaker, and no evidence of the possible earnings of the plaintiff in that capacity. The answers complained of related solely to the condition of the hand, which of course was competent evidence. The evidence itself being competent, we cannot reverse the judgment because of the form of the questions, unless we can see from the record that the defendant might probably have been prejudiced thereby. We think that the error was without substantial prejudice to the defendant, requiring a reversal of the judgment.

3. The defendant offered in evidence a written instrument signed by the plaintiff, which purported, in consideration of the payment of $62 "doctor's bill and other good and valuable consideration," to release the plaintiff from all claims for damages on account of the accident complained of. This writing was pleaded in the answer as a defense, and the plaintiff in reply alleged, among other things, that the defendant's agent who procured the defendant to sign the writing "pretended to read said

receipt." It is contended that this allegation is not supported by the evidence. The plaintiff testified that the defendant's agent neither read nor pretended to read this document to him. Upon this point the court instructed the jury: "In reference to this purported release, you are instructed that if the defendant, its agent, or representative pretended to read to the plaintiff the said purported release, and, in doing so, purposely misread the same, and thereby misled the plaintiff concerning the contents thereof and caused plaintiff to believe and understand that said release only discharged and was only in settlement of expenses incurred for surgical and medical attention to his injury, and that the plaintiff relied upon the statements and representations made by the defendant company, by and through its authorized agents and employees, and signed said settlement because thereof, and without negligence on his part, said release or written instrument would not under such circumstances bar the plaintiff's right to recover, but he would be entitled to maintain his action notwithstanding the signing of said release." It is insisted that this instruction was erroneous because of the variance above indicated. The plaintiff testified that the company's manager "sent me up to the doctor's to get the bill, and the doctor didn't have the bill ready, and he said, 'Anyway Mr. Randall (the manager) told me he would pay that bill, what do you want with it?'" That he went several times after the bill, and finally brought it down to the manager, who handed him $62, which was the amount of the bill, and told him to go back and pay the bill, and the witness continued: "That was when I signed this to show that I had accepted this $62 to pay the doctor bill with, whatever it is, exhibit 'C,' that is when I signed that one. And then after I paid the bill I brought back a receipt from the doctor to Mr. Randall that the bill was paid, but that didn't seem to be satisfactory to him, and then he called me in and asked me to sign this (referring to the release). He said, 'This is just a receipt to show that we paid the doctor bill, to

show to the company that we paid the doctor bill, and I want you to sign it.' I took it and started to undertake to read it, which would take me a long while to figure it out and fool with it, because I couldn't read good, and am a very poor hand at reading anyway, and undertook to take time to read it, and he said hurry up and sign that, that is very important business, and it has got to go off on this afternoon mail. So I signed it on what he said and let it go at that. I supposed that was all there was to it. Q. Now, what, if anything, did he do in reference to reading it? A. He didn't do anything any more than just hold it up and said, 'This is to show we paid the doctor bill. We want to show to the company that we paid the doctor bill.' He didn't pretend to read it whatever. Q. He pretended to state what it contained? A. Just pretended to state what it contained; yes, sir. Q. Now, did you rely upon his statement as to what it contained? A. Yes, sir; I had nothing else to rely on. He wouldn't give me time to try and figure it out. Q. Did you know at that time that it contained any matter excepting a receipt that the doctor bill had been paid? A. No, sir; or I would never have signed it, because I had made up my mind right on the start I would not sign any such a thing, and told him so." He further testified that he could not read the paper and that the manager knew of his inability to read. He testified to other circumstances which tended to support his contention that the manager, while holding this release in his hands, stated to the plaintiff what he represented was the contents of the paper. This evidence was sufficient to require the jury to determine the facts in regard to the matter, and there is no such variance from the allegations of the petition as to require a reversal under the law as already stated.

4. The defendant's final contention is that the defendant and its manager were sued jointly, and there was an allegation in the petition that "the said injuries and damage aforesaid resulted wholly and entirely from the joint and concurrent negligence of the defendants in the man-

ner and form hereinbefore alleged;" that, therefore, the jury having been instructed that there was no evidence against the manager, the verdict against the defendant cannot be sustained. The petition seems to have been framed upon the theory that the manager had personally changed the coupling and negligently failed to properly insert and fasten the bolts that held the socket, but the evidence shows that other employees had been sent by the manager to do this work and it was their negligence in that regard that caused the trouble. Under this condition of the evidence the manager could not be held personally liable, but the defendant is responsible for the negligence of its employees. This objection therefore is not well taken.

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

AFFIRMED.

GEORGE SOWERWINE ET AL., APPELLANTS, V. CENTRAL IRRIGATION DISTRICT, APPELLEE.

FILED MAY 13, 1912. No. 17,063.

Appeal: REVERSAL: REMAND: PROCEDURE. When the judgment of the trial court is reversed by this court upon appeal, and the reversal is general, without specific instructions, the trial court has discretion to allow amendments upon terms, and in the further disposition of the case. It has no discretion to dismiss the action without any further proceedings.

APPEAL from the district court for Scott's Bluff county: HANSEN M. GRIMES, JUDGE. *Reversed with directions.*

Wright & Duffie and *L. A. Berry,* for appellants.

L. L. Raymond and *James E. Philpott, contra.*

SEDGWICK, J.

Upon a former appeal in this case the judgment of the

district court was reversed and the action dismissed. 85 Neb. 687. Afterwards upon a motion to modify the judgment this court made and entered the following order: "Upon a consideration of the motion for a rehearing and to modify our judgment, for reasons unnecessary to state, the motion for a rehearing is overruled, but our opinion and judgment are so modified that the judgment is reversed and the cause remanded for further proceedings." After the mandate of this court was returned and filed in the district court, that court entered the following order: "Now on this August 29, 1910, same being one of the regular days of the special August 1910 term of said court, this cause came on for hearing by the court, having been remanded to this court by the supreme court, for further proceedings. After having fully and carefully considered the opinion of the supreme court rendered in the above entitled cause, this cause is hereby dismissed for want of jurisdiction in this court to hear and determine the issues raised herein." From this order dismissing the case the plaintiffs have appealed.

As shown in the former opinion, this is an action in equity, for the purpose of having certain lands of the plaintiffs detached from the irrigation district, defendant, under the provisions of section 49, art. III, ch. 93*a*, Comp. St. 1911, which provides: "That in no case shall any land be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby." The question presented upon the former appeal was whether the special findings of the trial court supported the judgment, and it was held that they did not. Those special findings were: "(1) That the plaintiff, George Sowerwine, is the owner in fee of the lands claimed by him; (2) that plaintiff Elizabeth Sowerwine is the owner in fee of the lands claimed by her; (3) that all of said lands are included in and are part of the defendant irrigation district; (4) as to lot 3 in section 31, lots 5 and 6 in section 32, lot 2 in section 5, and all that part of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 31, and lot 1 in section 6,

and lots 3 and 4 in section 5, lying and situated north of the particular line above referred to, * * * 'that down through the central part of the same, from the west to the east, is a slough which holds more or less water during the entire year; that the North Platte river maintains its highest stage from about the 1st day in May until from the middle of July to the 1st of August; that during high water in the river said slough becomes practically full of water, and the part of the said land involved herein is more or less wet and spongy, and at different places has standing water-holes of greater or less dimensions; that during the low-water period of the year in the river, from about August to May, said slough becomes practically dry, and the land involved is dry; that the balance of said land is practically all dry and fit to be mowed, and the same has been mowed for hay for a number of years; that during the irrigation season said land is rendered more or less wet by reason of seepage from the central ditch and the laterals therefrom being thrown on the land herein.' " From these findings it appeared that the lands consisted of several different tracts, located in different sections, and owned by different parties. The finding that some of it was at times overflowed with water, and that other tracts were "practically all dry and fit to be mowed, and the same has been mowed for hay for a number of years," would clearly not justify a decree detaching all of the lands from the irrigation district. The decree was therefore reversed. Under these circumstances, however, it was not proper to dismiss the case without a trial upon the merits. It might appear upon the trial that all of the lands involved should be detached from the irrigation district, or that some of the tracts should be detached and not others, or that none of the tracts should be detached. This court, discovering its error, modified the judgment so as to remand the cause for further proceedings in the order above quoted.

It is insisted that when a cause is reversed by this court and remanded generally, as this was, the trial court is to

exercise its discretion in the further consideration of the case, and that, the court having exercised its discretion, no error can be predicated thereon. The discretion which the trial court is expected to exercise is sound legal discretion. It appears from the order of the trial court that the dismissal was based solely upon the opinion of this court, the trial court not exercising any discretion based upon the conditions of the case and the further consideration thereof. The opinion of this court and the subsequent order modifying it indicate a further trial of the case, and the trial court was in error in construing it to require the dismissal thereof. "If the reversal is general, and the cause remanded for further proceedings, without specific instructions, it is the duty of the lower court to exercise its discretion in the matter of allowing amendments, as well as other matters in the further disposition of the case." *Gadsden v. Thrush,* 72 Neb. 1. In such case the trial court is to exercise its discretion in "allowing amendments" and in the further disposition of the case. It has no discretion to dismiss the action without any further proceedings.

The judgment of the district court dismissing the case is reversed and the cause is remanded, with instructions to allow amendments to the pleadings, if the parties elect so to do, upon suitable terms, and to hear the proofs and render such judgment as the law requires.

REVERSED.

STATE OF NEBRASKA V. M. ELAM.

FILED MAY 13, 1912. No. 17,400.

Food: PURE FOOD ACT: VIOLATION OF REGULATIONS. The statute provides that testing of cream for commercial purposes "shall be done in accordance with the rules and regulations therefor prescribed by said commission." Ann. St. 1911, sec. 9838. The commissioner made a rule that payment for cream purchased for

commercial purposes should not be made on the same day of the purchase. *Held*, That the defendant could not be punished criminally for a violation of this rule.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Exceptions overruled.*

Grant G. Martin, Attorney General, Frank E. Edgerton and *Amos E. Gantt*, for plaintiff in error.

Frank Reavis, contra.

SEDGWICK, J.

The defendant was informed against in the district court for Richardson county for an alleged violation of the pure food act. A general demurrer was filed to the information, which was sustained by the court, and the county attorney was permitted to file his exceptions in this court to obtain a construction of the statute under which the prosecution was brought.

The information alleges that the defendant held a permit from the pure food commissioner to test cream, and that on a certain day he purchased cream for commercial purposes and paid for the cream on the same day that he purchased it, "contrary to the provisions of regulation 59 of the rules and regulations of the food, drug and dairy laws, and contrary to the form of the statute," etc. The pure food commissioner has adopted regulations, among which is regulation No. 59, which recites that the test of cream requires great care and exactness, and that to make a test it requires at least 30 minutes, and agents cannot test deliveries of cream as they are received and give a test the necessary time and attention, and continues: "Pursuant to the above facts it is hereby ruled by the food, drug and dairy commissioner that samples of cream shall be grouped and tested at the close of each day's receipts or the following morning; the samples to be kept in closed jars while being held. In order to prevent any evasion of the above ruling it is further ruled that the

payment in whole or in part for cream shall be suspended until the following day, or the time of the next delivery. Payment for cream prior to the day following delivery, as a means of securing business or of taking advantage of another operator, is a violation of the rule and punishable under the law."

The gist of the offense which it was attempted to charge against the defendant is that he paid for the cream on the same day that he purchased it. The statute provides: "In testing milk or cream for commercial purposes under the provisions of this act the same shall be done in accordance with the rules and regulations therefor prescribed by said commission." Ann. St. 1911, sec. 9838. "The term 'to test milk or cream' as used in this act is hereby defined as the process or method by which the percentage of butter fat in said milk or cream is determined." Section 9832. The contention of the state appears to be that, since it requires 30 minutes or more to test cream properly, and it is not convenient for the party testing it to collect his samples and make his tests until "at the close of each day's receipts or the following morning," paying for the cream purchased is so far a part of the testing, or so necessarily connected with the testing, as to justify the regulation thereof by the food commissioner, and, since this regulation is therefore within the jurisdiction of the food commissioner, to make payments for the cream on the same day of purchase is a violation of the act and subjects the defendant to punishment under section 9840. "Any person violating any provision of this act shall upon conviction thereof be fined in a sum of not less than $50 nor more than $500 at the discretion of the court." Ann. St. 1911, sec. 9840.

No doubt the legislature may by statute "delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Field v. Clark,* 143 U. S. 649, 694. The legislature, however, cannot delegate its power to make laws. The time and manner of paying for the cream purchased can-

not, in the nature of things, have any connection with the testing of the cream. The fact, if it is a fact, that delay in payment for the cream would have a tendency to afford more time or convenience for testing it does not in any way affect the character or efficiency of the testing, or make the payment for the cream any part of the testing. The statute contains some directions in regard to the manner of making the test, and authorizes the food commissioner to make further rules for that purpose if the same should be found necessary, but this does not include the power to make rules to prevent unfair competition in business or "taking advantage of another operator." We think the district court was right in holding that a criminal prosecution cannot be sustained for a violation of this rule of the commissioner.

Other questions that might be presented as to the sufficiency of this information are not discussed in the briefs and they are not considered. The exceptions are

OVERRULED.

STATE, EX REL. GUY A. CROOK, APPELLANT, V. RICHARD A. COUPE ET AL., APPELLEES.

FILED MAY 13, 1912. No. 17,485.

1. Statutes: AMENDMENT: CONSTRUCTION. An act of the legislature, the sole purpose of which is stated in the title to be to amend a specified section of a complete and comprehensive act, makes the section so amended a part of the original act, which must, if possible, be so construed as to give it a meaning consistent with the whole act.

2. ———: CONSTRUCTION. Two sections of the same act of the legislature will not be considered so inconsistent as to be nugatory if by any possible construction they can be made to agree.

3. Counties and County Officers: POWERS OF COUNTY BOARD: BRIDGES. The act of 1905 (laws 1905, ch. 126) as amended by chapter 111, laws 1911, gives county boards power to let contracts for bridges,

culverts and road improvements to the lowest bidder; to reject any and all bids; and, if found to be in the interest of the public, to purchase materials and employ labor and construct bridges and culverts.

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

Reavis & Reavis, for appellant.

Clarence Gillespie, Amos E. Gantt and *Edwin Falloon, contra.*

SEDGWICK, J.

The board of supervisors of Richardson county published a notice to bridge contractors, advertising for bids "for the furnishing of all materials and labor necessary for the construction and completion of all steel bridges that may be ordered during the ensuing year." Pursuant to this notice seven bids were filed with the county clerk, and upon consideration of these bids the board entered an order that "the board of supervisors * * * have concluded to reject all bids and pursue the course followed by the county in the past few years in building its own bridges." This relator brought this action in the district court for Richardson county to compel the board of supervisors to readvertise for bids. Upon trial the district court found generally in favor of the defendants and dismissed the case, and the relator has appealed.

The question presented is whether the county board is authorized to construct bridges for the county, the cost of which exceed the sum of $500. The whole matter being within the jurisdiction of the legislature, the question depends upon the construction of the statute. In 1905 an act was passed by the legislature relating to bridges, contracts and improvements on roads. Laws 1905, ch. 126. The act is quite comprehensive, containing 19 sections besides the repealing clause. It repeals four sections of the road law of 1879 (laws 1879, p. 120) as they then appeared in

the Compiled Statutes. The last legislature passed an act entitled: "An act to amend section 6126 of Cobbey's Annotated Statutes of the state of Nebraska for the year 1909, and to repeal said original section and to declare an emergency." Laws 1911, ch. 111. The section so amended was the first section of the act of 1905, and as amended is as follows: "The county board of each county has the power to repair or erect all bridges and approaches thereto and build all culverts and make improvements on roads the cost and expense of which shall in no instance exceed five hundred dollars. And all contracts for the erection or reparation on bridges and approaches thereto, for the building of culverts and improvements on roads and for furnishing materials in connection with the same the cost and expense of which shall exceed five hundred dollars shall be let by the county commissioners or county board of supervisors to the lowest and best bidder. The records of each county board pertaining to such improvements shall be kept in a separate book provided for that purpose. Said book shall be kept indexed up to date. A complete record of each bridge repaired or constructed by the county shall be kept in said book as follows: First. The date of construction or repair must be given. Second. The bridge repaired or constructed must be located by giving its distance and direction from the nearest section corner, stating which section corner, naming the section and the township in which the section is located. There must be recorded an itemized statement of all material used, giving the amount, kind, quality and price of material and date furnished, and said statement must be sworn to by the person or persons furnishing the same, and an itemized statement of all work and labor performed, giving the number of days, the dates and the price per day, and said statement must be sworn to by the person or persons performing said work. Said original statements for material and labor shall be filed away by the county clerk, and it shall be designated in said record where they are filed; provided that said record

shall be kept by the county engineer in counties having such an officer. An itemized statement of all material used in construction of approaches and culverts and of all material used in improvements on roads, and all labor performed must be signed and sworn to by the party or parties furnishing the material and the party or parties performing the labor, and the record of said improvements shall be kept in the same manner as is herein provided in repairing or construction of bridges by the county. A similar record of all bridges or improvements made by contract shall be kept in said book. All bids for the letting of contracts must be deposited with the county clerk and opened by him in the presence of the board of supervisors and filed in the clerk's office." Section 10 of the act of 1905 is: "That the county commissioners or supervisors shall require bidders to bid upon plans and specifications prepared by a competent engineer and adopted by the county board; provided that in any county having a county engineer said plans and specifications shall be prepared by said county engineer, and said board may accept the lowest and best bid and award the contract accordingly or reject any and all bids if the prices submitted are exorbitant or too high or reject all bids submitted for such work. Upon rejection of any bid or bids by said board, it shall have power and authority to purchase the necessary bridge material and employ the necessary labor to construct and repair bridges to be built by the county within one year; the purpose being that said county board shall be vested with power and authority to purchase the necessary material and employ the necessary labor to construct and repair the bridges of the county within one year."

From the title of the amendatory act of 1911 it appears that the legislature intended to amend only the first section of the former act; there is no indication that it was intended to change any other part of the act. It follows that the whole act, as it now is, must be construed together, and the will of the legislature determined there-

from. The first section, if considered by itself, would necessarily be construed to mean that, when the cost of the proposed bridge or improvement would be more than $500, the contract must be let to the lowest bidder and the bridge could not be built by the county authorities. But section 10 provides: "Said county board shall be vested with power and authority to purchase the necessary material and employ the necessary labor to construct and repair the bridges of the county within one year."

The two sections are apparently inconsistent, and it is difficult to tell what is meant by such legislation; but, when cases are submitted and insisted upon, they must be decided. If it is impossible to ascertain with certainty what the intention of the legislature was, we must consider the purpose and spirit or policy of the act and prior legislation and ascertain the probable intention. Two sections of the same act will not be considered inconsistent, and therefore nugatory, if by any possible construction they can be made to agree. Section 19 of the act provides that under certain circumstances the county board "may proceed to enter into a contract, * * * or may buy materials and hire labor." This may indicate that, when the act speaks of a "contract," it refers to an entire contract for a specified improvement, and not to contracts for the purchase of material or for performing the labor when the work is done by the county itself. If by the second clause of the first section, then, the legislature intended that, when the board did let contracts upon bidding, it must let them to the lowest and best bidder, and if that was the whole purpose of this clause, the two sections are not inconsistent. It must be considered that this is a somewhat strained and unnatural construction of the clause, but it is better than to charge the legislature with inconsistency, and it is not impossible that such was the meaning of the legislature.

The language of the tenth section, "said board may accept the lowest and best bid and award the contract accordingly or reject any and all bids if the prices sub-

mitted are exorbitant or too high or reject all bids submitted for such work," is very much discussed in the brief for the relator. It is said that the words, "any and all bids if the prices submitted are exorbitant or too high," are special and particular, and are intended by the legislature to define when the board may reject bids, so that the subsequent clause, "or reject all bids submitted for such work," can be given no meaning or effect. It is argued that it follows that, unless and until the board finds that the bids are exorbitant or too high, they cannot reject them, and the further conclusion seems to be derived from this reasoning that, if the bids can only be rejected because they are exorbitant or too high, the board must in such case readvertise for bids, and cannot purchase the material and employ the labor to construct bridges. It would be better to disregard entirely the words, "or reject all bids submitted for such work," than to resort to such a construction by inference. As before stated, the act of 1905 repeals four sections of the act of 1879, and the act of 1879 repealed chapter 47 of the Revised Statutes of 1866. Section 16, ch. 47, Rev. St. 1866, authorized the county authorities to "let contracts to the lowest competent bidder, for the improvement of" roads, and the following section indicates that the repairing of bridges and culverts was included in the act. The act of 1879 provided that all contracts should be let "to the lowest competent bidder," and it was the act of 1905 that first introduced the power to purchase material and employ labor by the county authorities themselves. This perhaps accounts for the emphasis given by the legislature to this power of the county board to purchase materials and employ labor. The provision to that effect is repeated in the tenth section, first stating the power given to the board, and then emphasizing it by declaring the purpose and intention so to do. We conclude that the proper construction of the whole act as it now exists, giving as far as possible some meaning to every part thereof, is that the county board may build bridges by entering

into contract therefor, and that when they do so they must comply with the provisions of the statute in that regard and must let the contract to the lowest and best bidder; and that they may reject any and all bids, and, if they consider it in the best interests of the county, may purchase the material and employ the labor for the construction of the bridges.

This was the holding of the trial court, and the judgment is

AFFIRMED.

WILLIAM KUHLMAN, APPELLEE, V. EMMA SHAW ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 16,700.

1. **Vendor and Purchaser**: MISREPRESENTATIONS: MATERIALITY. Where the plaintiff brought suit against the defendants for damages alleged to have been sustained by him because of the misrepresentations of the defendants concerning the quantity of land contained in the "south half of the northeast quarter of section 3," and on the trial the evidence showed that the defendants represented that the northeast quarter of said section was a "long quarter," and that it was fractional and contained 172 or 173 acres, and further showed it was represented that if the plaintiff bought the south half of the northeast quarter he would get 86 or 87 acres, being 6 or 7 acres more than half a quarter section of land usually contains, and it further clearly appearing that the excess of the quarter above 160 acres was in the north half, which contained above 92 acres, and that no considerable part of the excess was in the south half, as it contained only 80.29 acres, *held*, that the misrepresentations made were material and proper to be considered by the jury in determining whether damages should be allowed, and in what amount.

2. ———: ———: RECOVERY OF DAMAGES. Where it is shown that the representations were made as alleged in the petition, that they were untrue, in so far as they applied to the "south half of the northeast quarter," that they were believed by the plaintiff to be true, that the plaintiff relied upon them and was injured in consequence, receiving only a fraction above 80 acres, when he bargained for 86 or 87 acres, *held*, he may recover his actual

damages sustained because of the difference in value in the number of acres actually sold and conveyed as compared with the number of acres bargained to be sold and conveyed.

3. Trial: INSTRUCTIONS. The court instructed the jury as follows: "The court instructs you that, before the plaintiff can, in any event, recover a verdict against the defendants, he, the plaintiff, must prove by a preponderance of the evidence that the defendant Henry Shaw was the duly authorized agent of said Emma Shaw to make the sale of said premises to the plaintiff, and that said Henry Shaw did, in fact, make such sale as the agent of said Emma Shaw." *Held*, That the instruction given as above was favorable to the defendants, and, if erroneous, that it could not have been prejudicial to them.

4. ———: ———. Where the court refused to give to the jury, at the request of the defendants, an instruction as follows: "The jury are instructed that if before the plaintiff purchased the land in dispute he inquired as to how many acres were contained in the south half of the quarter section of land, and was informed by Bucholz that it contained 80 acres, or was informed when the conveyance was made in Whittaker's office that this governmental description of the land contained only 80 acres, then, in either case, the plaintiff cannot recover"—but did give of its own motion the following instruction: "No. 6. The court instructs you that if you find from the evidence that the plaintiff at the time he purchased said land knew that the whole quarter section contained about 173 acres, and that about 93 acres thereof were in the north half of said quarter section according to government survey, and only about 80 acres of it were in the south half of said quarter section according to government survey, then your verdict should be for defendants"—*held*, that the jury were properly instructed touching this question, and that it was not prejudicial error, under the evidence, to refuse the instruction requested.

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

C. Gillespie and *Edwin Falloon*, for appellants.

Reavis & Reavis, contra.

HAMER, J.

The action in this case was brought in the district court

for Richardson county by the plaintiff, appellee in this court, William Kuhlman, to recover $664 damages from the defendants, appellants in this court, Emma Shaw and Henry Shaw, alleged to have been sustained by the plaintiff because of the purchase by him from the said defendants of a certain tract of land alleged by said defendants (as it is claimed by the plaintiff) to contain between 86 and 87 acres, and described in the warranty deed given by the said Emma Shaw and her husband conveying said land to said plaintiff as "all of the south half of the northeast quarter of section 3, township 2, range 16 east of the 6th P. M." It is alleged in the petition that the plaintiff relied upon the representations and assurances of the defendant Henry Shaw, made to the said plaintiff as the agent of his wife, Emma Shaw, to the effect that the said northeast quarter of section 3 was a "long quarter," containing more than 160 acres, and that the south half of the said northeast quarter contained more than 80 acres; that said northeast quarter contained 172.73 acres, and that said warranty deed for the south half of said quarter should have contained and conveyed 86.37 acres, but only did contain and convey 79.73 acres; that the said northeast quarter contains 172.73 acres, but that said defendants had on February 12, 1907, sold and conveyed to one August Bucholz the north half of the northeast quarter of said section 3, township 2 north, of range 16 east of the 6th P. M., which "said deed, among other things, contained the following warranty: 'Said described land contains 93 acres, and if, upon a survey of the same, it does not contain 93 acres the said Shaw agrees to deed to the said Bucholz enough land adjoining this on the south to make 93 acres; that said deed was delivered on the date above mentioned, and is recorded in deed book No. — at page — of the deed records of Richardson county.'" "That by reason of the deed last above mentioned the said defendants did convey to him the south half of the northeast quarter of said section, which should contain 86.37 acres, but in fact said defendants owned only 79.73 in said

quarter, which is less than the land described in said deed, and less than the lands agreed to be conveyed in their said contract; that plaintiff is entitled to 6.64 acres more under said deed and contract than he now has. Plaintiff avers that the land so conveyed by said contract and in said warranty deed of conveyance is worth at this time $100 an acre; and that by reason of being deprived of the land so purchased by him under said contract in said warranty deed he has been damaged in the sum of $664." There was a prayer for judgment.

The defendants answered denying each and every allegation contained in the petition "except what may be hereinafter specifically admitted." They further allege that prior to August 6, 1907, they entered into a contract to sell to the plaintiff the south 80 acres of the northeast quarter of section 3, township 2, range 16, in Richardson county at the agreed price of $90 an acre, the "entire consideration being $7,200;" that the intention was only to convey the said 80 acres "at the agreed price of $7,200, which has been fully paid;" that the intention was not to convey to the plaintiff the south half of said quarter section, but "80 acres of land;" that said northeast quarter consists of lot 3 containing 46.67 acres, lot 4 containing 46.04 acres, and that the south part of the northeast quarter contains a slight fraction more than 80 acres; that said two lots 3 and 4, being the north forties of said northeast quarter, had previously been conveyed, as the plaintiff well knew, to August Bucholz (the deed to Bucholz describes them as lots 1 and 2); that the plaintiff well knew that he was only buying the remainder of the quarter which had not already been conveyed to Bucholz; that the line dividing the land conveyed to Bucholz from the land conveyed by the defendants to the plaintiff had been established according to the government survey, the north half containing over 92 acres and the south half containing a little over 80 acres. There was no reply.

A trial was had upon the issues joined before Judge Pemberton and a jury. A verdict was found for the plain-

tiff for $559. A motion for a new trial was filed by the defendants, and overruled, and thereupon the plaintiff had judgment for the full amount of the verdict and the costs.

It is stipulated that the south part of the quarter contains 80.29 acres. The evidence shows that the north forties, lots 3 and 4 (or 1 and 2 as the case may be), contain, respectively, 46.67 and 46.04 acres. It appears, therefore, that the alleged statement of the defendant Henry Shaw to the purchaser Kuhlman that the quarter was a "long quarter" was correct; but whether he informed the plaintiff of all that he knew concerning the amount of land contained in the south part of the quarter is something which invites further discussion later in the case.

It is contended by the appellants that the court erred in giving the third instruction upon its own motion as follows: "The court instructs you that, before the plaintiff can in any event recover a verdict against the defendants, he, the plaintiff, must prove by a preponderance of the evidence that the defendant Henry Shaw was the duly authorized agent of said Emma Shaw to make the sale of said premises to the plaintiff, and that said Henry Shaw did in fact make such sale as the agent of the said Emma Shaw." It is claimed by the defendants' counsel in their brief that Mrs. Shaw swears positively that Henry Shaw was not her agent to make the sale of this land, and that when Kuhlman was at her house she asked $90 an acre for the land. It is claimed that the husband must have been authorized by her in writing. The instruction in question seems quite favorable to Mrs. Shaw. It clearly puts the burden upon the plaintiff, and seems under the evidence to be wholly without prejudicial error to the defendants' case. Mrs. Shaw cannot claim and receive the benefit of her husband's persuasive and effective conversation without being liable for it. If the testimony of the witnesses for the plaintiff is true, Mrs. Shaw received, and is yet holding, the fruits of her husband's skilled tongue. The claim of counsel for the defendants assumes

the testimony of Shaw and his wife to be conclusive concerning the alleged fact that the husband was not his wife's agent in bringing about the sale, but this ignores the testimony of Kuhlman, Woodring, and Wamsler, and is seemingly an unwarranted assumption that there was nothing relating to this part of the case to submit to the jury. In this case the agency was attempted by the defendants to be made a question of fact, the determination of which rested upon conflicting testimony, and it would seem therefore to be proper that this issue should be given to the jury; but, if not, then the defendants could not have been prejudiced by it, as submitting the question to the jury gave the defendants a chance to win, which they could not otherwise have had.

The defendants claim that the court erred in refusing to give to the jury at their request instruction No. 4, as follows: "The jury are instructed that if before the plaintiff purchased the land in dispute he inquired as to how many acres were contained in the south half of the quarter section of land, and was informed by Bucholz that it contained 80 acres, or was informed when the conveyance was made in Whittaker's office that this governmental description of the land contained only 80 acres, then, in either case, the plaintiff cannot recover." It is contended by the defendants concerning this instruction that, at the time the deed was drawn in Whittaker's office, it was there stated in the presence of Kuhlman that he was buying 80 acres at $90 an acre; also, that Mrs. Shaw was there present, and, if Kuhlman had bought 86 or 87 acres for $7,200, it was then incumbent upon Kuhlman to inform Mrs. Shaw of this fact, and not to keep quiet and by his silence perpetrate a fraud upon her. As to what was said in Whittaker's office there is a dispute and the witnesses do not agree, and this question was submitted to the jury along with the other issues in the case, and they found against the defendants. The sixth instruction given by the court upon its own motion seems to cover the exact question contained in the request of the defendants. By

the sixth instruction the jury were told that if the plaintiff knew "that the whole quarter section contained about 173 acres, and that about 93 acres thereof were in the north half of said quarter section according to government survey, and only about 80 acres of it were in the south half of said quarter section according to government survey," then the verdict should be for the defendants. It would seem that this instruction fairly presented to the jury the question of what the plaintiff knew about the amount of land included under the description. There seems to be no legitimate cause of complaint because of the failure of the court to give the instruction requested.

The petition charges that the plaintiff suffered damages because of the false representations of the defendants. The evidence shows that Kuhlman went to Shaw's house, and that Shaw and Kuhlman talked together about the purchase of the premises in the presence of Shaw's wife. The wife, who is one of the defendants, therefore knew that her husband was negotiating for the sale of the premises. When Kuhlman, the purchaser, and Shaw met down town after dinner and Shaw continued the negotiations, it is claimed that he then told Kuhlman that if he bought the land he (Kuhlman) would not be paying $90 an acre for it because the northeast quarter was a long quarter, and that if he (Kuhlman) bought the south half he would get 86 or 87 acres. It is perhaps immaterial whether Shaw personally knew that his representations were untrue. *Foley v. Holtry,* 43 Neb. 133; *Carter v. Glass,* 44 Mich. 154; *Shippen v. Bowen,* 122 U. S. 575; *Johnson v. Gulick,* 46 Neb. 817. In *Phillips v. Jones,* 12 Neb. 213, it is said: "And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded, in a proper case, will be entitled to relief"—citing *Smith v. Richards,* 13 Pet. (U. S.) *26, *38; *Turnbull v. Gadsden,* 2 Strob. Eq. (S. Car.) 14; *McFerran v. Taylor,* 3 Cranch (U. S.) 281. This court quotes with approval from the last-named case that "he who sells

property on a description given by himself is bound in equity to make that description good, and if it be untrue in a material point, although the variance be occasioned by mistake, he must remain liable for that variance." *Phillips v. Jones, supra.*

Shaw, the husband, had no business to make the representations unless he knew them to be true, and if he did make them without knowledge upon the subject, and his wife received the benefit of these representations, then she ought to give up the benefit received. In *Williamson v. Allison,* 2 East (Eng.) 446, it was held not necessary either to aver or prove the scienter. Lord Ellenborough, C. J., said: "But, here, if the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale." And Le Blanc, J., said: "The insertion or omission of the fact of the defendant's knowledge at the time, that the wine was unfit for sale, according to the warranty, makes no difference in the cause of action declared on, and therefore it may be struck out altogether." The same rule as to averment and proof of scienter is laid down in the following cases: *Beeman v. Buck,* 3 Vt. 53; *West v. Emery,* 17 Vt. 583; *Johnson & Grimes v. McDaniel,* 15 Ark. 109; *Hillman v. Wilcox,* 30 Me. 170; *Newell v. Horn,* 45 N. H. 421; *Ives v. Carter,* 24 Conn. *392. The case of *Ives v. Carter* is instructive, while that of *Newell v. Horn* closely resembles the instant case.

It is claimed by counsel for the defendants that the wife sold the land herself, and she attempts to testify to that fact, but the evidence clearly shows that she knew that her husband was active in making the sale and that he was negotiating with Kuhlman. The husband seems to have done a large share of the talking at the residence.

The evidence shows a condition of things by which the jury were justified in believing that the representations were made and that they were untrue, and that the plaintiff believed them to be true, and that he bought the land because he relied upon the truth of the representations as made, and that he was injured because of the fact that he did not get 86 or 87 acres of land, which he understood that he was purchasing. He only got a fraction more than 80 acres. It is in testimony that the representations were made as alleged, that such representations were not true, that they were believed to be true, that the plaintiff relied upon them, and that he was injured. *Johnson v. Gulick*, 46 Neb. 817; *Stetson v. Riggs*, 37 Neb. 797; *Upton v. Levy*, 39 Neb. 331.

Quarter sections adjoining the north and west boundaries of townships may be fractional, and therefore may contain more or less land than is given to other quarter sections within the township, and are sold as surveyed according to their plats in the land offices. The northeast quarter of section 3 was such a quarter section, and the north half of it had been divided into lots, 46.04 acres in one and 46.67 acres in the other, making the north half of the northeast quarter contain 92.71 acres, according to the copy of the plat (defendants' exhibit 1), and the south half containing, according to the same copy, 79.58 acres, although the parties stipulated that the south part of the quarter contains 80.29 acres.

It may be argued with force that "the south half of the northeast quarter" is equivalent to "all of the south half of the northeast quarter," and that one set of words conveys all the land that might be conveyed by the other. The latter phraseology is the language used in the deed. We think that "the south half of the northeast quarter of section 3" means all the south half of the quarter, and that the use of the additional words "all of" before "the south half of the northeast quarter of section 3" added nothing to the meaning of the words used, but we can understand that these words may have been used to in-

duce the purchaser Kuhlman to believe that he was getting the full half of all the land included in the quarter section, instead of the smaller quantity of land properly designated by "the south half of the northeast quarter," and which words would not properly include part of the lots which together made the north half of the northeast quarter. The way of using this phraseology was one of the facts for the jury to consider in determining the good faith of the defendants. Kuhlman testified that he went to Shaw's house, and that Mrs. Shaw said her husband was asleep, and she went upstairs and got him, and that he came down and they talked about the sale of the land in her presence, and the price, and that he told them that $90 an acre was more than he was willing to give, as there were no improvements on the land, and that he stayed there until it was nearly noon, and that he was invited to dinner, but excused himself on the ground that he had other business to attend to, and that in the afternoon, about 3 o'clock, Shaw met him down town and said to him that he had better buy the land, that Shaw said, "Now, look here Kuhlman, that land won't cost you $90 an acre;" that Shaw then explained that it was a fractional piece and that he got half of the quarter, and thereupon that Kuhlman said, "If that is so, I will take it." "Well, he said that was a big quarter, and this half quarter would overrun 5 or 6 acres, he said." Then Kuhlman told him that he would take it. He also testified that, if Shaw had not said that it overran 5 or 6 acres, he would not have bought it. Kuhlman testified that Woodring and Dan Wamsler were present and heard the talk in the afternoon between Shaw and himself. They seem then to have gone to Whittaker's office to have the deed drawn, and Shaw said: "Now, I have got to phone for my wife to sign the deed." Woodring and Wamsler corroborated the evidence of Kuhlman. Mrs. Shaw, one of the defendants, corroborates the testimony of Kuhlman to the effect that her husband was out with Kuhlman, and that he made the arrangement for her to come up and make the deed. He

seems also to have been at the Shaw residence before and was trying to buy the land. Although Shaw testified to these things, she claimed that her husband was passing in and out of the house at the time the sale was made, and that she really made the sale herself. She says of her husband: "Yes, sir; he was in the house a short time, he was passing out, but when he came in we had the thing settled; he didn't have anything to say about the land, I always done my own business and sold my own land." It seems, according to her testimony, that Kuhlman came to the residence three times before the sale was finally completed. The testimony of the plaintiff and his witnesses is controverted in part, but it was for the jury to determine the facts, and they have done so. The court believes that the verdict is supported by evidence sufficient to sustain it.

We are unable to perceive any substantial error in the proceedings. The judgment of the district court is therefore

AFFIRMED.

LETTON, J., not sitting.

FAWCETT, ROSE, BARNES and SEDGWICK, JJ., concur in the conclusion.

GUSTAVE LANDMAN, APPELLEE, V. CITY OF BENSON, APPELLANT.

FILED MAY 13, 1912. No. 16,706.

1. **Appearance.** A general appearance by defendant waives all defects that appear upon the papers and record in the issuance of the summons and in its service, and gives the court jurisdiction, and in such case, where the defendant answers to the petition and the case is tried upon its merits, no objection to the service of the summons will be considered.

2. **Appeal: EVIDENCE.** Where there is no bill of exceptions containing the testimony, it will be presumed that the verdict rendered is sustained by the evidence.

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

Charles Haffke, for appellant.

S. I. Gordon, contra.

HAMER, J.

The plaintiff Landman, appellee in this court, sued the defendant, the city of Benson, appellant, before a justice of the peace in Douglas county. There was an appeal from the judgment of the justice of the peace to the district court. The plaintiff Landman filed his petition in the office of the clerk of the district court, alleging that the village of Benson had been incorporated as a city of the second class; that on July 18, 1906, while it was yet a village, it had by its agents and servants pumped a large volume of water from a well located about five blocks from the plaintiff's premises, and had allowed the same to spread onto and over the plaintiff's half acre of growing cucumbers, so that the same were destroyed, except about 40 or 50 plants, which were greatly damaged, without fault of the plaintiff and to the plaintiff's damage in the sum of $190, for which he prayed judgment with costs. It was objected by the defendant that there was no proper service of the summons, and a special appearance was attempted to be made in the district court by the city of Benson. It was overruled. The objection was a general one containing no allegation as to what may have been the particular objection to the service. The city of Benson filed an answer as to the merits, and the case was heard in the district court before Judge Willis G. Sears and a jury. There was no allegation in the answer showing the defect in the service, if any, and it does not appear on the face of the record that there was any.

It will be seen that, in any event, there was a general appearance by the defendant. "A general appearance by a defendant is a waiver of all defects in the issuance and

service of the summons, and gives the court jurisdiction." The above is the second point in the syllabus in *Omaha Loan & Trust Co. Savings Bank v. Knight*, 50 Neb. 342, and its application to the instant case determines the point raised adversely to the contention made by the appellant.

The petition states a cause of action, and it will be presumed, in the absence of a bill of exceptions showing the insufficiency of the evidence, that such evidence sustains the verdict rendered.

No error appears from the record, and the judgment rendered is based upon a verdict of the jury, which is not shown to be excessive. The verdict was for the plaintiff for $155. The plaintiff filed a remittitur for the excess above $75, and the judgment rendered was for $75 and the costs. There is no error complained of concerning the giving of instructions to the jury, and we have not been shown any cause to reverse the judgment of the district court, and it is

AFFIRMED.

FRED M. FITZGERALD V. STATE OF NEBRASKA.

FILED MAY 13, 1912. No. 17,506.

Kidnapping: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* insufficient to support the verdict.

ERROR to the district court for Hayes county: ROBERT C. ORR, JUDGE. *Reversed with directions.*

P. W. Scott, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

HAMER, J.

The plaintiff in error, Fred M. Fitzgerald, hereinafter

called the defendant, was informed against in the district court for Hayes county on the 13th day of November, 1911, in an information by the county attorney, who charged in the information: "That on the 9th day of September, 1911, in the county of Hayes, and state of Nebraska, Fred M. Fitzgerald, then and there being, did unlawfully, maliciously and fraudulently lead, take, entice and carry away one Alice Barrett, then and there being a female child under the age of eighteen years, to wit, the age of sixteen years, with the intent of the said Fred M. Fitzgerald unlawfully to detain said child from one W. B. Barrett, the father of said child, and then and there having the legal custody of said child, Alice Barrett, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The information was prepared and filed under section 20 of the criminal code, which reads: "Any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or decoy, or entice away, any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

Alice Barrett is shown by the evidence to have been a young lady 16 years old at the time of the commission of the alleged crime. She resided with her father and mother in Hayes county, Nebraska. Against the expressed wish of her father, she had a lover, Fred M. Fitzgerald. They had been lovers about four months. They became engaged to be married. As the father objected, they planned to elope. On the evening of September 9, 1911, the young lady left home with her brother and sister to go to a dance. The brother seems to have known that Alice was to meet Fred on the way to the dance. Alice and Fred had met in the same way once before. The brother seems to have had knowledge of the friendship entertained by

Alice for Fred. On the way to the dance Alice got out of her brother's buggy and got into a buggy with Fred. She was acting voluntarily, and seemingly without her brother's opposition. Fred and his prospective wife drove to North Platte, and from there they went by train to Missouri, where they applied for a marriage license, which was refused. Then they went to Nebraska City, where they procured a license, and they were married on September 11, 1911, and then they returned home to the residence of the husband in Hayes county, and about a quarter of a mile distant from the home of the bride's parents. When the bride's mother telephoned them to come over to the house, they both went over. There was no objection from Fred.

An examination of the section under which the information was filed shows that the criminal intent necessary to make the defendant guilty in such case is "to detain or conceal such child from its parent or parents, or guardian, or other person having lawful charge" thereof. The facts show that it was a case of eloping for the very natural purpose of getting married. The alleged criminal act was not done "maliciously or forcibly or fraudulently." Neither was it done to detain or conceal the young lady from her father. The going away was voluntary on both sides, so was the getting married, so was the returning; and, when the mother invited them home, the young husband and wife both appeared together at the paternal residence. They announced their marriage. There was no detention or concealment from the beginning to the end. The court is unanimously of the opinion that the section referred to is wholly inapplicable to this case.

The judgment of the district court is reversed and the case remanded, with directions to dismiss the information and discharge the defendant.

REVERSED.

J. ARTHUR TILLSON, ADMINISTRATOR, APPELLEE, V. CHESTER HOLLOWAY, APPELLANT.

FILED MAY 16, 1912. No. 16,691.

MOTION to recall mandate in case reported in 90 Neb. 481. *Motion overruled. Costs retaxed.*

PER CURIAM.

Plaintiff's motion to recall the mandate and modify our judgment is overruled.

The trial court should proceed to try the equitable defense stated in the opinion upon such material and competent evidence as may be offered.

Our judgment does not interfere with the discretion of the trial court to take the advice of a jury if that court finds it advisable to do so.

All other issues are determined. The result of the trial of the equitable issue will dispose of the action, and judgment should be entered accordingly.

The plaintiff's motion to retax costs is sustained.

MOTION OVERRULED.

HUGH MCCAFFREY ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,567.

OPINION on motion to modify opinion reported, *ante*, p. 184. *Motion overruled.*

PER CURIAM.

A motion has been made by the appellee to modify certain expressions used in the opinion in this case (*ante*, p.

184) relative to the meaning of the clause in the statute, "record owners of a majority of the taxable foot frontage of property upon such street or alley to be improved within said district." Comp. St. 1911, ch. 12*a*, sec. 108, subd. II. The actual controversy in the case is whether or not the city had power to make a special assessment on property lying outside of an improvement district for the purpose of paying for improvements within the district. It was decided, in substance, that in order to warrant an assessment for street improvements (outside of certain specified limits in the city) there must be a petition of property owners in the proposed district, that a street improvement district must be created, that the levy of taxes for such improvement must be confined to property within the district which has been specially benefited by the improvement, and that no taxes for such improvement can be levied on property outside of the district. It hardly seems necessary to say that not all arguments made or reasons advanced in the course of the written opinion in this or any other case are judicial determinations. It is not infrequent that lawyers argue propositions and judges discuss matters not absolutely necessary to the final decision of the case. Unless the judgment of the court rests upon such points, the expression of views in regard thereto in an opinion may be regarded as argumentative and as expressing tentatively only the views of the writer of the opinion in regard thereto.

In this case the points actually decided are clearly expressed in the syllabus, which covers the real controversy. Propositions advanced in the opinion not essential to the judgment pronounced are not to be regarded as final determinations or as legal precedents.

The motion is, therefore,

OVERRULED.

BARNES and ROSE, JJ., adhere to former dissent.

CREIGHTON UNIVERSITY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 29, 1912. No. 16,701.

Municipal Corporations: GRADING STREETS: DAMAGES: APPEAL. Section 213, ch. 12*a*, Comp. St. 1909, commonly called the Omaha charter, prescribes the method of taking appeals from the action of the city council in awarding damages to property owners, caused by the grading of streets in said city, and a compliance with the provision that a petition be filed in the district court within 30 days after the final order of the council assessing damages is necessary to the taking of an appeal.

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

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

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

REESE, C. J.

The following facts are shown by the transcript in this cause: On the 4th day of August, 1908, the city council of the city of Omaha passed an ordinance "establishing the grade of Twenty-fourth street from Burt street to Cass street in the city of Omaha." For the purpose of the decision of the question presented, it is not deemed necessary to notice the provisions of the ordinance more than to say that by it the grade of Twenty-fourth street within the points named appears to have been duly established; the ordinance taking immediate effect. On the 16th day of March, 1909, another ordinance was passed, and later approved, declaring the necessity of grading Twenty-fourth street from Burt street to Cass street, and appointing three members of the city council appraisers to assess and determine the damages, if any, to the property owners which might be caused by such grading, the city to pay one-half the cost and expense thereof. By the

ordinance three members were named as such appraisers to appraise, assess and determine the damages to property owners which might be caused by the grading of the street. It was provided that the ordinance should take effect upon its passage. Presumably on the 26th day of April, 1909 (although the date of filing is not shown), plaintiff presented to the committee on appraisal of damages its claim for damages in the sum of $22,800, the items of which are set out in the claim. On May 18, 1909, the city council met in regular session, when the committee on appraisal of damages to plaintiff's property made its report assessing the damages at $700, remaining in session one hour at the time of making the assessment. There is no showing in the record that any notice of this meeting of the committee or what its action had been or would be was given to plaintiff. The report was immediately approved by the council. On May 25, 1909, the council was again in session, when the mayor reported that he had approved the report of the committee. June 2, 1909, an appeal bond was filed and approved by the city clerk. June 8, 1909 (presumably), a notice of appeal was given the mayor and council and city clerk, although we find no evidence of its service. It is probable that no such notice was necessary. A transcript of the proceedings of the council was prepared by the city clerk, dated June 10, 1909, and filed in the office of the clerk of the district court on the same day. On the 2d day of July of the same year defendant (city of Omaha) filed in the district court its motion to dismiss the appeal, and objecting to the jurisdiction of the court upon the ground that "no petition was filed as required by section 213 of the city charter of the city of Omaha." On the 2d day of December, 1909, plaintiff filed its petition. On the 26th day of March, 1910, the motion to dismiss was sustained, and the appeal dismissed. Plaintiff appeals.

The cause has been elaborately briefed on both sides. But, as we view the question presented, it is not difficult of solution. The cause turns upon the provisions of sec-

tions 212 and 213 of the Omaha charter in force in 1909 (Comp. St. 1909, ch. 12*a*). Section 212 need not be here copied, as, so far as it relates to the subject before us, it simply gives the right of appeal in cases of this kind. Section 213 is as follows: "Whenever the right of appeal is conferred by this act, the procedure unless otherwise provided shall be substantially as follows: The claimant or appellant shall, within twenty days from the date of the order complained of, execute a bond to such city with sufficient surety to be approved by the clerk, conditioned for the faithful prosecution of such appeal and the payment of all costs adjudged against the appellant. Said bond shall be filed in the office of the city clerk. It shall be the duty of the city clerk, on payment or tender to him of the cost of the transcript, at the rate of ten cents per hundred words, to prepare a complete transcript of the proceedings of the city relating to their decision thereon. It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within thirty days from date of the order or award appealed from, and he shall also file such transcript before answer day. The proceedings of the district court shall thereafter be the same as on appeal from the county board. Any taxpayer may appeal from the allowance of any claim against the city by giving a bond and complying with the foregoing provisions. Provided, that the foregoing provisions shall not be so construed as to prevent the city council from once reconsidering their action on any claim or award upon ten days' notice to the parties interested."

The inquiry arises as to what step it is that is to be taken by an appellant in order to confer jurisdiction upon the district court? We take it as not to be questioned that the jurisdiction is obtained by the filing of some pleading or process therein. As appears therein, the section under consideration provides: "It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within

thirty days from date of the order or award appealed from," and he shall file the transcript before answer day. Thereafter the proceedings shall be the same as appeals from the county board. This provides a departure from the law of ordinary appeals. It is not the filing of the transcript that gives jurisdiction, for it may be filed at any time before answer day. The petition is the first filing to be made and that must be filed within the 30 days named. Until that is done the case is not in court nor within its jurisdiction. This seems to be the plain provision of the section. It is within the power of the legislature to make the change from the usual course of procedure. The provision is a special one, probably enacted for the purpose of expediting the settlement of questions which may arise in the matter of grading and paving streets. We can see no way of escape from its direction.

Our attention is called to the use of the word "substantially" near the beginning of the section. We are unable to see how it can be construed to mean that the requirement that the petition shall be filed in the district court within 30 days after the order of the council, which was made on the 18th day of May, could be even substantially complied with by filing the petition on the 2d day of the following December. True, the transcript was filed within the 30 days, but we are unable to see how that could aid plaintiff.

Defendant insists that preliminary to an appeal in any case of this kind a written protest should be filed by an abutting lot owner before the adoption of the report of the appraisement of damages, as provided by section 116 of the charter. As we have seen, the report of the committee was presented to and adopted by the council at the same meeting, and, so far as appears, in the absence of all notice to or knowledge of plaintiff. We refuse to consider that question. The ordinary rules of common fairness appear to have been grossly violated by the action of the council, and, if it is to be held that the right of appeal may be cut off in that way, it must be in some other case, not in this.

Upon the sole ground that the law requires the filing of a petition to be the first and jurisdictional act within the 30 days prescribed, and the petition was not so filed, the judgment of the district court dismissing the appeal must be, and is,

AFFIRMED.

LETTON, J., not sitting.

FAWCETT, J., concurring.

To hold as contended for by plaintiff would be to hold that the filing of the transcript is what gives the district court jurisdiction. I think that ought to have been the law, but it is not; and the fact that this method of taking an appeal to the district court stands alone in our statutes cuts no figure, as it is clearly within the power of the legislature to provide a different course of procedure in one class of cases from that provided in others. Now, what is the meaning of section 213, which, after providing that the appellant shall within 20 days execute a bond to the city, conditioned for the faithful prosecution of the appeal, and file the bond with the city clerk, and that it shall be the duty of the city clerk to prepare a transcript, further provides: "It shall be the duty of the claimant or appellant to file a petition in the district court *as in the commencement of an action* within thirty days from date of the order or award appealed from, and he shall also file such transcript *before answer day?*" (The italics are mine.) To my mind, it is clear that by this statute the filing of the petition is the commencement of the action in the district court; or, if you choose to put it in another way, the institution of the appeal in that court. If the legislature had intended that the filing of the transcript should constitute the institution of the appeal in the district court, it would have reversed the order of filing the petition and transcript, and would have provided within what time *after* the filing of the transcript the petition should be filed. If the filing of the petition is not the commencement of the appellate proceeding in the district

court, then how are you going to determine when the transcript should be filed? The statute says it must be filed before answer day. What fixes the answer day? The petition, of course, as there is nothing to answer until a petition is filed.

The provision in section 213 reads: "It shall be the duty of the claimant or appellant to file a petition," etc. To my mind that is the same as if it had read: "The claimant or appellant shall file a petition in the district court," etc. In other words, where the statute says it *shall be* the *duty* of the appellant to do a certain thing, it is the same as if it had said, he *shall do* that thing.

It is urged that section 116 is the one which permits an appeal. It does permit appeals but it does not prescribe the procedure. Section 212 also permits appeals, but it too fails to prescribe the procedure. Then comes section 213 and prescribes the procedure under both sections. It provides: "Whenever the right of appeal is conferred by this act, the procedure unless otherwise provided shall be substantially as follows." The words, "unless otherwise provided," must in reason be held to mean, unless otherwise provided in this act.

I dislike very much to prevent a hearing of this case upon its merits, and would be glad if I could see my way clear to sustain plaintiff's contention, but it cannot be done without distinctly and definitely amending section 213. This we have no right to do.

SEDGWICK, J., dissenting.

It appears that the plaintiff executed its bond for appeal which was duly approved and filed, and also procured a transcript and filed the same in the district court, all within the 30 days. It failed to file a petition within the 30 days, and for this reason the appeal was dismissed. We ought not to keep a party out of court upon a technical objection if he has in good faith substantially complied with the statute. The opinion in this case is placed en-

tirely upon the section of the statute, which is 213 of the Omaha charter (Comp. St. 1909, ch. 12*a*). This section purports to provide the proceedings in the case of appeals. It says that the claimant or appellant *shall* execute a bond, etc., within 20 days. The bond must be approved by the city clerk and *shall* be filed in his office. Then it is the *duty* of the city clerk to make a transcript, and it is the *duty* of the appellant to file a petition in the district court, and he *shall* also file a transcript. The question is, what constitutes the appeal? Of course, it is not the duty of anybody to appeal, that is optional; but, after one has appealed, then it is his duty to file pleadings, and it seems to me that in providing that it would be the duty of the appellant to file a petition within the 30 days it is assumed that the appeal is taken by the other proceedings. If he wants to take an appeal he *shall* give the bond, have it approved, and *shall* file a transcript. If it is his duty to file a petition, that cannot be a necessary part of the appeal, because it is not the duty or any part of the duty of anybody to appeal from a decision, so I conclude that the statute intends that he has taken his appeal by other steps, and that, the case being appealed, it is his duty to file his pleadings. If filing the petition in the district court is taking an appeal to the district court, it is a novelty, no other such instance being found in our statute. There are, however, many instances of taking an appeal by filing a bond in the trial court, taking a transcript and filing it in the district court. The question is difficult; it is a peculiar statute. The appellant has given the bond and filed the transcript within time. We therefore should construe the statute so as to allow a hearing upon the merits rather than to defeat the action upon a technicality.

HAMER, J., concurs in this dissent.

FRANCIS J. BURKLEY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 29, 1912. No. 16,702.

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

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

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

REESE, C. J.

This case was submitted with *Creighton University v. City of Omaha, ante,* p. 486. It involves the identical question presented in that case, and is decided the same way.

The judgment of the district court is

AFFIRMED.

SEDGWICK and HAMER, JJ., dissent.

MAYME FITZGERALD, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 17,497.

1. **Appeal:** SECOND APPEAL: LAW OF THE CASE. The decision on a former appeal of the same case upon the question of the right of the plaintiff to maintain the action becomes the law of the case upon that subject, and will not be further considered.

2. **Death:** ACTION FOR DEATH: INSTRUCTIONS. Under the facts admitted and proved, it was established that the decedent was killed while in the line of his employment and duty as a railroad brakeman, and without negligence on his part. It was not error, therefore, for the court to instruct the jury that the decedent was killed without negligence on his part while he was acting under the direction of those in charge of the engine and cars

where he was working. Under the issues and evidence in the particular case, the instruction was devoid of prejudice.

3. ———: ———: NEGLIGENCE: QUESTION FOR JURY. The decedent was killed while making a coupling of an engine to a train of cars standing upon a railroad track. If the train of cars was unmolested, as he had a right to expect, he was working in a safe place and was guilty of no negligence in working there. There was evidence tending to show that a train standing upon a track, with an engine in front, was, under the customs and rules of railroading, a signal or warning that the train was "a live train" and should not be molested or other cars coupled on to it, unless so directed by the crew in charge of the standing train. This was a question of fact to be solved by the jury. If such rule did exist, the butting of a train of many cars against such train for the purpose of coupling onto it, without the consent from the crew of the standing train, would be an act of negligence.

4. **Remittitur.** Under the evidence, as referred to in the opinion, the judgment of the district court for $4,000 is held to be excessive, plaintiff having already received $4,400, and a remittitur of $300 is required, upon failure of which the judgment is reversed. If the remittitur is filed, the judgment for $3,700 will be affirmed.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This action was instituted in the district court for Douglas county. There have been two trials. On the first trial the court instructed the jury to return a verdict in favor of defendant, which was done and the cause was dismissed. From that judgment plaintiff appealed to this court, and upon a hearing here the judgment was reversed and the cause remanded for further proceedings. The case is reported in 89 Neb. 393. The facts as to the accident which caused the death of Martin Fitzgerald, and

for whose death the action was brought, are sufficiently stated in that opinion and need not be repeated here. Upon the second trial the jury returned a verdict in favor of plaintiff for the sum of $8,100. On the hearing of the motion for a new trial the court required a remittitur of $4,100 from the amount of the verdict, or that upon failure to so remit by plaintiff a new trial would be granted. Plaintiff filed the remittitur, and judgment was rendered for $4,000. Defendant appeals.

The question of plaintiff's right to maintain this action, unaffected by the settlement with the Chicago, Burlington & Quincy Railroad Company and the receipt of the fruits of that adjustment, was adjudicated in the former appeal, and the decision thereon has become the law of the case and must be considered settled. The subject will not be re-examined.

There was no eye-witness to the death of decedent. Others were present immediately thereafter—perhaps within a few minutes, or possibly seconds—and removed the body from the track between the cars. Death must have been instantaneous, as the head was crushed and the brain forced therefrom. The indications are that the arrival of the first person upon the scene must have been within a few seconds after the accident. The Burlington engine was standing at the north end of the string of cars to which it had been or was to be attached. It is not shown that any member of that crew, except decedent, was present, and he was not in sight of defendant's crew, he being between the front car and the Burlington engine adjusting a chain coupling; the coupling of that car having been broken and disabled. He was evidently in the discharge of his duty to his employer, and, if the cars were unmolested, in a safe place. At that moment a train of cars, being pushed by an engine of defendant, and which was in charge of a crew, was sent against the rear of the string or train of cars, of which the disabled car formed a part, with such force as to drive that car against the engine, thus crushing and instantly killing decedent.

It is urged that the fact of his position between the disabled car and the Burlington engine establishes the defense of contributory negligence on his part. Upon this part of the case, while the testimony of witnesses was conflicting, there was evidence sufficient to support a finding that, where a train is standing upon a track, with a locomotive in front of it, this is equivalent to a "flag" or warning to those in charge of other cars not to couple on or in any way molest the train or cars without the consent of the crew in charge of such train; that the engine being or standing in front renders it what is termed "a live train," and which must not be molested. If this were true, and of that the jury were the sole judges, the decedent was justified in believing that the train would not be molested and he could safely enter the space between the car and engine and make the chain coupling, and therefore he would not be guilty of contributory negligence. If by the same evidence the jury were satisfied that such a rule did exist, and the crew of defendant's train saw the engine in front, did not receive any signal authorizing them to couple onto the cars, but negligently drove their train, consisting of a long string of cars, against the standing train in violation of such rules, and thereby the decedent was killed in the discharge of his duty, this would support a finding of negligence on their part. This question was also for the consideration and determination of the jury, and with their finding, under the circumstances, we cannot interfere. There is no evidence of contributory negligence on the part of decedent, and there is sufficient to sustain the finding of the want of care on the part of defendant.

In the first instruction given to the jury, in which the issues presented by the pleadings were stated, the court used this language: "Martin Fitzgerald, you are instructed, came to his death in October, 1907, as the result of a train of cars under the control of defendant's servants being intentionally propelled against another number of cars that were in close proximity and on the same

track with an engine under the control of the servants of another. The deceased was killed by the impact and without any negligence on his part, while he was in the act of fastening the forward one of the cars to the engine with a chain, under the direction of those in charge of the engine and cars where he was working." This part of the instruction is strenuously objected to upon the ground that it took the question of contributory negligence from the jury. While it is true that all questions of fact at issue in the pleadings and evidence are for solution by the trial jury, yet, where there is nothing in either which would sustain any other finding than that contained in the instruction, there could be no possible prejudice in giving it. As we have hereinbefore said, there was no proof of contributory negligence on the part of the decedent, nor were there any facts proved from which such negligence could be inferred. The further language in the instruction that the accident occurred while the decedent was in the act of coupling the cars "with a chain, under the direction of those in charge of the engine and cars where he was working," is also objected to. We are unable to see that the objection is meritorious. The proof clearly shows that decedent was acting within the line of his employment. It is alleged in the answer that "when the switching crew of said railroad company, of which deceased was a member, approached the north end of said string of cars which they were about to remove from the transfer track No. 1, they discovered that the drawbar was out of the car on the north end of said string of cars and that said train could not be moved until a chain was attached to said car," and that after said chain was attached the decedent went between the cars for the purpose of coupling or assisting in making the coupling, and, while "so engaged in the attempt to make said coupling, said north end was, by reason of another train operated by the defendant herein coming against the south end of said string of cars, driven against the said engine, and the said decedent was caught and crushed between said car

and engine, causing his instant death; that while decedent was working on said car the railroad company negligently and carelessly failed to display, or cause to be displayed, any signal or flag for the purpose of notifying or informing other crews operating in said yard not to disturb the train upon which the said Fitzgerald was working." If, under the state of facts disclosed, there was any question as to by what direction or authority the decedent was engaged in seeking to couple the cars, these averments by defendant would remove all doubt. The language used in the instruction could prejudice no one.

The next, last and most perplexing contention presented by this record is that the damages awarded by the judgment of the district court are excessive. As is shown by the former decision in this cause, the railroad company paid to the parents of the decedent, during the lifetime of his mother, the sum of $4,400. It is also shown by this record that the relief department of that company paid her the sum of $2,200. This latter sum was in the nature of an insurance for which decedent had paid, and we do not think it should be here considered. But the $4,400 paid as damages is entitled to consideration. Before the trial from which this appeal is taken, the mother of the decedent died, leaving the father and some minor children surviving her, but none of the children are of tender years, the youngest being 15 years of age at the time of the trial. The father was 53 years of age, in bad health, and yielding little for the support of the family. The decedent appears to have been a bright, competent, well-educated young man, and by his efforts the family were, to a great extent, supported. There is some conflict as to what his earnings from his employers were, but enough is shown to make it appear that the members of the family remaining at home were practically supported by him. Complaint is made that the proof of the bad health of the father is not sufficient. That he failed to contribute to the support of the family to any great extent is clearly established, as well as the fact that he is without property.

The daughter, who is the administratrix *de bonis non* of decedent's estate, was asked as to the condition of her father's health, and her answer was: "My father has not been well for the last 20 years." She was then asked as to the present condition of his health, and she answered: "He is not well." On cross-examination she was not asked anything as to the health of her father, the inquiry being confined to what he had contributed, or failed to contribute, to the family. The way was open for further inquiry into his condition, but no questions were asked. So we are required to accept it as fact that he is not well and has not been for 20 years. As we have seen, the verdict of the jury was for $8,100. The amount paid by the railroad company was $4,400. The court required a remittitur of $4,100 from the verdict, leaving a judgment for $4,000. We can hardly presume that it was the intention of the jury to find that the damages were $8,100 plus the $4,400 received from the railroad company, which would equal $12,500 to be received by the estate, when we consider the number, ages and ability of the surviving members of the family. The $4,400 added to the sum of $3,700 would equal the amount of the verdict. From these considerations we are led to believe that it was the purpose of the jury to find the whole damage was the sum of $8,100.

The judgment of the district court will therefore be reversed and the cause remanded for further proceedings unless the plaintiff within 50 days enter in this court a remittitur of $300. If such remittitur is filed, the judgment of the district court will be affirmed for $3,700. The costs of this appeal to be taxed to plaintiff, all other costs to be taxed to defendant.

AFFIRMED.

LUCY J. MILLER, APPELLANT, V. JACOB MILLER, APPELLEE.

FILED MAY 29, 1912. No. 16,719.

1. **Divorce: ALIMONY.** In an action for divorce and alimony, the trial court should consider all of the facts in evidence as to the property rights of the parties, the sources from and the manner in which their property was accumulated, and may exercise reasonable discretion in dividing the property between them.

2. **Appeal: TRIAL DE NOVO: ALIMONY.** When a party appeals from that part of a decree relating to the division of property only, this court will try that issue *de novo* upon the record, and if the decree of the district court is found to be in substantial accord with justice and equity it will be affirmed.

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

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

BARNES, J.

This action was brought in the district court for Lincoln county for a divorce and alimony. The plaintiff had the judgment; but, being dissatisfied with the amount of the property awarded to her as alimony, has prosecuted this appeal.

Neither party assails that part of the decree granting plaintiff a divorce, but it is contended by her counsel that the decree, so far as it relates to the question of alimony, is unjust and inequitable; that it does not properly take into consideration the amount of money contributed by plaintiff to or paid by her for the purchase of a part of the common property, and this is the only question presented for our determination.

A trial *de novo* on the record brought here upon the appeal discloses that plaintiff and defendant were married in Cass county on the 14th day of February, 1884;

that on or about the 1st day of April of that year they moved to and settled upon the north half of section 11, township 16, range 27 west, in Lincoln county, Nebraska, they having previously entered that tract of land. In due time they made their final proofs and received a patent therefor under the laws of the United States. They continued to live upon the tract of land above described, and cultivated and improved it to some extent until about the 1st day of January, 1894, when the defendant was elected sheriff of Lincoln county, and they thereupon moved to North Platte, and the defendant held and filled the office of sheriff for a period of four years. Shortly after the expiration of his term of office they moved back to the homestead. For a period of nearly three years after leaving the sheriff's office the defendant was employed by the Union Pacific Railroad Company, and for a portion of that time was deputy United States marshal in the state of Wyoming. Before he was elected sheriff, and while residing upon the homestead, defendant supported his family by working at his trade as a blacksmith. During the period of his employment by the Union Pacific Railroad Company and as deputy United States marshal, defendant received a salary of from $60 to $75, and finally $100 a month. During a part of this time the plaintiff remained upon the homestead, and a part of the time lived in Cheyenne, Wyoming, with the defendant. Finally, in the year 1903, the parties returned to the homestead and occupied it as such until the commencement of this action, when they differed upon matters relating to religion, and the defendant left their home and has since resided with a relative in Lincoln county. The plaintiff continued to live upon the homestead, and still makes it her home. When the parties first moved to the homestead the plaintiff had a stove, some cooking utensils, some bedding and dishes, and six cows. The defendant had one span of ponies, one wagon, his blacksmith tools, three cows, one heifer, some notes and school orders, and some money amounting to about $400. The defendant, with his

earnings as a blacksmith, as sheriff of Lincoln county, as a detective for the Union Pacific Railroad Company, and deputy United States marshal of Wyoming, kept the family, improved the homestead, and with a portion of his earnings purchased other lands, then of little value, and which he owned at the time of their separation, amounting to 1,000 acres, situated in Lincoln county. Three children were born to the parties, and two of them were minors at the time this action was commenced. At the time of the marriage the plaintiff had a minor son named Frank Brazelton, the issue of a former marriage, who was raised and educated in the defendant's family. About the year 1899 the defendant built a good substantial frame dwelling upon the homestead, and later on built a store building, barn and other outbuildings upon the premises. It further appears that in August, 1905, the defendant had become indebted by reason of making the improvements upon the homestead and for living expenses to an amount of about $3,000. To develop a deposit of tripoli situated upon a part of his land, the defendant also borrowed $2,000 from one R. C. Peters, to be repaid in five years, and to secure the payment thereof the plaintiff and defendant executed and delivered to Peters a mortgage covering the homestead, and all other lands owned by the defendant, except a 200-acre tract in section 15, township 16, range 27; and, in order to pay such indebtedness, the defendant desired to sell the homestead. It further appears that the plaintiff had inherited 80 acres of land from her father, which was situated in Cass county; that she thought it was better to sell her Cass county land and use the money for the purpose of paying their debts, and thus retain the homestead. To this the defendant consented, and plaintiff thereupon sold her land in Cass county for $5,000, and turned the money over to the defendant. It is contended on her part that with this $5,000 she purchased the homestead, while defendant contends that she gave him the money to pay the debts, and desired him to secure the repayment of it by

deeding the homestead to her, which was accordingly done, and at the time this action was commenced the plaintiff had the title to the 320-acre homestead.

The decree, from which appeal is prosecuted, gives the plaintiff the homestead, consisting of 320 acres of land with all of the buildings and improvements, valued at the lowest figure at $10,000, and personal property and money worth at least $1,312, while the defendant is given 1,000 acres of unimproved land, valued at $6,800, and personal property amounting to $1,187, making a total of $7,987, out of which he is required to pay the Peters mortgage of $2,000, and the costs of this case. The decree also provides that, if necessary, defendant's part of the real estate shall be sold for that purpose. It thus appears that plaintiff's share of the property amounts to $11,312, while defendant is given only $7,987 worth of property, consisting of unimproved land and some personal property; that when he pays the costs of this litigation and the Peters mortgage there will remain to him only a tract of unimproved land, worth about $5,000. Counsel for the plaintiff insists that the fact that she purchased the homestead, as she claims, with the $5,000 which she received for her Cass county land, entitles her to a greater share of the property than she is given by the decree. It appears from the record, however, that the defendant used the $5,000 to pay all of their debts except the Peters mortgage of $2,000, and turned the balance over to the plaintiff, which was used to complete the improvements on the homestead, to aid the plaintiff's son, by her former husband, in business ventures to the amount of $400 to $500, and for the living expenses of the family. It would therefore seem that in equity and good conscience the homestead, with its increased value, sufficiently compensates her for the money she contributed for their common good.

We are therefore of opinion that the decree of the district court was just and equitable, and it is in all things affirmed. We are also of opinion that the record presents

a litigable question, and for that reason each party will be required to pay the costs which he has incurred in this court.

AFFIRMED.

REESE, C. J., dissents.

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

FILED MAY 29, 1912. No. 16,892.

Mortgages: FORECLOSURE: REDEMPTION. One who takes and records a deed to real estate (subject to a mortgage) in the name by which he is generally known and transacts all of his business, and thereafter pays no part of the mortgage debt, no taxes upon the land, and for his default the mortgage is foreclosed and the premises are sold in a proceeding against him by that name, cannot, after the lapse of nearly ten years, maintain an action to redeem against the grantee of one who purchased the land at the foreclosure sale, relying upon the validity of the decree, on the sole ground that he was not sued in the foreclosure proceedings by his full Christian name instead of the name by which he was designated in his deed.

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

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

Joseph Wurzburg, W. A. Meserve and *J. F. Green, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Knox county denying the plaintiff the right to redeem the land in question herein from a decree of foreclosure rendered by the district court of that county at its September, 1895, term, and from a sale of the mort-

gaged premises on that decree had and made in December of that year. It appears that in the foreclosure proceedings the plaintiff was sued by the name of J. S. Clark, and service on him by that name was made by publication. He now alleges that his true name is "James Samuel Clark," and this is the sole ground upon which plaintiff bases his right of redemption. The findings and decree were for the defendant, and appear to be fully sustained by the evidence. The facts of this case, as found by the trial court, bring it clearly within the rule announced in *Mansfield v. Kilgore,* 86 Neb. 452, and *Stratton v. McDermott,* 89 Neb. 622.

Therefore, the judgment of the district court was right, and is, in all things,

AFFIRMED.

JACOB RAYLES, APPELLEE, V. ADELIA RAYLES, APPELLANT.

FILED MAY 29, 1912. No. 16,692.

1. **Divorce: ALIMONY.** In an action for divorce and alimony, the trial court may consider all the facts in evidence as to the property rights of the parties and render such decree as may be just and equitable, irrespective of the question whether or not a decree in an action between them several years before had settled their property rights up to that time.
2. **Evidence** examined, and *held* that the decree of divorce and for alimony rendered by the district court is not erroneous.

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

Byron Clark and *Sullivan & Squires,* for appellant.

Matthew Gering and *Mockett & Peterson, contra.*

LETTON, J.

This is an action for divorce and alimony. A decree

was rendered dissolving the bonds of matrimony, and alimony was awarded defendant in the sum of $1,000. Defendant appeals.

The parties were married in Lancaster county in the year 1891. This was the plaintiff's third venture in the matrimonial field. At the time of this marriage he was about 60 years old. He had one son living, the issue of the first marriage, and two daughters, the issue of the second marriage; all were of full age and married. The defendant at the time of the marriage was about 40 years of age, and was a widow with two minor children. Two children resulted from the marriage with plaintiff, one of whom died before the trial of this case and the other is still living. At the time of the marriage the plaintiff lived in Cass county and the defendant lived in Lancaster county, Nebraska, and after the marriage they took up domestic life at the husband's home. On the day before the marriage the parties entered into an antenuptial contract. It is unnecessary to set this forth *in extenso*, but, in substance, it provided that Rayles should allow the children of Mrs. Ward to live in the home to be provided by him, and that during their minority he should support, maintain, clothe and educate them in the same manner as if they were his own; that he should provide his wife with a home, provide by will or otherwise for her comfort and support after his death; that if there should be any children of the marriage, they should be equal heirs with the children now living and should not be disinherited; and it was further agreed that Mrs. Ward released all her rights, both in law and equity, to all the property that Rayles then had or might thereafter acquire if he should make the provisions for her support and that of her children as contemplated in the agreement; that he should have the right to acquire and convey real estate the same as if the contract of marriage had never been entered into between them, and that she would sign all deeds conveying real estate, and for that purpose she agreed to execute a power of attorney to him authorizing him to execute

such deeds. On the same day she executed a power of attorney carrying out the provisions of the contract. After the marriage they lived in Cass county a few years, and subsequently moved to Custer county where plaintiff owned a farm.

In 1906 the defendant began a divorce action against the plaintiff in the district court for Custer county. While this action was pending a contract was entered into, signed by the plaintiff and by the defendant's attorney, which recited that the parties had found it impossible to live together as husband and wife, that the husband agreed to convey to his wife certain horses and other personal property, and that the wife should retain certain other specified personal property. He agreed to give her $100 in cash and to convey to her a certain 80 acres of land in Custer county, reserving the granary and other property thereon; and the wife agreed to receive the property described in satisfaction of all interest in the estate of the husband, and, in case there should be a divorce, in satisfaction of all claims for alimony. The agreement also made several other minor stipulations. Afterwards, on June 4, 1906, after certain negotiations with reference to the divorce action then pending, this agreement was ignored and another contract made. This agreement recited that Rayles at that time deeded to his wife the 80 acres referred to in the contract of May 29. Both parties agreed to keep peace in the family, and plaintiff agreed to cease the use of intoxicating liquors to excess. It recited that the wife owned about 30 head of cattle, but at the request of her husband she agreed to dispose of part of the same. She further agreed not to again begin divorce proceedings as long as he behaved himself, and, if compelled to begin such proceedings, then in allowing alimony the land deeded should be taken into consideration by the court. He also agreed to pay her $50 and her attorneys' fees in the divorce suit amounting to $100. The divorce case was then dismissed.

On October 29, the same year, Mrs. Rayles began an-

other divorce suit in Custer county. A cross-petition was filed by Rayles. Before a decree was rendered Rayles executed and delivered to the two children of their marriage, Adelia Rayles, Jr., and Jacob Rayles, Jr., conveyances to three 80-acre tracts of land in Custer county, reserving to himself a life estate therein. The court found against each of them and denied a divorce. It further found that the conveyances made constituted an equitable division of the property to Mrs. Rayles and the two children of the marriage, and ratified and approved the same. It also divided the personal property specifically in the decree, refused to charge maintenance while the parties lived apart, and adjudged that the husband pay the costs. No appeal was taken from this decree. Afterwards, the husband removed to the farm in Cass county, and in May, 1909, filed his petition in that county praying for a divorce on the ground of desertion and cruelty, and setting forth the antenuptial agreement, the contracts between the parties, the Custer county decree, and the division of the property. An answer was filed resisting the divorce, but praying for alimony if the plaintiff be given a divorce and a reply pleading *res adjudicata* and inability to pay alimony.

The defendant complains that the decree of divorce is not sustained by the evidence, and that the amount of alimony is inadequate. On the other hand, by a cross-appeal the plaintiff complains that the court erred in disregarding the antenuptial contract, the subsequent contracts made, and the final decree of the district court for Custer county, and in allowing alimony; and insists that the divorce should stand, but that the decree allowing alimony should be reversed.

We deem it unnecessary and inadvisable to set forth at length the evidence as to the unhappy conditions in this family, extending over a long period of time. It is not an infrequent occurrence that where parties in advanced life, each with a family of children of their own, contract a matrimonial alliance, they, after marriage, find that

their tastes, habits and individual characteristics have become so settled and fixed by the lapse of years that it is almost impossible for them to yield or modify the same for the comfort and happiness of the other contracting party. Such a situation often requires sacrifices that many are disinclined to make. The only wonder in this case is that they were able to get along as well as they did for as long a period of time as they lived together. It is probably true, as the defendant insists, that it is difficult to distinguish wherein one party was more guilty of cruelty than the other. Apparently both were not free from fault. Considering the fact that in the eye of the law the husband is the head of the family, and that he is vested with the authority and power to fix the domicile, and that, while the evidence is conflicting, there is testimony that when the plaintiff proposed to move from Custer county (where their disputes and jangles had apparently become notorious) and start life anew in another locality the defendant refused to do so, and that when he moved to Cass county the defendant refused to follow him, we think the evidence sustains the decree of divorce. The evidence is by no means strong, but when all the circumstances are considered we think it sufficient.

Upon the question of the amount of alimony: The appellant concedes that, in determining the amount of alimony that should be allowed, the value of the 80 acres conveyed to her should be taken into consideration, but urges that the court should also consider the value of the estate, the plaintiff's annual income, and the extent and value of the defendant's labor in acquiring the property. Plaintiff insists the contracts and decree in Custer county settle these property rights, and that defendant is entitled to nothing further. When the husband left Custer county he owned 160 acres of land in that county in fee and a life estate in the 240 acres conveyed to the children of this marriage. One of the children having died, the plaintiff and the defendant each inherited one-half of his estate, so that plaintiff then owned 220 acres in

Custer county, with a life estate in 180 acres more. On the other hand, the defendant had received 80 acres in Custer county by conveyance from the plaintiff and 60 acres by inheritance from the deceased son, so that at this time she owns 140 acres of land in Custer county, of which 60 acres is subject to the plaintiff's life estate. It also appears in the testimony that the plaintiff has conveyed the 80 acres in Cass county and the other 160 acres in Custer county to his children by his former marriages, subject to a life estate in himself, so that at the time of the trial the only farm land the plaintiff possessed in fee simple was the 60 acres which he inherited from his deceased son. The deeds are not in evidence, but the plaintiff so testified and the facts seem to be conceded. It appears also that he had been receiving about $2.50 an acre rent, and that he was paying taxes amounting to about $200, as well as paying for improvements and repairs on all the land except that conveyed to his wife. Since leaving Custer county he also purchased a home in the village of Greenwood.

As to plaintiff's contention that the Custer county decree settled the property rights and was final, and that the district court for Cass county was bound thereby, we are of opinion that the district court was entitled to consider the changed conditions at the time of the trial and to award such further relief to the defendant as in equity seemed proper. In the absence of any contract or agreement between the parties, we should be inclined to hold that the award of alimony should be increased to some slight extent, but after considering all the elements in the case, including the several contracts and the division of both real and personal property made in 1906, we are satisfied that the district court made an equitable apportionment, and that neither the appeal of the wife nor the cross-appeal of the husband should be sustained.

For these reasons, the judgment of the district court is

AFFIRMED.

DANIEL B. DUFFY, APPELLEE, V. FRED SCHEERGER, APPELLANT.

FILED MAY 29, 1912. No. 16,745.

1. **False Imprisonment:** EVIDENCE. The defendant filed a complaint which failed to charge a criminal offense before a justice of the peace, upon which he requested that a warrant be issued. This was done, and at his direction plaintiff was arrested and held in custody for several hours. Defendant failed to appear upon the hearing and the plaintiff was discharged. *Held*, That the facts in evidence sustain a verdict on a cause of action for false imprisonment.

2. **Limitation of Actions:** FALSE IMPRISONMENT: AMENDMENT OF PETITION. Where a petition stating a cause of action for false imprisonment is filed within one year from the time the cause of action accrued, the filing, after the expiration of one year, of an amended petition amplifying the allegations is not the beginning of the action, and the cause of action is not barred.

3. **Malicious Prosecution:** ACTING ON ADVICE OF COUNSEL. As a general rule, "one who, before instituting a criminal prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution." *Jensen v. Halstead*, 61 Neb. 249.

4. **Appeal:** MOTION FOR NEW TRIAL: RECORD. Affidavits purporting to have been used in support of a motion for a new trial, but which are not included in a bill of exceptions settled by the trial judge, cannot be considered.

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

Willis E. Reed, for appellant.

J. C. Engleman and *Mapes & Hazen, contra.*

LETTON, J.

This is an action for malicious prosecution and false

imprisonment. The first cause of action alleges that the plaintiff, on the 11th day of October, 1906, was arrested and imprisoned upon a warrant issued upon the following complaint: "The complaint of Fred Scheerger made before me, E. G. Dennis, a justice of the peace in and for Madison county, who, being sworn, deposes and says that on the 10th day of October, 1906, in the county of Madison, and state of Nebraska, D. B. Duffy, Elwood Duffy and William Duffy, did, by force, take and carry away one safe belonging to complainant, and still withholds the same. Fred Scheerger. Subscribed in my presence and sworn to before me this 10th day of October, 1906." That at the time the complaint was filed the defendant requested that a warrant for the arrest of plaintiff be issued, and that pursuant to the request the warrant was issued and delivered to a constable, who arrested the plaintiff and kept him in custody from 10 o'clock in the forenoon until 2 o'clock in the afternoon of that day; that the complaint did not charge a criminal offense, and that the arrest was made with improper motives and with the malicious purpose to coerce plaintiff into the giving of security upon an obligation in defendant's favor.

The second cause of action is for malicious prosecution on the charge of unlawfully selling and disposing of mortgaged property without the consent of the mortgagee. It is alleged that a warrant was issued on this complaint, that plaintiff was arrested and a trial had and plaintiff acquitted of the charge. Damages are laid at $2,087.80.

The answer is a general denial, except that it is admitted that the defendant signed the complaint set forth in the first cause of action, and that such complaint does not state a public offense under the laws of the state of Nebraska. The defendant also admits signing the complaint alleged in the second cause of action, the issuance of a warrant and arrest of plaintiff thereupon, the final hearing and the acquittal and discharge of the plaintiff. As a defense, however, the answer pleads a full, fair and honest disclosure to the county attorney of all the facts

within the knowledge of the defendant, and that upon his advice as county attorney the complaint was drawn by that officer and sworn to by the defendant, and that the prosecution was had in all respects in the utmost good faith; that the defendant is a German, who cannot speak or understand the English language very well and had no knowledge of legal terms and phrases, and that he relied upon the counsel and advice of the county attorney and of one Kilbourn, a practicing attorney, to whom he fully disclosed all the facts within his knowledge, and that he took no steps to prosecute the plaintiff without such advice. The statute of limitations is also pleaded as to the first cause of action. The jury found for the plaintiff on both causes of action, and assessed his damages on the first at $417 and on the second at $583.

It is contended that the first cause of action did not accrue within one year after the wrong complained of and is barred by the provisions of section 13 of the code. The original petition in the case was filed in March, 1907. The wrong was committed in October, 1906. This was within the time limited by the statute. The fact that an amended petition was afterwards filed amplifying the charge did not make the filing of the amended petition the beginning of the action. It is admitted that the complaint does not charge an offense. The evidence supports a finding that the plaintiff threatened the arrest and afterwards directed the officer holding the warrant to execute it. The evidence as to this cause of action convinces us that it amply supports the verdict of the jury.

The evidence as to the second cause of action shows that Scheerger had been engaged in the agricultural implement business at Battle Creek, Nebraska; that he sold his stock and business to Duffy; that, afterwards, a car of goods came in consigned to Scheerger, which Duffy bought. He gave his note for the purchase price of these goods, and to secure this obligation executed a chattel mortgage upon the property, which consisted of manure spreaders and other implements. With the oral consent

of defendant, the plaintiff proceeded to sell part of the mortgaged property, with the understanding between them that he should deposit in a bank for Scheerger the proceeds of the sales. Afterwards, a dispute arising between them with reference to the account, the defendant, who is a German apparently of somewhat irascible temperament, and who is unable to speak the English language with facility and is unable to understand more than ordinary colloquial speech, employed one Kilbourn, a practicing attorney in good standing at the Madison county bar, and fully disclosed to him all the facts and circumstances in the matter. Kilbourn advised him that Duffy was liable to prosecution for selling the mortgaged property without consent in writing; but, being unwilling to proceed in the matter except under the advice and direction of the county attorney, he went with Mr. Scheerger to the office of Jack Koeningstein, county attorney. At that time and place Kilbourn and Scheerger fully disclosed to the county attorney the facts as to the giving of the mortgage, and the oral consent given by Scheerger that Duffy sell the mortgaged property. The county attorney testifies that he objected at first to bringing the prosecution on the ground that oral consent given to sell mortgaged property might be held sufficient by the court; but, upon Mr. Kilbourn calling his attention to an opinion of the supreme court, he was of the opinion that the facts justified the prosecution, but he required Scheerger to give security for the costs, so as to protect the county in any event. A complaint was then drawn, either by him or Kilbourn, which was sworn to by Scheerger. The plaintiff was afterwards arrested on this complaint, a hearing had, and he was discharged.

There is evidence that before the visit was made to the county attorney Kilbourn told Duffy's attorney that there was about $1,000 due Scheerger on the Duffy note, and that unless the note was paid he would prosecute Duffy for selling mortgaged property; that unless permission to sell the mortgaged property was in writing the defendant

would be guilty, and unless the note was paid at once he would send Duffy to the penitentiary. Hazen further testifies that Scheerger said nothing, except that he nodded his head several times. In relation to this incident, Scheerger testifies that he took no part in the conversation and did not know what Kilbourn was about to say until after he had said it. The evidence is clear that a full and complete disclosure was made to Kilbourn, and that Scheerger relied in good faith on his advice and followed his directions. It is clear that Scheerger wanted to collect his money and that this was his purpose in consulting Kilbourn, but the moving spirit in most prosecutions for the unlawful selling of mortgaged property is the failure to receive the proceeds of the sale and the resentment occasioned by such failure. Scheerger was evidently out of patience, but it is equally evident that he took no steps until advised to do so, and that he relied upon his lawyer for advice and directions in the whole matter. The sinister presumption as to want of probable cause and malice where the prosecution is brought only to collect a debt cannot we think be applied under all the testimony. In this connection the facts as to Scheerger's nationality and ignorance of the English language become material.

Under the facts in the record, the familiar principle must be applied that "one who, before instituting a criminal prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution." *Jensen v. Halstead,* 61 Neb. 249; *Biddle v. Jenkins,* 61 Neb. 400; *Gillispie v. Stafford,* 4 Neb. (Unof.) 873; *Van Meter v. Bass,* 40 Colo. 78, 18 L. R. A. n. s. 49, and note. We are convinced that the evidence clearly sustains the defense pleaded, and that the verdict and judgment on the second cause of action are erroneous and must be set aside.

Complaint is made that the verdict upon each cause of action was arrived at by chance, and what purports to be copies of certain affidavits of jurors are found in the transcript. The affidavits, not being in the bill of exceptions settled by the trial judge, cannot be considered. *Gray v. Godfrey*, 43 Neb. 672.

We find it unnecessary to examine the other errors assigned.

The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to render judgment upon the verdict of the jury upon the first cause of action, with interest from the date of its return, and costs, and to dismiss the second cause of action; each party to pay his own costs in this court.

REVERSED.

IRVIN I. SHULL, APPELLEE, V. JOHN GOERL, APPELLANT.

FILED MAY 29, 1912. No. 17,073.

Specific Performance: SALE OF LAND. Plaintiff and defendant entered into a written contract for the sale of 160 acres of land for $15,600. Five hundred dollars was paid in cash, $2,000 was to be paid January 1, 1910, and a mortgage given for the balance. The vendor was to furnish a warranty deed and a good and sufficient abstract of title. Time was an essential element in the contract. A few days before January 1, 1910, the vendor consented to a delay until January 5 on account of inclement weather and bad roads whereby the vendee was prevented from reaching the office of the middleman where they had agreed to meet. On that day, the same conditions prevailing, the vendee was unable to attend the meeting place, though he had paid $1,000 to the agent for the defendant, and the vendor, without having prepared for delivery or having tendered a deed or abstract, declared the contract canceled. On January 11 the vendee was ready to perform, and the vendor was notified that the $2,000 had been paid and the mortgage and note executed, but he refused to execute the contract. *Held*, That the vendor having retained the money paid, having waived strict performance on the day named, and having failed to tender an abstract and deed as specified by con-

tract, the equities of the vendee are superior to his, and that the decree of the district court awarding specific performance is justified by the evidence.

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

Elmer E. Ross and *Baldrige, De Bord & Fradenburg,* for appellant.

Martin & Bockes, contra.

LETTON, J.

This is an action for specific performance of a contract for the sale of real estate. A decree was rendered in favor of the plaintiff, from which the defendant appeals.

On July 31, 1909, the parties entered into an agreement whereby the defendant Goerl agreed to sell to plaintiff 160 acres of land for $15,600, payable as follows: $500 cash, which was evidenced by a note then executed and later paid; $2,000 cash due January 1, 1910; and a mortgage for $13,100 at 5 per cent. to be dated January 1, 1910. Time was made the essence of the contract.

The testimony shows that plaintiff was a tenant of one W. C. Kerr, who was engaged in the real estate business in Central City. Goerl, the vendor, had listed the land with Kerr for sale. Kerr showed the land to plaintiff and negotiated the sale. He drew up the contract of sale in duplicate, and became security for the plaintiff upon a note for $500 to cover the first payment. This note was afterwards paid to Goerl. Upon December 28, 1910, plaintiff delivered to Kerr a check for $1,000 payable to him for the purpose of paying on the contract on January 1, 1910, when the $2,000 came due, and on January 11 he paid Kerr another $1,000 for the same purpose. In the latter part of December, 1909, Kerr went to Goerl's residence; Goerl was not at home, but his son Fritz, who often acted for him, was there. He told Fritz to tell his father that Mr. Shull and wife would be at his office on

January 5 to execute the notes and mortgage, that the money would be ready, and for his father to come in ready to complete the contract. So far there is no dispute in the testimony.

As to what occurred on the 5th day of January at Kerr's office there is a sharp conflict. Kerr testified that Goerl called at his office on that day; that he told Mr. Goerl that he had $1,000 there to pay him, asked him about the deed and abstract, and told him that Mr. Shull wanted an abstract; that Goerl got angry and went out, and that he never received from Goerl or tendered to Shull either an abstract or deed; that at a later date Goerl told him that he had canceled the contract; that at this later conversation he told Goerl he had $2,000 of Shull's money in his hands, and that Shull wanted his papers; that on January 11 he notified Goerl by letter that he had received this $2,000 from Shull for payment on the contract. The witness testified that he still has the $2,000 in question in his possession.

On the other hand, Goerl testifies that he was at Kerr's office on January 5, 1910; asked if the money was there; that Kerr said that the money was not there, that the weather was bad and Shull could not get out his corn; that he (Goerl) said, "That is a poor excuse, he had five months' time to finish that, and I have to keep to the contract, that is all I can do;" that Kerr never mentioned having $1,000 there for him, never said anything about money, and did not offer any mortgage or notes; that he took with him his old abstract, deed, mortgages, patents, etc.; that Kerr did not ask him about an abstract; that he did not show Kerr the papers, and that he never received a letter from Kerr. Goerl's son-in-law, William Sandeman, testified that he went with him to Kerr's office on January 5 and heard all the conversation. He corroborates Mr. Goerl's version, and testified that nothing was said by Kerr about having any money on hand, or with reference to a deed or abstract; that Kerr became angry when Mr. Goerl told him he was going to cancel

the contract, and so they left without further conversation. Fritz Goerl testified that, in August, Shull told him that on account of the way the crops looked he could not take the place, and that he did not want them to hold a sale or sell any of their stock until he knew whether he was going to take the place or not. Mr. Shull testified that Kerr was not his agent in any of these transactions; that he paid him a check of $1,000 for Mr. Goerl on December 28, 1909; that he had plenty of corn and live stock on hand for sale with which to raise the money; that he made arrangements at a bank for the balance if he could not deliver the stock and grain; that he lived 16 miles from Central City, and that on the 5th of January the weather was so bad that his wife and himself could not go there; that Goerl never furnished him an abstract of title and never tendered him a deed; that in August he had endeavored to get his $500 note returned and cancel the contract, but that Goerl refused to give it up, and that he then told Goerl that if he had to lose the $500 he might as well go ahead with the deal; that on January 11, 1910, he went to Central City and left $1,000 more with Kerr, and executed and delivered to Kerr the note and mortgage required by the contract, and that up to that time the payment of $2,000 had never been demanded and he had never received any word from Goerl that he would cancel the contract; that Goerl still retains the $500. Fritz Goerl further testified that he had a talk with Kerr about December 31, 1909, at the home place, and also a telephone conversation about the first Tuesday in January, 1910; that in the first conversation Kerr said that on account of the bad roads and snow Shull was having difficulty in getting his crop to market, and the weather was bad for him to get to town and this was causing Mr. Shull to delay; for them not to come in before Wednesday, and that he telephoned not to come in before Saturday; that the witness told Kerr that would be all right, and he would tell his father as soon as he got home; that when the father got home he told him Kerr had been out

and said not to come in until Wednesday, and then he telephoned on Tuesday that Shull could not come in until Saturday, and the father said it was all right if they would come up to the contract.

It appears that Goerl had an old abstract of title coming down to about 15 years before, but that he never had prepared and tendered to plaintiff for examination an abstract of title to the property or a deed to the same. There is no provision in the contract providing for the forfeiture of the money paid, yet he still retains the $500 paid upon the contract. It appears from the undisputed testimony that Goerl consented to a short delay to allow Shull to dispose of his grain and to come to Central City. Having thus waived a strict compliance with the terms of the contract as to time, when the money was ready for him upon the 11th of January, and when he was actually prepared to perform its conditions on his part, we think it would be highly inequitable to allow him to retain the $500 paid and to insist upon the cancelation of the contract. We think the equities of the case are with the plaintiff.

The judgment of the district court is therefore

AFFIRMED.

CHARLES LAMBERT V. STATE OF NEBRASKA.

FILED MAY 29, 1912. No. 17,443.

1. **Criminal Law**: NEW TRIAL: MISCONDUCT OF JUROR. Under the evidence in this case, an improper statement made by a juror in the jury room, after the case was submitted, *held* not to constitute such prejudicial error as to require the reversal of the judgment and the granting of a new trial.

2. ———: ———: CONFINEMENT OF JURY. The case was submitted to the jury upon Wednesday at about 11 o'clock P. M. The verdict was rendered upon the succeeding Friday morning. During the two nights that intervened the jury were not furnished sleeping

accommodations, but were kept in a comfortable room and received regular meals. The practice of keeping jurors for lengthy periods without opportunity to sleep is unfavorably criticised, but, under the facts set forth in the opinion, *held*, that the district court did not err in refusing to grant a new trial on this account.

3. ———: EVIDENCE. A farmer, who was the owner of the stolen harness which plaintiff in error was charged with unlawfully receiving, was permitted to testify as to the purchase price of the harness in the regular course of trade a short time prior to the theft, and as to the amount of wear that it had received, and also to give his opinion as to the value of the harness. *Held* not erroneous.

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

Thomas L. Sloan and *Herman Freese,* for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and *Howard Saxton, contra.*

LETTON, J.

Plaintiff in error was convicted on the charge of receiving stolen property of the value of $36. The first error assigned and argued in his behalf is that there was misconduct of the jury. Affidavits of three of the jurors filed in support of the motion for new trial are in substance to the effect that a juror named Hill, after the case was submitted and during its consideration by the jury, stated that he knew Lambert to be a thief and that he was a bad character, and that he repeated this and similar statements during the whole time the case was under consideration. On the other hand, an affidavit was made by Hill denying that he ever made a positive assertion that Lambert was a thief, but the affidavit recites that, while he had no acquaintance with Lambert, an incident that happened during the trial recalled to his memory the fact that he had heard it stated by a brother-in-law of the

accused at a time seven years before the trial that he had heard a rumor that Lambert was a thief. Hill's affidavit further averred that when he made this statement he was reprimanded by another juror for making the same and that he did not repeat it. The affidavits of other jurors are to the effect that the remark made by Hill, which was heard by all of them, made no impression upon their minds and that the verdict was based upon the evidence submitted. Plaintiff in error does not contend that the affidavits of the jurors produced by him may be used to impeach the verdict, but says that he complains only of the misconduct of the juror Hill. The trial court determined that the statement made by Hill was not prejudicial to the accused. We are of the same opinion. The statement was improper and should not have been made, but, under the evidence, we are unable to perceive whereby this misconduct could or did affect the verdict.

It is next contended that a new trial should be granted for the reason that the verdict was forced by the physical exhaustion of certain jurors. It appears from an affidavit made by certain jurors that the case was submitted to the jury on Wednesday at about 11 o'clock P. M., that the jury were confined from that time until the succeeding Friday morning when the verdict was rendered, that during the two nights there were not furnished sleeping accommodations, that they deliberated during the two nights and a day in which they were kept together, and that they were physically exhausted to such an extent they could not hold out longer, and they agreed to the verdict for that reason and by reason of being harassed by other jurors who had determined not to yield. Counter affidavits of most of the other members of the jury were filed by the state to the effect that the jury were placed in a comfortable room with chairs, table and paper, that they received their meals and had plenty to eat and drink, and that no juror was physically overcome. If the evidence in this case left the matter of the guilt of the defendant a close question, we should be very much inclined to set

aside the verdict and grant a new trial on account of this treatment of the jury. It is high time that the barbarities of the common law should be done away with, and that verdicts should be reached as a result of thought and deliberation, and not as a result of physical compulsion. There is no more reason for subjecting jurors to confinement in a small room for two nights and a day without opportunity for rest or repose than there would be for subjecting the judge himself or the other officers of the court to like privations. The strength of memory and the capacity for sound judgment usually found in persons in elderly life, as a number of these jurors were, is apt to be impaired if they are deprived of sleep for 48 hours. Moreover, under such conditions the man who is physically stronger may by force of that very fact prevail over the judgment of his brother juror who may be stronger mentally, but physically weaker. We criticise the practice unfavorably in the hope that it may not be repeated, but in this case we are of opinion that the evidence sustains the finding that the verdict was not produced as a result of the exhaustion of the jurors who made the affidavit.

There is another consideration entering into this case which should, perhaps, be noticed. The evidence of the value of the property alleged to have been received took a wide range, extending from $10 or $15 to $45. The jury found the value to be $36. By an oversight of the legislature, possibly, the receiving of stolen property of any less value than $35 is not a crime. The court was, therefore, compelled to instruct the jury that, in order to find the defendant guilty at all, they would have to find the value of the property to be at least $35. It was then for the jury to find that value or acquit. They went one dollar over the mark fixed by law. It is complained that there was no competent testimony as to the value of the harness. It is shown that it was nearly new and had only been used a few times, that the owner of the harness, whose testimony is particularly complained of, paid

$52 for it, and that a small part of it was missing. The principal objection urged is as to the competency of the testimony of the owner as to the price he paid and the amount of wear of the harness, and to his opinion of the value based thereon. We think that the amount that the harness cost when purchased in the regular course of trade a short time previous to the theft and the amount of wear that it had received were proper elements to be considered by the jury in fixing the value. It is shown that the opinion of the witness was based upon these elements. Having before it the facts upon which the witnesses' estimate of value was based, we cannot see wherein the accused was prejudiced in this regard. A number of other witnesses were examined upon both sides of this question, and we think there is no prejudicial error in this regard.

Complaint is also made as to the giving of certain instructions. The imperfections in these instructions have been repeatedly pointed out by this court and they should not have been given, but under the condition of the record we cannot perceive wherein the defendant was prejudiced by their having been given.

A number of other errors assigned have been considered and disposed of by this court in the case of *Lukehart v. State, ante,* p. 219, a companion case to the facts in this case, and will not be again reviewed.

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

AFFIRMED.

HAMER, J., dissenting.

It is said in the majority opinion: "Complaint is also made as to the giving of certain instructions. The imperfections in these instructions have been repeatedly pointed out by this court and they should not have been given, but under the condition of the record we cannot perceive wherein the defendant was prejudiced by their having been given." The instructions complained of are as follows:

"No. 15. The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to pause, it is (in)sufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"No. 16. The court instructs the jury, as a matter of law, that the doubt which a juror is allowed to retain in his mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of a juror, in view of the consequence of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources of doubt by resorting to trivial and fanciful suppositions, and remote conjectures, as to a possible state of facts differing from that established by the evidence. You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath imposes upon you no obligation to doubt where no doubt would exist if no such oath had been administered. You are instructed that if, after a careful, impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."

It is true that the above instructions have been con-

demned by this court, but this condemnation has been very tardy in coming, and it does not seem to the writer to be in active operation yet. As late as *Leisenberg v. State,* 60 Neb. 628, delivered at the September term, 1900, this court said of two of the most objectionable sentences in the instructions referred to: "This instruction has never, to our knowledge, received judicial condemnation; on the contrary, it was considered and distinctly approved in *Willis v. State,* 43 Neb. 102, and *Barney v. State,* 49 Neb. 515." The objectionable sentences are: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

In *Willis v. State, supra,* Judge RAGAN, Commissioner, delivered the opinion of the court. A comparison of paragraphs 15 and 16 of the instructions in the instant case shows that the language used is almost identical with the language used in the instructions of the court in the very noted case of *Spies v. People,* 122 Ill. 1. This is what is known as the anarchist case. It covers pages 1 to 267, inclusive. On page 82 of the report are the two original instructions from which the above instructions in this case are taken. For the convenience of the reader we reproduce them here:

"12. The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"13. The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered."

In *Barney v. State,* 49 Neb. 515, this court follows the instructions above given in the *Spies* case. The opinion was delivered by Commissioner IRVINE, and is unanimous. A comparison of the instruction used in that case with the instruction used in the *Spies* case will show that the language used is almost identical, except that in the *Spies* case there were two instructions and in *Barney v. State* it seems to be all put in one instruction. Judge IRVINE wrote an elaborate argument justifying the use of the instruction.

What I object to is that, while this court has finally come around to that point where it condemns the instruction, it does not condemn it in any practical way so as to do the prisoner any good. What difference does it make to the prisoner if the reviewing court says it condemns the instruction as improper, but refuses to reverse the case and leaves the prisoner in the penitentiary? I am looking for a practical condemnation of the instruction that will reverse a case and give the defendant a new trial *because he has been prejudiced by the giving of the instruction.* This court says the instruction is wrong and it ought not to be given; then, in effect, it says, we cannot reverse a case simply because the trial judge has given

improper instructions to the jury which probably convicted him. It is true that this court has announced the fact that an instruction of that kind is wrong, and some time or other, no one may tell when, it is likely to announce that the case is reversed because this instruction has been used. This instruction is either right or wrong. This court has no right to say that we reserve to ourselves the right to say *when* we will reverse a case because this instruction is objectionable. This sort of treatment of the rights of men who are charged with a crime, and their counsel, leaves everybody in the dark. The exercise or nonexercise of the power to reverse the case becomes arbitrary and despotic, and leaves to the will of the judges who sit as the reviewing court to say that in one case the judgment ought to be set aside, and in another case that it ought to stand, although the language in the instruction is just the same. The truth about the matter is that, whenever a trial judge wants to convict, he will use this condemned instruction, with a feeling that, no difference if he has done so and the man has been wrongfully convicted under an instruction which this court has condemned, yet, nevertheless, this court will never reverse the case. If the instruction used in A's case is condemned and A is left in the penitentiary, and in B's case nothing is said about the instruction and B is left in the penitentiary, what is the difference between A and B so far as any good either has received from this court?

In the hope that this court will exercise the power which is given to it and will proceed to lay down some sort of a rule for the guidance and control of the district judges, I want to briefly discuss the instructions used. I want to say of the instruction in the *Spies* case that we are beginning to be far enough away from that case to exercise a little of that calm and dispassionate judgment which history will ultimately record. That case originated in Chicago where the people believed that their lives and property were in danger from an organization known as the anarchists. The men arrested and tried were tried

in the heat of passion. Some of them were defended by lawyers who justified anarchy more than they defended their clients. The Spies instruction would probably have not originated, except because of the peculiar circumstances. There was a fight between the anarchists in Chicago on the one side and the people on the other side. An instruction that an oath of a juror imposes upon him no obligation to doubt where no doubt would exist if no oath had been administered belittles the effect of taking the oath and is an attempt to do away with its influence. *State v. Ruby,* 61 Ia. 86; *Siberry v. State,* 133 Ind. 677. The effect of the instruction is to say to the juryman: "If you have any doubts you do not need to let them trouble you." The language used is an invitation to disregard the evidence. It tells the juryman that he may give expression to his belief as he might have it as a man and without acting as a juror; in other words, that he can express his belief about the matter just as he might express his belief about any bit of neighborhood gosssip that he might hear. That part of the instruction in the instant case which tells the juryman that the instruction "is not intended to aid any one who is in fact guilty to escape," and also says, "a doubt, to justify an acquittal, must be reasonable," assumes that the juror is looking for something that is not in the case. It assumes that he is looking for a state of facts differing from those established by the evidence. The juror is a sworn officer of the law. He is selected generally because he is a well-known and prominent citizen whose business ability and superior intelligence commend him to the position which he is selected to fill. That an American judge should assume in a trial that the juror selected by a system provided by law would seek to shirk his duties, and that he would refuse to discharge them, and that he would need to be reminded of his inferiority and his tendency to go wrong is surpassingly strange. It is un-American and undemocratic. Such a course is deserving of unmeasured censure and condemnation and a

reversal. No juror should be urged "to justify an acquittal." That sort of a thing is scolding him in advance. Perhaps the members of this court have reasoned the matter out and know better than I do that it is all wrong, because they have condemned it, but their condemnation is utterly futile and brings nothing. This court ought to reverse this case, and until it does reverse a case where this instruction is used, and for that reason alone, there will be no attention paid to it by the trial judges who seek conviction and who are willing to ignore this court. It is no part of the duty of the judges to determine the guilt of the accused in the first place. The judges of the trial court are charged with the duty of giving proper instructions to the jury so that the jury may intelligently determine the questions of fact involved. It would seem that this court assumes to itself the right to determine *when* the anarchist instruction may be given without injury. This cannot be. There is always injury whenever the court talks to the jury about giving a reason for justifying an acquittal, or whenever the court talks to the jury about the doctrine of reasonable doubt being applicable to one case, the case of the innocent man, and not applicable elesewhere. Unfortunately this court in its treatment of the cases seems to assume the right to be as arbitrary as these district judges who refuse to be bound by the instructions which this court gives them from the bench. I do not clearly see the difference if the result is that the trial judge by giving this vicious anarchist instruction puts the defendant in the penitentiary and this court leaves him there, although it *says* the instruction is wrong.

In the case of *Bartels v. State,* p. 575, *post,* this court has decided the principal part of the first instruction given in this case to be prejudicially erroneous. The syllabus is: "An instruction in a criminal prosecution that the rule that requires proof of guilt beyond a reasonable doubt 'is not intended to aid any one who is in fact guilty to escape,' and which intimates that an acquittal

must be justified and a verdict of not guilty must be 'authorized,' is erroneous. In the condition of this record, it is found to be prejudicially erroneous." The point in the syllabus is right so far as it holds that the doctrine of reasonable doubt is intended only for innocent persons, and is not intended to aid any one that is in fact guilty, because it condemns that language. It is also right so far as it condemns the use of the language "that an acquittal must be justified and a verdict of not guilty must be 'authorized.'" The thing that is wrong with the syllabus is that it reserves to this court to say when and in what case the *same language* is prejudicial, and when it is not. It seems to be this way: This court says we will let the defendant go when we want to, and we will hold him when we like, and we will give no reason to anybody for it, because we do not have to. This is seemingly an esoteric condition.

In *Brown v. State,* 88 Neb. 411, the language used in the first paragraph of the second instruction is held to be prejudicially erroneous and the case is reversed, but there is in the syllabus and in the body of the opinion the reservation of the alleged right of this court to apply the *evanescent* rule that we will when we like and we won't when we do not want to. In *Blue v. State,* 86 Neb. 189, this court condemned so much of the language used in the first paragraph of the instructions in the instant case as compels the jury to have a reason for justifying an acquittal or to authorize a verdict of not guilty, and it held the language prejudicial and reversed the case, citing many authorities which condemn the language used in vigorous terms. Judge SEDGWICK delivered the opinion of this court in each of the two cases last cited.

In *Flege v. State,* 90 Neb. 390, this court condemned the instructions on reasonable doubt. The two instructions are quoted. The first paragraph of the second one quoted in the instant case is almost identical with the first paragraph of the twenty-fifth instruction in the *Flege* case, and the twenty-fourth instruction in the *Flege*

case is very like the fifteenth instruction in this case. The writer of the opinion in the *Fleye* case, Judge SEDGWICK, emphasizes the condemnation of the twenty-fourth instruction in that case by saying: "A jury in such a case ought not to be told that they must 'justify an acquittal' or that they must find something in the case 'to authorize a verdict of not guilty.'" While Judge SEDGWICK finds the language used in that instruction "so prejudicial as to require a reversal," he says: "The majority of this court, however, considers that instruction No. 24 is not prejudicially erroneous in this case." Here is again the reiteration of this court that it refuses to declare any tangible rule for its own government. The rule is no rule because it is as uncertain and as unfindable as a jack-o'-lantern in a swamp, and still this court has made progress since the opinions first above cited were written.

STEPHEN I. BROWN, APPELLEE, V. SWIFT & COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 16,669.

1. **Master and Servant: INJURY TO SERVANT: LIABILITY.** In a suit by a servant against the master for personal injuries, the employer is liable for the consequences, not of danger, but of negligence.

2. ———: ———: **DUTY OF SERVANT.** A servant of mature years and of ordinary intelligence should, in performing the duties of his employment, take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly.

3. ———: ———: **APPLIANCES.** The general rules of law applicable to the furnishing of tools and appliances by a master are not always applied, where a simple implement is furnished by him to a servant of mature years and of ordinary intelligence.

4. ———: ———: ———: **DUTY OF MASTER.** Where a servant of ordinary intelligence and of mature years has operated a simple implement often enough to enable him to avoid being injured by it, when using it in the exercise of ordinary care, or where the mode of operating it is so simple that such a servant can at once

perceive the safe and proper way to do so, if exercising ordinary care, there is no duty resting upon the master to instruct him in that regard.

5. ———: ———: TRIAL: DIRECTING VERDICT. In an action by a servant against his employer for personal injuries alleged to have resulted from defendant's negligence, it is error to submit the case to the jury, where defendant is entitled to a requested peremptory instruction on the undisputed facts.

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

Greene & Breckenridge, for appellant.

McCoy & Olmsted, contra.

ROSE, J.

Plaintiff was injured when he was attempting to haul a truckload of meat from a freight car to the sweet-pickle cellar of defendant's packing-house at South Omaha. In an action for personal injuries thus sustained, he recovered a judgment for $2,725, and defendant has appealed. Plaintiff died after the case was brought here, and it has been revived in the name of the administrator of his estate.

Plaintiff entered defendant's employ September 15, 1904, and the injury occurred December 3, 1904. He worked in the smoked-meat department until about December 1st, and thereafter handled a truck in the sweet-pickle department. He was 48 years old, 5 feet 10 inches high, weighed 170 pounds, was in perfect health, and was a man of at least ordinary intelligence. In front of, and west from, the packing-house, he was working on the second platform, a structure the length of three freight cars. It is adjacent to the second railroad-switch and extends north and south. A runway from the sweet-pickle cellar to this switch opens to the north and also to the south at the west side of the platform near the center, being equally convenient from both ends. On the day of

the accident, until about 4 o'clock in the afternoon, plaintiff had been hauling meat on a truck from the sweet-pickle cellar up the runway into a car at the south end of the platform. A few minutes before the hour named he had been directed by the foreman in charge to take a truck-load of meat out of a car at the north end of the platform to the sweet-pickle cellar. This order required plaintiff to leave the south end of the platform, where it is 9 feet wide and 2 inches lower than the floor of a freight car, and go to a freight car on the north end of the switch, where the platform is less than 7 feet wide, and, owing to a difference in elevations of the railroad track, 10 or 12 inches lower than the floor of a freight car. The car to which he was directed to go was 8 inches from the platform, and in unloading it the trucks were run in and out on a wooden apron 3½ feet long, one end resting on the floor of the car and the other on the platform. Plaintiff was using an ordinary two-wheeled truck with a box resting on the axle and on shafts supported in front by legs available for brakes, the center of mass being in front of the axle when the box is level. The handles were on the front ends of the shafts. Plaintiff took the truck thus described into the car at the north end of the platform, and after it had been loaded he started to the sweet-pickle cellar. He stood between the shafts with his back to the load, and pulled the wheels onto the apron, intending to turn to the right toward the runway as soon as they reached the floor of the platform. Instead of lowering the handles and sliding the shaft-legs on the platform to retard the motion when the truck began to run down the incline on the apron, he pulled back on the handles, with the effect of raising them without stopping the truck. He failed to make the turn quick enough, and the truck ran across the platform against upright timbers which supported a plank foot-walk along an elevated switch-track 4 feet higher than the platform on which he was working. His left hand was crushed by the impact and pinned to a timber. East of the foot-walk and the elevated switch-

track there was also an elevated platform accessible from the second floor of the packing-house, and all were above the runway through which plaintiff had been passing with his truck the day he was injured. The walk, the switches and the platforms were all parts of permanent structures used by defendant in connection with its packing-house.

The material inquiry is: Was it the duty of defendant to warn plaintiff of the dangers incident to running the truck down the apron to the platform and to instruct him how to perform that part of his work? Plaintiff asserts that he was a green hand, that he had never before hauled a truck out of a car at the north end of the platform, that he did not know the dangers incident thereto, and that, in his new situation and surroundings, he did not know how to handle the truck so as to prevent injury to himself. To defeat a recovery defendant invokes the following rules: In a suit by a servant against the master for personal injuries, the employer is liable for the consequences, not of danger, but of negligence. *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638; *Central Granaries Co. v. Ault*, 75 Neb. 249; *Weed v. Chicago, St. P., M. & O. R. Co.*, 5 Neb. (Unof.) 623. A servant of mature years and of ordinary intelligence should, in performing the duties of his employment, take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly. *Walsh v. St. Paul & D. R. Co.*, 27 Minn. 367; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372. The general rules of law applicable to the furnishing of tools and appliances by a master are not always applied, where a simple implement is furnished by him to a servant of mature years and of ordinary intelligence. *Vanderpool v. Partridge*, 79 Neb. 165. Where a servant of ordinary intelligence and of mature years has operated a simple implement often enough to enable him to avoid being injured by it, when using it in the exercise of ordinary care, or where the mode of operating it is so simple that such a servant can at once perceive the safe and proper way

to do so, if exercising ordinary care, there is no duty resting upon the master to instruct him in that regard. *Jones v. Louisville & N. R. Co.*, 95 Ky. 576.

Are these rules of law applicable to the facts stated? The case might be different, had the load behind the servant's back slipped in the box, through a defect of which he had no knowledge, tipped the handles and inflicted personal injuries. *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372. There was no defect in the truck, either latent or patent. The platform where plaintiff was working was part of permanent structures, which had been used for a considerable time without change. There was no hidden danger or defect anywhere. The whole situation was obvious. The conditions could have been seen by plaintiff every time he went into or came out of the car at the south end of the platform. He wheeled the truck into the north car at the identical place where he came out of it. The apron had not been moved. He had been using the same truck all day under conditions differing only in the slant of the wooden apron leading to the car, in weight, and in the width of the platform. He knew as well as his master that the loaded truck, if unobstructed, would run down the apron when started, and that the handles would tip as soon as raised high enough to throw the center of mass behind the axle. This knowledge did not require observation beyond a child's experience with a cart and a seesaw. Plaintiff had hauled the truck up and down an incline all day, and, if he exercised ordinary care, he knew that the shaft-legs, when lowered to the ground, would act as brakes. The evidence shows that he knew the weight of his load. In that respect his master could have known no more. Both the tipping of the handles and the velocity of the truck were due to familiar laws of gravitation as well known to the servant as to the master. The implement used was a simple one in common use. The mode of handling it is immediately observable to a person of ordinary intelligence and of mature age. It was intended for a single employee. There

is nothing in the record to show that more help was needed in using it, or that plaintiff was not strong enough for that task, or that he did not have a safe place to work. These are clearly circumstances under which the master is not charged with the duty of giving the servant notice of the dangers incident to his employment, or of instructing him how to use the implement provided for him. While his accident and consequent misfortune appeal to human sympathies, there is no principle of law, applicable to the facts, under which a jury can be permitted to find that the negligence of defendant was the proximate cause of plaintiff's injuries. At the close of the testimony defendant requested a peremptory instruction in its favor, which should have been given. It was erroneously refused. In addition, the rules herein stated were violated both in admitting evidence and in charging the jury. Furthermore, the trial court, instead of making a concise statement of the simple issues to the jury, submitted four or five pages of type-written allegations copied from the petition, nearly all of which were immaterial, and directed the jury that the burden was on plaintiff to establish every material allegation of the petition, but did not advise them what the material allegations were. On such a record, the verdict would have to be set aside, even if there could be a recovery under the facts.

The judgment is therefore reversed and the cause remanded, with directions to the district court to dismiss the action.

REVERSED.

REESE, C. J., not sitting.

LETTON, J., dissenting.

In my judgment, when all the facts in this case are considered, it is easily distinguishable from the cases cited where damages from the negligent use of a simple tool are considered. Plaintiff, who had never used the two-wheeled truck in unloading a car, was sent to work in a place where the narrowness of the platform, the weight

of the meat loaded onto the truck, the difference in elevation of the car floor and the platform, the obstruction caused by the edge of the apron at the car door, and the nearness of the overhanging trestle created a condition of peculiar danger not obvious to an ordinary man who had not been instructed as to the necessity of using the friction of the legs of the truck upon the floor of the apron as a brake in order to prevent the impetus of the heavily loaded truck from forcing him against the trestle. The trucks weighed about 400 pounds, and the loads from 600 to 800 pounds. The testimony is clear as to the danger of taking a heavily loaded truck out of a car at that end of the platform in the ordinary manner and without bearing down or riding on the handles so as to use the legs as a brake; and it is undisputed that the only safe way to unload with the truck under the conditions was to put the handles down as soon as the wheels were over the edge of the apron so as to keep the weight from overcoming the man's resistance and pushing him against the trestle in front before he could turn the truck. In view of the surroundings, there was danger in doing this work unless it was done in a particular manner. This being the case, it was the duty of the employer to point out the danger of performing it in any other way, and to fail to so instruct was actionable negligence.

CLYDE E. CARLOS, APPELLEE, V. HASTINGS INDEPENDENT TELEPHONE COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 16,685.

Master and Servant: ACTION FOR SERVICES: SUFFICIENCY OF EVIDENCE. On a record showing that the manager of a telephone company had received for his services $75 a month for eight months, the evidence discussed in the opinion is *held* insufficient to sustain a finding of the jury that the telephone company had agreed to

pay him $100 a month for the same period, the action being one to recover the balance due on a contract of employment.

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

R. A. Batty and *Tibbets, Morey & Fuller,* for appellant.

John C. Stevens and *J. A. Gardiner, contra.*

ROSE, J.

Plaintiff was the manager of the Hastings Independent Telephone Company, defendant, from January, 1906, to February, 1907, and this is an action to recover an unpaid balance of $200 on his salary under his contract of employment. The amount of the monthly salary which defendant agreed to pay him for his services for the eight months from April to November, inclusive, was the controverted issue. What defendant in fact paid him was $75 a month. For that period he recovered in this action upon a trial to a jury a judgment for $25 a month more and interest, or $241.45 in all. Defendant has appealed.

In the form in which the record is presented for review, the judgment must stand or fall upon the sufficiency of the evidence to sustain the verdict. Plaintiff did not sue upon a *quantum meruit*, but upon a contract. In his petition he alleged that he was employed as manager December 13, 1905, that his services were to begin January 1, 1906, and that defendant agreed to pay him $75 a month "for the first two or three months, and, if the said defendant retained the plaintiff longer than two or three months, to pay him $100 for the balance of the time said plaintiff was employed by defendant." He further alleged there is due him from defendant "on said contract of employment for services rendered by the plaintiff to the defendant, from April 1, 1906, to December 1, 1906, a balance of the sum of $200." Both parties agree that plaintiff's salary for the months of January, February and March was fixed by the contract at $75 a month and paid. For the months of December and January plaintiff re-

ceived $85 a month, and this compensation is not in dispute. Defendant denied that it agreed to pay plaintiff $100 a month for the months from April to November, inclusive, but alleged his salary was $75 a month for that period. The minutes of the corporation recite that $75 a month was the salary fixed by defendant, and its vouchers show that plaintiff received that sum each month during the eight months in question and receipted in full therefor. The payment and the receipt of $75 a month are also shown by the ledger kept by defendant when plaintiff was its manager.

In view of these facts, it was incumbent on plaintiff, since he sued upon a contract of employment fixing his salary, to prove that defendant agreed to pay him for his services $100 a month from April to November inclusive. Was the contract proved? His oral testimony shows that he had previously occupied a similar position at Broken Bow. While thus employed, early in December, 1905, he attended at Hastings a meeting of defendant's directors—a board composed of five members. On the witness-stand he said he told the board at that meeting his salary at the time was $100 a month. When asked if he was getting that, he answered: "I was; yes, sir. One of the board then asked me what my object was in coming down here for $75—asked what was my object in leaving there at $100, when I was only to get $75 here. I said that this was a larger town and a larger company, with larger opportunities for me, and they finally said: 'You come as an entire stranger. All that we know is what you tell us of your experience, and you should be willing to work for a month or two for $75 per month,' until, as they expressed it, they could 'try me out;' and I told them I would under those circumstances, but that I would not consider that permanently, and that, I think, was the sum and substance of the whole conversation. They told me that they would take the matter under consideration and notify me, and I took that as indicative that they were through with me that night."

After the board meeting, defendant's manager wrote plaintiff a letter, dated December 13, 1905. Plaintiff testified it had been destroyed and was permitted to introduce the following as a copy: "Replying to your letter received yesterday, will say that our board met this morning and decided to employ you under the conditions talked over when you were here, viz., $100 per month, if they decide to retain you; and 'that Mr. Carlos be notified that the question of further advancement in salary would be dependent on the value of his services, and that it will be the purpose of the board to pay a salary which is commensurate with the value of the services rendered, and that he shall come January 1, 1906.' Please write me at once how soon you can be here, as I am anxious to be relieved, and am going to try and get out before the 20th of the month. I guess there will be some one who can look after things for a few days between our regimes."

Referring to his first meeting with the members of the board, plaintiff testified he told them what he was getting, and that he had said: "I wouldn't take less, except that I would take less for a month or so, until they found I was the man they wanted;" and, further: "I don't know as I would have any objection to working a month or so with you for that figure"—$75 a month. He testified that no particular time was fixed to begin the payment of $100 a month; that, though it was his duty to bring matters of business before the board, he never presented the question as to when full compensation should begin; that in April or May he spoke to two of the five directors about bringing the matter before the board, and that they said they would bring it up; that he "made no statement to the board at the end of three months as to why his salary should not be $100 a month."

Plaintiff is bound by his petition and by his own testimony in support of its allegations. It follows that in making his own case he has conclusively established against himself these propositions: The copy of the letter quoted did not contain the terms of his contract of em-

ployment. No contract pleaded or proved stated the time when payment of a salary of $100 a month should begin. Plaintiff was not to receive that amount monthly, until, to use his own words, "they could 'try me out,'" or "until they found I was the man they wanted." Whether he proved to be satisfactory after a trial depended on the will of defendant's board of directors. What plaintiff did not prove, to entitle him to $100 a month, was that defendant's board of directors "tried him out" and found him to be satisfactory, or that they found him to be "the man they wanted." On this issue he had discussed the matter with two members of the board only, but was nevertheless asked: "You understood that you had made good and had done the work to the satisfaction of the corporation?" This was answered: "I certainly did, because one of them said, to use his expression, that I was entitled to my raise because I had done the work." Referring to the first day of April as the time for the increase, he also testified: "I felt that from that time on, at least, they could not have any objection to it." This comes far short of establishing an agreement by defendant that plaintiff was a satisfactory manager. That question could not be determined by plaintiff. It could not be settled by a mere expression of one of the directors. There is evidence that plaintiff's services were unsatisfactory and that efforts were being made to find a suitable person to take his place. The inference that he was satisfactory, in so far as it arose from his retention, was destroyed by undisputed evidence. The minutes of the corporation for which he was manager recited that his salary was $75 a month. If the ledger kept under his supervision spoke the truth, it showed the same fact. He received that amount monthly and gave a receipt in full. Though he testified the time for receiving his increase was not definitely fixed by the contract, he never brought the matter to the attention of the board until he contemplated resigning. He knew there was discord among the members of the board, and he was warned by one of the di-

rectors, after the 1st of April, that an opportune time to present the matter of increasing his salary had not arrived. It is clear he did not prove that defendant agreed to pay him $100 a month from April to November, inclusive. It follows that the evidence is insufficient to support the verdict.

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

REVERSED.

FILED JUNE 25, 1912.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. A statement touching the facts and evidence is contained in that opinion. It appears that the plaintiff brought an action to recover an alleged unpaid balance of $200 on his salary. He sought to recover for his services for the eight months from April to November, 1906. He recovered upon a trial to a jury a judgment for $241.45. The majority opinion holds that the evidence is insufficient to sustain the verdict. It is said in that opinion that "plaintiff did not sue upon a *quantum meruit*, but upon a contract." Whether he sued upon a *quantum meruit* or upon a contract ought not to make much difference touching his right to recover, so long as he sued for his wages during a given period when his employment is undisputed, and the fact that he worked for the company and that the company received the benefit of his services is not denied. It is, to the mind of the writer, a rather technical distinction which would deny a plaintiff pay for his services because his petition set up a contract at so much per month instead of alleging the reasonable value of his services for the time he was employed. The majority opinion says: "Both parties agreed that plaintiff's salary for the months of January, February and March was fixed by the contract at $75 a month and paid. For the months of December and January plaintiff received $85 a month, and this compensation is not in dis-

pute." The opinion says the minutes of the corporation recite that $75 a month was the salary fixed by the defendant, and its vouchers show that plaintiff received that sum each month during the eight months in question. The plaintiff testified that he had previously been in a similar position as manager of a telephone company at Broken Bow; that he was present at a meeting of defendant's directors at Hastings in December, 1905, and that he told the board at that meeting that he was then drawing a salary of $100 a month, but that Hastings was a larger town and there were larger opportunities for him there, and that it was agreed that he should work for a month or two at $75 a month until the company could try him out; but the plaintiff testified that he told the directors of the company that he would not consider $75 a month as a permanent salary. They told him that they would take the matter under consideration and notify him.

After the meeting of the board the manager of the defendant company wrote the plaintiff a letter, in which it was said: "Our board met this morning and decided to employ you under the conditions talked over when you were here, viz., $100 per month, if they decide to retain you." The plaintiff went to Hastings and then went to work for the company. It seems that no particular time was fixed to begin the payment of $100 a month. He seems to have spoken to two of the five directors of the company about bringing the matter up before the board, and he testified that they said that they would bring it up. In the language of the plaintiff, he was not to receive that amount monthly until "they could 'try me out,'" or "until they found I was the man they wanted." It is said in the opinion that the plaintiff did not prove that the defendant's board of directors "tried him out," or that they found him to be satisfactory, or to be "the man they wanted."

In answer to this contention, it appears that they kept him, and that he worked eight months in addition to the time for which he claims he was fully paid. It is the

belief of the writer that, if the telephone company kept him without discharging him, it should have paid him what he expected to receive—$100 a month—or, in any event, a reasonable compensation for his services. He was not discharged, and presumably he was kept because he was more or less "satisfactory." In *Parcell v. McComber,* 11 Neb. 209, the plaintiff agreed to work a year for the sum of $195, and he worked five months, and then sued for his wages. It was held that he could recover the actual value of his labor not exceeding the rate agreed upon, less any damage sustained by his employer by reason of the plaintiff's failure to work the entire year. In that case, as in this one, part of the money was paid as the work was performed. In *Burkholder v. Burkholder,* 25 Neb. 270, one brother agreed with another to continue in his service five years, when the brother was to give him a span of horses, wagon and harness. He failed to work the entire time, and it was held that, being susceptible of computation, a reference would be ordered to determine the amount of the deduction to be made. In *Harrison v. Hancock,* 2 Neb. (Unof.) 522, it was held that the reasonable value of the plaintiff's services should be allowed to him, although the contract had been abandoned by him. The same principle is announced in *Murphy v. Sampson,* 2 Neb. (Unof.) 297; *Harrison v. Hancock,* 2 Neb. (Unof.) 522. In *Small v. Poffenbarger,* 32 Neb. 234, the petition alleged that there was due from the defendant to the plaintiff for laborer's wages for work and labor done and performed by the plaintiff for the defendant at her request during the years 1886, 1887 and 1888 the sum of $466.55, no part of which had been paid. Held to state a sufficient cause of action, although subject to a motion to make more definite and certain.

It would seem to have been the policy of our courts to allow the person employed reasonable compensation for his services, whatever the bargain may have been, and without reference to a strict construction of the contract. It would seem that, if the telephone company permitted

the plaintiff to remain in its employ under circumstances which justified him in believing that he was going to be paid $100 a month, then it should have paid him that sum; and, if the company kept him under circumstances inducing him to believe that he would receive a raise in his wages, then it should have paid him a reasonable compensation for his services, without reference to the contract, and that no technical rule of pleading should be invoked, even though severely correct.

I am of the opinion that the judgment should be affirmed, or, if reversed, that it should be with instructions for a reference to determine the amount of a reasonable compensation and to render judgment thereon for the plaintiff. It may be that the latter is contemplated by the majority opinion, although it is not so stated, and for this reason I make this contention so that the plaintiff may be apprised of his possible rights.

LEVI BURNS ET AL., APPELLANTS, V. SAMUEL W. HOCKETT ET AL., APPELLEES.

FILED MAY 29, 1912. No. 17,478.

1. **Mortgages**: FORECLOSURE: PARTIES. Where a note and mortgage held as collateral security for the payment of a debt of mortgagees are unconditionally surrendered and redelivered to them, they are proper plaintiffs in a suit to foreclose the mortgage.

2. ———: ———: ———. Where a suit to foreclose a mortgage is properly commenced by the mortgagees, it may be prosecuted to final decree in their names as plaintiffs, though, pending litigation, they transferred their interest in the security and in the cause of action.

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

L. B. Stiner and *A. C. Epperson,* for appellants.

Paul E. Boslaugh, contra.

ROSE, J.

This is a proceeding by mortgagors to open a decree of foreclosure and to grant them a new trial under section 602 of the code, conferring on the district court power to vacate its own judgment, after the term at which it was rendered, for fraud of the successful party. From a judgment of dismissal plaintiffs have appealed.

In the foreclosure suit the mortgagees were plaintiffs and the mortgagors were defendants. In this proceeding the parties are reversed. The mortgage was given to secure payment of a debt of $3,500 and was a lien on a lot in Harvard. It was due according to its terms November 1, 1912, but maturity was accelerated for nonpayment of delinquent taxes. The only defense urged at the original hearing was that mortgagees were not authorized by the terms of the mortgage to declare the debt due. The district court held otherwise and the decree of foreclosure was affirmed by this court on an appeal by mortgagors. *Hockett v. Burns*, 90 Neb. 1.

For the purpose of this appeal the position of mortgagors may be summarized thus: In the foreclosure suit mortgagees were not the real parties in interest. Before bringing suit they had sold and transferred the note and mortgage to the Union State Bank and thereafter the assignee was the owner of the security. The bank would not have foreclosed the mortgage for nonpayment of taxes. Of these facts mortgagors had no knowledge while the suit was pending. The bringing and the prosecuting of the action in the name of the mortgagees and the failure to disclose the ownership of the note and mortgage amounted to a fraud for which a new trial should be granted under section 602 of the code.

At the time mortgagees decided to bring the suit, the note and mortgage were in possession of the Union State Bank. By formal assignment they were then held as collateral security for the payment of a debt owing by mortgagees to the bank, but a careful consideration of all

of the evidence requires a finding that the bank had surrendered the note and mortgage to mortgagees without condition before the action was instituted, that they were the legal owners of the security when they filed their petition, and that the bank had full knowledge of their purpose to foreclose the mortgage and of their prosecution of the suit. This finding fully justifies the dismissal from which mortgagors have appealed.

The surrender and the redelivery of the note and mortgage to the payees transferred to them the title thereto. They were the legal holders of the security when they sued mortgagors. It is unnecessary to inquire whether the bank subsequently acquired their interest in the security or in their cause of action or decree. Since the suit was properly commenced by mortgagees, it was legally prosecuted to final decree in their names as plaintiffs. Code, sec. 45.

AFFIRMED.

GRACE A. MOORE, APPELLEE, V. WILLIAM LUTJEHARMS ET AL., APPELLANTS.

FILED MAY 29, 1912. No. 16,684.

Specific Performance: DEFECT IN TITLE: ABATEMENT OF PRICE. **If a purchaser, at the time of entering into a contract for the purchase of real estate, is aware of a defect in the vendor's interest or title, or deficiency in the subject matter, he will not, in a suit for specific performance, be entitled to any compensation or abatement of price, unless equity and good conscience clearly require it.**

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

John Everson, for appellants.

Thomas & Shelburn and *J. G. Thompson, contra.*

FAWCETT, J.

This case is an aftermath of *Lutjeharms v. Smith*, 76 Neb. 260, to which reference is made for a clear statement of the transactions between the defendants in this case, Lutjeharms and Smith. Defendant Smith failed to comply with the decree entered in that case, requiring him to convey the land to Lutjeharms and deliver to him the patents and other title papers in his possession, and has ever since permitted the $3,000 paid into court for his use, by Lutjeharms, to remain in the hands of the clerk. After that case was decided Lutjeharms conveyed to the defendant Goedeken. As shown in *Lutjeharms v. Smith*, Smith only owned an undivided one-half interest in the 80 acres in controversy, the title to the other half being in his sister. Subsequently to the termination of that case the sister died, testate. By her will, which was duly admitted to probate in Illinois and has also been probated in Harlan county, this state, she devised her one-half interest in the land to her daughter, the plaintiff herein, and she brought this suit for partition. In her petition she made Goedeken, the present owner, and Lutjeharms, and her uncle Smith, defendants. The parties all appeared and filed pleadings. Goedeken set up his title under his deed from Lutjeharms. Smith filed an answer and cross-petition in which he claimed that the decree in the former suit had been obtained against him by fraud, and asked that it be opened up and that he be permitted to defend. Lutjeharms set up the contract entered into between himself and Myers as agent for Smith, as shown in *Lutjeharms v. Smith, supra*, and prayed that, if the court awarded partition to plaintiff, it order the money now in the hands of the clerk to be retained by the clerk until the final disposition of the partition suit, and that out of such fund he, Lutjeharms, be compensated for whatever portion of the 80 acres, in the event of partition, or whatever sum of money might be paid to plaintiff in the event of the sale of the land, in

such suit. Goedeken has been in possession, claiming to be the owner, for something over four years. The district court entered a decree sustaining plaintiff's claim as owner of an undivided one-half of the land; found the amount of her half of the rental value, for the time Goedeken had been in possession, to be $100; ordered partition to be made between plaintiff and Goedeken, if the same could be done without prejudice to the interest of the parties, the $100 to be a first lien upon the portion awarded to Goedeken; that, if the land could not be partioned, it be sold and divided between plaintiff and Goedeken, the $100 to be paid to plaintiff out of Goedeken's half of the proceeds arising from the sale; found that defendants Smith and Lutjeharms were not necessary parties to the partition suit and dismissed their cross-petitions. Defendants Lutjeharms and Goedeken appeal.

The question we are called upon to decide is a very simple one. In *Lutjeharms v. Smith* we held: "Where the vendee of real estate is willing to accept the title of the vendor, the courts will not refuse to compel a specific performance of a contract because of a defect in the title." This is well-settled law. It is generally held that, "if the purchaser at the time of entering into the contract was aware of the defect in the vendor's interest or title, or deficiency in the subject matter, he is not, on suing for specific performance, entitled to any compensation or abatement of price." 36 Cyc. 742. While this rule, like all others, doubtless has its exceptions, it certainly ought to be applied in a case like the one at bar, where the record shows that defendants are not in a position to insist upon any refinement of equity in their behalf. The purchase by Lutjeharms from Smith was made through one O. H. Myers, a real estate agent of Alma, and the record shows that he and Lutjeharms knew the extent of Smith's title when the contract was entered into. With that knowledge Lutjeharms deliberately decided to make the purchase and take his chances on getting title to the entire tract.

Myers, who now resides in Denver, was called by defendant Smith as a witness. He testified that at the time of his negotiations with Smith he and his partner, F. E. Herron, had an agreement with Lutjeharms that "we were to buy the land as cheap as possible, or rather sell it to him as cheap as possible; then have the privilege of reselling it and dividing the profits;" that Lutjeharms was to furnish the money and title was to be taken in his name. He also testified: "Q. I will ask you if Mr. Lutjeharms knew of the condition of the title of the south half of the southwest quarter of section 25? A. Yes, because we looked that up before we did any writing, and it shows on the plat and record that it does not belong to Mr. Smith. Q. What did Mr. Lutjeharms say relative to the title of that eighty prior to the time that he purchased it? A. Well, he thought that Smith could get his sister to sign the deed. Q. What did he say as to the title of that land? A. He said he would buy the whole thing and take the chances, because if he bought the 240 alone the price was a little bit higher; he was getting the eighty for, I believe, $500, and he knew he could sell it for more money, or that we could. * * * Q. Mr. Myers, did you ever have any conversation with William Lutjeharms about transferring the south half of the southwest quarter of section 25 to William Goedeken? A. Yes. Q. State when and where that conversation was had, and what was said by Mr. Lutjeharms relative to transferring said land to William Goedeken. A. It was in our office, at the time of the making of the pretended sale; and, as he had sold the 80 for about twice what it cost him, I asked him about the division of the profits. He told me that he had to get the land out of his hands, out of his name, and his uncle understood how the title was—he could not furnish a good abstract and had to be responsible for the title, and probably would have to take it back. Consequently, Myers and Herron would have to wait until he knew where he was at himself. Q. What relation is Mr. Goedeken to the said Lutjeharms, if you know? A. He is Lutjeharms' uncle."

Lutjeharms himself testified in relation to this eighty as follows: "Q. When you were proposing to purchase it, what papers or records did you examine to find out where the title was? A. Myers examined it, I think. He said that one eighty was in the title of Mills. * * * Q. When did you look up the title? A. It was after we heard from Mr. Smith that we looked up the title. Q. Then you bought it the same day that Myers received that letter, without looking at the land? A. We had received a letter and knew that the land was for sale. Q. And you bought the land on that same day? A. After we got the letter? Q. Yes. A. I think so; he went up and looked at it first and explained how it was. Q. That was before you got the contract that he explained how it was? A. Myers? Q. Yes. A. Yes, sir."

This testimony shows beyond question that Lutjeharms and Myers knew all about Smith's interest in this eighty at the time they entered into the contract which they claim was based upon Smith's letter of September 3, 1903. This being true, Lutjeharms obtained in *Lutjeharms v. Smith, supra,* everything he was entitled to. He made his contract with Smith, knowing that Smith was unable to convey more than an undivided half interest in this eighty. He brought his suit for specific performance with that knowledge. He obtained a decree compelling Smith to convey the title he had. With his previous knowledge, he could not have obtained in that case, had he asked it, and cannot obtain in this, any abatement in the price which he agreed to pay and which in that case he has compelled Smith to accept.

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

AFFIRMED.

SAMUEL R. ROBERTS, APPELLEE, V. LAURA S. T. COX, APPELLANT.

FILED MAY 29, 1912. No. 16,709.

1. **Contracts:** REQUISITES. "To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley*, 53 Neb. 509.

2. **Specific Performance:** CONTRACT: EVIDENCE. The transactions between the parties examined and set out in the opinion, *held* insufficient to establish the contract alleged in plaintiff's petition.

APPEAL from the district court for Scott's Bluff county: HANSOM M. GRIMES, JUDGE. *Reversed with directions.*

L. L. Raymond, for appellant.

Wright, Duffie & Wright, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Scott's Bluff county for the specific performance of a contract of sale from defendant to plaintiff of the southwest quarter of section 7, township 21, range 53, in that county. From a judgment in plaintiff's favor, defendant appeals.

Succinctly stated, the correctness of the judgment depends upon the question whether plaintiff ever unconditionally accepted any offer to sell made by defendant, or defendant ever unconditionally accepted any offer to purchase made by plaintiff.

The negotiations between defendant, who resided in Chicago, and plaintiff, who resided in Scott's Bluff county, were conducted by one John C. Trotter, a real estate agent, who also resided in Scott's Bluff county. Some time about or shortly prior to June 1, 1908, defendant gave Mr. Trotter the following written authorization: "Mr. Trotter is authorized to sell my place adjoining town of Minatare for $105 an acre, within six months from

June 1st, 1908. ½ cash if he can get it, not less than $6,000 cash in any case, the remainder at 7% secured by first mortgage on the farm. Mr. Trotter to receive the regular commission of $50 on the first thousand and $25 on each succeeding thousand dollars of the purchase price. (signed) Laura S. T. Cox." On this memorandum Mr. Trotter indorsed the following: "I hereby accept the selling of the within named place or farm in accordance with the terms within named. (signed) John C. Trotter." Mr. Trotter did not succeed in selling the farm within the six months, and on December 4, 1908, defendant wrote him as follows: "My Dear Mr. Trotter: Ever since I received your letter, have been trying to decide what should be done about this matter. It is like this to me. I feel that I must have the $16,000 clear. Perhaps if you show this letter to your buyer, he will realize that you are not trying to deceive him in any way about the commission. If he will pay me $16,000 and your regular commission, abstract fees and any other expense of the transfer which may not occur to me, I am rather inclined to let it go, provided he will pay $3,000 or $4,000 down when he gets deed and possession. I would not feel safe to take less down than $3,000. If he will be able to do this by March 1st, the sale can wait till that time. My tenant gets a forfeit from me if I sell under three seasons, and this I will pay. Your client can see that at $105 per acre I should get a mere trifle above $16,000, but I am not so determined about this that I might not let it go, if other conditions suited." On February 22, 1909, Mr. Trotter not having effected a sale, defendant wrote him as follows: "My Dear Mr. Trotter: Have been thinking some more about the farm deal and decided should your man be of the same mind still that I would write and offer to split the commission and transfer expenses with him, that is, he to pay $16,000 for the place, and one-half of your commission, and any other transfer expense. If he will pay down not less than $3,000, or as much more as he chooses, and $3,000 more

in a year from time of sale, he can have any reasonable time on the remainder at 7 per cent. He can have until May 1st to do this, if he wants to do it. But as you know, I'm not anxious at all about selling, so it is all right, if he don't agree to my proposition. I would not take less than $3,000 down, and would prefer $4,000."

All of the authority conferred upon Mr. Trotter on or prior to April 19, 1909, is contained in the written memorandum and two letters above set out. On the last named date negotiations between plaintiff and Trotter were reduced to writing, as follows: "Minatare, Nebraska, April 19, 1909. This contract and agreement entered into by and between Laura S. T. Cox, party of the first part, and S. R. Roberts, of Scott's Bluff, party of the second part, witnesseth: That for and in consideration of the sum of $16,425 to be paid by the said party of the second part, to the said party of the first part in the time and manner hereinafter specified, the said party of the first part has agreed to sell, and convey to the said party of the second part the following described land in Scott's Bluff county, Nebraska, to wit, the southwest one-fourth of section seven, township twenty-one, range fifty-three, less ten acres already sold on north side, but still containing one hundred and sixty acres. And the said party of the second part has agreed to purchase all of the above described land, and to pay for the same the said sum of $16,425 in cash, as follows, $100 cash in hand at the signing of this contract, the receipt whereof is hereby acknowledged, and that $2,900 be paid on June first, 1909. And $3,000 June first, 1910. Interest at 7% per annum, and $10,425 to be paid June 1st, 1914, interest 7 per cent. per annum. And it is further agreed that at the time of payment of $2,900 June first, 1909, party of the first part will convey by good and sufficient warranty deed, the above described real estate, consisting of one hundred and sixty acres together with all the improvements belonging to her, thereon, together with four shares of Minatare Mutual Ditch stock. The party of the first part

hereby agrees that party of the second part shall have and collect the rent from said premises for the year 1909. And the party of the first part hereby agrees to furnish abstract showing clear title to all of said land, in the said party of the first part at the time of said transfer, and further agreed to give party of the second part possession of said premises March first, 1910. And it is further agreed that the covenants and agreements herein contained shall be binding on the heirs, executors and assigns of the parties hereto. In witness whereof, the said parties have caused these presents to be executed in duplicate and have hereunto set their hands this 19th day of April, 1909. In presence of J. C. Trotter. (signed) S. R. Roberts."

On the same day Mr. Trotter made and delivered to plaintiff a receipt as follows: "April 19, 1909. Received of S. R. Roberts check for $100 for payment on land S. W. ¼ sec. 7-21, as per contract of this date. J. C. Trotter."

On May 9, after having received the proposed contract of April 19, defendant wrote Mr. Trotter as follows: "My Dear Mr. Trotter: Your note and contract for deed came to hand as well as the telegram, but you must have mistaken the sense of the agreement I made to sell quite a little. No one that I know of out there has given more than two shares of water with a quarter section of land, and as I knew this at that time as much as now, I cannot think I promised four water rights with my land. Then as to this contract, I would not sign anything of this kind, if I understand it, at all. It seems to me to bind me to sell my land with only $100 down, and no security whatever. Now, Mr. Trotter, you know, no man would let property go in this way, and though I'm a woman I'm trying to learn about business, and I surely cannot. Had the three or four thousand been in the Minatare or S. Bluff Bank, for me, when you wanted me to contract away my land, it might have been different, but we may as well drop this selling for the present. I don't see why this year's rent could be expected anyway, when the ten-

ant I have must have his year's crop begun, and should I make a sale to any one, it would always have to be, subject to any lease had previously contracted. I have taken some time to think of this, but I can't sign away the most valuable piece of property I have in this way. So drop everything about the farm until I come out which will be sometime in July." The letter then speaks of some other properties, and concludes: "But you know I've told you all the time I am not anxious to sell the land next to the town. I am not giving the right to sell any of my property to any one else. You shall sell it, when it goes. This much is due you for the trouble you have already taken about it. Am sorry to disappoint you by returning this contract unsigned, but it would not give me a safe deal, and I cannot do it. Better luck next time. Very truly, (signed) Laura S. T. Cox."

On May 16, 1909, and after receipt of the above letter, Mr. Trotter had prepared and signed by plaintiff another proposed contract, as follows: "Minatare, Nebraska, May 16th, 1909. Whereas on the 19th day of April, 1909, a certain contract in writing for the sale of the southwest one-fourth of section seven, township twenty-one, range fifty-three, in Scott's Bluff county, Nebraska, wherein Laura S. T. Cox is party of the first part, and S. R. Roberts of Scott's Bluff is party of the second part; and whereas it is stated therein that party of the first part as consideration for said lands is to receive therefor the sum of $16,425 cash, part in money in hand, and the balance in payments, and whereas through the mistake, inadvertence and oversight of the party drafting the writing omitted therefrom the matter and manner of the securing of the said balance of deferred payments: Now, this writing is made and executed for the purpose to set forth the whole of said contract, and the said omission therefrom so as to show the contract as made by and between said parties which is as follows, to wit: Minatare, Nebraska, April 19th, 1909. This contract and agreement entered into by and between Laura S. T. Cox,

party of the first part, and S. R. Roberts of Scott's Bluff, party of the second part, witnesseth: That for and in consideration of the sum of $16,425 to be paid by the said party of the second part to the said party of the first part, in the time and manner hereinafter specified, the said party of the first part agrees to sell and convey to the said party of the second part the following described land in Scott's Bluff county, Nebraska, to wit: The southwest one-fourth of section seven, township twenty-one, range fifty-three, less ten acres already sold on the north side, but still containing one hundred and sixty acres. The said party of the second part agrees to purchase all of the said one hundred and sixty acres of land described above and to pay to the said Laura S. T. Cox therefor the said sum of $16,425 in cash as follows: $100 cash in hand at the signing of this contract, the receipt whereof is hereby acknowledged, and the sum of $2,900 on the first day of June, 1909. The sum of three thousand dollars on the first day of June, 1910, with 7% interest from June first, 1909, to be evidenced by the negotiable promissory note of the party of the second part, bearing date June first, 1909, and to be secured by the first mortgage on said land of the party of the second part to the party of the first part duly executed and delivered, and the further sum of ten thousand four hundred and twenty-five dollars on the first day of June, 1914, with interest thereon at seven per cent. per annum payable annually to be evidenced by the negotiable promissory note of the party of the second part to party of first part, bearing date June 1st, 1909, and to be secured by the first mortgage on said land of party of second part to the party of the first part. It is further agreed that at the time of the payment of said two thousand nine hundred dollars, June first, 1909, or as soon thereafter as practicable, the said party of the first part will convey by good and sufficient warranty deed the above described real estate, consisting of 160 acres together with all the improvements belonging to her thereon, together with four shares of the Minatare

Mutual Ditch stock. The party of the first part hereby agrees that party of the second part shall have and collect the rent from said premises for the year 1909. And the party of the first part hereby agrees to furnish abstract showing clear title to all of said land in the said party of the first part at the time of said transfer, and further agrees to give party of the second part possession of said premises March first, 1910. And it is further agreed that the covenant and agreement herein contained shall be binding on the heirs, executors and assigns of the parties hereto. In witness whereof, the said parties have caused these presents to be executed in duplicate and have hereunto set their hands this 19th day of April, 1909. In the presence of J. C. Trotter. (signed) S. R. Roberts." When this document was sent to defendant she made no answer to it, for the reason, as she testified, "I supposed what I had written before was all that was necessary."

It is upon this record that plaintiff bases his claim for specific performance of this so-called contract. We deem it unnecessary to enter upon any extended discussion of this record. It shows upon its face that Mr. Trotter had no authority to bind the defendant, as was attempted to be done, by either the agreement of April 19 or the amended agreement of May 16. That plaintiff knew the limitations upon Trotter's authority is fully shown by the uncontradicted testimony of Mr. Trotter, who, when introduced as a witness by plaintiff, testified: "The fact of the business is, that I submitted the correspondence between me and Mrs. Cox to Mr. Roberts to see what I could do. I followed Mrs. Cox's instructions as near as I possibly could. It was not my understanding that I was to do this, but there is nothing in this transaction that Mr. Roberts did not understand. He knew just what I could and what I could not do. There is nothing about this that I wish to withhold from the court, and I will answer anything." And again: "I did not put up any talk to Mr. Roberts, I simply showed him the correspondence, and showed him what I thought I had authority to

do." Again: "Q. Did you show him Mrs. Cox's letters? A. With reference to the contract, I certainly did. Yes. Q. You showed him all you had? A. Yes, sir."

This is not, therefore, a case where plaintiff was dealing with an agent and relying upon any ostensible authority on the part of the agent. He knew exactly what the agent's authority was and the terms upon which the agent was authorized to sell defendant's farm. The terms proposed by defendant were not unconditionally accepted by plaintiff. Even in the amended contract of May 16 it is attempted to bind defendant to do things which she had never promised to do, and some of which, in her letter of May 9, 1909, she had expressly refused to do. It is clear that defendant never authorized the making of either the contract or amended contract, under which it is sought to bind her, and that the minds of the principals to this contract never met. It is also clear that by the letter of May 9 defendant declined plaintiff's offer to purchase, as outlined in the proposed contract of April 19, refused to sign or in any manner ratify that contract, and withdrew her farm from Mr. Trotter; and that thereafter he was without authority to in any manner represent or bind her in reference thereto. It follows that the district court was in error in awarding plaintiff specific performance of this so-called contract.

As the entire transaction between plaintiff and defendant, and Trotter, as defendant's agent, is fully disclosed by this record, and it clearly appearing therefrom that plaintiff is not entitled to any relief at the hands of defendant, this vexatious litigation against her should end. The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to dismiss the suit at plaintiff's costs.

REVERSED.

LETTON, J., not sitting.

HENRY W. SWETT, APPELLANT, V. ANTELOPE COUNTY FARMERS MUTUAL INSURANCE COMPANY, APPELLEE.

FILED MAY 29, 1912. No. 17,096.

1. **Insurance:** MUTUAL COMPANIES: BY-LAWS. A by-law of a mutual insurance company, which expressly provides that buildings in which a stovepipe runs through the roof or side of the house, or enters the chimney at the bottom or in the attic, are not insurable by such company, is valid and binding upon the members of such company.
2. ———: ———: ———. And a by-law which provides that removal of personal property to any farm in the county shall not invalidate the insurance of the member, "provided, that the buildings into which it is removed are insurable in this company," is likewise valid and binding.
3. **Pleading:** WAIVER. Waiver is an affirmative defense, which, to be available, must be pleaded.
4. **Insurance:** WAIVER. The making, and demand for payment, by a mutual insurance company, of an assessment upon a policy of insurance, subsequent to a loss under such policy, will not be held to be a waiver of its terms, in the absence of a plea and proof of payment by the assured of such assessment.
5. **Quaere.** Whether payment of such an assessment to a purely mutual insurance company would establish a waiver, *quære.*
6. **Trial:** DIRECTING VERDICT. Where it clearly appears from the pleadings and evidence that plaintiff is not entitled to any recovery, it is the duty of the court to direct a verdict for the defendant.

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

Henry M. Kidder, for appellant.

O. A. Williams, contra.

FAWCETT, J.

The petition alleges that defendant is a mutual insurance company, organized under the laws of this state; that plaintiff applied for and obtained a policy of $200

on furniture, clothing and other household effects; that at the time the policy was issued plaintiff resided on section 18, town 23, range 6, in Antelope county; that after the issuance of the policy he removed to section 33, town 25, range 7, in said county; that the removal was with the knowledge and consent of defendant; that plaintiff had paid all dues and assessments up to the time of the fire, and had complied with all of the rules and regulations of defendant contained in its by-laws and in the policy of insurance; that the property was destroyed by fire February 22, 1908, and was of the reasonable value of $302.20; that defendant refuses to pay the loss; and prays judgment for the amount stated in the policy. A copy of the policy and by-laws is attached to the petition and made a part thereof. The policy recites that it is issued in consideration of the cash premium and agreement in the assured's application. It also recites: "For further particulars see his application on file in the office of the secretary of this company, also articles of incorporation and by-laws annexed hereto, all of which are made a part of this policy." Section 8 of the by-laws reads as follows: "This company will not insure any old or dilapidated buildings; buildings with hay, straw, thatched, or rubber roof, or those that have a stovepipe through the roof or side of the house," etc. Section 15 provides: "The removal of personal property to any farm in the county shall not invalidate the insurance of the member. Provided, that the buildings into which it is removed are insurable in this company," etc. The answer alleges that the building situated upon section 33, into which plaintiff moved his personal effects, was not insurable in defendant company under the provisions of section 8 of the by-laws, for the reason that the stovepipes in said building passed through the ceiling and roof and not into any chimney, which rendered the personal effects of plaintiff uninsurable while contained in such building, as provided by section 15 of the by-laws; and that the fire which destroyed the property was caused and came

about because the pipes passed through the ceiling and roof and not into a chimney. The reply alleges that, subsequent to the fire and after the removal to section 33, the defendant made an assessment upon plaintiff of two mills on the full amount of his insurance policy, which was in the aggregate for $1,525, and which included the destroyed property; and that, because of such assessment and demand for payment thereof, defendant is estopped to claim that the policy was not in force on the goods destroyed at the time of the fire. At the conclusion of the trial the court directed a verdict in favor of the defendant. Plaintiff appeals.

The evidence is in line with the pleadings above set out, and no good purpose would be served by setting it out here. The district court was evidently of the opinion that no liability of the defendant ever attached to the articles of personal property, while contained in the uninsurable building situated on section 33. In this we think the court was right.

The alleged waiver or estoppel is not sufficiently pleaded. The allegation of the reply is: "That because of the said assessment and demand for payment the defendant has waived the conditions of the by-laws, and that because of said facts defendant is estopped to now claim that the said policy was not in force on the goods destroyed at the time of the said fire." Plaintiff does not allege that he paid the assessment. All the evidence shows is that, in the regular course of business, on October 19, 1908, an assessment notice in the usual form was sent out to the members of defendant company. The one mailed to plaintiff notified him that the assessment on his policy was two mills, or $3.06. This amount would be two mills upon the aggregate amount of plaintiff's policy. Not having alleged payment of the assessment, plaintiff is not in position to insist upon a waiver.

AFFIRMED.

CHARLES HENRY TOWNSEND, APPELLANT, V. GEORGE A. SWALLOW ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,660.

1. Judgment: INTEREST. When a court of equity decrees the specific performance of a contract to convey real estate upon the payment of a specified amount at a specified time, such decree will not ordinarily bear interest during the time so specified for payment.
2. ———: PAYMENT: CHECKS. A decree for the payment of money means lawful money of the United States; the creditor is not required to receive private checks as a compliance with the decree.
3. Interest: DEPOSIT IN COURT. The claim of interest on money deposited in court as a performance of the contract sued upon in equity must be determined upon a consideration of all the equities existing between the parties.

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

W. T. Wills and *J. H. Macomber,* for appellant.

D. A. Harrington, M. F. Harrington and *John A. Davis, contra.*

SEDGWICK, J.

In May, 1906, the defendant George A. Swallow was in possession of the real estate in question as the tenant of the plaintiff, and the parties then entered into a contract whereby the plaintiff agreed to sell to the defendant the said premises for $4,000, subject to an outstanding mortgage. The defendant paid $25 on the contract. Afterwards, the defendant still being in possession of the premises, the plaintiff brought an action against him in the district court for Boyd county to cancel the contract and obtain possession of the land. In the commencement of the original action the plaintiff tendered to the defendant and deposited with the clerk the $25 which

defendant had paid upon the contract at the time it was made. The defendant, by his answer and cross-petition, asked for a specific performance of the contract. He also tendered the plaintiff as a performance of the contract, and deposited with the clerk, corporate stock of the par value of $2,000, which he alleged the plaintiff agreed in the contract to receive as part payment for the land, and also tendered and deposited with the clerk $1,975 in currency which, with the $25 he had paid to the plaintiff upon making the contract, he alleged was the balance of the purchase price. Upon the trial of the cause the court found generally for the defendant, but rejected the tender of the corporate stock and required the defendant to make payment of the balance due upon the contract in currency, and found that the amount due from the defendant to the plaintiff upon the purchase price was $4,077.46. In computing this amount the court credited the defendant with the $2,000 on deposit with the clerk, which included the $25 paid by the defendant at the making of the contract, so that the plaintiff was entitled to a return of the $25, which he had deposited with the clerk and which would have been due to the defendant if the court had canceled the contract and had quieted the plaintiff's title in the land. The trial court decreed that upon the payment of $4,077.46 within 60 days from the date of the decree the plaintiff should execute to the defendant a warranty deed for the premises, and upon his failure to execute such deed the decree should operate as such conveyance. The defendant was dissatisfied with the decree, and executed a supersedeas bond and took some other steps preparatory to an appeal. He failed to perfect his appeal, and after more than a year had elapsed the plaintiff filed a "motion and petition" in the action, alleging the former decree of the court, that the time for appeal had elapsed, that there was no appeal pending, and that the defendant had "totally and absolutely failed and neglected to comply with said decree." The defendant answered, admitting the decree, and alleging that within 60 days after the

decree he paid into the hands of the clerk the full amount of the decree, and that this payment was made with the consent of the plaintiff. He asked that the "motion and petition" be denied, and that a decree be entered quieting the title. A trial of this issue was had, a finding and decree for defendant, and plaintiff has appealed.

It appears that within 60 days after the entry of the first decree there were negotiations between the parties looking to the settlement of the matter and the abandonment of the proposed appeal. It was agreed between them that the plaintiff should allow $100 discount from the amount of the decree, and the defendant should pay the balance in full as a final adjustment of the matter. After this had been agreed upon between the parties they went to the office of the clerk of the district court to complete the settlement. The defendant George Swallow testified that his father, James Swallow, assisted him in the settlement and was duly authorized. It appears that in making their settlement, before going into the clerk's office, the plaintiff's attorney had considered that the plaintiff was entitled to interest upon the decree from the date thereof, and that in offering to discount $100 the intention was to discount the $100 from the amount so computed. There is some conflict in the evidence upon this point, but it appears that the balance agreed upon as due the plaintiff, in addition to the $2,000 on deposit in the clerk's hands, was $2,111.78, $34.32 having been added as interest. Interest is not ordinarily allowed upon such decrees if payment is made within the time limited. *Cobbey v. Knapp*, 28 Neb. 158. It also appears that in making their computation in the settlement it was considered that the $25 which the plaintiff had deposited with the clerk would be returned to him, and that amount was not included in the amount agreed upon to be paid by the defendant. When they stated their settlement to the clerk, he first made an entry upon his docket showing that there was $2,000 upon deposit. He then made an entry upon his docket showing that the

amount that the parties had agreed upon to be paid by the defendant was paid into court, and the defendant George Swallow drew his check in favor of the clerk upon a local bank for $475, and his father, James Swallow, drew his check upon a bank in Shenandoah, Iowa, payable to the clerk, for $1,636.78, the two checks amounting to $2,111.78, the amount agreed upon to be paid by the defendant. The clerk then deducted the costs which had been adjudged against the plaintiff, $29, from the $2,000 upon deposit, and at the request of the plaintiff drew his check for $100 for the discount agreed upon by the parties, and also drew his check for $1,871 in favor of the plaintiff, being the balance of the $2,000 on deposit. The two checks drawn by the defendant and his father were indorsed over to the plaintiff by the clerk, and these four checks, amounting to $4,082.78, were supposed by the parties to be the amount which the plaintiff was to receive from the clerk. The clerk wrote a receipt for this amount upon his docket, which was signed by the plaintiff. The plaintiff then asked for the $25 which he had deposited, and it was discovered at once that they had made a mistake in the computation in that amount. The defendant retained the one hundred-dollar check and the clerk's check for $6.56 costs which had been advanced by him, and afterwards cashed these checks at the bank.

It appears that the first default in carrying out the settlement that had been agreed upon was the defendant's refusal to correct the mutual error whereby he was allowed a credit for the $25 which belonged to the plaintiff. The plaintiff could not be required to receive checks in lieu of currency in the payment of his judgment, but consented to do so in the settlement, and when the defendant refused to correct the error and complete the settlement as made the plaintiff refused to receive the checks. The evidence shows that the checks were good, and that the defendant might easily, if he had desired, substitute the currency therefor, but he refused to do so. Within 30 days after the failure of the settlement defendant paid

into court the additional $25, thus making good the error in the computation, and the plaintiff might then have received the checks and would have the benefit of the settlement substantially as agreed upon, but he then stood upon his technical right to currency instead of the checks, and also demanded interest for the short time that had intervened since the settlement. Mutual stubbornness prevented the completion of the settlement, and has occasioned this subsequent extensive litigation. It appears that the defendants have, during all of this time, been in possession of the farm and received the rents and profits therefrom. The plaintiff refused to receive the $1,975 deposited with the clerk by the defendant before the trial of the original action, and refused to allow the defendant to complete the purchase of the land upon any terms. It was found by the court that he was in error in so refusing. It seems therefore inequitable to allow him to recover from defendant interest on the money so paid by defendant. The defendant should have corrected the error when discovered, and should have then paid the additional $25. The plaintiff was not bound to receive the amount tendered him without this $25, nor to receive checks in payment if their settlement failed, and it seems therefore that he is entitled to interest on the balance due him under their settlement from the expiration of the 60 days allowed the defendant by the court in which to make payment. Plaintiff has paid the $100 discount agreed upon and should now receive for the land the amount agreed upon in settlement, $2,111.78, and the currency in the hands of the clerk when settlement was agreed upon, $2,000, amounting to $4,111.78, less the amount deposited by the defendant with his answer, $1,975, and $29 costs adjudged against plaintiff, $2,004, leaving a balance of $2,107.78, and should pay the additional costs adjudged against him herein. Defendant is entitled to the $2,025 currency now in the hands of the clerk if he fails to complete the contract and plaintiff keeps the land, and should pay the additional costs adjudged against him herein.

The judgment of the district court is therefore reversed and the cause remanded, with instructions to sustain the motion of the plaintiff and enter decree quieting his title in the land in question against the defendants and all persons claiming through or under them since the commencement of the original action, upon payment of the costs adjudged against him upon the first trial, unless the defendants pay into court for the plaintiff within 60 days after the entry of the decree the sum of $2,107.78, with interest thereon at 7 per cent. per annum from the 10th day of June, 1908, to the date of such payment, and that upon such payment the plaintiff shall execute to the defendant George A. Swallow a good and sufficient warranty deed for the said premises with the usual covenants of warranty. Upon failure so to do, the decree shall operate as such conveyance. One-half of the costs in the trial court since the original decree and in this court to be taxed against the defendants and one-half against the plaintiff.

REVERSED.

WILLIAM E. HARVEY, APPELLEE, V. T. B. BOWMAN, APPELLANT.

FILED MAY 29, 1912. No. 16,714.

Appeal: CONFLICTING EVIDENCE. This is an action at law, tried by the court without a jury. The evidence is somewhat conflicting, but sufficiently supports the judgment, which is accordingly affirmed.

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

C. E. Spear, F. J. Mack and *H. C. Vail,* for appellant.

H. Halderson and *O. M. Needham, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for the value of eight loads of corn. One Smith was farming the plaintiff's land on shares, and delivered the corn to the defendant, who was dealing in grain. The defendant admits that he bought eight loads of corn delivered by Smith, but testifies that the first three loads delivered belonged to Smith and not to the plaintiff, so that the controversy is in regard to the value of the three loads.

The scale checks taken by Smith are in evidence; the first three are made out to Smith, and the remaining five to the plaintiff, and the defendant testifies that when Smith contracted the corn with him he represented it to be his own corn, and after three loads were delivered Smith refused to deliver any more of his own corn, and afterwards delivered the five loads as the corn of the plaintiff. The defendant seems to be candid in the matter, and the conduct of Smith does not appear to be entirely consistent, but the defendant's own evidence is not sufficient to constitute a defense. He admits that he bought the corn, and that he has not paid for it, and that the grain checks which he gave for the corn were, before the commencement of the action, in the hands of the plaintiff who claimed to be the owner of the corn. The plaintiff and Smith both testify that the corn belonged to the plaintiff, and statements made by Smith, at the time he contracted it, that it was his own corn do not overcome this testimony.

The defendant deposited money in the bank for the five loads of corn, and insists that the judgment is therefore in any event too large, but he never made legal tender of any amount to the plaintiff, and deposited this money as payment in full of the plaintiff's claim. He is therefore not entitled to credit on this claim for the deposit in the bank.

The judgment of the district court is sufficiently sustained by the evidence, and is

AFFIRMED.

FRANK WILLIER ET AL., APPELLANTS, V. JAMES CUMMINGS ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,716.

1. **Wills:** CONSTRUCTION: POWER TO SELL HOMESTEAD. If a testator, who has no real estate except his homestead, provides in his will that all of his debts shall be paid out of the personal property if that is sufficient, a provision in the will that if the personal property is not sufficient the executor is authorized "to sell so much of my real estate as may be necessary for that purpose" gives the executor power to sell so much of the homestead, subject to the life estate of the testator's widow, as may be necessary to pay the debts.

2. ———: POWER OF SALE: RECITALS IN DEED. It is not necessary to the validity of a deed, executed by the donee of a power to convey, that the intention to execute the power should appear by express terms or recitals in the instrument.

3. ———: ———: EXECUTION OF POWER. An executor with power under the will to sell the homestead of decedent, subject to the life estate of the widow, to pay the debts of the testator, applied to the district court for license which was granted; sale was made accordingly and confirmed by the court and the proceeds applied in payment of the debts. In these proceedings no reference was made to the power under the will. The sale of the homestead for such purpose being invalid without the power given by the will, and the executor having no personal interest in the real estate, it is *held* that such sale and deed are valid as an execution of the power.

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

Albert & Wagner, for appellants.

A. M. Post and *W. N. Hensley, contra.*

SEDGWICK, J.

At the time of his death Daniel Schucker was residing with his wife and children on a homestead consisting of 80 acres of land, which it appears to be conceded was not

worth more than $2,000. He had no other real estate, and left a will which contained this provision: "I direct that all my debts and the expenses of administering my estate and funeral expenses be paid out of my personal property. If that be insufficient, then I authorize my executor to sell so much of my real estate as may be necessary for that purpose. Second, I give and bequeath to my wife, Maria Schucker, all of my property, both personal and real, during her lifetime, and in the event of her death, I direct that the balance and residue of my property be divided among my living children (naming them)." He left certain debts, and the executor of the will applied to the district court for license to sell 40 acres of land to pay the debts of the deceased. The license was duly granted and the land sold thereunder to defendant James Cummings. The sale was confirmed and deed ordered, which was duly executed and delivered. The plaintiffs, who are the residuary legatees under the will, brought this action in ejectment to recover the land. They were unsuccessful in the district court and have appealed. It is contended that the will should not be construed to authorize the sale of the homestead to pay debts; and, second, if it should, this sale was not made under the power given in the will, but under the statute which authorizes such sale only when the debts are a lien upon the land, and that such sale of the homestead is therefore void.

1. It is urged in the argument that the will is drawn from a form found in Maxwell's Justice Practice, and that the language was used inadvertently and without any intention to charge the homestead with the debts of the deceased. Several authorities are cited which hold that a recital in the will that the testator desires to have all of his debts paid will not have the effect to authorize the executor to sell the land for that purpose. It appears that at the common law the real estate of deceased was not subject to payment of his debts, and courts of equity then held that, if a will contained a devise of real estate with a recitation that the testator desired to have his

debts paid, such a recitation would be construed in equity to create a charge upon the land for that purpose. In this country, the real estate of the deceased being subject to the payment of his debts by statute, the recitation in the will that the testator desired to have his debts paid, or even the express provision that his debts should be a charge upon the real estate, would be without effect, because such expressions in the will would add nothing to the force of the statute and would therefore be meaningless; but, if the real estate is a homestead and is not under the statute liable for the debts of the deceased, and the testator has no other real estate, a provision in the will that the executor shall sell the real estate to pay debts is not meaningless. Our homestead act provides that the owner of the fee in the homestead may dispose of the same by will subject to the life estate of the surviving spouse, and this was the effect of the will in question. The manner of executing a will and its formal parts may be suggested by an approved form, but the granting clauses and the beneficiaries of the testator's bounty must be presumed to have been intended by the testator as they appear in the instrument itself. Lawyers do not depend upon forms in determining who shall be the beneficiaries under the will of the testator, and we cannot say that plain and unequivocal language like this was used inadvertently and refuse to give effect to the will of the deceased.

2. Neither the application for license to sell this real estate nor any other of the proceedings in that behalf contained any reference to the power of sale in the will. For this reason the plaintiffs contend that there was no intention on the part of the executor to execute the power, and that the deed is therefore void. The supreme court of the United States said, quoting from an opinion of the supreme court of Illinois: "All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument." *Warner v. Connecticut Mutual Life Ins. Co.*, 109 U. S. 357. In 2 Perry, Trusts (2d ed.) sec. 511*c*, it is

said: "The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear: (1) When there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. * * * If the grantor has no interest in the land, his deed will be insensible and mere absurdity, if not intended as an execution of the power, * * * if it refers to the subject matter of the power, or describes the land over which his power extends." Many authorities are cited by the author, and we have no doubt of the correctness of the rule so announced. In this case the donee of the power had no interest in the land, and his deed would have no operation if it was not the execution of a power. Indeed, the power which the court attempted to give him was precisely the power which the will gave him, and his deed as executor conveys the land as the will authorized him to do. The supreme court of Illinois so determined this precise question in a summary manner in *Purser v. Short,* 58 Ill. 477. Plaintiff's counsel cites some cases which appear to take a contrary view; among them, *Jay v. Stein,* 49 Ala. 514. The case was decided by a divided court, one of the three judges dissenting. In a later case language was used by that court which indicated a modification of their views. *Matthews v. McDade,* 72 Ala. 377.

For the reasons stated, the decree of the district court is right, and it is unnecessary to discuss the questions

that are raised in regard to adverse possession and the statute of limitations.

The judgment of the district court is

AFFIRMED.

WILLIAM BARTELS V. STATE OF NEBRASKA.

FILED MAY 29, 1912. No. 17,375.

1. **Criminal Law**: STATUTE: CONSTITUTIONALITY. The act of 1907, laws 1907, ch. 167 (criminal code, sec. 117*c*), defining poultry stealing and providing a penalty therefor, does not violate that part of section 11, art. III of the constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

2. ———: INSTRUCTIONS: REASONABLE DOUBT. An instruction in a criminal prosecution that the rule that requires proof of guilt beyond a reasonable doubt "is not intended to aid any one who is in fact guilty to escape," and which intimates that an acquittal must be justified and a verdict of not guilty must be "authorized," is erroneous. In the condition of this record, it is found to be prejudicially erroneous.

3. **Larceny**: EVIDENCE. The evidence is discussed in the opinion, and is found insufficient to support a conviction.

4. ———: POULTRY STEALING: PENALTY. Under the act of 1907, defining and providing a penalty for poultry stealing, if the value of the property stolen is less than $35, the penalty as for a felony should not be inflicted, except in cases of habitual crime, or when the act is accompanied with circumstances of aggravation.

ERROR to the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed.*

D. H. Sullivan and *R. E. Evans*, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant (plaintiff in error here) was convicted

in the district court for Dakota county under chapter 167, laws 1907 (criminal code, sec. 117*c*). The section is as follows: "If any person shall steal any chickens, ducks, turkeys, geese, pigeons, or guineas of any value or, if any person shall receive or buy any chickens, ducks, turkeys, geese, pigeons or guineas, that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner; or, if any person shall conceal a poultry or pigeon thief, knowing him to be such; or, if any person shall conceal any chickens, ducks, turkeys, geese, pigeons or guineas, knowing the same to have been stolen; every such person so offending shall be imprisoned in the county jail not less than ten days nor more than six months or in the state penitentiary for not more than three years nor less than one year, in the discretion of the court."

1. It is contended that the act violates section 11, art. III of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." It is said that, "if it is permitted to stand, it amends section 119 of the criminal code, and makes no reference to section 119, nor does it pretend to repeal that section." A similar act is considered and upheld in the recent case of *Wallace v. State, ante,* p. 158. That was a prosecution for hog stealing under section 117*b* of the code. Former decisions of this court are referred to, and the discussion and conclusion are entirely applicable to the question here presented.

2. It is also contended that the act is unconstitutional because more than one subject is contained in the title and in the act. The title of the act is: "An act to provide a penalty for stealing live poultry or pigeons, for receiving buying or concealing live poultry or pigeons, knowing the same to have been stolen, and for concealing poultry or pigeon thieves." The point insisted upon appears to be that poultry and pigeons are two different subjects of legislation and cannot be legislated upon in the same act. Poultry, according to the definition in

Webster's New International Dictionary is: "(2) Domestic fowls reared for the table, or for their eggs or feathers, such as cocks and hens, capons, turkeys, ducks and geese." Pigeons, if "reared for the table," are within the definition. The fact that pigeons are poultry and might have been considered as included in that term will not affect the question. If the title of the act had specifically named other poultry, as turkeys and geese, it would probably not be contended that for that reason the act is unconstitutional.

3. It is objected that the evidence is not sufficient to support the verdict. The witness Frank Phillips testified that in January of last year he was employed by the defendant as a farm hand, and that on the evening of about the 25th of January the defendant requested the witness and one Chester Ream to go with him to the place of one Bridenbaugh and steal his chickens; that they went accordingly, and defendant took some sacks from his granary to carry them in, and they made three several trips, each time filling three several sacks, stealing in all 56 chickens; that they took the chickens to the defendant's place and put them in an ice house that night, where they remained until the following night, when the witness and the defendant went to the ice house and cut off the tails of the roosters and placed them in the chicken house with the chickens of the defendant; and the following morning the little boy, about eight years old, opened the chicken house door and allowed the chickens to escape; that the defendant then put up a few feet of wire netting to keep the chickens from returning to their former owner. The defendant is a well-to-do farmer, with 280 acres of land where he has lived from 15 to 20 years, and has a family consisting of his wife and, at that time, two children, and they had at that time quite a number of chickens of their own, at least several hundred. It was no theory of the prosecution that the defendant stole these chickens because of gain or because of any use he had for them, but the witness testified that the defendant had

shortly before that time bought some straw of Mr. Bridenbaugh and had failed to get the straw he had paid for, and he became very angry with Mr. Bridenbaugh and proposed to steal these chickens to "get even with him."

There is no evidence corroborating this testimony of the witness Phillips, unless the following circumstances should be thought to support his testimony: Mr. Bridenbaugh testified that a day or two after the chickens were taken he was at the defendant's place and saw a large number of chickens, two or three hundred, and among them he saw two or three that had their tails cut off. He testified that he thought he saw some of his chickens there, but he did not pretend to identify them; and, being asked, "And you take one of your roosters and put him up besides Mr. Bartels' rooster and there was no difference in their tails, you couldn't hardly tell which chickens were yours or Mr. Bartels'? A. All were Plymouth Rock chickens. Q. All alike exactly?" He did not answer this question. Some time after the chickens were missed by their owner, a young man who resided in that neighborhood was riding by the defendant's place, and he testified that he noticed the defendant's chickens as he went by, and he was asked this question: "You may state whether you noticed any bob-tailed roosters there." He did not answer the question directly, but his answer would indicate that he intended to testify that he did. On cross-examination he was asked: "You couldn't tell whether cut with pair of sheep shears, or razor, or whether pulled out? A. No; so many there. I noticed they were bob-tailed." Another witness who passed the place some five or six months later gave similar testimony.

If the theory of the prosecution was that the defendant attempted to remove any of the distinguishing characteristics so that the stolen chickens could not be identified, this testimony would of course amount to nothing. It was shown without dispute that the defendant had upon his premises very many chickens that would have fully answered the description that these witnesses gave of

those they observed. The evidence of the witness Phillips then is wholly uncorroborated, and his testimony was contradicted by the defendant, the defendant's wife, and the witness Chester Ream, the defendant's brother-in-law, all of whom testified emphatically to circumstances and conditions which, if true, render it impossible that the defendant could have taken the chickens, as alleged by this witness.

This witness quarreled with defendant's wife about three months after the chickens were missed and was discharged by defendant. The defendant and his wife both testify that when discharged he was very angry and made threats that he would get even with defendant. The witness admits the quarrel and discharge, but denies the threats, and testifies that he immediately declared the defendant had stolen the Bridenbaugh chickens, and began this prosecution against the defendant. The defendant, his wife and brother-in-law all testify that on the evening of the 26th of January Phillips borrowed defendant's horse, representing that he wanted to visit his sister some few miles distant; that he was gone nearly the whole night, returning about 3 o'clock the following morning. The defendant testifies that when he went to the stable about 7 o'clock in the morning Phillips was cleaning the horse, removing harness marks which showed plainly that the horse had been driven hard in harness. This, Phillips denies, but he did not visit his sister, and is not corroborated in his explanation of his whereabouts during the night. Six or seven, apparently respectable, men, merchants and other business men, without any apparent interest in the controversy, testified that they had known the witness Frank Phillips for many years, knew thoroughly his reputation for truth and veracity in the community where he lived, and that it was bad. This evidence was not contradicted, except that one witness testified that some people said his reputation for truth and veracity was good and some said it was bad. Also an attempt was made, which was at least partially successful, to impeach

the defendant, but there was no attempt to impeach the defendant's wife, nor the witness Chester Ream. If the testimony of a witness can be discredited by impeachment, it would seem that the witness Phillips was effectually discredited.

The court instructed the jury: "The jury are instructed that one of the modes recognized by law for impeaching the veracity of a witness is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached in the neighborhood in which he resides; and, if the jury believes from the evidence in this case that the general reputation of the witnesses Frank Phillips and William Bartels for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard the whole of their testimony and to treat it as untrue, except where it is corroborated by other credible evidence or by facts and circumstances proved on the trial." If the jury had observed this instruction, they must have considered the evidence of the witness Phillips, wholly uncorroborated and discredited by impeachment as it was, insufficient to establish the guilt of the defendant beyond a reasonable doubt.

It seems probable that the jury were misled by the following instruction given by the court: "The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man

to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." This was the only instruction in which an attempt was made to define "reasonable doubt," except that in another instruction it is said: "The state must establish every material allegation in the information beyond a reasonable doubt, that is, to a moral certainty." If we consider that the witness Phillips was by his own testimony an accomplice in guilt, and that his evidence is wholly uncorroborated, it would seem probable that the jury by the eleventh instruction above quoted were led to believe that there must be some special circumstances in the case "to justify an acquittal" and "authorize a verdict of not guilty."

4. The defendant was sentenced to imprisonment in the penitentiary for a period of not less than one year nor more than three years, and it is urged that the sentence is excessive. The statute leaves a large latitude to the discretion of the court in fixing the penalty from ten days in the county jail to three years in the penitentiary. The statute is a new one, and it seems that the legislature considered that there might be circumstances under which the extreme penalty should be inflicted. If a defendant has prepared himself for the business of poultry stealing and practices it persistently for gain, it calls for more serious consideration than does a first offense done in anger and as a means of retaliation for a real or supposed injury. When the value of the property taken is less than $35, imprisonment in the penitentiary should be inflicted only in cases of habitual crime, or accompanied with violence or breaking or other circumstances of aggravation. The punishment in this case seems excessive. If the defendant should be found guilty, his offense would be regarded rather as a misdemeanor than a felony. Because of this insufficiency of the evidence and the erroneous definition of "reasonable doubt," it seems clear that the de-

fendant has not had such a trial as the law awards to all persons accused of crime.

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

REVERSED.

LETTON and ROSE, JJ., dissent.

FRANK KEENAN, APPELLANT, V. JOSEPH SIC, APPELLEE.

FILED MAY 29, 1912. No. 16,636.

Pleading: JUDGMENT ON THE PLEADINGS. In an action of replevin, the defendant pleaded title in himself. The specific allegations and admissions in the reply were inconsistent with the claim and ownership set forth in the petition. *Held*, That the motion of defendant for judgment on the pleadings was properly sustained.

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

James R. Swain and *H. C. Vail*, for appellant.

A. E. Garten, contra.

HAMER, J.

This is an action of replevin. The plaintiff, Frank Keenan, who is the appellant in this court, says in his petition that he is the owner and entitled to the immediate possession of a two-thirds interest in and to about 30 acres of wheat now in the shock or stack on the S. E. ¼ of 17-19-8, in Boone county, Nebraska, of the value of $500; that the defendant wrongfully and unlawfully detains said goods and chattels from the possession of the plaintiff, and has detained the same for the space of ten days, to plaintiff's damage in the sum of $50. The prayer is for judgment that the defendant return the property to the plaintiff and for damages, or for $550, the value of the property in case a return cannot be had.

The defendant answered, first, by a general denial; and, second, that on the 11th day of January, 1909, he, the said defendant, entered into a contract to purchase the land upon which wheat was then growing, being the land described in plaintiff's petition; that this contract was made with the plaintiff and others who were the owners of said land, and that said contract was in writing, and that said writing made no reservation of said wheat, or any part thereof, and that on or about March, 1909, the defendant entered into possession of said premises under and by virtue of said agreement. For his third defense, the defendant answered that on the 22d day of January, 1909, the plaintiff and others, as owners of the land mentioned in the plaintiff's petition, executed and delivered to the defendant a deed of general warranty, without any reservation of said wheat then growing on said land, by the terms of which the plaintiff, Frank Keenan, conveyed to the defendant all interest in said land, without any reservation whatever; that said deed was duly delivered to the defendant on or about the 17th of March, 1909, and was duly recorded in the records of Boone county; that in said deed the plaintiff, Frank Keenan, together with other grantors, covenanted that said land was free from incumbrance, except as to one mortgage of $700, and warranted said title against any other incumbrance, and covenanted to defend the title of said land against the claims of any person whatsoever, with no reservation as to said growing wheat on said land. Fourth. It is alleged that said wheat was not reserved by the plaintiff, but was delivered over to the defendant, and is his sole and separate property. Fifth. The defendant alleges the value of said wheat is about $600. It is also alleged in said answer that, by reason of the replevin and the defendant's interruption of possession, he has been damaged in the sum of $200, no part of which has been paid. The defendant prays judgment against the plaintiff for the property replevied and for its return to the defendant

or, if the same cannot be returned, for the value thereof in the sum of $600 and for damages in the sum of $200.

The reply admits the allegations in the answer to the effect that defendant entered into a written contract for the purchase of the land upon which the wheat in controversy was grown, and that the owners of said land after the execution of the contract executed and delivered a deed to said land to the defendant, and that there was no special reservation of the wheat in controversy in said contract or deed, but that said wheat was specially reserved by the plaintiff and the owners of said land *by parol,* both at the time the contract of sale was executed and the deed, and that the defendant agreed at said times that said wheat should be reserved to the plaintiff. It is also alleged in the said reply that the defendant agreed that he would settle with the plaintiff for said wheat. In the second paragraph of his reply, the plaintiff alleges that he told a third party, who was transacting the business of the sale, that the wheat must be reserved to him, and that said third party by a mistake failed to put a reservation of that kind in the contract and deed. It is further alleged in said reply that the plaintiff had the land on which the wheat was grown rented for the year 1909, and for several years before that, and that his interest in said wheat was acquired by virtue of a lease, which was oral, and which was made with the administrator of the estate of Margaret Keenan, deceased, and that said lease was in full force and effect at the time of the sale of said land, and the plaintiff delivered possession of the same with the understanding and agreement that he was to be paid for his wheat or that he could harvest the same.

On these pleadings the defendant, Joseph Sic, moved for judgment, because no cause of action is stated, and because the pleadings construed together constitute no cause of action. This motion was sustained, and the court found at the time the cause of action was commenced the right of property and the right of possession in the

property were in the defendant, Joseph Sic, and that the value of the property was $350. Judgment was rendered in favor of the defendant, that he was the owner of the right of property and the right of possession, and that he have a return of said property or its value in the sum of $350, and that he recover his costs. No testimony was taken, and the judgment rests upon the pleadings and motion in the case.

The plaintiff contends that parol testimony is admissible to prove that growing crops may be severed from a transfer of real estate by deed. It is said that this question was involved in the recent case of *Cooper v. Kennedy*, 86 Neb. 119.

The petition is an ordinary petition in replevin, and states conclusions sufficient, when accompanied by the statutory affidavit, to justify the issuance of the writ of replevin, but the pleadings which come after the petition, and which modify it, attempt to detail the facts upon which both the plaintiff and defendant rely, and they were construed together by the district court when it sustained the motion, and the question submitted to this court is whether the construction adopted by the district court is right. The statement in reply, which admits the allegations in the answer concerning the making of a written contract for the purchase of the land by the defendant from the plaintiff and others upon which the wheat in controversy was grown, and that the owners of the land after the execution of the contract executed and delivered a deed to said land to the defendant whereby said land was conveyed to the defendant, and that there was no special reservation of the said wheat in controversy contained in said contract or said deed, but that said wheat was specially reserved by the plaintiff and the owners of said land by parol, both at the time the contract of purchase and the deed were executed and delivered, and that the defendant agreed at said times that said wheat should be reserved to the plaintiff, states a good cause of action if it stood alone; but, unfortunately,

that statement does not stand alone, but is immediately coupled with and followed by the statement that the defendant agreed that he would settle with the plaintiff for such wheat. If he did, then it is the duty of the defendant to settle with the plaintiff for the wheat by paying him for it, but the wheat itself belongs to the defendant. The defendant owns the wheat, but he owes the plaintiff for it, although it does not appear how much, all of which leaves an uncertainty in the mind concerning the truth of any fact claimed to be agreed upon between the plaintiff and defendant. This uncertainty is further increased by the next statement, that the plaintiff told a third party who was transacting the business of the sale that the wheat must be reserved to him (the plaintiff), but that said third party by mistake failed to put the reservation in the contract and deed. This is followed by still another statement to the effect that the plaintiff delivered possession of the land, with the understanding and agreement that he was to be paid for his wheat or that he could harvest the same. As the plaintiff did not harvest the wheat, he seems to have elected that he would be paid for it. In that event the defendant would seem to owe the plaintiff for the wheat, and the plaintiff might bring his action against the defendant for the value of the wheat, but certainly not for the possession of the wheat itself.

While the plaintiff would have the right to prove that the reservation of the wheat was made by parol (under the opinion in *Cooper v. Kennedy,* 86 Neb. 119), this does not excuse him from stating a cause of action, and this he seems to have failed to do. He started with an action of replevin. Of necessity that action depended upon his right of ownership and possession. He is obliged to stay with his original action as he started out with it. He cannot exchange it for some other form of action. "The ultimate question to be determined in a civil action is, whether the public force shall be used in behalf of one party to compel some act or forbearance on the part of the other; that is, whether one party has a right of action

against the other, and at every stage of the action, whatever the state of the pleadings, an inquiry whether the pleadings, as they stand, will warrant such interposition is both pertinent and impending." Phillips, Code Pleading, sec. 35. "A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon." Phillips, Code Pleading, sec. 354. *First Nat. Bank v. Root,* 107 Ind. 224. The plaintiff should be required to state specifically what he denies. *Williams v. Evans,* 6 Neb. 216. One will not be allowed to plead inconsistent defenses. *Shellenbarger v. Biser,* 5 Neb. 195; *School District No. 27 v. Holmes,* 16 Neb. 486; *Columbia Nat. Bank v. German Nat. Bank,* 56 Neb. 803; *Oakes v. Ziemer,* 61 Neb. 6. It would seem that the reply should be consistent with the petition. It is not.

The question is not presented as to whether the plaintiff could replevin a two-thirds interest in 30 acres of wheat in the shock or stack, and we do not decide it.

The motion for judgment was properly sustained by the district court.

AFFIRMED.

WALTER O. SHULTS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 17,132.

1. Railroads: LICENSEE: DUTY OF LICENSOR. "Where one enters upon the premises of another with his consent, but without any invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." *Chesley v. Rocheford & Gould,* 4 Neb. (Unof.) 768, followed and approved.

2. Appeal: REVERSAL. The evidence in this case examined, and found not to be materially different from that taken at the former trial. *Shults v. Chicago, B. & Q. R. Co.,* 83 Neb. 272. The principle

therein announced that the plaintiff is a bare licensee, and that the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants, is declared to be applicable to this case and requires the reversal of the judgment of the district court.

3. **Railroads:** INJURY TO LICENSEE: LIABILITY OF LICENSOR. Where the plaintiff, without the knowledge of the train crew, but with the knowledge and consent of the yardmaster of the defendant railroad company, went upon the freight yards of said company in the night time, and while he was there entered one of its emigrant cars for private business of his own with the occupants thereof, who were moving from one Nebraska town to another, was injured during the time that the said car was being weighed and switched in the usual manner, *held*, that he was a bare licensee, and that the defendant railroad company owed him no duty as long as no wanton or wilful injury was inflicted upon him by the servants of the company.

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

James E. Kelby and *Byron Clark*, for appellant.

Shepherd & Ripley, contra.

HAMER, J.

As damages for a personal injury, the plaintiff recovered a judgment in the district court for Lancaster county against the Chicago, Burlington & Quincy Railway Company for $1,000 and costs. The railroad company has appealed. This is the second appeal. *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, contains the opinion of this court on the former appeal.

On private business of his own, the plaintiff went down into the freight yards of the defendant railroad company at Lincoln on February 28, 1906, and visited his two cousins, named Kimball, who were moving from Palmyra, Nebraska, to York, Nebraska, in an emigrant car. In one end of their car they had furniture and in the other end of the car they had five horses and three mules. They had attempted to build a fence about the horses and

mules. The horses and mules were in the south end of the car. They stood crosswise in the car, and were tied up to the side of it. There was a partition between the horses and mules and the empty space which was between the two doors of the car. When the plaintiff reached the car he found his cousins occupying this space. The plaintiff seems to have noticed the partition, and he remarked to one of his cousins that "if he was going to sleep there it should be pretty solid, because if they chugged the car the car might accidentally throw them (the horses and mules) on him." When the plaintiff was going down to the freight yard where his cousins were, the testimony shows that the yardmaster told him that the particular car in which his cousins were had not been weighed yet, that it was on the "6X" track. The "6X" track was the "scale track." There is testimony that the yardmaster told him that it was a dangerous place for any one to be wandering about. It was between 8 and 9 o'clock, and a dark night. The plaintiff says it was a dangerous place to go at night. He was shown the way to the car and got into it. It stood in the yards which were used exclusively for the business of the railroad company, and it was on the scale track in a string of cars which were being weighed. The members of the train crew testified at the trial that, while handling and weighing the cars which caused the injury, the work was done in the usual manner, and that no greater speed and no more bumping of cars occurred than was usual when the cars were being weighed. While it is contended by counsel for the railroad company that the public were not permitted to go to this yard, it is in evidence that there was no fence around the part of the yard where the car stood and where the injury occurred, and there were occasional passengers who got on and off of some of the freight trains that stopped in that neighborhood; and there was a small lunch counter in the vicinity, where the employees of the railroad company and a few passengers who rode on a part of the freight trains ate their meals. The conductor

or other employees of the railroad company directed such passengers as came there on trains to the foot of the stairway which led out of the freight yards to the top of the "O" street viaduct. The locality was not so much frequented by passengers or by the public that the employees operating the defendant's trains and switch engines could reasonably expect some one to be there at any time. There is no evidence that passengers boarded the train or left it while it was standing on the scale track, and that track was used expressly by the company and for the purpose of weighing freight cars and switching them. It is common knowledge that it requires no great jolt to throw horses and mules off their feet when they are confined in a freight car, and if the partition was only constructed of pine boards or pine lumber, as seems to be shown by the evidence, then it would be crushed and broken to pieces if the horses and mules, or a part of them, fell against it or fell down upon it, and the plaintiff in such event would quite likely be injured, although the employees of the defendant might exercise reasonable care.

The plaintiff had been in the car only 15 or 20 minutes when the accident happened that resulted in his injury. He testified that he did not know whether the car stood on the scale track or not. He also testified that he was uncertain whether the jolt came from an engine or from another car. It is uncertain whether the particular car was driven against another. When the jolt came the partition between the horses and mules and the empty space was broken down, and one of the mules fell "square on the side" and on top of the plaintiff. The plaintiff seems to have been injured and was not able to go to work at his old employment.

The injury occurred in the freight yards of the company near the viaduct on "O" street. It seems that the jolt occurred while the railroad people were weighing their cars. They would take the car up on to a "hump" in the track 3½ feet high, or a little more, the car would

be let down, and would run across automatic scales which weighed the car as it went across. The cars seem to have been bumped together for the purpose of coupling them, but it is uncertain just how the injury occurred. The car in question seems to have received the customary "bump," or was bumped against another car. The safety of the plaintiff depended upon the force of the "bump" and whether the partition was strong enough to resist such force. The plaintiff was familiar with the yards. He knew where the switch shanty, the scale track and the scales were. When the plaintiff went into the freight yards and entered the car with his cousins, he knew that he was taking some risk, because he knew that he was in a car where there were 5 horses and 3 mules, and that if the fence broke by reason of a car or an engine coming in contact with the car that he occupied, or because the car he occupied came in contact with another, then the mules and horses might be precipitated upon him unless the partition was strong enough to sustain their weight. He saw the partition and knew it was made of pine.

The plaintiff testified that there were cars on the track on each side of this car, that is, both north and south of it. The testimony of William G. Kimball, one of the cousins, is to the effect that there were cars both to the north and south of this car, and coupled to it. He does not know whether there was an engine on it at either end or not. He testified that he and his brother built the partition out of pine lumber. He does not describe this partition in detail. It may have been a flimsy affair and without much power of resistance. Marthenson, one of the switchmen, testified, as shown by the abstract: "The pieces of the partition in the car, I took out; they were broken all to pieces. The fiber of the lumber was not strong; it was pine lumber." From this statement it would seem that the lumber was brittle, easily broken, and probably had very little power of resistance.

E. J. Spratt testified: "I remember handling four or

five emigrant cars, and I believe they said a man got hurt in one of them. I remember one of the cars we had been handling was taken back to the yard office in order to take the man out; that was one of the string that we had been handling, yes, sir, just before that. Just before they came to take the car to the yard office we had been running them over the bump, the scale track, over the scales. I was car catcher—got on top of them to hold them, with brakes; after they had been cut off from the engine and came over the scales; I got them and held them as near as I could a car or two lengths from the scales; I cannot just say how many were in that string, something like 15 or 16 cars. The engine was south of the scales and the cars were north of the engine. Johnnie Ferguson was cutting them off before they went to the scales." This witness testified: "In letting that car over the scales and down to the incline there was no unusual movement of the car. I don't think we had to bump it any more than the rest; we had to bump it to make the coupling. The car, after it gets weighed, runs about two car-lengths before it hits the others. The car has to go across the scales slowly. I rode the first car down and held it and let the rest couple on. The ordinary method, the usual, every-day method of doing that was just as we did it. I had been doing that for some time, had been working in the yards of nights for four years."

John Johnson testified: "I remember the occasion of a man, Mr. Shults, getting hurt in the yards there in one of the cars about that time. * * * I know about the car being taken out of the string we had been handling. We had just weighed them. The engine was south of the scales, the cars north from the engine. We had about 15 or 18 cars. The engine pushed the car slowly up the incline and then the car was cut loose and weighed. * * * After they pass over the scale a man gets on top of the first one that goes over and sets the brake and keeps them moving. You know you let them run about a car-length from the scales and then stop them until the next car

comes along down; they bump against each other as they come down off the scales in order to couple them together, and then extend on down north on the track. * * * The whole string, including the emigrant cars, were let down over the scales that night slow in order to weigh them. You can't let them go fast over the scales because they won't weigh. There was no one of the cars that went down over the scales fast that night that I remember of. They come together with a bump after they go over the scales in order to couple them. From the time they are let loose until they bump another car is about two car-lengths or three car-lengths. They do not go over the scales fast. There was no time that evening when the engine pushed a car over and forced it against the others. After we got through weighing we took the engine and coupled onto them. After the whole string is weighed we throw the switch and go down with the engine, couple them up, and pull them back past the scales. We left them on the side track. I had five or six cars of emigrants."

He went into the yards after he had been warned that there was danger. He knew the conditions by which he was surrounded. He knew that the car was yet to be weighed. He saw the partition that separated the horses and mules from him and from the place he was compelled to occupy, and he must have known that he was more or less in danger because the partition was likely to be broken down by the horses and mules, or a part of them, falling against it or upon it, if another car or an engine should strike this particular car, or if this car should be struck by another. He saw the fence and had an opportunity to estimate its strength when he looked at it, and knew it might be broken down. It was necessary to use some force to couple the cars together. In any event that is the way the employees of the company did the work. The railroad company had no contract of any kind with the plaintiff. He was not in their employ. They were not carrying him as a passenger. Was the railroad com-

pany bound to handle the car in which the plaintiff was visiting his cousins in any manner different from the other cars which they were weighing? The other cars were taken up to the top of the "hump" on the "scale track," and they were then passed slowly down over the automatic scales so that they might be weighed as they passed over them. They would run a short distance below the "hump." Then each car was "bumped" into from time to time as the cars were coupled together, or it was bumped against another car. Was it the duty of this company to refrain from bumping this particular car because the plaintiff was in it? The plaintiff was hurt because he occupied an unsafe place after he had been warned of the danger and had observed and mentioned it, and while the company seem to have been handling their freight cars, including this particular one, in the usual way. There is no evidence that the train crew knew he was in the car at the time they weighed it.

The freight yards or switch yards, as they are some of the time designated, were not fenced. There was no way to prevent the public from going to the place where the car was found. The plaintiff went into the yards by the consent of the company's servants, and he was therefore not a trespasser. The car occupied was driven against another car, or another car was driven against it, so that the animals broke loose from their head fastenings and fell against the partition and broke it down, and so the plaintiff was injured.

The court said in the former case: "Viewed in the light most favorable to plaintiff, it (the testimony) establishes the fact that when he entered the yards of the defendant, and at the time he was injured, he was a bare licensee. He was not there as a passenger or servant, nor under any contractual relation with the defendant, but had been permitted to enter upon the premises for his own interest, convenience or gratification. In such a case the authorities substantially all say that the rule is well settled that an owner of premises owes to a licensee no duty as to the

condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or willingly cause him harm; that the licensee enters upon the premises at his own risk, and enjoys the license subject to its concomitant perils." In *Chesley v. Rocheford & Gould,* 4 Neb. (Unof.) 768, it is held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants."

The evidence in this case seems to be almost identical with that taken at the former trial. We think that the principle announced by this court at the former hearing disposes of this case. The rule laid down at the former hearing and in *Chesley v. Rocheford & Gould, supra,* compels us to hold that the plaintiff was a licensee, and was entitled to such protection only as the company could conveniently give him under the circumstances, and without a special effort made on his behalf, and there was no negligence upon the part of the company unless it wilfully and needlessly caused the partition to be broken down by the application of excessive and unnecessary force in weighing or handling the car, and thereby caused the animals in it, or at least one of them, to fall upon the plaintiff. And of this there seems to be no evidence. The plaintiff voluntarily took the risk, and the evidence is insufficient to sustain the verdict rendered. The defendant moved for a directed verdict against the plaintiff. This motion should have been sustained.

The judgment of the district court is

REVERSED.

SEDGWICK, J., concurs in conclusion.

REESE, C. J., dissents.

ABRAHAM L. DAVIES, APPELLEE, V. CHARLES K. DAVIES, APPELLANT.

FILED JUNE 12, 1912. No. 16,737.

Appeal: CONFLICTING EVIDENCE. Where a cause is submitted to a trial jury under the issues formed by the pleadings upon conflicting evidence, the verdict will not ordinarily be set aside.

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

John A. Miller and *Martin & Bockes,* for appellant.

Frank E. Beeman, contra.

REESE, C. J.

This action was commenced in the county court of Buffalo county, where plaintiff sued for the sum of $443.33. The cause was appealed to the district court, where a jury trial was had, resulting in a verdict in favor of plaintiff for $375, from which the sum of $15 was remitted, when judgment was rendered for $360. Defendant appeals.

Plaintiff and defendant are brothers, and the apparent feeling of animosity existing between them is to be much deplored. The testimony of both was taken upon the trial and abounds in contradictions and disputes on almost every material element in the case. The petition is of considerable length, and cannot be set out here in full, but may be summarized as follows: That on June 23, 1908, plaintiff was employed by the Union Pacific Railroad Company at Columbus, and was receiving wages at $50 a month, living in his own home, the same being paid for on the instalment plan, and in which his wife was keeping boarders, the same yielding an income sufficient to meet family expenses, while plaintiff's wages were devoted to paying the instalments due upon the home as

they matured; that defendant induced plaintiff to resign his employment, sell his home, and remove from Columbus to Kearney, by agreeing with plaintiff that if he would take care of defendant's dairy business in Kearney defendant would pay plaintiff the sum of $45 a month, furnish two men to do the work, and furnish plaintiff with feed for such live stock as plaintiff might desire to purchase; that the $45 a month should only be a part of the compensation to be received by plaintiff, and that if at the end of the year plaintiff had not made more than he was making at Columbus the defendant would pay plaintiff the difference; that, in pursuance of the contract, plaintiff sold his home in Columbus, surrendered his employment with the railroad company, sold his furniture in part, and removed his family and remaining furniture to Kearney at great expense, and took charge of defendant's dairy business, but that defendant failed to perform the conditions of his contract. The specifications of alleged failure are set out in some detail, but need not be here noticed. A statement of account is made by which it is claimed that there is $443.33 due plaintiff, and for which judgment is prayed.

The answer contains a denial of the alleged contract, and alleges, in substance, that defendant hired plaintiff and agreed to pay him $45 a month, and under the contract of hire plaintiff worked for defendant seven months and one day; that at the time of the hiring defendant told plaintiff that he would use his judgment in helping plaintiff buy some cows, and would go his security, not to exceed $400, in the purchase of cows, to be used on defendant's place, and plaintiff might keep four milch cows thereon, and defendant would pay plaintiff $4 a month for use of each of said cows, but that plaintiff failed to keep the same; that plaintiff did not purchase any cattle; that by a mutual contract thereafter made it was agreed that defendant should allow and pay plaintiff the sum of $60 a month for his services, and that the same should be in lieu of all other obligations on the part of defendant

to plaintiff and which was to be in full compensation, all of which had been paid; that plaintiff quit the employment of defendant on his own motion and was fully paid to said time. The reply was a general denial.

The whole of the testimony has been read by us, and, while much of it is not convincing to the writer, and is in some respects quite unsatisfactory, yet as the evidence was submitted to the jury, whose duty it was to decide those questions of fact, we cannot interfere, the evidence being conflicting, and the witnesses, with one exception, having testified in their presence.

It is insisted that the averment in the answer that there was a change in the contract, that plaintiff agreed to accept the $60 a month as full payment, and that the same was paid, was fully shown, not only by the evidence adduced by defendant, but by the testimony of plaintiff himself, and therefore the verdict is not sustained by the evidence, and the judgment should, for that reason, be reversed. This is true if the record clearly sustains the contention as to the state of proofs. We may assume that the testimony of defendant and his son support the claim of counsel, and yet, under the evidence, the question was for solution alone by the jury. The testimony of plaintiff does not coincide with that of defendant. It is true he accepted the increase of his wages to $60 a month, and that he testified that he received it under protest, but he nowhere admits that he received it in full satisfaction of his claims. He was called in rebuttal and interrogated as to the testimony of defendant and his son upon this point, and testified that in the conversation referred to "there was nothing said about $60, or about the change in the contract, or whether I was satisfied or not." He gave other testimony of quite similar import, and, there being a conflict, the matter was for the jury to decide. While the case is one in which, had we been the triers of fact, we might have come to a somewhat different conclusion, the whole case was submitted to the jury under proper in-

structions, and we do not see that we are called upon to interfere with the verdict.

The judgment of the district court is

AFFIRMED.

ALFRED BOLING V. STATE OF NEBRASKA.

FILED JUNE 12, 1912. No. 17,469.

1. **Rape**: CORROBORATIVE EVIDENCE. "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State*, 83 Neb. 226.

2. ———: ———. The unsupported testimony of a prosecutrix that the crime with which a defendant is charged was repeated subsequent to the alleged commission of the principal offense is not corroborative of the testimony of the prosecutrix as to the commission of the offense charged.

3. ———: EVIDENCE: ADMISSIBILITY. Corroboration of the testmony of the prosecutrix, as to the commission of the crime charged, on May 6, 1911, was furnished by the testimony of her sister, a young woman 20 years of age. *Held*, That the letter referred to in the opinion, written by the older sister to the defendant more than one month after the time when, as testified by her, the crime was committed upon her younger sister in her presence, was proper evidence to go to the jury upon the question of the credibility of the writer of such letter, and its exclusion was prejudicial error.

4. **Marriage**: EVIDENCE. Marriage may be proved by the oral testimony of those who were present, including the parties thereto. If such proof is necessary, it is not required that the record of the issuance of the license and of the marriage be produced.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

Lambert & McCarty, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

Plaintiff in error, whom we will hereafter refer to as defendant, was prosecuted in the district court for the crime of rape upon the person of one Dollie Hager, a female child under the age of 15 years; defendant being over 18 years of age. The jury returned a verdict of guilty, and he was sentenced to the penitentiary for a term of six years. He prosecutes error to this court.

The case is a most peculiar one, and perhaps there is no other like it. Defendant and Dollie Hager are first cousins. At the time of the alleged rape, she was between 13 and 14 years of age. There seems to have been a strong attachment between them. A short time preceding the night of the alleged rape, defendant proposed marriage to Dollie, and was met by the answer that she was too young to marry. The day before the alleged rape, they drove to the home of an uncle and aunt of Dollie, and remained there all night. An elder sister of Dollie, who was about 20 years of age, was at the home of the aunt when they arrived, and the three remained there. Two bedrooms are referred to in the evidence, one of which was occupied during the night by the uncle and aunt. In the other there were two beds, one of which was occupied by the two girls, and the other by defendant and two young men or boys of the ages of 15 and 17, members of the family. The night was stormy, with rain, lightning and thunder. The elder sister occupied the front side of the bed in which the girls slept, with Dollie in the rear side next to the partition between that room and the one occupied by the uncle and aunt. The aunt was ill, and the elder sister had been with the family for some days assisting in her care and the care of the household. It was testified by both girls that during the night defendant left the bed where he was sleeping, passed over the elder sister near the foot of the bed, placed himself between the two girls, and committed the crime on the younger girl, the elder being awake during the whole time and

knowing and realizing the full purport of his act, but making no objections and offering no protest; that he returned to his bed and remained until morning, but no reference was had to what it is said had occurred. That afternoon, with the knowledge of the elder sister, the defendant and Dollie returned to her home, and she testified that the intercourse was repeated there, none of the family being at home. All intercourse prior to a subsequent marriage in Kansas was denied by the defendant in his testimony, and no testimony was offered to prove any such intercourse in this state after the marriage. After their return to Dollie's home, they went to a neighbor's where Dollie's mother was, and returned to the home with her. Some two weeks thereafter defendant, with the knowledge and consent of the family, including the elder sister, started with Dollie to Kansas City, where his mother, who was the aunt of Dollie, resided. When they arrived at the city of Atchison, Kansas, they stopped, put up for the night at a hotel, being assigned separate rooms, and the next day they were married, the age of Dollie being misrepresented in order to obtain the license and marriage. They then went on to Kansas City, where they remained for a time with defendant's mother. He returned to Nebraska and to the family. Dollie was taken sick with appendicitis, and on her return home was taken to Omaha, where an operation for that disease was performed upon her. After defendant's return he informed the mother of Dollie of their marriage, but she objected to the marriage and forbade defendant's presence at her home. Soon thereafter the elder sister reported what is alleged to have occurred, and defendant's arrest and conviction followed.

It is not our purpose to discuss the evidence, nor to unnecessarily cast any reflections upon any witness, and therefore the evidence will not be considered, except so far as may be necessary in the disposition of the alleged errors which are presented.

Under the law of both Nebraska and Kansas the mar-

riage is void on account of the relationship between the parties. The charge contained in the information is as to the act said to have been committed at the home of the uncle and aunt when the bed was occupied by the two girls. During the trial Dollie was asked if defendant had intercourse with her at any other time about the date of the act referred to, and, over the objection of defendant, was allowed to testify that on the next evening upon their return to her home the act was repeated within the kitchen, no one else being at home. This evidence was admitted as corroborative evidence tending to corroborate the evidence as to the bed assault, which had been testified to by both the prosecutrix and her elder sister. The court also by two instructions instructed the jury to the same effect. This action is assigned as error. Under the rule stated in *Woodruff v. State,* 72 Neb. 815, and *Leedom v. State,* 81 Neb. 585, proof of the commission of the other offense, by competent testimony, is admissible. We do not wish to be understood as holding otherwise; no thought of doing so. But the question here is: Is the unsupported testimony of the prosecutrix of other criminal acts competent as corroborative evidence? In other words, can the uncorroborated evidence of other offenses, testified to by the prosecutrix alone, corroborate her testimony as to the principal fact? Can she by her unsupported testimony corroborate herself?

In *Mott v. State,* 83 Neb. 226, which was a case similar to this, it is said at page 230: "As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accompanied by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. *State v. Kingsley,* 39 Ia. 439; *State v. Lenihan,* 88 Ia. 670; *State v. McGinn,* 109 Ia. 641. Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit; and it is self-evident that the main fact in

this case cannot be strengthened by a collateral fact, the existence of which is dependent upon the same class of testimony."

In *Mills v. Commonwealth,* 93 Va. 815, which was a prosecution for seduction, in discussing the essentials of corroborating testimony in such cases, it is said: "It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such evidence as adds to, strengthens, confirms, and corroborates her."

As we have seen, the elder sister testified that she was in the bed with the prosecutrix; that defendant got in bed between them; that with her knowledge of every act performed, including defendant's preparation for the crime—in removing or pulling up the nightgown—to the completion of the gratification of his desires and remaining for a time in the bed between them, she made no effort to prevent the act, nor in any way to protect her younger sister; that she refrained from reporting the facts that night or the next day and for a comparatively long time thereafter; that she allowed defendant to take the sister home—a distance of some eight miles; that she offered no objection or protest to her accompanying him to Kansas City; and that she said nothing about the alleged occurrence until after she learned of the marriage.

As a part of her cross-examination she identified a letter written to defendant, signed by her, and mailed to him after the marriage, but before she knew of the fact. The letter was offered in evidence at various stages of the trial, both as a part of the cross-examination and in support of the defense, but, upon objection of the state, it was excluded. It abounded in expressions of affection and the use of endearing terms. It need not be here set out in full. At the close she says: "I think of you in daytime, I dream of you at night. I am wearing my heart away for you Alford dear. Well, I will close for this time. Hoping to hear from you soon. Yours sincere. With love and kisses. Answer soon." (Signed.)

This letter should have been received in evidence for the consideration of the jury in arriving at the weight to be given to her testimony. The criminal act is charged to have been committed on the 6th day of May, 1911, and the letter was written and dated June 19, following. If the testimony of herself and Dollie is true, she knew at the time of writing the letter that defendant had polluted and debauched her sister. It was for the jury to say whether with that knowledge and the recollection of the event on her mind she would have written such a letter. The fact of writing and sending the letter is not conclusive of the falsity of her testimony, nor do we say, as a matter of law, that it should impair its weight, but it should have been submitted to the jury for such consideration as affecting her testimony as they might see proper to give it.

Copies of the records of the county judge of Atchison county, Kansas, showing the issuance of the marriage license and the marriage of defendant and Dollie Hager were offered and received in evidence over the objection of defendant, and of which he complains. While the evidence is, ordinarily, deemed competent, and in some instances essential to prove marriage, yet the subject is not entitled to serious consideration here. It was not essential to the proof of the marriage, for the fact was testified to and admitted by defendant on more than one occasion. The admission of the documents was not necessary. Moreover, the fact of the marriage was not an essential element of the state's case. That the act charged occurred at or about the time alleged, the ages of the parties being proved, and that it was committed within the jurisdiction of the court, constituted the essence of the case. Neither the record of the marriage, nor the copy of the law of Kansas declaring the marriage of first cousins void and incestuous, could do more than incumber the record.

Other alleged errors are assigned, but which it is not deemed necessary to notice, as they may not occur upon a subsequent trial.

For the error in instructing the jury that the evidence of the complaining witness of other acts of intercourse corroborated her testimony as to the act charged, and the exclusion of the letter referred to, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

I am fully convinced that the jury in this case arrived at their verdict through the consideration of competent testimony alone, and that it can safely be said, in the light of the entire record, that the result would have been exactly the same had the trial court, in every particular, ruled according to the suggestions of the majority in the opinion. The jury voluntarily recommended the shortest sentence authorized by law for the felony charged and were not prejudiced against defendant. In my opinion, the conviction should not be set aside for any reason given by the majority.

BOB WILLIAMS V. STATE OF NEBRASKA.

FILED JUNE 12, 1912. No. 17,509.

1. **Criminal Law: PRINCIPALS.** Where one is personally present at the time of the commission of an offense, under such circumstances as to leave no doubt that his purpose was to participate in the act should occasion require, he should be held as a principal in the crime.
2. **Robbery: EVIDENCE.** The evidence is examined, the facts set out in the opinion, and *held* sufficient to warrant a verdict of guilty.
3. **Criminal Law: INDETERMINATE SENTENCE ACT: CONSTITUTIONALITY.** The indeterminate sentence law of this state is not unconstitutional.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Charles Haffke, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

An information was filed in the district court accusing plaintiff in error of the crime of robbery, the charge being that he robbed one Earl W. Spencer of the sum of $17.60 by an assault and putting him in fear of bodily violence. A jury trial was had, which resulted in a verdict finding plaintiff in error guilty, and he was sentenced to the indeterminate term of from three years to fifteen years in the penitentiary. He brings the cause to this court for review by proceedings in error.

There are three principal errors assigned: First, that the evidence is insufficient to sustain the verdict; second, that the court erred in instructions; and, third, that the law providing for the indeterminate sentence is unconstitutional and void, and, if sentenced at all, the judgment should have been for a fixed and determined length of time.

As to the first contention, there is practically no conflict in the evidence. The alleged facts as to the robbery and the presence of plaintiff in error, whom we will hereafter refer to as defendant, at the scene of the commission of the offense is not denied. The crime was committed after midnight, or early morning, of December 2, 1911. The person robbed was the toll-gate keeper at the west end of the bridge for general travel across the Missouri river in the city of Omaha. From the undisputed evidence it appears that defendant boarded a street car on the Iowa side and was transported to Omaha, arriving at the west end of the bridge about the hour of 1 o'clock and 30 minutes on the morning of the robbery, which occurred at about 20 minutes after 2. When the car reached Eleventh street, which is the second street west

of the west end of the bridge, he left the car. Another man, who is referred to in the evidence as "the white man," left the car at the same time, both going in the same direction. At about 20 minutes after 2 o'clock a white man and defendant went to the toll-house, situated near the west end of the bridge, when the white man presented the muzzle of a pistol toward Spencer, the toll-keeper, and compelled him to give him the money. Defendant was standing by, but said nothing, nor did he make any demonstration of any kind. After the robbery had been completed, the money all having been placed in the white man's pocket, he ordered defendant to go home, and compelled Spencer to go down a flight of steps to the railroad track below. They went down the steps, defendant in front, Spencer following, and the white man in the rear with his drawn pistol. When they arrived at the foot of the stairway, Spencer was ordered to go south along the tracks. He started to walk, but was ordered to run, which he did for some distance. He looked back and saw both men running toward the north, when they soon disappeared in or around a lumber yard. The evidence is clear enough as to the presence of defendant in the car coming from the Council Bluffs side of the river, and as to his presence with the other man at the scene of the robbery. The contention is that, as he took no active part in the robbing of Spencer, he should not be held guilty of the crime. It is true that mere presence is not always conclusive of participation in the acts of others. And if it be shown that such presence was by compulsion, or merely incidental, the presumption of participation, should such presumption arise, would be rebutted. But no explanation of the kind was offered. Moreover, the fact that defendant led the way down the steps and ran away with the principal actor in the despoiling of Spencer would seem to strongly indicate that there was more than an incidental meeting of the two. Defendant had come from across the river, and left the car some distance west of the bridge. The return of that car was the last

one to leave Omaha for Council Bluffs that night. There is no suggestion that the toll-house was in the line of travel to his lodging place. He did not cross the bridge to the east. He made no move to protect Spencer, nor to dissuade his associate from the commission of the crime. He was passive during the time of the robbery, possibly because his services were not needed, no resistance being made. These facts, unexplained as they were, would be sufficient to convince any reasonable mind that there was a common design between the two, and each carried out his part. The verdict cannot be molested as not sustained by the evidence. It is not essential that defendant should have taken any active part in the robbery. If he were personally present under such circumstances as to show that he was a participant in the offense, that would be sufficient to constitute him a principal. *Hill v. State,* 42 Neb. 503; *Dixon v. State,* 46 Neb. 298.

It was upon this theory that the instructions of the court were given, and it is not deemed necessary to extend this opinion by copying them here. We have examined them, and are unable to detect any prejudicial error in that regard.

The question of the constitutionality of the indeterminate sentence law was fully passed upon in *Wallace v. State, ante,* p. 158; the opinion having been filed since the preparation of defendant's brief. We have re-examined that opinion, and are satisfied with it. We have no doubt of the constitutionality of the law. The question was before the supreme court of the United States in *Ughbanks v. Armstrong,* 208 U. S. 481, and the decisions of the state courts in the cases cited in *Wallace v. State, supra,* were approved. The only difference between the holdings of those decisions and the views of the writer hereof would be as to the construction to be given to the language of the act. It is provided: "The court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less

than the minimum term provided by law," etc. Criminal code, sec. 502*a*. Had it not been for the holdings on practically similar statutes, that they deprived the trial courts of all discretion, we would not hesitate to hold that, while the court may not fix the limit or duration of the sentence, as under the prior law, yet this language does not prevent the fixing of an indeterminate sentence within the statutory limits. A sufficient illustration of this may be found in two cases of *Lukehart v. State, ante,* p. 219, and *Lambert v. State, ante,* p. 520, recently decided by this court. Those men were accused of receiving stolen property. The value of the property was found in one case to be $35.50, and in the other $36. The statute provides imprisonment of from one to seven years as the penalty for receiving stolen goods of the value of $35 or upwards. In each case the sentence is for that indeterminate term. Were the parties strangers and without friends who would become interested in their behalf, they might remain in prison for the full seven years. A cruel and unjust punishment, and yet beyond the power of the court to afford them justice, while no greater punishment would be imposed upon one who had received stolen property of the value of thousands of dollars. If permitted, the court might have imposed an indeterminate sentence commensurate with the offense, and yet, I believe, have been strictly within the letter and spirit of the law. We are, probably, bound by the many decisions of the high courts of the country, and the only power which can correct the evil is the legislature. We can see no objection to the constitutionality of the law, but cannot give our unqualified approval to the construction placed upon it.

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

AFFIRMED.

LETTON, J., concurring in part.

I cannot agree with the criticism made of the decisions of other courts. Under the statutory provisions, in my

judgment the holdings cannot logically be otherwise. I trust, however, that the legislature will remedy the obvious defect in the statute which permits the possibility of an unlearned or penniless convict remaining confined for the maximum term for the sole reason that he is unable to prepare and present for himself an application for release at an earlier time or to employ counsel for that purpose.

CHARLES E. HILL, APPELLEE, V. WALTER A. CHAMBERLAIN ET AL., APPELLANTS.

FILED JUNE 12, 1912. No. 16,720.

1. **Taxation**: FORECLOSURE SALE: SUIT TO SET ASIDE DEED: PLEADING. In an action to set aside a sheriff's deed executed upon a sale under a void decree foreclosing a tax lien, an allegation that the plaintiff is the owner of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer.

2. **Quieting Title**: LIMITATIONS. Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree or taking possession thereunder. *Payne v. Anderson*, 80 Neb. 216.

3. ———: TAXATION: EQUITY. In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity, and, if the right to redeem is contested, is a sufficient tender of any taxes due the defendants.

4. **Evidence** examined, and *held* sufficient to sustain the decree of the district court.

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

Hoagland & Hoagland, for appellants.

J. G. Beeler and *George E. French, contra.*

BARNES, J.

Action in the district court for Lincoln county to quiet title to the southeast quarter of section 2, township 9 north, of range 34 west of the 6th P. M., situated in that county. The plaintiff had the judgment, and the defendants have appealed.

It appears that on the 25th day of June, 1900, the county of Lincoln commenced an action to foreclose its lien for taxes on the land in question without administrative sale, and obtained a decree of foreclosure; that the land was thereafter sold to satisfy the decree, and a sheriff's deed therefor was executed to the county on the 18th day of December, 1901; that the county thereafter conveyed the premises to one W. A. Chamberlain, who on the 3d day of December, 1903, conveyed the same to the defendant Elizabeth Chamberlain, who took possession thereof some time in the year 1905, and has since occupied the land for agricultural purposes only; that in the tax foreclosure proceedings service was had upon the plaintiff as owner of the land by publication only; that at that time he was a *bona fide* resident of Adams county in this state, and for that reason the trial court found and decreed that the tax foreclosure proceedings were void, and rendered a judgment permitting the plaintiff to redeem his land from the lien for taxes by his payment into court for defendants' use and benefit the sum of $364, which was the amount of all taxes against the land, including interest, penalties and costs, which had been paid by the defendants and their grantors. It further appears that the decree gave plaintiff nothing for rents and profits, and no allowance was made to the defendants for permanent improvements.

Defendants contend that the court erred in overruling

their demurrer to the plaintiff's petition, by which it was alleged that plaintiff is the owner of the land (describing it); and it is argued that this allegation was merely a conclusion of law, and was insufficient to sustain the action. That question seems to have been settled in *Harrington v. Hayes County*, 81 Neb. 231, where it was said: "In an action to set aside a sheriff's deed upon the ground that the order confirming the sale which it was executed to carry out was made by the judge disqualified to act, an allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer." The rule thus announced seems to be supported by 31 Cyc. 61; *Johnson v. Vance*, 86 Cal. 128; *O'Keefe v. Cannon*, 52 Fed. 898; *George Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641; and *Ingram v. Wishkah Boom Co.*, 35 Wash. 191. We are therefore of opinion that this contention is not well founded.

Defendants also contend that the action was barred by the limitation contained in sections 11129, 11186, Ann. St. 1909. This court has already adjudicated that question in *Payne v. Anderson*, 80 Neb. 216, where it was said: "Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree."

It is further contended by the defendants that the pleadings and proof are not sufficient to sustain the decree, and it is argued that it should have been alleged and proved that all taxes due upon the property had been paid by the plaintiff or by the persons under whom he claimed. In *Payne v. Anderson, supra*, it was said: "In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any

lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants."

Finally, it is contended that the court erred in failing to allow the defendants anything on account of permanent improvements, and it is argued that the testimony shows that defendants broke 120 acres of the land in question, for which they should receive the sum of $270, with interest from the year 1905. An examination of the record discloses that at the time defendants took possession of the land 120 acres of it had been broken and previously farmed; that they disced the land, or rather listed it to corn. This testimony falls so far short of establishing the plaintiff's contention that we think the district court did not err in refusing to allow them anything for permanent improvements.

As we view the case, every question presented by the record has been determined adversely to the defendants by the former decisions of this court. Therefore, the judgment of the district court is

AFFIRMED.

HENRY DHOOGHE, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED JUNE 12, 1912. No. 16,729.

1. Venue: ACTION FOR INJURY TO LAND. An action for damages caused by flooding a tract of land upon which a brick-kiln is maintained, together with bricks in the process of being manufactured thereon, by the improper and negligent construction of a railroad track, is an action for an injury to real estate, which must have been brought in the county where the land was situated, if commenced before the 1911 amendment to section 51 of the code took effect.

2. ———: OBJECTION TO JURISDICTION: DISMISSAL. Where such action is brought in the wrong county, objection to the jurisdiction of the court over the subject matter may be interposed at any time before trial; and, where such objection is seasonably inter-

posed, it is proper for the court to dismiss the action without prejudice.

3. **Dismissal:** REVIEW. In order to predicate error for such dismissal on the ground that some of the property destroyed was personal property, it was incumbent upon the plaintiff to request the court to docket a separate cause of action for the recovery of such damages.

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

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

M. A. Low, Grimm & Grimm and *Hazlett & Jack, contra.*

BARNES, J.

Action in the district court for Saline county for damages to plaintiff's brick-yard situated in Gage county. On defendant's objection to the jurisdiction of the court over the subject matter of the suit, the action was dismissed without prejudice, and the plaintiff has appealed.

At the time when this action was commenced section 51 of the code contained a provision as follows: "All actions to recover damages for any trespass upon or any injury to real estate, shall be brought only in the county where such real estate is situated." The main question presented for our consideration is: Was this an action for injury or damage to real estate, and local in kind; or was it one for damages to personal property, and therefore of a transitory nature.

The petition contained but one count, in which it was alleged, in substance, that plaintiff was the owner of $4\frac{3}{4}$ acres of land situated in Gage county, Nebraska, which was used by him as a brick-yard, upon which there was situated sheds, machinery, a brick-kiln, brick in process of being manufactured, lumber and wood of great value, of which he is now and has been the owner and possessor ever since the 2d day of December, 1895; that the defend-

ant owns and operates a line of railroad running from the northeast to the southwest across the section in which the plaintiff's land is situated, and other lands lying near thereto; that defendant constructed its roadbed and graded its track in a manner wholly inadequate to pass the volume of water which accumulated and flowed in Turkey creek and the old channel of the Blue river near plaintiff's land; that on and prior to July 9, 1902, plaintiff was engaged in the manufacture of brick on his said tract of land in Gage county, as above stated; and by reason of the careless, negligent and insufficient manner in which the defendant had dug its ditches, made its embankments, built its roadbed, culvert and bridge as aforesaid, a large body of water accumulated in said ditches and in said creek, and the old channel on the west side of said railroad track, and set back and overflowed the banks of said streams and flooded and submerged plaintiff's brick-yard with large quantities of water, and deposited thereon mud, sand, silt and debris, and thereby damaged and destroyed 60,000 brick in the kiln, of the value of $390; 7,000 brick in sheds, of the value of $35; 2,000 brick in the wall of the kiln, of the value of $220; lumber, of the value of $20; and wood, of the value of $30, and damaged the said brick-yard and sheds in the sum of $160; that, in order to resume work and carry on his business, plaintiff was compelled to remove from and clean the said premises of sand, mud and debris, and, in so doing, expended the sum of $58; that he was deprived of the use of his premises, buildings, sheds, machinery and brick-kiln, and prevented from carrying on his business for several weeks, whereby he was damaged in the sum of $200; that on or about the 28th day of May, 1903, plaintiff's premises were again flooded with water in like manner and from the same cause, as above stated, whereby his buildings, sheds, brick-yard, machinery and brick-kiln were damaged in the sum of $50. Plaintiff prayed judgment for the aggregate sum of $1,163, with interest from the 1st day of November, 1903. To this petition defend-

ant filed an answer, and at the commencement of the trial objected to the jurisdiction of the court over the subject matter of the action. The court found that the action was real and local in its nature, and therefore dismissed the plaintiff's action without prejudice.

From the foregoing it seems clear that most of the injuries for which the plaintiff sought to recover were to his land, and his brick-kiln and other permanent improvements situated thereon, and, with the exception of the destruction of wood valued at $30, and lumber of the value of $20, could not have occurred to the plaintiff at any other place than upon his land situated in Gage county. The distinction between transitory and local actions is that the former may have occurred anywhere, and those only are considered local where the cause of action or the injury could not have occurred elsewhere. This rule is well stated in *Livingston v. Jefferson,* 15 Fed. Cas. No. 8,411, 4 Am. Law J. 78; *Hill v. Nelson,* 70 N. J. Law, 376; *Doherty v. Catskill Cement Co.,* 72 N. J. Law, 315; *Thayer v. Brooks,* 17 Ohio, 489, 49 Am. Dec. 474. In *Howard v. Ingersoll,* 17 Ala. 780, it was held that an action for flooding lands with water is local, and cannot be maintained out of the jurisdiction in which the land is situated, if the act causing the damage was done in that jurisdiction.

From the foregoing authorities it seems clear that the main items for which the plaintiff sought to recover were for injuries to his real estate, and therefore the action should have been brought in Gage county, instead of Saline county, as provided by section 51 of the code. The fact that the legislature of 1911 amended that section to the extent of permitting an action of this nature to be brought in any county where service can be made upon the corporation is immaterial here, as this action was commenced prior to such amendment.

It is contended, however, that some of the property injured was personal property, and therefore the court erred in dismissing the plaintiff's action. In disposing

of this contention, it is sufficient to say that the petition stated but one cause of action, and the plaintiff made no request to be allowed to docket a separate cause of action for damages to the two items of personal property mentioned therein. Therefore, he is in no position to complain of the judgment dismissing his action without prejudice.

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

AFFIRMED.

ELMER PHILLIPS, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 12, 1912. No. 17,066.

1. **Appeal:** REVIEW. The verdict of a jury upon questions of fact properly submitted to them is final, unless the verdict is manifestly wrong.

2. **Railroads:** INJURY TO LIVE STOCK: ACTION: EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* sufficient to warrant the trial court in refusing to direct the jury to return a verdict for the defendant.

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

Mapes & Hazen and *B. H. Dunham,* for appellant.

M. H. Leamy, contra.

BARNES, J.

Action in the district court for Pierce county to recover the value of a steer struck and injured by one of the defendant's locomotive engines. The plaintiff had the verdict and judgment, and the defendant has appealed.

The appellant contends that the evidence does not sustain the judgment, and therefore the district court erred

in refusing to direct the jury to return a verdict for the defendant.

It appears from the record that plaintiff's right of recovery depended upon the position of the animal when it was struck by the defendant's locomotive. On this question the evidence was conflicting. Mrs. Key, an apparently disinterested and truthful witness, testified that she was about 15 or 20 rods from the place where the animal was struck, and just a moment before that time she saw it on the railroad track and right of way just inside the cattle-guard. The engineer in charge of the locomotive testified that the animal at that time was on the public highway crossing just outside the cattle-guard. Other witnesses testified that the cattle-guard was insufficient to prevent live stock from getting upon the defendant's right of way. In fact the defendant's section foreman stated that he had seen cattle pass over the guard on the opposite side of the highway, which was constructed in the same manner as the one in question. A Mrs. Dutcher testified that she lived just across the road from the plaintiff's farm where the steer in question was killed; that she went to the door of her home just before the train whistled, and saw the steer standing on the highway by the cattle-guard just as if he was going to cross; that she went back into the house and heard the train whistle for something on the track; she immediately went to the door again and looked out in that direction; that the train had not yet crossed the highway; that she looked for the steer, but did not see him; that from the place and position where she was standing, at the time, she could see the steer if he was on the highway, and if he had passed over the cattle-guard and on to the right of way she could not see him. Some of the witnesses testified that they saw a single track apparently made by the animal a few feet inside of the cattle-guard, and it appears that the animal itself was found lying helpless upon the defendant's right of way about 75 feet from the inside of the guard.

Considering all of the testimony contained in the record, we are unable to say that the evidence was insufficient to sustain the verdict. While there are some features of the case from which we might have arrived at a different conclusion, still, considering all of the testimony, we cannot say that the verdict is not sustained by the evidence. The rule which requires a court of review to support a verdict and judgment based upon conflicting evidence, unless they are clearly wrong, constrains us to affirm the judgment in this case, which is accordingly done.

AFFIRMED.

VILLAGE OF KENESAW, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 12, 1912. No. 16,750.

1. **Nuisance:** INJUNCTION: VILLAGES. Under the corporate and general powers conferred by chapter 14, Comp. St. 1909, upon cities of the second class and villages, a village has the right to maintain an action in equity to enjoin the maintenance and continuance of a public nuisance.

2. ———: ABATEMENT: INJUNCTION. An injunction to prevent the maintenance of the necessary facilities for the loading of live stock by a common carrier will not be granted as a matter of right, but only when it is apparent that this duty may be carried on conveniently elsewhere, and that the evils complained of are substantial and cannot be otherwise remedied.

3. ———: ———: ———: DECREE. In an action to restrain a common carrier from maintaining stock-yards at a certain point within a village, it is not the duty of the court to fix the place to which they should be removed, and a decree which leaves the question of their future location to the defendant, outside of certain limits, is not so indefinite as to be erroneous and void.

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

Byron Clark, Frank E. Bishop and *John C. Stevens*, for appellant.

Tibbets, Morey & Fuller, contra.

LETTON, J.

This is an action to enjoin the defendant railroad company from maintaining stock-yards at the place where they are now situated in the village of Kenesaw.

The trial court found that the stock-yards "are located in or near the center of said village of Kenesaw, in the thickly settled portion thereof; that they are adjacent to the main business street of said village and about 40 feet therefrom, the entrance to said yards, pens and inclosures being about 80 feet from said street; that the same are kept in as good a condition as they can be kept, considering the purposes for which they are necessarily used, by defendant as a common carrier by railroad of live stock; but that, by reason of the manure and the natural odors from the animals therein inclosed, there arises therefrom smells and stenches, and the air thereabout is greatly filled and impregnated with many loud noises and many noisome, unhealthful stenches, stinks and smells, all of which are very offensive to the residents and citizens of the plaintiff and to those persons who necessarily go to and from said village for the transaction of business and otherwise. The court finds that such conditions constitute a great, irreparable, continuing and common nuisance to the citizens and residents of said village. The court further finds that said stock-yards, pens, and inclosures, by reason of the close proximity to the principal streets of said village, their nearness to the business and residence houses of said village, and also by reason of all the facts hereinbefore set forth, and all of the facts alleged in plaintiff's petition, constitute, in their present location, and would constitute at any place within two blocks from such location, a continuing public nuisance which should be abated, and

for which there is no adequate remedy at law. The court further finds that the plaintiff is entitled to maintain this action." A perpetual injunction was granted accordingly.

Three points are argued on behalf of appellant: First, that the village has no right or authority to maintain this action; second, that the court erred in holding that the stock-yards and the maintenance and the use of them were a nuisance, either public or private, which required removal; and, third, that the decree is so indefinite, uncertain and unreasonable that it should be reversed.

As to the contention that the village has no right to maintain the action: It is first argued that there was no public nuisance or offense shown. This will be considered later in passing upon the sufficiency of the evidence.

It is next said that the village is given express authority to deal with the subject of nuisances by ordinances, and is not given any right to sue, and the case of *City of Ottumwa v. Chinn,* 75 Ia. 405, is cited as upholding this argument. We are not impressed with the doctrine announced in that case, and are of the opinion that, under the corporate and general powers conferred by sections 41, 56, 69, art. I, ch. 14, Comp. St. 1909, it was entirely proper to obtain the judgment of a court of equity as to whether or not a public nuisance existed, and its aid to abate the same if one existed. We believe that the supreme court of Minnesota in the case of *City of Red Wing v. Guptil,* 71 Am. St. Rep. 485 (72 Minn. 259), in holding that "a city authorized by its charter to abate or compel the abatement of public nuisances has power to compel the abatement of a nuisance affecting the comfort or convenience of the public, * * * and, therefore, it may maintain an equitable action to aid in compelling an abatement of such nuisance," announces a sounder and better rule. This doctrine is supported by the following authorities: *Hickory v. Railroad,* 141 N. Car. 716, 53 S. E. 955; *Moore v. City of Walla Walla,* 2 Wash. Ter. 184, 2 Pac. 187; *Lonoke v. Chicago, R. I. & P. R. Co.,* 92 Ark. 546, 123 S. W. 395; and by many others. The reasoning

set forth in the opinion in *State v. Ohio Oil Co.*, 150 Ind. 21, 47 L. R. A. 627, with reference to the right and authority of a state to maintain an action for injunction against a public nuisance, which is in line with similar views expressed by this court in *State v. Pacific Express Co.*, 80 Neb. 823, we think applies to the right of a municipal corporation in the same behalf. We prefer to follow the doctrine of these cases, rather than that of the Iowa case cited. We are satisfied that it was not incumbent upon the village to enact an ordinance prohibiting the maintenance of stock-yards in the locality complained of before it had the right to apply to a court of equity for relief.

As to the second point: The evidence shows that about 30 years ago or more, when the railroad was first built and a station located at Kenesaw, the country was new and the town was only in embryo; that during this interval of time the population has increased until there are now about 1,000 people residing in the village. The business of the railroad company has increased in proportion, and it became necessary from time to time to make several additions to the stock-yards in order to accommodate the increased business; the last addition being made about six years ago. The station and the stock-yards were built originally in close proximity. There was no good reason at that time why they should not have been so situated; however, as population increased and business grew, it was entirely natural and proper and to be presumed, in the usual course of events, that the business houses of the community would be erected in the neighborhood of the station, and that this would form the nucleus around which the village would grow. This was what actually occurred. The evidence shows the village, or at least that part of it near the railroad and stock-yards, is built upon land which is almost level; that the railroad company in endeavoring to prevent the nuisance has filled in the stock-yards with broken stone, which has made the floor almost impervious to water and elevated it above the ad-

jacent land so that the filth and excrement, when the yards are washed or after a heavy rain, drain into an open ditch running parallel with the railroad, and that the odors arising from the intermingled mud and excrement are exceedingly annoying in hot weather to the residents of the village living on the leeward side of the track. There being no sewerage or means of rapid drainage, the facilities for keeping the yards clean are not very good, so that, while the railroad company seems to have exerted reasonable efforts to remedy the conditions, it has been unable to prevent the existence of a nuisance, at least to an extent very annoying to the residents living near by. The evidence also shows that live stock is loaded usually on Wednesday and Sunday, and that the consequent noise is disagreeable to church goers. We are inclined to think that under these conditions the rights of the inhabitants of the village to freedom from noxious odors and interference with their Sunday peace and quiet is superior to that of the railroad company to maintain the stock-yards in their original situation. It is true that the railroad company must have facilities within a reasonable distance of its station to carry on its business as a common carrier for hire of live stock, and it is inevitable that there should be more or less unpleasant features connected with this department of its activities. It is not every petty annoyance of the nature of that in this case that the courts will enjoin. The whole circumstances and what is fair, just and equitable between the public at large and the railroad company in the discharge of its duties as a common carrier must be considered. An injunction will be granted when the evils complained of are substantial and cannot be otherwise remedied, and when the business may be conveniently carried on elsewhere.

The decree of the district court enjoined the defendant for maintaining stock-yards within two blocks from the place where the same are now located. The defendant complains that the decree is so indefinite and uncertain in its requirements that it should be reversed. The principal

complaint seems to be that the court did not fix the exact spot to which the stock-yards should be moved, and it is said: "No place the company might select, if it tried to abide by the order, would furnish the slightest protection under this decree. The stock-yards are no more a nuisance at the present location than they would be three blocks from it." It was not the duty of the court to fix a place where the defendant might carry on its business. Its only function was to restrain a public nuisance. It found from the evidence that the surroundings of the stock-yards were such that, if moved less than a distance of two blocks in either direction from the present location, their maintenance would still annoy the people of the village. Beyond that it left the question of their location to the good judgment of the defendant, and very properly did not seek to interfere with its discretion. We think the evidence supports the decree

The judgment of the district court is therefore

AFFIRMED.

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

FILED JUNE 12, 1912. No. 17,499.

1. **Corporations: INSOLVENCY: LIABILITY OF STOCKHOLDERS: LIMITATIONS.** In an action in equity to enforce the liability of stockholders of an insolvent corporation, a finding of the amount of the liabilities of the corporation and judgment against each stockholder for his proportion of such liability is not a final disposition of the proceedings; and, if some of these judgments against the stockholders are not paid, an application for further judgment against the stockholders is not a new cause of action.

2. ———: ———: ———: ———. In such a case, where it is shown that executions upon the judgment were issued against some of the stockholders and returned unsatisfied, the failure of plaintiffs to collect from such stockholders will not constitute such laches as to relieve other stockholders of further liability.

3. Interest. The original judgment against the appellants having been paid upon its rendition, interest is chargeable, under section 4, ch. 44, Comp. St. 1911, upon the remaining amount for which each defendant is liable from the date of demand and refusal.

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

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

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

LETTON, J.

The facts involved in the action in which the proceedings now complained of were taken may be found fully set forth in the former opinion, 89 Neb. 632. Briefly stated, plaintiffs brought an action against the defendant corporation and its stockholders predicated upon the failure of the corporation to comply with the statutory requirements as to the publication of notice of indebtedness. A finding of the amount due the several plaintiffs was made on March 21, 1893, and it was adjudged that all the defendants were jointly and severally liable under section 136, ch. 16, Comp. St. 1889, for the amount of the judgment. Each defendant was adjudged to pay a specific amount, and the case was held for further decree in the event of any of the defendants failing to pay. On October 21, 1908, a motion was filed by the plaintiffs for judgment against defendants Phelps, Stuht, Kuhfall, and others for the balance remaining unpaid on the judgment. Defendants appealed to this court, and in the opinion referred to the judgment of the district court was reversed. It was held that chapter 13, laws 1891, applied, and not the former statute, and that the extent of recovery was limited by the provisions of that act. After the case was remanded plaintiffs filed another motion for judgment against the above named defendants under the decree of

March 21, 1893. Objections were filed which, in effect, set up as defenses: First, the statute of limitations; and, second, the doctrine of laches. The court found for plaintiffs for the balance remaining unpaid of the defendants' liability, under the act of 1891, with interest from the 26th day of October, 1908, and rendered judgment accordingly. Defendants appeal, and plaintiffs have filed a cross-appeal claiming that the district court erred in failing to allow interest against each defendant from the date of the decree in 1893.

The issues were submitted to the district court upon a stipulation of facts. This shows that between the rendition of the decree and judgment, in 1893, and August 18, 1898, seven executions and two vendi. were issued upon it. The last of the money received from executions was applied on the judgments on December 30, 1897. Execution was again issued in 1898, and returned *nulla bona* in December of that year. Certain payments were made on February 8, 1910, as the result of a decree in a mortgage foreclosure suit against defendant Goodman, in which plaintiffs were adjudged to have a first lien on the real estate by virtue of the judgment of 1893. A witness at the hearing in 1908 testified that the record showed that Goodman owned other real estate in Douglas county than that sold on the executions, and defendant Stuht then testified that this real estate was of the value of $20,000.

As to the contention that the proceedings are barred: It is said that the motion is in effect a supplemental petition which sets up causes of action based upon two things—the decree of March 21, 1893, and the subsequent default of the codefendants; that the issues thus made were not involved in the decree of 1893; and that the cause of action accrued when the other defendants failed to pay the amounts adjudged against them, which was more than four years before the filing of this motion.

The principal action was brought within the statutory period and has been pending in the district court ever since. It is true that judgment was rendered for a por-

tion of the liability, and that further proceedings against the appealing defendants were stayed while efforts were made to collect from the others; but the failure of co-defendants to pay the amount adjudged against them can hardly be said to be a cause of action against these defendants. The real cause of action had been adjudicated in 1893, and all that was left undone was for the court, if it afterwards became necessary, to ascertain and apportion among defendants the liability to pay the remainder of the debt in accordance with the statute. This might have been done in the first instance by rendering judgment for the whole amount and providing that executions issue under the court's direction until the entire judgment was satisfied. *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593. The issuance of a new execution in such case is not the accruing of a new cause of action, and neither can the calling of the attention of the court to the fact that a further judgment was necessary be properly so considered.

As to the plea of laches: There is no proof in the record that plaintiffs had any knowledge other than that derived from the returns upon the executions issued that the defendant Goodman owned other property from which the judgment against him might have been realized. Moreover, if the defendants had knowledge that their co-defendants possessed property from which the original judgment could have been collected, there is nothing to show that they ever called the attention of the plaintiffs to that fact. Executions were issued until the officers found no more property on which to levy, and money was collected and applied on the judgment as late as February 8, 1910. Under this condition of the record, we find no facts to justify the application of the doctrine of laches.

The district court refused to allow interest from the date of the first decree, but allowed it from October 26, 1908, when the plaintiffs filed their motion for further judgment. It is said this was upon the theory that the

defendants were then first called upon to pay the balance owing, and that inasmuch as they refused to make such payment they were chargeable with interest from that date. Defendants were not liable, as plaintiffs claim, for interest from the date of the original judgment, because they paid the sum then definitely adjudged against them in full. Demand was made for the balance due by the motion of October 26, 1908. It is true the demand was made for more than was due, but no offer was made by defendants to pay the true amount and they resisted the claim *in toto*. We think that under section 4, ch. 44, Comp. St. 1911, which provides for interest on money due and withheld by unreasonable delay the district court took the proper view.

Finding no error, the judgment of the district court is

AFFIRMED.

CITY SAVINGS BANK, APPELLANT, V. JOHN C. THOMPSON ET AL., APPELLEES.

FILED JUNE 12, 1912. No. 16,680.

1. **Homestead: LIENS: PURCHASE MONEY.** The unpaid price which a married woman agrees to pay for land is a lien on a subsequently acquired homestead interest therein, though her husband did not execute and acknowledge the contract of purchase.

2. ———: ———: ———. Money loaned by a vendor to vendee to improve the land purchased, pursuant to the terms of the sale, is not purchase money, within the meaning of the statute which subjects a homestead to execution for the satisfaction of a decree foreclosing a vendor's lien. Comp. St. 1911, ch. 36, secs. 3, 4.

3. ———: CHANGE OF LOCATION. By moving from one lot to another a dwelling-house constituting part of a homestead, the homestead interest in the house is not lost, where the owner and his family live in it while it is being moved, abandon the old location, and in the new location continue to occupy the house as their homestead.

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

William Baird & Sons, for appellant.

A. S. Churchill and *John G. Kuhn, contra.*

ROSE, J.

This is a suit to foreclose a contract for the purchase of a five-acre tract of land in Douglas county. The instrument was dated November 9, 1904. The City Savings Bank, plaintiff, was vendor and Emma V. Thompson was vendee. She agreed to pay for the land $1,000 in monthly instalments, and plaintiff promised to furnish her $1,000 to improve it, and did so. When the contract was executed, she was living with her husband and five children in a two-story frame house on a lot in Omaha about three-fourths of a mile from the land purchased. Pursuant to the terms of the agreement the money furnished to her by plaintiff was expended under her orders in moving to and upon the five-acre tract the family dwelling-house in Omaha, and in paying for carpenter work, plastering, painting and masonry, and in making other improvements on the new premises. The house was moved while the family occupied it, and it continued to be their home. The purchase price of $1,000, the $1,000 to be furnished for the improvement of the tract, and interest on both items, amounting to $1,011.72, were included in the contract as purchase money, to be paid in monthly instalments of $24 each, with the exception of the last, which was $35.72, due May 1, 1915. For each of the monthly instalments, 125 in all, vendee gave her note, the aggregate being $3,011.72. Notes 1 to 32, inclusive, were paid. The note due September 1, 1907, and the rest of the notes are unpaid. Vendee died November 1, 1908. The defendants are her husband, her children and the administrator of her estate. Defendant John C. Thompson, hus-

band of the deceased vendee, answered, and adduced evidence tending to prove that he had constructed the house moved from the lot in Omaha to the five-acre tract; that its value when moved was about $2,000; that he lived in it with his family while it was being moved, and continued to occupy it as a home at the new location; that before and after it was moved, and during the time of the removal, it was his homestead; that he did not execute or acknowledge his wife's contract of purchase, but refused to do so; that he did not convey, incumber, or release his homestead interest in his dwelling-house, within the meaning of the statute, which declares: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Comp. St. 1911, ch. 36, sec. 4.

To show the real nature of the transactions between his wife and plaintiff, he also pleaded the following as part of the original contract, John F. Flack, by whom it was executed on behalf of the City Savings Bank, being treasurer thereof: "Omaha, Neb., Nov. 8, 1904. Mrs. John C. Thompson, City: In connection with the contract which you have entered into with the City Savings Bank for the purchase of the north ½ of the N. W. ¼ of the N. E. ¼ of the S. W. ¼ of section 32-16-13, it is hereby understood that $1,000 is to be advanced to you for the purpose of moving your residence which is now on 40th avenue near Grand avenue onto this property; the carpenter work, plastering, painting and brick work on said property to be paid from this $1,000 remaining due you; also the well, fruit trees, etc., amounting to about $....., and about $.....to be used for the purchase of live stock and machinery to do the work on said place; and that we will not charge you interest on this money advanced until such time as it is paid out. John F. Flack."

Plaintiff asserts that the entire unpaid debt evidenced by the notes is purchase money and consequently is the first lien on the land and on all the improvements thereon.

The trial court, however, took a different view of the case and decreed that the purchase price was $1,000 only; that the sum of $1,000 advanced for the moving of the house and for the making of other improvements was a loan to vendee and no part of the purchase price; that all payments of principal and interest included in the canceled notes be applied to the purchase price, leaving due thereon a balance of $381.32, which is the first lien on the land, but not on the improvements; that the husband and children of vendee have a homestead interest in the house and outbuildings to the extent of $2,000, which, as to improvements, is superior to all other claims or liens; that the homestead interest of $2,000 attached to the land when the house was moved thereon November 24, 1904, and is inferior only to plaintiff's lien for the balance of the purchase price—$381.32; that plaintiff has also a lien on the five-acre tract for $1,483.44; that the land and the improvements thereon be sold, "provided said premises shall be sold for more than enough" to pay costs, taxes, the homestead right of $2,000, and the amount of plaintiff's first lien; that in case of a sale the proceeds be applied, first, to costs and taxes; second, to the homestead interest of $2,000; third, to plaintiff's first lien of $381.32, and the balance, on order of the court, to the other lien of plaintiff. From this decree plaintiff has appealed.

There is no dispute about any material fact. The effect of the homestead interest of defendants on the contract of purchase, under the circumstances of the case, is the controlling question. Except for that interest, plaintiff's right to a strict foreclosure for the unpaid debt would be obvious. Plaintiff insists that the money advanced to the vendee for improvements went into the property with the knowledge and consent of her husband, and that her indebtedness under the terms of her contract is purchase money, within the meaning of the law that a contract for the purchase of land, or a mortgage given by a wife to secure unpaid purchase money, is valid security, though not signed by the husband, notwithstanding the property

was purchased for and occupied as a homestead. *Prout v. Burke,* 51 Neb. 24. The statutory provision is that the homestead is subject to sale in satisfaction of a judgment obtained on a vendor's lien. Comp. St. 1911, ch. 36, sec. 3. The fallacy in plaintiff's argument is that the money advanced for improvements is not, as to the homestead right, under the facts disclosed, a part of the purchase price of the land. It is true that vendee in her contract treated her entire indebtedness as purchase money, but her husband did not join in the contract. In so far as his homestead interests were concerned, he had a right to defend the foreclosure suit in the light of the actual transactions. When his wife bought the land, there were no improvements on it. His own house, after it was moved, was the first improvement on the five-acre tract, and the money furnished by plaintiff for improvements was subsequently paid out. In *Smith v. Lackor,* 23 Minn. 454, the supreme court said: "A debt incurred for lumber to build a dwelling-house on a lot held under a contract of purchase, and claimed and occupied as a homestead, represents no part of the purchase money of such homestead." Under the laws of this state, the homestead is exempt from judgment liens and from execution and forced sale except for debts secured by mechanics', laborers' and vendors' liens, and for debts secured by mortgage executed by both husband and wife or an unmarried claimant. Comp. St. 1911, ch. 36, sec. 3; *Fox v. McClay,* 48 Neb. 820.

The evidence is conclusive that the husband did not execute the contract of sale, but refused to sign it. He abandoned his homestead on the lot in Omaha as soon as his house was removed therefrom. During the removal it was occupied by himself and family with the definite intention of making it their home when located on the land purchased. That purpose was carried out. The homestead, therefore, was changed from the old location to the new. *Maguire v. Hanson,* 105 Ia. 215. The statute makes "the dwelling-house in which the claimant resides"

an essential part of the homestead. Comp. St. 1911, ch. 36, sec. 1. The homestead may be sold and a new one selected. For the period of six months the proceeds, like the homestead itself, are entitled to protection from legal process. Comp. St. 1911, ch. 36, secs. 13, 16. If the proceeds of the sale of a homestead are protected in currency and in other forms of property, the dwelling-house, which is an essential part of the exempt property, is certainly entitled to the same protection, when claimed as exempt and occupied as a homestead in a new location. Did the husband of vendee, by permitting his dwelling-house to be moved on the land purchased by his wife from plaintiff, subject his homestead interest to a lien for the money furnished to her for improvements? If his homestead interest in the house was charged with a lien in favor of plaintiff, for the money advanced for improvements, that result was not accomplished by any instrument "executed and acknowledged by both husband and wife," as required by statute. Plaintiff knew that he refused to sign the contract. That part of the agreement pleaded by defendants refers to the house as the residence of vendee. Since the money furnished to her for improvements is not a part of the purchase money, since her husband did not execute or acknowledge the contract of purchase, since he retained and asserted his homestead interest in his house after it was removed, and since he occupied it as such in the new location with plaintiff's knowledge of the facts, a vendor's lien for the money advanced for the improvements, as distinguished from purchase money, did not attach to the homestead. This conclusion is not demanded by the principles of justice governing courts of equity independently of statute, but there does not seem to be any way to avoid it without doing violence to the homestead laws.

The decree, however, is erroneous in subjecting plaintiff's lien for unpaid purchase money to the homestead interest in the improvements. When the husband of vendee permitted her to move his house onto the land pur-

chased, he knew the surrounding circumstances. He had discussed with plaintiff the terms of the contract. He knew that plaintiff had a valid purchase money lien for $1,000 on the land before his house was moved onto it. He could not lawfully disturb that lien or interfere with plaintiff in enforcing it by permanently attaching his house to the land. By that act, he subjected his improvements to the vendor's lien, which, under the circumstances of this case, is by statute made superior to the homestead. The decree should have provided, without condition, for the sale of both land and improvements to satisfy the amount due plaintiff for purchase money, and interest thereon, taxes and costs of suit. It is therefore reversed and the cause remanded, with directions to the district court to modify the decree to conform to the views here expressed. Defendants will be required to pay the costs in this court.

REVERSED.

BARNES, J., concurring separately.

The policy of the law is to preserve the homestead for the use of, and to furnish shelter for, the family, and it therefore contains the wise, just and humane provision that the homestead cannot be incumbered except by a contract in writing signed and acknowledged by both husband and wife. In this case the husband refused to waive his right or incumber his homestead, and his wisdom and forethought seem to be fully justified by the record.

It appears that the wife is dead, and, if the view expressed in the dissenting opinion should prevail, the plaintiff would be allowed to deprive the defendant and his family of their home for the repayment of the money advanced by it to improve the property in question. For this the law gives the plaintiff no lien. It is true that the materialman and a contractor who performed labor and furnished material for that purpose could have obtained a lien on the homestead therefor, but the law makes no

provision for such a lien in favor of one who advances money with which to pay for such improvements.

It is suggested in the dissenting opinion that the sole ground of defendant's refusal to sign the contract was to avoid a personal liability. This suggestion does not seem to be supported by the record. On the contrary, his refusal must have been made in anticipation of the situation which now confronts him—that of having the home for himself and family swept away by the plaintiff's demands. I am therefore of opinion that the views expressed by the majority of the court are correct.

Again, it may be assumed that the property is of sufficient value to satisfy the plaintiff's claim without resorting to the homestead, which should not be sacrificed for that purpose.

SEDGWICK, J., dissenting.

The policy of our law is to encourage the improvement of homesteads. There are no restrictions placed upon adding to, improving or beautifying the homes of the people. If this plaintiff had removed defendant's house for them and placed it on this new homestead, and had repaired the house and otherwise improved and beautified it, the plaintiff could have filed a lien for the amount so expended and the homestead would be liable for it. In this case the plaintiff had no occasion to file a lien, because it had already a contract with the owner of the fee for the very thing for which the law would have allowed it to file a lien, to wit, for improvements made to their home. It was not necessary to have a contract for this purpose with any one except the owner of the fee. The husband refused to sign the contract. He did not own the fee in the land, and did not want to make himself personally liable for the purchase price. The property itself was good for it, and, if that is not enough without making the husband also personally liable, they might get along with the old home. There seems to have been no other reason for his refusing, as his signature was of no

importance upon the contract except to make him personally liable for the additions they were making to their home. He says that the house was his. He has consented to attach it to his wife's real estate and make it a part thereof. He says that the house was moved and made a part of his wife's real estate without his consent. If he had not consented to it, it would never have been moved, and if he objected to having so good a home as his wife seems to have been trying to provide for him, and did not want the building used for that purpose, he should have said so at the time. This he did not do, and he ought certainly now to be held to have consented to, and to have participated in, making the house a part of the real estate, and their home, and adding to it the improvements that were made. If he consented to the improvements, and the wife who held the legal title agreed that they should be a charge upon the property, and he has been for these years enjoying the benefit of those improvements, the policy of the law is to charge them upon the homestead. He knew that his wife had contracted to make these improvements a charge upon the homestead, and, knowing that, he moved his house upon his wife's land, made it a part of the real estate to be charged with the improvements, and adopted it as their homestead. The improvements were made and he is enjoying them as his home. If I buy a lot, upon which to make a home, for $1,000, with the agreement that the party from whom I buy it shall fill it up to grade at an expense of $500, and that I will pay $1,500 for it all improved, the filling up of the grade is as much a part of the property purchased as is the original lot. So, if I contract for a lot and agree that certain improvements or additions shall be made thereto, and that I will pay so much for the lot and the improvements, the amount that I pay towards the improvements is as much the purchase price of the lot as though the improvements had been made before I thought of making any contract, and that seems to me to be precisely this case.

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

PAUL H. DASSLER ET AL., APPELLANTS, V. CHARLES ROWE ET AL., APPELLEES.

FILED JUNE 12, 1912. No. 16,722.

Corporations: PURCHASE OF STOCK: RESCISSION OF CONTRACT. A purchaser of capital stock of a corporation cannot rescind the sale and recover back the consideration paid on the ground that he was induced by fraudulent representations to make the purchase, where he thereafter treated the stock as his own, accepted the benefits thereof, entered into a contract to sell a number of the shares, served as a director of the corporation and participated in its management, with a full knowledge of the facts on which his charges of fraud are based.

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

G. H. Merten and *H. B. Fleharty,* for appellants.

Lambert, Shotwell & Shotwell, contra.

ROSE, J.

For the price of $1,500 plaintiffs bought from a shareholder in the Mid-West Specialty Company 60 shares of the capital stock of that corporation. On account of alleged fraudulent representations inducing the purchase, this action was brought to rescind the contract and to recover back the consideration paid. Defendants denied the fraud charged, and pleaded ratification. After hearing the proofs of plaintiffs the trial court dismissed the suit, and they have appealed.

The evidence of plaintiffs shows that, after they learned the facts upon which their allegations of fraud are based, they treated the shares of stock as their own, accepted the benefits thereof, and entered into a contract to sell a number of shares after they brought the suit. From the purchase to the trial plaintiff Paul H. Dassler served as a director of the corporation and participated actively in

transacting its business. On these facts alone, the trial court properly dismissed their action on the showing made by themselves. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434; *Arnold v. Dowd*, 85 Neb. 108.

AFFIRMED.

ROBERT CAULK, APPELLANT, V. MARIE CAHOON CAULK, APPELLEE.

FILED JUNE 12, 1912. No. 16,746.

Marriage: ANNULMENT: ORDER FOR SUPPORT OF CHILD. In a proceeding by a father under the statute (Comp. St. 1911, ch. 25, sec. 33) authorizing him to bring a suit to annul the marriage of his son on the ground that he was married without the consent of his parents before he was 18, and did not cohabit with his wife after he attained that age, an order requiring plaintiff to pay money for the permanent support of defendant's child is erroneous.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed in part and reversed in part.*

Kingsbury & Hendrickson, for appellant.

J. J. McCarthy, contra.

ROSE, J.

This is a proceeding by a father under the statute authorizing him to bring a suit to annul the marriage of his son on the ground that he was married without the consent of his parents before he was 18, and did not cohabit with his wife after he attained that age. Comp. St. 1911, ch. 25, sec. 33; ch. 52, sec. 2. Plaintiff's pleadings and proof conformed to the requirements of the statute, and the marriage was annulled. Before the action was brought, however, the minor's wife had given birth to a child, and the trial court, on a cross-bill by defendant,

ordered plaintiff, the father of the minor whose marriage was canceled, to pay to the clerk of the district court for the permanent support of the child the sum of $800. From this allowance plaintiff has appealed.

The statute does not make the plaintiff, who is the parent of the minor, liable for the support of defendant's child. Liability for such an allowance, if considered as alimony, does not extend to the father of the married minor. That part of the decree requiring plaintiff to pay $800 for the purpose stated is erroneous. There does not appear to be any division of authority on the subject. *Stivers v. Wise,* 46 N. Y. Supp. 9; *Thayer v. Thayer,* 9 R. I. 377; *Osgood v. Osgood,* 2 Paige Ch. (N. Y.) *621; *Sturgis v. Sturgis,* 51 Or. 10, 15 L. R. A. n. s. 1034.

Other assignments of error are disregarded as not available on the record presented. That part of the judgment relating to the erroneous order mentioned is reversed.

REVERSED AS TO PERMANENT ALLOWANCE, BUT OTHERWISE AFFIRMED.

IN RE HARRY W. BURDICK.

FILED JUNE 12, 1912. No. 17,064.

Parent and Child: CUSTODY OF CHILD. Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman who properly cares for it in a suitable home without compensation, and the father permits a mutual attachment to grow up between them for a number of years under a contract with him awarding to her its permanent custody, in a proceeding by the father to regain his child, the general rule, that the controlling consideration is the child's own best interests, applies.

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

Sullivan & Squires, for appellants.

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

ROSE, J.

This is a controversy over the custody of a child named Bertha Mildred Burdick. It was born November 13, 1906, and its mother died five days later. Before it was a week old it was taken to the home of Bert Kaelin, where it remained for more than three years. Kaelin's family consisted of himself, his wife, and two children—a boy ten years old and a girl of the age of six. May 14, 1910, Harry W. Burdick, the father of the child, petitioned the county court of Custer county for a writ of habeas corpus to obtain its custody, alleging that it was unlawfully deprived of its liberty by the Kaelins. At that time Burdick's family consisted of himself, a second wife, and a little son by his first wife. The rival families are prosperous farmers, living in commodious homes three-fourths of a mile apart, in Custer county, near Ansley. The trial in the county court resulted in an order taking the child from the Kaelins and restoring it to its father. Upon a review of the proceedings in the district court the judgment of the county court was affirmed. The Kaelins have appealed to this court.

Is the judgment of the county court free from error? Did the best interests of the child, when all of the facts, circumstances and conditions disclosed by the evidence are considered, require the county court to take the child from the Kaelins and restore it to its father? These are the questions to be determined.

Both the father and the Kaelins are abundantly able to furnish the child a suitable home, to support it, to educate it, and to bestow upon it a bounty in the form of property or testamentary bequests. It cannot be determined, without disregarding the evidence, that the father is unfit to have the custody of his child. That Mrs. Kaelin

is a suitable person to raise it has been demonstrated by an actual test of motherly devotion and care above the criticism of the father himself. The decision must therefore be controlled by other considerations.

The father asserts his rights as the natural guardian of his offspring. He further urges that he has a suitable home; that he has remarried and can properly care for his child; that his present wife will give it the care of a mother; that, according to the expressed wish of the child's mother and his own desires, his two children should be raised and educated together; that for their own good they should be companions; that the ties between brother and sister will be a benefit to both, if they are permitted to live together; that the control of a father is the best assurance of the child's welfare and happiness; that the Kaelins obtained only temporary custody of the child, with the understanding they should receive compensation, which he is willing to pay; that, for the purpose of preventing his own relatives from interfering with its custody, he entered into a contract allowing Mrs. Kaelin to keep it, but not for the purpose of abandoning his own rights as parent; that the contract was void as to him, and that the best interests of the child demand that it be restored to his custody and control.

The merit of these propositions cannot be determined without a full consideration of other facts. In a controversy like this the court is not bound as a matter of law to restore the child to its father. The welfare of an infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person who has long stood in the relation of a parent with the parent's consent. *Sturtevant v. State,* 15 Neb. 459; *Norval v. Zinsmaster,* 57 Neb. 158; *State v. Porter,* 78 Neb. 811.

Before and after the death of the mother, Mrs. Kaelin was at her home to minister to her and to her child without compensation. At the request of its father she took the child and its little brother home with her, and for a

short time kept an account of her expenditures in behalf of the baby. The little boy returned to his father in three weeks, but went back at intervals, remaining for a short time only. The child was sickly, and for three months it took practically all of Mrs. Kaelin's time. Like an anxious and devoted mother she spent entire nights with it without sleep. One night, when it was sick, she telephoned for its father, and he came to see it. Afterwards she again telephoned for him in the night, but he declined to come, saying she knew better than he what to do. Constant attention to the helpless, innocent child produced the natural result. There soon came a time when she recognized a growing attachment for it and when she began to dread a separation. After considerable discussion, the following contract in writing was duly executed: "This agreement made and entered into this 16th day of March, A. D. 1907, by and between Harry W. Burdick of the first part and Blanche Kaelin of the second part, witnesseth: That Harry W. Burdick of the first part is the father of Bertha Mildred Burdick, his minor child; and that said Harry W. Burdick has this day voluntarily relinquished all his right to the custody of and control over said Bertha Mildred Burdick, and to the services and wages of said child; to the end that said Bertha Mildred Burdick should be adopted by Blanche Kaelin, and that said Blanche Kaelin shall bestow upon said Bertha Mildred Burdick all the care of and control over, as should be bestowed upon a child born in lawful wedlock. It is further agreed that the first party shall, at all reasonable times, be permitted to visit said Bertha Mildred Burdick and to have said Bertha Mildred Burdick visit him, if she so chooses. It is further agreed that, should the second party not provide the proper care of said child, then the said Harry W. Burdick shall have full right to take said child and declare this contract null and void. Harry W. Burdick, Blanche Kaelin. Witness: C. Mackey."

Consent to the adoption was withdrawn. Of course, a

father, by entering into a contract of this kind, cannot escape his obligations to his offspring; nor can such an instrument be made the means of keeping a child in an unsuitable place, where a proper one is available. An examination of the opinions discussing this subject shows the correctness of the following editorial note found in *State v. Steel,* 16 L. R. A. n. s. 1004 (121 La. 215, 46 So. 215): "Though it is quite generally held that a contract whereby a parent intrusts to another the custody of his child, with the understanding that his rights thereto as parent are thereby transferred, is against public policy and unenforceable, yet, the cases are numerous where the court is at great pains to discover whether or not such an agreement has been made. To such a contract great importance is attached; and oftentimes, especially where both claimants for the child are equally fit, such contract is the deciding factor."

Though Burdick insists that the contract was made to protect the child's custody from the interference of his relatives, his own testimony shows that every time he thereafter mentioned the subject to Mrs. Kaelin she asserted her absolute right of control, and that her will in that respect prevailed. She kept the child three years after he remarried. She and her husband have defended their possession in three courts with a vigor which could not be surpassed on behalf of their own children. When Burdick spoke to Mrs. Kaelin about paying for keeping the child, she resented it, saying she could not be compensated in money. He never in fact gave or paid her anything of value beyond $18—an insufficient reward for taking care of his little boy alone, though she made no charge for doing so. No disinterested person can read the record without being convinced that she believed in her right of custody under her contract. After the agreement was executed she allowed the child to pull at her heart-strings, and she reciprocated without restraint. She testified without qualification that her attachment for the child was the same as for her own children. When the writ was served

upon her, all the child knew of home and mother had been learned at the Kaelins, where it was happy and contented. Such ties cannot be severed without affecting the child. Did its best interests require a separation? Mrs. Kaelin has children of her own. Her spirit has been refined in the crucible of motherhood. She has been a teacher. In her home the child hears language and observes manners born of culture and refinement, where there are pictures, flowers and music. There it is under moral and religious influences softened by liberality and freedom. A court may well hesitate to take a child away from such surroundings to try an experiment elsewhere. It is no disparagement to the stepmother to say that these conditions cannot be equaled in her home. Upon a few days' acquaintance she was married to the father of the child six months after the death of its mother. She is ten years older than her husband, has no children of her own, and has passed the time of life when she can hope to become a mother. At the trial she made no claim to an affection for the child beyond that imposed by her duties as a stepmother. These facts are not mentioned as reflections upon her fitness to have the custody of the child, but to suggest the difference in conditions to which a change of custody would subject it. Mrs. Burdick has a large, well-kept house, near a good school, and her testimony indicates that she would require strict observance of moral and religious principles as she understands them.

At the time of the trial the child's happiness and welfare were assured, for the present at least. To make a change would be an experiment at best. At the Kaelins the father will not be deprived of the companionship of his daughter, but will be welcomed there as a visitor at all proper times, as long as he recognizes their right of custody. Upon a proper consideration of the entire case, it cannot be held that the best interests of the child require a change in its custody. It follows that there was error in the order affirming the judgment of the county court. The affirmance is therefore reversed and the cause re-

manded to the district court, with instructions to commit the custody of the child to Mrs. Kaelin.

REVERSED.

ADVANCE THRESHER COMPANY, APPELLANT, V. EUGENE C. KENDRICK ET AL., APPELLEES.

FILED JUNE 12, 1912. No. 16,941.

Appeal: AFFIRMANCE. "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial." *Vernon v. Union Life Ins. Co.*, 58 Neb. 494.

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

Albert W. Crites, for appellant.

Justin E. Porter, contra.

FAWCETT, J.

From a judgment of the district court for Dawes county, upon a verdict of the jury in favor of defendants, plaintiff appeals.

Plaintiff's abstract states that the petition is based upon seven causes of action, six of which are upon promissory notes, dated March 14, 1908, the last of which matured, upon its face, December 1, 1910, that said notes aggregate $2,460; that the seventh cause of action is upon an account for goods sold by plaintiff to defendants, aggregating $40.11; that the petition prayed judgment against defendants for $3,520.11, with interest from March 14, 1908; that all of these notes were secured by chattel mortgage on one steam traction engine and attachments, which mortgage provided for accelerating the ma-

turity of the remaining notes in case any of them should not be paid at maturity; that the notes set forth in the first and second causes of action were matured on their face when the petition was filed; and alleges the maturity of the remaining notes under the clause in the chattel mortgage providing for accelerating maturity.

The answer is quite voluminous. Among other things, it alleges, in substance, that the engine was not as represented; that it would not do the work; that, when notified, plaintiff furnished an expert engineer of its own to set the engine to work and to instruct defendants in its use; that the engine would not develop half its rated horse-power; that it was not well made or of good material and workmanship, and was inferior to traction plow engines of much smaller size, manufactured by other concerns; that the trial of the engine lasted over six weeks and was conducted by experts and other agents and employees of plaintiff, with the assistance of defendants, but that the engine would not do the work; that the parts constantly broke and wore out, "and said experts ordered new ones without authority of defendants;" that defendants paid the freight in the amount of $261.63 and were put to other expenses, which, with the item for freight, aggregated $848.37, for which, by way of cross-petition, they demanded judgment. In appellees' "additional abstract" it is shown that the answer further alleged that, the representations of plaintiff and its agents having proven false and the warranty having wholly failed, and the engine having never been accepted by defendants, but having remained with them and plaintiff's agents during the trial and testing thereof and the engine being wholly unsuitable and unfit and incapable of being used as a traction plow engine of sufficient traction power to plow or pull the plows referred to in the answer, or to develop the draft power rated, or to otherwise do the work as represented and warranted by plaintiff, and being of poor workmanship and material and continually breaking down and wearing out in parts and

wholly worthless to defendants as a plow draft engine, they returned said engine and all parts, including those items enumerated in plaintiff's seventh cause of action, to plaintiff at Marsland, and plaintiff received and took the same and converted it to its own use. The reply, as set out in plaintiff's abstract, admits that the notes were given for the entire purchase price of the engine, but denies every other allegation in the answer, and sets forth the warranties as contained in the written order for the engine given by defendants.

In its brief plaintiff states: "Default was made in the payment of the first two notes, and appellant exercised its option to accelerate maturity of the remaining notes, took possession of the machine under its chattel mortgage, advertised and sold it, and brought this action to recover the deficiency of the debt." The trouble with this statement is that it finds no support in either the pleadings or the evidence. There is no reference whatever in the pleadings as to any possession taken or sale made of the engine under the chattel mortgage. The mortgage is not even set out in the abstract. The only evidence in relation to any proceedings under it is the testimony of Mr. Redinbaugh, who acted for plaintiff in the sale of the engine to defendants, and who resold it after it had been returned by defendants to the railroad track at Marsland, as follows: "I sold it to Harry Pierce under the chattel mortgage." When Mr. Pierce was introduced as a witness, by plaintiff, he testified that he bought the engine from Redinbaugh; that he first saw it at Marsland; next on a flat car at Hemingford, from which it was unloaded and taken to his ranch; that the next morning "we went to plowing with it; we hitched on four plows in each gang, went out to a rather rolling piece of ground, put the plows in and went ahead; there were two gangs of 14-inch Parlin & Orendorf plows; they were mould board plows; there were some boxings that needed tightening up, but otherwise the engine pulled the plows to my satisfaction; I bought the engine after that test the

same day." It appears, therefore, that defendants, being dissatisfied with the engine, returned it to the point where they had received it, and that subsequently plaintiff took possession of and resold it. No evidence was offered to show the value of the machine at the time it was returned. The presumption, therefore, is conclusive that it was of the same value as when received by defendants.

A very vigorous argument is presented by plaintiff, assailing the rulings of the court in permitting defendants to prove representations made by the agent Redinbaugh at the time he made the sale and received from defendants their written contract and the notes set out therein, and upon the further point that, defendants having failed to show written notice to the company at Battle Creek, Michigan, and to its agent who sold the engine, at the time they returned it, the return of the engine was ineffectual to release defendants from their liability upon their notes, and that plaintiff was entitled to an instruction directing the jury to return a verdict in favor of the plaintiff for such amount as the jury might find to be due under the contract. Certain instructions, given by the court, and the refusal of the court to give certain instructions requested by plaintiff are also assailed. We deem it unnecessary to consider any of these questions, for the reason that the verdict returned by the jury was the only verdict which, under the pleadings and the evidence, could be sustained. The fact that plaintiff took possession of the engine and sold it at private sale to another party, thereby converting it to its own use, and offered no evidence to show that the engine was not in as good condition and worth just as much when it was returned by the defendants as when it was delivered to them, renders all of the above contentions immaterial.

AFFIRMED.

LILLIAN FULLERTON, APPELLEE AND CROSS-APPELLANT, V. MARGARET FULLERTON, APPELLANT; CLARENCE A. WOODS, CROSS-APPELLEE.

FILED JUNE 12, 1912. No. 16,725.

1. Trover: JOINT OWNERS. Two equal joint owners of different articles of property may agree upon a division of one of the articles, and if that agreement is executed and the division made accordingly and the shares so ascertained accepted by the respective parties, and one of the parties afterwards converts to his own use the share of the other party, he will be liable for its value in an action for conversion, although other articles owned jointly have not been partitioned.

2. Evidence: JOINT TORT-FEASORS: ADMISSIONS. If two persons jointly convert the personal property of another, admissions of one as to the facts constituting the conversion are competent evidence in an action against both jointly for the value of the property so converted, and neither defendant is entitled to an instruction to disregard the admissions of the other defendant.

3. Trial: EVIDENCE: REFUSAL OF INSTRUCTIONS. In such action, if there is sufficient evidence to justify a submission to the jury as to the liability of both defendants, a request to instruct generally that the jury must not consider the admissions of one defendant as evidence against the other is properly refused.

4. ———: ———: FAILURE TO REQUEST INSTRUCTIONS. In such action, the fact that the jury found that one of the defendants is not liable for the conversion will not require setting aside the verdict against the other defendant because the admissions of the defendant so found not liable were allowed in evidence, there having been no request for a proper instruction in that regard.

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

O. B. Polk, for appellant.

George A. Adams, contra.

SEDGWICK, J.

In 1906 the plaintiff and the defendant Margaret Ful-

lerton together owned a section of land in Webster county. Part of this land was under cultivation, and during the season of 1907 it was cultivated on shares by different parties, and a part of the rent consisted of several hundred bushels of wheat. The plaintiff contended that this wheat was divided between the parties by mutual agreement, and that afterwards these defendants converted to their own use a part of the plaintiff's share of the wheat, amounting to something over $100. She brought this action in justice court to recover the value of the wheat so converted. Afterwards the cause was appealed to the district court for Lancaster county, and upon trial there the plaintiff recovered a verdict and judgment, substantially as claimed by her, against the defendant Margaret Fullerton. The jury found in favor of the defendant Woods. The defendant Margaret Fullerton afterwards appealed, and there is a cross-appeal by the plaintiff from the judgment in favor of the defendant Woods.

The defense of Margaret Fullerton was that she and the plaintiff were joint owners of the land and of the crops, and that there had never been any settlement between them, and that the justice had no jurisdiction because such accounts could not be settled in a court of law, and therefore the district court obtained no jurisdiction upon appeal. If the wheat was divided by agreement between the parties and after the division the defendants converted the plaintiff's wheat, the fact that other crops had not been divided and that there were other unsettled accounts between the parties would not deprive the justice of jurisdiction for conversion of the wheat. The case was tried in the district court upon this theory, and the court with proper instructions submitted the question to the jury as to whether there had been a division of the wheat between the parties agreed upon and accomplished, and instructed the jury that unless there had been such division they must find for the defendant.

It appears from the evidence that the defendant Woods

cultivated a part of the land, but took no part in the conversion of the wheat, unless it was in hauling it to the elevator, and there is sufficient evidence from which the jury might find that both parties consented, and directed him to haul the wheat to the elevator and deposit it there. Upon this evidence the verdict in his favor is supported.

The evidence tends to show that it had been the custom between the parties to allow the tenant who lived upon the land to divide the rent in equal parts, and that the defendant divided this wheat pursuant to that custom with the knowledge and consent of both parties. There is also evidence from which it might be found that after this division Mr. Fullerton, who acted for his wife, the defendant Margaret Fullerton, concluded to retain the plaintiff's wheat until there had been a complete adjustment of their accounts, and he afterwards sold the wheat and received the money for it. The case is not clear and satisfactory, but the issue was fairly presented to the jury, and the judgment is not so clearly unsupported as to require us to reverse it for that reason.

There was considerable evidence as to statements made by the defendant Woods, and also letters written by him, or at his dictation, were received in evidence. It is contended that since the jury found that the defendant Woods was not connected with the conversion, and was therefore not a proper defendant, this evidence of his statements was incompetent and erroneously received. It seems that the defendant Woods was trying to preserve a disinterested position in the matter, and received no benefit from the conversion, but it is not clear that the plaintiff was not justifiable in joining him as defendant, and this objection that is now insisted upon was not suggested when the evidence was offered, and there was no attempt afterwards to strike out his admissions. We cannot find that the court has committed any reversible error in this regard.

The defendant Margaret Fullerton requested the court to instruct the jury that the admissions of the defendan

Woods should not be considered as evidence against her. There was sufficient evidence against Woods to justify the submission of the case as to both defendants, and there was no request for an instruction that, in the event they found that Woods was not connected with the conversion of the property, and therefore not liable, they should disregard evidence as to statements he had made when not under oath. The request therefore was properly refused.

Other instructions given by the court were objected to, but these objections we think are sufficiently answered in what is said upon the principal defense.

The judgment of the district court is

AFFIRMED.

FARMERS BANK OF LYONS, APPELLEE, V. ARGO N. DIXON ET AL., APPELLANTS.

FILED JUNE 12, 1912. No. 16,747.

Bills and Notes: BONA FIDE HOLDER. If a negotiable promissory note is transferred to a bank as collateral security to an indebtedness to the bank substantially equal to the amount of the note, and the note is so taken by the bank in the regular course of business and without notice of any defense thereto, the bank becomes an innocent holder, and the note is not subject to defenses that may have existed as against the original payee.

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

Kingsbury & Hendrickson, for appellants.

J. J. McCarthy, contra.

SEDGWICK, J.

The plaintiff began this action in the county court of Dixon county against these defendants upon a promis-

sory note. The case was tried several times in the county court and finally appealed to the district court. In that court the plaintiff moved to strike out several paragraphs of the defendant's answer upon the ground that they raised a new issue not presented in the county court. The defense attempted to be alleged in these paragraphs so stricken out was that the note in suit was given for a horse upon a warranty, and that the horse was not as warranted, and was of no value. It is not at all clear that the rulings of the court in striking out these paragraphs were justified in the condition the record then was, but it does not appear to be necessary to go into a detailed examination of that question because the defense failed upon other ground.

The bank claimed to be an innocent purchaser of the note in the regular course of business, and the defendants alleged in their answer that the note was first transferred to the bank by the payee as collateral security, and that it was afterwards purchased by the bank. There was no allegation that the bank had any notice of any existing defense to the note at the time it was received by the bank as collateral security, and by so receiving it without notice of any defense the bank became an innocent purchaser of the note to that extent. *Lashmett v. Prall*, 2 Neb. (Unof.) 284. It appears to have been taken as collateral to an indebtedness of the payee of the note, and if this indebtedness was afterwards canceled and the note, which was collateral thereto, was taken in payment of the principal debt, the bank would still be an innocent purchaser. One of the defendants testified that he wrote a letter to the bank in which he informed the bank that he had given a note to the payee for a horse, and that the horse was of no value, but this, by his own evidence, was after the bank had taken the note from the payee as collateral to the indebtedness to the bank, and had so become an innocent purchaser of the note. The district court instructed the jury to find a verdict for the plaintiff for the amount of the note and

interest, and this was the only verdict possible under the defendants' answer and evidence.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF JOHN A. CREIGHTON.

JOHN A. MCSHANE ET AL., EXECUTORS, APPELLEES, V. ELLEN E. CANNON ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

JAMES H. MCCREARY ET AL., APPELLEES, V. CATHERINE MCSHANE FURAY ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

FILED JUNE 12, 1912. NOS. 16,775, 16,776.

1. **Courts:** COUNTY COURTS: JURISDICTION. The county court has exclusive, original jurisdiction of the probate of wills and the settlement of estates, and its final orders within its jurisdiction are binding upon all parties and not subject to collateral attack.

2. ———: APPELLATE JURISDICTION: SETTLEMENT OF ESTATE: PARTIES. An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem*, all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court.

3. **Charities:** ENFORCEMENT: ATTORNEY GENERAL. A public charity is a public benefit, and the attorney general, upon request of the governor, may represent the public in giving force and effect to such charity when its interests are not otherwise adequately represented.

4. **Attorney and Client:** AUTHORIZATION OF ATTORNEY. When it is the duty of the attorney general to appear in an action or legal proceeding, he may authorize other members of the bar to appear for him, and pleadings or other papers executed in his

name by responsible members of the bar of this court will not be disregarded upon the sole ground that the attorney general must appear in person, and with no suggestion that such appearance was not duly authorized.

5. Wills: BEQUEST: CONSTRUCTION. A bequest in the following words: "I hereby will, devise and bequeath to the executors of this my last will and testament fifty thousand dollars in trust to purchase a site and build thereon a home for poor working girls, expending not more than one-half of said sum for the purchase of said site and erecting a building thereon and investing the balance in interest-bearing securities and applying the interest derived therefrom to the support of the said charity," is sufficiently specific to establish a public charity.

6. ———: CONSTRUCTION. When there are inconsistent and irreconcilable provisions in a will, the latest is generally supposed to express the intention of the testator. This rule, however, does not apply to ambiguous or apparently inconsistent words in the same sentence or provision.

7. ———: ———. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, WILLIAM A. REDICK and ALEXANDER C. TROUP, JUDGES. *Reversed with directions.*

Smyth, Smith & Schall, for appellants.

E. Wakeley, George W. Doane, W. D. McHugh, W. H. Herdman, Charles B. Keller, Arthur C. Wakeley and *W. H. De France, contra.*

SEDGWICK, J.

On January 6, 1904, John A. Creighton, a wealthy citizen and well-known philanthropist of Omaha, being then a widower and childless, executed his last will and testament, containing special bequests aggregating

$1,150,000. By paragraphs 2 to 6, inclusive, he bequeathed to nephews, nieces and personal friends $250,000. By paragraphs 7 to 12 he bequeathed $900,000 to various charities. Paragraph 13 is what is commonly called the residuary clause. Paragraph 10 reads thus: "I hereby will, devise and bequeath to the executors of this my last will and testament fifty thousand dollars in trust to purchase a site and build thereon a home for poor working girls, expending not more than one-half of said sum for the purchase of said site and erecting a building thereon and investing the balance in interest-bearing securities and applying the interest derived therefrom to the support of the said charity." Paragraph 13 is as follows: "I hereby will, devise and bequeath all the rest residue and remainder of the estate real and personal of which I may die seized or possessed to the legatees and beneficiaries hereinbefore mentioned, each of them to take and have the proportion of such remainder as the bequest herein made to him or her bears to the whole of my estate."

Paragraph 14 revoked all wills theretofore made, and constituted and appointed John A. McShane, James H. McShane, John D. Creighton and John A. Schenk executors without bond. James H. McShane declined to qualify, and Mr. Schenk died prior to the trial of this case in the court below, leaving the other two gentlemen named as the executors of the will. Mr. Creighton died February 7, 1907, leaving an estate of nearly $4,000,000. A number of nephews and nieces, who have been denominated the "unnamed heirs," were not mentioned in the will. It would appear from the record that they determined to offer no contest to the probating of the will, but to obtain their rights, if any they had thereunder, by a construction of the same. The will was therefore admitted to probate March 16, 1907. October 1, 1907, the unnamed heirs filed a petition in the county court for the construction of certain clauses of the will, including the tenth and thirteenth clauses, above set out, in which

petition they made the executors and legatees under the will defendants. The county court entered an order requiring the parties named in the petition and all persons interested to show cause why the prayer of the petition should not be granted. A decree was entered in the county court construing the will and holding the tenth clause, above set out, to be void and incapable of execution. The executors appealed to the district court. The unnamed heirs filed in the district court their petition praying for a construction of clauses 10 and 13 of the will, above set out. A petition of intervention in the name of the attorney general was filed in the district court on relation, as alleged, of Catherine B. McCarthy, and two others, and on his own behalf as attorney general, and on behalf of the people of the state of Nebraska, alleging that the charity and trust under the tenth clause of the will were of a public nature, in which the people of the state were interested, and that it was the right and duty of the attorney general to appear in the matter, for the purpose of protecting the said charity and trust; and that the relators were poor, working girls, having a right to intervene and appear in the case, as beneficiaries, through the attorney general. A motion was filed by the unnamed heirs to strike the petition of the attorney general from the files, for the reason that neither he nor the state nor the relators were parties to the suit, and had no rights or interest entitling them to intervene in the case pending on appeal from the county court. An amended petition of intervention was filed in the name of the attorney general, reciting that he appeared as set out in the original petition, and adding that the appearance was by request of the governor of Nebraska. In this amended petition the same claim is made as in the original petition, and it further relates that the executors and trustees "have failed to demur to or answer said petition or the contentions and claims made therein;" that the cause was docketed in that court March 12, 1908, and in the usual course of the business of the court would have been

reached and tried more than a year sooner if it had been pressed with due diligence by the executors. It then sets out the interest of the executors as stated in the original petition, and alleges that the financial interest of the trust and charity and of the beneficiaries thereunder is not in harmony with the financial interest of the executors and trustees, but is opposed thereto; that on October 5, 1909, they filed in the probate court a petition, "representing that a proposition of compromise had been made, proposing to give the executors $75,000 and the heirs $85,000 of the $160,000 in controversy, their counsel advising them that the litigation might be prolonged for several years, preventing or delaying the final closing of the estate, and the establishing and organizing of the home for working girls, and averred that they presented these facts to the court without recommendation, praying the court to advise and instruct them as to what action, if any, they should take as executors with reference to the proposition." This petition of intervention was signed, "William T. Thompson, Attorney General of the state of Nebraska, by Smyth, Smith & Schall, his attorneys, who are also attorneys for relators." The petition is verified by Mr. Smyth. On the same day Messrs. Smyth, Smith & Schall filed a separate petition of intervention for the three ladies named as relators in the petition of intervention which they had filed for the attorney general. A motion was filed to strike from the files the amended petition of the attorney general. A demurrer was filed to his amended petition, and a like demurrer to the petition of the three ladies named. The motion and the demurrer to the petition were both overruled. On the same day the motion to strike the petition of intervention of McCarthy, Brown and St. Onge was sustained and their petition stricken from the files. The executors filed an answer to the petition of the unnamed heirs. The case was tried and argued to the Honorable Lee S. Estelle, the Honorable A. C. Troup and the Honorable W. A. Redick, sitting together as judges of the district court for Douglas county.

The three judges of the district court above named, construing the latter part of the thirteenth paragraph literally, entered a decree sustaining the tenth paragraph of the will, and adjudged that under that paragraph and paragraph 13 the executors, as trustees and in trust for the purpose as set out in paragraph 10, were entitled to take $88,426.34 in satisfaction of said legacies and interest, and that the sum of $79,256.83 be paid by the executors to the heirs at law of John A. Creighton, deceased, share and share alike. Two motions for a new trial were filed in the name of the attorney general, two by the executors, and one by the unnamed heirs, and all were overruled. No motion for a new trial was filed by the interveners, McCarthy, Brown and St. Onge. An appeal bond was filed in the district court in the name of the attorney general, and within the time provided by law the attorney general caused a transcript to be filed in this court, and notice of appeal was duly given. The unnamed heirs and the executors filed their cross-appeals. After the appeal had been lodged in this court appellees (the unnamed heirs) moved to dismiss the appeal upon several grounds. The case was heard and an opinion rendered, which will be found reported in 88 Neb. 107, 113. The motion to dismiss was at that time overruled, all of the grounds urged in said motion being considered and decided, except the one that the attorney general had no authority to intervene in the case or to prosecute an appeal to this court. As to that point we said: "The appellees assert that the attorney general has no authority to intervene in the case or to prosecute an appeal to this court. The briefs and arguments upon these propositions are so meager that we shall reserve the question for consideration in disposing of the case upon its merits."

In their brief and in their oral argument at the bar appellees renew their contention that the district court for Douglas county erred in overruling their motion to strike the petition of intervention of the attorney general, and in allowing him to intervene in said cause in

the district court; that the district court erred in overruling their demurrer to the petition of intervention of the attorney general; that the attorney general, *"sole appellant herein,* has no interest, direct or indirect, of a beneficial or pecuniary character in the subject matter in litigation herein, and therefore is not, and cannot, be prejudiced by any decree or judgment entered herein in the district court for Douglas county, Nebraska, and hence possesses no right of appeal therefrom to this court."

It is contended by the appellees that neither the state nor the people of the state nor the attorney general in his official capacity had any such interest in the charity, sought to be established by the tenth paragraph of the will, as would have entitled the attorney general to appear at any stage of the proceedings; and, further, that, even if he might properly have appeared before trial in the county court, he could not do so after there had been a full and complete trial in that court and the case taken to the district court on appeal. This, for two reasons: First, that the order of the county court, entered October 4, 1907, for all persons, claiming any interest in the controversy, to appear and answer on or before the 28th of that month, operated as a bar to any right on the part of the attorney general to appear thereafter; and, second, that the intervention, if permissible at all, should have been made in the court of original jurisdiction—the county court. Section 9489, Ann. St. 1911, provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party, or interested." Section 4778 provides: "It shall be the duty of the attorney general to appear and defend actions or claims against the state. He may require the assistance

of the district or prosecuting attorney of the district or county wherein the action is brought, and in any case of importance or difficulty the governor or chief officer of the department or institution to which it relates may retain and employ a competent attorney to appear on behalf of the state." The attorney general has not objected to the appearance of these attorneys in his name, and is not now questioning their right to so appear; but, on the other hand, it seems that they are appearing with his approval. It is clear that the objection to their authority to represent the attorney general in this matter is not well taken.

The executors asked for the opinion of the court whether the will should be construed to give the whole estate to the beneficiaries named, including the charity named in the tenth paragraph, or those beneficiaries should take only a portion of the remainder of the estate, leaving a part to be distributed, as an intestate estate, to the legal heirs of the testator. It would seem proper for them to refuse to contend for either side of the controversy, and that made it necessary that the interests of the proposed charity should be represented, since the so-called unnamed heirs were vigorously insisting upon a construction favorable to them. Upon the principles and reasoning of *State v. Pacific Express Co.*, 80 Neb. 823, and *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, we think it was the duty of the attorney general to represent the interests of this charity. See, also, *Chambers v. Baptist Educational Society*, 1 B. Mon. (Ky.) 215; *Rolfe and Rumford Asylum v. Lefebre*, 69 N. H. 240; *Women's Christian Ass'n v. Kansas City*, 147 Mo. 103; *Going v. Emery*, 16 Pick. (Mass.) 107. In *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, it was said: "The provisions for the administration of charitable trusts under the statute of 43 Elizabeth *held* not to be in force in this state. The doctrine of administering trusts for charitable uses *cy pres*, or under the prerogatives of the king as *parens patriæ* by his sign-manual, is inapplicable

and has no part or place in the administration of the courts, either at law or in equity, in this state." This relates to the manner of administering the trust, and, as is held in the same case, "where a certain and ascertainable trustee or trustees are appointed, with full power to select the beneficiaries or designate the objects of the charity, and devise a plan for the application of the funds bestowed, the court will, through the trustee, execute the charity." Here the right of this public charity to exist is assailed, and such duties as general executors under the will are imposed upon the trustees as render it embarrassing for them to contend for the claims of either party as against the other. In such case it is the duty of the attorney general to appear in support of the charity.

The brief of the so-called unnamed heirs presents unquestioned authorities to support the proposition that the decree of the probate court in the settlement of estates upon matters within the jurisdiction of that court are final, unless appealed from, and cannot be collaterally attacked. It was perhaps unnecessary to cite authorities upon so plain a proposition, but that does not determine the question of the right to appear in the district court after the case has been appealed. *Blatchford v. Newberry*, 100 Ill. 484, and other similar cases, are cited, and upon these authorities it is contended that no party could appear in the case in the district court who had not appeared in the probate court. In the Illinois case it is decided that, "if there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction, and cannot be allowed in this court." What that court decided was that new parties could not appear and present new issues in the appellate court. This, however, does not decide the question that is before us. The proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*. Every one interested is a party in the probate court, whether he is named or not, and this is particularly true as to the question of the dis-

tribution of the estate. Under our statute it is not necessary to give any notice of the hearing upon the distribution of the assets of the estate. Everybody interested in that distribution is a party to the proceeding, whether he has appeared in the probate court in the proceeding or not, and so, if the state, in behalf of this charity, was interested in the distribution of the assets in the probate court, it was necessarily a party before that court, whether it appeared there or not. The court was acting upon the *res* of the estate, and not upon the persons interested in it. Therefore, it seems to follow that, when an appeal was taken by the executors to the district court, it removed the whole case to the district court, and all parties interested in the distribution were necessarily parties there and entitled to be heard.

The question of the validity of the tenth clause of the will is not as extensively discussed in the briefs as other questions are. It gives the trustees named a sum of money and directs them to purchase a site and build a house which it designates as a charity "for poor, working girls." It directs that they shall invest a certain specified proportion of the available funds in interest-bearing securities, and that they shall support the "charity," and shall use the interest derived from the securities for such support. While it leaves the details to the discretion of the trustees, it is sufficiently specific to establish the charity intended and place the general management and control in the hands of the trustees. *St. James Orphan Asylum v. Shelby,* 60 Neb. 796; *Chick v. Ives,* 2 Neb. (Unof.) 879; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *In re Estate of Nilson,* 81 Neb. 809.

The principal contention in this case is as to the construction and meaning of the thirteenth clause of the will. It is generally considered that one who makes a will intends to dispose of his property thereby. A will which makes defined bequests and devises to individuals and persons named, and contains a general residuary clause, will, as against collateral heirs, be held to dispose

of all of the property of the estate, unless the contrary appears from the language of the will itself. When there are inconsistent and irreconcilable provisions in a will, the latest is generally supposed to express the intention of the testator. This rule, however, does not apply to ambiguous or apparently inconsistent words in the same sentence or provision.

The thirteenth provision of the will expresses the intention to dispose of the remainder of the estate not included in the specified legacies and devises. It gives this remainder to the "legatees and beneficiaries" mentioned in the will. The testator was aware that he had not included all of his property in the specified amounts. He intended that all of the beneficiaries named should participate in the remainder. How much should each beneficiary take? He had already fixed the proportion that each should take of that part of his estate disposed of by the prior provision of the will. Did he intend that these respective legatees and beneficiaries should take the remainder in the same proportion? In this very clause he gives them the whole of this remainder. He must have used the words, "the bequest herein made," with that fact in mind. He had given this legatee a specified sum and a share in the remainder, and this gift would bear a certain proportion to the whole estate. He had also given each legatee a specified sum and a share in the remainder which would bear the same proportion to the whole estate. It would, of course, follow that the specified sum given to each legatee would bear the same proportion to the sum of the legacies specified that the entire gift to each legatee would bear to the whole estate. The amount of the legacies specified in the former provisions of the will was $1,150,000. This legatee had already been given one twenty-third of that amount, and would take the same proportion of the whole estate, and necessarily the same proportion of the remainder. We recognize this is not giving a literal construction to the last few words of this provision. "The proportion of such

remainder as the bequest herein made to him or her bears to the whole of my estate" is not literally equivalent to the proportion of such remainder as the bequest hereinbefore made to him or her bears to the sum of the bequests hereinbefore made. These words of the will, if taken by themselves, would more naturally have the meaning contended for by the unnamed heirs; but, construing these words with the clause in which they stand and in the light of the whole will, the construction stated presents less difficulty.

The judgment of the district court is reversed and the cause is remanded, with directions to enter a decree distributing the whole estate to the same legatees and in the same proportions that the $1,150,000 of the specified bequests was distributed to the beneficiaries specified in the will, giving to the trustees of the charity named in the tenth clause of the will one twenty-third part of the whole estate.

REVERSED.

FAWCETT, J., dissenting.

I am unable to concur in the majority opinion, for the reason that I do not think any of the parties are entitled to a review by this court of the judgment entered in the district court.

When the unnamed heirs filed their petition in the county court, for a construction of the will, that court entered an order requiring the parties named in the petition "and any and all other person or persons having or claiming to have any right, title or interest, actual or contingent," in the estate or in the assets of the estate, either as heir, legatee, beneficiary, trustee, or otherwise, to answer and show cause on or before the 28th day of October, 1907, why the prayer of said petition should not be granted; providing that in default of such answer "said parties, and each of them, and all other person or persons shall be forever barred from any and all right, title, interest," etc., and that notice of the order be pub-

lished for three consecutive weeks in the "Examiner," a weekly newspaper published in and for Douglas county, Nebraska. October 19, 1907, due proof of publication of the above order was made. February 17, 1908, a decree was entered in the county court construing the will and holding the tenth clause to be void and incapable of execution. March 12, 1908, the executors filed in the district court a transcript on appeal. May 29, 1909, the unnamed heirs filed in the district court their petition praying for a construction of clauses 10 and 13 of the will. June 14, 1909, the executors filed a motion to strike the petition of the unnamed heirs, on the ground that it raised other and different issues from those tendered and determined in the county court. This motion stood undisposed of until November 27, 1909, when leave was given the executors to withdraw their motion to strike and to plead by December 6, 1909. During the interim between the filing of this motion and the withdrawal of the same, and on October 25, 1909, a petition of intervention in the name of the attorney general was filed, as stated in the majority opinion. On March 27, 1909, a motion was filed by the unnamed heirs to strike the petition of the attorney general from the files, for the reason that neither he nor the state nor the relators were parties to the suit and had no rights or interest entitling them to intervene, and that the case was now pending in that court on appeal from the county court. November 3, 1909, an amended petition of intervention was filed in the name of the attorney general, as stated in the opinion. On July 15, 1910, an appeal bond was filed in the name of the attorney general. On July 21, 1910, an appeal in the name of the attorney general was filed in this court. December 17, 1910, the unnamed heirs filed a cross-appeal, and on December 21, 1910, the executors filed their cross-appeal. After the appeal had been lodged in this court, appellees (the unnamed heirs) moved to dismiss the appeal upon several grounds, which motion was disposed of as stated in the majority opinion.

In their brief and in their oral argument at the bar, appellees renew their contention that the district court for Douglas county erred in overruling their motion to strike the petition of intervention of the attorney general, and in allowing him to intervene in said cause in the district court; that the district court erred in overruling their demurrer to the petition of intervention of the attorney general; and insist that the attorney general, "*sole appellant herein,* has no interest, direct or indirect, of a beneficial or pecuniary character in the subject matter in litigation herein, and therefore is not, and cannot, be prejudiced by any decree or judgment entered herein in the district court for Douglas county, Nebraska, and hence possesses no right of appeal therefrom to this court."

This contention, which meets us at the very threshold of the case, is sound and should be sustained. It is contended by the appellees that neither the state nor the people of the state nor the attorney general in his official capacity had any such interest in the charity, sought to be established by the tenth paragraph of the will, as would have entitled the attorney general to appear at any stage of the proceedings; and, further, that, even if he might properly have appeared before trial in the county court, he could not do so after there had been a full and complete trial in that court and the case taken to the district court on appeal. Section 9489, Ann. St. 1911, provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party, or interested." Section 4778 provides: "It shall be the duty of the attorney general to appear and defend actions or claims against the state. He may

require the assistance of the district or prosecuting attorney of the district or county wherein the action is brought, and in any case of importance or difficulty the governor or chief officer of the department or institution to which it relates may retain and employ a competent attorney to appear on behalf of the state." It is thus made the duty of the attorney general to himself appear in all of the matters included within the sections above quoted. No power is given him anywhere in the statute to delegate his duties to private counsel. If that necessity ever arises, section 4778 prescribes who may retain such counsel. Moreover, in the present case, so far as the record before us discloses, the attorney general himself never actually appeared at any stage of the proceedings. He did not sign or verify either the original or amended petition of intervention. He did not sign the motion for a new trial, nor the appeal bond, nor the briefs filed in this court, nor did he appear upon the oral argument at the bar to argue the case. All of these things were done in his name by the private counsel who appeared for the interveners, McCarthy, Brown and St. Onge. It is apparent that counsel were in doubt as to their ability to establish the right of the three ladies named to file a petition of intervention, and that the name of the attorney general was borrowed by them with the thought that, if they failed to establish the right of their private clients, they might succeed under the protecting name of the attorney general. This the statute does not authorize.

After a careful examination and consideration of the will and the record of the case as it then stood, together with the amended petition of intervention, upon which the case went to trial in the court below, it seems clear to me that there was nothing to justify the appearance of the attorney general in that controversy. Upon this point I think:

1. That, under the tenth clause of the will set out. it cannot be held that the charity thereby sought to be

established was clearly a public charity. Treating that clause as valid, as contended for by the intervener, there is nothing in the wording of it to indicate that it was the intention of the testator to make it a public charity. The bequest was to his executors in trust, and the direction was that, with the fund thus bequeathed to them, they were to purchase a site and build thereon a home for poor, working girls, expending not more than one-half of the bequest for the purchase of the site and erection of the building, and to invest the balance in interest-bearing securities, and to apply the interest derived therefrom to the support of said charity. Were the working girls to be received in this home free of all charge, or should they be required to pay a modest consideration for the use of the home? Could any poor, working girl, whether worthy or not, demand admission to the home? Were their qualifications for admission to be passed upon by some public official, or by the trustees named in the will? Was the home thereafter to depend upon public taxes for support, or was it the intention of the testator, with the aid of the interest upon one-half of the bequest, and the receipts of the home from those who might be admitted, to make the home self-supporting? In short, I think the charity thus attempted to be created was in every essential a private, and in no respect a public, charity. I do not think the attorney general had any more right to intervene in behalf of that charity than he would have had to intervene for the Creighton College, which received $500,000, or the St. Joseph Hospital, which was to be the beneficiary of $200,000. In *Attorney General v. Soule,* 28 Mich. 153, it is held: "The state is not authorized, through its law officer, to bring a suit in equity, adverse to all private parties and interests, to enforce a gift by will to charitable uses, unless the gift be definitely to a charity such as equity recognizes, and definitely to a public charity. The state, no less than other prosecutors, must appear on the face of the record to be entitled to prosecute, or the proceeding

must fail in consequence of the irrelation of the plaintiff to the subject of the action." "The question is, not," says Sir William Grant, in *Morice v. Bishop of Durham*, 9 Ves. Jr. (Eng.) *399, "whether the trustee *may* not apply it upon purposes strictly charitable, but whether he is *bound* so to apply it." And in *James v. Allen*, 3 Mer. (Eng.) 17, he says, further: "if the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." As said by the Michigan court: "If the ambiguity involves the quality of the charity as public or private, the same reasons and principles must apply, where the right to maintain the suit depends upon its being public, and if the fund may consistently with the will be applied to a purpose not public, the attorney general cannot interpose to compel a public application."

Mr. Creighton was known as a devout Catholic. It is a matter of public notoriety that his benefactions to the institutions of that denomination had been so great that he had been invested with a title by the Pope. The two gentlemen named as trustees are also well known to be prominent members of that church. His confidence in them was such that he named them executors without bond. He imposed only two restrictions upon them as trustees—one that the site and building should not cost more than half of the bequest, and the other that the remainder should be invested for the support of the home to be established by them. Everything else in connection with the scheme he had in mind, as to the establishment, and the management of the home when established, was left in the hands, and consequently to the judgment, of the trustees. If they, knowing the testator's love for his own denomination, and in view of the fact that all of the other charities made beneficiaries by the will were under the control of various Catholic organizations, saw fit to admit to that home none but poor, working girls of the Catholic church, they clearly would be within the clause

of the will under consideration. Would such a home be considered a public charity, such as would warrant intervention by the state? Clearly not. If, then, the fund bequeathed might consistently with the will be applied to such a home, it cannot be held that the trust created was for a "definitely" public charity, and, hence, it is too indefinite to warrant intervention by the state.

2. If the attorney general had a right to intervene in this controversy, could he wait until the case had been fully tried and decided in the county court, and until the executors had prosecuted their appeal to the district court, and then intervene in that court? Section 50*a* of the code provides: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." In *Reischick v. Rieger*, 68 Neb. 348, we held that the county court has exclusive original jurisdiction of all probate matters, that the construction of a will is a probate matter, and that in such matters the district court has no original jurisdiction. In the light of this holding, the soundness of which cannot be questioned, the district court, in a case of the kind under consideration, is an appellate court; and I do not think the fact that upon such appeal it tries the case *de novo* in any manner changes the situation. The case in that court must be tried upon the same issues presented and between the same parties who appeared in the court of original jurisdiction—the county court. The attorney general, like all others claiming any interest in the construction of the will under consideration, was bound to

know of the pendency of the proceeding in the county court. He was chargeable with the notice given by the county court to appear and assert his contention on or before the date named in such notice. He failed to do so, but waited, not simply until the trial commenced, but until the case was finally determined in that court, and until an appeal had been prosecuted therefrom to the district court, before attempting to intervene. In *Blatchford v. Newberry,* 100 Ill. 484, in the fourth paragraph of the syllabus, it is held: "In a cause brought to this court by appeal, none save such as are parties to the record in this court have a right to be heard. If there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction, and cannot be allowed in this court." In the opinion, beginning on page 492, it is said: "The attorney general asks leave to join in this application, and insists that the public have interests involved in this cause, and he urges a rehearing that he may have an opportunity to assert, support and vindicate the same. We are of opinion that in a cause brought here by appeal, none save such as are parties to the record in this court have a right to be heard. If the interests of the public be such that the attorney general may properly intervene in this ligitation, we think such intervention must begin in the court of original jurisdiction, and cannot be allowed here." The fact that in that case the circuit court was the court of original jurisdiction, and that the attempted intervention was in the supreme court, does not make the case different in principle from the case at bar. I think that in this case the attorney general had no more right to intervene in the district court, after the case had been adjudicated in the court of original jurisdiction and appealed to that court, than he would have to intervene in this court, had he waited until the appearance of the case here. In *Cowan, McClung & Co. v. Lowry,* 75 Tenn. 620, in the first paragraph of the syllabus, it is held: "Where a garnishee

appeals from a justice's judgment against him, it is error in the circuit court to allow the judgment debtor to intervene, on his motion, as a defendant in the garnishment proceedings. His remedy was to appeal from the judgment." In *Henry, Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Ia. 33, it is said: "The right to intervene is purely a statutory right, and it must be exercised at the time, and in the manner, the statute prescribes." In *Chase v. Evoy*, 58 Cal. 348, 355, it is said: "The right to intervene is purely statutory, and the statute prescribes the mode of exercising it." In *Fischer v. Hanna*, 8 Colo. App. 471, 485, the above extract from *Chase v. Evoy* is quoted with approval. I think the attempted intervention was too late.

3. In addition to what has been said upon this question, I think it clearly appears from the record that there was no necessity for intervention either by or in the name of the attorney general at the time such intervention was made. At every stage of this case, since the will was filed for probate, the executors have been represented by able counsel, who appears to have at all times honestly and ably attempted to have every provision in the will of Mr. Creighton sustained and his large estate distributed as therein directed. It further appears that at all times the executors have followed his advice and acted under his directions. If the executors had been consulting their own financial interests, they would not have appealed from the judgment of the county court, as the decree of that court would have afforded them ample protection in distributing the fund covered by the tenth paragraph of the will. The fact that, after they had appealed, they submitted to the county court a proposition of compromise which had been made to them by the unnamed heirs is no evidence of any intention on their part to further their own private interests at the expense of the trust fund. To my mind, it is the very reverse of that. The questions contended for were far from being clear either way, and the executors would have as much reason

to expect that the judgment of the county court would be affirmed on appeal as they would have to believe that it would be reversed, and, if affirmed, they would participate in the distribution of the entire fund. Instead of refusing the offer of compromise upon their own responsibility, they did just what any honorable executors would have done under like circumstances, viz., submitted it to the county court for its instruction. While this was pending, they did not fail to protect their rights in the district court. In the amended petition of intervention, it is said that the executors had "failed to demur to or answer said petition." The record shows, however, that, while this statement may be technically true, in the sense that they had not filed any paper denominated a "demurrer" or "answer," they had, as a matter of fact, filed a motion to strike the petition upon grounds which were in no manner frivolous. This motion, until disposed of, would stay all proceedings under the petition as effectually as a demurrer. The motion was filed within less than three weeks after the filing of the petition. The date of the filing is June 14, 1909, just on the eve of the summer vacation, which is taken annually by that court. The motion filed by them had not been passed upon when the court adjourned for that term. When the first petition of intervention was filed, the October term of the district court had been in session less than one month. The executors' motion to strike had not yet been passed upon. The petition of intervention does not disclose any facts indicating that, from the time of the filing of their motion to strike, on June 14, to the time the petition of intervention was filed, on October 25, the executors or their attorney had been guilty of any negligence, or that the delay in acting upon the motion was due to either their intentional neglect or indifference. After the attorney general filed his petition of intervention, thereby joining issue with the petitioners, and thus waiving the right, so far as intervener was concerned, to insist upon the motion to strike, counsel for the executors obtained

leave to withdraw the motion and to plead within ten days thereafter, within which time an answer was filed vigorously assailing the petition of the unnamed heirs on every point. It therefore appears that the executors, from the time their appeal was lodged in the district court until the final hearing, were never in default of a pleading for a single moment of time, but were following up their appeal with all reasonable diligence. The record upon its face shows an entire absence of any necessity for intervention by or for the attorney general. Viewed from any standpoint, I am unable to discover any right or justification for this intervention.

4. The attempted appeal of the attorney general was in his name alone, and did not purport to be for the relators McCarthy, Brown and St. Onge. Had it done so, it could not have availed them anything, for the reason that more than six months had elapsed from the entry of the judgment dismissing their intervention and the filing of the appeal in this court. Hence, they could not, under any circumstances, have any standing here. *Harman v. Barhydt,* 20 Neb. 625; *Shold v. Van Treeck,* 82 Neb. 99.

5. The cross-appeal filed by the unnamed heirs and the like appeal filed by the executors were both filed more than six months after the entry of the judgment in the district court, and hence have no standing in this court as independent appeals. The only standing either of them ever had was as a cross-appeal. They therefore relied for life and standing in this court upon the original appeal. With that prop removed, eliminated from the case, the cross-appeals have nothing to attach to or rest upon. As they followed the original appeal into court, they should follow it out of court. The only right of appeal from a judgment of the district court to this court is to be found in section 675 of the code, which provides that a transcript shall be filed in this court within six months after the rendition of the judgment or decree, or within six months from the overruling of a motion for a new trial. In *Farrar v. Churchill,* 135 U. S. 609, the

court say: "Cross-appeals in equity must be prosecuted like other appeals; and although they may be taken and allowed after removal of the cause, on appeal, to this court, yet that cannot be done after the lapse of two years from the date of the decree." It would seem to be elementary that we cannot permit a litigant to file in this court an appeal from a judgment of the district court, by whatever name it may be called, after the expiration of six months as provided in section 675 of the code. A cross-appeal is incident to the main appeal, and hence is dependent thereon for standing in the appellate court. If there is no appeal here, then a so-called cross-appeal is not a cross-appeal at all, and would have to stand or fall as an independent appeal. There appears to be serious doubt whether, even in a case where a cross-appeal is filed within the six months, it could have any standing when the appeal is dismissed. Such is clearly the holding in *Crawford's Adm'r v. Bashford,* 16 B. Mon. (Ky.) 3. The opinion in that case says: "It is the opinion of the court that when the appellant or plaintiff in error, in this court, shall have his appeal or writ of error dismissed, whether upon his own motion or for other cause, in such case it follows, as matter of course, that the whole case is out of court, including the cross-errors, should any have been filed by the appellee or defendant in error, whether in the clerk's office or with leave of the court." In concluding the opinion, it is said: "Wherefore, if the appeal or writ of error be dismissed by the court, upon the motion of the appellant or plaintiff in error, or for other sufficient cause, then, of course, the cross-errors are *coram non judice.*" It may be that the Kentucky court went too far in that holding, but, whether so or not, it is clear that, when an appeal has been dismissed, a cross-appeal, filed long after the expiration of six months, falls to the ground and cannot be considered for any purpose, this court being entirely without jurisdiction in such a case. Any party to a judgment in the district court may prosecute appeal to this court, pro-

vided he avails himself of that right within the statutory six months; but I do not think we have any right to say that he may stand idly by, permit the six months to elapse, and then come into this court by cross-appeal and say that he too has a grievance in that case upon which he desires the affirmative action of this court; and this is peculiarly so in a case like the one at bar where the appellant was an interloper in the court below, whose intervention the cross-appellants had been strenuously objecting to in that court, and are still objecting to in this court. That this court has a right to dismiss an appeal by one who was not entitled to be made a party in the district court, and who has no rights to be affected by the proceedings had in that court, is clear. *Auvil v. Iaeger*, 24 W. Va. 583; *McClure v. Maitland*, 24 W. Va. 561, 580; *McMurray v. State Bank*, 74 Mo. App. 394; *Cowherd v. Kitchen*, 57 Neb. 426, 436, where we said: "But these appellants were not prejudiced by the order of discharge, and it is elementary that one cannot appeal from a decision, however erroneous, which does not affect his substantial rights;" and *Sturtevant Co. v. Bohn Sash & Door Co.*, 59 Neb. 82, where we said: "One not prejudiced by a judgment cannot obtain a review thereof." The attorney general had no right to intervene in the court below; consequently he was not prejudiced by the judgment in that court, and hence cannot obtain a review in this court. This being true, the motion to dismiss his appeal should be sustained. That being done, there is no case left, in which an appeal has been filed by any one in this court within six months from the rendition of the judgment below. The fact that section 675 of the code declares that "the filing of such transcript shall confer jurisdiction in such case upon the supreme court" does not mean that the filing of a transcript by one who has no right to appeal will give the court jurisdiction, after he has been dismissed with his appeal, to consider and determine questions raised by another upon a cross-appeal filed after the time permitted by statute.

The only case we have found, which is at all adverse to the views above set out, is *Feder v. Field,* 117 Ind. 386, where it is held: "The dismissal of an appeal by the appellant does not carry the case so far as it is affected by an assignment of cross-errors. The code makes no provision for the assignment of cross-errors by the appellee, but the practice has been so long recognized that it has become one of the unwritten rules of procedure." In that case the question as to whether the cross-errors were filed before or after the expiration of the time allowed by statute for appeal was not raised, and hence the case cannot be considered as an authority upon that point. If it had been made to appear that the cross-errors were assigned after the time within which appellees could affirmatively have obtained a standing in court, it seems to me the Indiana court would have been compelled to hold as was held by the United States supreme court in *Farrar v. Churchill, supra.*

The motion of appellees to dismiss the appeal prosecuted in the name of the attorney general should be sustained and the appeal dismissed. The cross-appeals of the executors and of the appellees should likewise be dismissed.

BARNES, J., concurs in the above dissent.

REESE, C. J., concurring in dissent.

I concur in this dissent upon the ground that the application to intervene was not made within the time required by the section of the statute quoted in the dissenting opinion, and therefore the attorney general never had any right to be heard. The statute is plain that intervention must begin in the court of original jurisdiction, and cannot be allowed in an appellate court to which, after judgment, the cause has been appealed. Having had no standing in the district court, the intervention has none here.

As to whether it was the purpose of the testator to

create a public or private charity, I do not find it necessary to express an opinion. As applied to this case, the authorities are not entirely harmonious.

BARBORA ZITNIK, ADMINISTRATRIX, APPELLEE AND CROSS-APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT; JOHN J. MULLEN, CROSS-APPELLEE.

FILED JUNE 12, 1912. No. 17,015.

1. **Corporations**: ACTION FOR DAMAGES: VERDICT: EVIDENCE. If a corporation and its employee or agent are sued jointly for damages alleged to be caused by negligence of the defendants, and there is a general verdict in favor of the employee and against the corporation defendant, the verdict cannot be sustained without evidence that employees or agents of the corporation other than the one so exonerated were guilty of negligence which was the proximate cause of the injury.

2. **Negligence**: ACTION: PLEADING AND PROOF. If the petition in an action for damages charges the defendants with certain acts of negligence, the proof must agree with the allegations, and the jury is not at liberty to infer that the defendants were negligent in other matters not alleged.

3. ———: LAST CLEAR CHANCE. The rule of "the last clear chance" implies that the one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him, but his testimony that he did not have such knowledge is not conclusive. Such knowledge may be shown by proof that the person injured was in a situation of imminent danger and so situated that the one injuring him, if he used his senses as human beings ordinarily do, must have known the danger.

4. ———: ———: EVIDENCE. The fact that the person injured was in a situation of danger and so situated that he could have been observed by the defendant must be proved by a preponderance of the evidence. The jury is not at liberty to estimate the probabilities in that regard without substantial proof.

5. **Appeal**: INCONSISTENT VERDICT. A verdict inconsistent with itself must be set aside upon application of all parties prejudiced thereby.

6. ———: REVERSAL: REMAND. The jury having found that the engineer in charge of the engine which killed the deceased was not negligent, and there being no evidence of negligence on the part of any other agent or employee of the defendent company, the plaintiff and the defendant company having both appealed, the judgment of the district court is reversed and the cause remanded.

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

John A. Sheean, for appellant and cross-appellee.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

Plaintiff, as administratix of the estate of her deceased husband, John Zitnik, commenced her suit in the district court for Douglas county against the defendants Union Pacific Railroad Company and John J. Mullen, to recover damages for the death of said John Zitnik, alleged to have been caused by the negligence of defendants. It is alleged that defendant Mullen was a locomotive engineer and in charge of a locomotive switch engine in use in the track yards of the company, and the decedent was an employee of said company, his duties, at the time of the alleged accident, being to keep the switches and tracks of the company in said yards clear of obstructions, and in which duties he was thus engaged; that on the 30th day of January, 1909, while Zitnik was engaged in said duties, and about the hour of 11 o'clock A. M., the defendants negligently caused a locomotive switch engine, belonging to defendant company, to move against, upon and over said Zitnik, thereby negligently inflicting injuries upon him from which he soon thereafter died.

The defendants filed separate answers to the petition, that of the company being: First, a general denial of all unadmitted allegations; second, an admission that Zitnik was killed at the time and place alleged; but denies that

"defendants, or either of them, negligently and carelessly, or without regard for the safety of said John Zitnik, caused a locomotive switch engine, belonging to the defendant railroad company, to move against, upon and over the said John Zitnik, thereby negligently and carelessly inflicting upon him the injuries which caused his death, but does not deny that the body of said John Zitnik was run over by a locomotive switch engine of defendant railroad company, of which defendant John J. Mullen was engineer." It is alleged that the decedent was guilty of contributory negligence. The defendant Mullen filed his separate answer, which was, in substance, the same as the answer of the railroad company. Plaintiff replied denying the contributory negligence of the decedent. Later, defendant company amended its answer, in which it is alleged, in substance, that the action was brought under the provisions of sections 10591 to 10593, inclusive, Ann. St. 1911, commonly known as the "Employers' Liability Law," and questioning the constitutionality of said sections. By these pleadings all question of the death of Zitnik by being run over by the switch engine of defendant railroad company is eliminated, and it is admitted that he was "run over by a switch engine" on the date named, and that he died on the same day, the only issue referring to his death being as to the negligence of defendants, and the contributory negligence of the decedent.

A jury was had, and at the close of the evidence the defendant Mullen moved the court for a peremptory instruction to the jury to return a verdict in his favor. The motion was overruled. Thereupon the defendant company presented a similar motion, which was overruled. The two defendants then joined in a similar motion on the same grounds, which was also overruled. To these rulings exceptions were separately taken. The jury returned a verdict in favor of defendant Mullen, and against the railroad company in favor of plaintiff, for the sum of $9,600. A motion for a new trial was

filed by defendant company. Plaintiff also moved for a new trial as against defendant Mullen. Both motions were overruled, when defendant company moved the court for a judgment in its favor notwithstanding the verdict. This motion was also overruled, and judgments were entered in accordance with the findings of the jury.

It appears from the evidence that Zitnik was one of the trackmen laboring on the tracks and switches in the yards of defendant. The 30th day of January, 1909, the day of the accident, was a cold day, the temperature being one degree below zero, and the wind blowing from the northwest at the rate of 22 miles an hour. During the forenoon the foreman directed Zitnik to go and examine the tracks and switches and report their condition. He went as directed, and soon thereafter returned and reported that there was some accumulation of snow in the switches. He was then directed to clean the switches of the accumulated snow. (There was little snow on the ground, but sufficient to be blown and packed in and about the switches.) He left the foreman for the purpose of discharging the duties imposed, and was seen later upon the tracks in the vicinity of the place where he was killed, but probably an hour or so before the accident. The first account we have of the engine on that day was just before the accident, when it was standing on one of the tracks near the Tenth street viaduct, headed west, and in charge of the engineer, fireman, and two persons on the running-board at the rear of the tender. The engine was started to the westward on one of the many tracks, and when it arrived at the Eleventh street viaduct, one block away, it ran over and injured Zitnik to such an extent that he almost immediately died. So far as is shown by the evidence, no person saw him immediately before the accident, nor at the time it occurred, and the first that was known of it was when the rear of the tender with the foot or running-board, on which the two men were standing, passed over Zitnik's body, when they jumped off the running-board, called the attention

of the fireman, giving the signal to stop, the fireman in turn notifying the engineer, when the engine was stopped, and the body, almost lifeless, was removed from the track. Life became extinct on the way to the hospital. The engine was running at the rate of two and one-half or three miles an hour as it approached the Eleventh street viaduct where Zitnik was killed. The northwest wind against which the engine was running caused the smoke from the engine to settle on the left or south side of said engine, and at times, at least, cut off the view of the fireman. The track was level and on a slight curve to the northward, with no cuts or fills. Just prior to the start the fireman shoveled fresh coal into the fire box, this making what is called a "green fire," which emitted an increased volume of smoke. The engine bell was kept ringing. As the engine bore a little to the northward following the curve in the track, the front end shut off the view of the engineer and brought the line within sight of the fireman, except as interrupted by the smoke. Upon an examination made at the place of the accident about two hours later, Zitnik's shovel and broom were found by the track, near the place where the engine probably struck him. Near where the accident occurred, and not far from where the shovel and broom were found, there was a small pile of snow which had the appearance of having been removed the morning on which the accident happened: No person was on the running-board in front of the engine. Zitnik was killed at about 11 o'clock A. M. As to the allegations of the answer, that the accident was the result of contributory negligence on the part of Zitnik, there is no direct evidence whatever. There was no allegation of negligence of the defendants, except the allegation above quoted, that the defendants negligently caused an engine "to move against, upon and over the said John Zitnik."

The engineer, who controlled the movements of the engine, was the defendant Mullen. If it was his negligence that caused the accident he was liable, and the

verdict must have been against him also. The jury found that there was no negligence on his part by finding a general verdict in his favor. The only other employees or agents of the defendant company that were in any way connected with the running of the engine were the fireman Walsh and the two men stationed upon the foot-board of the engine. It is not suggested by any one that the accident was due to any negligence of the men upon the foot-board. Unless the fireman was negligent, and his negligence was the proximate cause of the accident, the defendant company cannot be charged with negligence in running the engine. The only ground relied upon for imputing negligence to the fireman is derived from what is known as the doctrine of the last clear chance. If the fireman knew that Zitnik was in danger and could have saved him by the exercise of any and all reasonable means to that end, he was bound to do so, and his failure in that regard would be imputed to the defendant company. Some authorities hold that he could not be held negligent under this rule unless he knew that the deceased was in danger; others say that if he knew, or by the exercise of reasonable and ordinary care might have known, the situation of the deceased, he is charged with knowledge. Without going into refinements of definitions with regard to this element of the rule, it may be said that, while perhaps there are some unfortunate expressions in some of the numerous cases, the authorities are substantially agreed that the testimony of the person charged with negligence, that he did not have knowledge of the situation and danger of the deceased, is not conclusive. Such knowledge may be shown by evidence that the deceased was in a situation of imminent danger, and that the witness was so situated and so employed that he must, if he had used his senses as human beings ordinarily do, have known of the danger. The fireman testifies that he was looking out before the engine at the time of the accident; the engine was giving out large quantities of dense smoke; they were passing under the

viaduct which confined the smoke and so obstructed his view, and that he did not see the deceased. His statements as to existing conditions are not disputed by any other witness, but are corroborated by several. If we conclude that, notwithstanding this evidence, the jury were at liberty to find that he might and ought to have seen a man situated upon the track, and might and ought to have informed the engineer of the danger in time so that the engine could have been stopped and the accident avoided, still the principal fact necessary to the charge of negligence is wholly wanting. There is no evidence that Zitnik was in a situation where he could have been discovered by the fireman. Zitnik had been at work in these yards; he was seen there about an hour before the accident. We have no evidence of his whereabouts from that time until he was seen behind the engine after the accident. He may have been busily employed at his work on this particular track, and, because of the cold and storm, failed to observe the approaching engine; or, as he was not expected to work long in any one place, he may have been walking down these tracks to some point where his work might be necessary, or he may have been crossing these tracks. Whether he had been upon these tracks in this situation for some time so that the fireman would have time to observe his danger, or whether he was struck the moment he stepped upon the track, is not disclosed by the evidence. The engine was moving slowly, less than four miles an hour; the bell was ringing. That he should remain at work upon this track until the engine struck him seems improbable. It seems at least equally probable that he was going to some point in the yards, and, walking against the storm, crossed these tracks diagonally. These are only conjectures, and the evidence fails to prove that the deceased was on the tracks in a dangerous situation for such a length of time that he could have been seen by the fireman looking from the cab window. It is not the "probabilities" that are to be established by a preponderance of the evidence; the fact

itself must be so established. Instruction No. 1, requested by plaintiff, was misleading. Unless the jury could find from a preponderance of the evidence that deceased was in fact in a dangerous situation where he could be seen by the fireman, they could not assume that fact as probable, and then infer that the fireman was negligent in not seeing him.

It does not appear from the abstract that the petition alleged that the defendants were engaged in interstate commerce, and, for that and other reasons, we do not find it necessary to discuss the recent very important decision of the supreme court of the United States in *Mondou v. New York, N. H. & H. R. Co.*, 32 Sup. Ct. Rep. 169, in which it appears to be held that the act of congress (U. S. Comp. St. Supp. 1909, p. 1171), entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and amendment, supersedes the laws of the states in so far as the latter cover the same field, and may be enforced in the state courts.

The verdict, therefore, against the defendant company and in favor of the engineer, there being no evidence of negligence on the part of any other agent or employee of the company in the matters alleged in the petition, is inconsistent with itself and cannot be sustained. The plaintiff and the defendant company having both appealed, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

I find it impossible to get the consent of my mind to concur in this decision. The day was bitter cold and a most disagreeable one. The decedent was ordered by his foreman to inspect and report upon the condition of the tracks and switches in the track yard, which he did, and was then told to clear the switches and tracks of any snow or other obstructions which could interfere with

their use. He went to his work and was seen and known to be within the grounds and among the tracks pursuing his work. Owing to the inclement condition of the weather, it was known that he should be warmly dressed in order to protect himself from the biting cold and high wind. Under all the conditions shown, it was necessary that care should be taken to avoid accidents. There were two switchmen employed with the engine by which decedent was killed. They were both riding upon the rear foot-board of the forward moving engine. No one was at the front. If the volume of smoke emitted from the engine was so great as to cut off the views of the engineer and fireman, there was all the more necessity that every precaution be taken. No precaution whatever was taken. No one was at the front foot-board to warn any one of the approaching engine. The engine was sent forward blindly with two switchmen at the rear who could see nothing in front, and no one in connection with the engine knew of the presence of decedent until his mangled body rolled from under the rear of the engine. It goes without saying that, had one of those switchmen been at the front of the engine, Zitnik would not have been killed. That must be self-evident to the mind of any sane and right-thinking person.

Was it negligence on the part of defendant not to employ those necessary safeguards? Whose duty was it to decide that question? If juries are to be of any practical use in the administration of justice, the solution of the question was for them. The inference of negligence, or the want thereof, from these facts rested alone with and on them, and they *should* be permitted to decide the question as to defendant's want of care. There is nothing in the evidence to show that the switchmen were under the direction of either the engineer or fireman. If not, and if there was negligence (a question for the jury), whose negligence was it? Most certainly that of the defendant company. If that is true, the release of the engineer by the jury would furnish no just ground of complaint by

the employer. Was it negligence to order the man to work alone upon those switches and tracks under the conditions as they then existed? It was for the jury to say, considering all circumstances and conditions shown. There were other employees on and about those track yards who knew of Zitnik's presence on the tracks; yet no precaution was taken for his safety. True, the evidence is that the engine bell was kept ringing, but it is also shown that at the same time a train of cars was passing on a nearby track, and, considering the cold and high wind, the jury were justified in concluding that Zitnik did not hear or see the approaching engine before it ran him down. As shown by the testimony of the foreman of the gang of men with which Zitnik was connected, it was his custom and duty to warn the men of approaching cars. True, Zitnik had been sent out alone to the work on the tracks, but, under the circumstances, including this custom of the foreman, it was the province of the jury to consider this, as well as all conditions shown to have existed at the time, and arrive at their verdict upon the facts presented by the evidence. The court may be of the opinion that the uncontroverted facts are insufficient to sustain an inference of negligence, but the jury, being equally conscientious, may conclude that such an inference properly arises; the case being one where fair-minded men might arrive at different conclusions. In such case the whole matter rests with the jury. I do not say that the evidence in this case proves negligence on the part of defendant, for it is not the province of any member of the court to decide that question. It must (*should*) be left for the determination of the jury, and upon which the court should keep silent. Does the evidence tend to prove that there was negligence in running the engine as it was run without any safeguard whatever? If so, the matter does not rest with the court. In 2 Thompson, Law of Trials, sec. 1665, it is said: "The case must also *go to the jury* where, although the facts are not controverted, fair-minded men

might differ as to whether the inference of negligence should be drawn from them." This is elementary. *Railroad Co. v. Stout,* 17 Wall. (U. S.) 657; *Atchison & N. R. Co. v. Bailey,* 11 Neb. 332. And the rule has been recognized and followed by this court ever since the decision of those cases. If the verdicts of juries in such causes are to be set aside under circumstances like those presented in this case, and the burden assumed by the courts, the jury arm of our jurisprudence may as well be dispensed with, as our much vaunted "trial by jury" would be nothing more nor less than "a fraud, a delusion, and a snare."

FAWCETT, J., concurs in the above dissent.

ELBERT J. LATTA, APPELLEE, V. BUTTON LAND COMPANY ET AL., APPELLANTS.

FILED JUNE 22, 1912. No. 16,711.

1. **Vendor and Purchaser: FALSE REPRESENTATIONS: RESCISSION.** When, in order to induce a purchase of land, representations are made of material facts, and to ascertain their truth or falsity would require investigation, the party to whom they are made may place reliance upon them, and if deceived may be allowed to rescind the contract by a court of equity.

2. **Evidence examined and *held* to support a decree of rescission.**

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

Flansburg & Williams, for appellants.

Charles A. Robbins and *John C. Stevens, contra.*

LETTON, J.

This is an action to rescind a contract for the exchange

of certain real estate in Costilla county, Colorado, for real estate in Adams county, Nebraska, and certain notes and evidences of indebtedness. The defendant the Button Land Company is a corporation, Albert L. Button and Byron G. Button are officers of the corporation, and Elmer C. Hammond is a brother-in-law of the Buttons and an employee of the corporation. H. E. Gibson, from whom the title to the Colorado lands was conveyed to the plaintiffs, is a sister of Albert L. Button and Byron G. Button. The plaintiff Elbert J. Latta is a practicing physician, residing with his wife, M. Blanche Latta, at Kenesaw, Nebraska. The principal place of business of the Button Land Company is in Lincoln. At the time of this transaction it had local agents scattered over Nebraska, who drew the attention of prospective purchasers in their locality to the lands which the company had for sale, and who aided in gathering them into excursion parties at stated intervals. One of these agents was J. L. Templeton, a nephew by marriage of Dr. Latta, and in Dr. Latta's employ.

Dr. Latta, in the spring of 1908, desired to dispose of his Kenesaw property, and was induced by Templeton to go with him to the San Luis Valley, in Colorado, on a land selling excursion conducted by the Buttons. The party of about 25 or 30 persons occupied a sleeping car chartered by the land company. They reached Denver the next day, and spent the day in that city. The next morning they arrived at Alamosa, and went by train from there to Monte Vista, where they were met with carriages which the Buttons had in waiting. They were then driven some 30 or 40 miles over the country north and east of Monte Vista, stopping at the town of Center for lunch. This part of the valley is thickly settled and is in a high state of cultivation. The party returned to Monte Vista, where they took a train to Alamosa, and remained at a hotel there over night. The Button Land Company maintained an office in this hotel, in which was a display of agricultural products raised in the vicinity

of Mosca, a little town north of Alamosa, near which lay the land which the land company was selling. In the morning A. L. Button called the party into the office and gave each one a slip of paper with each piece of land to be shown numbered consecutively, so that when a place was reached the number would be mentioned and the land seeker could make such notes as he desired. Automobiles were provided and they were taken to see the listed lands. Their route took them to a point north and east of Mosca, thence westward to a point northwest of the town, and they returned to Alamosa without going into Mosca, though they could see a mill and elevators there. After arriving at Alamosa a written contract was made for the purchase of 320 acres of land, to be paid for by the conveyance of plaintiff's Kenesaw property and the transfer of certain specified promissory notes, which is the contract now sought to be rescinded on account of statements and representations which, it is claimed, were fraudulently made by Hammond and Button in order to induce the plaintiff to buy the lands, and upon which he relied in entering into the agreement. It is alleged, in substance, that these representations were that the actual selling price of the lands shown near Monte Vista, which were irrigated and under cultivation, was at that time $100 an acre and upwards, and that a piece which was pointed out had actually changed hands at $250 an acre; that it was further represented that the land near Mosca was of the same kind and character and fully as valuable for farming purposes as the land near Monte Vista, and was reasonably worth more than $35 an acre; that the defendants had no interest in the land, except a commission for procuring a purchaser; that the Buttons themselves owned a large amount of land in Costilla county, and were holding the land for a price of $100 an acre; that the lands were not settled and cultivated, because the same had been involved in litigation for a number of years, and for no other reason; and that a sufficient water right was attached to and appurtenant to

the land, and would pass to the party on deed of convey ance, and that plenty of water for irrigation would be furnished under said water right.

The plaintiff alleges that all of these allegations and representations were false and untrue. He further alleges that the legal title to the lands appeared to be in one H. E. Gibson, but that it really belonged to the Buttons, and that they received not less than $25 an acre profit on the sale; that the title was taken in the name of Gibson to deceive and defraud purchasers; that plaintiff stated to the Buttons that he relied upon their judgment and experience and knowledge in selecting the land, and not upon his personal knowledge or opinion or examination, and that it was represented to him by them that he could rely upon their knowledge and on their fairness, honesty and advice in purchasing the land. The answer contains objections to jurisdiction, a general denial, and a plea of ratification, and estoppel. The court found for plaintiff, and defendants appeal.

In August, 1908, the maker of one of the notes transferred deposited the money to pay it in a bank at Kenesaw to await the delivery of the note. Dr. Latta, having become dissatisfied, directed the bank to retain the money and not to pay it over to the land company. On September 28, 1908, about 10 or 12 days before the filing of the petition in this case, Byron G. Button went to Kenesaw to see about this collection. Plaintiff told him that he paid too much for the land, that it was not as represented, and that defendants had agreed to give him water, but had failed to do so. Button then delivered to him two shares of stock in the Farmers Union Ditch Company, and plaintiff authorized the bank to pay the money on the note. At that time Dr. Latta also asked Button to sell the land for him, and listed it for sale with the land company as his agent at the price of $40 an acre. A number of the notes which had been transferred to the defendants were sent to the Exchange Bank of Kenesaw for collection. October 10, 1908, this action was begun

to rescind the contract, to enjoin the bank from transferring, returning or in any manner disposing of the notes in its hands, and to quiet the title to the Kenesaw real estate in the plaintiff.

1. The jurisdiction of the district court for Adams county is assailed on the ground that the Kenesaw bank is not a necessary party to the suit. As to this point, we think it clear that that court had jurisdiction. The action was not only for the rescission of the contract, but to impound the negotiable securities which were in the hands of the Kenesaw bank for collection, and to prevent them reaching the hands of innocent purchasers, and to quiet the title to the Kenesaw real estate. These objects were properly embraced within the scope of the action and were necessary in order to give complete and adequate relief. The bank was a proper and necessary party, and the summons was properly served in Lancaster county against the other defendants. The cases cited by the defendants are not applicable under these conditions.

2. Defendants next complain that the evidence is insufficient to sustain the decree. It is impossible within the limits of this opinion to set forth the testimony in the record, much of which is irrelevant. We are not inclined to place much stress upon the claim that there was a fiduciary relation existing between the parties by reason of the conversation had between Dr. Latta and A. L. Button on the train. Nor do we place much weight upon the contention that the plaintiff, or the other members of the party, was prevented by undue means from making independent investigations as to the quality and value of the lands. This must be qualified, however, by saying that the short time which the party spent in the valley and the manner in which they were kept upon the move might of itself suggest to a prudent and cautious person that perhaps there was some ulterior object in making such a hurried trip. There are other facts which in our opinion justify the conclusion of the district court. It appears that farming operations upon the lands in the

neighborhood of Mosca had been for the most part abandoned after having been carried on successfully for about 10 years. The reason for this being that water from irrigated lands at a higher level percolated through the soil and raised the level of the water table in that vicinity from a depth of 15 feet to a depth of only 4 or 5 feet. In its passage through the soil the water became saturated with alkaline matter, and by capillary attraction the water holding this matter in solution was drawn to the surface of the ground and there evaporated, leaving a white alkaline substance on the surface. It is shown that this condition may perhaps be remedied by tile drainage, but that this is really largely a matter of experiment, and would cost about $7 an acre. When the party reached the valley, they were first shown beautiful fields and farms near Monte Vista, where the subsoil was of a sandy or gravelly nature. It was represented to them that this land was worth from $100 to $250 an acre. The land in this vicinity is somewhat stony, but plaintiff was told that the land which he would be shown next day was of a better quality, and not so rough and stony. As a matter of fact, the Monte Vista land was being held at from $40 to $75 an acre at this time. After the party left the hotel the next morning, and on the way to the Mosca land, plaintiff noticed that the farms had been abandoned, and, upon inquiry, was told that the right to water for irrigation had been in litigation between the United States and Texas or Mexico, that the litigation had lasted for 10 or 12 years, and had just terminated favorably for the settlers, and that, on account of the uncertainty of procuring water and the trouble of getting it, the settlers had moved away. The evidence shows that, while there had been some litigation, it was not as represented, but was of the nature of the settlement of priorities; that the right of the Farmers Union Ditch Company to the water was not seriously in dispute, and that the litigation had never operated to prevent farming operations in this vicinity. The difference

in the testimony of the Buttons and that of the Lattas with respect to the conversation in these respects is very slight. On the one hand, the plaintiff's witnesses say that the representations were made direct to them as matters of fact in order to induce them to purchase, while the defendants' witnesses testify that the party was repeatedly informed that the Buttons were new in the valley and knew nothing about irrigation, that they had heard that the lands were of the values stated, and that they had been informed that the reason the people had left the locality was on account of litigation and uncertainty about their water rights. It may be that the defendants' story is the true one. The district court, with the witnesses before it, found otherwise. In any event, it seems clear that, even if the statements made by Button and Hammond were qualified by them as being only what they had been told by others, they effectually conveyed the impression to the purchaser by one means or another that these statements were matters of fact. There is no dispute but that conversation of the general tenor testified to by the plaintiff's witnesses took place. Even if we disregard many of the other matters, the false value placed upon the irrigated lands near Monte Vista, which was evidently done to enhance in the purchasers' mind the value of the land they were to see next day; the plausible reason advanced for the abandonment of the farms near Mosca, which though having a substratum of truth was practically false; the false statements as to the value of adjoining lands; and the fact that the Buttons were not, as represented, selling the lands of others upon commission, but were in reality selling their own land, furnished sufficient basis for the decree, under principles long established in this court.

If representations are made of material facts, and to ascertain their truth or falsity would necessitate an investigation, the party to whom they are made may place reliance on them. *Foley v. Holtry,* 43 Neb. 133; *Olcott v. Bolton,* 50 Neb. 779; *Hamilton Brown Shoe Co. v.*

Milliken, 62 Neb. 116; *Perry v. Rogers,* 62 Neb. 898; *Dwinell v. Watkins,* 86 Neb. 740; *Brucker v. Kairn,* 89 Neb. 274. On the whole record, we are satisfied that plaintiff was deceived and misled as to the real nature and value of the property, that if the true facts had been disclosed he would never have purchased this land, and that the representations made were false and fraudulent in a matter exceedingly material to the transaction.

3. The defense of ratification we think is not supported by the evidence. Dr. Latta testifies that at the time he listed the land for sale with the defendants, while he was dissatisfied, he was not informed fully as to all the material facts. In the short interval between this time and the beginning of the suit he learned the truth, and at once began this action. Defendants were placed in no worse position by the delay.

In our opinion, the evidence sustains the findings and decree of the district court, and it is, therefore,

AFFIRMED.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL, RELATOR, V. JOHN J. RYAN ET AL., RESPONDENTS.

FILED JUNE 22, 1912. No. 17,363.

Municipal Corporations: OFFICERS: ACT EXTENDING TERM: CONSTITUTIONALITY. The legislation of 1911, amending the charter of South Omaha by providing that the general city election shall be held on the first Tuesday in May, 1913, and that elective city officers shall retain their offices until that time, is not unconstitutional as a legislative appointment of the present incumbents for another year or as being an enactment for the sole purpose of extending their term of office.

ORIGINAL application in *quo warranto* to oust respondents from the office of fire and police commissioner of the city of South Omaha. Objection to jurisdiction. *Objection overruled.*

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

H. B. Fleharty and *Smyth, Smith & Schall, contra.*

ROSE, J.

Respondents are fire and police commissioners of South Omaha, and this is an action in the nature of *quo warranto,* brought originally in this court, to remove them from office under the statutory provision that such officers may be removed for wilful failure to enforce any law which it is made their duty to enforce. Comp. St. 1911, ch. 71, sec. 1*a*.

Jurisdiction to oust them is now challenged on the ground that the term of office to which the charges of dereliction of duty apply has expired. They insist that the information refers alone to failure to enforce the law during the term which expired April 2, 1912; that under the charges made the statutory power of removal did not extend beyond that date; that the remedy was limited to removal for the remainder of that term; that they cannot be removed, since the term has expired; that they have been elected for another term which they are now serving; that, there being no authority to remove them during the present term, the action should be dismissed.

Is the assertion that respondents are serving a new term well founded? On the first Tuesday in April, 1910, they were elected for the term of two years. In 1911 the legislature amended the charter of South Omaha by providing that the general city election shall be held on the first Tuesday in May, 1913, and that the elective city officers shall retain their offices until that time. Comp. St. 1911, ch. 13, art. II, secs. 13-16; laws 1911, ch. 12. Respondents assert that the amendment was unconstitutional, and that they were elected in 1912 under the charter as it existed prior to the amendment postponing the

city election until 1913. If the amendment is valid, however, there was no legal city election in 1912, and they are still holding office under their election in 1910, and in that event their term has not yet expired.

To sustain the contention that the statute extending the term of office another year is void, respondents rely on *State v. Plasters*, 74 Neb. 652. The rule of law announced in that case was stated in this form: "The legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers." A casual examination of the amendment of 1911 will show that in passing it the legislature made no attempt whatever to appoint city officers, and that the sole purpose of the act was not to extend their official term. The extending of the term was merely incidental to a long enactment containing important legislation relating to municipal affairs over which the lawmakers had unquestioned legislative power. The authority of the legislature to lengthen the term, where the office is not created by the constitution, is recognized in the case cited, wherein it is said: "The office is not mentioned in the constitution. It is a creature of the statute, and there can, of course, be no doubt that the power that created the office may abolish it, or may change it, including the lengthening of the term of the office itself." It is a mistake to assume that the legislature, by changing the date for holding the election and by providing that the present incumbents shall hold their offices until they can be filled a year later under the new law, appointed respondents. Respondents hold their commissions from the people by whom they were elected. Strictly speaking, they were not elected for two years only, but for two years and until their successors are elected and qualified. When respondents were elected in 1910, their term of office, as fixed by the city charter, was subject to the following provisions of the general election laws: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which

he is elected or appointed expressly declares the contrary." Comp. St. 1911, ch. 26, sec. 104. The charter of South Omaha and the general election law in force in 1910 having made respondents' term of office, not two years, but two years and until their successors are elected and qualified, they were not appointed by the legislature to serve a year in addition to their regular term, but are now serving part of the term for which they were elected in 1910. It seems clear that the rule announced in *State v. Plasters,* 74 Neb. 652, does not control the question here presented, and that the attack made on the validity of the amendment of 1911 is unfounded. The objection to jurisdiction is therefore

OVERRULED.

OREY C. BELL ET AL., APPELLEES, V. CHRISTIANA DINGWELL ET AL., APPELLANTS.

FILED JUNE 22, 1912. No. 17,082.

1. **Courts:** COUNTY COURTS: JURISDICTION. Controversies involving title to and ownership of real estate are not within the jurisdiction of county courts.

2. **Equity:** JURISDICTION. "It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." *Buchanan v. Griggs,* 20 Neb. 165.

3. ———: TITLE TO LAND: ACCOUNTING. One out of possession of real estate, the title to his undivided portion of which has been fraudulently obtained by the one in possession, may join with his suit in equity for a recovery of his title a demand for an accounting as to the rents and profits and for a partition of the land.

4. **Limitation of Actions:** FRAUD. The pleadings and evidence examined and set out in the opinion. *Held,* That this case is controlled by the limitations of section 12 of the code.

5. **Guardian and Ward:** AUTHORITY OF GUARDIAN: BORROWED MONEY:

LIEN. A guardian is without authority to borrow money upon his ward's real estate without an order from a court of competent jurisdiction. If he does so, it will be held to be his personal debt, and, if he be an owner of an undivided interest in such real estate, the debt will be treated, as between him and his ward, as a lien upon his undivided interest only.

6. **Mortgages**: LIEN. The mortgage set out in the opinion *held* properly charged to the undivided interest of the defendant Christiana Dingwell in the land in controversy.

7. **Evidence**: LAWS OF OTHER STATES: ADMISSIBILITY. Where the trial court admits exhibits purporting to be the laws of another state, the question as to whether or not a sufficient foundation had been laid for their admission will not be inquired into where it appears that the opposite party has himself alleged the facts to be the same as shown by such exhibits.

8. **Parent and Child**: SUPPORT OF CHILD: ACCOUNTING: REVIEW. Where minor children are taken into the family of their mother and step-father, and they all thereafter reside together as one family during the minority of such children, each rendering to the other such support, care, education, obedience, and service as is usual with families of their class, without any agreement as to compensation from either to the other, and during such time the family is residing upon 80 acres of land belonging to the mother and children jointly, a judgment, refusing compensation to the parents for support, care and education of the children, and denying to the latter a recovery for rents and profits of the property, during such period of time, will be sustained on appeal.

9. **Homestead**: RIGHTS OF INFANTS. Where a widow, whose husband died intestate while a resident of a foreign state, removes from such state to this state, remarries here, is then appointed guardian of the minor children of herself and such decedent, and applies to the court of the foreign state for leave to exchange land situate therein, which under the laws of that state belongs to such widow and minor children jointly, for land in this state, and, upon obtaining leave so to do, fraudulently, and in violation of the terms of the order of the court, takes title to such land in her own name, to the exclusion of such children, and then moves upon the land, so acquired, with her second husband, she does not thereby obtain the right to hold the same as a homestead as against such children.

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

John C. Dort, for appellants.

William M. Jackson and *Story & Story, contra.*

FAWCETT, J.

Defendant Christiana Dingwell is the mother of plaintiffs; defendant John Dingwell being her second husband. Her former husband, and father of the plaintiffs, Robert Bell, a resident of the state of Iowa, died December 5, 1885, leaving defendant Christiana and the plaintiffs as his only heirs at law. At the time of his death he owned 80 acres of land in Taylor county, Iowa, and some property in the town of Clearfield, in that county. The children were then aged three, six, and eight, respectively. In 1887 defendant Christiana was married to her codefendant. In December, 1889, she was appointed by the county court of Pawnee county as guardian of the plaintiffs, and duly qualified as such. On February 15, 1890, she was duly appointed foreign guardian of plaintiffs by the district court for Taylor county, Iowa. Previous to her marriage with her codefendant, she had moved with the plaintiffs to Pawnee county, in this state. Upon her appointment as guardian by the district court in Iowa, she filed in that court her petition, in which she alleged that she was the owner of an undivided one-third, and the minor children, plaintiffs herein, were the owners of an undivided two-ninths, each, in the real estate in that county; that the farm land was worth $2,200, subject to a mortgage for $700, $500 of which was then due and unpaid; that neither she nor the minor children had any means with which to pay the mortgage; that the property in Clearfield was worth $600; that petitioner was permanently located in Pawnee county, Nebraska, was the mother of said minors, and that they resided with her; that Jacob Wade was the owner of the northeast quarter of the northeast quarter of section 35, and the northwest quarter of the

northwest quarter of section 36, township 2, range 10, in Pawnee county, Nebraska, which was worth about $2,000; that Wade wanted to move to Taylor county, Iowa, and wanted to exchange his 80 acres in Pawnee county for the 80 acres belonging to the minors and herself in Taylor county, and would pay $200 difference in value, the mortgage upon the Taylor county land to be paid off; "that such a trade would be of great benefit to the minors and herself, as they could live upon it and save expenses of agent," etc.; and prayed for an order of the court permitting her to sell the town property in Clearfield and to apply the proceeds on the mortgage upon the farm; that she be permitted to convey to Wade the shares of the minors, together with her own share, and to receive from him the $200 to apply on the mortgage on the Taylor county land, and also receive from him a warranty deed conveying the Pawnee county land to herself and said minors jointly, naming the respective shares of each. Upon a hearing of this petition after due and legal notice had been given to all parties interested, the court entered a decree as prayed in the petition, in which it was expressly provided that the petitioner should take from Wade a warranty deed conveying to her and said minor heirs jointly, naming the respective shares of each, the Pawnee county land. In accordance with this decree of the Taylor county court, defendant Christiana, for herself and as guardian for the minors, executed to Wade a deed to the Taylor county land, but instead of taking a deed of the Pawnee county land to herself and the plaintiffs jointly, as directed by the Iowa court, she took the same in her own name individually. She received the $200 "boot money" from Wade, and sold the Clearfield, Iowa, property for $400. The mortgage upon the Iowa land, when paid, amounted, as found by the court, to $800, which, as will be seen, was $200 more than the aggregate of the money received by her from Wade and the sale of the Clearfield property. For this excess of $200, together with interest, the district court upon the hearing of this case gave her credit.

About five years after the exchange of the land, as above set out, on February 3, 1897, the defendants jointly executed a mortgage upon the Pawnee county land to the Union Central Life Insurance Company for $900, and on February 2, 1907, they jointly executed a renewal thereof. This mortgage is now a lien upon the lands in controversy. It is conceded that the mortgagee accepted the mortgage without any knowledge of the rights and interests of the plaintiffs.

After the marriage of the defendants they moved upon the land in controversy, and have lived thereon ever since. During all the years of their minority the plaintiffs lived with the defendants, and the relations of the parties were those of an ordinary family, the defendants exercising the authority over and giving to the plaintiffs the care, supervision and attention usually exercised and given by parents, and the plaintiffs yielding to them the obedience and service usually accorded and given by children to parents. They worked just as other children work upon farms, and were educated in about the same manner that other respectable parents of their class educate their children. There is some evidence tending to show that, while attending the public school, the children were kept at work upon the farm a little longer in the autumn than other children, but, upon the whole, we are unable to say that they did not receive the same consideration as that ordinarily received by children brought up upon the farm. On the other hand, it is conceded by the defendants that plaintiffs performed their duties as children.

The prayer of the petition is that defendant Christiana be decreed to be the owner of but an undivided one-third interest in the land; that she be decreed to be the holder as trustee for each of the plaintiffs of an undivided two-ninths, which interest she be required to convey to plaintiffs free and clear of all incumbrances, or that judgment be entered confirming the shares of the parties accordingly; that the mortgage of $900 be decreed, as between

the parties, to be a first lien upon the share of defendant Christiana; that the land be partitioned according to the respective rights of the parties, or, if the same cannot be equitably divided, that it be sold and the proceeds divided according to the rights of the parties, and that plaintiffs have judgment against the defendants for the sum of $2,266 with interest, as their share of the rents and profits, and the same be adjudged a lien upon the interest of Christiana in said lands; and for general equitable relief.

Defendants filed objections to the jurisdiction of the court on the ground that defendant Christiana is guardian of the plaintiffs; that she has made no final report as such; that she has not been discharged, and that the guardianship matters are still unsettled; and also filed a general demurrer to the petition. The objections and demurrer were all overruled, and defendants answered, first, that the court had no jurisdiction for the reasons set out in their objections above outlined; second, the statute of limitations. The answer then admits the filing of the petition in the court in Taylor county, Iowa, and the entry of the decree by that court; admits the relationship of the parties to this suit; admits receiving the use and benefit of the Pawnee county land, but denies the value thereof "being anything like the sum alleged by plaintiffs;" admits that the land was deeded to defendant Christiana in her own name; denies generally all allegations not specifically admitted; alleges that while the guardian's action was pending in the Iowa court the mortgagee commenced a foreclosure of the mortgage; the borrowing by defendant Christiana from her husband and codefendant of sundry sums of money, which sums, together with the $400 received from the sale of the Clearfield property, were used in paying debts of her former husband; that there was no money or property remaining in the estate of her former husband, after paying off the debts and the judgment in foreclosure; that defendant Christiana is the owner of the land in contro

versy; that plaintiffs have no interest therein and are not in possession thereof; that the land is the homestead of the defendants and has been claimed by them as such for more than ten years; that defendants have placed costly improvements upon the land, describing them, aggregating, as they allege, $7,000; that they cared for, clothed, nursed in sickness, and educated the plaintiffs during their minority; that the said care, etc., was furnished at a cost to defendants of more than $9,000; denies owing plaintiffs any sum whatever; and alleges that upon a strict accounting plaintiffs are and would be indebted to the defendants in the sum of $9,000, no part of which has been paid. The prayer is that they be allowed to go hence, recover their costs, and "for such further and different relief as may be just and equitable." The reply denies all allegations in the answer, except that defendant Christiana has never made an accounting as guardian of any of the plaintiffs, has never filed any report as such guardian, and that no proceedings have ever been had in the county court since her appointment.

The court upon a hearing found generally for plaintiffs, and found specially: the death of Robert Bell; the property owned by him at the time of his death and the relationship of the parties as above outlined; that, under the laws of Iowa in force at the time of the death of Robert Bell, his lands descended in fee simple, one-third to defendant Christiana and two-thirds to the three children jointly; finds the ages of the plaintiffs; that the youngest reached his majority February 16, 1906; that this action was begun February 13, 1909; the marriage of the defendants; the appointment of defendant Christiana as guardian in the two courts above referred to; that Christiana made application to make the exchange of lands and obtained an order therefor and executed such exchange, as above set out; the sale of the Clearfield property by defendant; that the mortgage on the Taylor county land amounted, with interest and costs, to $800; the receipt by defendant Christiana from the

sale of the Clearfield property of $400 and from Wade $200; that after receiving the deed to the Pawnee county land defendants moved upon the same, and had lived thereon ever since, occupying it as a family homestead; that plaintiffs, as part of the family, lived with defendants for many years; that during the time plaintiffs lived at defendants' home they were supported, educated and cared for by defendants as parents, and during said time plaintiffs worked for and were governed by defendants as their own children, without any agreement concerning payment of any living expenses for plaintiffs; that since taking possession of the land defendants have made valuable improvements, the present worth of which is $1,750; that the annual rental value of the land, exclusive of the improvements, from 1903 to 1910, was $180 per annum; that plaintiffs were each entitled to recover $40 per annum for said years, with interest at 7 per cent. from December 1 of each year, as the value of such use and occupation of the land, from the time plaintiffs ceased to be supported by defendants; "that, after deducting the sum of $200 and interest from these amounts, there is due and owing to each of plaintiffs from defendants $239.39" (the $200 here referred to is the sum which defendant Christiana was required to furnish to complete the payment of the mortgage upon the Taylor county land); "that neither of plaintiffs knew until within four years before the commencement of this action that said deed named Christiana Dingwell as sole grantee, instead of setting out the rights of all plaintiffs, nor did either of plaintiffs discover until within four years before beginning this action that they had any interests in the land;" that defendants executed the mortgage and renewed the same upon the dates and for the amount above set out; that the same is now a lien upon the premises, but as between plaintiffs and defendants should be a lien only upon the share of Christiana; that Christiana has never had an accounting as guardian, nor made and filed any report of her doings as

such; that no proceedings have been had in the county court of Pawnee county since her appointment in 1889; and adjudged that Christiana is the owner of an undivided one-third and plaintiffs each of an undivided two-ninths in the property; that Christiana is holding the title to two-thirds of the land as trustee for plaintiffs; ordered the defendants to convey their several portions to plaintiffs free and clear of incumbrance; confirmed the shares of the parties accordingly, and adjudged that the same be divided among the parties according to their shares; appointed a referee to make partition; gave judgment for the plaintiffs against the defendants for the sum of $239.39 each, and that execution issue therefor, and that the mortgage as between the parties stand as a lien on the one-third interest of the defendant Christiana. A commission was issued to Frank A. Barton as referee. On October 19, 1910, the referee reported that the lands could not be equitably divided; that it was for the best interests of the owners that the same be sold and the proceeds divided. By further decree the report of the referee was confirmed and an order entered that he proceed to sell the premises subject to the mortgage of $900. From these decrees defendants appeal, and from that portion allowing defendants $1,750 for improvements and fixing the reasonable rental value of the land at $180 a year plaintiffs file a cross-appeal.

We shall not separately consider the cross-appeal, as the conclusion we have reached disposes of all points raised on both appeals.

It is argued that, under the rule that where an action is pending in two courts the court first acquiring jurisdiction will hold the same, excluding the other, the district court was without jurisdiction to proceed with this matter, for the reason that it is still pending in the county court of Pawnee county and should have been completed there, and the guardian discharged or an appeal taken from the settlement before a suit for partition or for the quieting of title could be maintained. This contention

does not require serious consideration. The county court would have been entirely without jurisdiction to determine the main question litigated in this suit, which is the title to and interest in real estate.

It is further urged that the court erred in awarding partition, for the reason, as claimed, that this is an action concerning real estate, where the title is in dispute; that the pleadings show this to be true, and that the first fact to be determined is that of ownership, which is a fact to be determined by a jury, and under the law cannot be tried out in an action in equity for the quieting of title and the partitioning of land among cotenants; that partition cannot be had by one out of possession, where they have no title, or where the title is in and ownership claimed by another. In support of this contention they rely upon *Seymour v. Ricketts,* 21 Neb. 240, and *McMurtry v. Keifner,* 36 Neb. 522. In those cases the parties asking for partition claimed to have the legal title; and, the parties asking for partition being out of possession, we held that they could not obtain such relief until they had first obtained possession by the ordinary proceedings at law. In this case plaintiffs expressly alleged that they did not have such a title, but that defendants fraudulently, as we shall later show, possessed the entire legal title. They therefore were not in a condition to bring ejectment nor to obtain any rights in any sort of an action at law. They were compelled in the first instance to appeal to a court of equity to invest them with their actual ownership in and title to their undivided interests in the lands in controversy. The court having properly acquired jurisdiction for that purpose, which was really the main and controlling question, properly retained it for all purposes. As was said by our present chief justice, in *Buchanan v. Griggs,* 20 Neb. 165: "It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters

in issue, and thus avoid unnecessary litigation." The rule there stated is again announced and followed in *Seng v. Payne,* 87 Neb. 812. It follows therefore that, having obtained jurisdiction for the purpose of determining the question of title and ownership, it was not only within the power, but was the duty, of the district court to proceed to a final determination of the case and to adjudicate all matters in issue, thereby avoiding unnecessary litigation. In order to do so, the court properly considered and disposed of the question of title and ownership, the value, use and occupation of the premises, the liability of the respective parties for the payment of the mortgage, the value of the improvements, and, after disposing of all of those questions, proceded to award partition of the land in controversy.

Another defense relied upon is the statute of limitations. Under the holdings of this court in *Kerr v. McCreary,* 84 Neb. 315, and *Bank of Alma v. Hamilton,* 85 Neb. 441, it is questionable whether the defendants are entitled to urge this defense, for the reason that, by appearing and asking for an accounting and praying for equitable relief, they have subjected themselves to the equitable powers of the court and have bound themselves to do equity on their part. In the first paragraph of the syllabus in the latter case we held: "If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions." In addition to the rule there announced, we think the district court was right in holding, in effect, that this suit is governed by section 12 of the code, which provides that an action for relief on the ground of fraud may be brought within four years after the discoverey of the fraud. But it is urged by defendants that "the petition in this action does not plead or attempt to plead any fraud, but that by mistake or inadvertence appellant Christiana Dingwell was named

as sole grantee." In this contention we are unable to concur. It is true the petition says, "but in said deed, through a mistake or inadvertence, the said Christiana Dingwell was named as sole grantee, when these plaintiffs should have each been named therein as grantees of an undivided two-ninths thereof;" but this statement in the pleading of the plaintiffs, as to the action of their mother in taking title to the land in her own name when it should have been taken in the names of all, must be construed in connection with the other substantive facts alleged in the petition, which are that the defendant Christiana and the plaintiffs were the joint owners of the land; that the defendant so represented that fact to the Iowa court; that that court so found, and ordered the defendant to take the title to the land in her name and in the names of the plaintiffs, as stated by her in her petition and as found by the court; that she conveyed to Mr. Wade the land in Iowa to which the plaintiffs had title, and, in violation of the judgment of the court, took the title to the Pawnee county land in her own name. The result was a legal fraud, and the simple fact that they in their petition said that she perpetrated this fraud through "mistake or inadvertence" is immaterial. Its immateriality becomes all the more conspicuous in the light of the further fact that she is here herself insisting that she did not take the title through mistake or inadvertence, but that she is the owner of the entire title. The district court was right.

It is further contended that the court erred in finding that the $900 mortgage should, as between plaintiffs and defendants, be a lien on the share of defendants only; and in support of that contention it is urged that they were compelled to mortgage the land in the first instance to raise the balance of money needed to complete the payment of the debts against the estate of plaintiffs' father, which included the mortgage and numerous other items. This contention must fail for several reasons. The practical effect of the court's judgment is to charge only $700

of the mortgage against the one-third interest of the defendant, credit being given her for the other $200 as hereinbefore shown, which is all the money that it was necessary for her to borrow to complete the payment of the mortgage on the Iowa land. Any other debts or liabilities paid by the guardian, or any moneys borrowed by her, were without authority from either the Iowa court or the county court of Pawnee county. As guardian she was entirely without authority to borrow money upon her wards' property and pay debts chargeable against their father's estate in Iowa, without a proper order from the proper court. In addition to this, the evidence as to the expenditures made by defendant is so vague, uncertain and indefinite as to be incapable of ascertainment. Defendant having placed this mortgage upon the land without authority, it must be held to be her individual loan, and the court properly charged it against her interest.

It is next insisted that the court erred in admitting certain exhibits offered by plaintiffs "purporting to be the laws of the state of Iowa." We find it unnecessary to inquire into this question, for the reason that, even if the exhibits were improperly admitted, they simply corroborate the allegations contained in defendants' petition, which she filed in the Iowa court, and in which she set out the interests of herself and her children, as the heirs of Robert Bell, deceased.

It is next contended that the court erred in declining to make any allowance to defendants for having "nursed, fed, clothed and schooled these appellees while they were minors." We are not willing to disturb the finding of the court upon this point. The district court, while refusing to permit defendants to recover for the items named, also refused to permit plaintiffs to recover anything for the rents and profits of the property during the same period of time. This disposition of that point is clearly equitable and meets with our approval.

The statement is made by defendants in their brief that the land in controversy is the homestead of defend-

ant Christiana, of which she cannot be dispossessed except by her voluntary act. The brief contains 29 specific assignments of error, none of which in any manner refers to the defense of homestead. The brief contains no argument in support of such controversy, but counsel contents himself with the mere assertion above noted. This proposition, stated concretely, is: Can a widow, whose husband died intestate while a resident of another state, remove from such state to this state, remarry here, apply to the court of the foreign state for leave to exchange land situate therein, which under the laws of that state belongs to said widow and the minor children of such decedent, for land in this state, and, upon obtaining leave so to do, fraudulently, and in violation of the terms of the order of the court, take title to such land in her own name to the exclusion of such children, then move upon the land, so acquired, with her second husband, and hold the same as a homestead, as against such children? The district court declined to so hold. We likewise decline.

Finally, it is contended that the findings and judgment of the court are not sustained by the evidence. Upon this point defendants must likewise fail. We have examined the record from beginning to end, and, were the case before us in the first instance, we could not reach a conclusion more favorable to defendants than that reached by the district court.

In one respect the decree must be modified. The court in its decree finds: "That defendants since taking possession of the land have erected valuable and permanent improvements, the present worth being $1,750, for which they are entitled to compensation." After confirming the shares of the respective parties the decree provides that the land be "divided among the parties according to their shares, provided that there be added to the share of Christiana Dingwell an amount in area equal in value to $1,750, value of improvements." This judgment is not in accordance with the finding. The improvements were placed upon the land as a whole. One-third of these im-

provements would inure to the benefit of the one-third interest of defendant Christiana herself, and only two-thirds thereof would be chargeable to the plaintiffs. Hence, there should not be added to the share of Christiana more than two-thirds of the $1,750. Otherwise, the plaintiffs would be paying out of their two-thirds the entire present value of the improvements. The defendants jointly made the improvements, and are therefore jointly entitled to the $1,750 allowed therefor. They jointly received the benefit of the $900 mortgage, and should jointly be required to pay the same. They also jointly received the benefit of the use of the land for which an allowance of $239.39 was made to each of the plaintiffs, and should jointly be required to pay those sums. This being true, then, when the land is sold by the referee (he having reported and the court having found that the land cannot be divided), the proceeds of the sale should be applied as follows: First, to the payment of the costs of this suit; second, to the defendants the sum of $1,750 for the improvements, less the sum of $239.39 to be paid to each of the plaintiffs. The balance of the proceeds of the sale, after deducting the said sum of $1,750 (the land being sold subject to the $900 mortgage), should be divided between the plaintiffs and defendant Christiana by paying to said defendant one-third of such balance, less the amount due upon the mortgage; and the residue divided between the plaintiffs, share and share alike. As thus modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

SEDGWICK, J., concurs in the conclusion.

FIRST NATIONAL BANK OF SUPERIOR, APPELLANT, V. J. F. BRADSHAW ET AL., APPELLEES.

FILED JUNE 22, 1912. No. 16,686.

Executors and Administrators: CLAIMS AGAINST ESTATE: LIMITATIONS. Under section 226 of the decedent act (Comp. St. 1901, ch. 23), as amended in chapter 28, laws 1901, creditors must take out letters of administration within two years after the death of the decedent, or "cause such letters to be taken out as provided for" in the act. They cannot take out such letters after the time limited; but, if letters are taken out by the widow or next of kin, it will be presumed that it was done in behalf of all parties interested in the estate, and creditors may present their claims within the time limited, pursuant to section 214 of the act.

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

Stubbs & Stubbs, for appellant.

J. H. Grosvenor, contra.

SEDGWICK, J.

H. N. Bradshaw died February 21, 1901. At the time of his death he was indebted to this petitioner, the First National Bank of Superior, upon three several promissory notes in the sum of $3,592.24. He left a widow and several children, most of whom were of age. There was no administration of his estate until more than six years after his death. Upon the application of his heirs letters of administration were then issued to one of his sons. Such proceedings were had thereon in the county court of Nuckolls county that within a few months after the letters of administration were issued an order was made by that court completing the settlement of the estate and barring all claims. Afterwards the bank made application to that court to have the order set aside and to be allowed to file their said claim. This application was

refused, and the bank appealed to the district court, where the order of the county court was affirmed, and an appeal was taken by the bank to this court.

It appears that the deceased was for many years a stockholder in the bank, and for some time prior to his death a director and its vice-president. This indebtedness had continued for some time, and had been renewed from time to time, and the stock which the deceased held in the bank, of greater par value than the amount of the notes, was by him deposited in the bank as collateral security. After Mr. Bradshaw's death, pursuant to an understanding between the bank and the heirs of the deceased, a part of the dividends upon this stock was applied in payment of the interest on the notes and the remainder of the dividends paid to the widow.

It appears also that the delay in applying for administration was caused by certain agreements between the bank and some of the heirs of the deceased relating to the payment of the notes and matters connected therewith, and it is contended by the bank that, on account of these agreements and various representations connected therewith and alleged fraudulent conduct on the part of the heirs, the county court should have set aside its order and allowed this claim to be filed. We do not find it necessary to discuss the mass of evidence relating to these conditions, since from our view of the law the judgment of the district court must be reversed without regard to the agreements between the bank and the heirs or the representations made by the heirs.

The district court made special findings of fact and found all the issues of fact in favor of the bank. From these findings, which are well supported by the record, it appears that the heirs waited about six and one-half years after the death of the deceased and then procured administration of the estate, and that no valid notice of the time limited for filing claims against the estate was given, and that this application of the bank to file this claim was made within a few months after the letters of

administration were issued. The court held, as a matter of law, that under section 226 of the decedent act a creditor of the estate must make application for administration of the estate within two years after the death of the decedent or his claim would be forever barred. We do not think that the section in question will admit of such construction.

That section, as section 1, ch. 28, laws 1901, is as follows: "Every person having a claim or demand against the estate of a deceased person whether due or to grow due, whether absolute or contingent, who shall not after the giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners within the time limited by the court for that purpose shall be forever barred from recovering on such claim or demand or setting off the same in any action whatever; provided, that if any person having such claim or demand shall fail for two years from and after the death of such decedent to apply for or take out letters of administration on the estate of such deceased person or cause such letters to be taken out as provided for in this chapter, then such claim or demand shall likewise be forever barred; this section shall not be construed to limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor shall it be construed to affect actions pending against the deceased at the time of his death."

The statute requires creditors to present their claims within the time limited under the provisions of section 214 when administration proceedings are instituted by the widow or next of kin. If the widow or next of kin fail for 30 days to select an administrator, a creditor may be appointed under section 178 of the act, and, of course, may apply for administration for that purpose. The application by creditors must be made within two years, but they may make the application directly, or "cause such letters to be taken out as provided for in this chapter." If the creditors make no such application within

the two years allowed them for that purpose, they cannot afterwards institute such proceedings. If letters are taken out as provided for in the act, and the estate is administered upon accordingly, it is not necessary that there should be affirmative proof that the creditors caused it to be done; it will be presumed that it was in behalf of all persons interested in the estate. The technical construction contended for would bar claims of creditors when letters of administration were taken out by the widow or next of kin either before or after the expiration of the two years' limitation, and in all cases, unless such letters were taken out by the creditors in person or through their procurement; this could not be the intention of the legislature.

The judgment of the district court is reversed and the cause remanded for further proceedings, allowing further pleadings in that court if necessary.

REVERSED.

LETTON, J., not sitting.

HAMER, J., concurring.

This case is the consideration of an appeal from a judgment of the district court for Nuckolls county by the First National Bank of Superior in a proceeding commenced in the probate court of that county to open up the administration of the estate of H. N. Bradshaw, deceased, to allow a belated claim. An appeal was taken from the county court to the district court. H. N. Bradshaw died February 21, 1901, owing the petitioner $3,593.24 evidenced by three promissory notes. Administration was not commenced on the estate of the deceased until the expiration of more than six years after his death. For many years during his lifetime, and at the time of his death, the deceased was a stockholder and officer of the petitioner bank. He was a director of the bank and its vice-president. The indebtedness to the petitioner was contracted several years before Mr. Bradshaw died. He gave renewal notes from time to time, and the last

renewal notes given were not due at the time of his death. The widow of the deceased, Mrs. E. J. Bradshaw, was the sister of Mrs. C. E. Adams, and Mr. C. E. Adams was the cashier of the bank at the time of Mr. Bradshaw's death. The Bradshaw and Adams families lived at Superior, where the bank was located. H. N. Bradshaw left surviving him his widow, Mrs. E. J. Bradshaw, and the following children: J. F. Bradshaw, Lillian Kendall, Christie Sweet, H. N. Bradshaw, Jr., and Thomas L. Bradshaw. Payments were made on the notes to the bank out of dividends earned by the bank stock taken in the name of the deceased, and which had been pledged as security for the debt. These payments were in the form of indorsements of interest on the notes as the dividends were earned and distributed. The notes seem to have been, at the time of deceased's death, one note for $1,038, one for $1,709, and one for $157. At the time of the death of H. N. Bradshaw the children were of age, except H. N. Bradshaw, Jr., and Thomas L.

It appears by the amended petition to the probate court that the intestate H. N. Bradshaw died on the 21st of February, 1901; that letters of administration were issued to J. F. Bradshaw on the 29th of August, 1907; that the filing and allowance of the purported final accounting and discharge of the administrator was March 12, 1908; that the bank was a *bona fide* creditor of the estate to the amount of $3,788.65 on account of the promissory notes referred to in the petition; that neither the bank nor any of its officers had any actual notice of the pendency of the administration proceedings until after the estate had been closed; that the heirs had promised and agreed to notify C. E. Adams, the president of the bank, in person, and the bank when any administration proceedings were undertaken; that no final distribution of the assets of the estate had been in fact made and that they were all intact; that the bank had relied on the representations and assurances of the Bradshaw heirs to give it actual notice of administration proceedings and to take

care of the bank's claims, and that by reason of such representations the bank had been induced to postpone any proceedings on its part looking toward administration of the estate, or otherwise protecting their claim; that no good or sufficient or legal notice of the time limit for the filing of claims was ever given or published during the course of the administration, and that the order of the court limiting the time for the filing of claims was made one day before the issuance of letters of administration, and was for that reason void; that the order and notice to creditors was void for the further reason that no six months' notice or time limit for the filing of claims was given as required by law; that the estate, for the reasons given, was prematurely closed; it was also alleged that the bank stock of the deceased in the bank had been pledged as security for his debt to the bank.

There was an answer by the heirs, which is in effect a general denial. There was a trial to the probate court, which decided against the bank, and the bank appealed to the district court, where there was a trial, and the findings of fact seem to have been in favor of the bank, and the facts were found as alleged in the foregoing amended petition and in the decree of the district court. The letters of administration on the estate were issued out of the county court of Nuckolls county August 29, 1907, to J. F. Bradshaw as administrator, and on the 12th of March, 1908, the final accounting of said administrator was filed in the county court, and an order was made by said court discharging him; and, within six months of the time fixed for filing claims against the estate, the First National Bank of Superior filed its petition in the county court praying that said administration be opened up and that the claims of the bank be filed and allowed.

It was found, among other things, that after it had been agreed that the estate of H. N. Bradshaw was to be administered the said heirs had agreed among themselves that said J. F. Bradshaw was to accept the office of ad-

ministrator, and that a few days prior to the application for administration that said J. F. Bradshaw promised and agreed with C. E. Adams, the president of the petitioner, that he would keep him advised and let him know when any administration of said estate would be undertaken or commenced. The district court found: "That said administration of the estate of H. N. Bradshaw was prematurely closed, and that the order limiting the time for filing claims was void, for the reason it was issued one day before the issuance of the letters of administration, and that no six months' notice of said time limit was given or published as required by law." The district court also found that all of the equities were in favor of the petitioner, the First National Bank of Superior, and all the issues of fact were in favor of said bank, but found "as a matter of law that the petitioner is barred from any relief herein by virtue of section 226 of the decedent act, being section 5091 of chapter 13 of Cobbey's Annotated Statutes of Nebraska for 1907."

The section reads: "Every person having a claim or demand against the estate of a deceased person whether due or to grow due, whether absolute or contingent, who shall not after the giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners within the time limited by the court for that purpose shall be forever barred from recovering on such claim or demand or setting off the same in any action whatever; provided, that if any person having such claim or demand shall fail for two years from and after the death of such decedent to apply for or take out letters of administration on the estate of such deceased person or cause such letters to be taken out as provided for in this chapter, then such claim or demand shall likewise be forever barred; this section shall not be construed to limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor shall it be construed to affect actions pending against the deceased at the time of his death."

The proviso contained in the section is important. All the legislature intended by this proviso was to limit the time within which creditors could apply for and take out letters of administration. This limitation was not intended as a bar preventing creditors from presenting their claims if administration should be taken out by the heirs or next of kin. If the heirs did take out letters of administration, the bar contained in the proviso of section 226 is not a bar which prevents the creditor from presenting his claim. It is not a bar which prevents the county judge from allowing it.

Section 214, ch. 23, Comp. St. 1901, reads: "When letters testamentary or of administration or of special administration shall be granted by any probate court, or during any appeal from said order, it shall be the duty of the probate judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by commissioners in this subdivision; provided, that the parties interested, or either of them, shall have the right to demand that two or more suitable persons be appointed commissioners, in which case said commissioners shall receive, examine, and adjust all claims and demands against the estate, as provided for in this subdivision, except when the value of the whole estate, exclusive of the furniture, and other personal property allowed to the widow, shall not exceed one hundred and fifty dollars, and shall be assigned for the support of the widow and children, as provided by law, in which case such assignment shall be deemed a full and final administration and bar to all claims against the estate. When such commisioners shall be appointed, it shall be their duty to appoint convenient times and places when and where they will meet for the purpose of examining and allowing claims; and within sixty days after their appointment they shall give notice of the times and places of their meeting, and of the time limited for creditors to present their claims, by posting a notice thereof in four public places in the said

county, and by publishing the same at least four weeks successively in some legal newspaper printed in this state, or in any other manner which the court may direct."

Section 217 provides: "The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not, in the first instance, exceed eighteen months, nor be less than six months, and the time allowed shall be stated in the commission."

The district court finds: "That said administration of the estate of H. N. Bradshaw was prematurely closed, and that the order limiting the time for filing claims was void, for the reason that it was issued one day before the issuance of the letters of administration." The district court also finds: "That no six months' notice of said time limit was given or published as required by law." The court also finds "all of the equities are in favor of the petitioner." It also finds "all the issues of fact in favor of said petitioner." The bar which it finds in section 226 should not be applied to this case. The section contains no bar against the consideration of the bank's claim if administration is taken out by the heirs. The bank was only barred by the section in question from making application and obtaining letters of administration. When the heirs have made application for letters of administration and they have been granted, there is no reason why the bank's claim should not be presented and allowed as are the claims of other creditors. The finding of the district court touching the equities of the case and the merit of the bank's claim is fully sustained by the record, and this finding would seem to be enough to justify the reversal of the case.

It should be remembered that the delay in administration of this case was for the benefit of the heirs of the estate. It seems to have been carried out in the utmost good faith for six and one-half years. There was a part performance of the agreement, because dividends on the

bank stock were applied on the indebtdness and were also divided with the heirs.

Section 178, ch. 23, Comp. St. 1909, provides that the administration of the estate of a person dying intestate shall be granted to some one or more of the persons therein mentioned, the widow or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent; or if the widow or next of kin or the persons selected by them shall be unsuitable or incompetent, or if the widow or next of kin shall neglect for 30 days after the death of the intestate to apply for administration or to request that the same be granted to some other person, then the same may be granted to one or more of the principal creditors, and, if there be no such creditor competent and willing to take the administration, then that the same may be committed to such other person or persons as the judge of probate may think proper. Creditors are to present their claims within the time limited under the provisions of section 214 when administration is instituted by the widow or next of kin. If the estate is administered upon as provided by the act, it is unnecessary that there should be proof that the creditor has caused it to be done. It will be presumed that administration is granted in behalf of all persons who are interested in the estate.

Under the finding of the district court, the claim of the bank is meritorious, and the administration of the estate should be opened up. The judgment of the district court for Nuckolls county should be reversed, with directions to make an order opening up the administration of the estate and to proceed in that court to a final hearing and judgment according to law.

FRANK J. PRUCHA, APPELLEE, V. LOUIS C. COUFAL, APPELLANT.

FILED JUNE 22, 1912. No. 16,631.

1. **Landlord and Tenant: RELEASE OF LESSEE: EVIDENCE.** The lessee of premises leased by him from the lessor is not released from the conditions of his contract to pay rent simply because he abandons the premises, and, where the undisputed fact is that the owner and lessor of the premises at all times refused to release him from the terms of his contract of lease and to accept a new occupant, there is no question of fact to submit to the jury.

2. **Trial: DIRECTING VERDICT.** The evidence examined, and it is *held* that there was no question of fact to submit to the jury, and that the motion of the plaintiff for a directed verdict in his favor and against the defendant was properly sustained.

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

Matt Miller, for appellant.

George W. Wertz and *L. S. Hastings, contra.*

HAMER, J.

Louis C. Coufal, the appellant in this court, was the defendant in the district court for Butler county. He seems to have leased from the plaintiff in the case, Frank J. Prucha, certain lots in the village of Howell, Colfax county, Nebraska, for a term of five years from the 1st of January, 1906. He was to pay $40 a month on the first day of each month. He took possession of the buildings on the lots on the 1st of January, 1906. He used the lots and buildings in conducting a general store. He paid the monthly rent until the 1st day of July, 1906, and for 7 or 8 days thereafter, at which time he yielded possession of the buildings and lots and turned the same over to the possession of one Adams, to whom he had sold his stock of goods. Adams paid rent up to the month of

October, 1906, and for 7 or 8 days thereafter. Then he seems to have quit.

The plaintiff brought suit against Coufal. He set up the fact of the lease to Coufal, and that Coufal had removed from the premises, and that he had refused to pay any portion of the rent since October, 1906. He claimed in his petition that he had used diligent efforts to rent the premises to the best possible advantage since that date, and that he had succeeded in renting the premises for certain sums of money of small amount, but alleged that he was unable to rent the premises to any other person or firm, and that by virtue of the defendant's refusal and neglect to pay as provided in the lease he had been damaged in the sum of $642.

The defendant admitted making the lease as alleged in the petition, and said that he had paid to the plaintiff $280 for the term of seven months, when he removed from the premises with the consent of the plaintiff, and he alleges that after he removed from the premises the plaintiff took possession of the premises and leased the same to various parties, and received and receipted for the rent received; also that the plaintiff had possession of the premises and the buildings thereon for his own use for several months, and that while he had the use of the premises he made changes and alterations in the buildings by remodeling some parts thereof, and that he divided up the building and made a number of rooms, and used and rented the rooms after he made the same, and that prior to the commencement of this action he had leased the premises for the period of a year, and that the person to whom he leased the premises was in possession and control of the building under his said lease with the plaintiff, and that there was nothing whatever due to the plaintiff on his alleged cause of action.

To this the plaintiff filed a reply, in which he admitted that he had made certain changes and alterations in the building, but said that it was necessary to do so in order to rent the premises after the defendant had abandoned them.

There was a trial in the district court before a jury, and each side moved for a directed verdict. The court overruled the defendant's motion for a verdict and sustained the plaintiff's motion, and thereupon the jury rendered a verdict for the plaintiff in the sum of $664.42. There was a motion for a new trial, which was overruled, and judgment was rendered on the verdict.

The evidence shows that the defendant went to see the plaintiff, and told him that he had sold out his stock, and he wanted to change the lease. The defendant had sold his stock to a Mr. Haddox, who took possession of the store, and he wanted the plaintiff to take Haddox for pay, but the plaintiff testified that he refused to do so. It seems that a man named Adams was running the business when Haddox was not around. There was some correspondence. The plaintiff testified that he received from Coufal from January 1, 1906, to October $360, then he received a year's rent from one John Voborial, $250. He also received $40 from a firm named Mestl & Prucha for storing some machines. He also received $60 from Frank Chuca, who was referee of some bankruptcy stock; $28 from Frank Hefner, and from one J. B. Sewdak he got $60. He also received $50 from a firm named Bierbaum & Schinden. It is in testimony that Prucha knew that Coufal had traded his stock of goods to some one in the month of July, 1906, and that the parties who got the stock of goods were in possession of the building. It is claimed by the defendant that a Mr. Adams, who was in charge of the stock of goods, paid the rent after July, 1906, while he remained in the building. After Adams ceased to manage the stock of goods which was being run by him, the plaintiff received certain goods to be applied on the rent at the agreed price of $10. The plaintiff himself testified that he had agreed to take the goods which Mr. Adams left in that building in payment for the rent of the building for eight or ten days. The improvements made were slight and for the preservation of the property, and to enable the occupation of the

premises by the persons who paid rent for which the defendant was given credit. There was a stipulation between the parties, part of which was read: "It is hereby stipulated and agreed between the plaintiff and defendant that plaintiff rented a portion of the premises in question in this case to one Frank Hefner some time after defendant removed therefrom at an agreed price of $4 per month, and that said Frank Hefner paid on said rent the sum of $28 prior to the commencement of this suit, and that said rental was made without the knowledge or consent of defendant." The testimony taken and stipulation show that there was a lease of the premises, and that the plaintiff never released defendant from the conditions of the lease, although he was requested to do so and hold the purchaser of the stock of goods liable for the remainder due on the lease. As there was no question of fact to submit to the jury, the motion of the plaintiff to instruct the jury to find a verdict in his favor and against the defendant in the sum of $664.42, with interest at the rate of 7 per cent. from February. 15, 1909, was properly sustained.

In addition to what has been said, the rule adopted in *Howell v. Bowman*, 89 Neb. 389, would seem to dispose of the case. In that case it was held that the findings of the trial court in a law action would not be set aside simply because such findings did not comport with the conclusion which this court as triers of fact might have reached; in order to justify a reversal of the findings of the court below, in a law action, on a question of fact, such findings must be shown to be clearly wrong; and where each party to a trial requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.

In the instant case the plaintiff moved the court to instruct the jury to find a verdict in his favor and against the defendant, and the defendant moved the court to instruct the jury to return a verdict for the defendant in

the case. As both plaintiff and defendant moved the court for a directed verdict, all questions of fact involved in the case were withdrawn from the jury and submitted to the court for its determination. *Martin v. Harvey*, 89 Neb. 173; *Dorsey v. Wellman*, 85 Neb. 262.

The judgment of the district court should be, and it is,

AFFIRMED.

UNION STATE BANK OF HARVARD, APPELLANT, V. H. L. MCKELVIE, APPELLEE.

FILED JUNE 22, 1912. No. 17,038.

1. **Married Women: DISABILITIES: CONTRACTS.** "The common law disability of a married woman to contract is in force in this state except as abrogated by statute. She may make contracts only in reference to her separate property, trade or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate." *Grand Island Banking Co. v. Wright*, 53 Neb. 574. *Citizens State Bank v. Smout*, 62 Neb. 223.

2. ———: **ACTION ON NOTE: PLEADING.** Where the liability of a defendant depends upon the execution and delivery of a promissory note, and it appears from the petition that the defendant sought to be charged was a married woman at the time of the execution of the note, and for that reason may have been disqualified to execute and deliver such note, it should further appear from the petition that the note was made with reference to, and upon the credit of, the defendant's separate property and with the intent to bind the same.

APPEAL from the district court for Clay county: LESIE G. HURD, JUDGE. *Affirmed.*

Matters & Matters and *James H. Macomber*, for appellant.

Paul E. Boslaugh, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Clay county upon a verdict for the defendant which was directed by the court. The court directed the jury as follows: "Gentlemen of the jury: Under the pleadings and evidence in this case there is no cause of action shown against the defendant, Mrs. H. L. McKelvie, and you are instructed to return a verdict for the defendant, Mrs. H. L. McKelvie." There was a motion for a new trial by the plaintiff bank, which was overruled and exceptions taken.

The bill of exceptions shows no testimony other than the admission of the plaintiff and defendant as follows: "It is admitted by the defendant that the Morley Twine & Machinery Company, before the note in suit became due and payable, the said twine company for a valuable consideration sold and indorsed the note to the plaintiff in this suit, and under the indorsement set out in the plaintiff's petition, and that the plaintiff was at the time this action was instituted, and now is, the legal owner and holder of the note. It is admitted by the parties that the amount of the note and interest at the time, up to the first day of this term, is one hundred sixteen and 20-100 dollars ($116.20). Plaintiff rests. Defendant rests."

The action was brought upon a promissory note in the usual form, and signed "Mrs. H. L. McKelvie," and contained a promise to pay the Morley Twine & Machinery Company, or order, $100, with interest at the rate of 8 per cent. per annum from maturity. There was an indorsement by the payee. The plaintiff alleged the execution and delivery of the note by Homer L. McKelvie on the 8th day of May, 1908, "with full authority from Mrs. H. L. McKelvie, *who is his wife;*" also, that before the note became due it was sold and indorsed for a valuable consideration to the plaintiff, who was alleged to be the legal owner and holder thereof. The suit was brought against "Mrs. H. L. McKelvie, H. L. McKelvie, and the

Morley Twine & Machinery Company." It was alleged that Homer L. McKelvie was liable because he affixed the signature of his wife to the note, and that Mrs. H. L. McKelvie was "liable upon said note as maker, she having given due authority to the said Homer L. McKelvie to execute said note." The fact appears from the petition that Mrs. McKelvie is a married woman, because it is alleged that she is the wife of H. L. McKelvie. As her disability to contract as a single woman appears from the petition, one of the pertinent questions presented is whether the petition should have alleged facts to take the case within the exception which would have made her liable as a married woman. Of course, as the fact appears from the petition which takes away from her the power to contract as a single woman and prevents her from making a binding promise, it need not be set up by way of answer.

In her answer, Mrs. McKelvie admitted that her husband made the note as her agent, and that she is therefore the maker of the note; but she further alleges that on the date when the note was executed she was, and ever since that time has been, a married woman, and that said note and contract and indebtedness forming the basis of action was not entered into or contracted upon the faith or credit or with the intention to bind her separate estate, trade, business or employment, and said contract and obligation would not and does not in any manner concern the separate estate, property, trade, business, labor or service of this defendant. Also that on the 8th day of May, 1908, or at any time since that date, she did not have any separate estate, property, business, or trade, nor was she performing any labor or service on her sole account.

By the reply the plaintiff admitted that the defendant was a married woman during all the times complained of.

It appears by the pleadings that the defendant was a married woman at the time the note sued on was exe-

cuted. Under the common law disability of married women she cannot contract except as permitted by the statute. She may make a contract only in reference to her separate property, trade or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate. *Grand Island Banking Co. v. Wright,* 53 Neb. 574. In that case it is said in the body of the opinion, beginning on page 577: "The implied power of a *feme covert* to contract is given by the last section quoted (4); but this only extends to her separate trade or business and to contract with reference to her personal services. The express authority conferred upon married women to enter into contracts is to be found in section 2 copied above. But this statute does not expressly nor by implication enlarge a wife's capacity to contract generally. She can buy and sell property in her own name and upon her own account, and enter into valid contracts with reference to her separate estate the same as if she were a *feme sole,* or as a married man may in relation to his property. The statute does not undertake to confer upon a married woman an unrestricted power to make contracts, but such right is limited to contracts made with reference to, and upon the faith and credit of, her separate property or estate. Upon such contract she is liable, but all her other engagements and obligations are void as at common law. To hold unqualifiedly that a married woman has the same right to enter into contracts, and to the same extent, as a man would be to disregard the qualifying clause of said section 2, which confers upon her the authority to 'enter into any contract with reference to the same (her property) in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.'" This court takes occasion to emphasize the idea that, "if the legislature had intended to wholly remove the common law disabilities of a married woman, and give her general power to make contracts of all kinds, this intention, doubtless, would have been ex-

pressed in apt and appropriate language. It would have expressly enacted that she could bind herself and her property by her general engagements whether made or entered into for the benefit, or on account of, her separate property or not, instead of empowering her to contract alone with reference to her own property, trade and business." Judge NORVAL, delivering the opinion of this court, pertinently suggests that "in construing this statute it is important to bear in mind that the legislature was not attempting to impose disabilities upon married women, but was engaged in removing some of those already existing. *She can contract only so far as her disabilities have been so removed by the legislature.* The statute requires that contracts, to be valid, must be entered into with reference to her separate property, and it is for the courts to so construe this enactment as to carry out the legislative will." There is in the case quoted an extended review of the decisions of this court touching the question involved, beginning with *Davis v. First Nat. Bank*, 5 Neb. 242, and ending with *McKinney v. Hopwood*, 46 Neb. 871.

Section 2 of the act (Comp. St. 1911, ch. 53) reads: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man in relation to his real and personal property."

Section 3 reads: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried."

Section 4 reads: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

By reference to section 1 of the act it will be seen that

the property of a married woman which she may own at the time of her marriage, and the profits therefrom, and all property coming to her by descent, devise or gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, and shall not be subject to the disposal of the husband. There are two exceptions to this: One is contained in the proviso which makes her property, not exempt from sale on execution or attachment, liable for debts contracted for necessaries furnished for the family, after an execution against the husband has been returned unsatisfied; and the other exception is that contemplated by section 4 above quoted, which enables her to carry on trade or business and to perform labor and services on her own separate account, and to retain her earnings and separate property and to use and invest the same in her own name. Enough should have been stated in the petition to take the case within one of the exceptions making the defendant, Mrs. McKelvie, liable. It was not stated in the petition or in the answer or reply that the defendant was liable because the note was given for necessaries furnished for the family, or in connection with Mrs. McKelvie's separate trade or business, and there is no admission of that kind in the stipulation. It would seem, therefore, that there is no foundation or basis for a liability against Mrs. McKelvie alleged or proved or in any way before the court. In the brief of appellant it is said that the note was given as the purchase price of stock in a company, but that statement does not appear from the pleadings or in the stipulation, and there was no testimony taken, and therefore it does not appear in any way.

The case of the *Citizens State Bank v. Smout*, 62 Neb. 223, seems to be in point. That was an action upon two promissory notes signed by James J. Smout and his wife, Josephine. She admitted signing the notes, but pleaded coverture, and that she signed the notes as surety for her husband only; that she received no consideration whatever, and that she did not sign the notes for the purpose

of binding her separate estate or property, and that said notes or either of them did not concern her separate property, trade or business. This court held in that case that the burden was on the plaintiff bank to establish that the wife signed the notes intending thereby to pledge her separate estate. The bank failed to enter into evidence upon this question. It was held that the wife was not liable in that case.

The burden was upon the plaintiff to allege a liability upon the part of the defendant, Mrs. McKelvie. Having alleged that she was the wife of the defendant, H. L. McKelvie, and therefore, in effect, that she was a married woman and would for that reason be generally disqualified to contract, it became necessary further to allege a fact under the statute, the existence of which would enable her to contract about the particular matter. Such fact was neither alleged nor proved nor admitted by the stipulation. There was therefore a failure to make a case.

The judgment of the district court in favor of the defendant, Mrs. H. L. McKelvie, is right, and it is

AFFIRMED.

LETTON and SEDGWICK, JJ., concur in the conclusion.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1912.

JOHN FORREST, APPELLANT, V. NEBRASKA HARDWARE COMPANY ET AL., APPELLEES; C. S. SALISBURY ET AL., APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 16,730.

1. Corporations: TRANSFER OF ASSETS TO STOCKHOLDERS: VALIDITY. Transactions between stockholders and members of the board of directors of a corporation, by which the property of the corporation is transferred to one of such stockholders and directors, when attacked by another stockholder, will be examined by the courts with care, and when a want of good faith, fraud or inadequacy of consideration is shown, such sale will not be upheld. But where the proposition of purchase is made to the board and accepted, and also submitted to a meeting of the stockholders and accepted by a majority of them, and the transaction appears fair and free from fraud and upon a reasonable consideration, a court of equity will not declare such sale invalid.

2. ———: MISAPPLICATION OF FUNDS: APPOINTMENT OF RECEIVER. Where, in a proper action, it is shown that the managers and head officers of a corporation have unlawfully withdrawn the funds of such corporation and applied them to their own use, a receiver will be appointed to take charge of the affairs of the corporation, unless the funds so withdrawn are restored and the corporation and stockholders are indemnified against further illegal acts by such officers.

3. ———: DISCRIMINATION AGAINST STOCKHOLDER: INJUNCTION. It is the duty of the managing officers of a corporation to consult, protect and conserve the interests of all stockholders alike and without discrimination. Discrimination against a stockholder by which the value of his stock is unjustly depressed will justify the interposition of a court of equity and the unlawful acts of such managers will be enjoined.

4. **Costs.** The expense of correcting the management of the financial affairs of a corporation by suit in court, or, in case of failure thereof, the appointment of a receiver, including the compensation of counsel, may be chargeable against the defendant corporation.

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

Burkett, Wilson & Brown and *J. C. McNerney,* for appellants.

E. C. Strode, Jesse L. Root, M. V. Beghtol and *Field, Ricketts & Ricketts, contra.*

REESE, C. J.

This action was commenced in the district court for Lancaster county by plaintiff, a stockholder, against the Nebraska Hardware Company and the officers and other stockholders thereof, the object and purpose being the appointment of a receiver, the closing up of the business of the corporation, and the cancelation of an alleged fraudulent sale by the corporation to Leon Baker and the Baker Hardware Company. The pleadings and record are very voluminous, and it seems necessary that the issues be stated in some detail. It is alleged in the petition that plaintiff is the owner of 90 shares of the capital stock of the Nebraska Hardware Company, of the par value of $9,000; that the defendant Leon Baker is the owner of stock of said company to the extent of $16,000 par value, and was a member of the board of directors and the treasurer of said company. It is alleged, in substance, that the officers and members of the Nebraska Hardware Company entered into a conspiracy to depress the value of the stock of the company owned by plaintiff, and, in pursuance of their plans and purposes, caused to be entered upon the records an alleged increase of compensation of the stockholders, except plaintiff, of 6 per cent. of the amount held by each, the same to be paid by the

issuance of the stock of said company under the guise of increasing the compensation of employees, when in fact many of the persons whose holdings were thus increased were not employees at all, and that, in pursuance of the conspiracy, the officers and stockholders had pretended to exchange $20,000 worth of the goods and wares in the stock of hardware to the said Baker for his $16,000 of stock, but which sale was illegal, fraudulent and void; that, in order to force plaintiff to surrender his stock in the corporation, they had unjustly and wrongfully conspired together to cause the son of plaintiff to be charged with the crime of embezzlement and incarcerated in jail, and demanded the surrender of plaintiff's stock in order to secure the release of the son. Other charges are made against defendants, including gross mismanagement of the business, and withdrawal of funds thereof by defendants, but which it may not be necessary to set out here at length. Enough is alleged which, if proved, would require the closing and winding up of the business of the company and the cancelation of the sale to Baker and the Baker Hardware Company.

The defendant James Fawthrop answered, and by cross-petition joined with plaintiff in seeking the relief asked, and setting up at length the wrongs, misstatements and mismanagement of the other defendants in the control of the business of the corporation, as well as the wrongful appropriation of the funds thereof to their own use. An answer and cross-petition was also filed by defendant Salisbury, containing substantially the same averments and prayer for relief as that of Fawthrop. Answers were filed by the remaining defendants, in which the corporate character of the Nebraska Hardware Company is admitted, as well as the relations which the defendants Jakway, James Fawthrop, Crosby and Leach as the board of directors sustain to said company. The averments of the petition as to the fraudulent acts of the members of the board or the stockholders are denied, as well as the averments charging the fraudulent issue of stock. All acts of mal-

versation on their part are specifically denied. It is alleged that the resolution directing the issue of stock to employees and stockholders, referred to in the petition as having been adopted January 30, 1909, was rescinded soon after its adoption, and that no certificates of stock were ever issued thereunder, and that no increase of salary or compensation to employees was made. The sale of a portion of the stock of goods on hand to the defendant Baker and the surrender of his shares of stock are admitted, but it is alleged that the sale was made in good faith, for adequate consideration, to meet a financial emergency in order to protect the credit of the hardware company, and was fully justified by the conditions then existing. The Baker Hardware Company (the successor to Leon Baker) answered, admitting the corporate character of the Nebraska Hardware Company, and alleging that Leon Baker was the owner of $16,000 par value of the stock of said company prior to the trade and purchase hereinafter referred to; that the Nebraska Hardware Company was engaged in both the wholesale and retail trade in hardware in Lincoln, and that said company desired to abandon the retail trade, giving its exclusive attention to the wholesale business; that Baker made a written proposal to the Nebraska Hardware Company to surrender his $16,000 of capital stock for $20,000 worth of the retail portion of the stock on hand at the selling price of said company; that the proposition was fully considered by the directors and stockholders of the said Nebraska Hardware Company, and accepted; that thereafter he organized the Baker Hardware Company, and on the 23d day of March, 1909, the said retail stock of goods was invoiced and the possession thereof transferred to him, and he had since said time engaged in buying to and selling from said stock and conducting a retail business. It is alleged that the stockholders of the Nebraska Hardware Company are estopped to question the validity of said transaction. The averments of the petition and cross-petitions are denied. Replies were filed to the answers

and cross-petitions. It is not deemed necessary to notice the pleadings further.

A trial was had, which resulted in findings and decrees which will be noticed in the order in which they occur, and upon each branch of which we devote such attention as the case may seem to demand, without extending this opinion to greater length than may be necessary. The findings are generally in favor of plaintiff and the cross-petitioners Fawthrop and Salisbury, as against the defendants, except the Baker Hardware Company. The finding is in favor of that company, and the sale to and purchase by it of the retail portion of the stock of goods is confirmed. The decision of the district court upon this part of the case furnishes the principal contention on this appeal by plaintiff and cross-petitioners.

At and prior to the time of the exchange of the capital stock for the goods, Leon Baker was a member of the board of directors and the treasurer of the Nebraska Hardware Company. To say the least, his relation to that corporation and its stockholders would demand the utmost good faith in dealing with the property of the company. The original transaction, it is said, grew out of a desire on the part of the management to discontinue the retail trade and devote the whole of the funds and energies of the company to the wholesale business. With this in view, notices were published in the newspapers announcing the desire to sell, and that the property was for sale. No buyers were produced, and on the 15th day of March, 1909, Leon Baker submitted the following proposition to the board of directors, and of which he was then one: "Nebraska Hardware Company, Wholesale Hardware, Corner 9th and O streets. Lincoln, Nebr., Mch. 15, '09. To the Directors of the Neb. Hdw. Co. Gentlemen: As you desire to sell the retail business dept. of the Neb. Hdw. Co., I hereby submit to you the following offer: Will give you sixteen thousand dollars ($16,000) worth of the Neb. Hdw. capital stock for twenty thousand dollars worth of mdse. and fixtures, invoiced at your regular wholesale

prices, and take a lease for term of years on the south storeroom at 100 per month, including the basement running from a point on east side of elevator, toward front, including all areaway under front walk, and middle room in south basement. I will further agree to exchange, from my stock to your at all times as far as possible to do in fairness to each other and on an equitable basis, further that business may not be disturbed to great an extent, will suggest that we invoice the mdse. as it now stands, but changing such items as may hereafter be found to more properly belong to either wholesale or retail stock to such stock. Respt. yours, Leon Baker." A meeting of the board was held on that day, and it is recorded that "a proposition as per attached (memo) was made by Mr. Leon Baker to purchase the retail department. A motion was made by Allen Crosby, and seconded by A. H. Holcomb, to accept the proposition. The motion was carried by all the votes." Signed by the secretary, to which is annexed the corporate seal of the Nebraska Hardware Company. This record does not show whether a full quorum of the board was present or not. There is a paper attached to the record, but not identified as an exhibit, showing that on April 27, 1909, "a special meeting of the stockholders of the Nebraska Hdw. Co. was held, at their office, to consider the sale of the retail department to the Baker Hdw. Co." We are unable to find any reference to notice given the stockholders of this meeting. A list of stockholders present is given, showing the amount of stock held or represented by each. The total number of shares represented appears to be 546, constituting $54,600 par value of the stock. The capitalization of the corporation is $87,000, leaving $32,400 of the par value, or 324 shares, unrepresented. Plaintiff was represented by his attorney, as proxy, and voted his 90 shares against the sale. Defendant Salisbury voted for it. This gave a vote of 456 shares, or 20 more than a majority of all the stock, in favor of the sale, and 90 shares against it. The 160 shares held by Baker prior to that time were not represented nor

voted. Deducting this from the 870 original shares would leave the capital stock at 710 shares, or 164 shares unrepresented. Aside from the proceedings of the board of directors, it is hard to say, under the evidence submitted, what the legal effect of that meeting would be. The consideration paid might be a subject properly to be investigated. There is a conflict as to the value of the capital stock exchanged for the property. The range of testimony is from 90 to 100 per cent. of the par value. The price paid for the goods was fixed at the "selling price" of the company, which was 20 to 25 per cent. above the wholesale price, or that much above what new goods could have been bought for if purchased from the wholesale trade. Making this allowance, it does not appear that the difference in values was so great as to conclusively suggest fraud or bad faith. A subsequent transaction presents a more serious question. It appears that after the completion of this purchase, and after Baker had severed his relation to the Nebraska Hardware Company, that company was in need of the sum of $5,000 to meet a past-due promissory note in a local bank, and that suit had been brought on the note and judgment was about to be rendered against the company. At that time Baker, or the Baker Hardware Company, offered to provide the $5,000 to pay the note, taking $10,000 worth of goods from the retail department in exchange therefor at the same price as paid for the goods on the previous purchase, and this offer was accepted. This would probably mean goods at the wholesale price of $7,500, or thereabouts. But, as in the former instance, many of the goods so purchased were somewhat out of date, shelf-worn, having been in stock a long time, and not marketable to the same extent as would have been the case had they been new. This might excuse the sacrifice, if one were made. While there are many things connected with these two transactions which can scarcely be commended, yet, since the majority of the stockholders approved both, and the corporation itself made and is satisfied with the sales, we hesitate at this late day, after

the transactions, to reverse the decree of the district court and invalidate the sales. We fully recognize the rule stated in *Miller v. Brown*, 1 Neb. (Unof.) 754, and *McLeod v. Lincoln Medical College*, 69 Neb. 555, but it is doubted if those cases can be applied here. We think the decree of the district court, in so far as it is to be applied to the transactions with Baker and the Baker Hardware Company, should be affirmed. It is from this part of the decree that plaintiff and cross-petitioners appeal.

The court found, as the evidence clearly shows, that defendant Jakway was insolvent and was indebted to the Nebraska Hardware Company for funds withdrawn therefrom. He was the vice-president of the company, and, owing to the decease of the president, was and had been its active manager. But the finding does not disclose the exact extent of his indebtedness. It is also found that defendant Crosby was indebted to the company, but there is no finding as to the amount nor as to his insolvency; that plaintiff and cross-petitioners are entitled to an injunction against those two, restraining them from increasing their indebtedness; that plaintiff and the cross-petitioners are entitled to a bond with good and sufficient surety indemnifying them against the unlawful acts theretofore done or that may thereafter be done by the defendants Jakway, Crosby and John Therkelson, the latter having been at a later date entrusted to some extent with the management of the business affairs of the Nebraska Hardware Company; that plaintiff and cross-petitioners were entitled to have a receiver for the company appointed, unless the defendant Jakway and Crosby repay into the funds of the company the amounts owing by them, and the bond given within 40 days from the rendition of the decree; that, upon failure so to do, a receiver would be appointed upon motion of plaintiff and cross-petitioners, with power to close up the business of the company. A general injunction was allowed as against William E. Jakway, Allen Crosby, George D. Leach, John Therkelson, J. H. Bracken and A. H. Holcomb, enjoining

them perpetually from becoming further indebted to the Nebraska Hardware Company or in any manner appropriating its funds to their individual use. This decree was rendered December 24, 1909. We have no information as to a compliance with the order of the court for the repayment of the funds unlawfully withdrawn, nor as to the management of the affairs of the business of the company since that time.

We have been impressed by a perusal of this record that the business of the company has been recklessly handled by those in charge, and cannot avoid the conclusion that the district court was fully justified in seeking to promote the honest administration of its affairs. We are also persuaded that much of the mismanagement has been, to some extent at least, for the purpose of depressing the value of plaintiff's investment in the stock of the company, causing him to either surrender it or sell it at a sacrifice. He, at one time, was active in the management of the business of the company. He removed to another state, his son being left in the employment of the company. Later the son joined his father. Subsequently to that time another employee was suspected of purloining the goods and money of the company. It is said that the alleged guilty party made a confession in writing in which he implicated plaintiff's son, but the written statement is not to be found in this record. On August 19, 1908, a telegram was sent to plaintiff requiring his immediate presence in Lincoln. This was followed the same day by a letter explaining that the son was charged with a participation in the embezzlement. The father left his home at once, and before the receipt of the letter which fell into the hands of the son. The son thereupon telegraphed his father at Lincoln that he was coming, and did so. Soon after his arrival in Lincoln he was arrested without a warrant and placed in jail, notwithstanding his voluntary return and assertion of innocence. He was held in the jail for a short time, but long enough for the proposition to be made to the father that the matter could be settled with-

out publicity by a surrender of his stock. This he did not agree to, and the son was released. It is claimed that the officers of the company did not direct the arrest, and upon that plea they were exonerated by a direction of the court to the jury in a civil action tried in the federal court, while the verdict went against the irresponsible officer who made the illegal arrest. If people could know their rights and resist such outrages in proper cases, such actions might not be so frequent.

On the 30th day of January, 1909, a meeting of the board of directors was held, when a motion was made by W. E. Jakway and adopted by the board "to allow the following emplies (employees) as salary and additional salary" the sums stated in the resolution, "to be paid to them during the year 1909." The list comprised every stockholder, except plaintiff, whose name was omitted. The amount thus voted totaled $4,572, and of which Jakway and his wife were to receive $1,536, Baker $960, Crosby $576, and others in smaller amounts; each allowance being equal to 6 per cent. upon the stock held. Many of the persons voted this bounty were not employees of the company. It is true that it is said that this resolution was subsequently rescinded and none of the money was paid, yet the fact of such action is at least suggestive of a dishonest purpose and discrimination in its inception. At another time, the company being indebted to Jakway, he applied to the person in charge of the records and books for the issuance of a certificate of stock, dating it back one year in order that he might receive a dividend thereon, but which was refused and not issued. These and other facts which might be mentioned clearly justified the district court in requiring unquestioned indemnity against further acts of the kind sought to be guarded against. Indeed, it is doubtful if the interests of plaintiff will be thus effectually protected.

From the length of time intervening since the trial, with no record before us of any subsequent move made by plaintiff, we are led to believe that the money wrong-

fully withdrawn has been returned to its proper fund and security given as required by the decree of the district court. Should such not be the case, or should it be shown that further mismanagement has occurred, that court should at once appoint a receiver to take charge of the business and honestly administer its affairs in the equal interest of all the stockholders.

It is shown that the indebtedness of Jakway to the company is in the neighborhood of $2,000 to $2,600, and that of Crosby is some $600. However, these amounts are not exact. This action on the part of plaintiff secures the payment to the company of the amounts due, and security for correct management of the company's affairs in the future, or, in case of failure of either, the appointment of a receiver. The result of the suit inures to the benefit of the stockholders generally, as well as promoting the best interests of the corporation. That there was a necessity for such an action is quite apparent from this record. An application was made to the district court for the allowance to plaintiff of his expenses in the way of counsel fees, but it was refused, and the same is renewed here. We are persuaded that, under the peculiar circumstances as shown by the whole record, an allowance ought to have been made. It is therefore ordered that the sum of $400 be allowed plaintiff for his said expenses, and that the same be taxed as costs, together with costs of this court, against the defendant the Nebraska Hardware Company. *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834.

Subject to the conditions named, the decree of the district court is affirmed, but the cause is remanded to that court for the entry of such supplemental orders as may be necessary to carry into effect the terms of this opinion.

AFFIRMED.

SUSAN CASE V. EDITH L. HAGGARTY ET AL., IMPLEADED WITH ZETTA PECHOTA ET AL., APPELLEES; SHIRLEY E. DAVIS, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,761.

Wills: CONSTRUCTION: MORTGAGE OF LAND DEVISED: VALIDITY. A will devised the use of certain real estate to the widow of the testator during her life, and provided that at her death the land should descend to his three children, naming them, share and share alike, but that, should either of said children die before the death of the widow, the portion that would have gone to such deceased child should descend to her children, share and share alike. Upon the death of the testator the will was admitted to probate. One of the children executed a mortgage on her undivided interest in said property, and thereafter died during the lifetime of the widow, leaving surviving children. *Held*, That as against the heirs of the mortgagor the mortgage created no lien upon the undivided one-third of said land, and was not subject to foreclosure.

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

J. H. Grimm & Son, for appellant.

Bartos & Bartos, contra.

REESE, C. J.

This is an action in partition. The owners of the legal title appear to have all been made parties, as well as certain mortgagees. There are two mortgagees, one holding a mortgage on the whole of the land, executed by the ancestor in his lifetime, and over which there is no contention; the other, executed to defendant Shirley E. Davis by one of the three heirs in her lifetime upon the undivided one-third of the land. She died before coming into possession of the estate, and the validity of the mortgage is contested by her children and heirs. The owner of this mortgage answered setting up his mortgage. A referee was appointed to partition the land. He reported that partition could not be made without loss, when the court

directed him to sell the property, which he did, and reported accordingly. The sale was confirmed, and the court found due defendant Davis the sum of $522.75, declared it a lien on the one-third interest of Rose Kline, deceased, the mortgagor, and ordered so much of the proceeds of the sale of the one-third interest paid to the mortgagee. The defendants Zetta Pechota and Burton H. Kline, the children and heirs of Rose Kline, applied for a modification of that part of the decree which provided for the payment of the Davis mortgage, insisting that it was not a lien upon their one-third interest. They set up a will which had been executed by their grandfather, Henry F. Hill, the father of their mother, Rose Kline, and, upon construing the provisions of the will, the court held that the mortgagor, Rose Kline, having died during the lifetime of the widow, her mortgage created no lien as against her heirs. The decree was modified accordingly. Davis appeals.

Divesting the case of all technical questions as to the procedure, the case must turn upon a construction of the will of Henry F. Hill, the father of the mortgagor, and the grandfather of her two children, who are resisting the foreclosure of the mortgage. There is no question presented as to the *bona fides* of the mortgage, or any claim that it was not given to secure a just debt. The provisions of the will must be considered. The second, third and fourth clauses, or paragraphs, are as follows:

"2nd. I give and bequeath to my beloved wife Hannah C. Hill, in lieu of homestead and dower, the use during her natural life, of the southwest quarter of section 17, of town(ship) 6 north, of range 4 east, Saline county, Nebraska, provided that she shall keep the taxes paid thereon and the interest on the incumbrance that may be thereon at my death. The intention being that this bequest shall release all my other real estate of which I may die seized or possessed of all claims of dower or other interest by my said wife, and that at her death said property shall descend to my heirs share and share alike, that

is to say, to my now living children, viz., Susan Case, Beatrice Davidson and Rose Kline shall each be entitled to a one-third interest in said property, but should either of my said daughters die before my said wife then the portion that would have gone to her shall descend to her children share and share alike and should either of my said daughters die without issue then it is my desire that the portion that would have gone to her shall go to the surviving sisters, or their heirs.

"3rd. I direct that my three daughters above named shall have the east half of the northwest quarter of section 20, in township 6 north, of range 4 east, Saline county, Nebraska, that is to say, the mortgage if any that may be on said premises at my death, shall be first paid from the proceeds of the sale of said premises and the remainder from the sale of said premises shall be divided among my said daughters, share and share alike.

"4th. It is my desire that all the rest and residue of my estate of whatever kind or nature, shall be divided equally among my said daughters or their heirs. It being my intention to bestow upon them equally all of my estate whatsoever, real or personal, as soon as practicable after my death, except the use of said southwest quarter of section 17, of town(ship) 6, range 4 east, Saline county, Nebraska, which my beloved wife Hannah C. Hill shall have during her natural life in lieu of homestead, dower or other interest or claim in my said estate as aforesaid."

The will was executed on the 6th day of October, 1899, and the testator died on the 12th day of March, 1902. The will was admitted to probate. The mortgage was executed by Rose Kline and her husband on the 6th day of October, 1906, and she died on the 18th day of October, 1908, leaving no will. Hannah C. Hill, the widow of Henry F. Hill, died intestate on the 2d day of January, 1909. It is insisted that, since Hannah C. Hill outlived the daughter and mortgagor, Rose Kline, she, the said Rose Kline, had no such interest in the devised premises as to enable her to create a lien on her undivided interest

as against her heirs, and therefore the mortgage is void as to them; while, upon the other hand, it is contended that she held the fee title subject to the "use" during the lifetime of the mother. If the former, the mortgage created no lien. If the latter, it did, and is subject to foreclosure.

It will be observed that by the second paragraph of the will the use of the property is devised to the surviving widow during her life, upon certain conditions. This conferred a life estate upon the widow, but subject to the conditions named in the proviso. Did it confer more? It is one of the canons of construction that in construing a will the court must resort to the whole thereof and from all its provisions seek to ascertain the intention of the testator and give it effect. In so far as the rights of the widow were concerned, we find no provision which can be construed as vesting the title to the property in her, except to the extent of giving her the use of the land during her life, which implies a life estate. It is provided that at her death the property in dispute shall "descend" to the heirs named, Rose Kline being one, share and share alike. The meaning of the word "descend" does not always refer to the vesting of title. It may refer to the enjoyment of the estate. "The word 'descend,' in a will devising testator's property to certain persons, but, if he left no child or children, then directing that the property was to descend to others, was construed to have been used in the sense of the words 'go to.'" 3 Words and Phrases, 2012-2014, and cases there cited. In the sense in which the word is used in the will, this is perhaps the definition to be here applied. Paraphrasing the language of the will to this extent, it reads that at the death of the wife the land "shall go to my heirs share and share alike, that is to say, to my now living children, viz., Susan Case, Beatrice Davidson and Rose Kline shall each be entitled to a one-third interest in said property, but should either of my said daughters die before my said wife, then the portion that would have gone to her shall go to her children share

and share alike and should either of my said daughters die without issue then it is my desire that the portion that would have gone to her shall go to the surviving sisters, or their heirs." By the language used, it seems clear that it was the intention of the testator that the fee title should vest in the three living children, only upon the condition that they should outlive their mother, and, in case of their not doing so, the title should go to their children by force of the will; that whatever interest the daughter would have should terminate at her death, if that event occurred before the death of the widow, and upon such death the interest she would have had should go to her children. If this is the proper construction, not only the interest of Rose Kline but that of her mortgagee was terminated by her decease.

The decree of the district court is

AFFIRMED.

RED WILLOW COUNTY, APPELLEE, V. HANS I. PETERSON ET AL., APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 16,772.

Sheriffs: MILEAGE FEES: CONSTRUCTION OF STATUTE. By the provisions of section 5, ch. 28, Comp. St. 1911, a sheriff is not required to report and pay over to the county treasurer mileage fees; they being expressly excepted in the section.

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Reversed and dismissed.*

W. S. Morlan and *C. E. Eldred,* for appellants.

Charles D. Ritchie, Perry, Lambe & Butler and *Ritchie & Wolff, contra.*

REESE, C. J.

This is an action by plaintiff, the county of Red Willow, against defendant, Hans I. Peterson, a former sheriff of

said county, upon his official bond, for the amount of certain mileage fees which, it is alleged, he earned and collected while in office, but failed to report and pay into the county treasury. A general demurrer to the petition was filed by defendant, which was overruled. Defendant declined to answer further, and stood upon his demurrer, when a judgment was entered against him for the amount claimed. He appeals to this court.

The petition alleges the failure of defendant Peterson to report and pay over the mileage fees for each quarter during the two years he held office. The effect of the demurrer is an admission that he so failed, and that the amounts alleged to have been collected are correctly stated. The only question is as to whether it was his duty to so report and pay over the fees named. At the time he took upon himself the duties of his office, the statute was, and still is, that on the first Tuesday in January, April, July and October of each year the sheriff shall "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." Comp. St. 1911, ch. 28, sec. 5. The case turns upon the meaning of the words "except mileage," and the intention of the legislature in incorporating them into the section. The legislative journals show that the amended act was passed in 1907. The bill was introduced without the quoted words, and was referred to the proper committees. (Senate File 319.) It was considered in the committee of the whole March 22, 1907, and the committee reported it back recommending a number of amendments, one of which was, "after the word 'fees' insert the words 'except mileage.'" (Senate Journal, p. 1003.) The report of the committee was adopted (Senate Journal, p. 1007), and the bill, as thus amended, was passed by both houses and

was signed by the governor. This is all the light given upon the subject, in so far as this language is concerned. It is argued with considerable force and skill that other provisions of the law requiring all fees to be paid into the county treasury, as well as the fact that the salary of the sheriff is fixed by statute, do not indicate that the mileage fees are to be excluded. The intention of the legislature, in the absence of ambiguous terms, is to be drawn from the language used. It is very clear that it was the purpose to exclude mileage from the report, or it would not have been excepted. The record shows that the exception was incorporated by the deliberate act of the law-making power. It is a well-established rule of construction that all words used in a statute should be given some meaning, if it can be done. The words "except mileage" are not meaningless, and but one intention can be attributed to their use, and that is, that mileage fees are not to be reported. If not, they are not to be accounted for.

It follows that the judgment of the district court must be reversed, and the cause dismissed, which is done.

REVERSED AND DISMISSED.

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

IN RE ESTATE OF WHITFIELD SANFORD.

CHARLES W. SANFORD ET AL., EXECUTORS, APPELLANTS, V. SAUNDERS COUNTY, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 16,458.

1. **Taxation: INHERITANCE TAX: DOWER INTEREST.** The dower interest of the widow in the estate of her deceased husband, whether taken under his will or by operation of law, is not subject to an inheritance tax.

2. **Opinion Modified.** Former opinion in this case, 90 Neb. 410, modified.

OPINION on motion for rehearing of case reported in 90 Neb. 410. *Former opinion modified, and judgment of district court reversed.*

BARNES, J.

It was contended on the argument of the motion for a rehearing that the recently adjudicated cases hold that, notwithstanding the fact that the widow of one who dies testate takes under the will and thus relinquishes dower, the value of her dower interest in the lands of which her husband died seized is not chargeable with an inheritance tax; in other words, the value of her dower interest should be deducted from the appraised value of the estate, and the inheritance tax should be computed on the remainder thereof. It would seem, from a review of the cases decided since our opinion was adopted, that such is the weight of authority. The reason for the rule seems to be that the widow takes her dower interest in the estate of her deceased husband by operation of law; that she could not be deprived of it by his will; that it is something which belongs to her absolutely and independent of any right of inheritance or succession, and therefore so much of the estate as belonged to her by right is not chargeable with an inheritance tax. We are not inclined to place ourselves in opposition to the weight of authority on this question, and to this extent our former judgment is modified.

It is next contended that we should further modify our former judgment by holding that the claim of Charles W. Sanford for $35,524.95 against his father's estate should also be deducted from the appraisement before the inheritance tax is computed. We see no reason to change our former opinion on this question. While the demurrer of the county admits the facts which are well pleaded by the petition, it must be observed that the petition is insufficient in that it fails to set forth any enforceable contract or agreement between Charles W. Sanford and his father which would sustain a judgment against the estate,

and it appears that, after the succession of the estate, the beneficiaries under the will, who were also the sole executors thereof, agreed between themselves upon the so-called satisfaction of this claim. Such an agreement should not have the effect of avoiding the payment of a substantial part of the inheritance tax.

Finally, as to the matter of interest, we are of opinion that interest should be charged on the amount of the tax found after deducting the dower interest of the widow from the appraised value of the estate, and the payment already made upon the inheritance tax, and interest should be computed on the balance from the date of the death of the decedent.

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

REVERSED.

REESE, C. J., not sitting.

FAWCETT, J., dissents from so much of the foregoing opinion as refers to the claim of Charles W. Sanford, for the reasons assigned in his dissenting opinion upon the former hearing, reported in 90 Neb. 410, 417.

HAMER, J., concurs in the dissent of FAWCETT, J.

LETTON, J., dissenting.

I am unable to concur in the view that, where a widow renounces her dower right and takes under a will, the devise or bequest is not liable to the inheritance tax. It is my view that, if the widow had taken her dower right, it would not be liable to the tax, since dower is not transferred by will, and is not the subject of inheritance. It, therefore, does not come within the provisions of the statute. But, in this case, as was held in the former opinion, since the widow rejected the dower and took the provisions made for her in the will, the bequest or devise is taxable.

since the title was transferred from the testator by means of the will, and not by operation of law.

The statute says "All property * * * which shall pass by will" shall be subject to the tax, and it contains no provision for offsetting the value of dower against the value of a legacy or devise. For the court to read such a proviso into the law would, in my opinion, be judicial legislation of the baldest sort. Ross, Inheritance Tax, sec. 56.

I adhere to the views expressed in the former opinion.

ROSE, J. I adhere to former opinion.

EBENEZER D. HARRIS, JR., ET AL., APPELLEES, V. LINCOLN & NORTHWESTERN RAILWAY COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 16,646.

1. **Eminent Domain**: RAILROADS: DAMAGES. The measure of damages for permanent injury to land occasioned by the necessary and proper construction of a railroad, no part of the land having been taken, is the difference in the market value of the property immediately before and immediately after the construction of the improvement, unaffected by any increase or depreciation of values generally in the same vicinity.

2. **Appeal**: ADMISSION OF EVIDENCE. In such case, the reception of evidence of the fair and reasonable value of the land immediately before and immediately after the overflow is reversible error.

3. **Waters**: FLOODING LAND: ACTION FOR DAMAGES: BURDEN OF PROOF. In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of a railroad nearby and adjacent thereto, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby.

4. **Evidence** examined, and found insufficient to sustain the verdict.

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

James E. Kelby, Halleck F. Rose and *Byron Clark*, for appellants.

A. G. Wolfenbarger and *George W. Berge, contra.*

BARNES, J.

Action for damages alleged to have been sustained by plaintiffs, by reason of the construction of that part of defendants' railroad near the city of Lincoln, known as the "Denton cut-off," which, it is alleged, caused the waters of Middle creek to flow over, across and upon the plaintiffs' land, destroying the crops growing thereon, and permanently injuring the land itself.

It was alleged in the plaintiffs' petition that the defendants in constructing their line of railroad established and made dikes and dams, and negligently, carelessly and recklessly filled and dammed up the natural watercourse and channel of Middle creek, entirely changing the natural bed and channel of that stream, causing its waters to be turned aside from the bed channel and natural course in which they had run from time immemorial, and carelessly, recklessly and unnecessarily cut and caused to be constructed a new and entirely different outlet and channel to carry the waters of the stream, beginning with the point of diversion at about one-half a mile above and northwest of the land owned and farmed by plaintiffs, thereby causing their land to be subject to overflow. It was further alleged in the petition that "before the building, establishing and construction of the grades, embankments, trackage, dikes and dams, and the diversion of the waters of said stream, the said land of the plaintiffs was worth, at a fair and reasonable valuation, the sum of $200 per acre; but on account of said negligent, careless, reckless and unnecessary acts and doings of the said defend-

ants, the said land is now rendered subject to continued and permanent danger of overflow, and the salable, reasonable and true market value of the same has been reduced more than $100 per acre, and said injury and damage to said land is permanent; that plaintiffs suffered damage in the premises by reason of said injury to and depreciation of the value of said land in the sum of $6,000, and all on account of the negligence, carelessness and unnecessary acts and doings of said defendants;" that on or about the 10th day of June, 1907, the watershed drained by Middle creek, including the vicinity where plaintiffs' land is situated, was visited by a heavy rain, and the volume of water coming down the stream was obstructed, caused to back up, and could not find its natural and proper outlet, and, because of the dams, high grades, embankments and other obstructions, Middle creek was caused to overflow and flood the land and farm of the plaintiffs, washing and tearing out their crops, and covering the land with loose earth, soil, washings, silt, sand, gravel, wreckage and debris, destroying their growing crops, to their damage in the sum of $4,000, and permanently injuring and damaging the land itself in the further sum of $5,100, for all of which they prayed judgment.

Defendants by their answer denied the allegations of the petition, both generally and specifically, and alleged that the natural bed and channel of Middle creek passes through plaintiffs' land, and then was, and now is, unobstructed; that the lands comprising the entire valley of the said stream, from its source to its mouth, including the land described in plaintiffs' petition, have from wholly natural causes, from time immemorial, and long anterior to any railroad or other improvements therein, been subject to overflow; that any overflow of water thereon at the time stated in the petition was due wholly to natural causes and to excessive and extraordinary rainfalls in the area of the land drained by that stream beyond any that had been previously known therein, and which so swelled the stream that it overflowed its banks, and the overflow was

caused by the act of God; that the defendants and neither of them were responsible or answerable therefor. It was also alleged that the petition stated two causes of action which were improperly joined, and the defendants prayed that the plaintiffs be required, before trial, to elect upon which of said causes they would rely. The reply was a general denial. The court refused to require the plaintiffs to elect. The cause was tried to a jury, the trial resulted in a verdict for the plaintiffs for $1,200, permanent injury to their land, exclusive of the damages sustained to their growing crops, and damages to crops to the amount of $1,839. A motion for a new trial was overruled; judgment was rendered on the verdict for the sum of $3,039, and the defendants have brought the case here by appeal.

One of the grounds assigned for a reversal is that the evidence is insufficient to sustain the judgment. It must be conceded that the burden of proof was on the plaintiffs to show by a preponderance of the evidence that the new construction, of which they complain, either caused the flood of June 10, 1907, to overflow their premises, or in some manner increased the natural overflow, together with the extent of such increase and the amount of their damages caused thereby.

It was disclosed by the plaintiffs' evidence that they were not the fee-title owners of the land described in their petition, but were in possession and were occupying it as lessees from the state, which was the owner of the fee; that they were paying therefor a rental of $19.60 a year, payable semi-annually; that they procured their leasehold interest in the month of September, 1906, and took possession of the land some time thereafter; that by the spring of 1907 they had completed their improvements in the way of a dwelling-house, stables and outhouses, which were located upon or near the southeast corner of the forty-acre tract, at a place which was above the flood-waters; that when they took possession of the land it was an ordinary pasture, situated in the lowest part of the valley of Middle creek, with that stream running through

it in a winding course, cutting it into three parts; that they broke a part of the land, harrowed it, disced it, and planted it to different kinds of marketable garden vegetables; that their crop was in fair condition when the flood in question occurred. It appears that on the 10th day of June there was an unusually heavy and excessive rainfall over all of the watershed drained by Middle creek, which caused the stream to overflow its banks. The overflow commenced about 8 o'clock in the morning, reached its highest point about noon, or shortly thereafter, and receded so that the creek was again within its banks by 4 or 5 o'clock in the afternoon; that the flood-waters swept over plaintiffs' land in the general direction of the course of the stream, and washed out and partially destroyed their crops.

The record shows that when the flood was at its highest point all of the plaintiffs' land, except about 11 acres, was covered by water. The ground where plaintiffs' permanent improvements were situated was not flooded and the remainder of the land which was not covered by water was situated on the north side of Middle creek, between that stream and the new construction. The evidence discloses that a change was made in the channel of Middle creek at a point about half a mile north and west of the plaintiffs' premises, which, it was alleged, caused the stream to flow in a southeasterly direction, whereas it formerly flowed to the north and east, and thereby forced the flood-waters onto plaintiffs' land, and caused the overflow in question.

It appears, without dispute, that when the new line was constructed it crossed a bend or loop in the stream on the north side of the valley, and, in order to save building two bridges, a channel was cut on the south side of the new construction, and the bend or the old channel was filled up. The new channel was 600 feet long, and had sufficient carrying capacity to accommodate any ordinary flow of the stream. Before the cut-off was made the stream ran to the north from the point of diversion,

made a short turn, ran back to the south, and continued its course down the valley and through the plaintiffs' premises precisely the same as since the new construction. The cut-off merely shortened the stream at that point some 600 feet, and its only effect was to slightly accelerate its flow. It is claimed, however, that before this cut-off was made the flood-waters of Middle creek at that point overflowed its bank, were diverted to the north and northeast, and thus relieved the valley of a portion of the overflow; that by the new construction and the new channel the flood-waters of the creek were turned to the south and thrown upon the plaintiffs' premises. As we view the record, that contention was not sustained by the evidence. Engineer Scott, who was a witness for the plaintiffs, testified; and the topographical map made by him, which is found in the bill of exceptions, clearly shows that at the north and east bank of the creek, where it turned south, and where it is claimed relief would have been had from the flood-waters but for the new construction, the elevation is 85.3, while at the highest point on plaintiffs' land, north of the creek, the elevation is only 83.4. So, it clearly appears that the flood-waters could not have escaped to the north and east at the point of diversion without attaining a level which would have entirely flooded the plaintiffs' premises.

It was also shown, without dispute, that on the south side of the new construction a wide and deep borrow-pit was constructed from the east end of the new channel to Salt creek; and it appears from a topographical map showing the extent of the flood-waters in question, the correctness of which is not challenged, that, when the flood was at its highest point, water ran down this borrow-pit, and at that time there was quite a large tract of plaintiffs' land on the north side of the creek, and between it and the new construction, which was not covered by water.

It further appears that plaintiff, when asked in what direction the water of Middle creek would flow when it

got above the banks at his place, answered: "It would have a tendency to flow towards Lincoln here, from up there (indicating east). Q. Towards the east? A. Yes, sir; the overflow; the general movement of the water was eastward."

S. M. Bartlett, one of the plaintiffs' witnesses, who had lived many years in the valley, testified that before the new construction, when Middle creek got out of its banks, it spread out all over the bottoms; that it spread north, and that it would flow east; the general direction of its course was east. This witness also testified that from his experience before 1906 when the new Milford cut-off was constructed, his lands situated in the valley, and near the 40 acres belonging to the plaintiffs, overflowed entirely independent of the grades; that in the flood of 1907 there was an island north of Mr. Harris' place, between that and the new railroad grade.

Peter Judge, a witness for the plaintiffs, testified that he had often seen Middle creek overflow its banks; that it was subject to frequent overflows; that, before the high land would overflow between plaintiffs' place and the railroad, their land would be under water. Another witness for the plaintiffs testified that north of Harris' house, after you cross the creek to go towards the railroad grade, there are some high places there that would throw the water south into the creek. A. G. Harris testified that the water, after leaving Cushman Park, which is above plaintiffs' premises, would spread out over the low land to a great extent across the valley.

For the defendant, E. M. Westervelt testified that, within a few years before 1907, the old Milford line at Cushman Park, and between Cushman Park and Lincoln, was washed out by overflows, and the valley was covered with water from one side to the other. Another witness testified that, when the water reached plaintiffs' land, it had a tendency to turn and flow southward along the course of the creek.

So it seems clear that the plaintiffs' claim that the new

construction either caused or contributed to the overflow, of which they complain, is not sustained by the evidence, but rests upon assumption or conjecture. In *Treichel v. Great Northern R. Co.*, 80 Minn. 96, it was said: "Damages cannot be predicated upon conjecture or mere speculation." It would seem clear that in this case, to sustain a recovery, the plaintiffs must show the excess of the overflow, which was caused by the acts complained of, over that which would have resulted from natural causes, and the extent of the damages caused thereby, and upon this point the record contains no direct or competent evidence.

It was also alleged that the defendants had constructed a dike across the north part of the valley, at or near what is called the "Denton cut-off bridge," which prevented any of the flood-waters of the stream from passing down the valley on the north side of the new construction; but the evidence shows that this dike was not constructed until the year 1908, and could not have in any way contributed to the flood of June 10, 1907.

Another ground assigned by the defendants for a reversal of the judgment is that the court erred in receiving evidence as to the measure of the plaintiffs' damages for permanent injuries to their land. It appears that the plaintiffs, in order to maintain their action for such injuries, propounded certain questions to their witnesses, and received answers thereto, in substance, as follows: Q. What was the fair and reasonable value of the plaintiffs' 40-acre tract of land on June 10, 1907, just before the flood of that date? A. $200 an acre. Q. What was the fair and reasonable value of that land immediately after the flood, which occurred on June 10, 1907? A. Not over $50 or $60 an acre. To this evidence defendants strenuously objected. Their objections were overruled, and the testimony was allowed to go to the jury.

It appears that when plaintiffs took the assignment of their lease in September, 1906, defendants had commenced and partially completed their yards and the new Milford

or Denton cut-off, of which complaint is made. Now, if it be conceded that the plaintiffs were entitled to recover for permanent damages to the land itself, as claimed by their petition, the inquiry should have been directed to the fair and reasonable market value of the land at the time when the new line of road was constructed, and its fair and reasonable market value immediately after the completion thereof. *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714; *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207; *City of Harvard v. Crouch*, 47 Neb. 133; *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137.

Plaintiffs contend, however, that because the new construction was situated about 40 rods north of their land, and no part of the land was taken, the rule announced in the foregoing cases does not apply; that they were entitled to recover damages for permanent injury to their land whenever and as often as it should be flooded by the waters of Middle creek, and that the evidence of values should be confined to that date. This contention might be sustained if it were shown that the defendants had unnecessarily and improperly constructed their railroad; that such construction caused or contributed to the overflow, and the extent of the increase thereof, if any. Upon that question, however, we are of opinion that the evidence found in the record does not furnish a sufficient basis for a recovery.

Defendants' brief contains several other assignments, but the foregoing conclusions render their determination unnecessary.

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

REVERSED.

REESE, C. J., not sitting.

SEDGWICK, J., concurs in the result reversing the judgment.

LETTON, J., concurring in part, and dissenting in part.

I agree with the conclusion that the plaintiffs are not entitled to recover for the alleged permanent injury to the land in question, upon the ground that they are not the owners of the fee and were not at the time of the overflow, and that for that reason the judgment should be reversed, at least, in part. Doubtless for prudential reasons, the cause was submitted to the jury in two separate parts; one, to find the extent of the injury to the land, and the other, to find the amount of damages suffered by the injury to and destruction of the growing crops. The jury found that the damage to the land amounted to $1,200, and to the growing crops, $1,839. The land was used for market gardening, and the various crops growing thereon were of great value, and that growing on the greater part was wholly destroyed. If the embankment constructed by defendants was negligently made and was the cause of the overflow, there can be no doubt of plaintiffs' right to recover to the extent of the injury to the growing crops, and the fact that the jury made a finding as to the extent of that damage, separate from the injury to the land, would permit the judgment to be affirmed for $1,839. This being true, the questions as to the proper construction of the embankment and as to the cause of the increased overflow became largely questions of fact to be solved by the trial jury. It is conceded that the valley of Middle creek was subject to occasional overflows, and at such times the water spread out over the valley to a greater or less depth, but at no time to the depth attained on the occasion named, and with such injurious effects as in the instance referred to in this record. There is evidence that the water was forced upon plaintiffs' possessions to such an extent as not only to destroy the growing gardens, but to remove the soil in places and deposit it in others, thereby destroying all and rendering the ground in no condition for replanting or resetting.

There is also evidence that the construction of the em-

bankment, which extended from a distance above plaintiffs' field to far below it, without any opening or other provision whereby the flood-waters could spread out over the valley as upon previous occasions, had the effect of forcing all the flood upon the one side of the valley where plaintiffs' land is located, and greatly increased the volume and destructiveness of the flow. I think this evidence was sufficient to justify the submission of these facts to the jury, and with their finding thereon we should be content.

It is my opinion that the judgment should be affirmed for the $1,839, upon condition that plaintiffs remit the $1,200 as of date of the judgment, and that the costs of the appeal be taxed to them.

GEORGE BREEDLOVE, APPELLEE, V. DOCTOR J. GATES, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,734.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISK. "If a servant, on account of his youth, lack of prudence and understanding, and because of want of proper instruction, fails properly to appreciate the risks involved in certain labor which he is commanded by the master to perform, and is injured, the master will be liable." *Ittner Brick Co. v. Killian*, 67 Neb. 589.

2. ———: ———: ———: QUESTION FOR JURY. There is no presumption that a child of nine years has as much prudence and understanding as an adult, and, where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment.

3. ———: ———: CONTRIBUTORY NEGLIGENCE. Where a boy nine years old undertakes dangerous work in obedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury.

4. **Trial:** INSTRUCTIONS. Record examined, and found to be without error in giving and refusing to give instructions.

5. **Appeal: VARIANCE.** An inconsiderable variance between the pleadings and the proof will not require the reversal of a judgment, unless it appears that the party complaining was thereby surprised or misled to his disadvantage.

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

Frank D. Williams and *Jefferis, Howell & Tunison,* for appellant.

C. E. Spear and *H. C. Vail, contra.*

BARNES, J.

Action to recover damages for personal injuries sustained by plaintiff while employed by defendant in driving a horse attached to a hay-stacker, while putting up hay on the defendant's farm.

It appears that in June, 1908, the plaintiff, then a boy only nine years old, was employed by the defendant to drive a team attached to a stacking machine in use upon the defendant's farm. The father of the boy was also working for the defendant as a sort of foreman in charge of the work. Some time before the 9th day of July of that year the defendant substituted a single horse for the team which was first used on operating the stacker, and on that day the boy, who was driving the horse, was injured by reason of the breaking of a part of the harness called a tug, which released one end of the whiffletree and allowed it to fly back and strike the plaintiff in the face, cutting his lips and chin and knocking out and destroying five or six of his front teeth. The boy was rendered unconscious for a time, his injuries were severe and painful, and to some extent were permanent. After his recovery he brought this action by his father as his next friend, and upon a trial in the district court for Boone county recovered a judgment against the defendant for the sum of $300, from which the defendant has prosecuted this appeal.

Appellant contends that the verdict is not sustained by sufficient evidence, and therefore the court erred in refusing to instruct the jury to return a verdict in his favor. It is argued that the uncontroverted evidence shows that the plaintiff was well acquainted with the dangers incident to the work in which he was engaged, and fully appreciated the risks to which he was exposed. A careful review of the evidence satisfies us that this argument is unsound. It appears, as above stated, that the plaintiff, a boy only nine years old, was employed by the defendant to perform the work of driving a team or horse attached to a hay-stacker; that the plaintiff had had no previous experience in such work, except for a half day when he had driven a horse for a Mr. Ball. The defendant knew this fact, and he undertook to instruct the boy as to the manner in which he should perform the work. Defendant testified that he told the plaintiff how to drive; that he took the lines and showed him how the work should be done; that he afterwards noticed that the plaintiff was not doing the work properly, and he again instructed him how to drive the horses. This was when they were using the team instead of the single horse, which was in use at the time the accident occurred. The defendant also stated that he called the attention of the father of the boy to the fact that he was not driving properly, and told him if he did not do better he would get some other person to do that work; that the father made no reply. Defendant further testified that he told the plaintiff that, if the horses stopped before they reached the end of the rope, he should whip them, and gave him a stick for that purpose. It therefore seems quite apparent that the defendant knew that, notwithstanding his instructions, the plaintiff was not possessed of sufficient judgment to comprehend and carry out those instructions.

It further appears that, when they quit using the team and commenced to use the single horse, the boy's father, who was the defendant's foreman, conducting the work in hand, selected the best set of single harness furnished

by the defendant for that purpose. It also appears that the horse, after being used for a little time, formed a habit of stopping short of the full length of the rope, and it was necessary to whip him in order to correct that fault; that the boy was given a stick for that purpose, and on the occasion of his injury it is supposed that he struck the horse, in order to make him pull up to the full length of the rope and thus drop the hay squarely upon the stack; that, in so doing, the accelerated speed or plunge of the horse caused one of the tugs to break or come apart where it had been spliced, with the result that the end of the whiffletree, which was thus released, flew back and struck the plaintiff in the face, causing the injuries of which he complained.

In view of this state of facts, which seem to be established beyond dispute, we are of opinion that this case should be ruled by *Ittner Brick Co. v. Killian*, 67 Neb. 589. That was a case where the plaintiff, a bright, intelligent boy, 14 years of age, was injured while oiling a pressed-brick machine, at the command of the master. It appeared in that case, as in the case at bar, that the plaintiff had been instructed how to perform his duties, and had been warned of the danger in performing them; and yet, notwithstanding that fact, he was allowed to recover. There, the trial court instructed the jury that, "under the law, when one is known to be inexperienced, who is put to work upon a machine which is dangerous to operate unless with care and by one who is familiar with its structure, it is the duty of the employer to instruct such person so that he will fully understand and appreciate the danger of his employment and the necessity for the exercise of due care therein. Therefore, if you find from the evidence that the employment of plaintiff at the time of his injury was dangerous, and that plaintiff was known to be inexperienced, and that defendant knew the peril or should have known the peril to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the

danger, and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible." That instruction was approved, and it was held that, youth and inexperience being inherent, and not the result of carelessness or negligence, it was not error to state in an instruction for personal injuries that if plaintiff, "because of his youth and inexperience, failed to appreciate the danger," and, because of want of proper instruction, fails properly to appreciate the risks involved in certain labor which he is commanded by the master to perform, and is injured, the master will be liable.

It should be observed that, while the plaintiff in this case was instructed how to drive the team, and was told how to avoid the danger and escape injury, still it appears that the father of the boy instructed him to lead the team, and, when the team was exchanged for the single horse, to lead the horse. It appears, however, that after a time it was found that plaintiff could not induce the horse to go far enough to properly dump the hay on the stack by leading him, and then, in order to perform the work, the child was compelled to walk behind the horse and whip him when he arrived at that point. This the defendant had directed the plaintiff to do, and when he was injured he was doing the very act which he had been commanded to perform. Notwithstanding the fact that the plaintiff had been told that there was danger, it cannot be presumed that a child only nine years old was possessed of sufficient judgment and forethought to fully appreciate such danger. Without doubt, when plaintiff saw it was necessary to whip the horse, he stepped up behind him to perform that act without sufficient comprehension of the result in case of accident. The defendant must have been aware of that fact, and he should not have employed a child of the tender years of the plaintiff to perform so dangerous a service. We are therefore of opinion that this contention should not be sustained.

Defendant's next contention is that the uncontroverted

evidence shows that the plaintiff was guilty of negligence which directly contributed to the injuries received by him, and therefore the court erred in overruling defendant's motion for a directed verdict. It is argued that the plaintiff should have walked to one side, or, in other words, kept away from behind the horse when performing his duties, and, failing to do so, he was guilty of contributory negligence. This argument would be forceful and controlling but for the fact that the plaintiff was a mere child.

In *Ittner Brick Co. v. Killian, supra,* it was said that there is no presumption that a child of 14 years has as much prudence and understanding as an adult, and, where such child has been injured while engaged in a dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment. That, where the boy 14 years old undertakes a dangerous work in disobedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury. We think that rule applies with irresistible logic to the facts of this case.

It appears in the opinion in the *Ittner* case that on cross-examination the plaintiff was asked: "You knew that if you did not take it (his hand) out of the mould it would get caught? A. Yes, sir. Q. You understood that perfectly well, just as well as you knew that if you put your finger in the fire it will be burned? A. Yes, sir." In the case at bar the defendant sought to escape liability by a similar line of questions propounded to the plaintiff, and it may be granted that the plaintiff knew perfectly well that, if he stood too close to the whiffletree and anything should break or give way, he would be injured. But the question still remains, did he possess sufficient prudence, discretion and understanding to appreciate the danger? We think not, and are therefore of

opinion that the plaintiff in this case was not guilty of contributory negligence.

Errors are assigned for the giving and refusing of instructions by the trial court. To quote and comment upon each of those instructions would extend this opinion to an unreasonable length. It is sufficient to say that the jury were fairly instructed as to the issues and the law of this case. Indeed, we find some of the instructions more favorable to the defendant than they should have been, and we are satisfied that there was no error in giving and refusing instructions.

It is further contended that there is a variance between the allegations of the plaintiff's petition and the proof. As we view the record the allegations of the petition are sufficient to sustain the verdict, and we find no intimation in the record, or in the brief of counsel, that defendant was surprised or misled or in any way prejudiced by such variance, if any there was.

A careful examination of the record satisfies us that the defendant had a fair trial; that no reversible error was committed; and the judgment of the district court is therefore

AFFIRMED.

GEORGE CRITES, APPELLEE, V. CAPITAL FIRE INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,728.

1. **Insurance**: ACTION: DEFENSES: BURDEN OF PROOF. Where an insurance company relies as a defense upon false representations made in answers to questions in an application for insurance, it has the burden to plead and prove that the answers were made as written in the application.

2. ———: PAYMENT OF PREMIUMS: DEFAULT: EVIDENCE. An insurance contract provided in substance that, if default be made in payment of the note given for the premium, the insurance should cease. The note was made payable at the office of defendant company in Lincoln. Prior to its maturity it was sent to a bank

at Bloomington for collection. The maker went to the bank at its customary hour for opening on the day of maturity prepared to pay the note, and waited for nearly half an hour; no one appearing, he went to his work. The property was burned between 10 and 11 o'clock that night. *Held*, That having used due diligence in attempting to pay the note at the place selected by the insurance company, and the day not having expired when the property burned, the liability of the insurance company upon the policy continued in force.

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

George W. Berge, for appellant.

W. C. Dorsey, contra.

LETTON, J.

This is an action to recover upon a policy of insurance for the loss by fire of a threshing-machine outfit. Plaintiff recovered, and defendant appeals.

The defenses relied upon are false representations with regard to the age of the threshing machine, and failure to pay the note given for the premium when due. The policy provided that, in case "any part of the premium on this policy shall not be fully paid when due, this policy shall be void." And the premium note recited: "It is hereby agreed that the company shall not be liable for any loss or damage that may occur to the property insured while this note or any part thereof shall be overdue and unpaid." The promissory note was made payable at the office of defendant company in the city of Lincoln. It was sent for collection to the Republican Valley Bank at Bloomington, Nebraska. A few days before its maturity Mr. Crites was told by the cashier that that bank held it for collection. It is shown that the customary banking hours in Bloomington at that time of the year are from 8 o'clock in the morning until 5 o'clock in the afternoon. The evidence tends to prove that on September 1, the day of maturity, Mr. Crites went to the bank a few minutes before 8 o'clock

with the money to pay the note, and remained there waiting for the bank to open until nearly half past eight, when he was compelled to leave in order to complete a job of threshing. The machine burned between 10 and 11 o'clock that night. He paid the note the next morning. The cashier of the bank testified that he usually opened the bank at 8 o'clock, and that on account of that being the first day of the month, and of the fact that he intended to leave town that evening, his opinion is that he probably was there at 8 o'clock, but he practically admits that he has no distinct recollection of the day, and that he might have been late. Defendant waived payment at the proper place by sending the note to Bloomington before it was due. It made no demand or presentment for payment on that day, either at its office in Lincoln where the note was payable, or in person on the maker. The memorandum written at one end of the paper on which the note is printed—"Send note for collection to Republican Valley Bank, Bloomington"—cannot alter the legal effect of the instrument itself, more especially when it is not established that this was on the paper when signed. Moreover, the note not being payable at a bank, the whole day was available in which to make payment. *Hipp v. Fidelity Mutual Life Ins. Co.*, 128 Ga. 491; 7 Cyc. 842. Plaintiff used reasonable diligence in endeavoring to pay the note on the day it was due, and, the fire having occurred before the day ended and before presentment, the policy was still in force. *Blackerby v. Continental Ins. Co.*, 83 Ky. 574.

The answer pleads: "That on the 1st day of July, 1908, the plaintiff herein made a statement in writing to the defendant company, in which he represented that, the threshing machine he wished the defendant company to insure, he himself had purchased three years before said application was signed, and was, as a matter of fact, only three years old;" and further sets forth, "that as a matter of fact said threshing machine was not three years old, and that as a matter of fact said threshing machine was not new when plaintiff purchased the same, but, in truth and

in fact, the plaintiff purchased the same as a second-hand machine, and said machine at the time plaintiff signed said application and when this defendant issued said policy was more than seven years old, and the same was purchased by the plaintiff as a second-hand machine, and when it was already old and worn-out; that as a matter of fact said machine was not of the value or condition represented by the plaintiff, but as a threshing machine was old and worthless." The application contains the following questions and answers: "When did you purchase the above described property? June, 1906. Was it new when purchased by you? Yes." The agent who wrote the application did not testify. Plaintiff denies making the answers as written, and testifies that he was only asked by the agent how long he had run the machine. Moreover, there is no proof in the record that plaintiff had any knowledge that the company would not insure machines used more than a certain number of years, so the materiality of this question and answer as a representation is perhaps questionable.

It is a question of fact for the jury, and in this case, since a jury was waived, it was for the trial court, to determine whether false representations were made in order to induce the insurance company to enter into the insurance contract. We have held that the burden is on an insurance company both as to pleading and as to proof to establish that written answers made to questions in an application for insurance were made as written. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842. See, also, *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159, and cases cited. This issue was determined against the defendant by the trial court, and the evidence supports the finding. Under the failure of proof on the part of defendant on this point, the question as to whether the amendment to the reply was properly made is of no moment.

The third assignment of error is that the court erred in excluding evidence material to defendant's case. The

questions objected to were propounded to the secretary of the defendant company, and had reference to the rules of the company as to the amount of insurance upon a machine being determined by the number of years it had been used, and whether the company could have insured the machine if it had been five years old. There is no proof that the plaintiff had any knowledge as to these limitations or rules, and hence this evidence was not material or relevant.

We find no prejudicial error in the record. The evidence sustains the judgment of the trial court, which is, therefore,

AFFIRMED.

RODNEY E. DRAKE, APPELLANT, V. CHARLES G. MCDONALD, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 16,757.

Trusts: RESULTING TRUSTS: EVIDENCE: BURDEN OF PROOF. "A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence." *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

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

Duncan M. Vinsonhaler, for appellant.

Shotwell & Shotwell and *Charles G. McDonald, contra.*

LETTON, J.

This is an action to quiet title to 160 acres of land in Cherry county, Nebraska, in the plaintiff. The district court found for the defendants and dismissed the case. Plaintiff appeals.

The contentions made by the plaintiff in this court are, in substance, that the findings and decree are not sustained by the evidence, and that the court erred in admitting testimony as to declaration of ownership of the land by Drake during his lifetime. Of course, if the evidence in behalf of plaintiff failed to establish his right to the relief sought, it is unnecessary to consider the question as to the admission of evidence.

In brief, plaintiff asserts that his father, James N. Drake, appropriated money left by plaintiff's mother, Emma N. Drake, at her death in 1899, to the amount of over $500; that the father soon after bought a stock of groceries in Omaha with this money for the plaintiff; that the business and stock belonged to plaintiff; that the stock and business was afterwards exchanged for the Cherry county land, and the title wrongfully taken by James N. Drake in his own name, in place of that of plaintiff, who is the true owner. He invokes the equitable principle that he is entitled to follow the trust fund and accept it in its changed condition, if he so elects.

James N. Drake is dead. The action is against his heirs and administrator *de bonis non*. The evidence shows that James N. Drake in August, 1899, purchased from one Edwards a stock of groceries in Omaha. He carried on the business in the name of the plaintiff Rodney E. Drake, who was then a boy of about 12 or 13 years of age, for about 7 months, when he disposed of the stock and business to one Joice for $650 in money and 160 acres of Cherry county land. James N. Drake died in February, 1909, leaving surviving him Emma N. Drake, his widow. Drake had been married twice previously. By his first wife he had two children, Rodney E. Drake and Charles Louis Drake. The whereabouts of the latter does not seem to be known, or whether he is yet living.

The testimony as to the fact of Mrs. Drake's possession of money consists of direct testimony by the plaintiff to that effect and testimony as to declarations by James N. Drake. Plaintiff testifies that a few years before his

mother's death she showed him over $500 in money; that this money was kept in the drawer of a commode and in an ordinary pillow. He afterwards said the money was left in the house at the time of his mother's death; but gave as his reason for saying so that it had been shown to him by her, but he could not say that it was a year or a month before. He also said he did not see it after her death. As to the declarations of James N. Drake, the testimony of Edwards, who sold the stock of goods to the father, is that at the time of the sale Drake told him that he was using his boy's money and buying the stock for him. A young woman, now Mrs. Shultz, who assisted in the store and who was then about 19 years of age, testifies that she heard Mr. Drake tell Edwards it was Rodney's mother's money that he was putting in the business. Houliston, the broker who negotiated the subsequent sale from Drake to Joice, testified that the bill of sale was drawn with "R. E. Drake," and "R. E. Drake, by James N. Drake, guardian," as vendors, at Mr. Drake's direction, and that he was told the boy owned the store and the land would be the boy's. On cross-examination, however, Houliston testifies that Drake "claimed that the property was his, but it was in the boy's name; he was doing business in his boy's name." "Q. Did he give you any reason at that time as to why the property was in his boy's name? A. He said he was in a hard row of stumps; he had some judgments against him; he said he could not pay them just now; he said he was going to pay them; he said I understood that business." Mrs. Shultz testifies that when Mr. Drake was in York, a few weeks before he purchased the stock of groceries, he showed her $900 in money, and told her that this money, except $150, "was Susan's money."

On the other hand, it is shown that after the father's death Rodney E. Drake caused to be prepared and presented to the county court a petition asking for administration of his father's estate. At the same time he filed a petition asking that the estate of his mother, Susan R.

Drake, who had died about 10 years before, be closed up. He was appointed administrator of his mother's estate, and in the inventory filed by him as such administrator he listed certain pieces of real estate, but showed no personal property as belonging to her at the time of her death. At that time apparently he had no recollection that his mother had any personal property at the time of her death, because neither in the petition for his appointment nor in his inventory of the estate does he recite this fact. He was also appointed administrator of his father's estate, but he filed no claim against that estate for the money which he now insists he inherited and which he claims his father misappropriated. Furthermore, the mother left insurance in the sum of $500, half of which was payable to her husband, James N. Drake, and half to her son, Rodney E. Drake. The father was appointed guardian of Rodney, took possession of the money, and reported his disposition of it to the county court, the allowance of which report seems to be still pending, so far as the record here shows. No claim was made in these proceedings that the guardian ever acquired any other money of the plaintiff.

Upon considering the whole case, we are of opinion that the most reasonable explanation of the facts is that given Houliston by Drake, that Drake was in debt, that the stock was his, but that he was conducting the business in his son's name. It is shown that Drake had conducted another store in his wife's name some years previously, which he had disposed of, and that in the interim he had carried on no steady business, but had been assessor, and had been engaged in selling mining stock. There is nothing to show from what source Mrs. Drake could or did acquire any money of her own.

In order to establish a resulting trust by parol proof, the evidence must be clear and convincing. Of course, a preponderance is sufficient, but in order to preponderate it must be of such a character that when all the circumstances are taken into consideration, and considering the

frailty of human memory with reference to oral statements made years before, it must satisfy the mind. Any inconsistency between the testimony of the person seeking to establish the trust and his conduct, and any explanation suggested by the evidence for the action of the person whom it is sought to charge as trustee must be considered.

On the whole record, we are satisfied that the district court made no error in holding that the evidence does not justify a decree declaring a resulting trust, and its judgment is, therefore,

AFFIRMED.

IN RE RICHARD HARTWIG.

RICHARD HARTWIG, APPELLEE, V. GEORGE BAUER, JR., APPELLANT.

FILED SEPTEMBER 28, 1912. No. 17,548.

Intoxicating Liquors: LICENSE: PETITION: SUFFICIENCY. In order to authorize a county board to grant a liquor license, a petition containing the names of at least 57 qualified resident freeholders was necessary. The petition in the record contains 79 names. A number of petitioners withdrew their names before the hearing. It was shown that several others had signed the petition after it was filed, but it is not proved that names were withdrawn so as to reduce the number of signers below the required number when the notice was published nor when final action was taken. The action of the board holding the petition sufficient is therefore sustained by a preponderance of the evidence.

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

R. P. Anderson, for appellant.

R. S. Norval, contra.

LETTON, J.

The only issue presented is whether a sufficient number

of *bona fide* resident freeholders of "K" township, in Seward county, had signed the petition of the applicant before the license was granted by the county board.

At the time the petition was filed there were 113 resident freeholders in the township. In the abstract prepared by appellant only 55 names are shown as having been signed to the petition, but the additional abstract of appellee shows there were 79 names appended. Appellant contends that, since 55 is not a majority of the resident freeholders, the board had no authority to act. If the proof sustained him the law is clearly with him. *Maxwell v. Reisdorf*, 90 Neb. 374. The record shows that a number of the persons whose names appear upon the petition signed their names thereto after it was filed, but there is absolutely no proof that the requisite number of names were not upon the petition before it was filed or before the first publication of the notice of the applicant.

Since there is nothing to show that the requisite number of names of qualified signers did not appear upon the petition before the filing thereof or before the publication of the notice, the district court did not err, and its judgment is, therefore,

AFFIRMED.

J. F. STRATTON V. STATE OF NEBRASKA.

FILED SEPTEMBER 28, 1912. No. 17,568.

Peddlers: LICENSE. A Missouri corporation, which manufactured and produced ranges in that state, employed defendant to sell them from a wagon in this state. He worked for a salary and had no interest in the sale or in the horses and wagon which he used in the business. A statute imposes a tax upon peddlers, but expressly excepts "parties selling their own works or production * * * either by themselves or employees." *Held*, That defendant is within the exception and is not liable to be taxed as a peddler under such statute.

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

J. C. Robinson, for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and *P. F. O'Gara, contra.*

LETTON, J.

Defendant was convicted of the offense of peddling without a license. From a judgment imposing a fine he appeals.

He was tried upon the following stipulation of facts:

"The Wrought Iron Range Company, a corporation of St. Louis, Missouri, is a corporation organized and existing under and by virtue of the laws of the state of Missouri, and having its principal place of business at the city of St. Louis, in said state of Missouri, and conducts and operates at said place a factory for the manufacturing of ranges, and is engaged in the business of manufacturing and producing ranges in said city of St. Louis, and said corporation has complied with the laws of the state of Nebraska, authorizing it to do business in said state, as required by the laws of the state of Nebraska.

"The defendant, J. F. Stratton, was on the 2d day of September, 1911, acting as salesman in the county of Cedar, state of Nebraska, for the said Wrought Iron Range Co., and had in his possession at said time a wagon and team belonging to said company; said wagon was drawn by two horses, and from this wagon he sold one range to W. A. Coop, and delivered it there and then in the original package to the said W. A. Coop, and caused to be executed and signed one promissory note, a copy of which is hereunto attached hereby referred to and marked 'Exhibit 1'; said sale and delivery was made in said county of Cedar, outside of any town or city, and without the said J. F. Stratton having first procured a license so to do.

"It is agreed that said defendant was an employee of said company and was working for a salary, and had no interest whatever in said note or sale. Said defendant's traveling expenses were paid by said company. It is also agreed that said company manufactured and produced each and every part of said range in their factory at St. Louis, the range being delivered just as it was finished by them and in the same package in which it was shipped from St. Louis, and that said range along with a car-load of the same kind of ranges was shipped to Randolph, Nebraska, to their order, and was never the property of any one else, until after the sale was consummated."

The statutory provision upon which the charge is based is as follows: "Peddlers plying their vocation outside of the limits of a city or town within any county in this state, shall pay for the use of said county an annual tax of twenty-five dollars; those with a vehicle drawn by one horse or selling by sample, fifty dollars; those with two or more horses, seventy-five dollars. Nothing in this section shall be held to apply to parties selling their own works or production, or books, charts, maps or other educational matter, either by themselves or employees, nor to persons selling at wholesale to merchants, nor to persons selling fresh meats, fruit, farm produce, trees, or plants exclusively." Comp. St. 1911, ch. 77, art. I, sec. 62.

The stipulation discloses that the defendant was an employee of the Wrought Iron Range Company, which manufactured the article sold.

The contention of the state is that the exemption in the statute covers only goods produced or manufactured by the peddler himself, and, unless the goods are produced by him, he must have a license. But the statute, by its express terms, does not "apply to parties selling their own works or production * * * either by themselves or employees." A number of decisions from other states have been cited by the attorney general, but no statute has been called to our attention as being in force in any

of these states which expressly excepts from the operation of the law both the producer and the employee who sells the article produced. The language of the statute is not ambiguous, and it cannot be extended to include persons not within its plain terms. The defendant has not violated the law.

The judgment of the district court is reversed and the defendant discharged.

REVERSED.

FRANK HOFFMAN, ADMINISTRATOR, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,457.

1. **Damages.** In an action against a railroad company for negligently causing the death of a brakeman earning $80 a month at the age of 39, a verdict in favor of plaintiff for $20,000 *held* excessive.

2. **Railroads: ACTION FOR DEATH: NEGLIGENCE: EVIDENCE.** In an action against a railroad company for causing the death of a brakeman by backing a car against him in the night-time, evidence that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning, *held* insufficient, in absence of a custom requiring such notice or warning, to prove actionable negligence, where decedent was an experienced brakeman familiar with the switch-yards and with the methods of switching therein, and was injured while crossing a switch-track in the private switch-yards of his employer on his way home from work; there being nothing to show that the car was not being moved in the usual and ordinary manner. REESE, C. J., dissents.

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

C. C. Wright, B. H. Dunham, Herman Aye, R. R. Dickson and *E. H. Benedict*, for appellant.

R. M. Johnson and *M. F. Harrington, contra.*

ROSE, J.

This is an action for damages caused by alleged negligence resulting in the death of George V. Glover. He left a wife and three children. Chadron was his home. At the time he was injured he was rear brakeman on a stock train running between Belle Fourche and his home city—a division station on defendant's railway system, where the trackage and the switching facilities are extensive. Not far from 1:30, Sunday morning, November 10, 1907, while engaged in the duties of his employment as brakeman, he came on a train from the west into the Chadron yards on a track north of the station. Shortly afterward he left his train, crossed a number of tracks on his way home, and appeared on the platform of the station hotel with the flesh on his left arm severed below the shoulder and turned back over the elbow. As a result of his injuries he died on the following Tuesday.

The negligence imputed to the railroad company is pleaded in a petition alleging, among other things, that, in the night-time, he had finished his work as brakeman and was traveling southward on foot from the caboose of his train to his home; that he necessarily had to cross a number of tracks whereon there were several strings of cars which obstructed his view; that there was an opening between some of the cars; that he safely crossed part of the tracks between cars in a safe and proper manner, and was about to cross another track, "when he was suddenly struck, thrown and knocked down by a car" moving eastward; that there was no light anywhere on the car; that no notice or warning of its approach was given; that in the dark he did not see it until it struck him; that it was noiselessly and slowly moved along, and he did not know of its movement until he was struck by it; that he was injured without fault or neglect on his part; that the car was on the east end of a string of cars then being moved eastward by one of defendant's engines; that such movement of the car in the dark at the time, without a light,

without a brakeman thereon, and without notice or warning of its approach, was a negligent act endangering him and other employees necessarily crossing tracks in going to and from work and in the discharge of their duties; that in crossing the track he was where he had a right to be and was not a trespasser, but was there with the authority and consent and with the knowledge of defendant. Defendant denied negligence on its part, and pleaded that he was injured through his own negligence and want of care. The latter allegation was denied by a reply. The suit was brought by the administrator of his estate for the benefit of his widow and children. From a judgment in favor of plaintiff for $20,000, defendant has appealed.

On the face of the record the recovery is excessive, and for that reason the judgment, as rendered, cannot be permitted to stand. On account of the death of decedent, plaintiff was not entitled to recover damages in excess of the pecuniary loss to the wife and the children. Comp. St. 1911, ch. 21, sec. 2. Decedent was 39 years old. His expectancy of life was about 28 years. There is no proof that his earnings had ever exceeded $80 a month. After deducting his own living expenses, the present worth of the monthly balances which he would have been able to contribute to his wife and children, had he lived, if computed for the entire period of his expectancy, falls far short of the award of the jury.

It is argued, however, that the prospect of promotion and of an increase in earnings was a proper matter for the consideration of the jury in estimating damages. Whatever may be the merit of this argument as a general proposition, it is clear that decedent's prospect of advancement was, under the circumstances of this case, too remote and speculative to be made the basis of damages. He drank intoxicating liquors. This is shown by the testimony of his own brother and by that of other witnesses. His mother, while inquiring about the incidents of his injury, asked the attending physician if her son had been drinking. For a number of years decedent's time had

been given alternately to farming and to braking on railroad trains. What he earned as a farmer is not shown. It ought to be assumed that plaintiff proved his earnings at their best. There is no evidence showing past promotions. In this state of the record, the judgment cannot be sustained on decedent's prospect of advancement in the railway service.

The verdict being excessive, should plaintiff be permitted to remit the excess as a condition of having judgment for the balance affirmed? Defendant insists that there is no evidence of actionable negligence on its part and that it violated no duty owing to decedent. These propositions are met by assertions that eye-witnesses testified to facts showing, in substance, that after decedent left his caboose he was seen attempting to cross a track a few feet from the east end of a string of cars; that they were not in motion at the time; that when he was on the track the cars were moved eastward by an engine at the west end of the string; that the night was dark; that he was struck and knocked down by the car on the east end of the string; that there was no brakeman on the car which struck him; that it was moved without having a light thereon and without notice or warning of its approach, and that shortly afterward he came onto the platform of the station hotel injured in the manner already described. In connection with these asserted facts, plaintiff further insists the evidence shows that decedent was returning from his work; that it was necessary for him to cross the tracks in going home; that he was injured when he was in a place where he had a right to be; that employees of defendant, in going to and in coming from work, and cattle-men and caretakers of stock, in approaching and in leaving trains, were obliged to cross the track where the injury occurred; that the employees in charge of the switching in the yards knew decedent would attempt to cross the track about the time he was injured.

To establish negligence on part of defendant under the circumstances disclosed, plaintiff invokes the rules which

require a railroad company, for the safety of passengers, shippers, caretakers, employees and strangers who are rightfully in places of danger by invitation or permission, to give notice or warning of the movement or approach of engines, cars and trains. In this connection many cases applying well-established rules are cited. Are the principles invoked applicable to plaintiff's evidence? The situation in the switch-yards at Chadron is different from that presented by ordinary main lines and side-tracks at stations generally. Chadron is a division of defendant's railway system, where extensive switching facilities and storage tracks are required. Track-yards exclusively for that purpose are established there. North of the station buildings, in the yards where decedent was injured, there are seven tracks. The business of defendant necessitates the constant movement of engines, cars and trains in those yards. No street or walk of the city crosses defendant's yards north of the station buildings. The evidence does not show that there was any defined way or path which was used by the public or employees, in crossing the tracks north of the station buildings, nor that employees, in going to or in coming from their work, or shippers or caretakers, in approaching or in leaving trains, had taken any recognized or defined path or way; nor that the car which struck decedent was not being handled in the usual and ordinary manner; nor that there was a custom to have a brakeman on the car or a light thereon, or to give notice or warning of its movement under such circumstances; nor that those engaged in switching in the yards created a condition through which decedent was deceived as to the actual situation or misled into relaxing his vigilance for his own safety. The car was not moved rapidly. The petition alleges the contrary. When injured, decedent was not engaged in the performance of any duty of his employment. In the petition it is stated that he had finished his work as brakeman and was on his way home. He was an experienced brakeman. He was acquainted with the tracks and with the condition of the yards. He knew, as well as his employer

or his fellow servants, the method of switching and of handling engines and cars in the yards and of the attending dangers. When he attempted to cross the track where he was injured the attention of the members of the switching crew would necessarily be directed to their work. Decedent's faculties were not thus engaged. His attention was not diverted from his own safety by the duties of his employment while he was going home. If he was in possession of his faculties and in the exercise of ordinary care, there was nothing to divert his attention from his own peril. The darkness of the night and his knowledge of his surroundings would naturally stimulate his sense of danger. There is no evidence to sustain a finding that the injury was wantonly or wilfully inflicted. Cases requiring notice or warning to persons who are permitted to use a path across tracks and analogous cases do not apply to the present situation. Proof that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning, in connection with other facts disclosed, is not sufficient, under the circumstances of this case, to show actionable negligence. *Chicago, R. I. & P. R. Co. v. McIntire,* 29 Okla. 797, 119 Pac. 1008, and cases cited.

The judgment, therefore, is not sustained by sufficient evidence, and is for that reason reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., concurring in part.

I believe the case should be reversed and a new trial had for reasons unnecessary to set forth, since a majority of the court concur in the opinion; but I think there was sufficient proof to carry the questions of fact to a jury.

FAWCETT, J., concurring.

I concur in the judgment of reversal, on the ground that the amount of the verdict is so grossly excessive as to force the conclusion that it is the result of prejudice on the

part of the jury. In such a case a remittitur does not reach the vice in the verdict. The only way to reach it is through a new trial.

REESE, C. J., dissenting.

I cannot agree to the decision in this case. My reasons for this dissent must be briefly stated. I make no objection to the holding that the verdict and judgment are excessive, and think that the plaintiff should be required to remit the excess, or, failing so to do, that the judgment should be reversed. But I can see no good reason why the judgment should be reversed *in toto*. I desire to enter my most earnest protest against the doctrine that, as a matter of law, an employer may create binding rules upon its employees by simply following a custom created and established by itself. Such a rule is vicious, unfair and unjust, and, in my opinion, is not good law. If there were neither light, warning, nor brakeman in charge of the moving train and cars, it was for the jury to say whether under all the circumstances there was negligence on the part of defendant in not employing some safeguard. By this opinion, and all others of its kind, the real and proper function of the jury is assumed by the court, and jury trials might as well be dispensed with. It is a doctrine as old as the law of jury trials that all questions of fact are for the decision of the jury when sitting as triers of fact. Why destroy that time-tried and time-honored function in cases of this kind by proclaiming a vicious rule of "custom" on the part of the employer, and then forcing the cases to bend to it? In my judgment the whole theory is wrong.

I would not object to requiring a reasonable remittitur as a condition of affirmance, but am unwilling to go further. I am familiar with the record in this case, having read it carefully and given it close study, and I can see no possible reason for destroying the judgment.

JOHN CARLON, APPELLEE, V. CITY SAVINGS BANK, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,766.

Principal and Agent: PERSONAL INJURIES: LIABILITY. Where the receiver of an insolvent trust company continues, under an order of the court, to collect for a bank the rents of a lot mortgaged to it, the same as the trust company had previously done, and there is a controversy between the receiver and the bank as to the insolvent's interest in such rents and in the lot itself, the receiver being subject to the directions of the court, and not, as agent, under the control of the bank, the latter is not, as a matter of law, necessarily liable to the tenant from whom the rents are collected for damages resulting from the negligence of the receiver's employee in repairing the mortgaged lot.

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

William Baird & Sons, for appellant.

H. H. Bowes and *E. C. Hodder, contra.*

ROSE, J.

The petition alleges that the wife of plaintiff was personally injured through the negligence of defendant, and this is an action to recover damages for the loss of her services. From a judgment in favor of plaintiff for $1,606, defendant has appealed.

In a separate action the wife of plaintiff previously recovered in her own right a judgment for the same injuries and her recovery was sustained by this court. *Carlon v. City Savings Bank*, 85 Neb. 659.

As tenants, plaintiff and his wife made their home on a leased lot in Omaha. The latter, in attempting to use a board walk extending from the rear of the house to an outhouse on the premises, fell through the walk into an old cistern September 24, 1903, and was injured. She was not at fault. Prior to the accident the walk had been tem-

porarily removed and the cistern had been negligently filled with frozen earth and manure, which afterward settled, and the walk, in an unsafe condition, had been restored to its former place. The appeal presents this question: Is the City Savings Bank, defendant, under the facts proved, liable to plaintiff for the negligence described? The sum of plaintiff's case is that defendant was at the time the landlord, in possession of the premises and collecting rent, and that through its agency the injury was inflicted.

Defendant is the successor of the Omaha Loan & Trust Company Savings Bank, but the legal entity of the corporation has not been changed. *Carlon v. City Savings Bank*, 82 Neb. 582. In 1892 the owner of the lot mortgaged it to the savings bank for $1,400, and in 1894 for $240 more, and in 1895 he assigned to the mortgagee the rents of the premises. The Omaha Loan & Trust Company, a separate corporation, was, by the savings bank, appointed agent to collect the rents so assigned. In December, 1901, W. K. Potter was appointed receiver of the trust company, and until March 12, 1903, collected the rents, instead of the trust company. At the trial of the former case the person who filled the cistern and the time of filling it were subjects of conflicting testimony, but in the present case it is fairly established by additional evidence, including the official records of the receiver, that it was under his direction the cistern was filled, and that the work was done by Jens Laritsen King for $3.65, November 21, 1902.

The giving of the following instruction is challenged as erroneous: "You are instructed that, under the pleadings and evidence in this case, William K. Potter, receiver of the Omaha Loan & Trust Company, must be regarded as the agent of the defendant bank in collecting the rents from said premises and in making repairs thereon; and it is therefore immaterial whether the man who filled said cistern was employed by said William K. Potter, receiver, or by some other agent of the defendant. It is accordingly

established by the evidence that the filling of the cistern must be regarded as the act of the bank."

To justify the giving of this instruction, plaintiff argues the following propositions: The trust company, at the time of the appointment of the receiver, had no interest of any kind in the leased premises. It had no right of possession of any kind. The receiver of an insolvent corporation takes only the assets thereof. The receiver succeeded the trust company as agent, and defendant recognized the agency. In collecting rents and in making repairs he acted alone for defendant and was exclusively its agent. Defendant was responsible for his acts. With knowledge of the receiver's actions defendant accepted the benefit of his collections and ratified his acts as agent, not as receiver. Is this argument sound? Did the trial court correctly instruct that Potter, receiver of the insolvent trust company, was the agent of defendant in filling the cistern, and that his employee's tort, which resulted in injury to plaintiff's wife, was the act of defendant? When the receiver was appointed, it was part of the business of the insolvent trust company to collect for defendant the rents of the lot where the injury occurred. While acting as receiver Potter directed the filling of the cistern and out of funds in his hands paid for the work negligently performed. His records as receiver so show. The decree appointing Potter receiver of the trust company and directing him in regard to its business ordered him to "conduct said business in all its branches." It was under this order that the receiver assumed to continue the collection of rents for defendant. A receiver may, under the directions of the court, proceed to carry on the business and perform the agreements of the insolvent corporation, if deemed to be for the best interests of those who may establish rights in the litigation. To prevent the receiver from collecting the rents, as the trust company had done, required an order of court. The fees for making the collections inured to the benefit of those interested in the assets of the trust company. The business of collecting

rents for defendant was transacted in the name of the receiver. There was a controversy between them as to the nature of the trust company's interests in the rents and in the mortgaged lot itself. Defendant went into court and demanded of the receiver an accounting and a return of the assignment of rents. In granting relief the court made the following order March 12, 1903:

"It is considered and directed by the court that said receiver, after payment of the bills incident to keeping said premises in tenantable condition since he was appointed such receiver and payment of the usual commission allowed rental agents for collecting the rents of the property, apply the balance of cash remaining in his hands toward the payment of the taxes upon said premises, so far as such balance may go. The court further orders and directs said receiver to turn over to said City Savings Bank the assignment of rents of said premises above referred to, provided same is in his possession, and that said receiver also direct the tenants occupying the property above described to pay their rents due upon said property from this date on, to the City Savings Bank of Omaha, Nebraska."

The district court, therefore, not only directed the receiver to collect the rents, but directed him how to apply them. In collecting and in distributing them, he acted under the orders of the court. As agent he was not under the direction of defendant. He learned his duties from the court, and not from defendant as his principal. In referring to the status of a receiver, the supreme court of the United States in *Booth v. Clark*, 17 How. (U. S.), *322, *331, said: "He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is *in custodia legis* for whoever can make out a title to it." *Atlantic Trust Co. v. Chapman*, 208 U. S. 361, 371. The law is the same in this state. *Vila v. Grand Island E. L.*

& C. S. Co., 68 Neb. 233, 239. The record showing, as already indicated, that the receiver collected the rents and distributed them as receiver under the order of the court, that there was a controversy between defendant and the receiver in regard to the interest of the trust company in the rents and in the mortgaged lot, and that defendant was unable to control the receiver as its own agent, the trial court carried the doctrine of agency too far in holding that defendant, as a matter of law, is liable to plaintiff for the wrongful act of Potter's employee in filling the cistern and in replacing the walk in a negligent manner. The instruction is erroneous under the following doctrine announced in the former case: "A receiver appointed by the court in the progress of litigation acts as receiver for all of the parties interested; but he is not the agent for the parties in the sense that each of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts." *City Savings Bank v. Carlon*, 87 Neb. 266.

Ratification of the acts of Potter so as to make defendant liable for the tort of his employees is not shown. For the misstatement of law in the instruction quoted, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurring.

I suppose that, in determining whether the savings bank is responsible for the action of the receiver in filling the cistern, we must ascertain whether the receiver was acting as the agent of the bank in so doing. The receiver was not employed by the bank. He had no connection with the business in any way, except by virtue of his appointment as receiver by the court. A receiver is an officer of the court and is at all times, in everything he does, subject to the order of the court, and is not subject to the control or influence of private parties. The bank, then, did not authorize him to do anything, and could not in any respect control or influence his actions. Such facts are incon-

sistent with the existence of the relation of principal and agent. By virtue of his authority as receiver he took control of the lease and collected the rents and held them for the court which appointed him, refusing to recognize the bank in any way. The bank could not terminate the receiver's agency and control. The court collected and held the rents through its receiver; other parties interested in the litigation claimed the rents, and upon application to the court, in whose hands the rents were, the court distributed the rents to the party to whom they belonged. This is the ordinary object of a receivership. The court, through its receiver, acted for all parties interested in the litigation, and the bank was interested as were all of the other parties. Perhaps the receiver was not authorized by virtue of his employment as receiver and his control of the lease to interfere with the property as he did in filling the cistern. No one expressly authorized him to do so; he had no power or authority whatever to fill the cistern, unless such power came to him from the court. There is no evidence that the bank knew that he filled the cistern, much less that it directed or authorized him to do so. The powers of an agent are given him by his contract of agency, and must be either expressly given him or implied from the powers that are expressly given. If this receiver had authority to fill the cistern it must be implied from his express powers, and those express powers he received from the court, and not from the bank. The bank could not terminate either those express powers or such powers as would be implied therefrom. The receiver must therefore have acted within the implied powers given him by the court in filling the cistern, or else he went beyond his powers and was not authorized by any one to do so. In either case the bank would not be liable for his act.

LETTON, J., dissenting.

I think the opinion ignores the real issue. The predecessor of the City Savings Bank was mortgagee in possession under a written agreement set forth in *Carlon v. City*

Savings Bank, 82 Neb. 582. The Omaha Loan & Trust Company rented the property as agent for the bank; this was a part of its regular business. The receiver, when appointed, also acted as agent for the bank in the collection of the rents. The agency might have been terminated by the City Savings Bank at any time. After the receiver had collected the rents a dispute arose as to their application, he claiming some rights under a second mortgage held by the Omaha Loan & Trust Company which had come into his hands as receiver. This dispute was settled by an order of the court in favor of the bank, as shown by the order set forth in the opinion. The controversy, however, until it was ended, did not interfere with the collection of the rent or the care of the property or the liability of the mortgagee in possession to the tenant. The cistern was filled in November, 1902, when Potter, as receiver, was acting as agent for the bank. The bank received all the rents, less the agent's commission for renting, by the payment of taxes according to its written agreement with Handy, the owner.

The fact that it was the receiver, and not the corporation, that was its agent is immaterial, and so, also, is the fact that it had a dispute with its agent as to the application of the proceeds. The bank was in possession and control and it is chargeable with its agent's negligence.

FAWCETT, J., concurs in this dissent.

GEORGE L. SMITH, APPELLANT, V. ALFRED PALMER ET AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 17,081.

Partition: ALLOWANCE OF ATTORNEY'S FEE. In partition, an allegation in the petition that the land can properly be divided among the owners without a sale and a denial thereof in the answer raise no issue of fact, since the matter in dispute relates to procedure

regulated by statute and does not make the proceedings adversary within the meaning of the rule that the trial court may allow plaintiff's attorney a reasonable fee to be paid out of the common fund, where the proceedings are amicable.

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

L. S. Hastings, for appellant.

A. J. Evans, contra.

ROSE, J.

This is an action for partition of a lot in Ulysses. The property was regularly sold by a referee to plaintiff for $2,045. In confirming the sale and in ordering distribution of the proceeds, the trial court, in the final judgment, directed the referee to pay the costs out of the fund in his hands, including a fee of $75 for plaintiff's attorney. Defendants did not ask for a new trial nor appeal from the judgment. Ten days after it had been rendered, however, they made a motion to retax the costs and modify the judgment by charging the attorney's fee of $75 to plaintiff. This motion was sustained and execution was awarded for the collection of the retaxed fee. Plaintiff has appealed, and the only question presented is the correctness of the order retaxing costs.

The motion to retax was based on the ground that the proceedings were adversary, and that consequently no fee for plaintiff's attorney could be allowed. *Oliver v. Lansing,* 57 Neb. 352. Plaintiff relies on the doctrine that partition is a remedy inuring to the benefit of all parties having an interest in the land, and that the trial court may allow plaintiff's attorney a reasonable fee to be paid out of the common fund, where the proceedings are amicable. *Johnson v. Emerick,* 74 Neb. 303.

The interest of each owner, as stated in the petition, was not disputed in the answer. No objection to the action for partition was made by any defendant. The in-

terests of all of the parties were, without controversy, adjudicated to be as alleged in the petition. Plaintiff, however, alleged that a division of the lot among the owners would be practicable, but prayed for a sale, if an equitable division could not in fact be made. In the answer defendants alleged that the lot could not be divided "without rendering the shares of the parties practically worthless." On these conflicting averments defendants assert that the proceedings were adversary. No issue of fact was raised by these allegations. The only controversy between the parties related to procedure, which is regulated by a statute requiring the appointment of a referee to make partition. If the property cannot be divided "without great prejudice to the owners," it is the referee's statutory duty to so report to the trial court. Code, secs. 812-814. Whether partition is practicable must, in the first instance, be determined by the referee. *Burke v. Cunningham*, 42 Neb. 645. The statutory procedure was followed and the referee reported that the land should be sold. There were no exceptions to the report of the referee, nor was there any further hearing. There was, therefore, no controverted issue to make the proceedings adversary in such a sense as to prevent the allowance of the fee in question.

The judgment is therefore reversed, with instructions to the district court to overrule the motion to retax costs.

REVERSED.

REALTY INVESTMENT COMPANY, APPELLANT, V. WILLIAM A. SHAFER, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 17,091.

1. **Vendor and Purchaser:** SALE OF LAND: RESCISSION: REPRESENTATIONS. A purchaser of land, to justify a rescission on account of a misrepresentation, must show in some manner that it was material and misled him to his injury and damage.

2. ———: ———: ———: ERRONEOUS STATEMENT OF VALUE. As a general rule a mere erroneous statement of value, when made by the owner of land in an effort to sell it, is not actionable.

3. ———: ———: ACTION FOR PRICE: DEFENSE OF FALSE REPRESENTATIONS. Where defendant, in a suit on a note executed by him and delivered to plaintiff in part payment of the purchase price of land, pleads that he was induced to make the purchase by means of false representations of plaintiff in regard to the character of the land, he must, in establishing that defense, prove, among other things, facts or circumstances showing that he was entitled to rely on such representations.

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

Hall & Bishop and *G. W. Lewis,* for appellant.

George A. Adams and *Morning & Ledwith, contra.*

ROSE, J.

This is an action on a promissory note for $840. Defendant agreed to buy from plaintiff a quarter-section of land in South Dakota for $5,200, and paid $200 down. Later he executed a formal contract of purchase and a series of notes for the remainder of the purchase price The note in controversy is the first of the series. It bears date August 21, 1909, and fell due December 1, 1909. In his answer defendant admitted the execution of the note, but pleaded it was void on the ground that he had been induced to sign it by the false and fraudulent representations of A. H. Rait, who, as agent of plaintiff, conducted the negotiations leading up to the alleged fraudulent sale. The answer also contained a cross-bill demanding judgment for the amount of the cash payment. The charges of fraud consisted principally in the making of false representations that the land was situated 2½ miles from Wetonka; that land of like character was selling for $35 to $40 an acre, and that the tract in controversy was better than the average quarter; that it was free from alkali, gumbo or hard-pan; that there were stones upon the

surface, but not beneath it; that there was no waste land and that all could be cultivated; that the land was worth $32.50 an acre; that plaintiff's title was good; that the soil would produce an average of 32½ bushels of wheat to the acre and a large amount of flax; that the soil was fertile, rich and deep. It is also pleaded in the answer that defendant was unacquainted with the land or the locality; that he saw the land a few moments only and had no opportunity to investigate it sufficiently to determine whether or not it was as represented; that Rait claimed to be well acquainted with the land and the locality, and that he had actual, personal knowledge of all matters upon which representations were made; that defendant informed Rait he knew nothing about the land and would have to rely upon Rait's word in regard to it, and was assured by him that his statements could be relied upon and that he would guarantee them to be true; that so relying on them and believing them to be true, while in ignorance of the facts, he entered into the contract of purchase; that after discovering the fraud defendant offered to rescind the contract. All fraud charged was denied by a reply. The case was tried to a jury. Plaintiff's action was dismissed, and judgment was rendered in favor of defendant on his cross-bill for $200. Plaintiff has appealed.

The principal question argued is the insufficiency of the evidence to sustain the verdict.

Can the verdict be sustained on proof that Rait told defendant the land was 2½ miles from Wetonka? Defendant testified that such a statement had been made, but it was denied by Rait. In any event it is undisputed that defendant, about mid-day, before he signed the contract of purchase or the note, went in an automobile directly from the land to Wetonka and there examined a map showing the exact distance. The evidence is uncontradicted that he had himself an accurate source of information, and that Rait pointed out to him the location of the land and the town of Wetonka on a map showing the distance between. Moreover, the abstracts fail to show that the

distance from Wetonka affected the value of the land, or that defendant suffered injury through the representation, if falsely made. For the purpose of rescission, it was incumbent on defendant to show in some manner that the statement was material and that he was thereby misled to his injury and damage. *Jakway v. Proudfit,* 76 Neb. 67. On this issue there is a failure of proof.

Can the verdict be sustained on proof that the market value of land of like character was misrepresented? If such representations were made, there is no evidence that they were false. Besides, the issue as to the market value of land was withdrawn from the jury by an instruction of the trial court.

Can the verdict be sustained under the charge that Rait falsely represented that the land was free from alkali and hard-pan? In support of these and other allegations of the answer, defendant testified he was told by Rait: "I will guarantee you there is no alkali or gumbo in this soil. Wherever you find a clay subsoil, as I have told you before, you will not find any gumbo or alkali." He further testified Rait represented to him that the surface was loam with a clay subsoil; that there were stones on the surface, but none under it, and that, when they were picked off, the place would be free from stones; that the water on the surface was not alkali water; that a draw crossing the land gave good drainage; that "there is as fine land as there is under the sun;" that "it was as good land as there was under the sun for crops;" that he would guarantee the land to be as represented. In testifying, defendant also stated that he told plaintiff he must rely on him; that he did so and believed Rait's representations and relied on them; that Rait said he was familiar with the land and the surrounding country; that defendant was not; that, when defendant was on the land to inspect it, he was hurried away by Rait and did not have an opportunity to complete his inspection. All of the testimony tending to prove misrepresentations is emphatically denied by one or more witnesses. Whether it is sufficient in this

case to justify a rescission of the sale, or to sustain the verdict, depends upon the facts and circumstances proved and the rules of law applicable thereto.

Defendant was 46 years old, and had been farming near Lincoln for 26 years. His own story is that in August, 1909, he went with two of his neighbors and friends to Wessington Springs, South Dakota, to look at land, and to buy a tract, if he found one to suit. He was also accompanied by two real estate agents, Hutchinson and Allen. The party spent two days inspecting lands near Wessington Springs, but defendant declined to make a purchase because the lands offered for sale were too rough and hilly to suit him. Afterward he went with his two friends and Allen to Aberdeen, and by the latter was introduced to Rait, who was an entire stranger. To Rait defendant stated he would buy a piece of land, if he found one to suit him, and he was taken in an automobile on a tour of inspection. On the trip Rait occupied the front seat with the chauffeur. Defendant sat in the rear seat with his two friends. Three tracts of land were inspected. In regard to the first, defendant testified Rait guaranteed that it was free from alkali, but that he did not buy it because he thought there were too many buffalo-wallows, that they represented alkali, and that the land did not suit him. He looked at the second piece, but, according to his own testimony, did not buy it because there were too many stones on it. Up to this time the evidence is undisputed that he acted on his own judgment as to the character of the land, taking into consideration buffalo-wallows as indicating the presence of alkali. The third tract is the land in controversy. When they arrived, Rait remained at the automobile and defendant went onto the land with one of his friends. There was a swale on the quarter-section, and the rough land in connection with it was variously estimated by the witnesses to be from three to eighteen acres. Defendant admits that he crossed this swale, and he afterward referred to buffalo-wallows therein. He therefore saw the swale itself and the land on both sides

of it. During his inspection Rait remained at the automobile on the highway and never mentioned the land. Defendant's own testimony is that, when he returned to the automobile, Rait asked him how he liked it, and that he replied: "I told him it looked pretty fair, and we might mark that down and look further." It was near noon, and the party went to Wetonka, defendant still occupying the rear seat with his two friends. Shortly after they arrived at the hotel there, defendant signed an agreement to buy the land and gave Rait a check for $200, with the understanding that what had been done was subject to the approval or rejection of plaintiff, and that a formal contract might be drawn and signed later. Defendant subsequently executed and acknowledged such a contract and signed notes for the balance of the purchase price. According to the proofs adduced by him, the alleged fraudulent representations were made on the way from the land to Wetonka and at the hotel there, after defendant had made his inspection with his friend and after he had told Rait that the land looked pretty fair. His excuses for not making further investigation are that he was told by Rait "to hurry back," "to hurry for dinner," that Rait signaled for him to come back, and that he was afraid he would be left on the land. Under the circumstances these excuses are without merit. He had made a long trip to inspect and buy land. He was an experienced farmer. He had assumed on the same trip to buy or to reject land on his own inspection. He was under no sort of restraint. He was a free agent. His two friends were with him. He did not sign the notes or the final contract to purchase for several days, and could have returned to the land from the hotel before doing so, or, if not satisfied with the examination already made, he could have refused to sign the notes. When he first asked Rait to rescind the contract, he gave as a reason that his wife was unwilling to move to the land and that he could not pay the notes. Later he urged defects in the title, but did not attempt to establish them in making his defense. Finally he defended the suit on the ground of fraud.

For reasons well understood, it is a general rule that a mere misrepresentation of value, when made by the owner of land in an effort to sell it, is not actionable. *Dresher v. Becker,* 88 Neb. 619; *McKnight v. Thompson,* 39 Neb. 752. In defending the suit on the ground that the note was procured by fraudulent representations, it was not only necessary to prove that the representations were made, that they were false and that he believed them and relied upon them, but it was equally essential to show in some manner the existence of circumstances entitling him to rely on them. *Runge v. Brown,* 23 Neb. 817. This doctrine is not condemned in *Hoock v. Bowman,* 42 Neb. 80, wherein it was held: "A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee." In that case the facts were different. In the present case defendant knew that Rait was a stranger whose only duty in making the sale was to properly represent his principal. In negotiating at arm's length for the purchase of a farm, an experienced farmer who makes an inspection for himself cannot idly abandon responsibility for his own conduct, the prompting of his own senses, his skill and knowledge, and his opportunity for investigation, and make out a case of fraud by merely testifying that, under the circumstances of a case like this, he told an utter stranger, with whom he was dealing, he would have to rely on his representation, that they proved to be false as made, that he believed them and relied upon them, and that the stranger had said he would guarantee the representations to be true. There is reason for the rule which requires him to show a substantial basis for such reliance. There was no confidential relation existing between the parties to the negotiations. Rait was known to be the agent of plaintiff. The principal was entitled to the services of the agent and should not be deprived of them by any unreasonable credulity on the part of defendant, either real or

simulated. Defendant's own testimony shows that he was competent to determine for himself the character and condition of the land. It was open to his observation. The herbage, the water, the stones and other surface indications told their own story. If they were not sufficient, his own proofs do not show that he was either deceived or coerced into his failure to examine the soil itself. He started out on his tour of inspection with the declared purpose to examine land and to buy a tract, if it suited him. He rejected two pieces. According to his own statements he disregarded on the same trip a similar representation as to other land. He examined the tract in controversy and gave no reasonable excuse for not making a satisfactory inspection, if he did not do so. The final contract of purchase and the note in suit were signed after he had an opportunity to make a re-examination. They should not be held void without something substantial to show that he had a right to rely on the false representations pleaded, if made. Business transactions, when deliberately reduced to writing and solemnly executed, should not be thus lightly invalidated. For failure of proof in the respect pointed out, the verdict is not supported by the evidence.

Material misrepresentation as to stone is not proved, and the same may be said of the charges that Rait falsely represented there was no waste land and that all could be cultivated. The allegations that the land was falsely represented to be worth $32.50 an acre and that plaintiff's title was good were not proved, and the trial court withdrew those issues from the jury. It is clear that the verdict cannot be sustained under the representation that the soil would produce an average of 32½ bushels of wheat to the acre and a large amount of flax. Proof that these representations were made does not appear in the abstracts; but, if they were made, they would, under the circumstances of this case, amount to no more than an expression of opinion not amounting to actionable fraud, since both parties understood that the land had never been tilled.

What has already been said in regard to representations relating to the character of the soil disposes of the defense that it was falsely represented to be fertile, rich and deep.

It is also argued that Rait was guilty of fraud in entering into a secret agreement with the two friends of defendant to pay them a commission in case of a sale. An examination of the abstracts in connection with the bill of exceptions fails to disclose evidence to sustain this charge.

The evidence being insufficient to sustain the verdict, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HOSEA CARPENTER, APPELLANT, V. MATTHEW SCHNERLE ET AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 16,620.

1. **Highways:** ESTABLISHMENT BY PRESCRIPTION. Slight deviations from the line of public travel to avoid mud, pools, or natural obstructions will not necessarily prevent the establishment of a highway by prescription, especially so when it appears that the natural obstructions have been removed and that the roadway has been used without interruption or substantial change for more than ten years.

2. ———: DEDICATION. Where a landowner notifies the public to cease traveling a road across his lands, and in lieu thereof to travel over the section-line road along the edge of his land, and he and his grantees, subsequently, for a period of ten years, permit the public without interruption to travel along said section line over a strip of land less than two rods in width, such acts will be construed to constitute a dedication of such strip of land as a public road.

3. ———: ———: ACCEPTANCE. In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities. It may be accepted by the public itself, and the acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered, by user.

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

W. C. Dorsey, for appellant.

George J. Marshall, contra.

FAWCETT, J.

The controverted fact in this case is the existence of a public road running south three-fourths of a mile from the northwest corner of the northwest quarter of section 27, township 2, range 16, in Franklin county, the entire roadway being east of the line between sections 27 and 28, on lands of defendants. Defendants attempted to close the road by building fences across it in May, 1909, and plaintiff brought this suit to enjoin and prevent them from doing so, claiming the right to use it for public travel. Previously, plaintiff had at will entered the road from the north and had also approached it from the southeast by crossing diagonally the southwest corner of section 27. The litigation is between private individuals, neither the county nor any officer thereof being a party to the suit. The trial court found that there was a legally established highway over the west side of the northwest quarter of section 27, east of the section line, but that there was no public road across the west end of the 80-acre tract south of it. The result is that plaintiff, in going to and from his home, and the public generally, will be prevented from crossing the land of defendant Matthew Schnerle, and the other defendant will be required to keep open on his land half a mile of roadway in the form of a *cul-de-sac*. Plaintiff has appealed, and defendants have taken a cross-appeal.

Plaintiff argues that a public highway for the entire three-fourths of a mile in controversy was clearly shown by the evidence, within the meaning of the following rule: "To establish a highway by prescription there must be a

user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." *Bleck v. Keller*, 73 Neb. 826; *Engle v. Hunt*, 50 Neb. 358. Whether a highway three-fourths of a mile long at the place described was acquired by either dedication or adverse user is the controlling question in the case. The claim of the public was shown by a witness who testified without objection that, about 12 years before the trial, the county surveyor surveyed the road; that it was laid out by the county; that damages were allowed, but never paid; that he lived on land west of the road and was notified to move his fence back; that the witness, under written notice from a supervisor, had done work on the road; that he "worked some there most every year;" that his son had also worked on the road, and that a man by the name of Davis "plowed the hills down about 12 years ago." While the county board's orders in regard to this road appear to have been introduced in evidence, they are not in the bill of exceptions. Evidently the parties consider them immaterial in determining the issues tried. A number of witnesses testified that the road, without substantial change, had been open to, and used by, the public generally, continuously, for 12 years or more before defendants attempted to close it; that the travel had never been interrupted; and that continuous use had worn tracks in the sod. It was shown that the roadway left open by those who cultivated the lands in controversy varied in width, but there is positive testimony that a space sufficient for the passage of wagons, buggies and stock was always used for that purpose. It appears that, for a time, heavy loads were, for a short distance, diverted at one place by a hill, but that there was continuous travel close to the section line during the entire length of the strip of land in question for more than 10 years. It is shown without contradiction that one Blackburn, who from 1896 to 1900

owned the quarter section of land, along which the north half mile of the road runs, notified the public, who were traveling over a road that ran through the middle of his quarter from north to south, to cease traveling over that road and to use the section line road; clearly showing a recognition and dedication of the north half mile of the road in controversy, on his part. It is also shown without contradiction that one Davis, who owned the south eighty, now owned by defendant Matthew Schnerle, as early as 1897, worked the hill on the road contended for, in front of his eighty, so as to make the hill more passable for vehicles of all kinds traveling along the road; thus showing a recognition and dedication by him of the other quarter of a mile of the road in controversy. The evidence is uncontradicted that, not only prior to the foregoing acts by Blackburn and Davis, but at all times subsequent thereto, until the defendants went into possession of the lands in 1907, the road had been open to the public and traveled by the people passing along there, at will. A dedication of land for a public road along a section line will be inferred upon much weaker testimony than would be required to establish such a dedication of a road running through a tract of land. In this case we think the evidence is ample to establish both a dedication, and user for the statutory period, of the road in controversy.

The judgment of the district court is therefore reversed and the cause remanded, with directions to that court to grant a perpetual injunction against both defendants as prayed in plaintiff's petition.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., dissenting.

It is said in the opinion that the controversy involves a road running three-fourths of a mile south from the north side of the section, and that the trial court ordered it opened for one-half mile along the section line, and the result of the judgment of the trial court was to keep open

a half mile of the roadway "in the form of a *cul-de-sac.*" The opinion extends this *cul-de-sac* one-fourth of a mile farther, so that now the public generally can drive down from the north side of the section three-fourths of the way across the section, and, if they desire, can turn and drive back. It is said in the opinion that the plaintiff has heretofore entered this three-fourths of a mile road from the north and has "approached it from the southeast by crossing diagonally the southwest corner of section 27." There is no attempt made in the opinion to show any right to cross this southwest quarter of section 27, but I understand from the record that there is no substantial claim by either party that there has ever been a road across the southwest forty of section 27, either by general user or by grant, and that there is no way that the proposed road three-fourths of a mile long can be made available. I do not think that the law will allow the creation of such a *cul-de-sac,* as it is named in the opinion, by prescription, and therefore the conclusion reached is not warranted by the record.

BETTYE P. BOOTH, APPELLEE, V. FREDERICK M. ANDRUS, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,630.

1. **Physicians and Surgeons:** MALPRACTICE. In an action for malpractice, a physician or surgeon is entitled to have his treatment of a patient tested by the rules and general course of practice of the school of medicine to which he belongs.
2. ———: SKILL REQUIRED. Physicians and surgeons are not required to possess the highest knowledge or experience, but the test is the degree of skill and diligence which other physicians in the same general neighborhood and in the same general line of practice ordinarily have and practice.
3. ———: ———. Physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty.

4. ———: MALPRACTICE: TRIAL: EXAMINATION OF THE PERSON. Where during the trial of an action against a surgeon for damages for malpractice, the plaintiff voluntarily submits a portion of her body to the inspection of the court and jury, it is error for the court to refuse to permit an examination, by a limited number of reputable surgeons of defendant's selection and school, of that portion of the body so exhibited.

5. ———: ———: ———: ———. And where, in such an action, the claim is single, and is based upon two separate operations on the same day, upon two different portions of plaintiff's body, if plaintiff voluntarily submits to the inspection of the court and jury that portion of her body upon which one of such operations was performed, it is error for the court to refuse to permit an examination, by a limited number of reputable surgeons of defendant's selection and school, of the other portion of the body upon which the other operation was performed.

6. ———: ———: ADMISSION OF EVIDENCE. In an action for damages against a surgeon for malpractice, where the allegations and prayer of the petition are based solely upon the defendant's alleged negligence and want of care in the performance of certain surgical operations and in the administration of medicines in connection therewith, at plaintiff's home and in defendant's hospital, it is prejudicial error for the court to permit plaintiff to testify that, at another time and place, during the several months interim between such operations, defendant made an indecent proposal to her.

7. Instructions examined and referred to in the opinion, *held* erroneous.

8. Appeal: REVERSAL. Where the preponderance of the evidence against the verdict of the jury is so great as to indicate that the verdict was probably the result of passion or prejudice, it will be set aside and a new trial ordered.

9. Evidence examined and set out in the opinion, *held* insufficient to sustain the verdict and judgment.

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

C. C. Marlay, L. C. Burr, B. F. Good and *S. A. Wood*, for appellant.

T. J. Doyle and *G. L. De Lacy, contra.*

FAWCETT, J.

During the period of time covered by the petition, plaintiff was a married woman living with her husband and defendant was a practicing physician and surgeon of the eclectic school. Defendant was first called to see plaintiff professionally in April or May, 1907, and continued to treat her from that time until September, 1908, at which time his ministrations ceased, and shortly thereafter this action was begun in the district court for Lancaster county, to recover damages for alleged malpractice on the part of defendant in his treatment of plaintiff during the time above indicated. The jury returned a verdict in favor of plaintiff for $7,200, upon which judgment was entered, and defendant appeals.

The substantial averments of the petition are:

1. That in the month of July, 1907, defendant carelessly and negligently, and without the knowledge and consent of plaintiff, produced an abortion of a living fœtus, and thereafter removed plaintiff from her home to a hospital owned and operated by defendant, "and there put the plaintiff under the influence of an anesthetic and curetted the plaintiff, subjecting her to great indignities and great pain, and further lacerated and injured the plaintiff."

2. That about February 14, 1908, defendant advised plaintiff that a surgical operation was necessary, to shorten certain ligaments, and also suggested that he desired to remove plaintiff's ovaries; the latter of which plaintiff forbade; that the ovaries were not diseased, and it was not necessary to remove the same; that, notwithstanding such fact, defendant performed said operation, and did so in such an unskilful manner that plaintiff was unnecessarily lacerated and mutilated; that an anesthetic was administered to plaintiff by defendant; that no physician was called in to aid or assist in administering the anesthetic or in performing the operation; that while plaintiff was unconscious defendant, without her knowledge or consent, removed her appendix, cut and lacerated the

ligaments, and removed one of the ovaries, all of which was entirely unnecessary, thereby greatly impairing and permanently injuring the health of plaintiff.

3. That during treatment of plaintiff defendant prescribed and used powerful and poisonous and deadly substances, known as H. M. C. tablets No. 1, and H. M. C. tablets No. 11, containing morphine, hyoscine, and other deadly poisons, and provided a hypodermic syringe, with which said poisons were injected into the system of plaintiff, thereby tainting her blood with said poisons, causing irritations and eruption upon the skin which was superinduced solely by said treatment and the use of said poisons, causing constant, permanent and "most powerful" irritation.

4. That on or about May 11, 1908, defendant advised plaintiff that it would be necessary to perform a further operation to adjust the ligaments already referred to, and that it would be necessary to put her under the influence of an anesthetic for that purpose; that plaintiff again gave imperative instructions not to remove the remaining ovary; that the same was not diseased and it was not necessary to remove it; but, notwithstanding this fact, after plaintiff was placed under the influence of an anesthetic, her body was again mutilated by making an incision therein without her knowledge or consent, and the remaining ovary removed; that the Fallopian tube of plaintiff was also removed; that the operation was done in a careless, unsurgeonlike manner, and was entirely unnecessary; that it left plaintiff a complete physical and nervous wreck; that the use of the poisonous drugs above referred to was continued; that plaintiff was compelled by defendant to use the same and was told that she would die if she did not do so; "all of which was entirely unnecessary and highly injurious to the constitution and health of the plaintiff, and this plaintiff by the malpractice of defendant in the manner aforesaid was brought to such a state of acute suffering that defendant attempted to keep plaintiff in a state of unconsciousness continu-

ously by the use of said opiates and poisons, which further wrecked and weakened her system and rendered her intensely nervous, and said germs of poison were injected into the system of plaintiff by defendant, and she was so impregnated therewith that the same continuously manifested itself in eruptions of the skin."

5. That prior to said assault "made upon plaintiff in the manner aforesaid by defendant" the general health of plaintiff was good; her constitution strong and unimpaired; plaintiff was then 32 years of age, a married woman with prospect of a long life, and the blessings and comforts and happiness of home and of rearing a family; that the assault and injury of the defendant "in the manner aforesaid" has rendered it impossible for plaintiff to conceive and to rear children, rendered her a constant and permanent sufferer, and that said injuries inflicted are permanent; that plaintiff has expended large sums of money in treatment and effort to cure the injuries inflicted upon her by defendant, in the manner aforesaid, in the sum of $1,000, all of which has been necessary; that she has been compelled to live away from the presence and companionship of her only child and to be constantly separated from her husband on account of the condition of health thus inflicted upon her by defendant, and for the reason of the premises has sustained damages in the sum of $50,000, for which amount she prayed judgment. Later, as an amendment to the petition, it was alleged that at the operation of May 11, above set out, defendant also made an incision in the plaintiff's body, extending from the lower part of the shoulder of the right side near the breast and continuing from there down around the breast, a distance of about seven inches; "cut and lacerated the plaintiff without her knowledge or consent, under the pretext that the glands of the breast were affected with tuberculosis and it was necessary to remove the same, and greatly irritated that said part of plaintiff's body by the cutting aforesaid, and did then put 22 stitches in said opening, and did said act in a careless and negligent man-

ner, in this, that he did not use antiseptics, and by reason of the uncleanliness of said operation in not using proper antiseptic and clean and sterilized instruments, and in not having the hands in the proper cleanly condition, and in performing said operation when it was entirely unnecessary, the said plaintiff having no tubercular glands. thereby caused an eruption of the skin and septicemia and a poisoned condition of the blood, causing the right side of the breast of plaintiff, arm and leg on right side to be constantly sore and affected with an eruption which is incurable and constant and very painful."

Defendant filed a motion to make the petition more definite and certain in certain particulars, one paragraph of which was directed against the allegation in the second paragraph of plaintiff's petition—"subjecting her to great indignities." This motion was overruled. Defendant also filed a motion to strike from the petition the words, "great indignities," which was also overruled. Thereupon defendant answered, first, denying generally all allegations not specifically admitted; and then alleging that when called upon to treat plaintiff he found her suffering very severe ovarian and uterine pains at her monthly periods; that he gave her the necessary and proper treatment required in such cases; gave her the best care and skill in such treatment, and in nowise omitted or neglected his duties or care towards her in any respect; that both plaintiff and her husband advised with the defendant and with other physicians and surgeons as to the condition of plaintiff's health, constitution and physical condition, and as to the operations to be performed upon her by defendant to relieve her and to restore her health, and both plaintiff and her husband, in all the treatments given plaintiff and in all the operations performed upon her by defendant and at the operations in February and May, 1908, consulted, advised with and directed defendant to use, and he did use, the best and greatest care, endeavor, judgment, skill and discretion, "save and except that said plaintiff stated several times to defendant that she did

not wish her ovaries to be removed except as a last resort, but nevertheless would leave that question to the judgment and discretion of defendant, and she wished defendant to save them or one of them, if possible, and defendant alleges that said ovaries and Fallopian tubes were in a dangerously unsound and unhealthy condition and the appendix was dangerously unhealthy and unsound and so badly affected that he found it necessary to remove and he did remove one of the ovaries, the appendix and a portion of one of the Fallopian tubes, all the same being approved and advised by other attending physicians;" denies the allegations contained in paragraph 4 of the petition; and alleges that plaintiff was not in general good health, nor was her constitution strong and unimpaired as therein alleged; "that for a long time prior to the event alleged in said amended petition, and during all the time alleged therein, she had consulted and been treated by defendant and many other physicians and surgeons in regard to the same, and so informed the defendant;" and alleges that in all of his services and treatment of the plaintiff he used the best care, skill, services and endeavor to cure and restore plaintiff to good health, and in nowise omitted his duties or care towards her in any respect thereto. The reply is a general denial.

Prior to the alleged abortion in July, 1907, the history of plaintiff's physical condition is substantially as follows: In 1895, the year prior to her marriage, her health was in a precarious condition, causing her to fear that she was going into consumption. She was carried from the house to a carriage and from the carriage to a train and taken to Wyoming, in hopes that change of climate might be beneficial. At that time she was having hemorrhages, the cause of which is unknown, but they evidently led to the fear above suggested. Her health having improved, in 1896 she was married. When her first child was born she had convulsions of so severe a character that her attending physicians advised against her having any more children. When her second child was born she again

suffered from convulsions, apparently not quite so severe as those experienced at the time of the birth of the first child. The second child, when born, was so imperfect physically that "it could not live." It died in three or four days. For some time previous to July, 1907, her menstruation, at the time of her monthly periods, was imperfect and unnatural. She was afflicted with what is termed vicarious menstruation. She would menstruate partly through the mouth, instead of in the natural and normal way. During the month just prior to the time of the alleged abortion she visted St. Paul, Nebraska, where she had formerly lived and had been treated by Doctor Nicholson. While there she was again treated by this physician. He was introduced as a witness for plaintiff, and testified that when she came to his office at that time she complained "of different symptoms, and, as I remember them, one was scanty menstruation." He made an examination of her at that time, using a speculum for that purpose. He testified: "As I found an unhealthy condition at the mouth of the uterus, I, after cleaning it off carefully, I used an iodine solution with a swab, swab with an iodine solution on it, painting the mouth of the uterus." He also testified that he found the womb in an unhealthy and congested condition, and described in detail his treatment. He further testified that vicarious menstruation is an abnormal condition—a rare disease; that "the average practitioner might go through life and not see one;" that in such a case he would look for the patient to probably become anæmic and run down in health. It was within a few days, or at most a week or two, after this treatment of plaintiff by Doctor Nicholson, under the conditions above described, that plaintiff claims defendant produced the abortion. Her testimony is that she was suffering great pain and the defendant was called; that he remained with her substantially all night, treating her from time to time; that during the night he inserted a dilator into the mouth of the womb and prescribed ergot as a medicine. The doctor denies having used a dilator

or any instrument other than a speculum, and also denies having prescribed ergot. His testimony is that when he was called he found her suffering great pain, and after propounding the ordinary questions that a physician would ask as to what she thought the trouble was, and after having made a thorough examination of the condition of the abdomen as to pain in the stomach, as to whether or not she had vomited and as to whether or not she had had menstruation previously, and as to what she thought was the cause of her condition, "she told me that she had had a great number of attacks of this kind at her monthly periods and thought it was due to her menstrual period at this time." He was asked: "Was there any reason or cause, in your opinion and judgment as a physician, that an abortion ought to be committed? A. I had no knowledge of the pregnancy previous to this time, therefore I had no right to conclude that an abortion could be produced." He further testified that the substance which was subsequently ejected was not an ordinary fœtus, or child, but was what is termed a mole. He fully described to the court and jury the cause and character of a mole, and testified that where there is this deformity in growth the authorities state, and his own knowledge of cases of that kind is, that at about the fourth or sixth month these foreign bodies are removed by nature. He testified that he described the mass which had been ejected the moment he saw it, designating it to the plaintiff as a "large tumor." He also testified to having opened it, and that "there was no child of any description in this mass." The testimony of Doctor Nicholson and of the defendant, as well as that of plaintiff herself, negatives the idea that defendant on that occasion would have any reason to suspect that plaintiff was pregnant, or that the thought of producing an abortion could have been in his mind at the time he was treating her. Plaintiff now claims that she was about four and one-half months advanced in pregnancy. Each of the four months during her alleged pregnancy she had had her monthly period to a

certain extent. During those times she suffered pain and had scanty menstruation. Her own thought, when she went to Doctor Nicholson and when she called defendant, unquestionably was that she was not pregnant, but that she needed something to relieve the defective menstruation. That is what she told Doctor Nicholson and that is what she told the defendant. Moreover, according to her own statement, if in that condition she did not desire an abortion. She did not request one, nor was one even suggested by the physician. She was a married woman living with her husband, and there was no reason why the defendant should commit a crime by performing this unnecessary act. We think the evidence is insufficient to sustain this charge.

The allegations of the petition and the substance of plaintiff's testimony are that at the time defendant performed the first operation, in February, 1908, no other physician was called in to assist in administering the anesthetic and in performing the operation, and that defendant then removed one of plaintiff's ovaries. Upon both of these points plaintiff fails to make out her case. The facts are that Doctor Skinner was present and administered the anesthetic, and that Doctor Werkman was present and assisted in the operation. That either of the ovaries was removed at this time is denied by defendant, and he is sustained by the fact that at the time of the second operation in May following both ovaries were in place. What the defendant did at the time of the February operation was to remove the appendix and treat the ovaries, both of which operations were with the approval of Doctor Werkman who assisted in the operation. The treatment of the ovaries was what has been termed "plastic work," which we understand to be removal of diseased portions of the ovaries, and which in this case consisted of cystic tumors adhering thereto. So far as the record before us shows, everything that was done by defendant at that time met with the approval of Doctor Werkman who was assisting in the operation. There was

nothing from which negligence or unskilful work, so far as the operation was concerned, can be inferred. The next operation was in May following. At that operation Doctor Skinner was again present and administered the anesthetic, while defendant was assisted in the operation by Doctor W. N. Ramey, who has been a practicing physician and surgeon since June, 1893, and by whom plaintiff had been examined prior to the operation, for the purpose of getting his ideas as to whether or not further surgical work was necessary. Defendant and Doctor Ramey both testified that upon opening the abdomen and making an examination they found both ovaries and the Fallopian tubes badly diseased. Defendant testifies that prior to this operation he had talked the matter over with plaintiff and her husband; that plaintiff again refused to consent to the removal of both ovaries, even though an examination should disclose that they were badly diseased, but that she consented to the removal of one, if it should be found necessary. The evidence shows that during this operation defendant and Doctor Ramey discussed the conditions as they found them and that everything that was done met with the approval of both. Doctor Ramey's testimony is that "the conclusion was that the work be done just as the doctor did it. It was necessary for the welfare of the patient." Doctor Ramey also testified as follows: "Q. Was there anything that was left undone that ought to be done? A. I would say that, according to my judgment, there was. Q. What was it? A. Had I been doing the work, I should have wanted to remove the right ovary in the same manner that we did the left one, and I so stated to the doctor. Q. At the time of the operation? A. Yes, sir." The defendant testified that at that time they removed the left ovary, but that as to the right ovary he removed the cysts which had formed, taking out the portion of the pedicel by which the cysts were fastened. "These were removed from the right ovary and the remainder of the ovary left on the right side, which she has at the present time unless it has been removed

since." If this testimony by defendant were not true it would have been a very easy matter to have shown its falsity, as an examination of the plaintiff would have disclosed whether or not she still retained her right ovary. The operation upon the right breast, which was done at the same time last above referred to, is testified to by both the defendant and Doctor Ramey. Their testimony shows that there were two nodules or tumors in the outer and under surface of the breast removed, also some enlarged glands; one nodule, as stated by Doctor Ramey, being as large as a medium hen's egg, and the other somewhat smaller. Defendant gives the size of these nodules or tumors as somewhat larger than that stated by Doctor Ramey. Dr. Ramey states that the growth was a foreign substance. He also testifies that he and defendant talked about them when they found them, and what ought to be done with them, and says: "And, if I remember correctly, I counseled even more radical work than the doctor did on that breast. Q. Were they of such growth and substance that it was necessary to remove them? A. Yes; I so considered it, beyond a question." The testimony of these doctors is corroborated in many particulars by Mrs. Andrus and Miss Heers, both of whom are experienced nurses. That each operation was deemed necessary by defendant and at least one other experienced surgon, and that each operation was properly performed, is established by what we consider clear and convincing testimony, and we do not see how any right of action can be based upon the operations themselves.

This brings us to the question as to whether there was any negligence on the part of defendant in the treatment of plaintiff after these several operations. That the last incision in the abdomen and the one in the right breast did not perfectly heal after the operations was established. The cause for their failure to heal has not been established, by any testimony outside of plaintiff herself, and her testimony with reference thereto is very unsatisfactory. Whether the failure of the wound to heal was

the result of plaintiff's diseased condition or from outside infection can only be conjectured. Mrs. Andrus and Miss Heers, the nurses, testified that after the operation plaintiff would put her hand under the bandages and raise them up so as to look at the wound; that they admonished her that she must not do that, but, heedless of their admonition, she repeated the performance at other times; and Mrs. Lee, a patient in the hospital, who had also been operated upon, testified that plaintiff showed her one of the wounds; that "she drew the bandage back upon her breast, and drew it back aways, and called me in to look at it. * * * I told her right away I did not care to look at it, or something to that effect, and she wanted me to touch it, and I did not and I would not. And I told her she better leave it alone. Q. Did she touch it herself? A. Once she did. She was feeling over it with her hand and I went and called the nurse. Q. Did she remove the bandage from the wound? A. Well, she had it pushed back. Q. How far off of the wound did she push it? A. Well, I should judge I could see two or three inches of it. Q. Showed you the raw wound? A. Yes, sir." She testified that this was less than a week after the operation. This testimony was all contradicted by plaintiff, and it may be said that it therefore raised a question of fact for the jury. Under ordinary circumstances this would be true, but we do not think that the naked testimony of the plaintiff should be permitted to prevail over that of surgeons of years of experience both in the practice of their profession and as instructors in a medical college, and over the testimony of two nurses, and a disinterested patient in the hospital. If the condition of plaintiff is the result of infection from without, it cannot, so far as the evidence discloses, be ascribed to improper dressing and bandaging of these wounds. No witness has testified that they were either improperly dressed or bandaged. No witness has testified that the bandages slipped off or became loose, so as to expose the wounds to infection, while three witnesses have testified

to acts of the plaintiff which may have caused the very infection of which she now complains. Considering the whole testimony, we think there is far more reason to suspect that the failure of plaintiff to make a full and speedy recovery, and the sores upon her person, are the result of her own inherent diseased condition, or of her own disobedient exposure of her wounds.

While plaintiff was upon the witness stand, her counsel had her leave the witness stand and recline upon the counsel table, and, with the assistance of a nurse, arrange herself on the table so as to exhibit her right breast and her right leg from the hip to the ankle. The jury were then permitted to leave the jury box and pass around the table to view the portions of plaintiff's body exposed. When this had been done, counsel for defendant requested that Doctor Wilmeth, whom he had with him in the courtroom to assist him in medical examination, be permitted to examine the right leg and right breast of plaintiff. To this counsel for plaintiff objected, but finally permitted the doctor to make some examination of these parts. Counsel for defendant also requested that Doctors Ramey and Wilmeth be permitted to examine the other breast, "and in order to have a full understanding of this they would have to examine the abdomen of this plaintiff also." This was objected to upon the ground that, if they desired to make an application, they should have made it before entering upon the trial. It was insisted by counsel for defendant that, as a part of the matter had been gone into by plaintiff by the exhibition of a portion of her person, defendant was entitled to go into the whole of the question and examine plaintiff both as to the operation in the breast and that in the abdomen; that plaintiff could not consent to let them examine her limb and say that they could not examine anything further, and cited section 339 of the code. While this discussion was going on, plaintiff got off the table and resumed her place on the witness stand. Upon being denied the right of examination requested, defendant requested that he himself be

permitted to examine the left breast and abdomen as part of the transaction that transpired in the courtroom, and counsel for defendant stated that they desired to complete that examination as a part of the cross-examination. The hour for adjournment having arrived, the court withheld its ruling, and on the next day sustained the objection to the application by defendant to make such examination. The court also denied the request of defendant to appoint physicians and surgeons of the same school as defendant to examine the same parts which had been introduced in evidence by plaintiff, counsel limiting his request to the parts that had been exhibited to the jury. The request for permission to examine "the other breast" was clearly gratuitous. It was in no manner involved in the action. It had never been operated upon or treated by defendant, and no part of plaintiff's claim was based thereon. The fact that plaintiff voluntarily exhibited certain parts of her body, involved in the action, did not give defendant a right to examine other parts, not involved. That part of defendant's request was, therefore, very properly denied; but, in denying the other parts of the request, we think the court erred.

Counsel for plaintiff seek to justify the ruling of the court, under our holdings in *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *Stuart v. Havens*, 17 Neb. 211, and *City of Chadron v. Glover*, 43 Neb. 732. In the *Finlayson* case the holding in the syllabus is: "It is not error for the court during the progress of a trial to refuse to order the plaintiff, who sues for injuries to his person, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury." From the opinion (p. 589) we learn that the request for an examination was made in the midst of the trial; that "the record shows that, when the witnesses on the part of the defense were placed upon the stand to testify upon

the question of the alleged injury, the defendant in error was asked to 'step forward and allow the witness to examine him,' which he did. The record further shows that the defendant in error was 'asked to remove his coat and vest, which he does, and the witness examines the back, sides, and other portions of the body of the plaintiff; also as to his breathing; also the condition of the eyes, the muscles of the leg, the condition of the tongue and of the pulse.' From this it must seem that, even if the court had erred by its refusal to make the order, that error was cured by the examination made by consent of defendant in error." In the *Stuart* case we held simply that, "if a personal examination is desired, the application should be made before the trial begins and experts agreed upon by the parties or appointed by the court." In the *Glover* case, in the fifth paragraph of the syllabus, it is held: "Whether it is proper in an action for personal injuries for the court to appoint, on the application of the defendant, a commission of physicians to make a physical examination of the plaintiff, *quære.* If such action is proper, the application must be made before the trial commences." In the opinion it is said: "It has been twice intimated that it is within the power of the court to make such an order. *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; *Ellsworth v. City of Fairbury,* 41 Neb. 881. In each case, however, the court disclaimed the intention of deciding the question. It was not necessary in either of those cases and it is not necessary here."

We think the same is true of this case. The question here is not whether it is error for the court, during the progress of a trial, to refuse to appoint a commission to examine the plaintiff. The question is, did the court err in refusing to permit the defendant, either in person or by other physicians whom he had in court, to make further examination of the portions of plaintiff's body which she had voluntarily exhibited, and to examine the wound in the abdomen caused by the incision made at the time of the second operation. Up to the time that plaintiff

voluntarily made her body an exhibit, the cases relied upon by plaintiff might apply, but, when she saw fit to introduce her body as an exhibit in this controversy, we think defendant had a right to examine and submit to the jury, if he saw fit, any other part of that exhibit, involved in the action. Defendant had been charged with negligence in the performance of both operations—that upon the right breast and that upon the abdomen. It had been charged that, as a result of these operations and the treatment in connection therewith, plaintiff's health had been permanently injured and she had become afflicted with sores upon her right breast and hip and leg; and, when plaintiff introduced her body as an exhibit, she thereby waived the immunity from exposure of her person, to which some courts have held that all persons are entitled. Section 339 of the code provides: "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; thus, when a letter is read, all other letters on the same subject between the same parties may be given. 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." The several operations performed by defendant form the basis of plaintiff's claim of injury. Her claim, therefore, is based upon detached acts, one upon the breast, the other upon the abdomen, but both upon the same body; and, when that body was introduced in evidence for the purpose of showing to the jury one of those detached acts, the defendant had a right to examine and give in evidence the other.

In *Winner v. Lathrop,* 22 N. Y. Supp. 516, it is said: "I have been referred to no case, nor have I been able to find any, in which a party claiming a physical injury has first voluntarily submitted the injured part to the inspection of the jury as evidence, and has refused to permit the adverse party to follow up that examination,

in the presence of the jury, by a personal or professional inspection of such injured part. Such an examination, seems to me, to stand upon a different principle from that of a compulsory examination by the adverse party, before or at the trial, when the injured party has not made profert of the injured part. It seems to me that it would be unfair, and might result in gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party, by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court, as well as the adverse party, and produce upon the mind of the jury a false impression as to the extent of the injury. The member having been put in evidence as a part of the direct examination, it is, for the purposes of the trial, made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a specie of evidence that is offered by one party, in support of his case, which may not, in the presence of the same tribunal, be examined and criticized by the party against whom it is offered. We think, therefore, that the inspection and examination of this limb should have been ordered and permitted by the court; and, in case of refusal to submit to such inspection by the plaintiff, her evidence, so far as that exhibit and explanation of the same by the plaintiff was concerned, should have been stricken out on defendant's motion. The plaintiff had a right to exhibit this injured limb to the jury, and the defendant had no power to exclude it. * * * If the party injured can offer this evidence, most certainly the adverse party should be permitted to cross-examine and criticize such evidence. For both the grounds above discussed, we think that this judgment and order should be reversed."

In *Haynes v. Trenton*, 123 Mo. 326, 336, it is said: "The leg, when shown to the jury, became evidence in the case which may have carried with it great weight, particularly in the matter of the damage sustained. This evidence thus put into the case was open to attack by the

opposite party in any manner which may have tended to reduce its probative force. When, for example, a piece of machinery or material, the character or quality of which is in issue, is exhibited to the jury, it is always competent for the opposite party to have experts examine it and give the jury their opinion of the quality of the material and the sufficiency of the machinery. When admitted in evidence, and its damaging effect has been accomplished, it cannot be withdrawn until the party affected by it has had opportunity to apply every test for the purpose of overcoming its force and effect. No reason can be urged why a different rule should be applied when an injured limb is the subject of inquiry. Defendant had the undoubted right in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg and testify, as experts, to its character and probable permanency. The question was not as to the right of defendant to have an examination of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff." And so in this case the question was not simply as to the right of defendant to have an examination of the person of the plaintiff, but as to his right, as stated by the Missouri court, to have the body, which had been introduced as an exhibit, examined by experts to test the effect and reduce the weight of evidence presented to the jury by the introduction of such exhibit.

In *Chicago, R. I. & T. R. Co. v. Langston,* 19 Tex. Civ. App. 568, the court say: "As this was the single specific ground of objection urged to their making an examination of the injured limbs, preparatory to giving an opinion, we come to the question, seeing that the ruling was probably prejudicial, whether the court erred in denying appellant's request for such preliminary examination. If appellee had not made profert of her injured limbs to the court and jury, the request to have experts appointed by the court to make an examination over her objection would present the question which has been repeatedly before the courts,

and upon which the decisions are in hopeless conflict, so much so that judges of the same court, notably of the supreme court of the United States, are divided in opinion upon it. For the two opposing lines of argument, see the majority and minority opinions in *Union P. R. Co. v. Botsford,* 141 U. S., 250. This court, and presumptively our supreme court, stands committed to the views expressed by the majority of the court in the *Botsford* case. *Gulf, C. & S. F. R. Co. v. Pendery,* 14 Tex. Civ. App. 60, in which writ of error was refused. But inasmuch as appellee invited an inspection and examination of her wounded limbs by making profert of them on the trial, we have finally concluded that the case presents a different question from that so often considered, and that its solution should not be influenced by our cherished Anglo-Saxon principle of personal security. In our opinion, it would be a perversion of that principle to apply it in a case like this, where the plaintiff, unfortunate and pitiable though she be, voluntarily lays bare before the court and jury her afflicted members for the inspection and examination of the judge, jury, and advocate. For all the purposes of the trial, she thus waived her right to object, upon the ground of an invasion of her right of personal security, to a reasonable and proper examination, under the direction of the court, of the wounded parts. She thus by her own voluntary act conferred upon the court jurisdiction to compel what otherwise she might have refused to submit to. Having conferred the jurisdiction, she could not take it away at pleasure without trifling with the court. It lasted as long as the trial lasted." The court then quotes with approval from *Haynes v. Trenton, supra,* and concludes as follows: "So we hold in the case at bar, not that the court should have appointed physicians to make an examination in the first instance, for we have no statute prescribing such procedure, but that when appellant's counsel made the following proposition, as shown in the bill of exceptions, 'Doctor, will you please here and now examine the plain-

tiff and her injuries?' the objection made by appellee's counsel should have been overruled and the witnesses permitted then and there, or at such other reasonable time and place as the court might appoint, to make the proposed examination and give the result of it to the jury. It seems to us that this would have been simple justice, and consequently that it ought to have been done, thereby avoiding the appearance of an *ex parte* trial on this important issue. No harm could have resulted from such a course. Upon this ground, therefore, we feel constrained to order a reversal of the judgment." This case was taken to the supreme court and there affirmed in 92 Tex. 709.

In *Chicago & N. W. R. Co. v. Kendall,* 167 Fed. 62, 71, the circuit court of appeals of our own circuit held: "Where the plaintiff, in an action for an injury to his knee, while on the witness stand voluntarily exhibited the injured knee for inspection by the jury, the defendant is entitled to require him to submit the same to a surgical examination, and the court has power independently of any statute to compel such submission." In the opinion, after considering *Union P. R. Co. v. Botsford, supra,* and other cases, the court say: "In the present case we are not dealing with an application for a surgical examination in advance of the trial. Here the plaintiff at the trial voluntarily exhibited his knee in open court for inspection. Having done this, it was beyond his power to arrest the investigation. The defendant and the court were entitled to employ any agency in its examination which would aid in the determination of the issue on trial. It is universally held that, where an inanimate object is produced upon the trial of a case, it is subject to any legitimate examination and test which will elucidate the matter in dispute. It may be submitted, for example, to chemical treatment, or to examination by the microscope. Simply looking at the plaintiff's knee with the eye of a layman furnished little aid in determining its condition. He himself maintained that there were no external evi-

dences of injury. Whether there were hidden ailments could only be discerned by the skill of a surgeon, and the defendant and the court were as much entitled to turn the eye of a surgeon upon the plaintiff's knee as they would have been to look at a blood stain through a glass. Having exhibited his knee to the jury, it became a part of the evidence in the case, and the mere accident that the thing exhibited was part of a human body could only qualify, and not defeat, the right of complete investigation"—citing *Chicago, R. I. & T. R. Co. v. Langston,* and *Haynes v. Trenton, supra.*

While plaintiff was a witness upon the stand she was permitted to testify that some time in April, 1908, which was something like two months after the first, and about a month prior to the last, operation, defendant brought her to Lincoln to see Doctor Ramey; that he stated that "he was going to be busy that forenoon at the hospital there, and he told me to meet him at the Lincoln hotel and we would have lunch and then go and see Doctor Ramey;" that after luncheon he procured a room and took her to it, and while in the room he insulted her by making an indecent proposal to her. This testimony was strenuously objected to by defendant. The objection should have been sustained. It did not even tend to sustain any averment in plaintiff's petition. The petition clearly and definitely bases plaintiff's claim for damages upon defendant's acts in producing the alleged abortion, in performing the surgical operations and in administering poisonous drugs, and makes no reference whatever to an assault of any other kind. In his brief counsel for appellee says: "On page 56, the court says: 'The indignities, as I understand the petition, are afterwards explained as meaning that the surgical operation was an indignity, and the lacerations and dilations, and that sort of thing, being contrary to direction.' The above statement of the court is the true interpretation of the petition." If those words, which in the statement of the case we have quoted from the second paragraph of the

petition, do not lay a foundation for this testimony, then clearly none was laid. In passing upon the objection the court said: "Had I been able to interpret this petition as laying the foundation for matters of a scandalous character I would have struck it out. The petition does not apprise me of anything of this character to be proved, but I am inclined to admit this testimony, notwithstanding the shape of the pleading. I think the petition should have stated plainly if an incident of this kind was to be proven, that the defendant would know what he was charged with, and that he might have an opportunity to prepare for it at the trial. The petition don't apprise the defendant that this sort of testimony would be offered. However, it is part of the conversations between the plaintiff and defendant, and I am going to overrule this motion and hear the testimony." Here the court gave a clear, clean-cut legal construction of the pleading, but followed it with an erroneous ruling. The testimony offered was entirely foreign to the issues. It could shed no light upon the question as to whether the defendant had skilfully or negligently performed the surgical operations complained of. In fact, from every point of view, it was improper and should have been excluded. That evidence of this character would probably be seriously prejudicial to defendant seems to us is not open to discussion, and we have no doubt but that it was largely responsible for the very liberal verdict of the jury.

Instruction No. 6 defined malpractice as "the bad professional treatment of disease, pregnancy or bodily injury, from reprehensible ignorance or with criminal intent." As an abstract legal proposition, or if based upon pleadings charging "reprehensible ignorance" or "criminal intent," the instruction would be correct, but a trial court has no right to state in its instructions to the jury an abstract legal proposition that is outside of the issues. In this case neither "reprehensible ignorance" nor "criminal intent" is charged. The charge is negligence, and we think the court would have been more accurate if it had told the jury that malpractice within the issues ten-

dered by the pleadings in this case means the negligent performance of the surgical operations set out, or the bad professional treatment of plaintiff immediately preceding or subsequent to the performance of such operations. There was enough in the case already to inflame the average jury without the introduction by the court of the questions of reprehensible ignorance and criminal intent. The court should, therefore, have carefully guarded this important definition in its instructions. The same objection applies to instruction No. 10.

By instruction No. 12 the court told the jury that it was the duty of the plaintiff as a patient to follow the instructions prescribed by the physician and surgeon, and that, "if she did not follow the reasonable instructions of the defendant, then the defendant is not liable for damages resulting from such disregard of her duty." This instruction correctly states the law, but the court followed it with instruction No. 14: "The jury are instructed that, in so far as testimony has been introduced tending to show that the plaintiff did not submit to all of the treatment prescribed by the defendant for her, and recommended in her case, the burden of proof is upon the defendant to show prescriptions were proper and adapted to the end in view." Our understanding of the law always has been that, in an action for damages against a licensed physician or attorney at law, the presumption is that the defendant had performed his duty to the plaintiff; that the lawyer correctly advised his client or the physician correctly prescribed for his patient; and when the contrary is alleged the burden, in every such case, is on the plaintiff to establish his allegation. In such cases, as in all other cases, under our holdings, where the burden of establishing his case is upon the plaintiff, that burden does not shift, but continues throughout the trial. Instruction No. 14 shifted the burden and placed it upon the defendant, and thereby conflicted with instruction No. 12, which properly placed the burden.

Physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account

of any failure in that respect, unless through some default of their own duty. They are not required to possess the highest knowledge or experience, but the test is the degree of skill and diligence which other physicians in the same general neighborhood and in the same general line of practice ordinarily have and practice. *Patten v. Wiggin*, 51 Me. 594; *Force v. Gregory*, 63 Conn. 167; *Martin v. Courtney*, 75 Minn. 255. When they accept professional employment they are only bound to exercise such reasonable care and skill which are usually exercised by physicians or surgeons in good standing in the same school of practice. And where any person claims a cause of action for neglect to exercise the required degree of care or skill, the burden is upon him to prove such neglect. *Martin v. Courtney, supra*, the case last cited, was an action for malpractice. In that case, as in this, there was some conflict in the evidence. Upon that point the court say: "If the defendant can be found guilty of malpractice upon the evidence in this case, it would be unsafe for any man to practice medicine or surgery. * * * While, in view of Doctor Gray's testimony, it cannot be said that there was no evidence tending to support the verdict, yet it is so manifestly against the great preponderance of the evidence that it was an abuse of discretion not to grant a new trial, and submit the case to another jury. * * * It is not merely a sum of money, but also the reputation of the defendant as a physician and surgeon, which is involved, and we do not think that he should stand condemned for all time as an incompetent upon the state of the evidence disclosed by the record, without at least submitting the question to one more jury of his countrymen."

For the insufficiency of the evidence, and the errors of law above set out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

ROSE, J., dissents.

EXCHANGE BANK OF ONG, APPELLEE, V. CLAY CENTER STATE BANK, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,754.

Evidence: PAROL EVIDENCE: ADMISSIBILITY TO VARY WRITING. "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite*, 30 Neb. 302.

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

Ambrose C. Epperson and *W. G. Hastings*, for appellant.

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

FAWCETT, J.

This action was instituted in the district court for Clay county to recover a balance claimed by plaintiff to be due to it upon an open deposit account subject to check, which it had with defendant, amounting, as alleged, to $6,112.91. The defendant admitted liability and offered to confess judgment for $819.86, which offer was refused. After both sides had rested, the court directed a verdict in favor of plaintiff for $6,121.08, and entered judgment thereon. Defendant appeals.

Plaintiff and defendant are banking institutions organized under the laws of this state, and during the times in controversy were closely allied in business transactions; the cashier and managing officer of plaintiff, J. O. Walker, being a member of the board of directors and at least nominal president of defendant. In February, 1907,

Walker addressed to the cashier and managing officer of defendant the following letter: "I have a few excess loans and I may want to send you some of them, until after we are examined I don't want any excess loans, when examiner is here, and he may come most any day and may not for a month or so, now I wish to know if you can handle them I will charge your account, and you give us credit for the amount, this way it will throw the balance in our favor, and you would treat our account then the same as a deposit account, subject to check so in that way it would not show due to other banks, but would be included in your subject to check account, but this would cut your cash reserve down the amount that we owe you but you have a good reserve, so it would not make much difference, or we might exchange some notes if you did not wish it this way you can let me know and I will send them over to you, if agreeable and after the examination you can return again to us, I want to carry the loans, but can't now as we will be examined soon and they will be excess loans, so you will see the point I am trying to make. I will also compute the interest. I remember what we talked of at Schwab's sale but had forgot it, so will go over this as soon as possible and count up the extra 1% to Feb'y 1st, or Jan'y 1st, and from then on 3% as agreed to. Hope you are O. K., I am feeling good except a bad cold I can't get over, let me hear from you at once and oblige, I am yours truly, J. O. Walker, Cashier." The evidence shows that, in accordance with that letter, Walker sent to defendant a promissory note dated September 20, 1906, for $5,000, due six months after date, payable to plaintiff bank, and signed by C. W. McMaster and E. McCann. When that note was mailed to defendant it was indorsed "without recourse." When received by defendant it was placed to the credit of plaintiff upon defendant's books. On May 23, 1907, Walker addressed another letter to the cashier of defendant, in which he uses this language: "I will send you a written guarantee as to notes so you can file same away

as this was to be done, as per our talk when the notes were forwarded or turned to you." The testimony of the cashier and assistant cashier of defendant bank shows that the words quoted from that letter referred to an agreement they had with Walker as cashier of plaintiff at the time they took the McMaster note, with others, that "they would guarantee the payment of the note;" that it was to be put in writing; and that "they would send" a written guarantee as to the notes. No written guarantee was ever sent. As the note in controversy was about to mature on March 20, 1907, it was sent by defendant to plaintiff for collection and credit. Instead of collecting it, Walker took a six months' renewal of the note, payable to plaintiff bank, indorsed it as before, sent it to defendant, and notified defendant that plaintiff bank had credited defendant bank with the interest. When the note matured again in September, 1907, the same course was pursued. Like action was taken when it again matured in March, 1908. When it was about to mature again in September, 1908, defendant sent the note to plaintiff as before, with this letter: "J. O. Walker, Cashier, Ong, Nebr. Dear Sir: Inclosed herewith we hand you for collection No. 1679 $5,000.00 which will be due September 20th, 1908. Please credit our account with the amount together with the interest when collected, and advise us of the amount. We are having lots of call for money for short time and hope these people will settle promptly. Yours very truly, F. T. Swanson, Cashier." The note was not paid, nor any renewal taken. Some time during that fall Mr. Walker died. On December 23, 1908, defendant's cashier wrote the following letter to plaintiff's new cashier: "Grace L. Walker, Cashier, Ong, Nebraska. Dear Miss Walker: We have this day charged the Exchange Bank of Ong with $5,300.00 being for principal and interest on the C. W. McMaster note, $5,000.00 being principal and $300.00 being interest from March 20th, to date. This is in accordance with the guarantee given us by J. O. Walker as cashier of the Exchange Bank of

Ong at the time this note together with some others were transferred here. This leaves a balance of $610.91 due the Exchange Bank of Ong as shown by our books." On the next day Miss Walker replied as follows: "Mr. F. T. Swanson, Cashier, Clay Center, Nebr. Dear Sir: Replying to your letter of the 23d inst., will say that we herewith return the C. W. McMaster $5,000 note which we held for collection. We do not see at this time any prospect for collecting same, and therefore return it to you. You say in your letter you have charged our account for said note and interest. This note was never owned by this bank, it was never run on our books, and you received it without recourse. Please credit our account again, for we cannot pay the note. Very truly yours, Grace L. Walker, Cashier."

The only matter in controversy here is this note. Upon the trial the district court excluded the testimony offered by defendant in support of its alleged contemporaneous oral agreement that plaintiff would guarantee the payment of the note in controversy, on the ground that it tended to vary the terms of a written instrument; and it is urged by plaintiff here that, "under the terms of this written indorsement, the defendant, when it purchased the original note and accepted the renewal notes, contracted with the plaintiff that the plaintiff should not be liable thereon or for the payment thereof. This written indorsement cannot be contradicted, varied or explained by evidence resting in parol." This contention is in line with the holding of the district court, but we think the rule in this state is settled adversely to plaintiff's contention. In *Norman v. Waite,* 30 Neb. 302, we held: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the

written contract or agreement is to depend." In *Barnett v. Pratt*, 37 Neb. 349, we held: "Further, it is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument." In *Davis v. Sterns*, 85 Neb. 121, we held: "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." The above holdings are reaffirmed and adhered to in *First Nat. Bank v. Burney, ante*, p. 269. The law merchant is not involved. The note had not passed into the hands of an innocent purchaser. This action is between the original parties to the contract, and we think the rule announced in the above cases is now well settled both here and elsewhere. The court erred in excluding the testimony referred to and in directing the verdict.

There would seem to be another good reason to doubt plaintiff's right to recover in this action. In the letter of December 24, 1908, above set out, the cashier of plaintiff says: "This note was never owned by this bank, it was never run on our books." If so, why should plaintiff have any credit for it on defendant's books. The inference is that the McMaster note was a transaction between McMaster and Walker personally, and for that reason it never was run on the books of plaintiff bank. There is no evidence to show that McMaster ever received any money from plaintiff bank for the note. If so, plaintiff has lost nothing by its nonpayment. By its letter of December 24 it repudiates all ownership of it, and it would seem that it should abide by such repudiation. If it never paid McMaster the consideration for the note, and never carried it upon its books, we see no reason why it should demand payment of it. But counsel for defendant say

that the letter does not refer to the note dated March 20, 1907; that it may or may not refer to the note dated September 20, 1906, or to the other notes or some of the other notes which were purchased from plaintiff by defendant in February, 1907, the time the McMaster note was purchased; that it may or not refer to still other notes bought by defendant at some other time than February, 1907. This argument is not convincing. The letter is too plain to be misunderstood. It says: "*This* note was never owned by this bank, it was *never* run on our books." This language is used in connection with the McMaster note set out in the letter, and the use of the word "never" clearly shows that the cashier had reference not only to the last renewal note, but to all of its predecessors.

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

REVERSED.

WILLIAM COOPER, APPELLEE, V. MARK M. COAD, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,758.

1. **Principal and Agent:** AGENCY: EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to establish a general agency on the part of defendant's agent, for the sale of the horses in question, and sufficient to justify plaintiff in dealing with him as such.

2. ———: AUTHORITY OF AGENT. And that the services rendered by plaintiff were reasonably within the scope of the business in which defendant's agent was engaged.

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

A. W. Crites, W. J. Coad and *W. H. Herdman,* for appellant.

Andrew M. Morrissey, Justin E. Porter, Allen G. Fisher and *William P. Rooney, contra.*

FAWCETT, J.

This action was commenced in justice court in Dawes county, where plaintiff had judgment, and defendant appealed to the district court. Upon trial in that court there was a verdict and judgment for plaintiff, and defendant appeals.

It appears that plaintiff was a liveryman and dealer in horses at Crawford, in Dawes county. Defendant was an importer and dealer in blooded stallions, and was located at Fremont, in Dodge county. In March, 1907, defendant employed one J. H. Hall, who, a number of years prior thereto, had been superintendent of the horse ranch at Fremont, for the purpose of selling six stallions that defendant still had on hand as a remnant of his former stock; he having decided to retire from that business. The arrangement with Hall seems to have been that Hall was to make a trip of investigation along the line of the railroad, for the purpose of finding a location where the prospects seemed good for selling these horses. He stopped at Alliance, but, conditions there not being satisfactory to him, he proceeded to Hemingford, where he again found conditions unsatisfactory. He then proceeded to Crawford, arriving there about the middle of the afternoon. Upon arriving there he called at three livery stables in Crawford, the last one being that of the plaintiff. Plaintiff was not in when he called, and, after talking for a while with one of plaintiff's employees, Hall left, stating that he would call again that evening and "talk horse" with plaintiff. In accordance with this statement he called at plaintiff's livery stable after supper that evening. Plaintiff testifies that at that interview they talked over the situation; that he assured Hall that the horses could be sold there; and that Hall agreed with him that, if he (plaintiff) would assist in selling the

horses, he should receive as compensation for his services $100 for each horse sold; that they thereupon went to the telegraph office, where Hall wired for the horses to be forwarded; that the horses arrived two or three days thereafter, and that he at once proceeded to do everything he could to assist in their sale; that with the help and assistance of plaintiff defendant sold one horse to Sherrill Brothers and another to Stevenson Brothers. Defendant in his answer denied the making of the contract by Hall, and further alleged that, if Hall did make the contract, his act in doing so was outside of the scope of his powers; that Hall had been employed by defendant for a stated compensation as his salesman and agent, with power only to sell and dispose of said animals and to care for and keep the same at defendant's expense pending such disposal; that he had no other or different power or authority, and that plaintiff at all of the dates named in the petition had full notice and knowledge of all of these facts. Defendant in his brief concedes that, the jury "having returned a general verdict in favor of Cooper, it must be conceded for the purposes of these appeals that Hall did so contract with Cooper." The question for our consideration, therefore, is whether Hall in making this contract acted within the scope of his authority as the agent of defendant. The only assigned errors argued in defendant's brief are: (1) That the verdict is not sustained by sufficient evidence; (4) that the verdict is contrary to the instructions given by the court; and (7) that the court erred in giving instruction No. 3 given upon its own motion. We will consider these errors in the order named.

Mr. Hall was introduced as a witness for defendant. He testified that he was a stranger in Crawford; that he "didn't know a soul." Plaintiff has lived in Dawes county for many years. He testified that he knows substantially every man and every horse in Dawes county. Hall was a stranger. He was there for the purpose of selling horses of a kind which are not purchased generally by people who own horses, but are only purchased by a man here

and there over the country. It is true he told plaintiff that the horses belonged to Coad, but, so far as the evidence shows, nothing else was said by him to indicate or cause plaintiff to suspect that there were any limitations on his authority as Coad's agent. After making the contract he, in plaintiff's presence, wired for the horses. The horses came accompanied by a caretaker. Hall secured quarters for them. He also had with him printed matter for distribution. The horses ranged in price from $500 to $1,500, according to the testimony offered by defendant, and from $500 to $1,250, according to the evidence introduced by plaintiff. Hall was there as defendant's agent to sell horses of this character and value, in a town where "he didn't know a soul," with power to name the price, so far as any purchaser was concerned, regardless of whether any limitation had been placed upon the price by his principal. He had power to sell them for cash or upon one or two years' time, and to pass upon the solvency of the purchaser. There was nothing to lead any one dealing with him to suspect that he did not have full authority to resort to any reasonable means to effect a sale of the horses. We do not think the agreement he made with plaintiff was, considering the character of the horses and the prices fixed upon them, at all unreasonable. Defendant says that in his instructions to Hall he fixed a price at which the horses should be sold; yet we think it will not be claimed that, if Hall had sold one of those horses at a hundred dollars less than the price fixed by defendant, and delivered the horse to the purchaser and collected the agreed price, defendant could have repudiated the sale. If Hall had learned of a prospective purchaser living at some distance from Crawford, there can be no doubt but that he would have had authority to employ the plaintiff or any one else to go out and try to induce such prospective purchaser to come in and examine the horses, and to pay him for his time and trouble, regardless of whether a sale was made or not. If so, he surely had a right to make arrangements with a man wh

was thoroughly acquainted with that line of business in that county that, if he would assist in obtaining purchasers and take his chances of getting his pay upon sales actually being made, he should receive a compensation of $100 for each animal sold, and that, in the event of a failure to close a sale, he should receive nothing. Under the evidence before us, we think Hall was the general agent of defendant Coad for the purpose of selling those horses, and that he was clothed with power to bind defendant by any reasonable agreement he might make in respect to the business in hand.

In the light of the above holding, the giving of instruction No. 3, given by the court on its own motion, could not have prejudiced defendant, as it is immaterial that the court submitted the question of the apparent scope of Hall's authority, and did not elsewhere in its instructions define apparent scope of an agent's authority.

We have carefully examined the instructions given by the court and do not think there is any merit in defendant's contention that the verdict is contrary to such instructions.

The case was properly submitted to the jury, upon evidence sufficient to sustain the verdict returned. Two courts have found for plaintiff for the full amount of his claim and there the matter should end.

AFFIRMED.

WILLIAM COOPER, APPELLEE, V. J. H. HALL, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,759.

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

A. W. Crites, W. J. Coad and *W. H. Herdman,* for appellant.

Andrew M. Morrissey, Justin E. Porter, Allen G. Fisher and *William P. Rooney, contra.*

FAWCETT, J.

This action was tried in the district court upon the same record and to the same jury as *Cooper v. Coad, ante,* p. 840. The amount demanded was $100 for the sale of another of the stallions, referred to in said case, to one McDowell. There was a verdict and judgment for plaintiff, and both cases were argued together here. For the reasons stated in our opinion in the former case, the judgment of the district court is

AFFIRMED.

FRED A. GROUT, APPELLEE, V. JOHN H. MEYER, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 17,090.

Evidence examined and referred to in the opinion, *held* sufficient to sustain the findings and judgment of the trial court.

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

G. N. Anderson, for appellant.

A. L. Bishop, contra.

FAWCETT, J.

Plaintiff instituted this action in the district court for Wheeler county to recover a balance of $360.02 claimed to be due to plaintiff for wintering 202 head of cattle between the 1st day of December, 1908, and May 1, 1909. Defendant conceded the making of the contract alleged by plaintiff, substantially as alleged, and admits that

plaintiff himself until March 1, 1909, and by his agent for the remaining two months, fed and cared for the cattle. The only real controversy in the case is over defendant's counterclaim for five head of cattle which he claims were missing at the time he retook possession on May 1. There was a trial to the court without the intervention of a jury, which resulted in findings and judgment for plaintiff for $340.08. Defendant appeals.

The month of April, 1909, ended on Friday. Plaintiff's agent, in charge of the cattle, testified that on the Sunday previous defendant promised that he would take the cattle away on Friday, April 30; that on that day he hauled four loads of hay to the pasture or corral where the cattle were being kept and fed it to them; that this was the last hay he had; that on the day previous he had counted the cattle and they were all there, and that on the evening of April 30 he closed the gate and securely wired it. Mr. Munsinger, a disinterested witness who resided within five rods of the corral, testified that the cattle got out that night. He was unable to state the time exactly, but fixed it somewhere about 11 o'clock. As to the conditions next morning, he testified that he was familiar with the gate; noticed it the evening of April 30; that it was wired up as testified to by plaintiff's agent; that he examined the gate "to see why the cattle had gotten out, and found the gate lying straight out, turned straight out and the cattle were all out on the meadow;" that this was the only opening in the fence through which they could have passed; that the other gates were all closed; that the gate stood straight out from the fence. Upon being interrogated by the court, he testified that the gate was not broken, but had by some means been thrown wide open; that the cattle did not seem to have touched the gate when they came out. On cross-examination he testified that the wire with which the gate had been fastened was "thrown down about three feet from the post where it was wired up to the gate." He drove or assisted in driving the cattle back into the pasture. He

also testified as to having counted the cattle twice that morning. His first count was 207 and his second 202, which would be the right number. Defendant testified that he went to get the cattle in the afternoon of May 1; that his son and a gentleman who happened to be passing counted and found there were only 194, which would be eight head short; that he hired a man to assist him to hunt for the cattle; that they succeeded in finding three, but that five of his largest steers never were found, and for the value of those steers and the expense of hunting them he claimed damages in the sum of $295.

It will be seen that the testimony of plaintiff's agent, as to the closing of the gate and fastening it with wire on the evening of April 30, is corroborated by Mr. Munsinger, and the testimony of the latter, as to the position of the gate and of the wire which had fastened it the night before, is uncontradicted. In the light of this testimony, we are not prepared to say that the district court erred in holding, as it must have done, that the escape of the cattle from the corral on the night of April 30 was not due to any negligence on the part of plaintiff or his agent. It is evident that someone opened the gate that night, as the conditions described by the witness Munsinger entirely negative the idea that the cattle broke out. The duty of plaintiff was to use reasonable care and diligence in safely keeping and caring for the stock. If the five head of cattle, which were never found, were stolen that night, plaintiff would not be liable for their loss; and, as the five head in controversy were not found, after the diligent search which defendant testified to having made for them, the inference is very strong that they were stolen. But, even if they were not stolen, if the opening of the gate on that night was the act of some evilly disposed person—an act of vandalism—we do not think plaintiff would be liable for the steers which strayed away after they had thus been turned out. Upon a review of the whole record, we think the district court was right in holding that plaintiff had fulfilled his contract. As will

be seen, the case is purely one of fact. No questions of law are involved which require consideration. The trial court saw the witnesses upon the stand and made its findings. We cannot say that the findings are not sustained by sufficient evidence.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. THOMAS HOCTOR ET AL., RELATORS AND APPELLEES, V. PATRICK J. TRAINOR ET AL., RESPONDENTS AND APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 17,765.

1. **Mandamus**: ELECTIONS: VOLUNTARY SURRENDER OF OFFICE. Respondents, who held the offices of mayor and city clerk, respectively, were by a writ of mandamus ordered to call a primary and a general election, in advance of the time when, as they contended, such election should have been called. They complied with the command of the writ by calling such elections. Thereafter, upon presentation of their certificates of election by the persons elected at such election as respondents' successors, respondents turned over their respective offices, together with all of the books, papers and documents pertaining thereto, to their said successors, who have ever since held and are now holding and administering the same. *Held*, That the surrender of their said offices by respondents was voluntary on their part.

2. **Appeal**: DISMISSAL. And in such a case an appeal by respondents of such mandamus action, prosecuted to this court after such voluntary surrender of their offices, will, upon motion, be dismissed, on the ground that a decision in this court in such action could afford no actual relief and would be followed by no practical results.

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

Brome, Ellick & Brome and *Benjamin S. Baker*, for appellants.

A. H. Murdock and *Sullivan & Rait, contra.*

FAWCETT, J.

The respondents Trainor and Good were on April 5, 1910, elected as mayor and city clerk, respectively, of the city of South Omaha. Their term of office, under the law as it then stood, was for two years, or until April, 1912. The legislature of 1911 amended the law under which the city of South Omaha was organized, so as to abrogate the holding of a city election in that city in the year 1912, and providing for the holding of the next election in May, 1913, and likewise providing that all of the elective officers of the city should hold their respective offices until such election in 1913. The relators, believing such amendment to be unconstitutional, at the proper time in 1912, if an election were to be held that year, tendered their petitions and filing fees as candidates for the offices of mayor and city clerk, respectively, to be voted for at an election which they contended should be held in April, 1912. The city clerk refused to file such petitions, giving as his reason therefor the amendment above referred to; whereupon the relators brought this action in the district court for Douglas county, praying for a writ of mandamus to compel the respondent Trainor, as mayor, to issue his proclamation calling for a primary election to be held on the 27th of February, 1912, and thereafter to issue the necessary proclamation and notices for the calling of a general election to be held in said city on April 2, 1912, and ordering the respondent Good, as city clerk, to receive the petitions tendered, etc. Upon hearing, the district court found the amendment of 1911 to be unconstitutional and ordered a writ to issue as prayed. Without further resistance, the respondents proceeded to call a primary election in February and a general election in April, at which election the relator Hoctor was elected mayor, to succeed the respondent Trainor, and one Perry McD. Wheeler was elected to

the office of city clerk to succeed the respondent Good. The returns of both the primary and general elections were duly canvassed by the proper authorities of the city, and Mr. Hoctor and Mr. Wheeler were declared duly elected to the offices of mayor and city clerk, respectively; whereupon, the respondents delivered up to their said successors their respective offices and all of the books, papers, and documents pertaining thereto, and such offices have ever since been administered by such successors. Nothing further was done in the case by the relators until after this court on June 22, 1912, handed down its opinion in *State v. Ryan, ante,* p. 696. In that case we held the amendment of 1911, above referred to, to be valid. Thereupon respondents filed their appeal in this court. Relators now move to dismiss the appeal upon several grounds, among which are: "(3) For the reason that the judgment of the lower court has been fully complied with, by the appellants herein, and that any judgment that this court might enter could not be enforced, as the time for any relief to appellants herein has long since elapsed;" and "(4) for the reason that any questions that might now be presented to this court in this action would be nothing but moot questions, and would not afford relief to either of the parties herein."

The motion appears to be meritorious. When the district court made its finding in favor of the relators and ordered the writ to issue as prayed, the respondents acquiesced in the judgment so rendered. They made no application to the district court for a supersedeas, which that court would have had power to grant (*Cooperrider v. State,* 46 Neb. 84; *Home Fire Ins. Co. v. Dutcher,* 48 Neb. 755), but, without further remonstrance or any attempt at appeal, they turned over their offices to the parties elected at the election called by them in obedience to the order of the district court. The writ issued by the district court did not command respondents to turn over their offices. It simply ordered them to call a primary and a general election. When they issued their calls for

those elections they did all that the writ commanded. Hence, when they surrendered their offices they did not do so in response to the command of the writ. They surrendered them in submission to and in recognition of the certificates of election presented by their alleged successors. So far as the writ of mandamus was concerned, they had complied with its commands, and as to them that action was at an end. If they felt that the election under which their successors were claiming was void, they should have stood upon their legal rights and have refused to turn over their offices. This they did not do. Their surrender of their offices was, therefore, voluntary on their part. This being true, we see no way by which they could be reinstated in their offices, even if we were to entertain the present appeal and reverse the judgment of the district court. In *Betts v. State,* 67 Neb. 202, we held: "A respondent in mandamus proceedings, against whom a writ has been issued, and who has performed its commands, after the allowance of a supersedeas and before his motion for a new trial has been disposed of, is not entitled to a review in this court of the question whether the writ should have originally been granted, especially where the judgment complained of provides for his reimbursement for costs and where his official term has meanwhile expired." We can see no difference between a case where the respondent's official term "has meanwhile expired" and one where he has fully complied with the mandate of the district court in a mandamus proceeding, and has subsequently voluntarily surrendered his office.

In *Farquharson v. State,* 26 Okla. 767, 110 Pac. 909, in an action very similar to the one at bar, it is held: "Where, pending appeal from a decree granting a mandamus directing the mayor of a city to call an election, the mayor calls the election, and the election is held before final decision is made upon the appeal, the appeal will be dismissed, upon the ground that the decision can afford no actual relief and will be followed by no practical results."

In *San Diego School District v. Supervisors,* 97 Cal.

438, it is held: "An appeal by a board of supervisors from a judgment in a mandamus proceeding, directing them to levy a tax for school purposes, will be dismissed upon motion, where it appears that after the judgment, and before the taking of the appeal, the board voluntarily complied with the mandate of the trial court by levying the tax."

In *State v. Napton,* 10 Mont. 369, the court uses language which is apt here: "A judgment of any kind from this court would present a peculiar result. An affirmance would be to direct the district court to issue a writ, which that court has already issued, and which has been obeyed. A reversal would be to say to the lower court, you may not order the clerk to do that which he has already fully performed. It is apparent that there is no controversy before us. The case is fictitious."

As this case now stands, it presents nothing, outside of a question of costs, except a moot question, and, as said in *Betts v. State, supra,* the matter of costs "will not alone afford such a subject of controversy as an appellate court will consider."

The motion is sustained and the appeal

DISMISSED.

STATE, EX REL. JAMES A. BENSON, APPELLEE, V. MAYOR AND COUNCIL OF THE CITY OF HASTINGS, APPELLANTS.

FILED OCTOBER 18, 1912. No. 17,504.

OPINION on motion for rehearing of case reported *ante,* p. 304. *Rehearing denied.*

PER CURIAM.

This cause was argued and submitted, and in due time a decision was rendered. The opinion is reported *ante,* p. 304. A motion and briefs for rehearing were filed, and,

upon further reflection and examination, some of the members of the court became doubtful of the correctness of the decision, and argument was ordered upon the motion for rehearing. When the cause was called for hearing, it was shown that the respondents had complied with the commands of the alternative writ of mandamus in all things and no rights could be protected or enforced by any further hearing.

The motion for rehearing is

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1. If party preparing abstract has not given the other party opportunity to examine it and has omitted material matter, and defects are supplied in an additional abstract by the other party, the rules will be construed liberally in favor of the party not at fault. *Roddy v. Missouri P. R. Co*..... 75

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cript and bill of exceptions, but not conclusions of counsel. *Carlson v. City of South Omaha* 215

6. Where a cause involving equitable principles is appealed on the merits, objections to the procedure on appeal should be made by motion or otherwise, and not withheld until the filing of briefs on final submission. *Bresee v. Ormsby*..... 399

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13. In absence of motion for new trial, a judgment sustained by the pleadings will ordinarily be affirmed. *Weller v. Sloan* 122

14. On appeal, no motion for new trial having been filed, the supreme court will ascertain only if the pleadings state a cause of action or defense and support the judgment. *Tait v. Reid* 235

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19. Where appellant relies on an assignment that the only evidence to establish a fact was incompetent, he should insert the evidence in the abstract, with the objections, rulings and exceptions. *City of Omaha v. Yancey*..... **261**

20. Where it is contended that there is no evidence on an issue, and the record is voluminous, the brief should refer to all evidence bearing on the point. *Murten v. Garbe*..... 439

21. Unless it is clear that some material issue is unsupported, the judgment will not be reversed for failure of evidence. *Murten v. Garbe* 439

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6. Interest on an additional judgment against stockholders of insolvent corporation *held* chargeable, under sec. 4, ch. 44, Comp. St. 1911, from date of demand, and not from date of original judgment. *First Nat. Bank v. Cooper*..... 624

7. A purchaser of stock of a corporation cannot rescind the sale on the ground of fraud, where he treated the stock as his own and accepted the benefits thereof, with full knowledge of the facts. *Dassler v. Rowe*..... 637

8. Where a corporation and an employee are sued jointly for negligence, a general verdict for the employee and against the corporation cannot be sustained, without evidence that other employees were guilty of negligence. *Zitnik v. Union P. R. Co.* 679

9. Where a proposition of a stockholder to purchase assets of the corporation is accepted by the board of directors, and is also submitted to a meeting of the stockholders and approved by a majority, and the transaction appears free from fraud and based on a reasonable consideration, it will not be declared invalid. *Forrest v. Nebraska Hardware Co*.... 735

10. Where officers of a corporation have unlawfully withdrawn funds and applied them to their own use, a receiver will be appointed for the corporation at the instance of a stockholder, unless the funds are restored and indemnity is given against further illegal acts. *Forrest v. Nebraska Hardware Co.* 735

11. Equity will enjoin acts of discrimination by officers of a corporation against a stockholder by which the value of his stock is unjustly depressed. *Forrest v. Nebraska Hardware Co.* 735

12. The expense of correcting the management of the financial affairs of a corporation by suit or by the appointment of a receiver, including compensation of counsel, may be charged against the corporation. *Forrest v. Nebraska Hardware Co.*, 735

Costs. See CORPORATIONS, 12.

Counties and County Officers.

1. Where a vacancy occurs in the office of county assessor more than 30 days prior to a general election, the county commissioners are required to fill the vacancy by appointment, the appointee to hold the office until the next succeeding general election. *State v. Coleman*..... 167

2. One county cannot replace a decayed wooden bridge over a

Counties and County Officers—*Concluded.*
division stream with a steel bridge, and recover from the other county as repairs. *Platte County v. Butler County*... 132

3. If one county replace three wooden spans of a division bridge with steel spans, it cannot recover from the other county as "needed repairs." *Platte County v. Butler County,* 132

4. Ch. 126, laws 1905, as amended by ch. 111, laws 1911, *held* to give county boards power to let contracts for bridges, culverts and road improvements to the lowest bidder, to reject any and all bids, and to purchase materials and employ labor and construct bridges and culverts. *State v. Coupe*.. 463

Courts. See QUO WARRANTO. TAXATION, 1.

1. Propositions advanced in an opinion not essential to the judgment pronounced are not to be regarded as final determinations or as legal precedents. *McCaffrey v. City of Omaha* 484

2. The county court has exclusive, original jurisdiction of probate of wills and settlement of estates, and its final orders within its jurisdiction are binding, and not subject to collateral attack. *In re Estate of Creighton*..... 654

3. An order of the county court in the settlement of an estate, by which distribution of the assets is made, is appealable to the district court, and, the proceeding being *in rem*, all persons interested in the assets are parties. *In re Estate of Creighton* ..... 65[illegible]

4. Controversies involving title to and ownership of real estate are not within the jurisdiction of county courts. *Bell v. Dingwell* ..... 69[illegible]

Criminal Law. See CONTINUANCE. EMBEZZLEMENT. FOOD. INDICTMENT AND INFORMATION. KIDNAPPING. LARCENY. NEW TRIAL. PEDDLERS. RAPE. ROBBERY.

1. Ch. 184, laws 1911, known as the "Indeterminate Sentence Law," *held* not to vest the prison board with judicial powers, in violation of sec. 26, art. V of the constitution. *Wallace v. State* 158

2. Sec. 117*b* of the criminal code, defining the crime of hog stealing, is an act complete in itself, and not amendatory of secs. 114 and 119. *Wallace v. State* 158

3. The purpose of sec. 117*b* of the criminal code, creating the crime of hog stealing, was to create an independent substantive crime, and it is not violative of any constitutional provision. *Wallace v. State* 158

4. Instruction as to weight of evidence of accused *held* not erroneous. *Wallace v. State* ..... 15[illegible]

Criminal Law—*Continued.*

5. Rulings on the giving or refusal of instructions cannot be reviewed unless challenged in the district court by motion for a new trial. *Lukehart v. State* 219

6. On a trial for receiving stolen property knowing it to have been stolen, the giving of an instruction defining larceny *held* not error. *Lukehart v. State* 219

7. Admission of certain evidence tending to impeach a witness for the defense, against whom a prosecution was pending for stealing the property alleged to have been unlawfully received by accused, *held* not prejudicial to accused. *Lukehart v. State* 219

8. Under sec. 436 of the criminal code, *held* error to require accused to immediately proceed to trial, without arraignment, after amendment of defective information. *McKay v. State* 281

9. One accused of felony and placed on trial under a defective information *held* not placed in jeopardy a second time by being forced to trial on an amended information. *McKay v. State* 281

10. On a trial for receiving stolen property, after evidence that the property stolen was received by accused, it is competent to prove, as tending to show guilty knowledge, that the same person had stolen similar property which had been received by accused, and that accused had received and cashed a check delivered to the thief in payment therefor. *Becker v. State* 352

11. On a trial for receiving stolen property, a check payable to accused in connection with a similar transaction *held* competent evidence as tending to show guilty knowledge. *Becker v. State* 352

12. It is not reversible error to receive in evidence indorsements on a check, not identified or explained, where the check was properly received, and the indorsements are immaterial. *Becker v. State* 352

13. The words in an instruction, "the fact that he (the accused) has been contradicted by other witnesses, if he has," *held* not erroneous, as implying that he has been so contradicted. *Becker v. State* 352

14. It is not error to refuse an instruction containing the statement, "the law does not favor confessions;" the force and effect of confessions being for the jury. *Becker v. State*.... 352

15. Under the showing, an improper statement of a juror in the jury room *held* not prejudicial error. *Lambert v. State*.... 520

Criminal Law—*Concluded.*

16. The practice of keeping jurors for lengthy periods without opportunity to sleep criticised, but *held* that the trial court did not err in refusing a new trial on account thereof. *Lambert v. State* 520
17. Where a farmer, who was the owner of a harness alleged to have been stolen, was permitted to testify as to the purchase price and the amount of wear it had received, and to give his opinion as to the value, *held* not error. *Lambert v. State* 520
18. Ch. 167, laws 1907 (Cr. code, sec. 117c), defining poultry stealing, *held* not to violate sec. 11, art. III of the constitution, relating to the enactment and amendment of laws. *Bartels v. State* 575
19. An instruction that the rule that requires proof of guilt beyond a reasonable doubt "is not intended to aid any one who is in fact guilty to escape," and that acquittal must be justified and a verdict of not guilty "authorized," is erroneous. *Bartels v. State* 575
20. The indeterminate sentence law *held* constitutional. *Williams v. State* 605
21. Where one was personally present at the commission of an offense, under circumstances leaving no doubt that his purpose was to participate in the act should occasion require, he is a principal. *Williams v. State* 605

Damages. See CARRIERS, 2. DEATH, 4. EMINENT DOMAIN. LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 1, 2.

1. In an action for personal injury, plaintiff cannot recover damages sustained in a special occupation, unless they are alleged and proved. *Yorty v. Case Threshing Machine Co.*. 449
2. A verdict for $20,000 for causing the death of a brakeman, earning $80 a month, at age 39, *held* excessive. *Hoffman v. Chicago & N. W. R. Co.* 783

Death. See NEGLIGENCE, 9-12.

1. Evidence *held* to support finding that injuries complained of were the proximate cause of death. *Albrecht v. Morris*.. 442
2. In an action for death, *held* not error, under the facts admitted and proved, to charge that decedent was killed without negligence on his part while acting "under the direction of those in charge of the engine and cars where he was working." *Fitzgerald v. Union Stock Yards Co*..... 493
3. In an action for death, whether a train with an engine in front was, under a custom of railroading, a signal that other cars should not be coupled onto it, unless by direction

Death—*Concluded.*

of the crew in charge, *held* a question for the jury. *Fitzgerald v. Union Stock Yards Co*..... 493

4. Verdict for $4,000 *held* excessive. *Fitzgerald v. Union Stock Yards Co.* 493

Deeds.

1. Where a deed purports to be the deed of the principal made by his attorney in fact, it may be signed by the attorney subscribing the name of the principal alone. *Tiger v. Button Land Co.* 433

2. An acknowledgment by an attorney in fact must recite that it is made by him in his representative capacity. *Tiger v. Button Land Co.* 433

3. It is not necessary to the validity of a deed, executed by the donee of a power to convey, that the intention to execute the power should appear by express terms in the instrument. *Willier v. Cummings* 571

Dismissal.

1. Where an action for injury to land is brought in the wrong county, and objection to the jurisdiction is interposed at any time before trial, it is proper to dismiss without prejudice. *Dhooghe v. Chicago, R. I. & P. R. Co*..... 613

2. Where an action is dismissed because brought in the wrong county, in order to predicate error on the dismissal because some of the property destroyed was personalty, it is incumbent on plaintiff to request the court to docket a separate cause of action therefor. *Dhooge v. Chicago, R. I. & P. R. Co.* 613

Divorce.

1. In fixing alimony, the court should consider the sources from and manner in which the property was accumulated, and exercise reasonable discretion in dividing it. *Miller v. Miller* 500

2. On appeal from the part of a decree relating to the division of property, the supreme court will try that issue *de novo*, and if the decree is just it will be affirmed. *Miller v. Miller* 500

3. In awarding alimony, the court may consider all the property rights of the parties and render such decree as may be equitable, irrespective of whether a decree in a former action had settled their property rights up to that time. *Rayles v. Rayles* 505

4. Evidence *held* to sustain decree of divorce for desertion. *Rayles v. Rayles* 505

Dower. See QUIETING TITLE, 4. TAXATION, 4.

Under sec. 20, ch. 23, Comp. St. 1905, the dower of a nonresident is limited to lands of which her husband died seized. *Burr v. Finch* 417

Elections. See COUNTIES AND COUNTY OFFICERS, 1. MUNICIPAL CORPORATIONS, 18. SCHOOLS AND SCHOOL DISTRICTS. STATUTES, 11.

Any attempt by the legislature to provide for the election of police magistrates in any other manner, or at other times, than fixed by the constitution is void. *State v. Mayor*..... 304

Electricity.

1. The right to maintain an overhead trolley wire carrying a deadly current of electricity across railroad tracks imposes the duty of so maintaining it as not to injure persons lawfully operating trains of the railroad company. *Scherzer v. Lincoln Traction Co.* 407

2. An injury to a railroad employee from contact with an overhead trolley wire affords a presumption of negligence, requiring the party maintaining the wire to show that its dangerous condition was caused by an unforeseen agency beyond its control. *Scherzer v. Lincoln Traction Co*..... 407

Embezzlement.

In a prosecution under ch. 170, laws 1907, for embezzlement of a crop by a tenant, it is not material when the relation of landlord and tenant began, or will terminate; it being sufficient if the tenant was in possession of the property when embezzled by him. *Murten v. Garbe* 439

Eminent Domain. See HIGHWAYS, 2. MUNICIPAL CORPORATIONS, 8, 9, 19. RAILROADS, 3.

The measure of damages for permanent injury to land by the construction of a railroad, no part of the land being taken, is the difference in its market value immediately before and after the construction. *Harris v. Lincoln & N. W. R. Co*... 755.

Equity. See QUIETING TITLE, 6.

1. Where equity has obtained jurisdiction it will adjudicate all matters in issue. *Bell v. Dingwell*..... 699

2. One fraudulently deprived of possession of real estate may join, with his suit in equity to recover title, a demand for accounting for rents and profits, and for partition. *Bell v. Dingwell* 699

Evidence. See APPEAL AND ERROR, 17-28. ASSAULT AND BATTERY. BILLS AND NOTES, 2. CRIMINAL LAW. NEGLIGENCE, 4, 7, 9, 12-16. OFFICERS, 3. PHYSICIANS AND SURGEONS, 4-7. RAPE. SALES. WATERS.

1. Offer of books of account *held* insufficient to authorize their

Evidence—*Continued.*
admission under sec. 346 of the code. *Goodyear Tire & Rubber Co. v. Bacon* 62
2. In proving an admission against defendant by an averment of his answer, plaintiff is only required to offer so much of the pleading as is necessary to show the admission, where the severance does not pervert its sense. *Sibert v. Hostick*, 255
3. Evidence that a letter containing a notice was "mailed" implies payment of necessary postage. *City of Omaha v. Yancey*, 261
4. Though a letter duly addressed, stamped and posted is presumed to have reached the addressee in due course of mails, such presumption may be rebutted. *City of Omaha v. Yancey* 261
5. Evidence denying the receipt of notice inclosed in a letter properly addressed, stamped and mailed, does not overcome the presumption that the notice was received, but presents a question of fact for the jury. *City of Omaha v. Yancey*.... 261
6. In an action on a note by the payee, parol evidence *held* admissible to show the purpose for which it was executed. *First Nat. Bank v. Burney* 269
7. Where the good-will of a business is included in a written contract of sale, without restriction on the right of the seller to re-engage in the business, parol evidence that he agreed not to do so is inadmissible. *Wessell v. Havens*.... 426
8. Parties to a written contract may prove a contemporaneous oral agreement constituting a condition on which performance of the written agreement is to depend. *First Nat. Bank v. Burney* 269
9. The existence of a written agreement does not prevent the party apparently bound from pleading and proving a contemporaneous oral agreement constituting a condition on which performance of the written agreement is to depend. *Exchange Bank v. Clay Center State Bank*..... 835
10. In determining whether a notary's name was appended to a jurat with a rubber stamp, or written, the trial court need not disregard the appearance of the name and accept as conclusive indefinite testimony that it was stamped. *Burr v. Finch* 417
11. A physician may testify as to the condition of a deceased person as disclosed by his examination immediately after an injury, and statements as to pain suffered and necessary to the determination of the location and extent of his injuries. *Albrecht v. Morris* 442
12. If two persons jointly convert personalty, admissions of one

Evidence—*Concluded.*

are competent evidence in an action against both jointly, and neither is entitled to an instruction to disregard the admissions of the other. *Fullerton v. Fullerton*..... 649

Exceptions, Bill of. See APPEAL AND ERROR, 16, 24.

Executors and Administrators, See PARTIES. WILLS.

1. A legatee appointed executor, who delayed settlement of the estate, *held* not estopped from claiming interest on his legacy, where the value of the estate was enhanced by the delay. *Lewis v. Barkley* 127
2. It is the duty of the probate court, and of the district court on appeal, to state the entire accounts of an executor, who is a legatee. *Lewis v. Barkley* 127
3. On appeal from the allowance of a claim against an estate, the district court tries the case *de novo*, and must determine whether the claim was filed in time, and whether an amendment allowed by the county court was such a departure as amounted to filing a new and different claim after the time limited therefor had expired. *In re Estate of Gamble* 199
4. Amendment of claim for money advanced to pay notes *held* justly allowed. *In re Estate of Gamble*..... 199
5. Under sec. 226, ch. 23, Comp. St. 1901, if letters of administration are taken out by the widow or next of kin, it will be presumed that it was in behalf of all parties interested, and creditors may present their claims within the time limited by sec. 214 of the act. *First Nat. Bank v. Bradshaw*, 714
6. Sale and deed of homestead *held* valid as execution of a power given in a will. *Willier v. Cummings*..... 571

False Imprisonment.

Evidence *held* to sustain verdict for plaintiff in action for false imprisonment. *Duffy v. Scheerger* 511

Food.

Violation of a rule of the food commissioner that payment for cream purchased for commercial purposes should not be made on the day of the purchase *held* not punishable under secs. 9838, 9840, Ann. St. 1911. *State v. Elam*..... 460

Fraud.

1. Petition *held* to state a cause of action for damages for fraud. *Parsons v. Barnes* 116
2. Evidence in action for fraud *held* to sustain verdict for plaintiff. *Parsons v. Barnes* 116
3. Variance between the allegation and proof of fraud in the procurement of a release *held* immaterial. *Yorty v. Case Threshing Machine Co.* 449

Garnishment.

Payment by judgment debtor under order of court to attachment creditor of judgment creditor of the amount of the judgment, *held* a satisfaction, though the court was without jurisdiction to enter personal judgment against the defendant in the attachment suit. *Hume v. Peterson*..... 347

Guardian and Ward.

1. A guardian has no authority to borrow money on his ward's real estate without an order of court. *Bell v. Dingwell*.... 699
2. Where a guardian mortgaged land owned by him and his ward, without an order of court, *held* that it is a lien only on the guardian's undivided interest. *Bell v. Dingwell*.... 699

Habeas Corpus. See PARENT AND CHILD.

Highways. See PLEADING, 3.

1. The filing of a claim for damages by the location of a public road over private land *held* a waiver of objections on the ground of irregularities in locating the road. *Sittler v. Board of Supervisors* 111
2. Before a county can appropriate private lands for a public road, it must provide for payment of damages, either by appropriation from the proper fund or levy of taxes; and the landowner may enjoin the use of his property until such compensation is made. *Sittler v. Board of Supervisors*.... 111
3. Ch. 115, laws 1909, amending sec. 6157, Ann. St. 1907, requires damages caused by the laying out, altering, opening or discontinuing any county road to be paid by warrant on the general fund of the county. *Sittler v. Board of Supervisors* 111
4. To constitute a highway by dedication, the offer of dedication need not be accepted by the public authorities, but may be accepted by the public. *Carpenter v. Schnerle*..... 806
5. Slight deviations from the line of public travel to avoid obstructions will not prevent the establishment of a highway by prescription. *Carpenter v. Schnerle*..... 806
6. Where a landowner notifies the public to cease traveling across his lands and to travel the section-line road, which is done for ten years, it constitutes a dedication as a public road. *Carpenter v. Schnerle* 806

Homestead. See EXECUTORS AND ADMINISTRATORS, 6. WILLS, 9.

1. The unpaid price which a married woman agrees to pay for land is a lien on a subsequently acquired homestead interterest therein, though her husband did not execute and acknowledge the contract of purchase. *City Savings Bank v. Thompson.* 628

Homestead—*Concluded.*

2. Money loaned by vendor to vendee to improve land purchased is not purchase money, under secs. 3, 4, ch. 36, Comp. St. 1911, subjecting a homestead to a vendor's lien. *City Savings Bank v. Thompson* 628
3. A dwelling-house moved from one lot to another *held* to retain its homestead quality. *City Savings Bank v. Thompson* 628
4. Where a widow, as guardian of minor children, exchanged land in a foreign state, owned by her and her children jointly, for land in this state, fraudulently taking title in her own name, she cannot hold it as a homestead as against the children. *Bell v. Dingwell* 699

Husband and Wife. See HOMESTEAD, 1. JUDGMENT, 2, 3. PLEADING, 6.

1. A married woman may make contracts only in reference to her separate property, or business, or on the credit thereof and with intent to charge her separate estate. *Union State Bank v. McKelvie* 728
2. In an action on a note, where the petition shows that defendant was a married woman at the time the note was executed, it should further appear that it was made with reference to, and upon the credit of, her separate property and with intent to bind the same. *Union State Bank v. McKelvie* 728

Indemnity. See JUDGMENT, 9, 10.

Indictment and Information.

An information which charged an offense as subsequent to the date on which the information was filed, or on an otherwise impossible date, *held* defective. *McKay v. State*..... 281

Injunction. See CORPORATIONS, 11. HIGHWAYS, 2.

Insurance.

1. Permission to foreign surety companies to do business does not create a contract, and, if it did, the state, under its police powers, has the right to regulate the business by additional legislation. *State v. American Surety Co*..... 22
2. Where a collector for an accident insurance company, pursuant to agreement with a member, furnished the money for premium of the member on the pay-day and remitted to the company, *held* that the insurance continued in force. *Redman v. Fidelity Accident Ins. Co*..... 89
3. The simultaneous repeal and re-enactment, in terms or in substance, of parts of a by-law of a fraternal beneficiary association preserve without interruption the re-enacted provisions. *Quick v. Modern Woodmen of America*..... 106

Insurance—*Concluded.*

4. Where the evidence in an action on a fraternal beneficial certificate tended to show that assured changed his occupation from painter to locomotive fireman under conditions releasing defendant from liability under the contract, *held* error to refuse an instruction that plaintiff is not entitled to recover, if the jury find the facts to be as stated. *Quick v. Modern Woodmen of America* 106

5. Minutes of the legislative body of a fraternal beneficiary association reciting that a section of the by-laws has been amended and repealed *held* not to prove that the original section has been eliminated, where neither the original nor amended section is disclosed. *Quick v. Modern Woodmen of America* 106

6. An action by the receiver of an insolvent mutual insurance company, organized under ch. 46, laws 1899, to recover an assessment by the court to pay liabilities *held* properly brought in equity, and summons may be issued to any other county. *McCall v. Bowen* 241

7. A by-law of a mutual insurance company, which provides that buildings in which stovepipe runs through the roof or side are not insurable, is binding on the members. *Swett v. Antelope County Farmers Mutual Ins. Co*..... 561

8. A by-law of a mutual insurance company, which provides that removal of personal property to any farm in the county shall not invalidate the insurance if the building into which it is removed is insurable, is valid. *Swett v. Antelope County Farmers Mutual Ins. Co*..... 561

9. Demand for payment by a mutual insurance company of an assessment on a policy, after a loss under it, is not a waiver of its terms, in absence of plea and proof of payment. *Swett v. Antelope County Farmers Mutual Ins. Co*.. 561

10. Where an insurance company relies as a defense on false representations in answers in the application, it must plead and prove that the answers were made as written in the application. *Crites v. Capital Fire Ins. Co*..... 771

11. Insured *held* to have used due diligence in attempting to pay his premium note, and, the day of its maturity not having expired when the property burned, the policy was in force. *Crites v. Capital Fire Ins. Co*..... 771

Interest. See CORPORATIONS, 6. JUDGMENT, 17. WILLS, 2-4.

A claim for interest on money deposited in court as performance of a contract sued on in equity must be determined by consideration of equities between the parties. *Townsend v. Swallow* 564

Intoxicating Liquors.

Petition for license *held* sufficient. *In re Hartwig*..... 779

Judgment. See ATTACHMENT. COURTS, 1, 2. NUISANCE, 3.

1. "The village Board of the Village of Curtis" is not a person, natural or artificial, authorized to sue or be sued, and a judgment nominally against it binds no one. *Adams v. Village Board of Curtis* 125
2. Where a married woman fails to make the defense of coverture to an action on a note, and allows judgment to be rendered against her, she is conclusively bound thereby. *Jones v. Knosp* 224
3. Where a married woman allows her separate property to be sold on execution, she cannot thereafter sue to set aside a sheriff's deed to the purchaser on any ground available to her as a defense to the action in which the execution was issued. *Jones v. Knosp* 224
4. A judgment of a justice of the peace, filed and indexed in the office of the clerk of the district court, is a lien on after-acquired property, and such property is subject to execution in satisfaction thereof. *Jones v. Knosp*..... 224
5. If process is served on a defendant in a wrong name, and he suffers a default, or omits to plead misnomer, he is concluded by the judgment, and in future litigation he may be connected with the judgment by proper averments. *Jones v. Knosp* 224
6. Where process is served on a defendant in a wrong name, he should appear and object by motion, in the nature of a plea in abatement, or he will be concluded by the judgment. *Jones v. Knosp* 224
7. Under sec. 82 of the code, providing for the opening of a judgment within five years, relief may be granted after the expiration of five years, where notice was given and a sufficient showing made within the statutory time. *Rine v. Rine* 248
8. On application for relief under sec. 82 of the code, providing for the opening of a judgment within five years, the authentication of an affidavit in support of the application may be amended after the expiration of five years; notice having been given within the time. *Rine v. Rine*..... 248
9. In an action against a contractor for the amount of a judgment against a city for damages resulting from his negligence, notice to him of the original action *held* sufficient to make the judgment therein binding on him. *City of Omaha v. Yancey*. 261

Judgment—*Concluded.*

10. In an action by a city against a contractor's bondsmen for the amount of a judgment for injuries resulting from the contractor's negligence, notice to the bondsmen of the original action *held* sufficient to make the judgment against the city binding on them. *City of Omaha v. Yancey*..... 261

11. A right under a tax sale certificate may be barred by the decree in a suit where the owner is a party, and his claim to priority is assailed in the pleadings and adjudicated against him. *Cowles v. Kyd* 274

12. One duly served with summons becomes a party to the suit, and is presumptively present in court and charged with notice of every adverse claim in the petition. *Cowles v. Kyd* 274

13. Where the petition alleges that a defendant claims an interest in land in suit, but that his claim is inferior to plaintiff's, and he permits a finding and judgment against him, the judgment is *res adjudicata* as between him and plaintiff, and as between him and the purchaser at sheriff's sale. *Cowles v. Kyd* 274

14. When his lien is assailed, the holder of a tax sale certificate, issued less than two years previously, must set up his lien, otherwise his right to subsequently assert it is barred. *Cowles v. Kyd* 274

15. Where a court has jurisdiction of the subject matter and parties, its determination of disputed questions is binding on all the parties, and the remedy for error is by appeal, and not by collateral attack. *Cowles v. Kyd*..... 274

16. If a judgment debtor, in an action to revive in the name of the administrator of the judgment plaintiff, answers that the judgment has been paid, and that issue was tried without objection, it will be too late to object on appeal that, the judgment not being dormant, the answer constituted no defense. *Hume v. Peterson*..... 347

17. A decree for specific performance, on payment of a specified amount at a specified time, will not ordinarily bear interest before the time for payment. *Townsend v. Swallow*, 564

18. A decree for payment of money means lawful money of the United States; and a creditor is not required to receive private checks. *Townsend v. Swallow* 564

Judicial Sales.

Where notice, under an order of sale, is not published 30 days before the sale, the sale is voidable, and the defect is ordinarily cured by confirmation. *Bresee v. Preston*..... 174

Jury. See CRIMINAL LAW, 15, 16.

Kidnapping.

Evidence *held* insufficient to support conviction of unlawfully carrying away a child with intent to detain her from her father. *Fitzgerald v. State* 481

Landlord and Tenant. See EMBEZZLEMENT.

1. In a suit by a lessee against the lessor for breach of contract for possession, the measure of damages is the difference between the rental value and the rent reserved, and in addition special damages shown to have necessarily resulted. *Sibert v. Hostick* 255
2. In an action for the value of corn sold defendant by plaintiff's tenant, evidence *held* to support judgment for plaintiff. *Harvey v. Bowman* 569
3. A lessee is not released from his contract to pay rent, where he abandons the premises without the landlord's consent. *Prucha v. Coufal* 724

Larceny.

1. Evidence *held* insufficient to sustain a conviction. *Wallace v. State* 158
2. Evidence *held* insufficient to support conviction of poultry stealing. *Bartels v. State* 575
3. Under ch. 167, laws 1907, providing a penalty for poultry stealing, if value of property stolen is less than $35, the penalty as for a felony should not be inflicted, except in cases of habitual crime, or when the act is accompanied with circumstances of aggravation. *Bartels v. State*..... 575

Licenses. See NEGLIGENCE, 13. RAILROADS, 4.

Liens. See ATTORNEY AND CLIENT.

Limitation of Actions. See CORPORATIONS, 4. EXECUTORS AND ADMINISTRATORS, 3, 5. QUIETING TITLE, 5.

1. Sec. 13 of the code, limiting time of commencing a civil action for assault and battery, *held* not to apply to an action for trespass upon the person, resulting in birth of a child. *Kramer v. Weigand* 47
2. Suits for assessments made by the receiver of a mutual insurance company under direction of the court *held* not barred, though invalid assessments by the directors were made more than four years before. *McCall v. Bowen*..... 241
3. Where an action for false imprisonment was begun within one year from the time the cause of action accrued, the filing of an amended petition after one year *held* not the beginning of the action. *Duffy v. Scheerger*..... 511
4. Pleadings and evidence *held* to present a cause of action for fraud, and properly brought within the time limited by sec. 12 of the code. *Bell v. Dingwell*..... 699

Malicious Prosecution.

1. Evidence *held* insufficient to connect defendant with the criminal prosecution of plaintiff. *Gering v. Leyda*..... 430
2. If a petition charges both malicious prosecution and false imprisonment in one count, and no objection is made until after judgment, such objection will not be considered on appeal. *Murten v. Garbe* 439
3. If one causes unlawful arrest and imprisonment of another under a criminal statute, without probable cause, he cannot justify on the ground that the statute is unconstitutional or defective. *Murten v. Garbe*..... 439
4. One who, before instituting a criminal prosecution, makes a full statement of the facts to an attorney, and in good faith acts upon his advice, will not ordinarily be liable for malicious prosecution. *Duffy v. Scheerger*..... 511

Mandamus.

Where a mayor and city clerk were by mandamus ordered to call a primary and a general election, and they complied with the writ, and thereafter turned over their offices to their successors, the surrender was voluntary, and they cannot have a review of questions pertaining to the issuance of the writ. *State v. Trainor*..... 848

Marriage.

1. Marriage may be proved by the oral testimony of those present, and it is not required that the record be produced. *Boling v. State* 599
2. In a suit by a father, under sec. 33, ch. 25, Comp. St. 1911, to annul the marriage of his son on the ground that he was married without his parent's consent before he was 18, an order requiring plaintiff to contribute to the support of defendant's child is erroneous. *Caulk v. Caulk*..... 638

Master and Servant. See RELEASE.

1. In an action for injuries caused by an automobile, *held* that at the time of the accident no such relation of master and servant existed between defendant and the chauffeur as would render defendant liable. *Neff v. Brandeis*..... 11
2. To sustain a recovery for injuries caused by defendant's automobile, plaintiff must show that the chauffeur was defendant's servant and engaged in the master's business at the time of the accident. *Neff v. Brandeis*..... 11
3. It is the duty of an employer to warn an employee, 17 years of age, of dangers connected with the coaling of engines, due to the dangerous proximity of the track and coal chutes. *Chase v. Chicago, B. & Q. R. Co*..... 81

Master and Servant—*Continued.*

4. Knowledge of increased hazard from location of a structure in dangerous proximity to a defective railroad track will not be imputed to an employee, 17 years of age, merely because he had knowledge of general surrounding conditions. *Chase v. Chicago, B. & Q. R. Co.* 81
5. Unless a court can declare, as a matter of law, that an employee had or was chargeable with knowledge of dangerous conditions, so that he assumed the risk, the question should be submitted to the jury. *Chase v. Chicago, B. & Q. R. Co.* 81
6. Evidence in action for death of employee *held* to establish negligence of defendant in the construction and manner of operating a coal chute and the track adjacent thereto. *Chase v. Chicago, B. & Q. R. Co.* 81
7. An employee accustomed to handle threshing machines *held* to have assumed the risk of his employment. *Yorty v. Case Threshing Machine Co.* 449
8. Employer *held* liable for negligence of employees, though one employee sued jointly with the employer was found not liable. *Yorty v. Case Threshing Machine Co.* 449
9. An employer is liable for the consequences, not of danger, but of negligence. *Brown v. Swift & Co.* 532
10. A servant of mature years and ordinary intelligence should take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly. *Brown v. Swift & Co.* 532
11. The law applicable to the furnishing of tools by a master is not always applied, where a simple implement is furnished by him to a servant of mature years. *Brown v. Swift & Co.* 532
12. Where a servant of mature years has operated a simple implement for some time, or where its use is so simple that he can at once perceive the safe way of operating it if exercising ordinary care, the master is not required to instruct him in its use. *Brown v. Swift & Co.* 532
13. Where a servant, on account of his youth and for want of instruction, fails to appreciate the risks of labor he is commanded to perform, and is injured, the master is liable. *Breedlove v. Gates* 765
14. Where a child nine years old was injured while engaged in dangerous work, it is for the jury to say whether he assumed the risk. *Breedlove v. Gates* 765
15. Where a boy nine years old undertakes dangerous work at the command of the master, he is not guilty of contributory

Master and Servant—*Concluded.*

negligence, unless the danger was so manifest that he must have known that he could not do it without injury. *Breedlove v. Gates* 765

16. In an action against a railroad company for causing the death of a brakeman by backing a car against him in the night-time, evidence *held* insufficient, in absence of a custom requiring warning of the moving of the car, to prove actionable negligence. *Hoffman v. Chicago & N. W. R. Co*..... 783

17. In an action for remainder due on a contract of employment, evidence *held* insufficient to sustain finding that defendant had agreed to pay plaintiff $100 a month for a period for which he had received $75 a month. *Carlos v. Hastings Independent Telephone Co*..... 538

Monopolies. See STATUTES, 2.

1. The Gondring act (laws 1897, ch. 79) declares a combination to prevent competition in insurance to be a trust and an unlawful conspiracy against trade and business. *State v. American Surety Co.* 22

2. "Trade and business" in the Gondring act are intended as a generic term; and the term "trust" includes combinations in restraint of competition in insurance. *State v. American Surety Co.* 22

3. Under the Junkin act (laws 1905, ch. 162), its administration and enforcement are committed to the attorney general and the governor. *State v. American Surety Co*..... 22

Mortgages. See WILLS, 14.

1. A prior unrecorded mortgage *held* to take precedence of a sale under attachment or execution, if placed on record before the sheriff's deed based on such sale. *Minor Lumber Co. v. Thompson* 93

2. In the absence of fraud, confirmation of a sale made by a sheriff cures all defects in the proceedings subsequent to his receipt of the order of sale. *Bresee v. Ormsby*..... 399

3. One who takes possession under mesne conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to the rights of a mortgagee in possession. *Kaylor v. Kelsey* 404

4. Neither the mortgagor nor one claiming under him can assail the title acquired through void foreclosure proceedings of a valid mortgage, without offering to pay the amount of the decree and interest. *Kaylor v. Kelsey*..... 404

5. One taking a deed to land in the name by which he is generally known, against whom a mortgage is foreclosed by

Mortgages—*Concluded.*

that name, cannot sue to redeem on the sole ground that he was not sued by his full Christian name. *Clark v. Hannafeldt* 504

6. Where a note and mortgage held as collateral for a debt of mortgagees are unconditionally surrendered to them, they are proper plaintiffs in a suit to foreclose. *Burns v. Hockett* 546

7. Where foreclosure is properly commenced by the mortgagees, it may be prosecuted in their names, though, pending litigation, they transferred their interest in the security. *Burns v. Hockett* 546

Municipal Corporations. See ACTION. CONSTITUTIONAL LAW. NUISANCE, 1. OFFICERS, 2, 3. STATUTES, 10, 11.

1. To overturn a city ordinance on the ground that it is unreasonable or invades private rights, the evidence should be clear and satisfactory. *State v. Withnell*..... 101

2. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject. *State v. Withnell*..... 101

3. In the exercise of police power, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted, and when and how such police power should be exercised. *State v. Withnell*..... 101

4. Within constitutional limits, private property is held subject to proper rules regulating the common good and the general welfare of the people. *State v. Withnell*..... 101

5. In testing police regulations, the court should inquire whether they have relation to the public health, safety or welfare, and whether such is the end sought. *State v. Withnell* 101

6. Under statutory authority to define, regulate, suppress and prevent nuisances, acts of the city council may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon circumstances. *State v. Withnell* 101

7. The passing of an ordinance forbidding the construction of brick-kilns in a city may be a valid exercise of police power. *State v. Withnell* 101

8. The appraisal of damages from construction of a viaduct under subd. 3, sec. 129, art. I, ch. 13, Comp. St. 1909, does not create a liability against the city for the payment of such damages. *Phœnix Mutual Life Ins. Co. v. City of Lincoln* 150

Municipal Corporations—*Continued.*

9. The provisions of art. I, ch. 13, Comp. St. 1909, authorizing cities to require railroad companies to build viaducts over tracks are governmental in character, and create no liability on the part of the city for damages to abutting property. *Phœnix Mutual Life Ins. Co. v. City of Lincoln* 150
10. Under Comp. St. 1911, ch. 12*a*, secs. 106, 107, the creation of a street improvement district is the foundation of all further proceedings in a street improvement, including the levying of the assessment (sec. 198) and a relevy where a former levy has been set aside for irregularities (sec. 186). *McCaffrey v. City of Omaha* 184
11. No assessment for street improvement can be levied on property outside of the improvement district. *McCaffrey v. City of Omaha* 184
12. In a suit to cancel an assessment for paving a street, evidence *held* not to show that the improvement district included parts of three streets. *Carlson v. City of South Omaha* 215
13. The necessity of paving a street of different levels is a question for the municipal authorities, and not for the courts. *Carlson v. City of South Omaha* 215
14. An ordinance establishing a paving district *held* sufficiently specific. *Carlson v. City of South Omaha* 215
15. Estimate of cost of street improvement by city engineer, approved by city council, *held* to comply with sec. 61, ch. 17, laws 1903. *Carlson v. City of South Omaha* 215
16. The fact that, after a street improvement was partly constructed under a contract, a new contract for the remainder of the work was entered into, did not affect the legality of the proceedings authorizing the improvement. *Carlson v. City of South Omaha* 215
17. Where a board of fire and police commissioners directed the manner in which the chief of police should enforce the law for suppression of prostitution and sale of liquors, and he enforced the law accordingly, he is not subject to removal under sec. 1*a*, ch. 71, Comp. St. 1911, for wilful failure to enforce the law. *State v. Donahue* 311
18. Ch. 12, laws 1911, amending the charter of South Omaha by providing that the general city election shall be held on the first Tuesday in May, 1913, and that elective officers shall retain their offices until that time, is not unconstitutional as an appointment for another year or as extending their term of office. *State v. Ryan* 696
19. Under sec. 213, ch. 12*a*, Comp. St. 1909, known as the Omaha

Municipal Corporations—*Concluded.*
charter, to perfect an appeal from the action of the city council in awarding damages from grading streets, a petition must be filed in district court within 30 days after the final order assessing the damages. *Creighton University v. City of Omaha* 486

Negligence. See CORPORATIONS, 8. ELECTRICITY. MASTER AND SERVANT. RAILROADS, 4.
1. Act of God defined. *Amend v. Lincoln & N. W. R. Co*..... 1
2. Where a good-faith effort, without negligence, is made to rescue one from a place of danger, wrongfully caused by another, the effort, even if unsuccessful, will not relieve the wrongdoer from liability. *Amend v. Lincoln & N. W. R. Co.*. 1
3. Whether the natural connection of events is interrupted by a new and independent cause is usually a question of fact, and not of law. *Amend v. Lincoln & N. W. R. Co*..... 1
4. In an action for death, evidence *held* insufficient to prove intoxication of rescuing party. *Amend v. Lincoln & N. W. R. Co.* 1
5. In an action for death, instructions *held* to sufficiently charge as to the effect of intervening causes other than the negligence of defendant. *Amend v. Lincoln & N. W. R. Co.*. 1
6. It is not error to instruct that the natural instinct of men to avoid personal harm may raise the presumption that a person injured or killed was in the exercise of ordinary care. *Chase v. Chicago, B. & Q. R. Co*..... 81
7. Where plaintiff pleads specific acts as negligence, and there is no general allegation of negligence, an instruction that evidence of other acts of negligence may properly be excluded *held* not erroneous. *Bowers v. Chicago, B. & Q. R. Co.* 229
8. A custom of leaving trenches uncovered within inclosed premises *held* not a defense to an allegation of negligence, if the conditions were such as to cause a reasonably prudent man to believe that human life or safety were endangered thereby. *Albrecht v. Morris* 442
9. Evidence *held* to support finding that decedent's injuries were caused in the manner alleged in the petition. *Albrecht v. Morris* 442
10. An instruction that "by contributory negligence is meant negligence on the part of plaintiff," *held* not prejudicial in view of other instructions. *Albrecht v. Morris*..... 442
11. An instruction that, if the injuries to deceased were caused by the negligence of defendants, and such injuries caused "*or contributed*" to the death of deceased, the jury should

Negligence—*Concluded.*

find for plaintiff, *held* not prejudicial in view of additional charge that plaintiff could not recover unless such injuries were the proximate cause of death. *Albrecht v. Morris*.... 442

12. If a person is killed through negligence of another, and there is no evidence as to negligence or due care of the deceased, the law presumes that he exercised ordinary care. *Albrecht v. Morris* 442

13. The occupier of premises owes no duty to a licensee as long as he inflicts no wanton or wilful injury upon him. *Shults v. Chicago, B. & Q. R. Co*..... 587

14. If a petition charges defendants with certain acts of negligence, the proof must agree with the allegations, and the jury cannot infer that defendants were negligent in matters not alleged. *Zitnik v. Union P. R. Co*..... 679

15. The rule of "the last clear chance" implies that one charged with negligence knew that the person injured was in danger and negligently failed to avoid injuring him, and his testimony that he did not have such knowledge is not conclusive. *Zitnik v. Union P. R. Co*..... 679

16. That a person injured was in danger and so situated that he could have been observed by defendant must be proved by a preponderance of the evidence. *Zitnik v. Union P. R. Co.* 679

New Trial. See APPEAL AND ERROR, 12-16. REFERENCE.

Where one ground for a motion for new trial was newly discovered evidence, and the motion was submitted on conflicting affidavits, the decision of the trial court will not be reversed unless manifestly wrong. *Lukehart v. State*..... 219

Nuisance.

1. Under ch. 14, Comp. St. 1909, a village may sue to enjoin the maintenance of a public nuisance. *Village of Kenesaw v. Chicago, B. & Q. R. Co*..... 619

2. An injunction to prevent maintenance of facilities for loading live stock by a common carrier will not be granted as a matter of right, but only when this duty may be carried on conveniently elsewhere, and the evils complained of cannot be otherwise remedied. *Village of Kenesaw v. Chicago, B. & Q. R. Co*..... 619

3. In an action to restrain a carrier from maintaining stockyards at a point within a village, the court need not fix the place to which they should be removed, and a decree which leaves their future location to defendant, outside of certain limits, is not so indefinite as to be void. *Village of Kenesaw v. Chicago, B. & Q. R. Co*..... 619

Officers. See MUNICIPAL CORPORATIONS, 17.

1. An office created by the legislature may be abolished, the term shortened, or changes may be made in duties to be performed, without violating any constitutional provision. *State v. Ure* 31
2. Sec. 1*a*, ch. 71, Comp. St. 1911, expressly provides for the removal of inferior police officers. *State v. Donahue*..... 311
3. Prosecutions under sec. 1*a*, ch. 71, Comp. St. 1911, are highly penal in their nature, and the evidence must be clear and satisfactory. *State v. Donahue* 311
4. When it is the duty of the attorney general to appear in a legal proceeding, he may authorize another to appear for him, and pleadings executed in his name by responsible attorneys will not be disregarded upon the ground that he must appear in person. *In re Estate of Creighton*..... 654

Parent and Child.

1. Where, on the death of the mother, the father commits a child to the custody of a competent woman, under a contract awarding to her its permanent custody, in habeas corpus to regain the child, the controlling consideration is the child's best interests. *In re Burdick*..... 639
2. Where minor children live with their mother and stepfather upon land belonging to the mother and children jointly, a judgment, refusing compensation to the parents for support, and denying rents and profits to the children, *held* proper. *Bell v. Dingwell* 699

Parties. See COURTS, 3.

Though the executor or administrator, in actions affecting decedent's personal property, is the proper party to prosecute or defend, an heir or legatee may appear to protect his own rights, where there is collusion between adverse parties and the legal representative. *Rine v. Rine*..... 248

Partition.

An allegation in a petition for partition that the land can be divided without a sale and a denial thereof in the answer *held* not to make the proceedings adversary, within the rule that the court may allow plaintiff's attorney a reasonable fee out of the common fund where the proceedings are amicable. *Smith v. Palmer* 796

Peddlers.

An employee selling ranges from a wagon *held* within the exception in sec. 62, art. I, ch. 77, Comp. St. 1911, and not liable to be taxed as a peddler. *Stratton v. State*..... 780

Physicians and Surgeons.

1. In an action for malpractice, a physician or surgeon is

Physicians and Surgeons—*Concluded.*

entitled to have his treatment tested by the rules and general course of practice of the school of medicine to which he belongs. *Booth v. Andrus* 810

2. Physicians and surgeons do not impliedly warrant recovery of their patients, and are not liable for failure in that respect, in absence of default of duty. *Booth v. Andrus*..... 810

3. Physicians and surgeons are only required to exercise such skill and diligence as other physicians in the neighborhood and in the same general line of practice ordinarily have and exercise. *Booth v. Andrus* 810

4. Where, on a trial for malpractice, plaintiff voluntarily submits a portion of her body to the inspection of the jury, it is error to refuse an examination of such portion by reputable surgeons of defendant's selection and school. *Booth v. Andrus* 810

5. Where, on a trial for malpractice in operations on two different portions of plaintiff's body, plaintiff permits the jury to inspect one portion, it is error to refuse an examination of the other portion by reputable surgeons. *Booth v. Andrus* 810

6. In an action for malpractice, admission of evidence that during the intervening time between separate operations defendant made an indecent proposal to plaintiff *held* prejudicial error. *Booth v. Andrus*..... 810

7. In an action for malpractice, evidence *held* insufficient to sustain verdict for plaintiff. *Booth v. Andrus*..... 810

8. In an action for malpractice, an instruction that the burden was on defendant to show that his prescriptions were proper, *held* erroneous. *Booth v. Andrus*..... 810

9. Where, in an action for malpractice, neither "reprehensible ignorance" nor "criminal intent" is charged, it is error to charge that malpractice is "the bad professional treatment of disease, pregnancy, or bodily injury, from reprehensible ignorance or with criminal intent." *Booth v. Andrus*..... 810

Pleading. See EXECUTORS AND ADMINISTRATORS, 3, 4. FRAUD, 1, 3. TAXATION, 3. WILLS, 1.

1. Where the defect of want of legal capacity to sue appears on the face of the petition, a statement in the answer that plaintiff has no such capacity will be treated as surplusage. *Pine-Ule Medicine Co. v. Yoder & Eply* 78

2. Where the petition shows that plaintiff has no legal capacity to sue, the defect should be reached by demurrer, and not by answer. *Pine-Ule Medicine Co. v. Yoder & Eply,* 78

Pleading—*Concluded.*

3. Petition in action against a road overseer for grading a road and removing a culvert *held* not to state an actionable wrong. *Wilson v. Spencer* 169
4. A general demurrer admits the truth of all material facts well pleaded, but does not admit conclusions of law. *Bresee v. Preston* 174
5. Where it is claimed that an act is unconstitutional because not regularly passed, the defect in the proceedings must be specifically pleaded. *Bresee v. Preston*..... 174
6. Coverture is an affirmative defense, and must be pleaded and proved, or it is waived. *In re Estate of Gamble*..... 199
7. Where an information in *quo warranto* is indefinite, the remedy is by motion, and not general demurrer. *State v. Donahue* 311
8. Waiver is an affirmative defense, which must be pleaded. *Swett v. Antelope County Farmers Mutual Ins. Co*..... 561
9. In replevin, where admissions in the reply were inconsistent with the petition, motion of defendant for judgment on the pleadings *held* properly sustained. *Keenan v. Sic*..... 582

Pledges.

In the absence of fraud or a special bailment, a pledge is waived by surrender of the pledged property. *First Nat. Bank v. Bradshaw* 210

Powers. See DEEDS, 3. EXECUTORS AND ADMINISTRATORS, 6.

Principal and Agent. See DEEDS, 1, 2.

1. Where the receiver of an insolvent trust company continues, under order of court, to collect for a bank rents of a lot mortgaged to it, as the trust company had done, the bank is not necessarily liable to the tenant for negligence of the receiver's employee in repairing the lot. *Carlon v. City Savings Bank* 790
2. Evidence *held* to establish a general agency on the part of defendant's agent for the sale of horses, justifying plaintiff in dealing with him as such. *Cooper v. Coad*..... 840
3. In an action by a subagent for commissions, evidence *held* to show that the services rendered were within the scope of the business in which defendant's agent was engaged, so as to authorize his employment of plaintiff. *Cooper v. Coad*, 840

Process. See INSURANCE, 6. JUDGMENT, 5, 6.

Notice to nonresidents of foreclosure of tax lien, inserted in a weekly newspaper September 14, 21, 28, and October 6, 1899, *held* published "four consecutive weeks," within sec. 79 of the code. *Burr v. Finch* 417

Quieting Title.

1. Pleadings in suit to quiet tax title *held* to sustain decree for defendant. *Patterson v. Reiter* 56
2. In a suit to quiet title and for other relief, evidence *held* to sustain decree for plaintiff. *Tiger v. Button Land Co*... 63
3. In a suit to establish an interest in certain land, judgment of dissmissal *held* proper in view of the evidence. *Barnhard v. Barnhard* 71
4. Suit to quiet title, based on inchoate right of dower, cannot be maintained. *Bresee v. Ormsby*..... 399
5. Where lands of a resident are sold under a decree entered on service by publication, no appearance being made, an action to quiet his title may be brought within ten years from the recording of the sheriff's deed or taking possession thereunder. *Hill v. Chamberlain* 610
6. In an action to quiet title as against a tax sale under a void decree, an offer to pay such sum as the court may find due on any lien for taxes paid is a sufficient offer to do equity. *Hill v. Chamberlain* 610
7. Evidence in suit to quiet title *held* to sustain decree for plaintiff. *Hill v. Chamberlain* 610

Quo Warranto. See PLEADING, 7.

The proper procedure for the removal of public officers under sec. 1*a*, ch. 71, Comp. St. 1911, is by *quo warranto*, and the supreme court has original jurisdiction thereof under sec. 2, art. VI of the constitution. *State v. Donahue*..... 311

Railroads. See MASTER AND SERVANT, 3, 4, 16.

1. Evidence in action for damages by fire *held* not to sustain judgment for plaintiff. *Roddy v. Missouri P. R. Co*..... 75
2. The duty of railroad companies to care for streets at crossings is a continuing one. *Phœnix Mutual Life Ins. Co. v. City of Lincoln* 150
3. Railroad companies may be required, when necessary, to construct viaducts over their tracks, and are liable for damages to any person whose property is injured by such construction. *Phœnix Mutual Life Ins. Co. v. City of Lincoln* 150
4. One entering freight yards of a railroad company on private business *held* a bare licensee. *Shults v. Chicago, B. & Q. R. Co.* 587
5. In an action for killing a steer, evidence *held* to warrant a refusal to direct a verdict for defendant. *Phillips v. Chicago & N. W. R. Co*..... 617

Rape.

1. On a prosecution for rape, the unsupported testimony of prosecutrix that defendant repeated the offense after the occasion of the principal offense is not corroborative of her testimony as to the offense charged. *Boling v. State*..... 599
2. On a prosecution for rape, a letter written by a sister to defendant after the offense *held* admissible on the question of her credibility, and its exclusion prejudicial error. *Boling v. State* 599
3. The uncorroborated evidence of prosecutrix *held* insufficient to sustain conviction. *Boling v. State* 599

Receivers. See CORPORATIONS, 10, 12. PRINCIPAL AND AGENT, 1.

Reference.

1. The findings of a referee may be challenged by objections without motion for a new trial. *State v. Donahue*..... 311
2. Sec. 316 of the code, requiring a motion for a new trial to be filed within three days after the "verdict or decision," *held* not to apply to report of referee. *State v. Donahue*... 311

Release.

Release of railroad company by injured employee in consideration of payment of wages and a gratuity, where the company was not liable, is no defense to the party causing such injury. *Scherzer v. Lincoln Traction Co*..... 407

Replevin. See PLEADING, 9.

Robbery.

Evidence *held* to sustain a conviction. *Williams v. State*..... 605

Sales. See CONTRACTS, 3. EVIDENCE, 7.

1. Evidence in action for goods sold *held* to sustain judgment for plaintiff. *Tilton-Phelps Furniture Co. v. Wiant*..... 137
2. In an action to recover money paid on purchase price of a saloon, evidence *held* to sustain a finding that there was a delivery of the property. *Aebig v. Binswanger*..... 207
3. Evidence in an action for the price of signs *held* insufficient to sustain verdict for defendant. *Meek Co. v. Rohlff*..... 298

Schools and School Districts. See STATUTES, 16.

1. A proposition of a school district to issue bonds must be submitted separate from any other not germane thereto, but it is not necessary to submit it at an election at which no other proposition is submitted. *State v. Barton*..... 389
2. An election upon a proposition to vote bonds for a school building will not be invalid because at the same election the voters are asked to choose between two locations for the proposed building. *State v. Barton*..... 389

Schools and School Districts—*Concluded.*

3. When a school district includes a city and other territory, an election to vote bonds is not invalid because there are no voting places outside the city, if the electors are notified to vote at the nearest voting place in the city, and it does not appear that any elector was prevented from voting. *State v. Barton* 389

4. The publication of notice of school district election to vote bonds must be for 20 days prior thereto, and publication in a weekly paper is sufficient. *State v. Barton*..... 389

Sheriffs.

Under sec. 5, ch. 28, Comp. St. 1911, a sheriff is not required to report and pay over mileage fees to the county treasurer. *Red Willow County v. Peterson*..... 750

Specific Performance.

1. Where a purchaser, at time of purchase, is aware of defect in title, or deficiency in subject matter, he cannot, in suit for specific performance, recover compensation. *Moore v. Lutjeharms* 548

2. Evidence *held* to sustain decree for specific performance of sale of land. *Shull v. Goerl* 516

3. Evidence *held* insufficient to establish the contract alleged. *Roberts v. Cox* 553

Statutes. See CORPORATIONS, 3. PLEADING, 5.

1. The legislature has power within reasonable limitations to define terms used in enactments. *State v. American Surety Co.* 22

2. Statutes against combinations and monopolies should be considered together, and definitions in prior acts applied in construing later acts. *State v. American Surety Co*..... 22

3. Combination to prevent competition in insurance is a proper subject for legislation under the title, "An act to protect trade and commerce against unlawful restraints and monopolies." Laws 1905, ch. 162. *State v. American Surety Co.* 22

4. The purpose of sec. 4, ch. 162, laws 1905, requiring certain statements and undertakings to be filed in the office of the attorney general, being to aid him in enforcing the statute, the subject matter of the section falls within the scope of the title of the act. *State v. American Surety Co*..... 22

5. A legislative act is not violative of sec. 11, art. III of the constitution, because more appropriate language in the title might have been adopted, if the general purpose of the act is expressed and the matter in the body of the act is germane thereto. *State v. Ure* 31

Statutes—*Continued.*

6. The adoption of provisions of prior acts in a legislative act by reference does not render the new act amendatory of the acts referred to, if it is a complete act in itself. *State v. Ure* 31
7. Where an unconstitutional portion of a statute was not an inducement to its passage and may be eliminated without interfering with the general purpose of the act, and the remainder is valid and capable of being enforced, the act will be upheld. *State v. Ure* 31
8. A statute of doubtful meaning should be construed so as to carry out the intent of the legislature, notwithstanding a seeming conflict in the language; such meaning to be ascertained from consideration of the entire act. *State v. Ure,* 31
9. A law operating alike upon all persons and localities in the same class is not open to the objection that it is local or special legislation. *State v. Ure*..... 31
10. Though under ch. 24, laws 1911, adoption of the commission plan of city government is optional with cities within a certain class, the act is not unconstitutional as local or special legislation. *State v. Ure*..... 31
11. The provisions of ch. 24, laws 1911, the commission plan of city government act, that only names of candidates nominated at a primary election shall be placed on the official ballot, *held* not violative of the constitutional guaranty of freedom of elections. *State v. Ure*..... 31
12. The constitutional provision respecting amendment and repeal of statutes has no application to an act complete in itself. *State v. Ure* 31
Stewart v. Barton 96
13. Reference in an act by implication to a prior act does not render the new act amendatory of the prior act, if the later act is complete in itself. *Stewart v. Barton*..... 96
14. Provision in ch. 205, laws 1911, that a building therein provided for shall be known as the "laboratory building" *held* within the title, and not violative of sec. 11, art. III of the constitution. *Stewart v. Barton* 96
15. Courts will not inquire into the motives for the enactment of laws, nor the wisdom of laws. *Stewart v. Barton*..... 96
16. Sec. 24, subd. XIV, ch. 79, Comp. St. 1911, relating to the issuance of school district bonds, *held* germane to the act amended, and constitutional. *State v. Barton*..... 357
17. The rule that, where the title of an act is to amend a particular section of a statute, the amendment must be germane

Statutes—*Concluded.*

to the subject matter of the section, will be applied where there is nothing to indicate the subject of the proposed legislation except the language of the section named. *State v. Barton* 389

18. The purpose of sec. 11, art. III of the constitution, is to prevent surreptitious legislation; and, when the title of an act is to amend a section of the statutes, it is sufficient if the amendment is germane to the section named. *State v. Barton* 389

19. An act amendatory of a specified section of a complete act makes the section so amended a part of the original act, and it will be construed, if possible, so as to give it a meaning consistent with the whole act. *State v. Coupe*..... 463

20. Two sections of an act will not be considered so inconsistent as to be nugatory, if by any possible construction they can be harmonized. *State v. Coupe*..... 463

Street Railways. See ELECTRICITY.

Taxation. See MUNICIPAL CORPORATIONS, 10-16. QUIETING TITLE. 6.

1. Former decision of supreme court holding invalid a blanket notice of tax sale *held* to have established a rule of property. *Patterson v. Reiter* 56

2. Foreclosure of tax lien by a county without antecedent administrative sale *held* not void for want of jurisdiction. *Burr v. Finch* 417

3. In an action to set aside a sheriff's deed on a void decree foreclosing a tax lien, an allegation that plaintiff is the owner of the land is a sufficient plea of ownership to resist a general demurrer. *Hill v. Chamberlain*..... 610

4. The dower interest of the widow in the estate of her husband, whether taken under his will or by operation of law, is not subject to inheritance tax. *In re Estate of Sanford* 752

Trade Marks.

A corporation which had established an extensive trade in a particular coal by selling it by the trade name of "Cristo Canon Coal," *held* entitled to injunction to prevent the use of that name by a former manager. *Consolidated Fuel Co. v. Brooks* 421

Trial. See APPEAL AND ERROR. CRIMINAL LAW. DEATH, 2, 3. INSURANCE, 4. MASTER AND SERVANT, 5. NEGLIGENCE, 3, 5-7,

Trial—*Concluded.*

10, 11, 14. NEW TRIAL. PHYSICIANS AND SURGEONS, 8, 9. PLEADING, 9. RAILROADS, 5. VENDOR AND PURCHASER, 3, 4.

1. Where evidence is insufficient to sustain verdict for plaintiff, *held* error to overrule motion to direct verdict for defendant. *Ward v. Ætna Life Ins. Co*..... 52
2. Questions of fact on conflicting evidence are for the jury. *Lukehart v. State* 219
3. A party, to predicate error on failure to instruct on his theory of the case, must tender an instruction on such theory. *Bowers v. Chicago, B. & Q. R. Co*..... 229
4. It is not error to charge as to the legal effect of uncontradicted evidence or admitted facts. *Whelan v. Union P. R. Co.* 238
5. Error cannot be predicated on a part of a paragraph of an instruction which as a whole correctly states the law. *Whelan v. Union P. R. Co.* 238
6. Where the evidence offered by a party is insufficient in law to make out his case, it is the duty of the court to so instruct the jury. *Meek Co. v. Rohlff* 298
7. It is error to submit a case to the jury, where defendant is entitled to a peremptory instruction on the undisputed facts. *Brown v. Swift & Co*..... 532
8. Where it clearly appears from the pleadings and evidence that plaintiff is not entitled to any recovery, the court should direct a verdict for defendant. *Swett v. Antelope County Farmers Mutual Ins. Co*..... 561
9. A verdict against one of two defendants sued jointly for conversion will not be set aside because admissions of the one found not liable were received in evidence; no request for a proper instruction having been made. *Fullerton v. Fullerton* 649
10. Where there is sufficient evidence to go to the jury as to the liability of two defendants sued jointly, a request to instruct generally that admissions of one must not be considered against the other is properly refused. *Fullerton v. Fullerton* 649
11. In an action for rent, motion by plaintiff for a directed verdict *held* properly sustained. *Prucha v. Coufal*..... 724

Trover.

Where two joint owners of different articles agree upon a division of one of the articles, and one of the parties afterwards converts the share of the other, he will be liable in an action for conversion, though the other articles have not been partitioned. *Fullerton v. Fullerton*..... 649

Trusts.

A resulting trust will not be declared upon doubtful grounds; and one claiming the existence of the trust must establish the facts upon which it is based by clear and satisfactory evidence. *Drake v. McDonald* 775

Vendor and Purchaser.

1. Misrepresentations as to the quantity of land sold *held* material, and proper to be considered in determining damages recoverable. *Kuhlman v. Shaw*..... 469
2. Purchaser *held* entitled to recover the value of the difference in the number of acres of land sold and the number bargained to be sold. *Kuhlman v. Shaw*..... 469
3. Instruction as to agency of husband in sale of wife's land *held* proper. *Kuhlman v. Shaw* 469
4. Refusal of instruction as to misrepresentations in the quantity of land sold *held* not prejudicial in view of instruction given. *Kuhlman v. Shaw*..... 469
5. A purchaser of land may rely on representations of material facts, the truth or falsity of which would require investigation, and, if deceived, may rescind the contract. *Latta v. Button Land Co.* 689
6. Evidence *held* to support a decree of rescission of contract to purchase land. *Latta v. Button Land Co*..... 689
7. A purchaser of land, to justify a rescission for misrepresentation, must show that it was material and misled him to his damage. *Realty Investment Co. v. Shafer*..... 798
8. As a rule, a mere erroneous statement of value of land is not actionable. *Realty Investment Co. v. Shafer*..... 798
9. Where defendant, in an action on a note given in part payment of the price of land, pleads false representations as to the character of the land, he must show that he was entitled to rely thereon. *Realty Investment Co. v. Shafer*.. 798

Venue.

An action for flooding land upon which is a brick-kiln, by improper construction of a railroad track, is an action for injury to real estate and local, under sec. 51 of the code, before the 1911 amendment. *Dhooghe v. Chicago, R. I. & P. R. Co.* 613

Waters.

1. In an action for damages to land from overflow occasioned by the construction of a railroad, admission of evidence of the reasonable value of the land immediately before and after the overflow is reversible error. *Harris v. Lincoln & N. W. R. Co.* 755

Waters—*Concluded.*

2. In an action for damages to land and crops by flood-waters of a stream, subject to overflow from natural causes, and alleged to have been caused by improper construction of a railroad, the burden is on plaintiff to show that the construction caused the overflow, and the amount of damages. *Harris v. Lincoln & N. W. R. Co*..... 755

3. In an action for damages to land by flooding, evidence *held* insufficient to sustain verdict for plaintiff. *Harris v. Lincoln & N. W. R. Co*..... 755

Wills.

1. Petition for construction of a will and for an injunction *held* demurrable. *Pitts v. Burdick*..... 123

2. Whether interest is to be allowed on a specific legacy of money depends upon the testator's intention; and, if that cannot be determined, it will be presumed that the testator intended it to bear interest after a year from the appointment of the executor. *Lewis v. Barkley* 127

3. Where a will gives a specific legacy of money to each of three persons, and provides that two of the legacies shall not bear interest, the presumption is that testator intended that the third legacy bear interest. *Lewis v. Barkley* 127

4. Under sec. 282, ch. 23, Comp. St. 1911, unless otherwise indicated by the will, the presumption is that testator intended a legacy to be paid within a year after appointment of the executor, and to bear interest thereafter. *Lewis v. Barkley* 127

5. Where a will was contested on the ground of undue influence, an instruction "that the fact that the proponent and the decedent were married is not of itself undue influence," *held* improper under the evidence. *In re Estate of Paisley* 139

6. Evidence *held* insufficient to sustain judgment admitting to probate a will contested on the ground of undue influence. *In re Estate of Paisley* 139

7. The right of a widow to elect under secs. 4907, 4908, Ann. St. 1911, is a personal one, and does not pass to her heirs or personal representatives. *Fergus v. Schiable*..... 180

8. Where a widow elected to take under the law, under a mistake as to her rights, her administrator had no power to elect for her, and the court could not ignore her election made in her lifetime. *Fergus v. Schiable*..... 180

9. Will construed, and *held* to authorize the executor to sell

Wills—*Concluded.*

the homestead, subject to the life estate of the widow. *Willier v. Cummings* 571

10. A clause or provision of a will must, if possible, be construed so as to give effect to the intent of the testator. *In re Estate of Creighton* 654

11. If ambiguous words in a clause of a will appear to be inconsistent with unambiguous language in the same clause, such words will be construed, if possible, so as to render the whole clause consistent. *In re Estate of Creighton*.... 654

12. Where there are irreconcilable provisions in a will, the latest generally controls, but this rule does not apply to words in the same sentence or provision. *In re Estate of Creighton* 654

13. A bequest to executors in trust to purchase a site and build a home for poor working girls *held* sufficiently specific to establish a public charity. *In re Estate of Creighton* 654

14. Where land was devised to testator's widow for life, and at her death to their three children, but, should any child die before the widow, her portion to descend to her children, a mortgage by one of testator's children, who died during the lifetime of the widow, leaving surviving children, *held* to create no lien as against such surviving children. *Case v. Haggarty* 746