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JOHN TONGUE, APPELLANT, V. R. D. LLOYD ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,820.

Justice of the Peace: CONTINUANCE: REVIEW: FINAL ORDER. The continuance of a civil suit by a justice of the peace for more than 90 days from the return day of the summons, without the consent of the parties, is a discontinuance of the action, and therefore a final order, which may be reviewed by proceedings in error in the district court.

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

Mills, Mills & Beebe, for appellant.

E. E. Stanton and *C. S. Roe, contra.*

REESE, C. J.

This action was commenced before a justice of the peace of Polk county. The summons was issued on the 30th day of August, 1909; the 9th day of September being set for the trial. On that day the parties appeared, and, by agreement, the cause was continued to October 9. On October 9 a further continuance was had to November 9, on the motion of plaintiff. On that day the cause was again continued to December 9 by agreement of the parties. December 9, the parties appeared, when, on motion of defendants, and over the objection and exception of plaintiff, a continuance was had for an additional 30 days, to January 8, 1910. The objection to the continuance was based upon the ground that the order extended the continuances for more than 90 days from the return day of the summons. Plaintiff then presented the case to the district court by petition in error, upon the contention that the order worked a discontinuance and dismissal of the case, and was therefore final. This view seems not to have been entertained by the district court, and the petition in error was dismissed at plaintiff's costs. Plaintiff appeals.

Defendants have filed no brief, nor have they appeared

in this court further than to acknowledge service of the notice of appeal, and we are left wholly in the dark as to to their theory of the case, or the views of the district court.

Sections 960 and 961 of the code provide that a case may be adjourned for 30 days upon the application of either party, either on the return day or any subsequent day to which the cause may stand adjourned, "but not to exceed 90 days from the time of the return of the summons, upon compliance with the provisions" of the statute. If the adjournment, without plaintiff's consent and over his objection, for more than 90 days worked a dismissal of the case, and the justice thereby lost jurisdiction to proceed further without the consent of the parties, the order was final, and the proceeding in error would lie. We are not aware that this identical question has ever been before us. In *Fischer v. Cooley,* 36 Neb. 626, the final adjournment, beyond the 90 days, was had by the agreement of the parties to the suit, and, for that reason, it was held that jurisdiction was not lost; but we said: "Under said section (961), when a justice of the peace adjourns a suit pending before him, without the consent of parties, for more than 90 days from the return day, it operates as a discontinuance." In Maxwell, Practice in Justices' Courts (5th ed.) 129, it is said: "Without consent of the parties, the court has no authority to adjourn a cause more than 90 days from the return day of the summons. An adjournment exceeding that time, without consent of the parties, operates as a discontinuance of the action"—citing *Dunlap v. Robinson,* 12 Ohio St. 530. While the exact question here presented was not involved in that case, the logic of the opinion sustains the text in Maxwell's Justice Practice. In the body of that opinion it is said: "His (the justice) power of adjudication is derived from the statute, and, if not exercised within the time allowed by law, it is clearly lost; and the cause is no longer pending before him. The legal effect of such a failure in duty is a discontinuance of the action. So, jurisdiction may be lost by an adjourn-

ment of the suit, without consent of parties, for a longer time than the statute permits. Such unauthorized adjournment, or other neglect of duty by the justice, which prevents a hearing and determination of the suit within the proper time, it has been repeatedly held, works a discontinuance of the action."

The judgment of the district court is reversed and the cause is remanded to that court, with direction to reverse the ruling of the justice of the peace, with costs to plaintiff, and retain the cause for trial, as provided by section 601 of the code.

REVERSED.

ALBERT PRINCE V. STATE OF NEBRASKA.

FILED NOVEMBER 27, 1912. No. 17,716.

Homicide: DEFENSE OF INSANITY: EVIDENCE. Plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death. On error to this court, no question of law as to procedure is presented. The defense was insanity at the time of the killing, and the case is presented upon the sole question of fact as to the accountability of the accused. Upon a review of the evidence, it is *held*, by a majority of the court, that the judgment and sentence should be affirmed.

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

A. E. Howard and *Price & Abbott,* for plaintiff in error.

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

REESE, C. J.

On the 17th day of February, 1912, the county attorney of Lancaster county filed in the office of the clerk of the district court for said county an information against Albert Prince, charging him with the crime of murder in the first degree by cutting and stabbing one Edward D. Davis

so that from the effects thereof the said Davis died. The information is in the usual form followed and prescribed in such cases, and, as its sufficiency is not here questioned, it will not be necessary to set it out in detail. The accused was arraigned in open court, and entered the plea of not guilty. A jury trial was had, which resulted in a verdict finding him guilty as charged in the information, and fixing the punishment at death. A motion for a new trial was filed and overruled, when sentence of death was pronounced, and fixing the date of execution on the 30th day of August, 1912. The case is now presented to this court for review by petition in error, and, under the constitutional provision, all further proceedings are thereby stayed pending such review.

No serious question of law as to the procedure is presented by the briefs or was argued upon oral argument. The killing of Davis, while denied by the plea of not guilty, is not controverted, but was admitted by plaintiff in error while upon the witness stand in his own behalf. It is contended, however, that, at the time of the killing, plaintiff in error was insane and not legally responsible for his act, and evidence was introduced tending to support the contention. Counter evidence was introduced by the state tending to disprove the claim of insanity. The question of the sanity or insanity of a defendant in a criminal prosecution is, usually, largely a question of fact to be solved by the trial jury under proper instructions, yet in a case involving the life, or even the liberty, of a human being, the courts will not hesitate to look carefully into the evidence, and, if the verdict is not supported thereby, grant the needed relief or correct the error in such way as the condition of the proofs may suggest.

The bill of exceptions is quite voluminous, consisting of about 600 pages of typewritten matter. It has all been carefully read. The uncontroverted facts may be said to be that plaintiff in error is and was at the time of the tragedy an inmate of the Nebraska penitentiary, serving under a sentence imposed for a violation of the criminal

law of the state, and was laboring in the broom factory then being carried on in the building. The decedent was the deputy warden, and was largely in charge of the discipline and control of the prisoners. A short time prior to the 11th day of February, 1912, plaintiff in error secreted a knife used in the broom factory and carried it to his cell, keeping it in his pocket. The date named was on a Sunday, and, when the inmates were assembled for the usual chapel exercises, he carried the knife with him into the chapel. The usual place of the deputy warden during the exercises was pretty well to the front in the audience, and near the close of the service it was his custom to pass down the aisle toward the entrance door through which the assembly would pass out. Plaintiff in error was seated near the aisle and not far from the door, and when the last hymn was being sung—the audience standing—the decedent walked down the aisle between the standing rows of men, and, when he came opposite and near plaintiff in error, plaintiff in error stabbed him a number of times in quick succession, and from which death soon after resulted. A guard approached plaintiff in error, to whom he surrendered the knife without resistance, and was led away and placed in the solitary confinement cell. He was a witness in his own behalf on the trial, and with commendable frankness admitted that he had made preparation to take the life of either the warden or the deputy, as opportunity might offer, and that in taking the life of the deputy he had carried out his previously conceived purpose and intention.

The evidence tends strongly to show that at one time, under a previous administration of the affairs of the prison, plaintiff in error was subjected to a long and, from his point of view, a cruel administration of discipline. The evidence shows that he had been guilty of an act of insubordination and defiance of authority, and it was necessary to maintain the rules and discipline of the prison; but, whether it was necessary to carry the punishment to the extreme to which it was carried, we are not

called upon to decide. The complaint made by plaintiff in error was that in the first instance he had violated no rule of the prison, and that he was never informed of what charges were against him, and does not know to this day, but that his whole treatment up to the time of the incident referred to was arbitrary, vindictive, tyrannical, and without cause. The testimony of the guard under whom he worked, called by the state, was that prior to that time plaintiff in error had been a faithful worker, pleasant, affable, and agreeable, and that he was obedient to the rules of the prison, causing no annoyance or trouble whatever.

There was considerable evidence offered by the defense that from that time his mental condition appeared to undergo a change; that he became "moody," absent-minded, and when not at work would sit, resting his head upon his hands, lamenting his fate, frequently saying the officers and guards "had it in for him," and would beat and otherwise mistreat him without cause. There seems to be little doubt but that during the administration of a subsequently appointed warden the management of some of the prisoners was cruel and brutal, and it was stated by the witnesses that this seemed to affect plaintiff in error's mind, he often referring to the treatment others had received, and which he deemed unreasonably harsh and severe; that during the later times, prior to the tragedy for the commission of which he was convicted, his mind seemed to wander; that his continuity of thought was impaired, and he could be induced to converse upon one subject for only a very short time, and his mind would "fly from one subject to another." Much of the evidence in his behalf was given by convicts and ex-convicts, while the opposite was maintained by the guards and some of the convicts yet serving time. It is gratifying to note that all the witnesses testified to a much more reasonable and humane system of government of the prison by the present warden and officers. The cruel and inhumane treatment of plaintiff in error and others, it is claimed, so weighed and preyed

upon his mind as to destroy his accountability for his acts, dethrone his judgment, and weaken his appreciation of the enormity of his act. He took the witness-stand in his own behalf and testified, with candor and intelligence, what he understood to be the moving cause of his own treatment and the treatment of others, and that he contemplated taking the life of the then warden or his deputy, and that he believed he would be doing right in the act, and believed he was doing right in taking the life of the deputy, for which he was being prosecuted. There seems to be no claim that he was otherwise than sane at the time of the trial. If we assume that the evidence offered on his behalf at the trial was all, or substantially all, true, it would be difficult to find any justification for the infliction of the death penalty.

Among the witnesses called by the state were certain physicians who were summoned to the bedside of the decedent, all of whom conversed with, or heard others converse with, plaintiff in error soon after the tragedy, and they all testified that they saw no indication or symptom of insanity during the conversations had; that he did not appear to be under any mental excitement, but conversed freely upon what he had done, and was ready and willing to receive punishment therefor. Two local alienists were called who made an examination of plaintiff in error during the trial, and both testified to the absence of any symptom of existing or previous insanity. Guards and others from the penitentiary testified on behalf of the state that they had discovered no symptoms of mental aberration in the conduct or manner of plaintiff in error either before or after the tragedy, and some deny the truth of the charges of needless cruelty to other prisoners; but it appears to be well established that such charges were made and believed in by the inmates, and that they were heard and believed by plaintiff in error.

The fact that a delusion existed, if such were the fact, would produce the same effect upon the party deluded as if the belief were based upon the real fact. The legal

presumption originally is that all people are sane, and that presumption continues until evidence to the contrary is introduced. That presumption applied to plaintiff in error in the first instance. Upon evidence being introduced to show mental derangement, it devolved upon the state to prove his sanity at the time of the commission of the act charged beyond a reasonable doubt. There is also a presumption that, where a state or condition is shown to exist, it continues until shown to have been removed. This applies to the mental condition of people. Judging by the evidence of the acts, conduct and manner of plaintiff in error, there may be some doubt whether his act was prompted by a diseased mind, or a desire for revenge as against the warden and deputy for acts of oppression and cruelty of which he deemed them guilty. If the former, he should not be held to the infliction of the extreme penalty. If the latter, there would be, in law, no extenuation. While these questions were largely for solution by the jury, yet, in the interest of human life, the duty of carefully considering the evidence is ultimately devolved upon the courts. From a consideration of all the evidence and a contemplation of the mainsprings of human conduct, it is the conviction and firm opinion of the writer hereof that plaintiff in error should not and cannot be held guiltless, but that he did not and does not deserve the taking of his life; but that he should be confined in the prison during his life as a protection to society, and that the sentence of the court should be reduced from execution to that of life imprisonment.

However, a majority of the court are of the opinion that there is no proper cause shown why the judgment of the district court should be interfered with, and it will therefore have to be affirmed. The time fixed by the district court for the execution of plaintiff in error having passed, it is ordered that the sentence be carried out on Friday, the twenty-first day of March, 1913.

AFFIRMED.

MIKE MITCHELL, APPELLEE, V. OMAHA PACKING COMPANY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,831.

1. **Master and Servant:** VICE-PRINCIPAL. Whether an employee occupies the position of a fellow-servant to another employee, or is the representative of the master, is not to be determined from the grade or rank of the offending or injured servant, but should be determined by the character of the act performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.

2. ———: NEGLIGENCE: LIABILITY OF MASTER. Where a master, instead of performing a duty which is personal to himself, directs an employee to perform that duty, he is liable for the neglect of that other, no matter what may be the position of the employee as to other matters.

3. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. Where it clearly appears that the plaintiff in an action for personal injuries was not guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the rights of the defendant.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

H. C. Murphy and *John P. Breen, contra.*

BARNES, J.

Action to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant, the Omaha Packing Company. On the trial in the district court for Douglas county, the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the plaintiff and a native of Japan, called "Joe," on December 12, 1906, were working for the Omaha Packing Company, and were under the charge and

direction of one Aleck Romansky, who was night fireman of the defendant in its packing plant. The general duties of the plaintiff and Joe, hereafter called the Jap, were to bring coal to the boiler from cars that were set opposite the defendant's boiler house, to help pull the clinkers and ashes from under the boilers, to help Romansky swab the boiler flues, to wheel out the ashes and clinkers from the boiler house and deposit them in open railroad cars, which were set upon the tracks from time to time near the boiler house; that the defendant furnished a mechanical contrivance, called a "crane," for the purpose of elevating the ashes from the platform of the boiler house into the railroad cars; that the crane was broken, and, for three nights before the plaintiff received his injuries, he and the Jap had taken the ashes and clinkers out in wheelbarrows over a temporary runway and dumped them into the cars, which were set opposite the building for the purpose of receiving them. The cars were moved every day, which made it necessary to construct a new runway every night. On the night when the accident occurred, after the ashes and clinkers were taken out and cooled off, Romansky, who it is conceded was as to the defendant company a vice-principal, ordered the Jap to go out and construct a runway and platform to be used for the purpose of depositing the ashes and clinkers in the car. The Jap constructed such a runway and a platform out of materials which the defendant company had furnished and were at hand for that purpose. The runway appears to have been properly constructed, but the platform, which extended over the top of the open car, consisted of what is called a "grain door," which extended across the top, and from side to side thereof. This platform or grain door appears to have been thin in structure or so defective in its condition as to be unsafe for that purpose. Plaintiff testified that, when the Jap returned and stated that the runway and platform were ready for use, Romansky ordered him to wheel out the ashes and clinkers; that, when his third wheelbarrow load of clinkers struck the plat-

form, the wheel of the barrow broke through it, and thus caused him to lose his balance; that he fell from the car to the track below, a distance of some ten feet, and he thereby sustained very serious injuries. He also testified that the runway was made of solid plank, and was suitable for that purpose; that the grain door which was used as a platform, as above stated, appeared in the dim light situated nearby to be sound and safe and all right. There was practically no conflict in the evidence. At the close of the testimony, defendant requested the court to direct the jury to return a verdict in its favor. This request was denied. The jury were instructed by the court, and afterwards returned a verdict for $1,500 in favor of the plaintiff.

It is not claimed that the verdict is excessive, but it is strenuously contended that the court erred in not directing the jury to return a verdict for the defendant; and it is argued that the Jap and the plaintiff were fellow servants; that the defendant was not liable to the plaintiff for injuries received by reason of the negligence of his fellow servant. On the other hand, it is contended that, notwithstanding the fact that the plaintiff and the Jap were fellow servants in the performance of the general duties assigned to them, yet when the Jap, under the direction of his vice-principal, Romansky, constructed the runway and platform in question, he was acting for the company as vice-principal; that it was defendant's duty to furnish plaintiff with a reasonably safe place to work, and that duty could not be delegated to the plaintiff's fellow servant, and the defendant be thereby relieved from liability for the negligent performance of that duty.

It must be conceded that it was the duty of the defendant company to furnish the plaintiff with a reasonably safe place to work; that when the crane, which had been successfully used for elevating and dumping the ashes and clinkers into the railroad car was broken, or otherwise put out of commission, it was the duty of the defendant to supply another suitable and reasonably safe appliance

to be used for that purpose. It must also be conceded that if Romansky, who it is admitted was defendant's vice-principal, had constructed the runway and platform, his negligence would have rendered the company liable. Therefore, when Romansky delegated that duty to another, he thereby constituted him a vice-principal so far as the performance of that particular act was concerned; and such is the great weight of authority in this country.

In *Schroeder v. Flint & P. M. R. Co.*, 103 Mich. 213, it was said (quoting from McKinney, Fellow Servants, sec. 23): "The true test, it is believed, whether an employee occupies the position of a fellow servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, *whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.*" The rule has been stated in another form, as follows: "If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." *Northern P. R. Co. v. Peterson*, 162 U. S. 346. See *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 87, 16 S. W. 924; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.

For the foregoing reasons, we are of opinion that the court did not err in refusing defendant's request for a directed verdict.

Defendant contends that the district court erred in instructing the jury, in substance, that Romansky was a vice-principal over the Jap, who constructed the runway

and platform in question, and while the Jap was engaged in that work he also acted as a vice-principal. The foregoing authorities effectually dispose of this contention, and error cannot be predicated on such an instruction.

Defendant further contends that the court erred in giving the eighth paragraph of his instructions, by which the jury were told, in substance, that one is charged with knowing that which he would have known under the circumstances, had he taken ordinary care and prudence to know, but he is not charged with knowing more than ordinary prudence required him to know. If the plaintiff actually knew of the condition of the platform as to quality, and still went on with his load, and that such act of so going was one of foolhardiness, then plaintiff cannot recover, as it would be a negligent act of a proximate nature leading to the injury. A workman, such as the plaintiff, has a right to repose some degree of confidence and reliance upon such structure erected by his principal for his use, and thereby to that extent is not charged with as close an inspection, as a duty towards himself, as if it were not so erected. But this does not admit of such employee closing his eyes or conscience to dangers that are apparent, but only a reasonable reliance under all attendant facts and circumstances as are known. By this, and other instructions, the court submitted the question of the plaintiff's contributory negligence to the jury. While this instruction is not to be commended, and in some cases might be erroneous, still under the facts disclosed by the evidence we are unable to see how it could have resulted in prejudice to any of the defendant's substantial rights.

It appears that a runway and platform had been constructed and used for at least two nights before the accident occurred; but on those occasions the grain door rested on a solid bed of ashes and cinders; while on the night in question the Jap constructed the platform without such solid foundation. The plaintiff testified that when he looked at the platform by a nearby light, which

was to some extent insufficient to enable him to ascertain its condition, it appeared to be sound and all right. This testimony was not disputed by any one; and, when we consider the fact that the plaintiff and the Jap had theretofore erected and used such a runway and platform with safety, it can hardly be said that the plaintiff was guilty of contributory negligence in assuming that the platform in question was safe and sufficient for the purpose for which it was constructed.

As we view the record, the evidence fails to disclose contributory negligence on the part of the plaintiff, and therefore the instruction complained of was error without prejudice.

We think the foregoing disposes of the questions which were presented in the argument of counsel for the defendant; and, finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

IDA M. BEEBE, APPELLEE, V. SCOTT'S BLUFF COUNTY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,850.

1. **Highways:** MAINTENANCE: LIABILITY OF COUNTY. The road law of this state does not require a county or municipality to guarantee the safety of its highways and streets, but it is required to keep them in a reasonably safe condition for public travel.

2. ———: ———: ———. For a county to allow an open ditch, nearly a mile in length, and from 6 to 8 feet wide, with a depth of from 26 to 34 inches, to be and remain for many years in the center of one of its public roads may render it liable for an injury caused thereby.

3. ———: ———: ———. Where injuries result to a traveler upon such highway, caused by the combined effect of the county's neglect and an accident, such as the sudden fright of an ordinary gentle farm team of horses, for which the driver is in no way to blame, the county is liable for the injuries thereby sustained.

4. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. Where it clearly appears

that the plaintiff in an action for personal injuries was not guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the defendant's rights.

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

W. W. White and *Morrow & Morrow,* for appellant.

Wright & Duffie, contra.

BARNES, J.

Action to recover damages for personal injuries alleged to have been sustained by plaintiff while traveling upon a public road or highway, by reason of the failure of the defendant county to maintain the road in a reasonably safe condition for the public use. On the trial in the district court for Scott's Bluff county, the plaintiff had the verdict and judgment, and the defendant has appealed.

The record discloses that the highway or public road in question was established some time about the year 1893, and has been in use by the public ever since that time. It is situated on the section line running north and south between sections 13 and 14, township 22 north of range 56, in Scott's Bluff county, and there is a ditch, about a mile long, running along the section line and in the middle of the highway, which had existed and remained in that condition for many years; that the fences on each side of the section line had been moved back a distance of about 33 feet, the fence on the west side of the road being about 24 feet from the ditch. It appears that a traveled track existed on each side of the ditch, and on the 25th day of November, 1909, the plaintiff, with her husband and seven small children, was driving along this road in a two-seated carriage drawn by an ordinary farm team of gentle horses. They were traveling in the beaten track on the west side of the road, and between the ditch

and the fence. When they reached a point near to the residence of one Carr, the team, for some cause not clearly explained, became frightened, turned quickly to the east and ran into the ditch. The carriage was overturned and badly damaged, and the plaintiff was severely and permanently injured.

The defendant contends that the foregoing state of facts are insufficient to sustain the judgment, and in support of this contention cites section 6197, Ann. St. 1911, which reads as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs to the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; provided, however, that such action was commenced within thirty (30) days of the time of said injury or damage occurring." It is argued that if there is any other cause concurring with the insufficiency or want of repair of a highway, which results in the damages complained of, to hold the county liable would be to extend its liability beyond that fixed by the statute. In support of this argument defendant cites *Bell v. Village of Wayne*, 123 Mich. 386, *Harris v. Inhabitants of Great Barrington*, 169 Mass. 271, *Schaeffer v. Jackson Township*, 150 Pa. St. 145, *Moore v. Inhabitants of Abbot*, 32 Me. 46, *Bartram v. Town of Sharon*, 71 Conn. 686, and other cases decided by the courts of those states, where the rule for which the defendant contends seems to have been adopted. We find, however, that the authorities are divided on this question. The courts of Iowa, Vermont, New York, Minnesota, and many other states hold that when two causes combine to produce an injury to a

traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and some other occurrence for which neither are responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect. *Langhammer v. Manchester,* 99 Ia. 295. In *Gould v. Schermer,* 101 Ia. 592, it was held that the mere fact that some other cause operates with the negligence of the defendant to produce the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the cause was one for which the defendant was responsible or not. The authorities on this question are collected in a note to *City of Denver v. Utzler,* 8 L. R. A. n. s. 77 (38 Colo. 300), where, at page 80, it is said: "And even those states which deny liability where the horse has become uncontrollable have modified the strictness of their rule somewhat by holding that a horse which which merely starts or shies to one side cannot be regarded as unmanageable or beyond the driver's control, so as to preclude him from recovering, where, because of such shying, the horse comes in contact with a defect or obstruction, and injury results."

In the instant case, it clearly appears that the county authorities knew that the ditch in question had existed in the center of the public road for many years, and had negligently permitted it to remain in that condition. It is also clear that the result was to render the traveled parts of the highway so narrow that it could not, under all conditions, be safely used by the traveling public. It is true that so long as nothing happened to the harness or vehicle in which a party was riding, so long as a well-broken horse exhibited its usual docility, one could travel along the path on the west side of the ditch, and within six or eight feet of it, safely. But it is well known to all that the horse, while probably one of the most docile and tractable of all our domestic animals, is the most subject

to fright, and a trivial cause will often startle him and render him, for the moment, uncontrollable. The nature of his movements at such a time cannot reasonably be anticipated, and when we consider his strength and agility it is not unreasonable to suppose that he cannot always be controlled. The defendant in this case, therefore, ought to have provided against the contingency which caused the plaintiff's injury.

To our minds, it seems clear that but for the existence of the ditch in question the plaintiff's husband could have controlled his team, and their sudden fright would not have resulted in any injury to the occupants of the carriage. The rule adopted by the trial court accords with the one adopted by a majority of the courts of this country, and we feel constrained to follow that rule. We therefore hold that one whose negligence has concurred with some other cause, both operating proximately at the same time in producing the injury, is liable therefor.

Defendant complains of the seventh paragraph of the court's instructions. By that instruction the jury were told, in substance, that, to render the defendant county liable for the injury complained of, the insufficient condition of the highway must have been the proximate cause of such injury; that if plaintiff's injury was sustained by reason of the team becoming beyond control of the driver, and such control of said team was for such a distance and such a time as shows that the uncontrollable condition of the team was the proximate and effective cause of plaintiff's injury, then their verdict should be for the defendant.

We have not quoted this instruction, but have attempted to give its substance as we understand it. It is not clear in expression, and is not to be commended. But, as we view the evidence, the defendant was clearly liable to the plaintiff for the injuries which she sustained. It is not contended that the judgment is excessive, and this case ought not to be reversed for a technical error of instructions. Finally, in any view of the case, it cannot be said

that the instruction complained of resulted in any injustice to the defendant.

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

AFFIRMED.

MARY BUTLER, APPELLEE, V. JAMES B. SECRIST ET AL., APPELLANTS.

FILED NOVEMBER 27, 1912. No. 17,358.

1. **Limitation of Actions:** PLEADING: AMENDMENT. Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem. *Butler v. Smith*, 84 Neb. 78, approved and followed.

2. **Appeal:** CONSOLIDATION OF ACTIONS. The consolidation of two actions pending in the same court, at the same time, against different defendants, to redeem from the lien of a mortgage, is a matter within the sound discretion of the trial court, and error cannot be predicated on the order of consolidation, unless an abuse of discretion is shown.

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

Field, Ricketts & Ricketts, J. F. Green and *W. A. Meserve,* for appellants.

M. F. Harrington and *W. R. Butler, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Knox county allowing the plaintiff to redeem a tract of land situated in that county from a void decree of foreclosure, and a finding of the amount which plaintiff should be required to pay the defendants for that purpose.

It appears that in January, 1890, one Ellis W. Wall owned the land in question, and mortgaged it to Pierce, Wright & Company for $2,850. After giving the mort-

gage, Wall conveyed the premises to Clement L. Boone. Boone did not take the title by his initials, but took it by his real name as Clement L. Boone, and his deed was promptly recorded in the office of the county clerk of Knox county. In March, 1894, one Henry H. Drake, who had become the owner of the mortgage, brought a foreclosure suit in the district court for Knox county against Wall and his wife and C. L. Boone. The records in the office of the county clerk stated plainly that the land was owned by Clement L. Boone. Service was had by publication only. None of the defendants appeared, and a decree of foreclosure was granted. Thereafter the land was sold under the decree, and on May 24, 1895, the owner of the mortgage, who was the purchaser, took possession of the premises through one Green, and the purchaser and his successors in interest, the defendants in this action, have ever since retained such possession.

It further appears that the plaintiff obtained her title by quitclaim deed from Clement L. Boone, and mesne conveyances, and on the 11th day of March, 1905, commenced this action in the district court for Knox county as a suit in ejectment against James B. Secrist, Mary E. Secrist, and Susie M. Smith to obtain possession of a part of the land in question; that she also at the same time commenced an action in ejectment against Charles A. Kissinger and Emily Kissinger to obtain possession of the remainder of the mortgaged premises; that thereafter plaintiff was permitted to amend her petitions by changing the form of her actions to suits to redeem the land, and require the defendants to account for the rents and profits. Trials in the district court resulted in judgments for the defendants. From those judgments plaintiff appealed and obtained reversals in this court, and the causes were remanded to the district court for Knox county for further proceedings. For a more full and complete statement of the facts, reference may be had to *Butler v. Smith*, 84 Neb. 78. When those suits came on again for trial in the district court, an order was made consolidating them,

and thereafter, upon the issues thus presented, a decree was rendered allowing the plaintiff to redeem, and fixing the amount necessary for such redemption. From that judgment the defendants have prosecuted separate appeals.

The record discloses that, upon the second trial in the district court, defendants Secrist and Smith interposed a plea of former adjudication, alleging that the judgment in their favor upon the former trial had never been reversed, and was a complete bar to the further prosecution of this action; while defendants Kissinger also entered a like plea, and contended that the judgment in their favor in the former action had never been reversed, and was a bar to the further prosecution of this suit against them. Their pleas of former adjudication were overruled, and this ruling is assigned as error.

It appears that, when the petition in *Butler v. Smith* was amended, Charles A. Kissinger and his wife, Emily, were made parties defendant in that action, all of the land involved in both actions was described therein, and plaintiff prayed to be allowed to redeem from the Wall mortgage as to all of the defendants. The defendants in that case all filed answers to the amended petition. The same course was pursued and like pleadings were filed in the original case of *Butler v. Kissinger*, and both actions were then pending in the district court for Knox county. Plaintiff thereupon filed a motion to consolidate the two actions, which was overruled. There was a separate trial of each of said actions, and a judgment rendered in each of them for all of the defendants. The plaintiff thereupon prosecuted appeals from said judgments. The appeals were docketed in this court against all of the defendants. The plaintiff was named as the appellant, and all of the defendants were made appellees. All of the defendants appeared and filed briefs, and, upon the hearings in this court, both of the judgments were reversed as to all of the defendants named in each case, and the causes were remanded to the district court for new trials. An exam-

ination of the record in the former cases fully disposes of the plea of former adjudication, and the judgment of the trial court on this point should be affirmed.

It is further contended that the court erred in overruling defendants' pleas of the statute of limitations. That question, however, was fully determined in *Butler v. Smith,* 84 Neb. 78, where it was said: "Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem." *McKeighan v. Hopkins,* 19 Neb. 33, was a suit in ejectment, and was changed by amendment to an action to redeem, and it was said by this court: "The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition filed by him by leave of court he seeks to recover the land in question, upon the ground that he is the owner of the same; but, while asking equity he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitations ceased to run when the summons which was served on him was issued." In the instant case, the actions were commenced before the limitation had expired, and when commenced, although separate suits were brought, such actions were sufficient to toll the statute.

Error is predicated on the order of the district court consolidating the two actions for a single trial in the instant case, and it is argued that, because the court had once overruled a motion to consolidate the actions, it was error to thereafter sustain such a motion. A mere ruling on a motion during the progress of a cause is never *res judicata,* and it is within the sound discretion of the court to permit another motion to be filed and change its ruling. Unless the party complaining makes it appear that the

trial court was thereby guilty of an abuse of discretion. error cannot be predicated thereon.

Finally, it may be said that, when the two causes were remanded for new trials, the only matter left for the determination of the district court was an accounting to determine the amount the plaintiff should be required to pay defendants in order to redeem the land in question from the mortgage lien. It is not contended that the court erred in determining the amount of redemption money, and the judgment of the district court is

AFFIRMED.

CHARLES A. KISSINGER ET AL., APPELLANTS, V. MARY BUTLER, APPELLEE.

FILED NOVEMBER 27, 1912. No. 17,357.

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

Field, Ricketts & Ricketts, W. A. Meserve and *J. F. Green,* for appellants.

M. F. Harrington and *W. R. Butler, contra.*

BARNES, J.

This case presents the separate appeal of the Kissingers from the judgment of the district court in *Butler v. Secrist, ante,* p. 506. The facts and questions of law in the two appeals are identical, and, for the reasons given in that case, the judgment of the district court is

AFFIRMED.

HENRIETTE SCHMIDT, APPELLEE, V. VILLAGE OF PAPILLION, APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,836.

1. **Appeal:** RECORD. Affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions.

2. **Pleading.** Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the legal conclusion to be drawn therefrom.

3. **Appeal:** CONFLICTING EVIDENCE. Where the verdict of a jury is reached upon conflicting evidence sufficient to sustain a recovery in favor of either party, this court will not disturb the verdict.

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

James T. Begley, for appellant.

William R. Patrick and *Ernest R. Ringo, contra.*

LETTON, J.

Action for damages for personal injuries alleged to have been received by falling upon a defective sidewalk in the village of Papillion. Plaintiff recovered a verdict and judgment for $200. Defendant appeals.

There have been two trials of this case in the district court. At the close of the first trial a motion for a new trial was filed, which was granted by the court. This is assigned as error. The motion was submitted upon affidavits which are not preserved in the bill of exceptions. We must, therefore, presume the evidence justified the action of the district court in granting a new trial.

The defendant contends that the petition fails to state a cause of action. In substance, it pleads that the defendant is a municipal corporation; that the sidewalk along the east side of lots 1 and 2, in block 23, was in a

dangerous and defective condition, describing the same; that it was in that condition on the day of the accident and for several months prior thereto; that the plaintiff, while passing on the walk, tripped on one of the loosened boards, fell, and received the injuries described in the petition; that due notice was given to the village authorities of the accident; and that by reason of the injuries plaintiff has been damaged in the sum of $1,500.

It is said the petition fails to charge negligence, a duty to repair, and neglect of the same, and that sufficient time has elapsed for the repairing; that it fails to charge notice of the defect, and due care on behalf of the plaintiff. When a petition sets out the facts, it is unnecessary to plead the legal conclusions to be drawn therefrom.

It is contended that the verdict is contrary to the evidence. The evidence on the part of defendant tends to prove that the walk was in a good state of repair at the time of the accident; that it had been inspected by the village authorities about four months before and found to be in good order; that it appeared to be sound, as far as any one could see, and that it was not until about four or five days after the accident that a loose board was discovered near the point where plaintiff fell. There was also testimony that plaintiff had said that the injury was caused by her tripping and falling between the sidewalk and the fence, striking her knee and hip on the edge of the walk, and not by falling forward as she testified at the trial. On the other hand, there is testimony that plaintiff fell from tripping on a loose or broken board; that the sidewalk at that point at the time of the accident, and for a number of months before, was in a defective and dangerous condition; that a part of the cross-boards were broken and loose; that it was shaky and had settled so that one side was lower than the other; that the stringers on which the boards were nailed were so rotten that nails would not hold therein and stuck up above the boards. The evidence being in this condition, it is apparent that we cannot interfere with the verdict of the jury.

The charge of the court covers the issues presented, and we think the defendant has no cause to complain of the refusal to give the instruction requested.

We find no error in the record. The judgment of the district court is

AFFIRMED.

FRANK WILKINS, ADMINISTRATOR, APPELLEE, V. WATER & LIGHT COMPANY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,852.

1. **Master and Servant:** ERECTION OF TELEPHONE POLES: NEGLIGENCE. The poles and wires of an electric light company were placed in an alley some years previous to the erection of a telephone distributing pole about 2½ feet away on adjacent private property. The telephone wires were contained in an underground conduit in the form of a cable, and the cable was carried up the side of the telephone pole in a metal tube to the bottom of the cable box, which was nearly 30 feet from the ground. There was a platform on the pole 27 feet from the ground. The top of the pole was over 38 feet from the ground. The electric light poles were about 15 feet shorter than the telephone pole. The top cross-arm of the light pole carried two insulated and two uninsulated wires. The other cross-arms carried insulated wires. The bare wires were used as guard wires, and were not intended to carry electricity. The top of the cable box from which the telephone wires emerged for distribution was nearly 10 feet above the top of the light poles, and there was no opportunity for any of the wires of the telephone company to come in contact with the wires of the light company. *Held*, That these facts do not establish negligence on the part of the telephone company in placing its distributing pole in the position where it stood.

2. ———: NEGLIGENCE: ASSUMPTION OF RISK. The doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense where that relation does not exist between the parties.

3. **Negligence:** CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. The question whether an employee of a telephone company is guilty of contributory negligence in ascending a telephone pole in proximity to an uninsulated wire belonging to an electric light company is a question of fact for the jury, where reasonable minds may differ as to whether ordinary prudence justified the act.

4. Electricity: NEGLIGENCE. Where the manager of an electric light company is informed that an uninsulated guard wire, which is strung upon poles belonging to that company in close proximity to a telephone distributing pole upon which workmen may reasonably be expected to go, has become charged with a heavy current of electricity from contact with other wires of that company carrying a heavy voltage, it is his duty to remedy the dangerous situation as soon as practicable, and a delay of over 36 hours in remedying the defect may constitute gross negligence on the part of the light company.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed as to the Water & Light Company, and reversed as to the Nebraska Telephone Company.*

Greene & Breckenridge, Paul Jessen, Pitzer & Hayward and *Edwin Zimmerer,* for appellants.

Matthew Gering and *John C. Watson, contra.*

LETTON, J.

Action to recover for the death of plaintiff's intestate, Clinton Gilman. In the opinion, for convenience, the defendant Nebraska Telephone Company will be termed the Telephone Company, and the defendant Water & Light Company of Nebraska City the Light Company.

In the brief of the Telephone Company we find the following statement of facts: "The Water & Light Company of Nebraska City has a line of poles, in a certain alley in that city, along and upon which are strung two electric wires carrying a voltage of from 2,000 to 2,200 volts of electricity. These two wires are strung on the top cross-arm between two guard wires. There was also strung on these poles of the Water & Light Company a bare, uninsulated iron wire which had at one time been used as a signal wire in connection with a stand-pipe valve, and had been used on Sundays up to about March, 1908, for the transmission of a low voltage of electricity, and after that it served the Water & Light Company as a guard wire

to break the drops of individual telephone wires that were higher than the electric light wires. But this bare iron wire became 'crossed' or in contact with one of the high-tension wires, and thereby was unintentionally charged with some of the 2,000 or more volts of electricity which was by intention carried over the two high-tension wires supplying power and light to the customers of the Water & Light Company. The poles of the Water & Light Company have been located in this alley for a long time, and in October, 1909, had become somewhat sagged and out of plumb. As a matter of fact, one of the poles in the alley already mentioned, which for convenient and distinct designation will be spoken of as electric light poles, back of a certain restaurant known as Kastner's, leaned toward a pole of the Nebraska Telephone Company which was outside of the alley and on private property, so that the bare iron wire on the electric light pole already mentioned swung and rubbed against the telephone pole, and had apparently been in contact with the telephone pole at some time when through contact with the live electric wires it was carrying a high current of electricty, for the point of contact was plainly visible on the telephone pole. This iron wire was at a considerable distance above the ground. The telephone pole was about 30 feet high, and was used for the purpose of distributing the telephone wires to the customers of the Telephone Company in that locality. The telephone wires (which ran in an underground conduit) were carried up the side of the pole in a conduit or tube as far as the cable box. * * * The box projected over the property in which the pole was set, and not into the alley; and wires were distributed out of the cable box from the insulators at the cross-arm at the top of the pole to the places of business of the Telephone Company's patrons. The bare iron wire referred to was about 20 feet above the ground. It was not possible for any of appellant's telephone wires to come in contact with any wire of the Water & Light Company. * * * Clinton Gilman, the deceased, was an employee of the Telephone

Company. He had formerly worked for the Water & Light Company, and had had some experience in working around telephone and electric light poles, and wires of both kinds. On October 4, 1909, and while working for the Telephone Company painting telephone poles, he got a shock by contact with this iron wire on the particular pole described in the testimony in the rear of Kastner's restaurant, which was the identical pole from which he fell the following Wednesday, receiving at that time the injuries which terminated his life. This wire had been cut at both ends. It was not used for the transmission of electricity at that time, and the fact that it was allowed to remain there in the situation in which Gilman found it on the afternoon of the day he received his injury created a condition which, it is claimed, was negligent as against the Water & Light Company. When this wire was charged with the electric current, it was through contact with the electric light wire of the Water & Light Company, and not through any crossing or contact of the high-tension wires of the Water & Light Company with any of the Nebraska Telephone Company's wires, none of which were involved in the accident or the cause of it."

Plaintiff concedes that this statement of facts is correct as far as it goes. The following additional facts seem to be established by the evidence. On the afternoon of Monday, October 4, 1909, and while working for the Telephone Company painting the ironwork on this pole, Gilman received a slight shock and was burned on the hand by touching this bare wire. He had been told that the wire was "hot" by another workman who had touched it that day when painting. This wire had become charged through coming in contact with another wire of the Light Company at a distance of a little more than a block away. Gilman, who was apparently much alarmed by the first shock, immediately reported the facts to George Bauman, the foreman of the Telephone Company, who directed him to cease working upon the pole. The foreman testifies that he immediately went to see Mr. Egan, the manager

of the Light Company, and Egan promised to have the matter attended to at once or early the next morning. Egan says he promised to attend to the matter the next Sunday when there was no current on the wires. The next morning Gilman was told by the foreman of the Telephone Company of Egan's promise to make immediate repairs. The repairs were not made, and on Tuesday afternoon, October 5, Bauman told Gilman that he had been informed by employees of the Light Company that the cross had not been cleared. Nothing further was said to Gilman about this matter. On Wednesday forenoon Gilman was engaged in trimming trees. Bauman directed him in the afternoon to resume the work of painting. Bauman testifies: "Q. What did you say to him? A. I told him to go out and follow the work he had been doing. Q. Did you tell him to go to any particular place? A. No, sir. Q. What else did you say to him? A. The last words I said to him was: 'Clint, for Christ's sake be careful.'" Gilman and John Bauman left the shop together. Nothing was said by Gilman to indicate he was going back to work on this pole. Soon afterwards Gilman climbed the pole, and some few minutes after fell to the ground enveloped in flames. He died as a result of the accident.

In substance, the petition alleges that Gilman was employed by the Telephone Company as a lineman; that he was inexperienced and had no knowledge of the effect that contact between wires heavily charged with electricity or between such wires and metal would have; that it was his employer's duty to warn him as to the dangers incident to such work, to furnish him with a reasonably safe place to work, to place its poles at a reasonably safe distance from the wires of the Light Company whose poles and wires were in close proximity; that it was the duty of each of the defendants to keep their poles and wires so that the same would not cross, interfere, or come in contact, to keep them properly insulated and stretched so as not to permit them to sag and become loose; that the

Light Company permitted its wires to become loose so that they crossed and came in contact with the wires, poles and cable of the Telephone Company. It ascribes similar negligence to the other defendant. It further alleges that on October 4, 1909, Gilman reported to each of the defendants that the wires were crossed, and each of them promised to repair the same immediately, but negligently omitted to do so, and that Gilman, relying on the promise, on the 6th day of October, without any knowledge that the wire had not been repaired, attempted to work on a pole of the Telephone Company; that the wires were crossed which caused the accident, and that as a result Gilman died, leaving a widow and one minor child, aged five years, who were dependent upon him for support.

The answer of each defendant pleads that the risks of the service were obvious, and were understood, known to, and assumed by plaintiff, and also pleads contributory negligence on his part.

We will first consider the errors assigned by the Telephone Company. The principal complaint made by this defendant is that the court erred in overruling its motion for a directed verdict, for the following reasons: "(*a*) The testimony fails to show, and does not tend to prove, any negligence upon the part of the Nebraska Telephone Company which was the proximate cause of the injury resulting in the death of Clinton Gilman; (*b*) the evidence does not tend to establish why and how the injury to Clinton Gilman was received; (*c*) it is established that Clinton Gilman knew and appreciated the danger of his situation created by the proximity of the bare wire which was near to or abutting against the telephone pole described in the testimony, and that he assumed the risk of injury therefrom; * * * (*e*) the ground, as alleged in the petition and stated by plaintiff's counsel in his opening statement to the jury, that defendant's foreman promised and assured Gilman that the dangerous situation of which Gilman was informed, and which he re-

ported to the foreman, would be removed, is not sustained by the proof, nor does it appear in the evidence that he resumed his work relying on any promise of repair made by the Nebraska Telephone Company's foreman; but, to the contrary, he knew that the Telephone Company would not make such repair, and he knew, or had reason to believe, and feared that the danger still existed and that the wire was hot."

We cannot agree that the testimony does not show why and how the injury to Gilman was received. The circumstantial evidence upon this point is sufficient. But we are of the opinion that some of the other grounds upon which the motion was predicated are well taken. We think the evidence fails to show negligence on the part of the Telephone Company in placing its distributing pole where it did. The top of the pole was 38 feet 6 inches from the ground. The bottom of the platform thereon is 27 feet from the ground, and the point on the pole opposite the loose wire is 23 feet 4 inches from the ground. The top of the cable box from which the wires emerged for distribution was nearly 10 feet above the burned place on the pole, and hence there was no opportunity for any of the wires of the Telephone Company to come in contact with the wires of the Light Company, and, in fact, such a condition did not occur. There were two cross-arms on the Light Company's pole beneath the one which carried the dangerous wire, each carrying insulated wires charged with heavy currents. There is no proof that these wires were not properly insulated opposite the pole.

Gilman knew the danger of the situation created by the charged wire which had burned him. The promise which was made to remove the danger was not made to Gilman by his employer, the Telephone Company, but it was a promise made by the manager of the Light Company to the Telephone Company and communicated to him, and there is no proof that Gilman expected or anticipated that the removal of the cross would be made by the Telephone Company, or that he resumed work upon a promise made

by his foreman that the Telephone Company would remove the danger.

We are convinced that it was not negligence on the part of the Telephone Company to place the pole where it did for the purpose of distributing its wires, nor was this the proximate cause of the injury. Neither is it liable for a failure to warn Gilman of the danger, since he had been told by another employee and warned by the foreman of the danger of working on this pole on account of the proximity of the charged wire. There being no negligence on the part of this defendant, the motion should have been sustained. The other errors assigned by the Telephone Company we need not consider.

Taking up the points presented in the brief of the Light Company, several matters with respect to the admission of evidence are urged as being erroneous. The first is that the plaintiff was permitted to show that, after the accident, a piece of rubber hose had been placed over the bare wire at the place of the accident, and it is argued that to admit proof of subsequent repairs made by the employer is prejudicially erroneous. Unfortunately for this contention, no such evidence is in the record. It does appear (at one place without objection) that a piece of rubber hose had been nailed, after the accident, by the foreman of the Telephone Company upon the pole at a point opposite the bare wire. Since no change was made by the Light Company, this could not be prejudicial as against this defendant. Moreover, the jury were carefully instructed as to how far this evidence should be considered. As to the admission of evidence as to Gilman being usually a careful man, we think this could not affect the verdict, since all the facts as to his actions were before the jury.

It is next argued that the proof fails to show that the Light Company failed to perform any duty it owed to deceased, and that hence negligence on its part has not been proved. It is true that the duties of the Telephone Company and the Light Company to Gilman are not the

same. It is also true that, if there had been no telephone pole in that locality, the accident would not have happened, still the Telephone Company had the right to place its pole as it did. If the Light Company had not allowed its poles to lean, and its wire to sag, and negligently allowed a dangerous current to flow through the bare wire, the accident would not have happened. The Light Company knew of the proximity of this pole, with steps on each side, and with a platform and distributing box above the cross-arms and wires of the Light Company, and knew that men might be expected to work there with such tools and appliances as were needed. It owed the duty of exercising care either to insulate its wires at that point, or to see that vagrant and dangerous currents were not allowed to pass through its unused wires. *Olson v. Nebraska Telephone Co.*, 85 Neb. 331; *Atlanta Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798. Its manager recognized this duty by his promise to make repairs. The failure to do this was one of the proximate causes of the accident.

This defendant also pleads that Gilman assumed the risks of his employment, and hence that there is no liability on its part. The Light Company owed Gilman, as well as all other persons rightfully using the poles of the Telephone Company, the duty of using no negligence with respect to the upkeep of its wires and poles. The legal doctrine of the assumption of risk arises from the relation of master and servant. Since Gilman was not an employee of the Light Company, he assumed no risks as to the negligence of that company. Moreover, its promise to make immediate repairs had been communicated to him. This defense, therefore, is not available to the Light Company. The Light Company argues that there is no evidence that the wire was heavily charged, and that it may have carried no more than 110 volts. We cannot see that the intensity of the current is of much materiality in this connection. It is apparent that the uninsulated wire was charged with a current which might be dangerous to

workmen on the poles of the Telephone Company. The circumstantial evidence seems to show that Gilman's fall was caused by the metal of the paint pail forming a short circuit with the charged wire and the metal covering of the telephone cable on the side of the pole, thus causing the sudden flashing into fire and exploding of the paint, which was shown to be mineral paint containing turpentine and other highly inflammable ingredients.

The question whether Gilman was guilty of contributory negligence was submitted to the jury under carefully prepared instructions. They were also permitted a view of the scene of the accident. Whether Gilman was justified in attempting to climb the pole and pass the charged wire in order to reach the platform is a question as to which reasonable minds might differ. The question is a close one, but it is peculiarly one for the jury to determine. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332; *Cudahy Packing Co. v. Wesolowski*, 75 Neb. 787; *Grimm v. Omaha Electric L. & P. Co.*, 79 Neb. 387. We think there is sufficient evidence to warrant a finding for the plaintiff on this point.

The case seems to have been carefully tried and all rights of the Light Company preserved. It was submitted to the jury upon a clear and lucid statement of the law in the instructions. The only prejudicial error we find is that the motion of the Telephone Company for a directed verdict should have been sustained.

The judgment is affirmed as to the Light Company, and is reversed as to the Telephone Company.

JUDGMENT ACCORDINGLY.

IN RE PARKER M. WICKSTRUM.

PARKER M. WICKSTRUM, APPELLANT, V. ERNEST HUNGER ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 17,778.

Constitutional Law: CITY ORDINANCE: REGULATING USE OF MOTOR VEHICLES. A provision in a general ordinance of the city of Lincoln regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator," *held*, to be general with respect to all members of the class affected, to be based upon a reasonable classification, and to be a valid exercise of the police power of the city in protecting the safety of travelers on the city streets and persons carried on motorcycles.

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

Barton Green, for appellant.

F. C. Foster and *D. H. McClenahan, contra.*

LETTON, J.

Appellant was arrested and convicted of the violation of a city ordinance providing that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator." This provision is embraced within a general ordinance regulating the use of motor vehicles in the city of Lincoln. Having failed to pay the fine and costs adjudged against him, he was committed to jail. He applied to the district court for release upon a writ of habeas corpus, on the ground that the ordinance was unreasonable and void, and from a denial of the writ he has appealed.

Summarily stated, his contention is that the ordinance arbitrarily invades personal rights; that a motorcycle is a type of motor vehicle which is no more dangerous to operate with a passenger in front than an ordinary electric automobile, which is usually a glass-inclosed cab in which passengers may occupy a seat directly in front of

the operator. From these facts he argues that where a restraining law or ordinance is against a class, or one type of a class, that type or class must be more dangerous than others, or legislation against it cannot be upheld. The testimony is that, when a person is carried in front of the operator upon a motorcycle, he sits between the handle bars of the machine, directly over the gasoline tank; that while, by leaning the body or moving the head to one side, the operator may see directly in front, the presence of the passenger obstructs the view to some extent. It is also shown that several instances have occurred of fuel tanks leaking and catching fire, and that in case of accident it is difficult or almost impossible for the person carried to get out from between the handle bars. It is also shown that such vehicles may be operated at a speed of from 30 to 60 miles an hour, and that upon wet pavements they are more likely to slip than four-wheeled vehicles.

The principles controlling the question presented are so well settled in this state as scarcely to require repetition: "Courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature." *Enders v. Friday*, 78 Neb. 510. In *Peterson v. State*, 79 Neb. 132, it is said: "It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities thereof by the legislature. When they have acted and passed an ordinance, it is presumptively valid, and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred, by acting in an arbitrary manner." See, also, *In re Anderson*, 69 Neb. 686. We think there

is such a distinct difference between the operation of a motorcycle and of ordinary motor vehicles as to justify the enactment of the ordinance. Even if it be true that regulation in respect to passengers obstructing the view of the driver would be proper as to other classes of motor vehicles, perhaps the authorities have only made a beginning. It may be presumed that, if the city authorities become convinced of the necessity of further safeguarding the lives of the inhabitants of the city, they will take steps to do so. It seems clear that the provision complained of was intended to protect not only ordinary travelers on the streets from the danger that might accrue from the obstruction to the vision of the operator of such a speedy vehicle, but it was also intended to avoid the danger of accident to the person carried.

The ordinance is general with respect to all persons who operate motorcycles, and since it treats all members of that class alike, and the classification is founded upon a reasonable basis, it was within the power of the city council to adopt the same.

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

AFFIRMED.

FRANK H. PARSONS, APPELLEE, V. JOHN T. CATHERS ET AL. APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,817.

1. **Creditors' Suit: EXHAUSTION OF REMEDIES AT LAW.** For the purpose of maintaining a creditor's bill, proof of a judgment at law, of the issuance of an execution, and of a sheriff's return *nulla bona*, is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law have been exhausted.

2. ———: **PROPERTY SUBJECT: JUDGMENT AGAINST CITY.** In equity, the interest of a judgment debtor in a judgment against a city may, in a proper case, be subjected to the claim of his judgment creditor.

3. ———: **SALE OF COLLATERAL PENDING SUIT.** Failure of a court of equity to dismiss a creditor's bill, on an answer alleging that

plaintiff has possession of unsold collateral security for his judgment, *held* not reversible error in a record which shows that plaintiff, before filing his reply, sold the collateral and applied the proceeds in part payment of his claim, that the case was tried on pleadings raising all the issues essential to an adjudication of the rights of the parties, and that no one was prejudiced by the procedure adopted by the trial court.

4. **Fraudulent Conveyances: EVIDENCE.** Decree upholding a conveyance from a husband to his wife *held* proper under the evidence, though assailed as fraudulent in a creditor's bill.

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

J. O. Detweiler, for appellants.

Charles Battelle and *J. F. Stout, contra.*

ROSE, J.

This is a creditor's bill in which plaintiff seeks to collect a judgment for $8,369.88, rendered August 14, 1909, in the district court for Douglas county, against John T. Cathers and others. The suit wherein the judgment was rendered was commenced April 28, 1894, and the liability of Cathers was that of surety on a promissory note for $5,000, dated April 8, 1892, and payable to the McCague Savings Bank. Plaintiff succeeded to the rights of the payee. Execution was issued and returned "*nulla bona.*" The property which the court is asked to subject to the payment of the judgment consists of three items: (1) A lot in Omaha, conveyed January 7, 1898, by Cathers to his wife, through a trustee, it being alleged that the conveyance was made without consideration, with the intent to hinder, delay and defraud plaintiff in collecting his claim against grantor. (2) Unpaid awards of $1,245 against the city of Omaha in favor of the wife, the city having appropriated to public purposes part of the lot conveyed to her, and the amount recovered by her being the value of the property thus taken. (3) The interest of Cathers in two unpaid judgments against the city of

Omaha, one rendered in favor of Anna J. Robinson, November 30, 1907, for $1,640, and the other rendered in favor of Rhoda Gilliland, March 27, 1909, for $1,500, Cathers having filed an attorney's lien for one-half of each of the two judgments. The principal debtors and Cathers and wife and other persons claiming an interest in the property in controversy are defendants herein. The answer contains a denial that the conveyance from Cathers to his wife was made without consideration, or to defraud plaintiff, or to hinder or delay him in collecting his claim. On the contrary, it is alleged that the conveyance was executed in good faith for the full consideration of $5,087.92. Other matters pleaded in defense are that the creditor's bill was prematurely filed; that Cathers was a surety only; that plaintiff held as collateral security for the payment of his claim 20,000 shares of capital stock of the Colorado Gold, Silver & Lead Mining Company, property alleged to be of great value belonging to the principal debtors; and that the collateral described, though in control of plaintiff, was never sold or in any way applied to the payment of the note on which Cathers was surety. In a reply plaintiff states that on February 24, 1910, a date subsequent to the filing of the answer to the creditor's bill, he sold the collateral at public sale, after due notice, for $100, and credited the proceeds on his judgment. The trial court upheld the conveyance from Cathers to his wife, and declined to apply the latter's awards against the city of Omaha on plaintiff's judgment, but subjected thereto the attorney's liens on the judgments against the city of Omaha. Cathers and wife appealed, and plaintiff filed a cross-appeal. After the record was filed in this court, Cathers died, and the case was revived in the name of his wife, Louisa E. Cathers, as administratrix of his estate.

Should the creditor's bill be dismissed because the action was prematurely brought? It is argued that relief was erroneously granted to plaintiff because his pleadings and proofs do not show that he exhausted his legal reme-

dies before bringing his suit in equity. This proposition is based on the assertion that property subject to execution was not sold before the filing of the creditor's bill. The record shows that plaintiff pleaded and proved his judgment, and that an execution was issued thereon and returned *nulla bona*. Nothing more could be done without the aid of equity. *First Nat. Bank v. Gibson*, 60 Neb. 767. Fraud or collusion on the part of the sheriff in performing his duties under the writ or in making his return is not shown. Under the circumstances plaintiff was not required to impeach the officer's return or to show by additional evidence that neither the principal debtors nor the surety had any property subject to execution. In absence of fraud or collusion on the part of the officer, the judgment, the execution and the sheriff's return were sufficient evidence that the remedy at law was inadequate. *Weaver v. Cressman*, 21 Neb. 675; *First Nat. Bank v. Gibson*, 60 Neb. 767; *Cochran v. Cochran*, 62 Neb. 450; *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309; *Howard v. Raymers*, 64 Neb. 213; *Coffield v. Parmenter*, 2 Neb. (Unof.) 42.

It is further argued that the funds burdened with the attorney's lien, while under the control of the city of Omaha, cannot be impounded or subjected to the payment of plaintiff's judgment. The city of Omaha is a defendant, and at the trial did not resist the making of an order directing payment of those funds to plaintiff. The statute creating a remedy in aid of execution provides: "Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods, or effects which he may have in possession of any person, body-politic, or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed." Code, sec. 532. In direct terms the equitable

remedy extends to the interest of a judgment debtor in a judgment against a "body-politic, or corporate." The remedy in aid of execution does not exclude relief in equity. *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316. It follows that this point, on the record presented, is not well taken.

Should the action be dismissed because plaintiff, before filing his creditor's bill, failed to sell the collateral security in his hands and apply the proceeds on his claim? That defense was pleaded in an answer filed by Cathers January 24, 1910. The court of equity had acquired jurisdiction. In a reply plaintiff alleged that he sold the collateral February 24, 1910, and applied the proceeds on his claim. Fraud or illegality in the sale is not shown. At the time of the trial, therefore, this feature of the defense had no existence as originally pleaded. The proceeds of the collateral paid a small part of the debt. Leviable property subject to execution and the collateral were wholly insufficient for the satisfaction of the judgment in favor of plaintiff, when the creditor's suit was tried. Equitable relief was not granted before the remedies at law had been exhausted. Had the suit been dismissed under these circumstances, the parties would necessarily have been burdened with the costs and expenses incident to the bringing and prosecuting of a second suit of the same nature as the first. In *Haffey v. Lynch*, 143 N. Y. 241, the court said: "Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that, if he then commenced his action, he would be entitled to the equitable relief sought." For these reasons, the case having been tried below under pleadings raising all the issues essential to an adjudication of the rights of the parties, the action will not now be

dismissed, since no one was prejudiced by the trial court's procedure.

Was the conveyance from Cathers to his wife fraudulent? Both testified that early in their married life the wife received from her father's estate, from a life insurance company, and from the sale of stock of the Chartiers Valley Railroad Company various sums of money aggregating several thousand dollars; that this money was turned over to the husband under an agreement to return it, and that he never did so until he deeded her the lot in controversy in fulfilment of his promise. Cathers testified, also, that the consideration mentioned in the deed was the amount received from his wife, with interest. There is proof that the wife, when she accepted the deed, had no knowledge of her husband's liability as surety; that the husband then thought his liability was fully protected by collateral security; that plaintiff, for many years, made no effort to bring his suit on the note to trial, and that Cathers, before, and two years after, the conveyance to his wife, retained in his own name title to a large tract of valuable land near Omaha. Plaintiff made no effort to contradict this testimony by direct proof. When it is all considered with the entire record, the trial court's finding against plaintiff on the issue of fraud in the conveyance from Cathers to his wife appears to be correct. It necessarily follows that plaintiff is not entitled to the awards against the city of Omaha for that part of grantee's lot taken for public purposes. There is no error apparent in the proceedings below. Neither appellants nor cross-appellant having obtained relief in this court, the costs here will be equally divided between them.

AFFIRMED.

WILLIAM KISER, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,864.

Carriers: DELAY IN SHIPMENT. Verdict against a carrier for damages resulting from delay in transporting live stock to market *held* sustained by the evidence.

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

Byron Clark, *W. S. Morlan* and *Arthur R. Wells*, for appellant.

John Everson, *contra.*

ROSE, J.

The suit was brought to recover damages in the sum of $175.83 for defendant's delay in transporting a car of hogs loaded at Woodruff, Kansas, February 13, 1909, and delivered at St. Joseph, Missouri, too late for the market February 16, 1909. Plaintiff pleaded that the consignment, in the ordinary course of transportation, would have reached its destination in the morning of February 15, 1909; that defendant permitted the loaded car to stand on its track at Woodruff two days during stormy, cold weather, and that in consequence the hogs crowded together, 15 of them died, and the others depreciated in value. The answer contained a general denial; and an affirmative plea that plaintiff undertook to load the hogs and to care for them until they were taken away from Woodruff; that he put them into the car during a snowstorm, which increased in severity until it blockaded defendant's railroad; that by reason of the blockade defendant was unable to transport the car any earlier than it did; and that the delay and the resulting injuries were caused by the storm, and by want of ordinary care on part of plaintiff in loading the car when it was storming,

and in failing to give the hogs proper care while they were at Woodruff. Plaintiff recovered a verdict and judgment for $163.86. Defendant appealed.

The only question presented is the sufficiency of the evidence to sustain the verdict. There is no proof in the record except that adduced by plaintiff. It shows: Two stock trains a week, going eastward, ran out of Woodruff, one Wednesday at 4 o'clock in the morning, and the other at the same hour Sunday. At night there was no agent at the station. It was customary for the station agent to deliver the bill of lading Saturday evening for Sunday's shipment, for the shipper to load the car before 4 o'clock the next morning, and for the carrier to take it away shortly afterward. Defendant maintained stock-yards at Woodruff. About 5 o'clock Saturday afternoon, February 13, 1909, plaintiff put 80 hogs in the stock-yards, told the agent what he had done, where the hogs were to be shipped, and procured from him the same evening a bill of lading. Between 3 and 4 o'clock the next morning, plaintiff loaded the hogs into a stock car on defendant's track, and went home. The car was not moved until Monday evening, did not reach St. Joseph until Wednesday, and the consignment was injured in the manner pleaded in the petition.

Defendant argues these propositions to show the insufficiency of the evidence: There was no delay except at Woodruff. The consignment was picked up by the first train going east. Plaintiff undertook to care for the hogs during the delay. He failed to prove that they were delivered to defendant for shipment before the car was taken away.

Defendant's view of the evidence relating to the delivery is not the only reasonable one. Plaintiff testified in substance: There was no agreement on his part to care for the hogs or to furnish a caretaker at the station or en route. He learned about 10 o'clock Sunday morning that the car had not been taken away. He promptly went to the station, found some of the hogs dead, reported the con-

ditions to the agent, under his direction nailed grain doors on the car to protect the rest of the hogs from the storm, and afterward bedded and fed them. The proof of these facts, when considered with the entire record, is sufficient to sustain findings that the hogs would have had less protection from the storm in defendant's stock-yards than they had in the car; that what plaintiff did to protect and care for them was done by direction of the station agent; and that plaintiff surrendered full control over the hogs for the purpose of shipment when he loaded them.

It is also argued that the evidence is insufficient for the following reasons: The hogs had proper care at Woodruff. There was no delay elsewhere. Defendant was prevented by an unprecedented snowstorm from starting the shipment sooner.

The last conclusion thus stated by defendant is not a necessary deduction from the proofs. The testimony relating to the storm is meager. Plaintiff said it was storming some when he got the bill of lading, and that it was snowing quite a little and blowing when he loaded the car. He also said he was told about noon Sunday that one of defendant's engines was stuck in a drift west of Woodruff. Neither the place nor the distance west was shown. This comes far short of proving an unprecedented storm which excused the delay in shipping the hogs, though plaintiff never before had a similar experience. There is no evidence that defendant's road was blockaded between Woodruff and St. Joseph, or that the car could not have been taken out promptly by an engine or train from the east.

A sufficient reason for setting aside the verdict has not been given, and the judgment is

AFFIRMED.

GEORGE P. CRONK, APPELLEE, V. CORA L. CRONK, APPELLANT.

FILED NOVEMBER 27, 1912. No. 17,024.

Divorce: EXTREME CRUELTY. Decree granting a husband a divorce on the ground of extreme cruelty affirmed as a proper disposition of the case under the evidence.

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

W. W. Slabaugh and *G. W. Shields*, for appellant.

Crane & Boucher and *A. W. Jefferis, contra.*

ROSE, J.

The parties are husband and wife. The husband is plaintiff, and the trial court granted him a divorce on the ground of extreme cruelty. The wife appeals, and insists that under the evidence the divorce should not have been granted.

They were married September 18, 1906, and the suit was commenced June 20, 1910. The intervening time was full of sensation and scandal. Both had been previously married and divorced. They lived in Omaha. Evidence relating to what occurred after they became husband and wife fairly establishes the following facts: Defendant accused her husband of marital infidelity, and at the trial was unable to prove her charges, though she had previously given them wide publicity. She clandestinely took his watch and other articles of personal property and pawned them to secure money for herself. She accepted from her husband money and transportation for a trip to Virginia to visit her relatives, and consented to his going to California at the same time to visit his children by a former wife. After he left Omaha pursuant to this understanding, she secretly followed him and spied upon him

while he was visiting with his children at Long Beach. She falsely intimated to police officers there and at Los Angeles that her husband was having improper relations with his former wife and importuned them to arrest him. In California she deliberately gave newspaper publicity to her simulated wrongs, and made him and his children the subjects of sensational notoriety and scandal. In Omaha she went before the grand jury, falsely charged him with wife-desertion and nonsupport, and attempted to have him arrested. She directed public attention to her scandalous relations with her husband by hurrying after him in the public streets of Omaha, by calling to him, and by giving publicity to her unfounded suspicions. She went personally to eminent citizens who were fraternal brethren of her husband and falsely accused him of desertion and nonsupport, with a view to having him investigated by his lodge and disgraced. She was wholly unable to disprove this conduct. In some form it was often repeated. It was deliberately planned and appeared to get worse. There is convincing proof that it robbed her husband of his peace of mind, made his marital relations intolerable, and seriously impaired his health. It amounted to extreme cruelty within the meaning of the divorce laws. His conduct is assailed by his wife, but the proofs do not justify a finding that he was guilty of such misconduct as would warrant a court of equity in dismissing his suit on that ground.

Defendant offered a vast amount of testimony to establish condonation. If full credence could be given to the witnesses who testified in favor of defendant on that issue, the defense might be established, but the trial court, under all the circumstances, properly disbelieved their testimony on material matters. After the alleged condonation, defendant's conduct was more cruel than before. A careful consideration of the entire record leads to the conclusion that the findings below were right and that the divorce was properly granted. An analysis of the evidence would not benefit the parties nor improve the litera-

ture of the court. It has all been carefully examined, however, and the decree below is adopted as correct.

AFFIRMED.

REESE, C. J., dissenting.

Having read the abstract containing the proceedings upon the supplemental hearing, I am compelled to dissent from the opinion of the majority in this case. After the submission of the case to the district court, quite a lengthy memorandum opinion was written and filed by the judge who heard and decided the case. A portion of that opinion impresses me most strongly. After discussing another feature of the case, the court says: "But apart from this, what seems to be improbable in plaintiff's testimony is that these persons should be together even as much as plaintiff admits they were, and under the circumstances they were, and yet at no time were familiarities of any nature indulged in, or even suggested, as plaintiff testifies. Knowing these parties as I do and have come to know them since this litigation commenced, particularly the defendant, and knowing as I do that her persistent and almost unceasing effort and object has been to reinstall herself in her husband's favor, whether for good or evil, I need not now say, I can scarcely conceive it possible for these two persons to have been together for even as much as nine nights from 7 or 7:30 to 10 or 11 o'clock, according to plaintiff's testimony, or much later according to defendant's testimony, in a room alone, and yet neither, at any time, having made any advances of familiarity to the other; that at no time throughout the entire series of visits did anything occur between them but what might be expected to occur between two strangers. Such a thing, of course, was possible, but, in the very nature of things, it seems to me it would not be probable."

There are many things stated in the opinion which reflect strongly upon the conduct and character of defendant, and which are probably merited, but for the purpose

of this dissent need not be set out. The question submitted upon this supplemental hearing was whether there had been a condonation after the rendition of the decree of divorce in favor of plaintiff, the husband. It is alleged by defendant that after the decree was rendered, and while the cause was pending in the supreme court on appeal, the parties became reconciled, lived and cohabited together as husband and wife. There was a mass of evidence introduced, aside from the direct and positive testimony of defendant, which tended to establish that fact. The testimony of plaintiff, in denial of the statements of defendant and her witnesses, is equally strong and emphatic, and yet he shows by his own statements that he was often in the room of defendant of evenings, but seeks to explain his presence there by testifying that those visits were at the solicitation of defendant for the purpose of advising her upon matters of her business upon which she was considering, and, in part at least, in which she was engaging. The consideration of this mass of evidence, the knowledge of both parties as gained by the same judge upon the hearing of the trial of the principal case, no doubt prompted the remarks by the court above quoted. It was but the measurement of both parties, applied after their vile lives had been uncovered and laid bare to the court, and which forced the judicial mind to the announcement made.

It is shown that this is the third matrimonial venture by plaintiff and the second by defendant, each made possible by the divorce route, now much traveled to the disgrace of the American people. Near the close of the opinion the district court makes use of the following language: "Again, speaking for the state as a party to these proceedings, so much of crimination and recrimination already has been indulged in between these parties that I am satisfied no good could possibly result from any attempt at reunion. Better, far better, and now more than ever, both for themselves and the public, that these persons be divorced and this tiresome and unprofitable litigation

end." To this doctrine I cannot agree. The legitimate conclusion to be drawn, though not so intended by the court, must be that, since the parties have so far graduated in sin and uncleanness and by their "crimination and recrimination" have laid open to the public gaze the immorality of the life of each, and that owing to that fact "no good could possibly result from any attempt at reunion," therefore it would be "better, far better, and now more than ever, both for themselves and the public," that they be divorced, and "this tiresome and unprofitable litigation end." Judging the future by the past in the lives of these two people, I fear the decree would not have that salutary effect. On the contrary, each would thereby be turned loose upon society with the legal right to embark in new matrimonial schemes with other parties, much to the enjoyment, doubtless, of these litigants, but to the disgrace of the state and the crushing of the hopes and hearts of others.

The divorce laws were never intended for such abuses. Since divorces have been granted, in the earliest days, they have only been intended for the protection of the innocent, but never as a reward for wrongs and crimes committed. Where each party is guilty of such conduct as might be grounds for divorce for one, had the applicant been innocent, it was never intended that the sacred bond of marriage should be severed because both were guilty. It does not follow that, because a reunion is rendered improbable by reason of the iniquities of both parties, a divorce should be granted in order that they may form "unions" with others, and in and by which the disgraceful courses of life may be further pursued in fresher and greener fields. This is the teaching of the whole theory of the divorce laws of this country. To my mind it is clear as the noonday sun that this divorce should not be granted to either party. Neither is entitled to it, and neither should receive it. If they do not desire to be reunited, they can remain separate, but should never be permitted to contaminate other lives under the guise of "holy matri-

mony." For these reasons, the whole proceeding should be dismissed, and the merited and unqualified condemnation of the court placed upon it.

FAWCETT, J., concurs in the dissent.

SINGER SEWING MACHINE COMPANY, APPELLANT, V. JOHN L. BARGER ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,830.

1. **Principal and Agent:** DISAFFIRMANCE OF ACTS OF AGENT. "A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.

2. ———: RATIFICATION OF ACTS OF AGENT. Where, in settlement of a balance due upon the sale of a sewing machine, what is termed a "single payment note" is given by the purchaser for such balance, and said note provides that the machine is to remain the property of the seller until full payment of the purchase money, and the holder of such note, with notice that it has been altered by raising the amount, brings an action of replevin upon the note in its altered condition, and endeavors to recover in such action, he thereby ratifies the act of alteration.

3. ———: ALTERATION OF NOTE BY AGENT. And, in such a case, if it is established that such note was altered by the agent of the holder, who sold the machine and obtained the note from the purchasers, after the latter had signed the same and without their knowledge or consent, the plaintiff in such action cannot recover.

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

Claude S. Wilson, for appellant.

J. C. Robinson, contra.

FAWCETT, J.

This is an action of replevin brought in justice court in

Cedar county and appealed to the district court for that county. From a judgment in favor of defendants, plaintiff appeals.

The property replevied was a sewing machine sold by plaintiff through its agent, Poole, to the defendants. The evidence shows that the price fixed upon the machine was $60; that plaintiff took as part payment an old machine, and, according to the testimony of defendants, was to receive $35 in addition, of which $5 in cash was paid at the time. Poole testified that defendants were to pay $39, and paid $5 in cash at the time. What is termed a "single payment note" was signed by defendants and delivered to Poole. This note provided for the payment of the difference between the two machines one year after date, and also provided that the machine, for the purchase money of which the note was given, should remain the property of the company until full payment of the purchase money, with interest and costs. Defendants testified that when they signed the note it was drawn for the sum of $30. When the note was about to mature, it was sent to a bank for collection. Defendants were notified of that fact, and were requested to make payment at the bank, the notice stating that the note was for $34. The defendant John L. Barger went to the bank and asked to see the note, stating that there must be something wrong about it. When the note was shown to him, he at once stated that the amount of the note had been raised from $30 to $34, and refused to pay it, stating that he was willing to pay the $30, but would not pay any more. The bank reported to plaintiff what had been said, and received in return a letter from plaintiff, in which it is said: "We accepted this note with a balance of $34 and had no thought but what it was correct. If Mr. and Mrs. Barger say they were to pay only a $30 balance you may collect same and we will settle with our Mr. Poole. Kindly make arrangements with Mr. Barger to let us have the note to help us make our settlement." When notified of the statement of plaintiff, defendant refused to pay the $30, and

upon the trial gave as his reason for such refusal that he was not willing to pay the $30 unless he got his note. Some time later a representative of plaintiff called at the home of the defendants and demanded payment of the $34, and, upon payment being refused, said he was going to take the machine. This the defendants would not permit him to do. The next step in the matter was when another agent of plaintiff, with a constable, called at the home of defendants and again demanded payment of the note. Defendants refused to make payment, giving as their reason the raising of the note from $30 to $34. Plaintiff's agent thereupon offered to take the $30 in settlement of the matter, and he testified that he made that offer without adding anything for costs. This testimony is contradicted by defendants, who state that he only offered to take the $30 on condition that they would pay the expenses of himself and the officer for coming after the machine, which amounted to something like $6, which defendants refused to do. Thereupon the constable served the writ of replevin in this action and took the machine.

Upon the trial defendants both testified unequivocally that at the time they signed the note it was drawn for $30. The note shows upon its face that the word "four" must have been written into the note after the word "thirty," after the note had been drawn. An examination of the original note, which is before us, shows that as originally drawn it read "thirty no-100 dollars." Subsequently there was writen in between the word "thirty" and the "no-100 dollars" the word "four." That this was written in afterwards is evident from the manner in which the last letter of the word "four" is crowded up against the line between the word "no" and the figures "100." Plaintiff's agent admits that he wrote the word "four" in after the other part was written, and explains his act in doing so by testifying that the defendants were to pay $9 in cash and give a note for $30, and that after he had the body of the note written, but before writing the figures $34 in the

upper left-hand corner thereof, defendants said they only had $5 cash on hand; that he thereupon agreed to accept the $5, and raised the note to $34 before it was signed by defendants. This testimony is positively contradicted by both defendants, who say that there never was any talk about $9 or $39, but that the amount was to be $35, $5 in cash and a note for $30. Counsel for plaintiff in his brief says: "The question then reduces itself to two propositions: (1) Has the contract been altered since it was signed? and, if so, (2) what effect has such alteration had upon the rights of the parties to this action?" He then concedes that there were only three persons present, viz., Poole and the two defendants, and then says: "The contract shows no alteration upon its face; and, while appellant still contends that the same had not been altered, yet, inasmuch as a jury found against the appellant upon conflicting evidence, we realize that it would be a waste of time to argue to this court that phase of the question. For the sake of argument, then, let us concede that said contract was altered as alleged; we still contend that the judgment of the district court must be reversed."

In the light of the admissions of counsel, which are eminently proper in the face of the record, his contention must fail. It is argued, and authorities cited in support of the argument, that where an agent has no authority, either express or implied, to make an alteration of the character under consideration, it is simply a spoliation by a stranger to the contract, and does not impair the validity as it originally stood. The trouble with plaintiff's contention and with his authorities is that they do not fit the facts established at the trial. We think the rule of law applicable here is that if the alteration is made by an agent, while in the transaction of the principal's business and within the scope of his authority, then the act of the agent is the act of the principal. The cases supporting this rule are numerous and hardly call for citation. Among them may be noted authorities cited in defendants' brief, among which are *Kingan & Co., Limited, v. Silvers,* 13

Ind. App. 80; Mechem, Law of Agency, sec. 739; *Denver, S. P. & P. R. Co. v. Conway,* 8 Colo. 1, 5 Pac. 142; *Law v. Grant,* 37 Wis. 548, reaffirmed in *Matteson v. Rice,* 113 Wis. 328; *Rhomberg v. Avenarius,* 135 Ia. 176. We think in this case the act of Poole, who, the evidence shows, was "managing salesman" of the plaintiff, and made the alteration while engaged in the service of the plaintiff in this particular transaction, is sufficient to bind the plaintiff.

But, even if this were not so, there is another rule of law from which we are unable to see any escape by plaintiff. The evidence shows that, after plaintiff had due notice of the alteration of the note, it failed to disaffirm the unathorized act of its agent, but, on the contrary, affirmed his action by taking the machine in a replevin action, under the authority given by the altered note. It being established by the verdict of the jury that the note had been altered, it was void in its entirety, and plaintiff obtained no rights under it. Without that document to aid it, plaintiff had no authority to take the sewing machine, for, if no valid contract, in the terms and of the kind relied upon, was ever signed by defendants, then the transaction between plaintiff and defendants was simply an ordinary sale of a sewing machine on one year's time. By such a sale plaintiff would part with its title to the machine, and its only legal remedy, in the event of a failure by defendants to pay the balance due, would be by an ordinary action at law and a collection upon execution. "A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank,* 49 Neb. 379. "The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date, and the principal is bound in all respects as if he himself had been the actor." *Johnston v. Milwaukee &*

Wyoming Investment Co., 49 Neb. 68. "When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, *held*, that he thereby ratified the act of alteration, and that the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made." *Perkins Windmill & Ax Co. v. Tillman*, 55 Neb. 652. "A principal must adopt the unauthorized contract of his agent as a whole, or not at all. He cannot adopt the portion that is beneficial and reject the remainder." *Citizens State Bank v. Pence*, 59 Neb. 579.

It is contended that the court erred in giving instruction No. 2. In that instruction the jury were told that the burden was upon the plaintiff to prove every material allegation contained in its petition, and, if the jury found the evidence bearing upon any material allegation was evenly balanced, or that it preponderated in favor of defendants, plaintiff could not recover. The instruction is not open to the construction placed upon it by plaintiff. It is next contended that the court erred in giving instruction No. 6. This instruction should be considered in connection with No. 5, and when so considered it is free from error. It is further urged that the court erred in not giving instruction No. 1, requested by plaintiff, as follows: "You are instructed that if you find from the evidence, exclusive of the written instrument in question, that at the time of the commencement of this action the title and right of possession of the property replevied was in the plaintiff, then your verdict should be for the plaintiff, regardless of any alleged alteration in the written contract." This instruction was clearly bad, and was properly refused. No right of possession of the property replevied had been shown, "exclusive of the written instrument in question."

The verdict of the jury being conclusive as to the fact that the note was materially altered after its execution by the defendants, and plaintiff having ratified the unau-

thorized act of its agent by bringing this action upon such fraudulent note, the trial court did not err in overruling the motion for a new trial and entering judgment upon the verdict.

AFFIRMED.

JOHN M. DINEEN, APPELLANT, V. WILLIAM H. LANNING, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,855.

1. **Deeds**: DEED TO PARTNERSHIP: EFFECT. A deed to a partnership in its firm name is not void, but vests an equitable estate in the firm for the benefit, first, of the partnership business and creditors, and, second, of the members of such partnership.

2. **Abatement**: DEATH OF PARTNER. And where a mortgage antedating such deed is foreclosed, and in the suit for foreclosure the partnership and all of the members thereof are made parties, and summons is served upon such members, and after such service one of the members dies, the suit does not thereby abate, but may be prosecuted to final decree against the other members as surviving partners.

3. ———: ———: DISMISSAL AS TO DECEASED PARTNER. Nor does the fact that at the time of entering the decree plaintiff requests and obtains an entry of dismissal as to such deceased member operate as an abatement of the suit.

4. **Partnership**: FORECLOSURE OF MORTGAGE: SERVICE OF SUMMONS. Nor would the fact that the partnership, as a separate entity, had not been served with summons affect the validity of the decree in such suit as to the equitable interest of the members of the partnership who were served. Such members would be bound by the decree, and a sale of the real estate thereunder, duly confirmed, would divest them of such interest, and the same would pass by the sheriff's deed to the purchaser at such sale.

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

M. S. McDuffee, for appellant.

Albert W. Crites, contra.

FAWCETT, J.

From a judgment of the district court for Box Butte county, dismissing plaintiff's suit for a partition of the northeast quarter of section 30, township 26, range 47 west of the sixth P. M., in said county, plaintiff appeals.

On February 1, 1888, one William H. Wareham, who was the then owner of the land in controversy, his wife joining him, executed and delivered to defendant Lanning a mortgage upon the land. Thereafter, by mesne conveyances, the title reached one Harvey Myers, who on February 27, 1892, by warranty deed, conveyed the land to Job Hathaway & Company, subject to defendant's mortgage. The company failing to pay the taxes, the county treasurer sold the same for delinquent taxes to one Virgil Young. On October 4, 1902, Young commenced suit to foreclose his tax lien, in which suit "Job Hathaway & Company, a firm composed of Job Hathaway and Emma C. J. Austin," and Job Hathaway, Emma C. J. Austin, and the present defendant, William H. Lanning, with others, were made defendants. Defendant Lanning filed an answer and cross-petition in that suit for a foreclosure of his mortgage. The files of the district court in that case were introduced in evidence in this. They show that due service was had upon Job Hathaway and Emma C. J. Austin, but the return of the officer does not show any attempt at a formal service upon Job Hathaway & Company as a separate entity. The uncontradicted evidence shows that the copartnership of Job Hathaway & Company consisted of Job Hathaway and Emma C. J. Austin, as equal partners. The decree entered in that case contained the following recital: "Be it remembered, that on this 18th day of February, 1903, this cause came on to be heard before the court, the plaintiff appearing by Wm. Mitchell, his attorney, the defendant, W. H. Lanning, appearing by W. G. Simonson, his attorney, the plaintiff asks to dismiss this case against Job Hathaway and Annie L. Hathaway, wife of Job Hathaway, a member of defendant firm Job

Hathaway & Company, and wife of Job Hathaway, defendant, defendants, and same is hereby dismissed." Thereupon a default was entered against all of the other defendants named in plaintiff's petition, except defendant Lanning. The decree found the proceedings in the case to be regular; found the lien of plaintiff under his tax sale certificate to be a first lien, and the mortgage of defendant Lanning to be a second lien; decreed a foreclosure of the same, and awarded an order of sale therefor. The sale was duly advertised and made. Defendant Lanning was the purchaser at the sale, and upon due confirmation of the sale received the sheriff's deed for the land. At the time of entering the decree above referred to, Job Hathaway was dead; his death having occurred during the interval between the service of summons and the date of the entry of the decree.

The main contentions by plaintiff for a reversal are: A copartnership, as such, cannot take title to real property; that the copartnership, as such, was not served with summons in the foreclosure suit; that the conveyance from Myers to Job Hathaway & Company was a conveyance to Job Hathaway, individually, clothed with a trust in favor of the copartnership; that upon the dissolution of the copartnership Job Hathaway became the owner of one moiety and trustee for the other moiety; that in land purchased by partners with partnership funds partners are tenants in common, unless real estate is needed for partnership purposes; that real estate belonging to a partnership, but standing in the name of one partner only, may be partitioned; that the heirs of Job Hathaway could have partitioned unless there is a good defense appearing affirmatively, and so can the appellant who has succeeded to all rights of the heirs of Job Hathaway; that the copartnership was dissolved in 1892, and that by the recital in the decree in the foreclosure suit, above set out, the action was dismissed as to Job Hathaway, and that when he died in October, 1902, after service had been had upon him, the action abated, and, never having been revived, his

heirs, after his decease, were necessary parties to that action. We will not attempt to discuss the above points *seriatim*, but will consider them together.

We do not think the deed to the copartnership was a conveyance to Job Hathaway, individually. Conceding that the deed to Job Hathaway & Company was ineffective to lodge the legal title to the land in the copartnership (*Barber v. Crowell*, 55 Neb. 571), it did vest an equitable estate in the firm (30 Cyc. 431, 432, and authorities cited in notes 42, 43).

The death of Job Hathaway, after service upon him and prior to the decree, did not abate the suit. *Union P. R. Co. v. Metcalf*, 50 Neb. 452, was an action by Metcalf & Wood, a firm composed of Metcalf and Wood. On page 457 of the opinion it is said: "Finally, it was pleaded that if there was any such firm as Metcalf & Wood it had, since the commencement of the action, been dissolved by the death of Lafayette Metcalf, and that by reason thereof the action had abated." On page 458 it is said: "We have quite recently held, following well-established principles, that on the death of a partner the assets and choses in action of the partnership vest in the survivor. *Lindner v. Adams County Bank*, 49 Neb. 735. It is, therefore, the surviving partner who has in such case a right to proceed with the action." In the syllabus we held: "That the surviving partner was already a party to the action, and that on the death of the other partner the action could properly be continued in the name of the survivor alone." The principle is the same, whether the partners are plaintiffs or defendants.

The fact that plaintiff, in the tax foreclosure suit, on the date the decree was entered, saw fit to dismiss his suit as to Job Hathaway, who was then dead, did not deprive the court of jurisdiction to determine all of the questions involved in that suit, for the reason that if Job Hathaway were then dead, as the pleadings in this case show, then Emma C. J. Austin, as the sole surviving partner of Job Hathaway & Company, was vested with

the equitable interest as fully and completely as she and her copartner were prior to his decease. Hence, the status of the *res* had not been changed, and the court could proceed to determine all of the issues precisely as if the formal dismissal of Job Hathaway by plaintiff had not been made. His dismissal, therefore, did not affect the rights of either the plaintiff or cross-petitioner Lanning. In addition to this, we are inclined to think (although as the question has not been argued, we do not so decide) that the dismissal of the suit as to Job Hathaway, by plaintiff, operated only as a dismissal of the suit so far as plaintiff was demanding any relief against him, but did not operate as a dismissal of Job Hathaway as to the relief demanded in the cross-petition of defendant Lanning. Such a dismissal could only be made upon Lanning's motion.

Even if the failure to serve the copartnership by leaving a summons at its usual place of business, with a member thereof, rendered the decree void as to the copartnership as a separate entity, it did not affect the validity of the decree as against the equitable interest of the members of the copartnership who were served. The interest of the copartnership in the land being an equitable interest, held by the firm, first, for the benefit of its creditors, and, second, for the members of the firm, the decree bound the latter, and the sale of the property under such decree foreclosed their individual interests; and the fact, if it be a fact, that the creditors of the copartnership might assail the decree, is immaterial so far as plaintiff here is concerned, for the reason that he, as the grantee of the heirs of Job Hathaway, is bound by such decree. He bases his action upon rights which he alleges he obtained from the heirs of Job Hathaway. The interest of their ancestor having been foreclosed by the decree, they had no interest which they could convey to plaintiff.

Plaintiff's suit is, therefore, without equity, and was properly dismissed.

AFFIRMED.

WILLIAM B. LUCAS ET AL., APPELLANTS, V. ASHLAND LIGHT, MILL & POWER COMPANY, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,347.

1. **Statutes:** TITLE OF ACT: MILLS. The title of the act of 1873 (Gen. St. 1873, ch. 44, Comp. St. 1911, ch. 57), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility and having "machinery to be propelled by water."
2. **Quaere.** Whether the provisions of that act extend to mills such as "saw, carding, or fulling mills," when wholly private in their nature, *quære.*
3. **Eminent Domain:** PUBLIC UTILITIES: QUESTION FOR LEGISLATURE. Whether an undertaking is for the benefit of the people at large, and should be regarded as of public utility, must necessarily be largely within the discretion of the legislature to determine, and, unless it is clearly private in its nature, the court will not interfere with this legislative discretion.
4. ———: ———: WATER POWER. The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use, and the act should be construed to apply in such case.
5. ———: ———: CHANGE OF USE. When the right of flowage of private lands has been acquired under the *ad quod damnum* act for a public purpose, if the use of that right is changed to an entirely different and private purpose, it will amount to an abandonment of the right, but a change from one public use to another, which is within the purview of the act, will not amount to an abandonment of the right.
6. ———: FLOWAGE: REMEDIES OF LANDOWNERS. Owners of riparian lands which are injured by flowage, and were not included in the original *ad quod damnum* proceedings, may proceed under section 14 of the act. Gen. St. 1873, ch. 44. After the dam has been built at great expense and the mill has been in operation for many years, they cannot maintain an action in equity to abate the dam as a nuisance, or to restrain the use thereof until their alleged damages are adjusted.
7. ———: ———: ———: DAMAGES. In an action in equity by the owners of riparian lands to enjoin the use of the water power and remove the dam as a nuisance, and for general equitable relief, the trial court should adjust the rights of the several parties, and, if the injunction is refused, should allow plaintiffs such damages as they are entitled to.

8. ———: ———: ———: ———. In such action, plaintiffs whose lands were not included in the original *ad quod damnum* proceedings should be allowed such damages as are caused by maintaining the dam; and those whose lands were included in the original proceedings should be allowed such damages, if any, as the new and additional use of the dam and power cause to their lands over and above the damage caused by the dam and the use thereof, as allowed in the original proceedings.

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

John J. Sullivan and *Louis Lightner,* for appellants.

Hainer & Smith, G. W. Simpson and *H. Gilkeson, contra.*

SEDGWICK, J.

In 1873 Oscar M. Carter prosecuted proceedings in *ad quod damnum* in the district court for Saunders county, and in the following year obtained a judgment in that action, establishing his right to erect and maintain a dam across Wahoo creek on certain lands then owned by him near the town of Ashland, in said county. This dam by the judgment was not to be maintained more than 15 feet high above low-water mark, and damages were allowed to the owners of certain riparian lands which it was found would be injured by raising the water to that height. This defendant succeeds to these rights by mesne conveyances. The petition in *ad quod damnum* showed that the "petitioner is erecting a grist mill on his said land, and is constructing a dam across said Wahoo creek, * * * and is excavating a mill-race for his said mill," and prayed "that he might have leave to proceed to the construction of his said improvements." The order of the court recited that the petitioner had asked "for leave to build and continue his milldam at the point described in his said petition." The jury by their verdict found that "by reason of construction and continuance of the milldam built 15 feet high above low-water mark (the defendants, naming

them, would be damaged in certain amounts specified), and that the said flouring mill erected by the plaintiffs will be of public utility." This verdict was approved by the court, and it was ordered, among other things, that "the plaintiff be and is hereby authorized to build and continue his said mill and milldam as prayed in his said petition." Mr. Carter thereupon built a small mill and erected a dam, and afterwards other dams which appear to have been unsubstantial and of a temporary nature. In 1889 a substantial dam was begun, which was completed in the following year. This dam was built at considerable expense. Many car-loads of rock were used, and this dam has continued in service and has proved to be a substantial and suitable structure. Prior to the erection of this dam, it would seem that the power had been used principally, if not entirely, for grinding grain. In 1890 electrical machinery was installed, and the power was used for furnishing electric lights for the city of Ashland and its inhabitants. In May, 1907, the mill and a large part of the machinery were destroyed by fire, and the owners of the property immediately rebuilt the building and power-house and installed new machinery therein. Since that time the power has been used for generating electricity for the city of Ashland and its inhabitants.

In December, 1907, these plaintiffs began this action in the district court for Saunders county, alleging that they were owners of riparian lands damaged by the maintenance of the defendant's dam, and asking that the dam be "adjudged to be unlawful and a nuisance, and that it be abated and the defendant perpetually enjoined from maintaining it or any other dam on Wahoo creek, whereby said lands or any of them may be flooded," and for general equitable relief.

The plaintiffs also alleged that the dam was being maintained at a greater height than allowed by the *ad quod damnum* proceedings, and asked for an injunction restraining the defendant from so maintaining the dam. A temporary restraining order was issued restraining the de-

fendant from raising or maintaining the dam above the top of the solid masonry thereof by means of flash-boards, or otherwise. The defendant answered, alleging special matters in defense, which will be stated, so far as may be necessary, in the discussion of the questions of law and fact presented in the briefs. Upon the trial the court found generally in favor of the defendant and dismissed the plaintiffs' proceedings. The plaintiffs have appealed.

The plaintiffs insist that the dam is not now being devoted to a public use, and that "an easement for a particular purpose ceases when the purpose no longer exists," and that, "in any event, the dam can only be maintained 15 feet above actual low-water mark;" that the dam has been substantially raised above the prescribed limits by use of "flash-boards," which in effect added something like two feet of height to the dam. It is also insisted that some of the plaintiffs in this case are the owners of riparian lands which were not included in the *ad quod damnum* proceedings, and which are injured by this dam, and that such plaintiffs are entitled to relief, although others are not found to be so. The case is an important one, and some of the difficult questions presented are without precedent in this state. A reargument was allowed, and we have had the assistance of a thorough and able presentation of the case from both points of view.

1. The principal discussion has been in regard to the nature of the rights conferred in *ad quod damnum* proceedings, and in that connection, also, in regard to the limitations placed upon the legislature by the constitution. The constitution has placed certain limitations upon each of the three departments of government. Whether an attempted act of legislation is beyond its power is a question of law. The constitution makes it the duty of this court to determine questions of law that arise in litigation before it, and, when an act of the legislature is drawn in question as beyond its power, we cannot avoid the determination of the question so presented.

The courts have, no doubt, in some instances interfered

unjustifiably with legislation. This power should be carefully guarded and judiciously used, avoiding any tendency to restrict legislation to the limits that the judges think are beneficial and desirable. This, of course, the courts have no power to do. In all questions of doubt, the legislature should determine the matter. When there is substantial and reasonable doubt, the act of the legislature must be upheld. Two objections are urged against the constitutionality of the act. The first is that the title of the act is not broad enough to admit of legislation concerning "machinery to be propelled by water," and that, therefore, that clause in the first section of the act has no force. The title of the act is "An act relating to mills and mill-dams." Gen. St. 1873, ch. 44. If we consider the word "mill" in its original and first meaning, there is no doubt that it would not include "machinery to be propelled by water," unless that machinery was to be used in grinding; the word "mill" originally meaning to grind or make fine. This word has, however, been used for many years and has now acquired a variety of uses. Webster's Unabridged Dictionary, after defining the word "mill," uses this language: "In modern uses the term mill includes various other machines or combinations of machinery * * * to some of which the term manufactory or factory is also applied." And in the New International Directory this statement is changed, and the fifth definition of the word "mill" is: "A building or collection of buildings with machinery by which the processes of manufacturing are carried on." The Standard Dictionary gives, among others, the following definitions: "(2) Any one of various kinds of machines that transform raw material by other processes than grinding into some other form; as, a saw-mill; planing-mill. * * * (5) An establishment for reducing ores by a process other than smelting. An iron-works where the metal in the cruder forms is converted into merchant iron. (6) A building fitted up with the machinery requisite for a factory; as, a cotton-mill; woolen-mill. * * * (10) (Slang.) A pugilistic com-

bat; set-to." And it is stated that "mills are named from their action on the substance operated upon, and from the material or substance that they operate upon or prepare for use"—citing between 40 and 50 kinds of mills.

In Colorado their constitution provides that private property may be taken for private use without the consent of the owner "for private ways of necessity, and * * * for reservoirs, drains, flumes or ditches, on or across the lands of others, for agriculture, mining, milling, domestic, or sanitary purposes," and the supreme court of that state held that, under this provision of the constitution, land could be condemned to carry water to operate an electric light plant. The court held: "The term 'milling,' as used in the constitution, is synonymous with the word 'manufacturing,' and an electric light plant is a manufacturing establishment." *Lamborn v. Bell*, 32 Pac. 989 (18 Colo. 346). Our constitutional provision, that the subject of legislation must be expressed in the title of the act, is supposed to be to prevent inserting foreign matters in pending bills, and so securing ill-considered legislation. "An act relating to mills and milldams" is a comprehensive title. It permits of legislation regarding any kind of mill that uses "machinery to be propelled by water." We think this objection cannot be sustained.

The second constitutional objection which the plaintiffs urge against the construction of the statute contended for by the defendant is that the legislature has no power to condemn private property for private use. The *ad quod damnum* act involves the exercise of the right of eminent domain, and it is contended that to generate electricity to be furnished to a city and its inhabitants is not a public use, and beyond the power of the legislature to authorize the damaging of private property for such purpose, and therefore to make such use of the right obtained by *ad quod damnum* is to abandon the right which was originally given and was within the power of the legislature. The Massachusetts court, construing the statutes of that state, appear to have held that the provisions of the milldam act

extend to mills for mechanical and manufacturing purposes as well as to those intended to serve the public for a stipulated toll, and this appears not to violate the fourteenth amendment of the federal constitution. *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140. We do not find it necessary to determine or discuss this question.

Is the use that is being made of this power a public use? There is an interesting discussion of this question in 3 Farnham, Waters and Water Rights. The author severely criticises the decisions of several courts, and especially the supreme court of Massachusetts. He does not agree with that court in upholding the constitutionality of acts which allow the flowage of lands for the purpose of constructing private mills, and says: "The only things that will justify such a taking is the intention to use the power for the direct benefit of the public, as by the erection and operation of a public mill, where every one will have a right to have his work done upon payment of a toll, and which will always be under control of the legislature." Section 697. In discussing the question how far a water power can be taken under the power of eminent domain for the purpose of generating electricty, this author says: "If the electricity generated is to be subject to the common use of all who apply for it upon making reasonable compensation, it is more nearly a public use than is any other connected with the generation of power." Section 697*b*. The supreme court of Minnesota has decided that "the generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise, and property so used is devoted to public use." *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 5 L. R. A. n. s. 638. It was said by the supreme court of Vermont, in *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109: "But to say what a public use is with sufficient comprehensiveness and accuracy to meet the exigencies of all cases is, to say the least, difficult. Nor is it easier to define the limit of legislative power in respect to the right of eminent domain. This power

must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever varying and constantly increasing necessities of an advancing civilization. The circumstances and requirements of the particular case, and the practice of other states and governments where constitutional limitation is placed on legislative action in this respect must be our guides in determining what is and what is not a public use. It is sometimes easier to say what is not than to say what is." In *Traver v. Merrick County*, 14 Neb. 327, this court quoted from the Massachusetts statute and the decisions of that court, apparently with approval, and it was held that bonds given in aid of a water mill were valid. It appears from the syllabus in the case, and perhaps from some of the expressions in the opinion, that the mill in question was a public mill, intended to grind for toll, but this is not treated in the opinion as necessarily a controlling matter. The case has been cited by text-writers as following the Massachusetts rule. 15 Cyc. 598. In the later case of *Getchell v. Benton*, 30 Neb. 870, it is held that a beet sugar manufactory, which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any law of this state, and is not a work of internal improvement. The opinion seems to put this holding upon the ground that it is not a work of public utility. Whether an undertaking is for the benefit of the people at large, and is so general in its nature that it should be regarded as a public utility, must necessarily be within the discretion of the legislature to determine, and, unless it is clearly private in its nature, the courts will not interfere with this legislative discretion. Under such circumstances, it becomes a question of ascertaining the intention of the lawmakers.

The evidence shows that this defendant is using this power to furnish the city of Ashland and its inhabitants with electricity for lighting and power purposes. It was organized for that purpose. The law requires it to furnish

all applicants upon equal terms. Its business, including its rates, are subject to legislative regulation. This would seem to be a public use.

2. It is contended that the statute cannot be construed to authorize this use of the right obtained by *ad quod damnum* proceedings. The language of the first section of the act is a sufficient answer to this objection. "If any person, desiring to erect a dam across any water-course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water, * * * he may file a petition," etc. Comp. St. 1911, ch. 57, sec. 1. The last legislature enacted a statute providing that cities and villages can acquire milldam sites for municipal purposes. Laws 1911, ch. 83. This is a legislative construction that such use of the power is a public use, and clearly contemplates that rights of flowage acquired by *ad quod damnum* proceedings may be used for such purposes. Unless this is true, the act in its most common application would be unconstitutional.

3. It is said that "an easement for a particular purpose ceases when the purpose no longer exists," and *Gross v. Jones*, 85 Neb. 77, is cited as supporting this proposition. In that case the principal question determined was whether the dam and the power generated thereby had been abandoned. It is assumed in the opinion that to maintain the dam and mill-pond for the purpose of furnishing ice would not be such a use of the right acquired as to prevent the loss of the right by abandonment for nonuser. It may be conceded that, having obtained the right of flowage of these lands for a specified public purpose, it cannot be devoted to an entirely different and private purpose, and an attempt to do so would be an abandonment of the right obtained. The question is: What must be regarded as a different purpose within the meaning of this rule? In *Chicago & E. I. R. Co. v. Clapp*, 66 N. E. 223 (201 Ill. 418), the supreme court of that state held: "Where a railroad company has ceased to operate a branch to a coal mine after the mine was exhausted, had taken up the tracks

and nearly all the ties, removed all the crossing signs and all the cattle guards but two or three, taken out the switch ties and bridge timbers, allowed the right of way to grow up with weeds, and failed to keep the fences in repair, it was proper to submit to the jury whether there was an intention on its part to abandon the branch." And the court in the opinion stated the law as follows: "When a corporation, in the exercise of the right of eminent domain, acquires for a public purpose a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and when such public use becomes impossible, or is abandoned, its right to hold the land ceases, and the property reverts to its original owner." There must be necessarily some substantial basis upon which to determine the character of the purpose for which the right is used. The right obtained in this case was to raise the dam to a given height for milling purposes. A change from the exclusive grinding of wheat into flour to the grinding of corn, barley, and other grains might be in some sense applying the power to a different purpose, but clearly not within the meaning of the limitation that we are considering. One who objected to such a change of the purpose to which the power was applied should suggest some substantial basis for such a distinction. *Hathaway v. Mitchell,* 34 Mich. 164. See, also, note, 67 L. R. A. 390. We have seen that the legislature has in the most solemn form authorized the application of rights so acquired to municipal purposes. The change is from one public use to another, and not a change from a public to a private use. The present use of the power is not such a change from that authorized by the *ad quod damnum* proceedings as to amount to an abandonment and justify the destruction of the property. The owners of property included in the *ad quod damnum* proceedings should be allowed to recover from defendant all damages which their property has sustained by the new use of the water power, if any, over and above the damages caused by the use authorized by the *ad quod damnum* proceedings.

4. It is urged that some of these plaintiffs were not parties to the *ad quod damnum* proceedings, and their lands which are injuriously affected by the flowage were not included in those proceedings, and that the trial court therefore erred in not granting such plaintiffs any relief. The fourteenth section of the act authorizes any one whose land is overflowed or injured by the maintenance of a milldam to begin proceedings under the act. Perhaps the court intended to indicate in *Kyner v. Upstill*, 29 Neb. 768, that he might maintain an action for damages. This would seem to be in harmony with the holdings in *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444, *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207, and *Bronson v. Albion Telephone Co.*, 67 Neb. 111. He could not maintain an action to enjoin the use of the dam, and abate the same as a nuisance, after so long acquiescence under the circumstances in this case. If lands not included in the *ad quod damnum* proceedings are damaged by defendant's dam and the use thereof, the owners of such land should be allowed to recover such damages.

5. The plaintiffs contend that the evidence establishes that the defendant's dam is more than 15 feet above low-water mark, and that the use of flash-boards raises the water to a greater height than is permitted by the rights obtained by the defendant's grantors. They do not attempt any analysis of the evidence, but they allege that the defendant's recital of the evidence upon these points is incomplete and unfair. A large number of witnesses were examined, and the bill of exceptions is quite bulky, presenting some conflict in the testimony. It does not seem advisable to enter upon a discussion of this evidence. It seems to support the conclusions reached by the trial court. The contention of the defendant that the plaintiffs and all parties interested have consented to the use of these flash-boards, and so are now estopped to complain, does not seem to be quite consistent with the position that the defendant has taken in urging that the use of these flash-boards has not raised the water above the prescribed limit.

The defendant does not seem to be in a position to insist upon any greater rights than those acquired through the *ad quod damnum* proceedings. The judgment in this case is without prejudice to a future action, if it should be found that the defendant is exceeding those rights.

The writer would have affirmed the judgment of the trial court as rendered, but upon consultation we concluded that the trial court, having jurisdiction of the matter, should have retained the action for all purposes, and should have allowed the plaintiffs whose lands were not included in the *ad quod damnum* proceedings to recover their damages, and the plaintiffs whose lands were included in the *ad quod damnum* proceedings to recover such damages, if any, to the lands as were caused by the new and additional use of the dam and water power.

The judgment of the district court dissolving the injunction is affirmed, and the judgment is in other respects modified, and the cause remanded to the district court, with instructions to allow the parties to amend their pleadings, if so advised, and take further evidence, if necessary, and determine the plaintiffs' damages as indicated in this opinion.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

LETTON, J.

I concur in the opinion, subject to the principles of law announced in *Znamanacek v. Jelinek,* 69 Neb. 110, and *Arterburn v. Beard,* 86 Neb. 733.

HAMER, J., concurring.

I agree in the conclusion reached by Judge SEDGWICK that the dam should not be destroyed, but I only partly agree to the things said in the main opinion, and I wish to give my understanding of what I conceive to be the principle which should be applied.

Flour may be manufactured by an aggregation of capital applied to the development of water power and ma-

chinery. A private person may not manufacture flour for his own use because of lack of capital and lack of machinery. The manufacture of flour by private persons or corporations for commercial purposes would seem to be a private use for a public purpose. When each person who comes to mill pays for his grinding by a toll taken from the grist the mill is then a grist-mill. This was the old method. It has been in a very large degree, perhaps entirely, superseded by the method of barter and exchange; that is, the man who comes to mill brings a load of wheat and takes away a certain amount of flour which he receives in exchange for the wheat. This would seem to be the method in vogue at the present time. We have outgrown the ways of our grandfathers, and, according to the standard which existed in earlier times, the flouring mill of today is a commercial enterprise for a commercial use in which the public is interested because the public demands that the flour shall be manufactured and placed upon the market where it may be purchased for the general use of the people, as nearly everybody uses flour.

The thing that justifies the taking of the land and submerging it by water is the creation of a water power to be used in the interest of the public in the conduct of an enterprise to manufacture flour. The mill is for the benefit of the public, and it matters not if the old method of taking tolls out of the grists has been superseded by the new method of exchanging so many bushels of wheat for so many sacks of flour. When the wheat is exchanged for the flour, that is a matter in which the public is interested, although the actual grinding of the flour is a private enterprise conducted by the miller. It is a public utility because it is a necessity to the public, and the creation and maintenance of the power which creates the flour in order that the public may purchase it is clearly a public utility. The actual manufacturing of the flour is a private enterprise, although the flour when manufactured is for the public use. Is there any serious distinction between the manufacture of flour for the use of the public and the

generation of electricity for the use of the public? Do we deceive ourselves with words when we call the manufacture of flour for the public a private enterprise because it is conducted by private capital? And is the generation of electricity by private capital for public use forbidden because the capital used in developing electricity is private capital? Is it the way the thing is manufactured that determines whether it is for the public use and whether the business is a public utility, or is it the necessity of the thing that is manufactured for the public? May it not be said that, because the public demand the use of the flour and also demand the use of electricity, the manufacture of the flour and the generation of the electricity are both public utilities. In Massachusetts all sorts of mills are treated as public utilities. The rule adopted in Massachusetts consults the welfare and benefit of the public. The mill-streams are there lined with cotton factories, woolen factories, and shoe factories, and, while these enterprises are conducted by private capital, the right to dam up the streams and to utilize the power in these various manufactories is for the betterment of the whole people. These occupations give employment to thousands of people. They permit the investment of millions of dollars. These enterprises are held to be public utilities because of the great public interest in them and because of the great public benefit received by the people.

Section 13 of the Bill of Rights of the constitution of 1866: "The property of no person shall be taken for public use without just compensation therefor." The foregoing declaration of rights was in force when the property in question was taken. The constitution itself does not specify a particular use, as the manufacture of flour alone or corn-meal or feed or lumber, but it is just the taking of the property for "public use." The provision of the constitution of 1866 was followed by section 21 of the Bill of Rights in the constitution of 1875, and that section contemplates the taking or damaging of property for "public use," and it does not provide that after the prop-

erty is taken for public use it shall be used for any special purpose. Chapter 57, Comp. St. 1911, contains the original section as it is now amended. This section contemplates erecting "a dam across any water-course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water." Section 1. The section appears to have been intended to cover the things known when the act was passed, and then, seemingly as an afterthought, there is added "erecting any machinery to be propelled by water." I am unable to conceive of language broader than that employed in the section, and there is seemingly nothing in the constitutions of 1866 and 1875 to forbid the use of the language employed. It is apparent from this language that the makers of the constitution intended to compel the payment to the private owner of the amount of his damages before the property could be taken for public use. As that has been done once and the property has actually been taken for public use, is there any reason why there should be a second payment when the private owner has been paid once for the taking of his property? Is not that enough? To meet the new conditions of advancing civilization, should the courts say that the narrowest possible construction should be put upon the language used, and that the legislature intended that the power once acquired could only be used for the least number of purposes to which it might be applied? Is it not better that the courts should be liberal in the construction of statutes like this? Is it not better that there should be a degree of elasticity in limiting the legislative power in respect to the right of eminent domain? Section 15, ch. 57, Comp. St. 1911, contemplates the bringing of a petition to obtain leave to build a mill or milldam. By this language it would seem that the legislature intended that there might be either a mill or milldam, or both. Milldam would seem to be a general term by the construction of which power is obtained and not necessarily to run any particular kind of mill. Section 24 of the same act seems to contemplate a

"milldam belonging to any mill or machinery." It authorizes the owner of the mill to enter upon lands contiguous for the purpose of repairing embankments to prevent the water from breaking through in case of flood. Section 27 of the same act makes those mills which grind for toll public mills. Section 33 of the same chapter provides for changing a public mill into a private mill. This may be done by posting a notice on the mill and in two other conspicuous places within the county, and by reimbursing those people who have assisted in the erection of the public mill. It is not, however, contemplated that because the mill becomes a private mill the milldam shall be abandoned or destroyed.

It will be seen by this that the legislature did not contemplate the exclusive application of the power to a mill grinding for toll. Putting it the other way, the legislature contemplated the *ad quod damnum* proceedings and the payment of damages and the use of the power obtained for the running of a private mill. It is undoubtedly a public utility to build a dam and a mill for the manufacture of flour. To build such a mill and to manufacture flour is a private enterprise conducted with a public purpose. It may be a private enterprise to generate electricity for the use of the public with which the public may light its streets and buildings. Is the use of the power to manufacture flour more a private enterprise than the use of the power to generate electricity? By virtue of the *ad quod damnum* proceedings, the plaintiffs in this case sold to the original proprietors the right to flow their lands. Their lands were originally overflowed for the purpose of furnishing power to run the mill. The thing that the plaintiffs parted with was the right of the petitioner in the *ad quod damnum* proceedings to overflow their lands along the creek in consideration of the money which he paid to them for that privilege. They have been paid once. Can it be of any serious moment to them whether their lands are overflowed for the purpose of furnishing power to a mill that grinds flour which the public purchase and

use, or a mill or machinery that provides something else which the public need and purchase and use? The people who own these lands agreed that their lands might be submerged, and they were submerged. They are only submerged yet.

It is contended, with ingenuity and force, that only the things can be done which were in contemplation of the original jury that sat in the *ad quod damnum* proceedings. The theory is that there can be no growth or change. The theory is that it must be a "grist-mill," and that it cannot be anything else. It would hardly seem that this contention is fair in view of the provisions of the constitution and in view of the provisions of the statute. The words used, "erecting any machinery to be propelled by water," certainly suggest that it was in contemplation of the legislature that something else might be done in addition to running a flour-mill. If this be not so, then is there any purpose in using the words "erecting any machinery to be propelled by water"? If the right was granted for the purpose of using power, what difference can it make to the grantors whether the power is applied to one purpose or another? They have consented that the water may be backed up the stream, and that their lands may be submerged so that the power may be created. What difference can it make to them whether the power is applied to one legitimate purpose or another? They have recognized the principle that the power may be created and applied. When the power is created and has been applied, why should they seek to destroy it?

In view of the able opinion delivered by Judge SEDGWICK, I hesitate to write anything in addition, and I only do so because of the fact that the main opinion does not seem to me to fully give the reasons which I believe should be given to justify the conclusion reached.

ROSE, J., dissenting.

As I see the merits of this case, the affirmance of that part of the lower court's decree denying an injunction to

prevent defendant from overflowing the lands of plaintiffs deprives them of constitutional rights and leaves portions of their real estate in control of a trespasser. Entertaining this view, I am compelled to dissent. In giving the reasons by which I am guided, I prefer to state in my own way what I find in the record and the questions presented for determination.

The relief sought by plaintiffs is a perpetual injunction to prevent the maintaining of a dam across Wahoo creek near Ashland. They are upper riparian proprietors whose lands are damaged by overflowing water. Defendant is a corporation. It maintains the dam and uses the water-power of the stream to generate electricity for lighting purposes in the city of Ashland, Nebraska, and in Pacific Junction, Iowa. The trial court dismissed the case after a trial on the merits, and plaintiffs appealed to this court for the equitable relief denied below.

One of the grounds urged by plaintiffs for an injunction may be stated in this form: Defendant never had any right to maintain the dam except for the purpose of operating a grist-mill; that right has been lost by abandonment or nonuser, and defendant is unlawfully overflowing the lands of plaintiffs for the purpose of running an electric light plant. On the other hand, defendant, through an easement of flowage acquired by condemnation, asserts the right to use the water-power to propel the machinery installed in its power-house. In determining the merits of these contentions, the privilege under which defendant assumes to act must be traced to its source. By a judgment rendered May 26, 1874, in *ad quod damnum* proceedings in the district court for Saunders county, Oscar M. Carter was authorized to construct and maintain a dam on the present site, and he promptly exercised the right thus granted. It is stipulated by the parties that defendant, through mesne conveyances, succeeded to the rights of Carter. On the face of his petition in the condemnation proceeding, the enterprise originally undertaken, in addition to the construction and maintenance of the dam, was

the operation of a "grist-mill." In performing their duties the jury, selected under the writ of *ad quod damnum*, among other things, found: "Said 'flouring-mill' erected by the plaintiff will be of public utility." And it was adjudged by the court: "That the plaintiff be and is hereby authorized to build and continue his said mill and mill-dam as prayed in his said petition." On the right thus acquired defendant attempted to justify the overflowing of plaintiffs' lands to generate electricity for lighting purposes alone. Is that position tenable? A finding by a jury that the mill will be of public utility is by statute made an essential part of the proceeding to condemn lands under the act of 1873. The finding of the jury was limited to the public utility of a flouring-mill, and the decree of the court in the *ad quod damnum* proceeding went no further. Is defendant now lawfully exercising the original easement of flowage? Since 1896 no flour has been manufactured, and one of defendant's officers admitted on the witness stand that the establishment could not during that period be considered a "flouring-mill." The original building was old and dilapidated in 1904. During the fall of that year and the ensuing year it was torn down and the flouring machinery removed. The old structure was replaced by a power-house in which electrical machinery for a lighting plant was installed. The flouring machinery was nearly all sold and there was no attempt to replace it. A corn-burr, however, was retained, and there is convincing proof that defendant intended to use it for the purpose of preserving the original easement of flowage, instead of operating a grist-mill in good faith. The remaining operations of the grist-mill, so far as disclosed, consisted of grinding a sack of grain for one customer, five or ten bushels for another, and a car-load for the owner of the mill. The plant was destroyed by fire May 8, 1907, and since that date no grain of any kind has been ground, nor has defendant installed any machinery for that purpose. The electric power-house, however, was promptly restored and equipped for the utiliza-

tion of both steam and water-power. The truth of the record is that electric lighting is the soul of defendant's enterprise. To that business it has devoted its capital and energy. Neglect, nonuser and abandonment of the milling enterprise, for which alone the right of flowage was established, are shown with equal certainty. It abandoned its grist-mill and lost the incidental easement of flowage.

It is settled law in this state that the condemnation did not vest in Carter or in his grantee the right of flowage in perpetuity. What he procured was the mere privilege of exercising his easement during its existence. *Gross v. Jones,* 85 Neb. 77. The original easement of flowage for grist-mill purposes, therefore, cannot be successfully interposed as a defense to the action of plaintiffs to enjoin defendant from overflowing their lands for the sole purpose of utilizing the water-power for an electric light plant. After abandonment of the particular use for which a mere easement in land is established, it cannot be lawfuly devoted to a different purpose without payment of additional compensation or recondemnation. *Heard v. City of Brooklyn,* 60 N. Y. 242; *Campbell v. City of Kansas,* 102 Mo. 326; *Pittsburgh & L. E. R. Co. v. Bruce,* 102 Pa. St. 23. Having lost the original easement by abandonment and nonuser, having made no effort to condemn the lands of plaintiffs for the new and different purpose of obtaining water-power to generate electricity, and having failed to pay for, or otherwise acquire, an additional right of servitude, defendant is a trespasser, and should be enjoined as such.

The deduction I make from the facts and the law cannot be avoided by merely pointing to the milldam act of 1873 and asserting that its title is broad enough to include legislation relating to the procuring of easements of flowage for the purpose of generating electricity by water-power, that the purpose named is a public one, and that the act authorizes such easements. If the title is as broad as the description of the majority, and if the act contains

provisions for the condemnation of land for an easement of flowage for the purpose of generating electricity by water-power, defendant is still a trespasser for the following reasons: It abandoned the mill and lost its incidental right of flowage. It did not in a new *ad quod damnum* proceeding under the act of 1873, or in any other manner, acquire the right to use plaintiffs' lands for electric lighting purposes. It did not pay for such different and additional use. No jury ever found, as required by the milldam act, that the new enterprise is a public utility. No court ever so held in an *ad quod damnum* proceeding. The original judgment rendered in 1874 did not extend to the new enterprise. Damages therefor were never estimated or paid. The lighting of cities by electricity was unknown in 1873, when the milldam act was passed. An easement of flowage to supply an electrical plant with power was not at that time in the mind of the legislature, or of the jury, or of the court, or of the parties. In the *ad quod damnum* proceeding, therefore, Carter acquired no electric lighting easement. The method of appropriating private property for a public purpose is defined by statute. There is no pretense that defendant pursued the statutory method after it lost its original easement. If defendant had a right under the act of 1873 to acquire a new easement applicable to the new use, without the consent of plaintiffs, that right has never been exercised. Since defendant never acquired an electric-lighting easement under the milldam act, I decline to express an opinion on the breadth of its title or on the scope of its provisions.

I do not find in the record any substantial proof of the acquiescence suggested by the majority as a reason for denying equitable relief. The power-house and other improvements were constructed on land to which defendant owned the fee. The power-plant is equipped to utilize both water-power and steam-power. By the latter the lighting enterprise can be carried on without the right of flowage. Improvements for utilizing steam-power did not concern

plaintiffs. As long as the grist-mill was operated in good faith, plaintiffs were not injured by the maintenance of the dam at the lawful height. Defendant at all times claimed the right to maintain the dam under the original easement. It now asserts that right in this court. It kept a corn-burr for the ostensible purpose of exercising its grist-mill easement, while its real business was electric lighting. Under the circumstances of this case, plaintiffs should not be deprived of their property because they did not discover, at an earlier date, contrary to the continuous assertions of defendant, that the grist-mill had been abandoned. If I apprehend the import of the majority opinion, cases are cited to sustain the proposition that a chancellor should not inconvenience the public or interfere with a public utility by granting an injunction which would interrupt public service. It may be conceded that a landowner who knowingly permits a railroad company to build and operate a highway on his land, or a telephone or telegraph company to proceed under like circumstances, is sometimes limited to the remedy for damages. That rule, however, has no application here. Defendant's power-house is equipped to utilize as much steam-power as water-power. The granting of an injunction would not interfere with the public service, but would permit plaintiffs to control their own property until such a time as defendant acquires by lawful means the easement it now exercises in violation of law.

FAWCETT, J., concurs in the dissenting opinion.

IDA BRADFORD, ADMINISTRATRIX, APPELLANT, V. BEE BUILDING COMPANY, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,822.

Master and Servant: ASSUMPTION OF RISK. It is the duty of the employer to furnish a reasonably safe place for his employee to work, but if a machine which is a necessary part of the equip-

ment is unsafe, because not sufficiently protected to prevent contact with it, and the employee has full knowledge of its condition and takes charge thereof with the other machinery, without objection, and is injured by coming in contact with the exposed machine, he will be held to have assumed the risk of such injury.

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

W. W. Slabaugh, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

SEDGWICK, J.

In the basement of the Bee building in Omaha there is complicated machinery, including dynamos, commutators and generators for furnishing power to printing presses and other machinery in the building, and for furnishing light to the various other occupants of the building. For ventilating the basement there was placed therein a fan, described by the parties as a large section fan with arms like a boat propeller, which ran about one-half inch from the two cross-bars, one perpendicular and the other horizontal, into which, at their junction, the pivot of the fan revolved. There was no screen or guard or protection over the fan, except these two bars crossing before it at right angles to each other. Bradford was an employee of the defendant company in the capacity of an electrical engineer. While in that employment he passed in front of this fan, and alleged that his hand was brought into the fan and injured. He brought this action in the district court for Douglas county to recover the damages sustained Upon the close of the plaintiff's evidence, the defendant moved the court for an instruction to find in its favor. The court instructed the jury to find a verdict in favor of the defendant, and the plaintiff has appealed.

The fan revolved rapidly, and had great power, to remove the air from the basement and force it out of the building. The first contention is that the defendant was

negligent in not further protecting the fan; that the fan was a dangerous instrument, and should have been covered with a screen or otherwise so protected as to prevent the employees of the defendant from coming into contact with it. It is, of course, the duty of an employer to furnish his employees with a safe place in which to work, and there appears to be sufficient evidence in this record from which the jury might have found that the defendant had failed in this respect. The duty of the employer to furnish a safe place for his employees to work is an important one. He has the control of such matters, and is in a position to know whether his building and machinery are properly constructed and guarded. If we conclude that this fan should have been covered, and that the defendant was negligent in that regard, we still have the questions of assumption of risk and contributory negligence to determine. These questions have been before the courts everywhere very often, and this court has frequently considered them. Some propositions governing their applications in actions for personal injuries have been so firmly settled in the earlier decisions that the courts are not now at liberty to overturn them. If the law, as it has long been established in this state, is unjust to the employee, it devolves upon the people through the legislature to correct it. Under the law, as it now is, even if a machine or instrument is imperfect and dangerous, an employee who without objection, uses it with full knowledge of its condition assumes the risk of injury in its use. And, when the employer is guilty of negligence causing injury to the employee, he is not liable in damages if the employee is also guilty of negligence directly contributing to the injury.

Applying the so long-established principles of law the plaintiff's case must fail. Mr. Bradford was an electrical engineer of 20 or more years' experience. It was because of this experience that he was entrusted with the management of this complicated machinery. Mr. Parker was his superior; but, when Mr. Parker was away, Mr. Bradford was in full charge and control of the room and machinery.

This was generally the case in the evening and fore part of the night, and Mr. Bradford was alone in charge when the accident happened. At such times this fan ran for his benefit, if it ran at all. He was not accustomed to keep it running when he was alone in the evening. Generally, Mr. Parker turned it off when he left the building in the afternoon. When he failed to do so, Mr. Bradford turned it off himself. He says that on this occasion he did not know it was running; but it was his duty to know and to determine for himself whether it should continue to run. He discovered that something was wrong in the electric machinery, and had been directed to attend to such matters at once, and instructed that great danger to the machinery and building might result almost instantly if the generators or other electrical machinery became out of order. There was a narrow passageway in front of this fan, which he says was some eight feet shorter way to the machinery, where he had observed trouble, than the passageway usually used. In his haste to remedy the fault in the machinery, he took the shorter way, which was dangerous, and while passing the fan his hand was drawn into it by the air. If he was not himself negligent in carrying his hand so close to the fan, the danger was certainly easily avoidable. He knew all of the existing conditions. The apprehended danger to the electrical machinery was not so imminent as to justify risking human life or limb to remedy it, and yet he rushed by the fan and placed his hand where it was injured thereby. The fan was a part of the permanent equipment of the building. He undertook to manage it with the rest of the apparatus, and made no objection on account of any supposed dangerous condition. Either he allowed himself unnecessarily to become so unreasonably excited as to fail to use his senses, or else he deliberately assumed the risk of accident. In either case, under the long-established law of this state, he cannot hold his employer liable for the consequences.

This action now appears in the name of the administratrix of his estate. It is said that since the trial below Mr.

Bradford has died. The defendant questions this statement, and raises questions as to the regularity of the appeal to this court. We have preferred to dispose of the case upon its merits. The evidence was not sufficient to support a verdict for plaintiff, and the court was right in directing a verdict for defendant.

AFFIRMED.

VALPARAISO STATE BANK, APPELLANT, V. CHRISTIAN J. SCHWARTZ ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,848.

1. **Creditors' Suit:** PERSONAL CONTRACTS. The contract of husband and wife to support his father in their family and furnish him with $50 a year during his life is a personal contract, and the rights of the father under the contract cannot be subjected by a court of equity to the payment of a judgment against him.
2. ———: HOMESTEAD. In such case, if the consideration for the contract on the part of the father was the conveyance of his homestead of the value of $3,000, which is exchanged for a home for the husband and wife upon which the father retains a lien to secure the performance of the contract, the father's interest in the property so conveyed to the husband and wife will not be subjected to the payment of a judgment upon an indebtedness incurred after the transfer of the property to the husband and wife.
3. **Homestead:** TENANCY IN COMMON. The homestead of a family may be taken in property of either the husband or wife, and if their home is owned by them equally as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt.
4. **Fraudulent Conveyances:** HOMESTEAD. If the husband and wife own two town lots equally as tenants in common, and reside on one of them as their home, which is of the full value of the homestead exemption, the undivided one-half interest of the husband in the other lot will not be exempt from a judgment against him. The transfer by him of such interest to his wife without consideration, to hinder or delay his creditors, will be set aside as fraudulent.

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

E. J. Clements, for appellant.

G. W. Simpson and *G. H. Simpson, contra.*

SEDGWICK, J.

In August, 1909, the plaintiff recovered a judgment against the defendants, Jacob Schwartz and Christian J. Schwartz, in the county court of Saunders county, and caused a transcript of the judgment to be duly filed in the office of the clerk of the district court for said county. Execution was issued thereon and returned wholly unsatisfied, and this action was brought in the district court for Saunders county in the nature of a creditor's bill to subject the interests of the defendants in certain property to the payment of the judgment. The district court found in favor of the defendants and dismissed the case, and the plaintiff has appealed.

In January, 1907, the defendant Jacob Schwartz, who was a widower, owned 80 acres of land in Seward county, which was his homestead, and which he had occupied as such for many years. He then conveyed this land to one Scott, who was the owner of lots 14 and 15 in block 3, in the village of Valparaiso, in Saunders county, and Scott conveyed the two lots to the defendants Christian J. Schwartz and Betty Schwartz, his wife, who took the lots as tenants in common. Christian J. Schwartz is the son of the defendant Jacob Schwartz. The consideration paid for these lots conveyed to Christian and Betty Schwartz was $4,500. Christian and Betty Schwartz both testified that the homestead of Jacob Schwartz was exchanged for the lots and the lots given to them for supporting Jacob Schwartz during life. There was a mortgage of $1,000 on the farm, and its actual value above the mortgage was $3,000. Christian and Betty Schwartz paid the remaining $1,500 for the lots. At the same time, and as a part of the same transaction, Christian Schwartz and Betty Schwartz entered into a contract with Jacob Schwartz in which they

agreed to "board, clothe, and furnish him with one room," and to pay him $50 in cash each year during his natural life. This written contract gave Jacob Schwartz a lien upon the two lots as security for the performance thereof on the part of Christian and Betty Schwartz. The parties then made their home in the building upon one of these lots, in which there was also a restaurant kept by Christian and Betty Schwartz. The value of this lot and building is variously estimated by the witnesses from $1,500 to $2,500. From a consideration of this evidence we think the value should be found to be $2,000. The building on the other lot was rented for a barber shop and other purposes. After incurring the indebtedness upon which the said judgment was rendered, Christian Schwartz conveyed to his wife, Betty Schwartz, his undivided one-half interest in the said lots. This conveyance is conceded to have been without consideration.

Plaintiff contends that the interest of Jacob Schwartz in the lots in question under the said contract should be subjected to the payment of the judgment against him, and that the one-half interest in the lot not occupied as a home, which was conveyed by Christian Schwartz to his wife, should also be subjected to the payment of the judgment against him. It is insisted that, as the parties have always resided together in the building upon the one lot, and as Christian Schwartz is the head of the family, the defendant Jacob Schwartz has no homestead interest in the property in which he resides, and that his interest therein is therefore not exempt.

1. The arrangement between Jacob Schwartz and his son and daughter-in-law is peculiarly a personal arrangement. Jacob Schwartz himself could not transfer his rights under this contract to a stranger and clothe that stranger with the power to demand these services and a fulfilment of this contract on the part of Christian Schwartz and his wife. Under such circumstances, a court of equity will not attempt to appropriate the interests of Jacob Schwartz under this contract for the benefit

of his creditors. Ordinarily an order to that effect could not be enforced. There are considerations arising out of the relationship of the parties and their mutual undertakings for the benefit of each other that are wholly personal and are incompatible with the substitution of a stranger in the place of either party. See *Hilton v. Crooker*, 30 Neb. 707; *Zetterlund v. Texas Land & Cattle Co.*, 55 Neb. 355, and cases there cited. It is suggested that these reasons do not apply to the money consideration of $50 a year, but the contract is entire, and the consideration going to Jacob Schwartz under it cannot be separated. The inducement to take one's father into a family and make him a member thereof, conferring and receiving reciprocal advantage from the relation, may be and perhaps generally is much more than $50 a year. It cannot be supposed that the same contract would have been made with a stranger, or that the $50 a year for expenses any more than measures the difference between taking one's own father into the family and performing the same services for a stranger. We do not think that this contract shows such a financial advantage to Jacob Schwartz as a court of equity can appropriate to the payment of a judgment against him.

2. We think the second claim of the plaintiff has more merit. When Christian Schwartz and Betty Schwartz took the title of this property and began occupying it as their home, they acquired a homestead interest in it. A homestead may be taken in the property of either husband or wife, and, as the title to this property was taken by the husband and wife in common, the homestead exemption would apply to their joint ownership, the lot which they occupied as a home being of the value of the homestead exemption. The interest of the defendant Christian Schwartz in the other lot would, as against his creditors, be no part of the homestead and would be liable for his debts. When Christian Schwartz transferred this interest in the remaining lot to his wife without consideration, the indebtedness upon which this judgment was rendered

existed, and the transfer was in fraud of his creditors. Christian Schwartz furnished $1,500 of the purchase price of the lots. He and his wife therefore obtained not more than a two-thirds part of the property from Jacob Schwartz, and if they fail to perform their contract should return the same to him. The district court should have subjected an undivided one-half interest in the lot not exempt to the payment of this judgment.

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

REVERSED.

HENRY A. TRILLER, APPPELLANT, V. JAMES SADLE, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,697.

1. **Principal and Agent**: OSTENSIBLE AUTHORITY. Ostensible authority to act as agent for the principal may be inferred if the party to be charged as principal affirmatively, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb. 644.

2. ———: GENERAL AGENTS. Where the name of the principal was signed to a lease by a firm of persons who signed the principal's name, by themselves, as agents, and subsequently attempted to collect the money due on the lease by superintending the giving of the bill of sale executed by the original lessee to the plaintiff, their principal, and obtained possession of the hay growing on the land leased by means of an action of replevin maintained in the name of their principal, they will be held to have been the general agents of the plaintiff, and the plaintiff will be bound by what they did.

3. **Replevin**: EVIDENCE. The evidence examined, and *held* to support the judgment of the district court.

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

William E. Shuman, for appellant.

Hoagland & Hoagland, contra.

HAMER, J.

The plaintiff Triller seems to have been the owner of certain land in Lincoln county. He executed a lease of this land, or a part of it, to one C. W. Hutchinson. The plaintiff did not reside in the state, but seems to have been represented by Bratt & Goodman, a firm at North Platte, and the lease was signed "H. A. Triller, per Bratt & Goodman, Agts." Triller is the appellant and the plaintiff in the court below. The mortgage lease seems to have provided that the rental of the land, $115, was to be paid on or before December 1, 1908, with interest from date, and the lessee of the land agreed in the lease that there should be a lien upon the hay grown upon the land during that year. On the 4th of May, 1908, the date of the lease, it is not probable that the grass had grown much, but it was probably alive and growing a little, so that it was in existence. The lease was filed for record May 19, 1908. On October 14, 1908, no part of the lease money seems to have been paid, and James Sadle, the defendant and appellee, seems to have been hauling the hay away. To prevent Sadle from getting the hay, an action of replevin was brought by the plaintiff, Triller, against him in the county court. The plaintiff had the verdict and judgment, and the defendant appealed to the district court. The case was tried in the district court, where the defendant obtained a verdict and judgment. Before the commencement of the replevin suit, but about the time the same was commenced, and on October 14, 1908, Bratt & Goodman received from Hutchinson a bill of sale of all the hay upon the land, and which was executed to their principal, Triller. This seems to have been done the day the replevin case was commenced, and after this hay was cut. It is claimed on the part of the plaintiff that Bratt & Goodman were without authority to collect the money, and it is contended that they did not bind the plaintiff by what they did, except as to the making of the lease. Whatever the fact may be, they seemingly exercised the right to do whatever they

claimed was necessary to enable them to secure and collect the money for their principal, the plaintiff in the case. At any rate, they were taking care of the plaintiff's business seemingly as best they could.

The affidavit for replevin alleged, among other things, "that he (the plaintiff) is the owner of the following described property, to wit: All the hay located upon * * * part of said hay being in stack, part baled and part loose, upon the above described land; * * * that said plaintiff is entitled to the immediate possession of said property." The petition alleged, among other things: "That the plaintiff had * * * a special interest in said hay, in that one C. W. Hutchinson, on May 4, 1908, executed and delivered to this plaintiff a chattel mortgage lease by the terms of which the said Hutchinson, who was at that time the owner of all of said hay, mortgaged the same to this plaintiff to secure the payment of the sum of $115, and interest at 8 per cent. per annum, from May 4, 1908." It was also alleged that the same was a valid indebtedness from said Hutchinson to the plaintiff, and a copy of the chattel mortgage lease was attached to the petition as exhibit "A." In the third paragraph of the petition it was alleged: "That thereafter, on October 14, 1908, and prior to the commencement of this action, the said C. W. Hutchinson delivered to the plaintiff herein the possession of all of said hay, and also gave this plaintiff the right of possession thereof, and executed and delivered to this plaintiff a bill of sale of said hay conveying to the plaintiff all the interest and ownership of said hay not conveyed by the mortgage above described, a copy of which bill of sale is hereto attached and marked exhibit 'B.'" In the fourth paragraph it was alleged that the plaintiff was, at the commencement of this action, and now is, entitled to the immediate possession of all of said hay. And in the fifth paragraph it was alleged that the said hay was at the commencement of this action wrongfully detained by the defendant. It will be seen that the plaintiff claimed both by reason of the chattel mortgage lease and also by reason

of the bill of sale. While the mortgage was not yet due when the case was commenced, it is claimed that the instrument entitled the plaintiff to possession, and that therefore he was entitled to maintain his action of replevin against the mortgagee and against any stranger, even though the mortgage was not yet due.

The bill of sale was dated October 14, 1908, in the consideration of the sum of $1 and other considerations paid by Henry A. Triller. It undertook to grant, sell, transfer and deliver to the said Triller, his executors, administrators and assigns, all the hay now located upon the particular land (describing it) in Lincoln county, Nebraska, "part of said hay being in stack, part baled, and part bunched on the ground." It also described the hay as "all of the hay grown upon said premises during the year 1908, wherever situated, whether located on wagons or racks." It also proposed to sell and assign all Hutchinson's interest in and to the proceeds of certain hay grown on the above described land and delivered to Harrington & Tobin, and authorized Triller, or his agents, to collect such proceeds. It also contained this clause: "It is my intention by this instrument to fully convey all my interests in the hay which I mortgaged to the said Triller on May 4, 1908, by a written chattel mortgage lease."

Upon the trial the defendant sought to prove that he was the owner of 20 tons of loose hay and 21 tons of stacked hay, and that the plaintiff took this hay in the writ of replevin. Of course, the main question to be determined is, who was entitled to the possession of the hay.

Upon the trial Mr. Goodman, of the firm of Bratt & Goodman, testified: "We were agents for the owner of the land, Henry A. Triller, *for leasing it.*" An effort was made to show that the agency of Bratt & Goodman for Triller was a restricted or special agency, and that they were not the general agents of the plaintiff. The defense was that after the chattel mortgage lease had been filed the lessee, Hutchinson, entered into a contract with one Shaw to cut, stack and bale the hay for one-half of it, and that

Shaw, learning about the mortgage to the plaintiff, Triller, went to North Platte to see Mr. Bratt, of the firm of Bratt & Goodman, agents of Triller, and that he had a talk with Mr. Bratt in which it is claimed that Mr. Bratt told him (Shaw) that he might go ahead and put up the hay in controversy, but that he should leave one-half of it upon the ground. While an examination of the bill of exceptions shows that Shaw did not testify, others undertook to relate what was said in the conversation between Bratt, of the firm of Bratt & Goodman, and Shaw. It is also claimed that the defendant, Sadle, had certain conversations with Mr. Bratt along the same line, and in which Mr. Bratt said that Shaw was to have half of the hay for cutting it. Sadle himself testified to a deal with Shaw with reference to cutting and stacking the hay, and that he afterwards saw Hutchinson, and that he and Hutchinson divided the hay. Sadle also testified that he talked with Goodman in North Platte, and that Goodman asked him if he was hauling the hay from Shaw's and, when he told Goodman that he was, then Goodman told him he did not want him to haul any more hay "until they (meaning Bratt & Goodman, for their client, Triller) had got their money." Sadle then testified: "I told him that we had divided the hay, and I was going to haul my half of it right along. He said, 'You can't do it,' and I said I was going to do it, anyhow." Sadle also testified to a conversation with Mr. John Bratt, of the firm of Bratt & Goodman. They talked about putting up the hay, and Bratt told him that the hay was mortgaged, and then he (Sadle) wanted to quit. He told Bratt that he was not going to do anything more, and then Bratt told him to go ahead, providing Hutchinson would give up his half of the other hay, the Triller hay, and then Hutchinson said that he was willing to give up the hay, and that Bratt at that time made no claim to both halves of the Triller hay. Sadle testified that at that time Bratt or Triller were not claiming any interest in the Triller hay, other than half, which Hutchinson was to have. Sadle testified that Bratt

was just claiming half of the hay on the ground, "the Triller half." Mr. Bratt testified as a witness, and denied the statements attributed to him by these witnesses. The defendant claimed that he secured the right to take one-half of the hay without regard to the mortgage upon the same, and that he was authorized to do so by what Bratt said to him. The plaintiff attempts to make the point that there was no evidence to the effect that Triller, the plaintiff, authorized Bratt to make these statements, and had no knowledge that Bratt made such statements, or that Bratt in any way ratified what was done. While Mr. Goodman, the other member of the firm of Bratt & Goodman, testified that Bratt & Goodman were the agents of the owner of the land simply for the purpose of "leasing" it, yet they seem to have sold the hay after possession was obtained under the writ of replevin. Over the plaintiff's objections, the defendant was permitted to introduce evidence to the effect that, after the chattel mortgage had been filed, Hutchinson had agreed with Shaw to divide the mortgaged hay if he (Shaw) would cut, stack and bale it; that Shaw delivered his interest in the contract to the defendant, Sadle, and that the hay was divided. There was testimony tending to show that the hay had been divided at the time the replevin suit was commenced, and that Sadle's share of hay under the division was taken away from him by the replevin proceedings.

There is a most strenuous contention that the plaintiff, Triller, never authorized Bratt to make any statement whatever to either Shaw or Sadle to the effect that any one might go ahead and cut, stack, and bale the hay, and that Bratt was getting outside of his authority if he said anything of that kind. It is claimed, on behalf of the plaintiff, that after Bratt & Goodman leased the land to Hutchinson their powers ended, and that, that being the fact, any talk that Bratt had with Shaw or Sadle about cutting the hay and dividing it was improperly received. It is also claimed that the instructions of the court improperly submitted to the jury the question of whether or not

Bratt & Goodman, on behalf of the plaintiff, Triller, had agreed with Shaw that he (Shaw) might have half of the hay in consideration of cutting and harvesting it.

Whether Bratt & Goodman were "special" agents or "general" agents, they were all the agents there were, and they seem to have authorized everything to be done that was done, and they hardly have the right to say that they had less authority than they exercised for the benefit of their principal. If the hay had not been cut, the plaintiff would have had no hay and no pay for the use of the land. While Bratt & Goodman made a contract for their principal to take a mortgage upon the hay for the purpose of securing the payment of the amount promised to be paid for the use of the land, it is apparent that they would have received nothing if somebody had not cut the hay, because there would have been nothing out of which to realize the rent money. If the hay was cut, the men who cut it ought to be paid. There was no hay before the grass was cut and cured. Bratt & Goodman had authority to make the original bargain for their principal. They seem to have had authority to take the subsequent bill of sale which was delivered to them to secure the money due for the rent of the land. At least they proceeded. When they got this bill of sale, there was immediately a replevin suit under which possession was taken, and they sold the hay which they got under the writ of replevin. If they had the authority to take the bill of sale, they apparently had the authority to secure the payment of the money and to collect it. It would seem to be better to hold that Bratt & Goodman had the right to bind their principal, the plaintiff, than to hold that the men who cut the hay, and therefore made it valuable to the plaintiff and enabled him to get his money out of it, are to do without the money necessary to pay them for their labor. Bratt & Goodman zealously looked after the interest of their principal, Triller. Triller has accepted the proceeds of the property and the work of Bratt & Goodman as his agents. During the summer, when it was apparent that Hutchinson was

not going to cut the hay upon which Triller had the lien of the chattel mortgage lease, and afterwards when Shaw was about to quit, and when Sadle was about to quit, then Bratt & Goodman were active in getting the hay cut and stacked so that they could get the rent of their principal out of it. Of course, if Shaw had not cut the grass, it would have been left standing and would not have been hay; it would have gone back into the ground again. But when Bratt & Goodman told Shaw to go ahead and cut the grass and leave half of it on the ground, and when Bratt told Sadle to go ahead, they were both exercising business thrift on behalf of their principal. While it is true that Mr. Bratt testified that he was not acquainted with Shaw, he did not fully deny his conversation with Sadle, but whatever this testimony may have been it was fairly submitted to the jury, and the jury found in favor of the men who cut and stacked the hay.

In view of what was done in the premises by Bratt & Goodman on behalf of their principal, we think that the instructions of the court to the jury were correct, and that when the jury found against the plaintiff they determined the agency of Bratt & Goodman to be a general agency to lease the land and collect the rent. The agency was shown. *Crilly v. Ruyle*, 87 Neb. 367; *Cooper & Cole Bros. v. Cooper*, 90 Neb. 209; *Creighton v. Finlayson*, 46 Neb. 457; *Thomson v. Shelton*, 49 Neb. 644; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762; *Kasson v. Noltner*, 43 Wis. 646; *Brown v. Eno*, 48 Neb. 538; *Bankers Life Ins. Co. v. Robbins*, 55 Neb. 117; *Phœnix Ins. Co. v. Walter*, 51 Neb. 182; *Faulkner v. Simms*, 68 Neb. 295; *Oberne v. Burke*, 30 Neb. 581. The acts of Bratt & Goodman on behalf of their principal seem to have been ratified. Not one of them has been disavowed.

Notwithstanding the ingenious and plausible argument of counsel for the plaintiff, we are constrained to hold that the trial court committed no error in the instructions given and rulings made, and that the judgment was properly rendered for the defendant.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and SEDGWICK, JJ., concur in the conclusion only.

HENRY J. LENDERINK, ADMINISTRATOR, APPELLEE, V. B. F. SAWYER ET AL., APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,805.

1. **Courts:** RELIEF: EXECUTOR DE SON TORT: SET-OFF. Where the defendant, who was the coroner of Dakota county, and his surety, the defendant company, were sued by the administrator of the estate of one Robert Reed, deceased, who sought to recover from them the value of certain personal property which had belonged to said Reed at the time of his death, and which had been sold by the defendant coroner immediately after the death of the deceased and to enable him to pay the necessary expenses of the funeral, and he had sold the property for its full and fair value, and had used the proceeds for that purpose, and at the request of the nephew of the deceased and his son, *held:* (1) That the defendants were entitled to set off the money paid out for the necessary expenses of the funeral against the plaintiff's claim. (2) That the district court, having the parties before it and having jurisdiction of the subject matter and the parties, should adjudicate and determine the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate, thereby unnecessarily increasing the expenses of the litigation.

2. **Executors and Administrators:** EXECUTOR DE SON TORT: PAYMENT OF FUNERAL EXPENSES. Under the facts shown, the defendant Sawyer was at most an executor *de son tort.* The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration. As the administrator of the estate of the deceased would be bound to pay the funeral expenses, if they were not already paid, he cannot complain because the coroner paid them.

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

Paul Pizey, for appellants.

J. J. McCarthy, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Dakota county against the coroner of that county and the surety on his official bond. The suit was brought by the administrator of the estate of Robert Reed, deceased. It appears that one Robert Reed died intestate at his home in Dakota county while living alone; that when his body was found the defendant, Sawyer, at the request of the nephew of the deceased, took charge of the body and gave it a Christian burial; that he took possession of certain personal property of the deceased, sold it for its full value, and applied the proceeds to the payment of the expenses necessarily incurred for the burial casket, the lot in the cemetery, etc. The plaintiff, as administrator, brought this action to recover the value of the personal property so sold. On the trial the defendant offered to prove as a matter of set-off that the expenses incurred by him were proper and necessary, and were just and reasonable in amount; that the property was sold with the consent of the nephew and a son of the deceased, or at least the son ratified the sale; that the amount realized from the sale was the full value of the property; and the defendant sought to set off his expenses against the sum received by him for the sale of the property. The proposed evidence was rejected, and the court directed the jury to return a verdict against the defendants for the amount that the defendant Sawyer realized from the sale of the property. The verdict and judgment rendered were for $499.72. For the rejection of the evidence so proffered and the giving of the peremptory instruction, the defendants assign error.

It is claimed by the defendants that the administrator is estopped from prosecuting the action; that all the

charges made by the defendant were reasonable and just; and there seems to be no controversy concerning the fact that defendant Sawyer sold the property and paid the funeral expenses with the proceeds. One purpose of an administrator is to take charge of the property belonging to the estate. He becomes the means by which the property belonging to the estate is applied to the payment of debts, if there are any, and the surplus remaining is distributed among the heirs. The statute in this case seems to contemplate that those of the relatives who are near the deceased are charged with the duty of taking care of the body and burying it. If the defendant Sawyer carried out the wishes of the relatives who were there, it would appear that the other relatives would have no reason to complain. As the administrator represents the creditors and the heirs, and is only a trustee, he is estopped from maintaining an action against the defendant Sawyer and his bondsmen for doing that which Sawyer was requested to do, and which he actually did, in taking charge of the body of the deceased and burying it. In Dame, Probate and Administration, sec. 231, it is said: "All courts generally hold that the personal representatives may pay the same (funeral claims) directly without their being exhibited." If this be true with respect to personal representatives, it should be true of the coroner who is requested by the personal representatives to discharge the duties which are a natural burden upon them.

It is altogether probable that when Sawyer sold the property he thought he was authorized to do so by section 110, ch. 18, art. I, Comp. St. 1909: "When any valuable personal property, money, or papers are found upon or near the body upon which an inquest is held, the coroner shall take charge of the same and deliver the same to those entitled to its care or possession; but if not claimed, or if the same shall be necessary to defray expenses of the burial, the coroner shall, after giving ten days' notice of the time and place of sale, sell such property, and after deducting coroner's fees and funeral expenses, deposit the

proceeds thereof, and the money and papers so found, with the county treasurer, taking his receipt therefor, there to remain subject to the order of the legal representatives of the deceased, if claimed within five years thereafter, or if not claimed within that time, to vest in the school fund of the county." He was brought face to face with the problem of giving the body of the deceased decent and immediate Christian burial. The sale of the property would furnish the means of paying the very necessary expenses of the funeral. He sold it, got the money, and used it. The dead man seems to have been decently and properly buried according to Christian rites. The defendant is equitably entitled to his pay for it, and it is not quite right that the plaintiff should have judgment against him. We do not intend to hold that the section quoted justified the conduct of the coroner. The same is justifiable upon other grounds. We think that if the defendant Sawyer was requested by the nephew, Bert Reed, to take charge of the body and to prepare it for burial, and that he did so because of such request, and that he sold the property for its full and fair value, which is not questioned, and used the money which he received therefor in payment of the necessary funeral expenses, then he is equitably entitled to pay therefor, and he is further equitably entitled to set off the money so paid out by him against the plaintiff's claim for the value of the property sold. The same is true if the matter was ratified and adjusted between the defendant Sawyer and the son of the deceased, Earnest Reed. We do not undertake to say what, if any, steps should have been taken before the county court towards proving these claims, because that question is not before us.

"The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration." 18 Cyc. 1361. Among the authorities cited is *Thompson v. Harding,* 75 E. C. L. (Eng.) 630, holding that a proper payment to a creditor of the estate will bind the true representative. In that case

Richard Smith was employed to receive the rents of the deceased in his lifetime, and after his death continued to receive the rents due to the deceased. No other representative of the deceased appearing, Smith paid various debts due from the deceased. Among other things he paid the defendants, who were bankers of the deceased. A considerable time after payment administration was granted to the plaintiff, who brought the action. The court held, under the facts, "that the rule to enter a verdict for the plaintiff ought to be discharged."

In *Outlaw v. Farmer*, 71 N. Car. 31, John Farmer gave his promise in writing to pay John Lewis or James Parker, agents, by agreement with the heirs of Anna Herring, deceased, the sum of $125.50. Lewis and Parker were appointed agents by the heirs of Anna Herring. As the agents of such heirs, they had charge of the entire beneficial interest in the estate. In a suit by the duly appointed administrator of the estate against the makers of the promise, it was held: "Administration was only the technical form of passing the legal estate from the intestate to the distributees. Without administration they had the potential dominion over the estate, and could dispose of it by sale, gift or testament. Therefore, a sale by their agent conferred upon the purchaser a title which the courts will protect. The bond given for the property was given on a valuable consideration and is valid, both as to the principal and as to the sureties." The court further said: "Where the equitable as well as legal rights of parties are administered, the bond sued on will be upheld as valid against the defendant, and the plaintiffs are entitled to judgment thereon."

"Although an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor might do." 18 Cyc. 1363.

In *Brown, Adm'r, v. Walter*, 58 Ala. 310, it was held: "Where one has received and used assets of an intestate, under circumstances constituting him an executor *de son*

tort, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration."

In *Risk v. Risk,* 10 Ky. Law Rep. 566, 9 S. W. 712, R., having paid the first instalment on land, died, leaving a widow and six children, and the defendant, without administering on the estate, but with the concurrence of the plaintiff, undertook to pay the deferred payments and to support the widow and minor children, and he failed to make the third payment, and the land was sold under a judgment by the vendors, and when A. advanced to the defendant money to redeem the land, and the widow and heirs obtained an order for the sale of the land to pay A., who purchased and offered to permit the widow and heirs to redeem, and he conveyed the land to defendant, who paid the balance of the purchase money, in an action by plaintiff for the settlement of the estate of the father, a division of the land, and allotment or dower, held, that the acts of defendant should be treated as those of a duly appointed administrator from the date of the father's death, and that he holds the land in trust for the widow and heirs.

It is incumbent upon the executor *de son tort* to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative. 18 Cyc. 1363. Among the authorities cited in support of the doctrine stated is that of *Gay v. Lemle,* 32 Miss. 309, holding that, where it appears that he has paid one particular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets in due course of administration, but must be liable as executor *de son tort* to the other creditors. But in that case the doctrine announced emphasizes the contention that the executor *de son tort* is entitled to fair treatment if he has acted justly. The syllabus in that

case reads: "If an executor *de son tort,* when sued by a creditor, attempt to justify his unlawful intermeddling with the assets of the deceased by showing that he has applied them to the payment of his debts, he must show that he has applied them in the same manner that they would have been lawfully applied by the rightful executor, and if it appear that he has expended the assets in the payment of one particular debt, not being a lien on them, leaving others unpaid, he will be liable to the other creditors." The body of the opinion fully sustains the syllabus, and requires only that the executor *de son tort* "must show that he has applied them (the assets of the estate) in the same manner in which they could have been lawfully applied by the rightful executor."

In *Holeton v. Thayer,* 89 Ill. App. 184, it was held that where a person named as executor in a will acts without qualifying, and receives proceeds of the sales of lands and rents, the burden is upon him to account for the same, and, if he assumes to pay debts without having them probated against the estate, he assumes the burden of producing evidence that would be sufficient to prove such claims in the probate court in case of objection.

In *Crispin v. Winkleman,* 57 Ia. 523, it was held: "One who intermeddles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct."

Since the district court has acquired jurisdiction of the parties, and the whole subject matter is presented for adjudication, nothing can be gained by rendering a judgment against the defendant and compelling him to file his claim against the estate, thus unnecessarily increasing the litigation and costs. We think that the district court should dispose of the whole case before it. There is no showing that the deceased was in any way indebted. The estate is solvent. The defendant is not shown to have

injured any one by reason of what he did. The claim of no creditor is endangered.

It follows that the district court erred in excluding evidence tending to show that the money received from the sale of the property was expended in and about the burial of the deceased.

The judgment of the district court for Dakota county is

REVERSED.

LETTON and FAWCETT, JJ., concurring in result only.

We think the principles announced in *Phillips v. Phillips*, 87 Me. 324, and *Adams v. Butts*, 16 Pick. (Mass.) 343, apply, and hence concur in the result.

SEDGWICK, J., concurs in the conclusion.

LEE A. HANKS, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 17,058.

1. **Carriers:** ACTION: DEFENSE: INTERSTATE SHIPMENTS. In an action to recover from the defendant railway company the necessary cost of the labor, lumber and material used in constructing grain doors for box cars used in transporting grain from Cook, Nebraska, to Kansas City, Missouri, *held*, that the answer of the defendant company that the interstate commerce commission had made a rule to the effect that the carrier might not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars, unless expressly so provided in its tariff, and that there was no such provision in the tariff of the defendant company at the time the doors were so furnished (though afterwards one was adopted), and therefore that the defendant company was not liable, failed to state any defense.

2. ———: ———: ———: ———. That, as there is no allegation in the pleadings stating when the particular rule was adopted, it will not be presumed to have been adopted before the car doors were furnished, or to have been in force at that time.

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

B. P. Waggener and *Edgar M. Morsman, Jr.,* for appellant.

Hugh La Master, contra.

HAMER, J.

On the 18th day of April, 1910, the plaintiff, who was a dealer in grain, lumber, coal, and live stock, at the village of Cook, Johnson county, Nebraska, sued the defendant in the district court for Johnson county, alleging his business, and that he was the sole owner thereof; that the defendant was a railway corporation, incorporated under the laws of the state of Missouri, licensed to do business in the state of Nebraska, and doing a general transportation business as a common carrier, with lines of railroad in the state of Nebraska and in other states, having a line of railroad running from Talmage, Nebraska, through Johnson county, Nebraska, and through the village of Cook, in said county, to Crete, Nebraska; that defendant maintains a depot at said village of Cook, and an office at said depot, and keeps a duly appointed agent in charge of said office for the management of its business at said village; that from the 26th of July, 1906, until the 17th of January, 1908, the plaintiff at the request of the defendant, made by the agent of the defendant, at Cook, Nebraska, sold, delivered and furnished to the defendant certain lumber and nails, and furnished certain labor to the defendant, all of the value of $271.03; that said articles were so furnished in repairing freight cars belonging to the defendant, and freight cars of other companies then being used by the defendant, all of which cars were loaded and shipped by the plaintiff to points on the lines of the defendant, and all of which articles were necessary to put said cars in proper repair and condition for the transportation of grain and stock, and were not made for the

purpose of violating any law, either state or federal, and in the construction of inside doors for grain cars owned and used by the defendant; that an itemized bill of said lumber, showing the dates when furnished, amounts, dimensions, kinds and prices, was attached to the petition as a part thereof; that the same were just and reasonable prices, and were the prices agreed upon, and that the lumber was of the aggregate value of $211.03; that nails were furnished as needed in making said repairs and said car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of $10, and that labor was furnished as needed in making said repairs and car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of $50; that by reason of the sale, delivery and furnishing of said lumber and nails, and the doing and furnishing of said labor, the defendant became indebted to the plaintiff in the sum of $271.03, for the payment of which the plaintiff has made demand of the defendant, and which the defendant has refused to pay. The prayer was for judgment against the defendant for $271.03, with interest at 7 per cent. from July 17, 1908, and costs.

The defendant answered, omitting the title of the case, the signature of counsel, and the verification, as follows: "Comes now the defendant, and, for its answer to the petition of the plaintiff, it admits that plaintiff furnished the material and labor in the amount and of the value stated in the petition, and defendant states: That any and all lumber which may have been furnished by the plaintiff, as alleged in his said petition, was furnished for the purpose of constructing grain doors, or making repairs upon certain grain cars, which were furnished by the defendant to the plaintiff for the transportation of grain in the regular course of interstate commerce; that each of the said cars, so furnished or repaired, moved from Cook, in the state of Nebraska, to Kansas City, in the state of Missouri, and beyond; that, by reason of such shipments of grain being of an interstate character, this court is without jurisdiction in the premises to hear or try this

case. The defendant alleges that, at the time the plaintiff claims to have furnished such lumber for grain doors, the defendant did not have, regularly published and filed with the interstate commerce commission, and posted as required by law, any tariff or any provision of any tariff, whereby the defendant promised, or agreed or was permitted, to reimburse the plaintiff for and on account of lumber so furnished. Plaintiff alleges that the interstate commerce commission, by rule 78 of bulletin 2 of the conference rulings of the commission, made a ruling as follows: '78. Grain Doors. A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff.' In construing and applying such ruling, the interstate commerce commission held that, if carriers proposed to pay shippers for grain doors furnished by such shippers, where the same were necessary and were actually furnished, carriers could pay the actual cost of such doors with stated maximum allowance per grain door and per car, provided same were covered by their tariffs; that, following the ruling of the interstate commerce commission, the defendant company thereafter regularly published and filed with the interstate commerce commission an amendment to its tariffs, which became effective November 16, 1908, as follows: 'When cars furnished for grain-loading, requiring interior doors, are not so equipped by the railroad company, and such doors are furnished by the shippers, the actual cost thereof (when not to exceed $1.20 per car) will be paid by this company.' That such amendment to defendant's tariffs was made subsequent to the time the plaintiff claims to have furnished the lumber for the grain doors in question, such lumber having been furnished from July 26, 1906, to and including January 17, 1908. The defendant states that payment by it to the plaintiff for the grain doors in question, without authorization therefor from the interstate commerce commission, would be a violation of the interstate commerce act, and would subject, not only the plaintiff, but also the defend-

ant, to a severe penalty. The defendant states that this honorable court is not only without jurisdiction in this matter, to enforce payment for grain doors prior to November 16, 1908, but its order so to do would be requiring the defendant company to violate the interstate commerce act; that the defendant has no desire in any way to take advantage of the plaintiff, and stands ready and willing at all times to reimburse and pay to the plaintiff any and all amounts which it may be authorized to pay by the interstate commerce commission, and the defendant alleges that, if the plaintiff has furnished lumber as claimed by him, the same would have been paid for in due course by the defendant, had such payment not been in violation of the law. Wherefore the defendant asks that it shall go hence without day, and recover its proper costs."

A general demurrer was filed by the plaintiff to the defendant's answer. Whereupon it was, on or about the 8th day of October, 1910, considered by the court that the said demurrer to the answer should be sustained. The defendant elected to stand upon its said answer, and refused to plead further, whereupon judgment was rendered for the plaintiff in the sum of $313.71, with interest from the date of the judgment at 7 per cent. per annum, and the costs.

It would seem that the question presented is whether the plaintiff can recover for repairs to freight cars and for grain doors furnished for freight cars, such cars having been furnished by the defendant for transporting grain shipped by the plaintiff in interstate traffic. If the plaintiff cannot recover, it must be because of provisions contained in the interstate commerce law, and amendments thereto. The appellant seems to particularly rely on sections 3, 6 of the act of 1887 (24 U. S. St. at Large, ch. 104, p. 379), and on the Elkins act, approved February 19, 1903 (32 U. S. St. at Large, pt. 1, ch. 708, p. 847). The act as amended may be found in Drinker, Interstate Commerce Act (Supplement), and allied acts, pp. 1-75. They may also be found in the act approved February 4,

1887 (24 U. S. St. at Large, ch. 104, p. 379), amended by act approved March 2, 1889 (25 U. S. St. at Large, ch. 382, p. 855); by act approved February 10, 1891 (26 U. S. St. at Large, ch. 128, p. 743); by act approved February 8, 1895 (28 U. S. St. at Large, ch. 61, p. 643); by act approved June 29, 1906 (34 U. S. St. at Large, pt. 1, ch. 3591, p. 584); by act approved April 13, 1908 (35 U. S. St. at Large, ch. 143, p. 60); by an act approved June 18, 1910 (36 U. S. St. at Large, ch. 309, p. 539). Section 3, among other things, provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 6, among other things, provides: "That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act." Among other things, it is provided in said section that the schedules shall be printed in large type, and that copies shall be kept for the use of the public in every depot or station, also that no advance shall be made in the rates, fares, and charges except after 10 days' public notice, the notice to plainly state the changes proposed to be made in the schedule then in force. Section 3 remains as it was originally adopted, but section 6 has been amended. As amended, it is provided in section 6 that, when the rates have been established and published, it shall be unlawful for the common carrier to charge, demand, collect, or receive from any person a greater or less compensation than

is specified in such published schedule of rates, fares, and charges; that every common carrier shall file with the commission copies of its schedules of rates, fares, and charges, and shall notify the commission of all changes made, and shall also file with the commission copies of all contracts, agreements, or arrangements in relation to any traffic affected by the provisions of the act. There is also a penalty for failure to comply with the requirements of the act, such failure being punishable as a contempt.

The foregoing provisions are probably intended to prevent favoritism and the giving to one shipper an advantage over another. It is plain that the plaintiff should recover for the labor and material furnished, unless the statute is in derogation of the common law and thereby forbids it. To pay a reasonable and just price for the labor and materials furnished does not of itself give the appellee undue or unlawful preference or advantage. The payment of a debt is not giving an undue preference or advantage. But it is claimed that the rule adopted by the interstate commerce commission wholly prevents the transaction itself, and that therefore there can be no recovery. It is claimed that the transaction is of such a nature that the defendant company might pay one shipper one price for the labor and grain doors and pay another shipper another price, and that there is thereby created a chance to be dishonest and to violate the original intention of the law which forbids discrimination.

Rule 78, adopted by the commission and set forth in the answer to which the demurrer is interposed, makes the reimbursement of shippers for expenses incurred in attaching grain doors to box cars unlawful, unless expressly provided for in the tariff of the common carrier. It is alleged in the answer that the defendant filed with the commission an amendment to its tariffs, which became effective November 16, 1908, and that this amendment provided that, when the cars required interior doors and the shipper furnished them, then the company would pay to the shipper the actual cost of the doors, not exceeding $1.20 per

door, and that the amendment was made after the time that the plaintiff claims to have furnished the doors in question. The date fixed in the petition when the grain doors were furnished seems to be from July 26, 1906, to January 17, 1908. The amendment was made to the defendant's tariff November 16, 1908, being about ten months from the time the last item of the grain doors was furnished. It does not appear from the answer when rule 78 was adopted. Ten months elapsed after the last item of the grain doors was furnished before the tariff required was filed with the interstate commerce commission and became effective. In that ten months the rule may have been, and probably was, adopted. If so, it was after the grain doors were furnished. There would be nothing in the way of paying for the grain doors if they were furnished before rule 78 was adopted. For anything that appears in the answer, the rule had not yet been created, and was therefore not in existence when the doors were furnished.

It is the duty of the railway company to furnish the shipper a car that is fit to use. Perhaps the railway company fails to do so because of difficulties in the way. It may have been that the car doors have been stolen. Perhaps they have been broken up. At any rate they are missing, and the agent of the railway company is not in a condition perhaps to furnish the doors, and therefore the shipper may be compelled to rely upon his own ingenuity, labor and material. Therefore he builds the door and puts it in the car. The rule of the interstate commerce commission is based upon the idea that such an opportunity as this will be utilized by the railway company and the shipper in paying and securing unjust rebates. This reasoning is based upon the assumption that men in an ordinary commercial transaction are likely to have a secret agreement, and that unlawful rebates will be collected to the special advantage of the particular shipper who builds the car doors. We simply take the view that, before payment for the grain doors can be forbidden, the rule must have been

in force when the labor and materials for the grain doors were furnished.

The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the interstate commerce commission. A general demurrer to the answer was sustained and judgment rendered for the plaintiff. It does not appear from the answer that the rule was in force at the time the shipments were made and the labor and material furnished. Of course, the rule could not be retroactive, and the answer therefore states no defense.

The judgment is

AFFIRMED.

SEDGWICK, J., concurring only in the result.

The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the interstate commerce commission. A general demurrer to the answer was sustained and judgment rendered for the plaintiff. The defendant has appealed.

The rule relied upon is set out in the answer. It relates only to "grain doors to box cars." The petition counts upon lumber, labor and nails furnished in repairing the *cars* of the defendant. The answer says nothing about the labor and nails, and alleges that the *lumber* furnished by plaintiff "was furnished for the purpose of constructing grain doors or *making repairs upon certain grain cars*," without specifying that the doors were for box cars, or how much, if any, was for constructing grain doors. These allegations do not constitute a defense to plaintiff's claim. Moreover, it does not appear from the answer that the rule relied upon was in force at the time the shipments

were made and the labor and material furnished. Of course, the rule could not be retroactive, and for this reason, also, the answer fails to state a defense.

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

FREDERICK E. SCHWARTZ, APPELLANT, V. ANDERS ANDERSON, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,814.

1. **Adverse Possession:** EVIDENCE. It is shown by the uncontradicted evidence that defendant has been in the open, continuous and exclusive possession of the land in question for more than 10 years prior to the commencement of an action in ejectment, claiming to be the owner thereof, and that during said time plaintiff occupied and owned adjoining land and recognized defendant's possession as such owner, and that during all of said time plaintiff might have instituted an action contesting defendant's right. *Held*, That the statute of limitations had run in favor of defendant, and that ejectment could not be maintained.

2. ———: ———. The fact, if true, that the land involved in litigation was not correctly described in defendant's muniments of title would not prevent the running of the statute of limitations in his behalf, as between him and another claimant, there being no question of the identity of the particular land occupied and claimed by him.

3. **Appeal:** VERDICT: EVIDENCE. "If a verdict is the only one justifiable by the evidence, instructions to the jury will not be examined." *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571.

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

W. S. Morlan, for appellant.

Lambe & Butler, contra.

REESE, C. J.

This is an action in ejectment. Plaintiff alleged in his amended petition that he was the owner and entitled to

the immediate possession of "lot numbered six (6), in section numbered six (6), in township number one (1) north, range thirty-six (36) W. of the 6th P. M., in Dundy county, Nebraska, being also known as the southwest quarter (S. W. ¼) of the northwest quarter (N. W. ¼), of said section number six (6), and said defendant ever since the 3d day of June, 1908, has unlawfully kept and still keeps the plaintiff out of the possession thereof." The second cause of action is for rents and profits, and need not be here set out. The defendant answered: (1) A general denial of all unadmitted allegations of the petitions. (2) It is alleged that neither plaintiff nor his grantors, etc., were seized or possessed of any part of said southwest quarter of the northwest quarter of said section 6, within 10 years immediately preceding the commencement of the suit; that the plaintiff's cause of action, if any he ever had, accrued on the 25th day of April, 1898, which was more than 10 years prior to the commencement of this action. (3) That on or about the 22d day of March, 1893, defendant entered into possession of the premises, to wit, the said southwest quarter of the northwest quarter of said section 6, under claim and color of title, and has since retained the actual, adverse and exclusive possession of the premises, at all times claiming to be the owner thereof; that plaintiff with knowledge of the facts has since the 25th day of April, 1898, up to the time of the commencement of the action stood by and permitted defendant to cultivate and make permanent improvements upon said land, and that he is estopped thereby to make any claim therefor; that the boundary line between plaintiff and defendant has been agreed upon between them and recognized by both for more than 10 years immediately preceding the commencement of the suit, and that during all of said time plaintiff has not claimed, asserted or demanded any right, title or interest in said premises, and during all of which time defendant has occupied the same, claimed and in good faith improved it, being, and believing himself to be, the owner thereof. The reply was a general

denial. A jury trial was had, when the jury returned a general verdict in favor of defendant. A special finding was submitted and answer returned by the jury, the question and answer being as follows: "Does the jury find that from the 30th day of August, 1897, when the plaintiff received a receiver's receipt for lot numbered six (6), to the present time the defendant Anders Anderson, or some one in his behalf, has been in open, peaceable, exclusive and adverse possession of the land in dispute during all of said time, claiming to own the same? Answer: Yes." A motion for a new trial was filed, overruled, and judgment was rendered on the verdict in favor of defendant. Plaintiff appeals.

The case is a peculiar one, and, were it not for the plea of the statute of limitations, would be difficult of decision under the evidence submitted. There is no question of boundaries involved, nor as to the identity of the exact premises in dispute, for both petition and answer refer to them as the southwest quarter of the northwest quarter of section 6, township number 1 north, range number 36 west of the sixth P. M. Neither is there any dispute as to defendant's exclusive possession thereof since 1893. At some time, probably May 3, 1884, a duplicate receiver's receipt was issued to George W. Tompkins for the sum of $200.70 in full payment for "lot 8, sec. 31, tp. 2 north, and lot 1, 2, 3, 4 and 5 quarter of section No. 6, in township No. 1 north of range No. 36 west, containing 160 acres." On the 6th day of May, 1884, Tompkins deeded it to J. M. Tolman (Tallman). On the 21st of April, 1888, a patent was issued to Tompkins. March 12, 1885, Tallman deeded to William J. Wilson. November 7, 1891, Wilson conveyed to Mads Anderson. March 22, 1893, the sheriff of Dundy county, by virtue of an execution sale against Mads Anderson, conveyed to defendant. In all those transfers the property is described as lots. Immediately after the execution of the sheriff's deed defendant went into possession of the land in dispute as his own and has held the possession ever since. Lot "6" is not referred to in any of

those conveyances by that number. On the 3d day of June, 1908, the United States authorities issued to plaintiff what is styled "Timber culture certificate No. 1466," by which lots 6 and 7 in the same township and range were conveyed to him. At the close of the instrument this language is used: "This patent is issued in lieu of one bearing the same numbers, dated April 25, 1898, which has been canceled because of an error in the description." There is in this record a conveyance by quitclaim deed from plaintiff to the United States, releasing all claim to lot numbered 5, in the same township and range, and which bears date May 16, 1908. There is nothing in or about this deed giving any explanation as to why it was made, nor do we find anything in the evidence upon that subject. The inference would probably be that the original patent issued to plaintiff April 25, 1898, conveyed lot "5," and an error was thought to be discovered. This error, if one existed, was probably caused by the numbering of the original survey. The fact remains that now both plaintiff and defendant are claiming to be the owners of the tract of land occupied by the defendant, plaintiff claiming to own it by virtue of his patent of 1908, supplanting that of 1898, and defendant claiming it by and through the location of Tompkins in 1884, and the sheriff's deed to himself in 1893, and under which he is, and has been since said date, in the exclusive possession.

There is some evidence that the numbers of the lots appearing in the public records in the local land office, as well as in the office of commissioner of public lands and buildings, have been changed by erasure and substituting the numbers corresponding with plaintiff's claim, but it seems to be unknown when or by whom such changes were made. The evidence as to the original numbering of the lots is not convincing one way or the other, and we find ourselves unable to solve the question from the evidence. This uncertainty is, no doubt, largely owing to the long lapse of time since the survey and the report thereof. We are impressed with the belief that when Tompkins made

his entry in 1884, and when defendant purchased the land in 1893, as well as when plaintiff made his entry in 1898, it was understood and believed that the number of the lot was as is now claimed by defendant. This number is also shown by the survey made in 1892 by the county surveyor, as shown by the record of that office of 1891-1892. The evidence shows without dispute the possession of defendant; that for a long period of time, longer than the statutory period of limitation, plaintiff has occupied adjacent land and knew of defendant's claim, at one time objecting to the fence of defendant being over the line and from which it was removed to on or near the true line. It is true, as contended by plaintiff, that the statute of limitations does not run against the general government; but, even if true that the title remained in the United States until the year 1898, there was yet more than 10 years intervening between that time and the commencement of this action, and by which the statutory bar was complete. This being true, we are persuaded that the verdict and judgment were the only ones that could have been rightfully rendered. If we are correct in this, the question of errors in the instructions does not require attention. *Jeffres v. Cashman,* 42 Neb. 594; *Henry v. Dussell,* 71 Neb. 691; *Kielbeck v. Chicago, B. & Q. R. Co.,* 70 Neb. 571; *Booknau v. Clark,* 58 Neb. 610.

As we have heretofore suggested, there is no question of boundaries, nor of any mistake in the particular land which defendant occupied and claimed to own. He occupied and openly claimed the land with the knowledge of plaintiff during the statutory period. The contention is that the land itself is not described by the correct numbers. Each party knew just what defendant claimed. His occupancy was exclusive, continuous. Eliminating the question of a mutual mistake, if there were one, his right could not be successfully assailed. But, if there were a mistake as to the correct description, his title would be good. *Baty v. Elrod,* 66 Neb. 735, 739, and cases cited. In that case the contention related to boundary lines, but it

is not perceived that any different rule should be applied in a case like the one now under consideration. If the defendant had exclusive possession for the 10 years, claiming it as owner, his title would be perfect as against the whole world, except the sovereign, and those under disability. "It is the visible and adverse possession, with an intention to possess, that constitutes its adverse character." *Fitzgerald v. Brewster*, 31 Neb. 51.

The judgment of the district court is

AFFIRMED.

SEDGWICK and ROSE, JJ., dissent.

UNION STOCK YARDS NATIONAL BANK OF SOUTH OMAHA, APPELLEE, V. MARY LAMB, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,837.

1. **Bills and Notes: ACTION: DEFENSE OF COVERTURE: BURDEN OF PROOF.** In an action on a promissory note, signed by a defendant, and it is not alleged in the petition that such defendant is a married woman, the fact that she is such, if relied upon as a defense, must be alleged in the answer, in which case the burden of proof is upon the defendant to establish the fact, and, if proved, the burden of proof is upon the plaintiff to prove that the contract was made by the defendant with reference to and for the purpose of binding her separate property and estate.

2. **Pleading: SUFFICIENCY OF PETITION.** If a cause of action is stated in the petition, the fact that the pleading contains allegations of redundant and unnecessary matter, which does not conflict with nor weaken the proper averments made, will not render the petition demurrable as not alleging facts sufficient to state a cause of action.

3. **Appeal: BILL OF EXCEPTIONS: AUTHENTICATION.** "The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *State Bank v. Bradstreet*, 89 Neb. 186.

4. **Instructions** given and refused are examined, and no error discovered in the action of the court thereon.

5. Appeal: SPECIAL FINDINGS: FAILURE TO REQUEST. If a litigant desires that special findings of fact be made and returned by a trial jury, he should request their submission.

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

J. R. Swain, for appellant.

Parish & Martin and *John E. Kavanaugh, contra.*

REESE, C. J.

This is an action by plaintiff against Mary Lamb and M. Lamb to recover the balance due upon a promissory note executed by both defendants. It is alleged in the petition that the note sued upon is a renewal of a note previously given for the same indebtedness; the former note having been signed by both defendants. The fifth paragraph of the petition is as follows: "That on the 13th day of September, 1907, the defendant Mary Lamb executed and delivered to the plaintiff a chattel mortgage for the sum of $4,119.92, and that said chattel mortgage was made at the same time as the note herein set out, and was made a part of the original contract between the plaintiff and the defendant, and the said chattel mortgage contained the following condition: 'It is expressly understood that this mortgage covers and secures all extensions or renewals of within described note or notes.' And said mortgage also contained the following condition: 'If for any cause said property shall fail to satisfy said note, debt, interest, costs and charges, I covenant and agree to pay the deficiency.'" It is alleged in the sixth paragraph of the petition that the consideration named in the notes and mortgage was extended to the defendant Mary Lamb, and the entire contract whereby she became indebted to the plaintiff was made with the defendant Mary Lamb, whereby she pledged her separate property for the faithful performance of the obligation named in said notes and mortgage.

Defendant M. Lamb filed no answer. Mary Lamb answered (1) by a general denial of the unadmitted averments of the petition; (2) admitted the signing of the note upon which the action was based, but alleged that "she is a married woman, the wife of M. Lamb, the defendant in this case, and was such at all times mentioned in said petition, and a resident of the state of Nebraska; that she never signed said note mentioned in paragraph two of plaintiff's petition or any agreement connected therewith with reference to her separate property, estate or business, nor with a view of binding her separate property, estate or business, but signed said note solely as surety for said M. Lamb, and for no other purpose;" (3) avers that she never received any consideration for said note, other than the fact that she signed it as surety, and that she never had any business dealings with plaintiff, and was not indebted to it in any sum, and signed said note at its request as surety only. The reply was, in substance, a general denial. A jury trial was had.

It is suggested in the transcript that, at the commencement of the introduction of evidence, the defendant Mary Lamb objected to the introduction of any evidence, for the reason that the petition did not contain facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant Mary Lamb. The objection appears to have been overruled and exception taken, and the ruling is presented in this court for error. The contention seems to be that it is shown by the paragraphs in the petition, herein above referred to, that the action is against Mary Lamb as a married woman, and, that being the case, the petition is deficient for want of an allegation that she signed the note upon the faith of her separate estate, which she then had and continued to have at the time of filing the petition. A number of cases are cited in the brief sustaining this view, and the law is probably as contended for, if in a proper case; but we fail to see that it can be applied to this case. There is no averment in the petition that Mary Lamb is, or was, a married woman. We are

unable to see the necessity for the averments in the petition, above quoted and set out, since they fall short of making the allegation of coverture. It may have been the object of the pleader to plead his evidence, which, although violative of the rules of pleading, would not furnish a basis for a demurrer. It did not detract from the cause of action stated. It may have been the purpose to anticipate a possible defense of suretyship, which would be improper, but would not render the pleadings demurrable as not stating a cause of action, if one was otherwise stated. We therefore conclude that the court did not err in overruling the demurrer *ore tenus*. Where the petition does not allege coverture, the fact that the defendant is a married woman is matter to be set up in defense, and in such case it is for a defendant to sustain the defense by proper evidence. If she establishes coverture, the burden is on the plaintiff to prove that the contract was made with reference to and upon the credit of her property. *Citizens State Bank v. Smout*, 62 Neb. 223.

It is shown by the transcript that upon trial to the jury a general verdict was returned finding in favor of plaintiff and against Mary Lamb, and assessing the amount of plaintiff's recovery at $1,257.03. A motion for a new trial was filed, overruled, and judgment rendered on the verdict. Defendant appeals.

It is insisted that the verdict is not sustained by the evidence, and the bill of exceptions is referred to as sustaining the contention, but there is no certificate of the clerk that the papers said to contain the evidence is the bill of exceptions, either the original or a copy, and we are debarred from this investigation. It has been so often decided by this court that the certificate of the clerk is jurisdictional, and what purports to be the bill of exceptions must be ignored if not certified, that it would seem to be unnecessary to cite cases, but a small number will be here appended. *Scott v. Spencer*, 42 Neb. 632; *Yenney v. Central City Bank*, 44 Neb. 402; *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Reuther v. Zimble-*

man, 50 Neb. 165; *Bryant v. Cunningham,* 52 Neb. 717; *Coy v. Miller,* 54 Neb. 499; *Noble v. Neal,* 57 Neb 797; *State Bank v. Bradstreet,* 89 Neb. 186. This must also apply to the contention that the court erred in excluding testimony offered by defendant, as we have no authority to examine, for any purpose, what purports to be a bill of exceptions.

Of the instructions, those numbered 12 and 13 are objected to. Instruction numbered 12 told the jury, in substance, that the material question to be decided was: "Did the parties, at the time the note in suit was executed, contract with reference to, and upon the faith and credit of, the separate estate of the defendant Mary Lamb?" etc. The criticism is as to the use of the word "parties." It is claimed that this included only the plaintiff and did not include the defendant. We think this is too narrow a construction of the language. It evidently referred to the parties to the contract and suit, which would include all. But, were it true that the instruction was indefinite, in the matter of which complaint is made, the thirteenth instruction tells the jury that, in order to hold Mary Lamb liable on the note, they must find she executed it "with reference to, and upon the faith and credit of, her separate property and estate." This removed all doubt, if any existed. The same idea is given in another form in the fourteenth instruction.

Defendant requested the court to give the following instruction: "The jury are instructed that the defendant in this case is not bound by any act of her husband, Michael Lamb, as her agent, unless you find from the testimony that he had authority from her to so act." What the testimony was is not before us, and, before the judgment could be reversed for the refusal to give an instruction, the instruction asked must have been applicable to any state of facts provable under the pleadings. It must be conceded that, if a person assumes to act as the agent for another, the principal will be bound by the agent's acts if authority was given, or if the principal subsequently

ratified an unauthorized act. We are unable to say whether there was any evidence that the husband acted as agent, or whether if he did so act, even without authority, his act was ratified by defendant. In either case there would be no error in refusing to give the instruction.

The final contention is that "the verdict and judgment in this case are of no force, for the reason that there is no finding in the verdict that the defendant Mary Lamb had a separate estate at the time the contract was entered into, or, if so, that any such was in existence at the time the verdict was rendered; nor does the judgment recite that the same is against the separate estate and property of the defendant Mary Lamb, or that she had a separate estate, either at the time the contract was entered into, or at the time the judgment was rendered; nor does it recite that execution should issue against the separate property of Mary Lamb for the satisfaction thereof." A number of cases are cited as supporting this contention; but we think they are not authority here when considered in the light of the statute of this state. In short, we do not think any of these elements are essential to be found in order to the validity of either the verdict or judgment. Had the defendant desired that the jury should pass on the questions suggested, the submission of special findings under the provisions of sections 292 and 293 of the code would probably have been in order. Instead of this, she submitted her case to the jury calling for a general verdict. The judgment is in accordance with the requirements of section 292 of the code, and that must be held sufficient.

We are unable to find any reversible error in the record before us. The judgment will therefore have to be affirmed, which is done.

AFFIRMED.

M. K. GOETZ BREWING COMPANY, APPELLEE, V. FRANK M. WALN, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,854.

1. **Courts: RULE TO INFERIOR TRIBUNALS: APPEAL: AMENDMENT OF RECORD.** "The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission." Comp. St. 1911, ch. 19, sec. 28.

2. **Appeal: CORRECTION OF TRANSCRIPT.** Where an appeal from a judgment of the county court is taken within the time required by law, the transcript being filed in the district court, but the county judge failed to attach his certificate thereto, the district court may by order direct the transcript to be returned to the county judge for proper certification.

3. ———: ———: **NEGLECT OF COUNTY JUDGE.** In such case the failure of the county judge to return the transcript duly certified within the time allowed by law for taking the appeal will not deprive the district court of jurisdiction over the cause.

4. ———: ———: **NUNC PRO TUNC ENTRY.** Where, upon the return to the district court of the transcript duly certified, it is discovered that at the close of the trial the county judge announced the judgment to be that the plaintiff's action was dismissed and judgment rendered in favor of defendant against the plaintiff for the costs, but that in entering the judgment the order dismissing the case was inadvertently omitted from the record, and that fact is established to the satisfaction of the district court, it is within the power of that court to again return the transcript in order that a *nunc pro tunc* entry may be made according to the fact. While the proceeding was probably irregular, the district court was not deprived of jurisdiction thereby.

5. **Novation: REQUISITES.** In order to constitute a novation, by which the original debtor is released, the creditor being bound thereby to discharge the debt as to him and look to another for the payment of his demand, it must appear that there was a legal and enforceable contract made between the new debtor and the creditor by which the claim could be enforced against such new debtor, and that the creditor unconditionally released the original debtor and accepted the third person in his stead.

6. **Appeal: VERDICT: INSTRUCTIONS.** Where the verdict and judgment are the only ones which could be legally returned and entered according to the evidence, the instructions of the court to the jury will not be examined.

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

O. E. Bozarth and *W. S. Morlan,* for appellant.

G. Norberg and *Lambe & Butler, contra.*

REESE, C. J.

This action was commenced in the county court of Gosper county for the purpose of collecting the amount alleged to be due on certain promissory notes executed by defendant to plaintiff. The execution and delivery of the notes being admitted by defendant, both in his answer and testimony, they need not be further described here. Plaintiff failed to obtain judgment in the county court, and sought to appeal to the district court. The county judge prepared a transcript of the proceedings, and the same was filed in the office of the clerk of the district court within the time allowed by law for taking appeals, but the county judge failed to certify to the same. Upon the discovery of this omission the district court, on motion of plaintiff, and over the objection and exception of defendant, directed the transcript to be remanded to the county judge for proper certification. The transcript was returned to the district court duly certified, but the time for appealing had expired. Defendant then objected to the filing of the amended transcript. The objection was overruled, to which he excepted. It was then discovered that the transcript did not contain a formal judgment dismissing plaintiff's action, and, upon the application of plaintiff, and over the objection and exception of defendant, the transcript was again returned to the county court for the entry of a *nunc pro tunc* order and judgment in order to conform to the fact. The *nunc pro tunc* entry was made, the judge certifying that at the close of the trial he did announce and rendered judgment dismissing the suit, but had neglected to so record the fact in his docket.

The cause was then held for trial in the district court over the objection of defendant; the claim being that the district court had no jurisdiction, and that the appeal was not perfected within the time required by law. To say that the county judge was guilty of inexcusable gross carelessness in the whole matter, from which much annoyance, expense and delay resulted, would be but a mild reflection upon his conduct. It is now contended that the district court never acquired jurisdiction over the case, owing to the failure of the county judge to present a "certified transcript" as is required by section 1008 of the code. It is apparent from this record that the failure of the county judge to certify to the transcript was not the fault of plaintiff, and it is the well-settled law of this state that a party cannot be deprived of his appeal by the wrong of the officer, when he is without fault himself. In making the order for the proper certification of the transcript, the court was well within the power conferred by section 28, ch. 19, Comp. St. 1911, which provides: "The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission."

In defendant's answer filed in the county court, he admitted "the execution and delivery of said notes as set out in said petition," of which there were five, amounting on their face to $700, but upon which there were certain credits allowed, amounting to $132.35. The transcript as originally made shows, among other things, the following as occurring at the trial: The five promissory notes were introduced in evidence and were objected to "for the reason the notes have not proper and sufficient verification. Objection sustained by the court, and defendant rests case. It is therefore considered by me that the defendant have judgment against the plaintiff in this action in the sum of $8.90 his costs." This entry is under date of February 12, 1907. A showing was made to the district court that this entry was not in accordance with

the facts, in that the proper judgment was announced from the bench dismissing the suit, whereupon the court ordered that the transcript be referred back for a proper certification as to the fact. The county judge's transcript, under date of November 9, 1907, shows a motion was made by plaintiff to correct the record "by entering judgment in said action according to the facts *nunc pro tunc* as of February 12, 1907." It is recited that due notice of the hearing of the motion was given, and that the hearing was adjourned to November 23, when the parties appeared, and defendant filed a special appearance to object to the jurisdiction of the court, which, "after full argument by attorneys upon both sides," was overruled, and the court "finds of his own knowledge" that the judgment was that the action be dismissed, as announced at the completion of the trial, but that, in making up the record, it was inadvertently omitted. The judgment is then rendered in proper legal form. This is dated November 30, 1907, and was probably filed in the office of the clerk of the district court, as it is contained in the rambling and imperfect record presented here. Objections to that record were presented to the district court and overruled, when pleadings were filed, and the cause tried to a jury on the merits on the 25th day of January, 1910. Less attention should have been given to this subject by us, were it not for the fact that it is discussed extensively in the briefs.

The amended petition filed in the district court is in the usual form for declaring upon promissory notes. The answer thereto is of considerable length, but can be fairly summarized to be that plaintiff, to induce defendant to handle its beer at Swanton, in Saline county, advanced the money necessary to procure a liquor license for the year 1904, and for which the notes were given, and defendant entered upon the business at said place; that, on account of the inferior quality of the beer furnished by plaintiff, the saloon business was not a success, but a failure, by reason of which defendant was caused to lose $1,000; that defendant sold his saloon to one Mitlewski, by the consent

and approval of plaintiff, Mitlewski to assume said indebtedness of defendant; that plaintiff accepted Mitlewski therefor, agreeing to look to him alone for the payment thereof and cancel and surrender the notes of defendant; that, under the contract and agreement of the parties, Mitlewski took charge of said saloon, became indebted to plaintiff for the amount of said notes, and defendant was discharged from all indebtedness to plaintiff. It is further alleged that, during the time defendant was held liable on the notes, he executed a bill of sale to plaintiff upon the saloon fixtures, of the value of $350, which property was appropriated by plaintiff to its use, and for which he claims credit, if held liable to plaintiff on the notes. Judging by the verdict, this claim was allowed by the jury, though for a less amount, and the matter need not be further noticed. The contention is made in the answer that the court was without jurisdiction, owing to the irregularities above referred to, but, as we view the case, this is without merit. The reply was a general denial. The jury returned a verdict in favor of plaintiff for $523, on which judgment was rendered; the motion for a new trial being overruled. Defendant appeals.

The controlling question in the case is as to the defense of novation alleged in the answer. The evidence, including the testimony of defendant, shows, without dispute or conflict, that the money represented by the notes was loaned defendant by plaintiff about the time defendant went into business at Swanton. The alleged agreement to release defendant from the payment of the notes is denied by both plaintiff's managing officer and Mitlewski, but we look to the testimony of defendant for the purpose of ascertaining whether there was any competent evidence that the novation was made by which plaintiff agreed to release defendant and look to Mitlewski as its debtor. We do not think his own testimony was sufficient to prove, or tended to prove, that such an agreement was made. It is shown that Parker, plaintiff's agent, with whom all agreements were made, died before the trial, and

his version of the matter could not be had. It is stated by defendant that the whole of the agreements with Mitlewski and with Parker were oral, no writings having been drawn. Defendant was asked as to what arrangement he had made with Parker in regard to the saloon business. His answer, referring to the transaction with Mitlewski, was: "About that time Parker came to my place and he asked me in regard to what kind of a man this Mitlewski was, and I told him I considered him an all-right man. 'Well,' he says, 'I will see that the Goetz people accepts of him then.' The deal had been made the Saturday night before, providing the Goetz people would accept of him. After the 1st of September I wrote the Goetz people, and they said they would notify Mr. Parker." He presented a letter from plaintiff company dated September 24, 1904, written to him, which says: "Noting your kind favor of the 22d inst., our salesman, Mr. W. H. Parker, informed us of the arrangement made between you and Mr. Fred Mitlewski, which is, in our opinion, entirely satisfactory, and we hope the two notes past due will be paid in the time mentioned in your letter. Thanking you for past favors, and hoping that we may be able to have business dealings together in the future, we remain, Very truly yours, M. K. Goetz Brewing Company, per M. K. G." Defendant was also asked what Parker said to him and what he said to Parker. His answer was: "He asked me what kind of a man Mitlewski was, and I gave him a good recommendation, and told him Mitlewski was to take up my notes and assume all indebtedness. * * * I told him I had sold to Mitlewski provided Goetz Company would accept of the deal. He said it was all right, and that Mitlewski was to take up my notes and enter into a new contract and take up the indebtedness with the Goetz people;" that he then turned the business over to Mitlewski and he had nothing further to do with the business after that. On cross-examination he stated that Mitlewski had been in his employ; that he could not say if Mitlewski had any property, and had never represented

to Parker that he had; that Mitlewski never signed any agreement to pay defendant's debts, but that he did agree to do so with Parker and the witness; that the agreement with Parker was that defendant was to be discharged from liability on the notes; that he never demanded nor received the notes; that he did not know if the business was continued in his name, nor did he know if the funds of the saloon were deposited and checked out in his name. He testified that it was supposed that the business would yield sufficient to pay the notes, but that no arrangement was made for meeting any deficiency resulting from a failure in that regard, and no agreement as to who should pay it. On re-examination he was asked to state what he said to Mr. Parker in regard to Mitlewski paying the notes. His answer was: "I told him that Mitlewski was to take the place and pay off the indebtedness and all the notes against me, and to draw up a new contract with Mitlewski. Q. What did he say to that? A. Parker said it was all right." This is all the evidence adduced by defendant in support of the averment of his answer.

It is elementary that, in a case of this kind, there can be no novation unless the party whom it is asserted assumed and agreed to pay the debt became unconditionally bound to the creditor to pay the debt of the original debtor. There must also be the contract of the creditor, made with the new debtor, to accept him as his debtor. If Mitlewski agreed with defendant that he would become obligated to the creditor, but entered into no contract with the creditor by which he became the debtor of the creditor so that the creditor might have maintained an action against him, there could be no novation, and the original debtor would not be released. In *Izzo v. Ludington*, 79 N. Y. Supp. 744, it is said: "Neither do I think that the facts proved with respect to these orders constitute a novation. That requires the creation of new contractual relations, as well as the extinguishment of old. There must be the consent of all the parties to the substitution, resulting in the extinction of the old obligation,

and the creation of a valid new one (citing authorities). There is no proof here of any consent by McMahon & Wells or the brewing company to release Izzo (the original debtor), and to look to the defendant for their pay, nor of any valid agreement on the latter's part making him liable to them, and therefore the doctrine of novation does not apply." See, also, *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276; 29 Cyc. 1130; 1 Parsons, Contracts (9th ed.) *217; Clark, Contracts, sec. 260.

We are unable to find any evidence that Mitlewski became indebted to plaintiff, or that plaintiff accepted him as its debtor. This being true, defendant remained liable to plaintiff for the debt evidenced by the notes, and the verdict of the jury and the judgment thereon were the only verdict and judgment warranted by the pleadings and evidence. This renders it unnecessary for us to examine the instructions either given or refused. *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571.

The judgment of the district court is

AFFIRMED.

CHARLES E. LEAR, APPELLEE, V. WILLY FICKWEILER, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,870.

Mortgages: FORECLOSURE: NAMES. Where one takes title to real estate by his initial letters as his first name, subject to a mortgage then existing, the mortgage may be foreclosed and notice given him by publication by such name.

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

M. F. Harrington, for appellant.

Lear & Lear, contra.

REESE, C. J.

This is an action in ejectment, which was commenced on the 5th day of February, 1910, and in which plaintiff claims the possession of the northeast quarter of the southeast quarter of section 23, and the west half of the southwest quarter and the southwest quarter of the northwest quarter of section 24, all in township 34 north, of range 17 west, in Keya Paha county. Aside from certain averments in the petition, in which it is alleged that a mistake in the description of the land in one of the deeds constituting the chain of title is sought to be corrected by a reformation of the deed, it is alleged that plaintiff is the owner and entitled to the possession of the land; that on or about the 10th day of December, 1901, the defendant took forcible and unlawful possession of the land, and has held such possession without right ever since. Judgment for possession and an accounting of rents and profits is demanded.

The defendant's answer consists of a general denial and the averments that on the 9th day of April, 1889, he was the owner of the fee title to said land, when he executed a mortgage and note to the Nebraska Mortgage & Investment Company to secure the sum of $400, bearing interest at the rate of 7 per cent. per annum before maturity, and 10 per cent. thereafter; that, for value, the mortgage and note thereby secured were sold and transferred to W. C. Brown; that on the 19th day of June, 1900, the said Brown commenced suit to foreclose said mortgage, making P. H. Bender, the then holder of the legal title, and Mrs. P. H. Bender, who were then nonresidents, parties defendant, the service being had by publication; that a decree of foreclosure was rendered September 10, 1900, finding the amount due the plaintiff in said action to be $668.48, and ordering the land to be sold to pay the same; that an order of sale was issued, the land sold by the sheriff to William C. Brown for the sum of $668.48, and a sheriff's deed was issued to the purchaser, which

deed was duly recorded; that thereafter Brown sold and conveyed the premises to defendant, and, under his said purchase, defendant took possession of the land in the year 1901, and has held such possession since said time, the possession being open, peaceable and exclusive. It is conceded in the answer that, by reason of the action to foreclose the mortgage having been brought against "P. H. Bender," instead of against him by his full name, the foreclosure was invalid; but alleges that by his purchase Brown retained his mortgage lien, and by his deed to defendant he transferred the same to defendant; that Bender abandoned the land, paying no taxes thereon, and defendant's possession was that of mortgagee in possession, which tolled the statute of limitations; that he has paid the taxes thereon since 1896, and that before plaintiff can succeed in this suit he must pay the amount due on the mortgage, as well as the taxes paid by defendant, with interest thereon.

The reply consists of a general denial of all unadmitted averments in the answer; admits the execution of the note and mortgage, and their transfer to Brown; that Philip H. Bender became the owner of the property in controversy, subject to the mortgage; that Brown procured the foreclosure as alleged, but that the mortgage was barred by the statute of limitations; that defendant received the conveyance from Brown and took possession of the land by virtue thereof. There is a special denial of anything being due defendant, or that he is in possession as a mortgagee. This being covered by the general denial need not be further noticed. A trial was had to the district court, without a jury, and which resulted in a finding and judgment in favor of plaintiff. Defendant appeals.

It is seldom that an appellate court is called upon to hold counter to the conclusion of the trial court and the counsel upon both sides of the case, but we seem to be compelled to do so in this case. It is made clear by the pleadings that at the time of the foreclosure of the mortgage Bender was the holder of the title to the land, sub-

ject to the mortgage, and that in the deed by which he held title he is named as P. H. Bender. In *Stratton v. McDermott*, 89 Neb. 622, *Clark v. Hannafeldt*, 91 Neb. 504, and *Butler v. Farmland Mortgage & Debenture Co.*, p. 659, *post*, we held and decided that where a person accepts and holds title to real estate, being described and referred to in that way, and so records his deed, it is equivalent to a representation that that is his name, and notice by publication may be rightfully given by such name. This cause was tried, appealed, and the brief of appellant filed before those decisions were made, and it is no surprise that neither the court nor counsel adopted that view. Following those decisions, we must hold that the foreclosure was valid, and that, by his purchase from Brown, defendant became the owner, and plaintiff's action cannot be maintained.

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

REVERSED.

S. HIRSCH DISTILLING COMPANY, APPELLANT, V. JOHN J. ROACH, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,899.

1. **Sales: ACTION: BURDEN OF PROOF.** In an action on account for goods sold and delivered, where the purchase and receipt of the goods are denied, the burden is on the plaintiff to prove such sale to the defendant.

2. **———: ———: QUESTION FOR JURY.** Where the proof is that the goods were sold to one in charge of a saloon formerly occupied by defendant, and in which the defendant's license was posted up, that the order was signed by the person in charge, not as agent or manager, but in his own name, that the goods were ordered to be shipped to defendant, the order being given without defendant's knowledge or consent, and it is also shown that plaintiff afterward filed a claim for the account in the county court against the estate of the person who gave the order, a question of fact

is presented for the decision of the jury as to the person to whom the goods were sold.

3. ———: ———: EVIDENCE. That plaintiff had filed the claim against the estate of the person making the order for the goods is a circumstance tending to show that the goods were sold to such person.

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

William Simeral and *I. J. Dunn,* for appellant.

Martin & Bockes, contra.

REESE, C. J.

This action was commenced in the county court of Merrick county, and was on an account of liquors alleged to have been sold by plaintiff to defendant, a licensed saloon-keeper in the city of Grand Island, and delivered at various times during the months of July, September and December, 1908; the bill amounting to the sum of $348.14. The answer of defendant consisted of (1) a general denial of all unadmitted allegations of the petition; (2) admitted that he was a licensed saloon-keeper in Grand Island during the year 1908; (3) a special denial that plaintiff sold him any portion of the liquors for which the suit was brought; (4) alleged that, notwithstanding he had procured the license as aforesaid, on the 18th day of July, 1908, he ceased to engage in business in Grand Island, and removed to the city of Kearney, and has never since said date been engaged in business in Grand Island. The fifth paragraph of the answer need not be here noticed, except that it is alleged that the liquors, if sold as alleged, were sold to G. A. Mann, who was then engaged in the saloon business in Grand Island. The reply was a general denial, with an averment that no defense was stated in the answer, and an allegation that plaintiff had no knowledge or information at the time of the sale that defendant claimed to have sold his

saloon, or that Mann, in charge thereof, was not his agent with authority to purchase, and that plaintiff dealt with Mann as the agent of defendant. After a trial and judgment in the county court, the case was appealed to the district court, where, by stipulation, the pleadings in the county court were made the pleadings in the district court. A jury trial was had, which resulted in a verdict in favor of defendant, and upon which judgment was rendered; the motion for a new trial being overruled. Plaintiff appeals to this court.

The principal question presented by the brief of appellant is one of fact as to whether Mann should be held to be the agent of defendant in the purchase of the goods described in the account. It is shown that Mr. Mann is deceased, and therefore his testimony could not be had. So far as the contention in this case is concerned, it may be said that the goods, as charged in the bill, were sold and delivered to some one; plaintiff alleges to defendant; defendant denies the purchase. Plaintiff's salesman testified that on the 21st of July, 1908, he went to the place of business in Grand Island, which defendant had, and, so far as the salesman then knew, still occupied as a saloon, and inquired for defendant, but was informed by Mr. Mann, in charge, that defendant was out of town. Upon being asked if any goods were wanted, Mann stated that he could use some, and gave the order, signing his own name thereto. The order was headed, "Send to J. J. Roach, Grand Island," but whether this was by the direction of Mann we are not informed. Defendant testified that he ceased to do business in Grand Island about the 18th of the same month; that he was succeeded in business by G. A. Mann; that he removed to Kearney, and shipped his stock of liquors to that place, and did not authorize any other person to order liquors to be shipped to him there after that date. It appears that his city liquor license was permitted to remain posted upon the wall of the saloon, and which was observed by plaintiff's agent. There is no evidence of any inquiry having been made by

plaintiff's agent, nor any statements made by Mann, concerning defendant, except as above stated. The liquors were not paid for, and Mann, who it appears resided in Hastings, died. During the administration of his estate in the county court of Adams county, plaintiff filed a claim against his estate for the identical goods sued for in this case. Whether the bill was ever allowed against the Mann estate is not disclosed by the record before us. The proof of the filing of the claim is by the certificate of the county judge of Adams county, and the filing is not pleaded as payment, or estoppel, and, as we understand, was offered as a circumstance, for the consideration of the jury, tending to prove that plaintiff did not consider or understand that the sale was to defendant, but to Mr. Mann. For this purpose it was competent, relevant and material, and subject to such inferences and weight as the jury might think it entitled to. There was no explanation given for plaintiff's action in filing the claim, no contention that plaintiff understood Mann and defendant to be in partnership, nor other reason for filing the claim than that the goods were sold to Mann. This with all the other evidence in the case was for the consideration of the jury. There was no evidence that Mann was ever the agent of defendant, that he ever assumed to act as such unless in giving the order, or that defendant ever held him out as such, by word or act, unless leaving his license posted in the saloon amounted to such; but, on the contrary, the filing of the claim by the leading officer of plaintiff was to say, in effect, that the goods were sold to Mann, and to no other person. For those reasons, the case of *Moise v. Weymuller*, 78 Neb. 266, is not in point.

It is claimed in plaintiff's brief that the certified copy of the claim against the Mann estate was not properly authenticated. This objection, however, was not presented when the evidence was offered; the objection being "incompetent, irrelevant, immaterial, not a proper defense, and not set up as a defense in the answer." Had the want of proper authentication been presented, it is quite probable that the objection would have been sustained.

We are unable to see that there has been a miscarriage of justice, and the judgment of the district court will have to be affirmed, which is done.

AFFIRMED.

STATE, EX REL. JAMES CONKLING ET AL., APPELLANTS, V. JOHN A. KELSO ET AL., APPELLEES.

FILED DECEMBER 18, 1912. No. 17,600.

1. **Constitutional Law**: SPECIAL LEGISLATION: ACT FOR REMOVAL OF COUNTY SEATS. An act of the legislature, upon the subject of the relocation of county seats, which provides that no county seat shall be relocated, except upon a majority vote of three-fourths of the electors, in any case where the county seat has been located and retained for a period of ten successive years, "prior to the passage and approval of this act," in any one place, is void under the provisions of section 15, art. III, of the constitution of this state, as local and special legislation.

2. ———: ———: ———. A classification which limits its provisions to a certain class then in existence, excluding all others from ever entering such class by growth, development, or other cause, when applied to the relocation of county seats, is equivalent to the naming of the county seats within the class, and is thereby rendered local and special legislation. *State v. Scott*, 70 Neb. 685, followed.

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

C. C. Flansburg, for appellants.

George J. Marshall, contra.

REESE, C. J.

This was an application to the district court for Franklin county for a writ of mandamus to the county board of said county directing it to call a second election for the removal of the county seat. It was alleged in the writ, in

addition to the allegation of relators' capacity to maintain such an action, that Franklin county is under township organization, and respondents are members of the county board; that the village of Bloomington is, and has been for more than 25 years last past, the county seat of said county; that on the 8th day of July, 1911, a petition was filed, signed by more than three-fourths of all the electors of the county, as shown by the preceding general election, praying the board to call a special election for the relocation of the county seat; that the petition was found by the board to be sufficient, when it ordered that an election be held on the 29th day of August of that year; that due notice was given, and the election held, at which 2,251 votes were cast; that, of the votes cast, the village of Macon received 713, the city of Franklin 813, the village of Bloomington 670, the village of Upland 27, the village of Naponee 5, the village of Riverton 13, the village of Hildreth 5, the village of Campbell 1, the center of the county 3, and Ash Grove 1, all thereof being in the county of Franklin; that the votes were duly canvassed and found to be as above stated; that upon the same being reported to the board, and it appearing therefrom that more than three-fifths of all the votes cast had been in favor of places other than Bloomington, the then county seat, the relators demanded that said board immediately call a special election upon said question, but the request was denied, and the board refused to call the same. The prayer was for a mandamus compelling the board to call the desired election. The respondents demurred to the writ. The demurrer was sustained. Relators stood upon the writ, when the cause was dismissed. Relators appeal.

The controlling question in this case is as to the validity of an act of the legislature of 1905 (laws 1905, ch. 42), entitled "An act to amend section 4410 of Cobbey's Annotated Statutes of Nebraska for 1903, and repealing said original section." The act amended is contained in laws 1875, p. 159, and is carried forward into Ann. St. 1903 as sections 4410 to 4418, inclusive. It is not deemed neces-

sary to set out the act of 1875 in full. The substance of the act is to the effect that the county seat of any county may be relocated by a vote of three-fifths of the electors at an election called and held for the purpose of voting thereon, and that upon a petition of three-fifths of the electors to the county board it shall be the duty of the board to call such election; that, if no place receives three-fifths of the votes cast, another election shall be called and the question resubmitted, and, if any place receives three-fifths of the votes cast, such place shall be the county seat, except that, if the then county seat shall receive more than two-fifths of the votes at either of the elections, no further election shall then be called on the petition presented, and the county seat shall remain at its then place for at least two years, during which time no election shall be called upon that question.

The act of 1905 (laws 1905, ch. 42, Ann. St. 1911, sec. 4410) is as follows: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, and containing in addition to the names of the petitioners, the section, township, and range on which, or town or city in which the petitioners reside, with their age and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat. Provided, that in case any county seat has been located and retained for a period of ten successive years, prior to the passage and approval of this act, in any one place, the said place shall become and remain the permanent county seat of such county, unless such petition be signed by such electors equal in number to three-fourths of all the votes cast in said county at the last general election held therein. Notice of the time and place of

holding said election shall be given in the same manner, and said election shall be conducted in all respects the same as is provided by law relating to general elections for county purposes. The electors at said election shall designate on their ballots which city, town or place they desire said county seat located at or in, and any place receiving three-fifths of all the votes cast shall become and remain, from and after the first day of the third month next succeeding such election, the county seat of said county; provided, that in case any county seat has been located and retained for a period of ten successive years, prior to the passage and approval of this act, in any one place, it shall not be removed unless some other place shall receive three-fourths of all the votes cast at said special election." This act is practically a copy of the original section (laws 1875, p. 159, sec. 1; Ann. St. 1903, sec. 4410), but with the provisos added. By the first proviso, if the county seat has existed at any one place for ten successive years prior to the passage of the act, the petition asking a submission of the question must be signed by three-fourths, instead of three-fifths, of the electors. By the second proviso, if the county seat has remained in the same place for ten years prior to the passage of the act, another place must receive three-fourths of all the votes cast at the election, or no removal will result.

It is contended by relators that both of these provisos are violative of section 15, art. III of the constitution, and void, as local and special legislation. That section provides: "The legislature shall not pass local or special laws in any of the following cases; that is to say: * * * Locating or changing county seats." The vice of the act above quoted, if any, is found in the clause limiting the provisions to county seats which have been located for ten successive years "prior to the passage and approval" of the act. There can be no just objection to the classification of county seats, if such classification is general and could be applied to all counties in the state, should the county seat remain unchanged for a specified number

of years. This principle is recognized in *State v. Berka*, 20 Neb. 375; *Van Horn v. State*, 46 Neb. 62; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *State v. Farmers & Merchants Irrigation Co.*, 59 Neb 1; *State v. Frank*, 60 Neb. 327, 61 Neb. 679; *State v. Stuht*, 52 Neb. 209. But in *State v. Scott*, 70 Neb. 685, a different rule is applied where the limitation closes the door to any further admission to the class, and the act is held to be the equivalent of naming the county seats to which the proviso is to be applied, and can never apply to any others, and to that extent it is both local and special legislation. We have examined the cases cited in *State v. Scott, supra*, and they support the holding in that case, and in addition we cite *Nichols v. Walter*, 37 Minn. 264; *Codlin v. County Commissioners*, 9 N. M. 565; 15 Am. & Eng. Ann. Cases, 856 *et seq.* The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. It follows that the limitation in the act to all county seats which had existed for ten successive years at the time of the passage of the act, and not permitting the rule to be applied to other counties, is equivalent to the naming of the county seats of that class, and is therefore void. This being true, we are compelled to accept the law as it existed in the act of 1875 unchanged. There is no doubt but that the spirit of the law of 1905, could it be enforced, is salutary and desirable, and the attention of the legislature is called to the benefits to be derived from such an act, but with those words of limitation omitted. Whether a change of the county seat can be legally effected by an effort to follow the involved and complicated provisions of the act of 1875 is not now before us, and is not decided. The question may never arise.

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

REVERSED.

PROVIDENCE JEWELRY COMPANY, APPELLANT, V. GRAY MERCANTILE COMPANY, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,881.

1. Appeal: FINDINGS. Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.
2. Parol Evidence: SALES BY SAMPLE. Oral warranties made by an agent or traveling salesman, that the goods sold would be equal to the samples exhibited by him in procuring an order for the sale of goods, may be shown by parol, in a proper case, though the order contained the provision that the principal will not be bound by terms not in the written order.
3. Sales: REFUSAL TO ACCEPT. Independently of an express contract, a purchaser by sample may refuse to receive the goods when delivered, if they fail to correspond to the sample. *National Engraving Co. v. Queen City Laundry, ante*, p. 402.

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

George W. Wertz, for appellant.

Reeder & Lightner, contra.

BARNES, J.

Action to recover the price of certain jewelry alleged to have been sold and delivered by plaintiff to defendant on a written order or contract. The petition was in the usual form. Defendant admitted giving the order for the goods mentioned in plaintiff's petition, and alleged that it did not contain the entire contract; that a part thereof was omitted by mistake at the time the order was given.

It was further alleged that it was agreed by and between plaintiff and defendant, at the time defendant signed the order in question, that if the articles mentioned therein were not satisfactory or equal in quality, value or pattern to the samples shown and exhibited to the defendant by plaintiff's agent or traveling salesman, the defendant should have the right to return all unsold articles, with payment for what had been sold, and the contract of sale should thereby be canceled. It was further alleged that prior to the signing of the contract, and as an inducement to the defendant to enter into the same, plaintiff falsely and fraudulently stated to the defendant that it was a manufacturer of jewelry, such as was exhibited by sample; that the prices affixed to each of the articles mentioned in the contract were the regular wholesale prices of such goods, and as cheap as any wholesale dealer could sell such merchandise; that plaintiff also falsely and fraudulently stated to defendant that all of said merchandise described in the written order would be fully equal to the samples exhibited, for quality, appearance and workmanship; that the goods were of a superior quality of gold plate, possessing good wearing qualities, and would give satisfaction to the trade generally; that at that time defendant was not familiar with the wholesale or trade prices of the goods mentioned in the contract, all of which was well known to the plaintiff; that believing the false and fraudulent representations so made by the plaintiff, relying thereon, defendant entered into the contract; that shortly after the receipt of the goods defendant discovered that all of the plaintiff's statements were false and untrue; that plaintiff was not a manufacturer; that the jewelry delivered was not equal to the samples shown to defendant, either in quality, workmanship or appearance; that the goods were not a superior quality of gold plate, and did not possess good wearing qualities; that, in fact, the goods were of no value, and were a positive damage to any dealer who would sell the same; that the prices affixed to the different articles were not the regular wholesale or

trade prices thereof; that such goods were being sold by reputable wholesale dealers from 40 to 50 per cent. less than the prices named in the order; that, upon the discovery of said facts, the defendant rescinded its said order and returned to the plaintiff all the unsold goods then on hand, together with payment for all that had been sold. The defendant prayed that the contract be reformed to correspond with the true contract between the parties, and that defendant have judgment for a dismissal of plaintiff's cause of action, together with such other relief as might to the court seem just and equitable. The reply, in substance, was a general denial. The cause was tried to the court, without the intervention of a jury. Defendant had the judgment, and the plaintiff has appealed.

It is contended that the evidence does not sustain the findings and judgment of the trial court. It appears that defendant, to maintain the issues on its part, produced several competent witnesses who testified that the goods in question were of a cheap and inferior quality; that the wholesale price on that class of goods ranged from 20 to 200 per cent. less than the prices named in the written order. The members of the defendant company testified that, at the time they made the order, they had no experience in the business of buying and selling jewelry; that they relied on the statements made by the plaintiff's traveling salesman, and that his statements were false and untrue in many particulars. This evidence was disputed by plaintiff's traveling salesman and by its president. The testimony shows beyond question that plaintiff's traveling salesman, at the time he took the order in question, had samples of the goods which he proposed to sell, and stated that the articles mentioned in the written order were equal to such samples in quality, workmanship and appearance. There was some competent testimony introduced by the defendant tending to show that the goods actually delivered were much inferior in quality, value and appearance to the samples which were exhibited to defendant at the time plaintiff obtained the written order. It was also

shown that shortly after defendant received the goods in question they ascertained their true condition and value, and, upon finding that they were not equal to the samples, defendant returned the shipment to the plaintiff, paying the return charges thereon, and forwarded a draft for the price of the small portion of the goods sold before ascertaining their actual quality and value. It appears that plaintiff refused to accept the goods and brought this suit to recover the agreed price thereof. Having in view the rule that the finding of a court in such an action has the same force as the verdict of a jury, we are of opinion that the plaintiff's contention that the evidence was insufficient to sustain the judgment must fail.

As we view this case, it must be ruled by *National Engraving Co. v. Queen City Laundry, ante,* p. 402, where it was held that, independently of an express contract, a purchaser by sample may refuse to receive the goods when delivered, if they fail to correspond to the sample. In such case a return of the goods, with payment for such as were received and sold, is a defense to an action for the purchase price thereof.

The defendant in this case having pursued that course, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion only.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL, RELATOR, V. JOHN J. RYAN ET AL., RESPONDENTS.

FILED DECEMBER 18, 1912. No. 17,363.

1. **Statutes:** ENACTMENT: AMENDMENT. Where amendments have been made to a bill after its first or second reading in either house, it is not essential or necessary that it be again read at large on three different days in each house in order to comply with section 11, art. III of the constitution.

2. ———: ———: ———. Where a bill has been introduced into the legislature within the time limited by the constitution for the introduction of bills, amendments which are within the general purpose of the bill may be made after that limit has expired.

3. **Estoppel**: MANDAMUS: STATE AS NOMINAL PARTY. A mandamus proceeding brought by a private citizen cannot estop the state in other litigation from taking a different position from that taken by the relator in the mandamus proceedings, since the state is only a nominal party thereto under section 2, ch. 71, Comp St. 1911.

4. **Officers**: REMOVAL: POLICE COMMISSIONERS. Members of the board of fire and police commissioners of the city of South Omaha who, together with police officers under their supervision and control, have actual knowledge of frequent violations of the laws of the state by saloon-keepers in selling liquors on election day and Sundays and at prohibited hours of the night, and make no attempt in good faith to suppress such crimes or to enforce the law, are guilty of a wilful refusal to perform their duty.

5. **Evidence** *held* to support the findings of fact of the referee.

ORIGINAL application in *quo warranto* to oust respondents from the office of fire and police commissioners of South Omaha. *Judgment of ouster.*

Grant G. Martin, Attorney General, George W. Ayres and *J. D. Ringer,* for relator.

Harry B. Fleharty, Smyth, Smith & Schall and *W. J. Connell, contra.*

LETTON, J.

This is an original proceeding in *quo warranto* against the respondents, John J. Ryan and Joseph Pivonka, fire and police commissioners of the city of South Omaha, Nebraska, brought under the provisions of "An act to provide for the removal by *quo warranto* of derelict officers," commonly known as the "Sackett law." Laws 1907, ch. 87; Comp. St. 1911, ch. 71, secs. 1*a*, 1*b*.

The information sets out at length that there are three members of the board of fire and police commissioners, two of whom are the respondents and the other is the

mayor of the city. It sets forth specifically the statutory duties of the board with respect to the police force of the city, the granting of licenses for the sale of liquors, and the enforcement of the laws of the state and ordinances of the city with respect to the liquor traffic. It then alleges that the respondents have wilfully failed, neglected and refused to enforce the laws of the state of Nebraska in these respects, setting forth specific charges of neglect of duty, and naming the time when and the individual with respect to whose conduct the wilful failure to enforce the laws took place. The prayer is that the right and title of each of the respondents to hold the office of member of the board of fire and police commissioners be declared forfeited and that they be ousted from office. A motion to quash the information was filed, which was overruled. The respondents answered by a general denial, and a denial of the jurisdiction, and of the sufficiency of the facts pleaded to constitute a ground for the relief sought. Afterwards objections were filed to the jurisdiction of the court over the subject matter of the action, for the alleged reason that the term of office of the respondents had expired April 8, 1912, that the offices had been filled at an election held April 2, 1912, and that the board duly elected at such election had qualified and assumed the duties of the office. These were overruled and the Honorable Silas A. Holcomb, formerly chief justice of this court, was appointed referee to take the testimony and report his findings of fact and conclusions of law to the court.

At the time of the hearing before the referee, and before any testimony was offered, the respondents asked leave to file an amended and supplementary answer, which, in addition to the former defenses, pleaded that on April 5, 1910, respondents were elected members of the board for two years and until April 9, 1912; that in 1911 the legislature pretended to amend the statutes so as to abrogate the holding of a city election in the year 1912, and to provide that the officers elected in 1912 should hold their offices until 1913; that the attempted amendments were

void because not made until more than 40 days of the sitting of the legislature had elapsed, and not until the 52d day of the session; that they are not germane to the original bill; and that they were not read at large on three different days in either house of the legislature, and, hence, are unconstitutional and void; that the term of office which respondents were filling at the time the information was filed against them expired by limitation on April 3, 1912, and therefore they ceased to hold the office or the term of office for which they were elected in April, 1910; that afterward certain proceedings were had in the district court for Douglas county whereby a mandamus was issued causing an election to be held on April 2, 1912, for the election of city officers to succeed the respondents; that such an election was held and the respondents were re-elected to their respective offices to succeed themselves for the term of two years commencing on April 9, 1912, and that they qualified therefor and entered upon the duties thereof, and that they are now holding the office by virtue of this later election. The referee permitted the amended and supplementary answer to be filed, but made no ruling as to its effect.

A large number of witnesses were examined in behalf of both the relator and the respondents and much documentary evidence was submitted. When the evidence with respect to the mandamus proceedings was offered, the referee held that "the proffered evidence is not admissible under the issues as at present formed, but, in view of the possible ruling by the court admitting an amendment to the pleadings, will permit the proffered evidence to be made a part of the record."

The referee found that the respondents were elected in April, 1910, and are now members of the board of fire and police commissioners by virtue of such election; that a part of the duties of the board was to keep a record of its proceedings as a public record, that a partial record was kept, but not a full and complete record as required by law; that for the years 1910 and 1911 the board granted

about 80 licenses to different persons to engage in the saloon business in South Omaha, and that bonds were required from each in the penal sum of $5,000 conditioned as provided by law; that 31 of the whole number of bonds given and approved were signed by sureties who had each justified as worth $2,500 over and above all his debts, obligations and exemptions, and on each bond was a printed form whereon each had sworn that he was not principal or surety upon any other bond; that of these 31 bonds the "signers were in almost every instance worthless as sureties, and said bonds so taken, accepted and approved were wholly and entirely inadequate and insufficient for the purposes mentioned and contemplated by law; and that the penal sum mentioned in said bonds could not be collected from any one or all the sureties who signed said bonds. * * * That no investigation was made by said respondents to ascertain the worth, property and qualifications of the sureties on said bonds so taken and accepted, save such information as was contained in said justifications so made by each and all of said sureties who respectively signed said bonds; that the city attorney advised said respondents as members of the said board of fire and police commissioners that when bonds were presented, whereon the sureties had justified or qualified, as aforesaid, they (the respondents) were not charged with the duty of making other or further inquiry regarding the responsibility and efficiency of the sureties so offered on the respective bonds by them accepted and approved; that gross carelessness characterized the action of the respondents in approving said bonds and granting licenses to the respective applicants therein mentioned, and that reasonable inquiry upon their part would have disclosed the fact that said sureties were not qualified, and did not possess property of the value stated subject to execution over and above debts and exemptions, and that said bonds were wholly and totally inadequate; that in several instances said respondents were charged with knowledge of facts and circumstances which would put a reasonably prudent

and careful person upon inquiry as to the sufficiency of the bonds and the sureties thereon so offered for approval by the different applicants for saloon licenses. I find that the action of the respondents in the acceptance and approval of said inadequate and insufficient bonds and the granting of licenses to the respective applicants was not a wilful failure or refusal to enforce the law with respect to the giving and approval of such bonds within the meaning of section 1731*a*, Ann. St. 1911."

The report then makes specific findings that certain keepers of saloons, giving their names, between May 1, 1910, and October 1, 1911, violated the law by selling and giving away intoxicating liquors during the hours prohibited by law and on election days and Sundays. It continues: "That during the period covered by and mentioned in the information filed in this case, to wit, from May 1, 1910, to October 1, 1911, and while the respondents were acting as fire and police commissioners, there were many and repeated violations of the law with respect to the sale of intoxicating liquors by persons to whom license to sell had been granted, by the sale and giving away of intoxicating liquors at their several places of business between the hours of 8 P. M. and 7 A. M., also on election days and on Sundays. * * * That respondents personally knew of some instances of violations of the law in the above mentioned respect; that many complaints were made to them of alleged violations, and the repeated and continued violations in that regard were such as that they must have known that the law was not being observed by the licensed saloon-keepers, but, on the contrary, was being continually, openly and notoriously violated; that during said period, and at times when illegal sales were made in violation of law, the front doors of the saloons were generally closed and locked, but entrance thereto was obtained through side and rear doors by those that were procuring liquors during such prohibited hours; that the prevailing sentiment among the inhabitants of said city of South Omaha was and is averse to the require-

ments of law prohibiting the sales of liquor between the hours mentioned and on election days and Sundays, and favored a policy that permitted the obtaining and purchasing of intoxicating liquors during such prohibited hours and on Sundays; that the respondents neither themselves nor through the police department made any earnest, continued or persistent effort to enforce the law in regard to such sales or to prevent violations thereof, or to punish those guilty of such violations, nor did they act in good faith regarding the enforcement of such laws, nor did respondents use reasonable effort or actively endeavor either by themselves or through the police department to secure the enforcement of such laws, and they failed to adopt any efficient rules and regulations, or any rules and regulations whatever, for the purpose of securing the enforcement of the law in regard to sales at times prohibited by law, and to punish violations thereof, to control the traffic and require observance of the law in that regard * * * That no continued, persistent or determined effort was made during said time on the part of the respondents, or caused to be made by them, to require and compel licensed vendors to observe the law by abstaining from the sale of intoxicating liquors after 8 P. M. and before 7 A. M. and on election days and on Sundays, and no sufficient rules nor regulations were adopted by said fire and police commissioners with the view of requiring, instructing and directing the members of the police force to prevent such violations and to punish those violating the law in regard to such prohibited sales; that in regard to the sales of intoxicating liquors by licensed vendors or saloon-keepers between the hours of 8 P. M. and 7 A. M. and on election days and on Sundays during the period of time mentioned in the information, to wit, from May 1, 1910, to October 1, 1911, respondents have wilfully refused, failed and neglected to enforce the law which it was their duty to enforce within the meaning of said section 1731*a*." The referee finds as conclusions of law: "(1) That respondents and each of them have forfeited

their right and title to the office of member of the board of fire and police commissioners of the city of South Omaha now held by them. (2) That a judgment of ouster should be entered removing them and each of them from such office."

Exceptions were filed to the findings of facts adverse to the respondents, and also to the report, for the reason that the referee did not make any findings upon the issues tendered by the amended and supplemental answer. The case has been submitted upon these exceptions, and upon the motion of the attorney general to confirm the report of the referee and for a judgment of ouster.

We will first consider the contention of the respondents that the evidence is not sufficient to sustain a finding that the respondents have wilfully and unlawfully failed, neglected and refused to enforce the laws of the state of Nebraska. It is impossible within the necessary and proper limits of this opinion to set forth the evidence. Each of the respondents testifies that, while he had no personal knowledge of violations of the liquor law, complaints came to him that the laws regulating the liquor traffic were being violated, and that, in consequence thereof, a resolution was passed by the board instructing the chief of police to exert every energy in the pursuit and conviction of offenders against the law. It is shown that this resolution was adopted unanimously and communicated to the chief of police and to the officers under his control and direction. There is evidence in the record that as to some of the saloon-keepers, these respondents endeavored to enforce the law, but the conclusion which we draw from the testimony as a whole is that the findings of fact to which exceptions were taken are amply supported by the testimony. We are also inclined to the view that the evidence as to the approval of bonds would justify a conclusion less favorable to respondents than that drawn by the referee.

Respondents contend that they are not holding the same terms of office that they held when these proceedings com-

menced, and cannot be removed from their present office because of misconduct committed during a prior term. This contention, however, was made and disposed of at a prior hearing in this case (*State v. Ryan,* 91 Neb. 696), and it is unnecessary to repeat what is said in that opinion.

The supplementary and amended answer filed with the referee, however, seeks to raise for the second time this issue upon other grounds, and while, on account of the late day of its tender, we perhaps should not allow it to be filed, we have considered its allegations as a part of the issues. It pleads, in substance, that the amendatory act (laws 1911, ch. 12) was not passed in accordance with the requirements of the constitution, and is illegal and void, and, hence, that respondents' term ended in April, 1912. It is said that the original bill (Senate File No. 93) was introduced within 40 days after the meeting of the legislature provided for that purpose, and that on the 52d legislative day the legislature attempted to amend the bill with respect to the terms of officers of the city, and the time and manner of holding city elections, and that the sections thus sought to be changed were in nowise referred to in the original bill and bear no relation thereto. The bill, as originally introduced, provided for the amendment of certain sections of the charter of South Omaha. The amendments made to the bill provided, in addition, for the amendment of certain other sections of the charter. It is contended that since this court has held that under a restrictive title of an amendatory act the amendment must be germane to the original section proposed to be changed, and since, after the time for the introduction of bills had expired, certain new sections were embraced in this act by amendment, the principles announced in *State v. Tibbets,* 52 Neb. 228, apply, and the amendment is void. We think this result does not follow. The legislature has full control over the passage of bills, and may amend the same and the title to the same at any time permitted by its rules during their progress through the legislature. If

the amendment is germane to the subject of the original bill, and not an evident attempt to evade the constitution, the fact that the time limit for new bills has expired is immaterial. A case directly in point is *Common Council of Detroit v. Schmid,* 128 Mich. 379, in which it is said: "Section 28, art. 4, of the constitution, providing that no new bill shall be introduced in the legislature after the expiration of the first 50 days of the session, does not prevent the substitution of one bill for another after such period, provided the subject matter of the substituted bill is germane to the general purpose indicated by the title of the original bill. Under this rule, a bill purporting by its title to amend a specified section of a city charter, without stating the subject of the section, may have substituted for it a bill to amend a certain other section of the same charter, the subject matter of which has no necessary connection with that of the former section." See, also, *Attorney General v. Stryker,* 141 Mich. 437; *Pack v. Barton,* 47 Mich. 520; *Hale v. McGettigan,* 114 Cal. 112. Furthermore, the language of the opinion in the *Tibbets* case is applicable to the amendment by a new statute of a previously existing law, and not to the amendment in the legislature of a mere bill for an act.

It is also contended that the bill was not read at large in either house on three different days, and that the journals of the house and senate show this to be the fact. The fact that after amendments have been made the bill as amended is not read upon three different days is not material or essential. If this was necessary and each amendment necessitated three separate readings of the bill in each house thereafter, the process of legislation would be interminable. *State v. Liedtke,* 9 Neb. 490; *Cleland v. Anderson,* 66 Neb. 252, 262. As to the other point, we have examined the original enrolled bill and the recorded history, in the office of the secretary of state, of its progress through the legislature. These show that the title to the bill was amended in the senate before it reached the house; that it was sent to the house under the amended

title, and read there the first time under the same; that the house reported to the senate that it had passed the bill under the amended title; that it was enrolled under the proper title, as certified by the joint committee; and that it was certified by the proper officers as having passed under the proper title. The only discrepancy is that the printed house journal recites that the bill under its proper number, but under the original title, was read the third time and passed. It is apparent that the statement in the printed journal that the bill was read in the house for the third time by its original title is erroneous. Considering the whole history, and applying the presumptions of validity, we are satisfied that the bill followed the constitutional route. *State v. Moore,* 37 Neb. 13.

It is also urged that the state of Nebraska is estopped to urge that respondents' term of office did not expire in April, 1912, for the reason that certain proceedings were had, entitled the State of Nebraska, ex rel. Thomas Hoctor and August Miller, v. Patrick J. Trainor and Frank H. Good, the Mayor and City Clerk of South Omaha, to compel the calling of an election on April 2, 1912, in the city of South Omaha for the election of city officials, including members of the board of fire and police commissioners. As a result of the suit a peremptory writ was issued commanding the calling and holding of the election. At this election the respondents were elected to a term of office beginning on the 9th day of April, 1912. Respondents argue that, since the state went into the district court alleging that the terms of the city officers elected in April, 1910, expired in April, 1912, and obtained the writ mentioned, it is now estopped to say that the respondents are still holding the term for which they were elected in 1910. This position is untenable. Under the statutes of this state, any citizen may sue out writs of mandamus without application to the prosecuting attorney. Comp. St. 1911, ch. 71, sec. 2. This being so, we can see no basis upon which an estoppel against the state

can arise. We have not been cited to any authority so holding, and are satisfied that none such can be found.

It is insisted that the information does not state a cause of action for a wilful failure to enforce the saloon closing laws. The gist of the argument on this point is that, under the statute, it is not the duty of the board of fire and police commissioners to file complaints or to prosecute violations of the law, and that such matters are under the sphere of duty of the mayor and chief of police. But the charter provides: "The board of fire and police commissioners shall have the power, and it shall be the duty of said board to appoint a chief of police, and such other officers and policemen, all of whom shall be electors of such city, to the extent that funds may be provided for by the mayor and council, to pay their salaries, and as may be necessary for the proper protection and efficient policing of the city, the chief of police and all other police officers and policemen shall be subject to removal by the board of fire and police commissioners under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline or for the more effective working or service of the police department. * * * It will be the duty of said board of fire and police commissioners to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, protection, removal, trial, or discipline of officers or policemen as said board shall consider proper and necessary." Section 8262, Ann. St. 1911. It further provides: "The chief of police shall have the supervision and control of the police force of the city, and in that connection he shall be subject to the orders of the board of fire and police commissioners, and all orders relating to the direction of the police force shall be given through the chief of police, or, in his absence, to the officer in charge of the police force." Section 8263, Ann. St. 1911.

In *State v. Donahue,* 91 Neb. 311, where it was sought

to remove the chief of police of Omaha under like proceedings, and where the provisions in the charter of the city were almost identical in respect to the powers and duties of the board of fire and police commissioners and the chief of police, it was held that the chief of police was not subject to removal, even though palpable and open infractions of law were proved, for the reason that he was carrying out the policy of his superiors, the board of fire and police commissioners. The opinion says: "He was appointed by the mayor and police board. He was removable by them at their pleasure. They had all of the information in regard to existing conditions that the respondent had. He knew what had been determined by his superiors to be a sufficient and proper enforcement of the law. He knew that if he violated their policy they might be expected to immediately remove him in favor of one who would obey instructions. * * * If he in good faith believed that it was his duty to take such action in regard to the enforcement of the law as the mayor and board of fire and police commissioners prescribed for him he may have been mistaken, but it does not clearly appear that he acted wilfully." In the concurring opinion of the chief justice we find this: "Questions of this kind must be solved by a consideration of the facts in each particular case. If the mayor and police board, admittedly the superiors of the chief of police, knowingly and wilfully stand in the way of the enforcement of the law by their subordinate officers, it seems clear that they should not escape, and the whole of the penalties of the law inflicted upon their subordinates." The chief of police is not liable under this decision (as to which the writer dissented). If his superiors are likewise invulnerable to assault for failure to enforce the law, as respondents contend, the remedial statute under which these proceedings are brought may as well be repealed.

The evidence convinces us that the conduct of the respondents was such as to raise the bulwark of the *Donahue* case against every attempt by the state to remove the

police officers of the city for such derelictions of duty as charged here, and that the information is sufficiently specific in the respect mentioned.

On the whole case, we are of the opinion that the report of the referee is eminently fair and just to the respondents, giving them the benefit of every doubt, and giving full weight to all the evidence produced in their behalf. We are also satisfied that the evidence is ample to sustain the conclusions of law. The exceptions are overruled, the report of the referee confirmed, and judgment of ouster rendered as prayed.

JUDGMENT OF OUSTER.

HARRY L. NORTON, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,845.

New Trial: AMOUNT OF DAMAGES. "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." *O'Reilly v. Hoover*, 70 Neb. 357.

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

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

C. S. Allen, contra.

ROSE, J.

This is an action to recover damages in the sum of $10,000 for personal injuries caused by the alleged negligence of defendant in running a street car, on which plaintiff was a passenger, rapidly around a curve at Sixteenth and M streets in the city of Lincoln, and in throwing him

violently to the pavement. The answer was a general denial and a plea of negligence on the part of plaintiff. From a judgment on a verdict in favor of plaintiff for one dollar, he has appealed.

The controlling question for review is the sufficiency of the evidence to sustain a verdict for one dollar only. Plaintiff was seriously injured. The jury found in his favor. He insists that evidence of his hospital expenses and of other definite items of pecuniary damage amounting to $220.70 is undisputed; that therefore the verdict is too small to be sustained by the evidence; and that consequently a new trial should be granted. Defendant's answer to this argument is that section 315 of the code forbids the granting of a new trial on account of the smallness of damages awarded by a jury in an action for personal injuries. The precise question was considered in *O'Reilly v. Hoover*, 70 Neb. 357, and it was there held: "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." Section 315 of the code, though repealed in 1911 (laws 1911, ch. 169), was in force when the trial court overruled plaintiff's motion for a new trial in the present action, and is binding on the parties thereto. The judgment below cannot be reversed without overruling the case cited, and it is deemed inadvisable to do so. Adherence to that case leaves the proceedings below without error.

AFFIRMED.

PHILIP C. SCHROEDER, APPELLANT, V. LODGE NO. 188, INDEPENDENT ORDER OF ODD FELLOWS, ET AL., APPELLEES.

FILED DECEMBER 18, 1912. No. 16,838.

1. **Trial: INSTRUCTIONS: ISSUES: SUBMISSION OF PLEADINGS TO JURY.** It is the duty of the court to fairly and fully state the issues to the jury; and, when it has done so, there is no necessity, nor is it a commendable practice, to permit the jury to take the plead-

ings with them to the jury room; but the action of the court in doing so is not sufficient ground for a reversal of the judgment, where it appears that such action was not prejudicial to the party complaining thereof.

2. ———: ———: FAILURE TO REQUEST. "Before error can be predicated upon the failure of the court to present a particular feature of a case to the jury, the party complaining should, by an appropriate instruction, request the court to charge upon that feature." *German Nat. Bank v. Leonard*, 40 Neb. 676.

3. ———: ———: REPETITION. While frequent repetition of a proposition in the instructions of the court should be avoided, and in some cases may constitute prejudicial error, it will not be so held where it appears that the party complaining was not prejudiced thereby.

4. Negligence: ACTION: CONSTRUCTION OF WALL. One who constructs a wall so that if it falls it will fall upon and injure the adjoining premises is bound to so construct it that it will withstand any gales which, from past experience, are reasonably to be expected in that locality.

5. Evidence examined, but on account of its voluminous character not set out, and *held* sufficient to sustain the verdict of the jury.

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

W. S. Morlan and *James I. Rhea*, for appellant.

W. D. Oldham and *G. Norberg*, *contra.*

FAWCETT, J.

Plaintiff brought this action in the district court for Phelps county, to recover damages to his store building and merchandise, occasioned by the falling of a brick wall of a building, being constructed by defendants, adjoining his building on the north. There was a verdict and judgment for defendants, and plaintiff appeals.

This action was brought against the lodge, its building committee, the independent contractor, and the contractor's bondsmen. The amended petition alleges that the building was erected in an unskilful and negligent man-

ner; that the wall of the building was carelessly and negligently built so that it overtopped plaintiff's building 12 feet; that it was allowed to remain in a green and immature condition, without properly bracing or staying the same, without joists, anchors or stays, and was permitted to remain unsupported so that it was liable to be blown down, and that, as a result thereof, it was blown down upon plaintiff's building, causing damage to plaintiff in the sum of $3,000; that the falling of the wall was caused by a severe wind upon January 28, 1909. Upon the trial all of the defendants were released by the instructions of the court except the contractor, defendant Anderson. As to him the case was submitted to the jury. No error is urged here by reason of the release of the other defendants, and the case will therefore be considered only as to defendant Anderson, who will be hereinafter referred to as the defendant.

The answer of the defendant admits that, at the time of the injury complained of, he was engaged in the erection of the brick building referred to in plaintiff's petition, and alleges that, "at the time of the injury complained of in plaintiff's amended petition, there was an unprecedented wind-storm or hurricane that swept over the village of Bertrand and the adjacent country; that all of the injury alleged to plaintiff's property by reason of the wall in process of construction by this defendant was occasioned by the act of God, and not by any negligence or default on the part of this defendant;" alleges, further, that the building was being constructed in a good, workmanlike manner; that the walls were well braced and anchored; and that every reasonable precaution was exercised by defendant to construct the building in a good, workmanlike manner; and denies all other allegations in the amended petition. The reply was a general denial. Plaintiff argues five assignments of error, which we will consider in their order.

1. "It is the duty of the trial court to state to the jury the issues on which they are to find. Reference to the

pleadings, instead of a statement of the issues directly, is good ground for reversal." This assignment would imply that the court in its instructions did not state the issues to the jury, but referred them to the pleadings for such issues. The fact is, the court in its statement of the case set out the allegations of the pleadings quite fully; if anything, more so than was necessary; and then added: "You will be permitted, gentlemen of the jury, to take the pleadings with you to your jury room, wherein the contentions of the parties are fully set forth, namely, the amended petition, the separate answers of the defendant Anderson, and the reply of the plaintiff, to which you may refer for a more complete statement of the issues." We think it would have been better if the court had not done this, but doing so could not have worked any prejudice to the plaintiff, for the reason that, so far as the issues between plaintiff and defendant Anderson were concerned, the pleadings would not show anything more or less than was included in the statement of the issues by the court. This assignment, therefore, is without merit.

2. "Where, in an action for damages caused by a falling wall, the answer admits that the wall fell, and sets up an act of God as a defense, the burden of proof is on the defendant." It is argued that the statement in the answer, "that all of the injury alleged to plaintiff's property by reason of the wall in process of construction by this defendant was occasioned by the act of God," is an admission that the wall fell and that plaintiff's property was injured thereby, and is an attempt to avoid liability by pleading an act of God; that this issue makes out a *prima facie* case against the defendant, and that therefore the burden of proof was upon the defendant to establish his defense that the injury was caused by an act of God. It is further argued that instruction No. 2 and, to some extent, instruction No. 4 "are so worded as to lead the jury to believe that under the pleadings there was nothing for the defendants to do. The whole burden of proof is on the plaintiff. They entirely ignore the fact that the admissions of Ander-

son's answer make out a *prima facie* case for the plaintiff. In other words, these instructions, at the start, give the jury to understand that there is a presumption that the wind was an act of God, and that the burden was on the plaintiff to prove that the wind was not an act of God, and that the wall fell because of defendants' negligence." While we agree with plaintiff's contention that, where the act of God is pleaded as a defense, the burden is upon the defendant to establish his plea (*City of McCook v. McAdams*, 76 Neb. 11), we cannot concur in his construction of instruction No. 2. That instruction is the one ordinarily given. It reads as follows: "The court instructs you, gentlemen of the jury, that the burden of proof in this case is upon the plaintiff, and before he would be entitled to recover he must establish by a preponderance of the evidence the truth of every material allegation in his amended petition, not admitted by the defendants, which material allegations are: (1) That the walls of the Odd Fellows' building fell as a result of the negligence and carelessness of the defendant contractor, Magnus Anderson; (2) that plaintiff's property was damaged by reason of the falling of the walls of said building; and (3) the amount of said damage." It will be seen that this instruction is directed solely to the plaintiff's petition, and tells the jury what the plaintiff must establish, in the first instance, in order to entitle him to recover. In that respect the instruction is correct. Instruction No. 4 simply told the jury that "the burden is upon the plaintiff, and it is for him to prove every material allegation of his petition by a preponderance of the evidence. If, upon any one or more of the material allegations of the plaintiff's petition, the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant." This instruction also applied to the case in chief by the plaintiff, and is correct.

After having instructed the jury as to the allegations contained in plaintiff's petition, and what it was necessary

for the plaintiff to prove in support thereof, the instructions take up defendant's answer, when we have the following: "Instruction No. 10. The court instructs the jury that the defendant Magnus Anderson has pleaded as a defense, in this cause of action, that the walls of the building in controversy were in process of erection by him at the time of the injury complained of by the plaintiff; that he was erecting the building in a good and workmanlike manner, and had placed the proper protection and braces around and against the walls to protect them against falling down from any condition of the elements that might reasonably have been anticipated at the time and place at which the building was being constructed, and that the injury, if any which the plaintiff received, was occasioned by an unexpected wind-storm of unprecedented velocity in the vicinity in which the building was being constructed, and the injury to the plaintiff was occasioned by the act of God, and not by any negligent act on the part of the defendant Magnus Anderson." This was a correct statement of the defense as pleaded by defendant.

Then followed instruction No. 11: "The court instructs you that by the defense which is styled in legal terms 'the act of God' is meant some inevitable accident which cannot be prevented by human skill and foresight, but results solely from natural causes, such as cyclones, earthquakes, tempests, floods or inundations, and if you believe from the evidence that the injury to the plaintiff was occasioned solely by the wind-storm of unexpected and unprecedented violence, and not by any negligent act of the defendant in the construction of the building, then your verdict should be for the defendant." The only objection which could be urged to instruction No. 11 is that it does not in express terms say that "the burden is upon the defendant" to prove the facts which the jury are therein told they must find in order to warrant their returning a verdict for the defendant. The most that can be said, therefore, is that the instruction is not sufficiently explicit. If the plaintiff desired a more explicit statement, he should have brought

the matter to the attention of the court by a request for an instruction that would be satisfactory to him. Not having done so, this assignment must fail. *Burlington & M. R. R. Co. v. Schluntz,* 14 Neb. 421; *German Nat. Bank v. Leonard,* 40 Neb. 676.

3. "The frequent repetition of a proposition in the instructions of the court gives the same undue prominence, and is therefore error." This assignment is based upon instruction No. 14, given by the court on its own motion, and instructions 10, 11 and 12, given at the request of defendant. The contention is that the court in all four of those instructions told the jury that the defendant was not liable if they found the injury to the plaintiff's building resulted from an extraordinary wind-storm, and not from the negligence of the defendant. As the court had covered that proposition quite fully in its instruction No. 14, it really was not necessary for it to have given the three instructions requested by defendant; but we are unable to see how the plaintiff was prejudiced by the court's giving prominence to the fact that, in order to exonerate the defendant, the jury would have to find that the injury to plaintiff's building resulted from an extraordinary wind-storm, and not from the negligence of the defendant. Had the court given all four of those instructions upon its own motion and plaintiff had recovered a verdict, we can understand how defendant might have felt aggrieved at such repetitions; but they certainly could not have operated to plaintiff's prejudice.

4. "It is the duty of a person building a brick wall close to the premises of another to so construct the same that it will withstand all gales which are reasonably to be expected in that locality. A wall which will merely withstand ordinary storms is not sufficient." Upon this point, plaintiff complains of the action of the court in giving instruction No. 12, requested by defendant, and refusing instruction No. 4, requested by plaintiff. The objection to No. 12 is based upon this language in the instruction: "The court instructs the jury that, in the construction of

the walls in controversy, the defendant Anderson, as contractor and builder of said wall, would be liable to the plaintiff for injury occasioned to his property by the negligent construction of the walls or the failure of the defendant to properly guard and brace said walls against any ordinary storm or wind that may have reasonably been expected to have occurred at the time and place at which the building was constructed." If this language stood alone in the instruction, plaintiff might have cause for complaint; but it is followed by the following, separated only by a comma from what we have already quoted: "And the defendant Anderson would be liable for all consequence connected with the construction of the wall, which might have been foreseen and expected as a result of his conduct, but he would not be liable for any consequence which he could not have foreseen and was not morally obliged to take into consideration in the prosecution of his work, and if the jury believe from the evidence in this case that the proximate cause of the injury to plaintiff's building and contents was a wind of unusual and unexpected velocity such as a reasonable man would not anticipate, then the defendant is not liable for the injury, if any, which may have been suffered by the plaintiff, unless you find from the evidence that the defendant, Anderson, neglected to put proper bracings and supports around the walls of the building which he was constructing to protect them against such ordinary storms and winds as might have been reasonably expected at the time and place at which the building was being constructed." We do not see how this instruction, taken as a whole, could have misled the jury into believing that the defendant was not bound to so construct and protect his wall as to guard against any wind-storm which might reasonably be expected, and that he would only be excused in the event that the injury resulted from a "wind of unusual and unexpected velocity such as a reasonable man would not anticipate." By instruction No. 4, requested by plaintiff, and refused, the court was asked to instruct

the jury, among other things, that "it was the duty of the defendants to consider what was likely to occur during a severe or strong wind, and they were required by law to so erect and construct the walls of said building and keep them in such condition they would withstand the conditions that might reasonably and ordinarily be expected in the country where they were erecting said building. The principal fact in this case left for you to determine is: Did the defendants so erect and leave the walls of said building in a condition in which they would be expected to remain and be reasonably safe? Did they do all that prudence or forethought would demand of them? In other words, if you believe a wind-storm might be expected in the country where said building was built that would blow over or down said walls and render them dangerous, then negligence would be chargeable against the builders and constructors of said building." The last sentence quoted from that instruction is not the law, even under the authorities cited by plaintiff. The duty devolving upon the defendant was not to guard the wall against such a wind-storm as "might be expected." It was to guard the wall against such a wind-storm as might "reasonably" be expected. The quotation made by plaintiff upon this point from *Cork v. Blossom,* 162 Mass. 330, so states, viz.: "If a person builds and maintains upon his premises a chimney so that, if it falls, it will fall upon and injure the adjoining premises, he is bound, in the exercise of proper care, to construct it so that it will withstand any gales which experience shows are reasonably to be anticipated in that locality." That is a correct statement of the law, and it shows the error in the instruction requested by plaintiff.

Finally: "The verdict is not sustained by the evidence, but is contrary thereto." It would serve no good purpose to set out the voluminous testimony or to even attempt to give a synopsis of it here. It is sufficient to say that upon every material point it is conflicting, and is ample to sustain the verdict.

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

AFFIRMED.

MARY BUTLER, APPELLANT, V. FARMLAND MORTGAGE & DEBENTURE COMPANY ET AL., APPELLEES.

FILED DECEMBER 18, 1912. No. 16,893.

Estoppel by Deed. *Stratton v. McDermott*, 89 Neb. 622, reexamined, reaffirmed, and the case at bar *held* ruled thereby.

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

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

Fred H. Free and *G. T. Kelley, contra.*

FAWCETT, J.

The land involved is the southeast quarter of section 30, township 29 north, of range 4 west, in Knox county, Nebraska. In 1890 one Crittenden, then the owner of the land, executed and delivered to defendant mortgage company a mortgage thereon to secure the sum of $900, due and payable October 1, 1895. In March, 1896, Crittenden sold and conveyed the land to one Jackson. In the deed Jackson, the grantee, was designated as A. R. Jackson. This deed was duly recorded. In his deed Jackson assumed the Crittenden mortgage. Default having been made upon the mortgage, the loan company, in April, 1896, brought suit to foreclose the same and made "A. R. Jackson" a defendant. Jackson being a nonresident, service by publication was had upon him by the name which appeared in his deed of conveyance from Crittenden, viz., A. R. Jackson. A decree of foreclosure was entered, and at the sheriff's sale the loan company was the purchaser. The sale was confirmed

and deed issued to the loan company. In 1901, and after having obtained its sheriff's deed, the defendant loan company entered into a contract with one Stevens for a sale of the land. Stevens assigned his interest in the contract to defendant Cox, and defendant McColley is a tenant under defendant Cox. In view of the conclusion reached in this case, it will not be necessary to again refer to the three last named defendants. In May, 1905, for an alleged consideration of $25, plaintiff obtained from Jackson a quitclaim deed to the land. Jackson's name appeared in the body of the deed as A. R. Jackson, and the deed was executed and acknowledged in the same manner. Plaintiff brought this suit in the district court for Knox county, as such grantee of Jackson, to redeem from the mortgage above referred to and for an accounting of the rents and profits. From a judgment in favor of the defendants, plaintiff appeals.

The ground upon which plaintiff bases her claim for reversal is that the foreclosure of the mortgage as to Jackson was void, for the reason that he was sued by the initial letters of his Christian name, and that the service by publication upon him was likewise by such name. In plaintiff's brief it is urged that the case is controlled by *Enewold v. Olsen*, 39 Neb. 59; *Gillian v. McDowall*, 66 Neb. 814; *Herbage v. McKee*, 82 Neb. 354; *Butler v. Smith*, 84 Neb. 78, and other cases, which are to the effect that, "in law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the code of civil procedure (*Enewold v. Olsen, supra*);" and, "unless a defendant sued by the initial letters of his name under section 148, code of civil procedure, is served personally or makes an appearance in the case, the judgment or decree rendered therein is not binding upon him." *Gillian v. McDowall, supra.*

Defendants contend that, Jackson having taken a deed

to the property in the name of A. R. Jackson and recorded the same under that name, and plaintiff having accepted from Jackson a deed in which he is described and which he executed as A. R. Jackson, and recorded the same, they both thereby represented to the world that A. R. Jackson was Jackson's true and only name, and that plaintiff is now estopped to claim that his name is other than that set out in those deeds. Defendants insist that the cases relied upon by plaintiff have no application to the case at bar, but that the case is ruled by *Stratton v. McDermott,* 89 Neb. 622. We think defendants' contention is sound and must be sustained. In *Stratton v. McDermott,* the doctrine of estoppel, now contended for by defendants, was fully and very carefully considered by this court, and, while the opinion in that case was not by a unanimous court, it, of course, has the same force and effect as if it had been unanimous. In that case the cases now cited and relied upon by plaintiff were all carefully considered, and this court, after such full and careful consideration, announced the law as contended in the syllabus, viz.:

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

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

No sufficient reason has been assigned for a departure from the doctrine so carefully considered and announced in *Stratton v. McDermott,* and it is reaffirmed. The judgment of the district court being in harmony therewith, it is

AFFIRMED.

CHARLES DEEDER V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1912. No. 17,752.

1. **Evidence:** SECONDARY EVIDENCE. "What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence cannot be secured." *Donner v. State,* 69 Neb. 56.
2. ———: ———: FRAUD AT ELECTION: MISREADING BALLOTS. In the prosecution of a judge of election under an information charging him with having wilfully and wrongfully misread the ballots cast at a general election, the ballots cast at such election are the best evidence of how and for whom they were cast; and, unless it be first shown that such ballots have been lost, or so mutilated as to render them inadmissible as evidence, secondary evidence of such facts is not admissible.

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

C. E. Eldred and *F. M. Flansburg,* for plaintiff in error.

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

FAWCETT, J.

Plaintiff was informed against in the district court for Hitchcock county. The gist of the charge is that defendant, being a duly appointed, qualified, and acting judge of election at the general election for the year 1909, "did then and there fraudulently, unlawfully, knowingly and wil-

fully violate his official oath and duty in that said Charles Deeder did not then and there cause the ballots which had been then and there taken and cast at said election to be fully read and ascertained, and did not then and there cause a true statement of the ballots then and there taken and cast at said election to be made according to the best of his knowledge and ability, in that said Charles Deeder did then and there fraudulently, unlawfully and wilfully read and cause to be read and counted certain ballots to the number of 16, or some other number, then and there cast at said election for Ira E. Thomas for the office of county clerk of said county, in favor of and as if cast for a candidate other than for the said Ira E. Thomas;" with a similar charge of misreading 9 votes for the office of county treasurer, 10 votes for the office of sheriff, 5 votes for the office of superintendent of schools, and 5 votes for the office of county commissioner. Defendant was found guilty and sentenced to a fine of $300 and imprisonment in the county jail for a period of three months, from which sentence and judgment he has prosecuted error to this court.

Plaintiff in error, whom we will designate as defendant, has assigned and discussed 12 separate assignments of error. Assignment No. 7 is, as stated by the attorney general, the main question in the case. Having reached the conclusion that this assignment is good, and that the judgment must be reversed for the error therein complained of, the other assignments argued will not be considered. This assignment alleges: "The court erred in permitting witnesses called on behalf of the state to testify orally, (*a*) whether or not plaintiff's exhibit 2 was similar to the ballot voted by them at the election in controversy; (*b*) for whom they voted for the several county offices in controversy; (*c*) as to how they marked the ballots cast by them; and (*d*) as to what tickets they voted, without the production of the ballots which would be the best evidence of such facts." Upon the trial the ballots were not produced, nor any reason given for not producing them. The

precinct poll book, a blank official ballot similar to those used at the election, and a card containing instructions to voters were introduced in evidence. The poll book shows that the total vote polled was 35. There were indorsed on the information the names of 42 witnesses, over half of whom were called to testify. The evidence shows that Frank Shank, Roy Barnett, and defendant acted as judges of the election, and S. S. Powell and Frank Wiley as clerks; that, a few minutes after the polls closed, the canvass of the vote was entered upon, the arrangement being that Barnett was to hand the ballots to defendant, defendant was to read them, Mr. Shank was to string them, and the clerks, Powell and Wiley, were to record the votes. The poll book showed that for sheriff W. M. Dennis received 10 votes; for county clerk Ira E. Thomas 4 votes; for county treasurer W. S. Britton 9 votes; for county superintendent Bessie V. Crews 17 votes; and for county commissioner E. D. Jones 19 votes. The contention of the state is that defendant fraudulently read the ballots so that Mr. Dennis received but 10 votes for sheriff, when he in fact received at least 18; that Mr. Thomas received but 4 votes for county clerk, when in fact he received at least 18; that Mr. Britton received but 9 votes for county treasurer, when in fact he received at least 17; that Bessie V. Crews received but 17 votes for superintendent, when in fact she received at least 19. The method pursued by the state in making its proof was by calling a large number of electors of Union precinct, exhibiting to each witness a blank copy of the official ballot used at the election, and then showing by the witness for whom he voted for the several offices above indicated.

The purpose of this testimony was to show that the ballots were not as read by defendant. If so, the best evidence of that fact would be the ballots themselves. The state quotes from *Wheat v. Ragsdale*, 27 Ind. 191: "If the ticket cast by the witness can be found and can be identified by him, it is the best evidence of the fact, but if the ticket cannot be found, or cannot be identified by the wit-

ness, then it is competent for him to state for whom he voted;" and then argues that, "under the Australian ballot system, how can the ticket be identified by the voter? By law, he is prohibited from making any identification marks upon it." The fallacy of this argument is apparent. The ballots which defendant is charged with having misread were easy of identification. At least two of the judges of election are required to sign their names in ink upon the back of each ballot given to a voter when he presents himself at the booth. In the absence of any proof to the contrary, it must be presumed that the judges performed that duty. Hence, the identification of the ballots *en masse* was an easy matter. This is not a case of identifying a particular ballot cast by a particular voter, but it is simply the identification of the mass of ballots cast at an election, which, it is claimed, were misread by one of the judges. The undisputed evidence shows that the ballots were, as fast as counted, strung by one of the judges, tied to hold them in place, placed in a bag and the bag sealed by one of the members of the election board, taken by one of the members of the board and delivered to the county clerk, where, so far as the evidence in this record shows, they are still quietly reposing. If they have been destroyed or in any manner tampered with since the time when they were placed in that bag and the bag sealed, so as to render them unreliable as evidence or to cast doubt upon their being the particular ballots cast at the election, then the secondary evidence offered by the state would probably have been admissible. "What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence cannot be secured." *Donner v. State*, 69 Neb. 56. "Evidence cannot be received which, on its face, indicates that it is secondary and that the original source of information is in existence and accessible." *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713. "Before the contents of a written instrument can be established by oral testimony, the loss of the instrument must be ac-

counted for." *Myers v. Bealer*, 30 Neb. 280. On page 287 of the opinion in the case last cited, it is said: "It does not appear that the paper is not in existence. It was left with the county judge, and he was not called to testify what search, if any, he had made for the missing paper. For all that appears from this record, it is where the county judge can place his hands upon it at any time. The person in whose custody the paper was left should have been called to establish that it was lost, before receiving oral testimony of its contents." The analogy between that case and this is perfect. The county clerk was not called to testify as to the whereabouts of the ballots. No evidence was offered to show why they were not produced. Their production, together with the poll book and the testimony of the other members of the election board, would have furnished a sure, safe and inexpensive method of proving or disproving the charge contained in the information, and would have saved the needless expense of calling in the large number of electors who voted at that election. At each attempt to offer this secondary evidence, proper objections were interposed by defendant. The objections should have been sustained.

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

REVERSED.

STATE, EX REL. NATIONAL EMPLOYEES ASSOCIATION, APPELLANT, V. SILAS R. BARTON, APPELLEE.

FILED DECEMBER 18, 1912. No. 17,806.

1. **Insurance:** STATUTORY PROVISIONS. The act of 1873 (Gen. St. 1873, ch. 33, p. 428), entitled "An act regulating insurance companies," applies to all kinds of insurance in this state, except life insurance, which is expressly omitted from the operation of that act.

2. ———: LICENSE. All companies whose object is to transact insurance business in this state must obtain license as the statute provides.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Harrison H. Bowes, for appellant.

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

SEDGWICK, J.

The relator alleges that it is incorporated under the general incorporation laws of the state, with a capital stock of $10,000, $5,100 of which is subscribed. The petition alleges: "The object of this association is to sell contracts to employees to compensate them when out of employment, by paying to them a percentage of the wages earned in their last place of employment, where such lack of employment arises from unavoidable causes, to be defined in the by-laws of this incorporation, upon a payment of this corporation of a certain stipulated sum per month to be provided in the by-laws; but no money shall be paid where the loss of employment is from lockouts, strikes, or incompetency; not more than 60 per cent. of the monthly salary or wages shall be paid under any contract, nor for a longer period than six months." It appears to be conceded that the object of this company is to transact a species of insurance. The company applied to the auditor for license to do business in the state, and was refused. Application was then made to the district court for Lancaster county for a mandamus to compel the auditor to issue the license. The writ was refused, and the relator has appealed.

Chapter 25 of the Revised Statutes of 1866 was entitled "Incorporations." It contained 144 sections. The first 14 sections related to insurance companies. Other classes of corporations were provided for, and then followed provisions applicable to corporations in general. Section 123 was as follows: "Any number of persons may be associated and incorporated for the transaction of any lawful

business, including the construction of canals, railways, bridges, and other works of internal improvement." This section has been retained unchanged, and is now section 123, ch. 16, Comp. St. 1911. Insurance companies were from the first required to file statements with the auditor and procure a license before doing business in the state. In 1873 the legislature passed an act entitled "An act regulating insurance companies." The first section provided: "That hereafter, when any number of persons associate themselves together for the purpose of forming an insurance company, for any other purpose than life insurance, under the provisions of chapter 25 of the revision of 1866, and all acts amendatory and supplementary thereto, they shall publish a notice of such intention, * * * and they shall also make a certificate under their hand, specifying * * * the amount of its capital stock," with other requirements. The third section provided: "No joint-stock company shall be incorporated under the provisions of this act, with a smaller capital than $100,000, * * * of which capital at least 50 per cent. shall be fully paid up in cash." The first act was general and applied to all companies organized to do an insurance business in this state, and it seems clear that this act was intended to apply to all insurance companies other than life insurance. Section 8, as amended (Comp. St. 1911, ch. 43), contains nine subdivisions defining what it shall be lawful for companies organized under the act to do, followed by the general clause, "and generally to do and perform all other matters and things proper to promote these objects." Several sections of the general incorporation law are cited as showing that it is still contemplated that corporations organized for purposes not mentioned in the eighth section of the general insurance law may be incorporated under the general law. Section 20 provides that the proper officers of "each company organized under this act, or incorporated under any law of this state," shall make a statement to the auditor, etc.

Insurance companies had already been incorporated

and were doing business in this state before the act of 1873, and it was not intended to compel them to be reincorporated, but section 20 requires such companies to make statements to the auditor. There is therefore no implication that, after the act of 1873 went into operation, companies might be incorporated under some other law. The language of the act of 1873 is so plain and comprehensive as to admit of no doubt of its meaning. No insurance can be done in this state without a compliance with the statutes on that subject. If the ninth section of the act should be considered to prohibit such insurance as is contemplated by relator, and if such provision would be unconstitutional, no such questions are presented by this record.

The judgment of the district court is

AFFIRMED.

APPEL MERCANTILE COMPANY, APPELLEE, V. PEARL BARKER, APPELLEE; GRAND DRY GOODS COMPANY, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,865.

1. **Statutes:** TITLES: "BULK SALES LAW." Sections 31, 32, ch. 32, Comp. St. 1911, commonly known as the "Bulk Sales Law," are not unconstitutional as legislating upon a subject not clearly expressed in the title.

2. ———: ———: ———. The act makes all such sales void as to creditors, unless certain specified conditions are complied with. The conditions imposed cannot be considered as separate subjects of legislation, within the meaning of section 11, art. III of the constitution.

3. **Constitutional Law:** DUE PROCESS OF LAW. The act does not violate section 3, art. I of the constitution, which provides: "No person shall be deprived of life, liberty or property without due process of law."

4. ———: CLASS LEGISLATION. The act applies to all people of the

state who engage in the business designated. The classification is not arbitrary and unreasonable, so as to make the act special or class legislation, forbidden by the constitution.

5. **Garnishment**: PURCHASER OF MERCHANDISE IN BULK. One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee.

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

Stewart, Williams & Brown, for appellant.

R. H. Hagelin, Baldrige, De Bord & Fradenburg and *McGilton, Gaines & Smith, contra.*

SEDGWICK, J.

The plaintiff, having a judgment against the defendant, Pearl Barker, in the district court for Lancaster county, and an execution thereon having been returned wholly unsatisfied, caused the appellant, the Grand Dry Goods Company, to be summoned as garnishee. Mr. Dearsdorf, the president and general manager of the company, appeared and answered in the garnishment proceedings. Upon his answer the court ordered the garnishee to pay into court, to be applied upon plaintiff's judgment, the sum of $831.89. From this order the garnishee has appealed.

It appeared from the answer of Mr. Dearsdorf that a few days before the garnishment proceeding the defendant, Pearl Barker, was carrying on a retail millinery business in Lincoln, and made a contract of exchange of her stock of millinery goods to this appellant for a quarter section of land in Lincoln county. The value of the stock of goods was stated in the exchange as $2,200, and was in fact something over $1,000. The appellant took possession of the goods and disposed of them. The land exchanged was not conveyed by the appellant, but the title

was held until such time as the defendant, Pearl Barker, should pay her commercial indebtedness. The provisions of the statute, commonly known as the "Bulk Sales Law" (Comp. St. 1911, ch. 32, secs. 31, 32), were not complied with in making the exchange, and the court held that the transfer of the stock of goods was void as against creditors, and ordered the garnishee to pay the value thereof into court to be applied on the judgment. The garnishee insists that this order is erroneous, because the bulk sales law is unconstitutional for several reasons, and because the garnishee was entitled to trial by jury, and the summary order of the court was erroneous. The statute in question was before this court in *Lee v. Gillen & Boney*, 90 Neb. 730, and it was assumed to be constitutional and valid. The question of its constitutionality, however, was not determined or considered, and, the property transferred not being merchandise, within the meaning of the statute, it was held that the statute had no application to the transaction then being considered. It was therefore unnecessary to consider the constitutionality of the act.

1. The first objection made in this case to the constitutionality of the statute is that the statute is broader than the title; that is, that the subject of legislation is not clearly expressed in the title, as required by section 11, art. III of the constitution. The title of the act is "An act to declare void sales, trades or other disposition of stocks of merchandise or portions thereof in bulk, otherwise than in the ordinary and regular course of the seller's business." Laws 1907, ch. 62. The act consists of two sections, and is as follows:

"Section 31. The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, trade or other disposition, make a full detailed inventory,

showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, trade or other disposition; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale, trade or other disposition and of the price, terms and conditions thereof; provided, that at least five (5) days before the sale, trade or other disposition, the seller may file with the county clerk in the county in which the stock is located, an agreement with all his creditors waiving the inventory and notice above required.

"Section 32. Nothing contained in this act shall apply to sales by executors, administrators, receivers or by any public officer under judicial process."

The purpose of the constitutional provision in question is to prevent surreptitious legislation. The title of an act of the legislature must be such as to give reasonable notice to the members of the legislature, and others interested, of the general subject upon which it is proposed to legislate. Some of the earlier decisions of this court which are cited in the brief construed this constitutional provision very strictly. We do not consider it necessary to go further in that direction than this court has already gone. The presumption in favor of the validity of an act of the legislature is very strong, and, unless the conclusion is unavoidable that the subject of legislation is not included in the title of the act, the statute will not be considered void for that reason. Some courts, even in recent years, have applied this provision technically and, we think, too strictly. The subject of legislation expressed in the

title of our act is: "To declare void sales, transfers or other disposition of merchandise or portions thereof in bulk." And the act itself provides that all sales in bulk shall be void, as against the creditors of the seller, under certain circumstances and conditions. The complaint really is that the legislature did not go so far in declaring sales void as it might have done under the title of the act. The greater includes the less, and this title is ample notice that it was intended to limit the right to make valid sales of merchandise in bulk. The legislature has not done more in this respect than the title would justify. The fact that it has done less surely will not invalidate the act.

2. It is said in the brief that the act has more than one subject, and so violates the constitutional provision cited; that the title to declare sales void will not cover a provision regulating valid sales. This objection seems to be without any force. The act declares sales of merchandise in bulk void, with certain specified exceptions. The fact that the act does not go as far as the title, that, instead of making all sales under all circumstances void, it makes certain sales under certain circumstances void, prescribing certain conditions to be complied with in order to make a valid sale, does not make the specified conditions a distinct subject of legislation.

3. It is said that the act is unconstitutional because it deprives persons of their property without due process of law, in violation of section 3, art. I of the constitution.

In *Everett Produce Co. v. Smith,* 2 L. R. A. n. s. 331 (40 Wash. 566) several cases are reported from different states upon this interesting question. A footnote is appended, from which it appears that the earliest legislation in this country upon the subject of bulk sales of goods was the act of Louisiana, in 1896. This note appears to have been written in 1905, and it is said that at that time 22 of the states and territories had enacted such legislation. The courts have not been entirely agreed as to the validity of the various statutes. The courts which have held such legislation constitutional appear generally to agree with

the supreme court of Washington, which used the following language: "It was intended to prevent retail dealers in goods, wares, and merchandise from defrauding their creditors. As such, it is among the undoubted subjects of legislation; and the real question to be considered, therefore, is: Is the act so far an abuse of the power of legislation as to take it out of the rule of due process of law? In our opinion, it is not. It is a general rule that, when the business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt such measures as they see fit to correct the existing abuses, so long as the measures adopted have relation to and a tendency to accomplish the desired end, and violate no direct constitutional provision. This act is within the rule. That it has relation to and will tend to prevent the particular frauds aimed at cannot be doubted. Nor is there any direct constitutional provision against the enactment of such laws. Whether the act is more harsh than was necessary, or whether it is not the wisest or best that could have been adopted, are legislative questions, with which the courts have nothing to do. It is enough for the court to know that the act is within the legislative power." *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549. Our statute is new, and if it is found in any respect to be defective, or any of its provisions are harsh and unreasonable, the legislature will, of course, remedy the matter. It is not necessary in this case to construe the various provisions of the statute. If some of them should be found for any reason to be invalid, that would not necessarily render the whole act unconstitutional.

4. The statute is not unconstitutional as being special or class legislation. "A law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it. The act in question applies equally to all the people of the state who may engage in the business described. The limitation of the act to retail dealers is not an arbitrary classification." *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277.

5. The final contention of the appellant is that garnishment proceedings will not lie in such a case. This objection has been, we think, well answered by the supreme court of Washington, in *Kohn v. Fishbach*, 36 Wash. 69. The circumstances seem to be similar with those in this case, and the court said: "It is true * * * that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the *cestui que trust* or the creditors for the disposition of such property." In the case at bar the garnishee appears to have protected itself in the possession of this stock of goods. It still holds the title to the land, and its contract provides that the title shall not be conveyed until the creditors are paid.

The judgment of the district court is

AFFIRMED.

ALPHIA M. SHEVALIER, APPELLANT, V. ELMER B. STEPHENSON, ADMINISTRATOR, ET AL.; MARGARET A. MILLIKEN, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,874.

1. Appeal: REFUSAL OF CONTINUANCE. Alleged errors of the trial court in refusing a continuance will not be considered upon plaintiff's appeal, when the plaintiff, after such continuance was refused, dismissed her action, and the cause was afterwards tried solely upon the cross-petition of one of the defendants, and no further application was made for a continuance and no showing of any necessity for a continuance upon the trial of the issue presented in the cross-petition.

2. ———: SUIT IN EQUITY: EVIDENCE. The rule that, upon appeal in an action in equity tried before the judge of the district court, it will be presumed that the court decided the case solely upon

competent evidence, and that no alleged errors in receiving incompetent testimony will be considered in this court, is well established and never departed from.

3. Injunction: MULTIPLICITY OF SUITS. A court of equity may enjoin a plaintiff from bringing successive actions for the same alleged cause against the same parties. If such action is begun and, when ready for trial upon issues joined, is dismissed by plaintiff, and immediately recommenced and again dismissed by plaintiff when ready for trial after the issues have been made by the parties, another action for the same alleged cause against the same parties should be enjoined, in the absence of any evidence of good faith on the part of the plaintiff in so doing.

4. ———: ———. If an action at law has proceeded to judgment, and one of the parties afterwards brings successive vexatious suits in equity to obtain a new trial, dismissing her case and immediately recommencing it, the defendant will not be required to further establish her legal rights in the controversy before obtaining upon cross-petition in the action in equity an injunction restraining the plaintiff from further dismissing and recommencing such action.

5. Equity: RELIEF. When a court of equity has taken jurisdiction of the principal matter in controversy between the parties, it will dispose of the whole matter, and prevent further unnecessary litigation.

6. Judgment: RES JUDICATA: PARTIES. A decree in equity is binding only upon parties to the action; but the matters determined by the decree cannot again be litigated against a party to the trial on the ground that she is jointly liable with others who were dismissed from the action before trial.

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

Minor S. Bacon, for appellant.

Tibbets & Anderson and *F. B. Baylor, contra.*

SEDGWICK, J.

When Helen Horn died, in 1907, she left real estate of the value of something more than $20,000 and some personal property. This plaintiff presented to the county court of Lancaster county an alleged will of Mrs. Horn,

giving her property to this plaintiff and another. Upon contest in that court, probate was allowed, and the heirs of Mrs. Horn, Margaret A. Milliken, Jennie E. Foley, and Mary K. Nichols, appealed to the district court. While the contest was being tried in that court, the heirs claimed that this plaintiff had taken several thousand dollars of money, belonging to the estate, and other personal property, and caused her to be arrested upon a charge of larceny. Several thousand dollars were found upon her person. Thereupon, through the plaintiff's attorney, purporting to act for her, a settlement of the matter was made with the heirs. The money was assigned to plaintiff's attorney, and by him to the administrator of the estate, and a judgment was entered determining the contest in favor of the heirs. The plaintiff afterwards brought this action in equity in the district court for Lancaster county to obtain a new trial of the will contest, and to recover the money taken from her person while under arrest, and assigned by her to the administrator in the said settlement. In her petition she alleges that the settlement of the controversy which resulted in the judgment against her in the contest proceedings was obtained by duress, and the fraud and misconduct of her attorney conniving and conspiring with those interested to defeat her. She made the three heirs of Mrs. Horn, the administrator of the estate, the police officers who participated in her arrest, and her attorney, who represented her in the contest proceedings and in the settlement, defendants in this suit.

Mrs. Milliken, as one of the heirs, answering, denied the principal allegations of the plaintiff's petition, but admitted the transfer of the money to the administrator and the settlement of the contest proceedings through the plaintiff's attorney, and, as cross-petition against the plaintiff, alleged that in September, 1908, which was about 18 months before this action was begun, this plaintiff began an action in the district court for Lancaster county against these same defendants, "in which the same matters

and facts were set forth in the petition as are set forth in the petition herein," and that, when issues were joined in that case and the same was ready and argued, the plaintiff dismissed the action, and immediately began another action against the same defendants, and filed a petition which was an exact copy of the petition in the former case, and that, after issues were duly joined in the second action and the case ready for trial, the plaintiff dismissed the action, without prejudice, and immediately filed the petition in this action, which is an exact copy of the former petitions. She also alleged the interest of the answering defendant in the property of the estate and the value of the property, and that these repeated actions prevented a settlement of the estate, clouded the defendant's title in the real estate, and caused the defendants great and unnecessary expense and annoyance, and that the actions were brought by the plaintiff without any desire or intention of obtaining a trial and determination of the issue so presented, but for the sole purpose of "harrassing and embarrassing this defendant and her co-heirs from disposing of said real estate and to cast a cloud upon the title of the same." The prayer of the cross-petition was that the plaintiff be enjoined from harrassing defendant "with actions based upon the allegations contained in the petition herein, and that she be enjoined from prosecuting any action looking toward the setting aside of the judgment rendered against the said plaintiff" in the will contest. The trial court found the issues in favor of the defendant and enjoined the plaintiff as prayed, and the plaintiff has appealed.

1. The action of the trial court first complained of is in refusing a continuance of the case upon application of the plaintiff. This application was based upon the absence of a witness and was supported by an affidavit, but the matters that it was supposed the witness would testify to were not stated in the affidavit, and, after the court had overruled the application, the plaintiff dismissed her action as to all the defendants; but, upon the objection of

the cross-petitioner, the court refused to dismiss the cross-petition and proceeded to the trial of the issues so joined. No further application for a continuance was made, and it is clear that the plaintiff cannot now avail herself of any supposed errors of the court in refusing the continuance. There is nothing in the record to show that any continuance was necessary, or was supposed to be necessary, upon the hearing of this defendant's cross-petition.

2. The plaintiff complains of the rulings of the court in admitting evidence, and in allowing too much latitude to defendant's attorney in cross-examining the plaintiff, and in other similar matters; but in a trial to the court, and especially in an equity case, the court is supposed to base its judgment upon the competent evidence produced, and, if evidence which was properly introduced will support the judgment, error in allowing incompetent evidence or cross-examination will not be considered.

3. It is insisted that the evidence does not support the decision, and that an action to enjoin the commencement of further suits, under the circumstances, cannot be maintained. The plaintiff in the brief says: "We maintain that we have the right to dismiss a suit, either in equity or at law, without prejudice to a new action, and immediately refile the same suit, against the same parties, concerning the same subject matter, asking the same relief, when the suit has not been fully and legally adjudicated between the parties. It has been held that this right continued as long as there is the right to submit the cause on its merits." *Thornhill v. Hargreaves*, 76 Neb. 582, is cited as supporting this doctrine. That was a proceeding to revive a dormant judgment begun in the county court, and after having appealed to the district court the plaintiff dismissed the proceedings. He afterwards begun new proceedings to revive the judgment, and the former action and the dismissal thereof were relied upon as a bar to the new proceedings. The court held that the plaintiff had a right to dismiss his action in the district court, without prejudice, and after such dismissal another action might

be begun. The questions here presented were not involved in that case, and there is nothing in the opinion that supports the plaintiff's contention.

When a plaintiff seeks to enjoin a multiplicity of suits, and relies upon an alleged right as between himself and the defendant as the basis of his action—that is, if his right of action depends upon his title to certain real estate or upon his ownership and right of possession of certain personal property, and that title or that ownership and right of possession is contested and doubtful—it has been frequently held that he must first establish that right in an action at law before he can maintain his action in equity to prevent further litigation. If this rule obtains where there is no distinction between the procedure in an action at law and in actions in equity, as in the code states generally, and if the application of the rule might in an action in equity depend upon the circumstances of the particular case, it seems clear that the rule has no application in the case at bar. The principal contention between these parties was as to the probate of the proposed will. That issue had been determined in an action at law. If a party could bring successive actions for the same cause, and successively dismiss and again begin the action, the rights of the parties would never be determined in actions so brought and dismissed, and there would, under plaintiff's contention, never be a time when the court could stop such proceedings.

The plaintiff says that she was prevented from having the issues she desired to present determined because of the unjust and erroneous rulings of the court in refusing continuances, and otherwise preventing a fair trial, and so compelling her to dismiss the successive suits. Errors of law committed by the trial court prejudicial to the rights of a litigant cannot ordinarily be corrected by another suit in the same court. The remedy is by appeal; and, unless appealed from, such rulings must be regarded as right. Any attempt to correct such rulings except by appeal is usually regarded as a collateral attack. We

must therefore consider that the plaintiff dismissed her cases voluntarily, and without any ground for so doing except to serve her own purposes. Under such circumstances, the plaintiff would be required to produce evidence to convince a court of equity that she was attempting in good faith to procure a fair trial upon the merits of her claim. The plaintiff used the same allegations in each case begun by her. The petition in this case shows that it was verified long before the former case was dismissed. Whenever it was thought that the action which she had pending was about to be brought to trial, she was already prepared with a duplicate of the petition, and, when the matter could no longer be delayed in court, her action was dismissed, and immediately the same action, substantially, begun again. The brief is quite voluminous, but it does not point out any evidence in the record that would explain or justify her motive in so proceeding. It is true that there had been no adjudication as to the plaintiff's right to the money that she assigned to the estate, and as to the validity of that assignment; but if the contest of the will was the main issue between the parties, and if the rights of the respective parties in that issue had been fully determined, as we have seen, in an action of law, a court of equity, having taken jurisdiction of the principal controversy, ought at the same time to determine the whole matter.

4. The plaintiff insists that, as her action was dismissed as against the other two heirs and all other defendants, the court was without jurisdiction to enjoin the plaintiff from proceeding against the other defendants. The decree was "that the plaintiff be, and she is hereby, permanently enjoined from prosecuting or instituting any further action for the recovery of the $5,100, or for the setting aside of the decree of the district court rendered in the matter of the estate of Helen A. Horn, deceased, wherein the probate of the will proposed by the plaintiff, Alphia M. Shevalier, was denied, and from instituting, prosecuting or furthering any actions including said matters." This is

perhaps the usual form in such cases, and is, of course, binding only upon the parties thereto. It enjoined the plaintiff from bringing any more actions of the same nature against the cross-petitioner, or that will affect the interests of the cross-petitioner in adjusting and distributing the estate in question. There is no doubt that the court had jurisdiction to adjudicate all the interests of the plaintiff against this cross-petitioner in the matters involved in litigation, and we do not see that the decree has gone further than necessary for that purpose.

We think the judgment of the district court is supported by the evidence, and it is

AFFIRMED.

REESE, C. J., having been of counsel in a former stage of this litigation, took no part in this decision.

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

WILLOW SPRINGS BREWING COMPANY, APPELLANT, V. HORATIO G. NEWCOMB, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,887.

1. **Intoxicating Liquors: LICENSE.** A saloon license purporting to be issued to a deceased person in the company name used by such person in his lifetime is invalid for any purpose.

2. **Principal and Agent: PURCHASE OF LIQUORS: LIABILITY OF AGENT.** One who assumes to act as agent for the estate of a deceased person in conducting a saloon and in purchasing liquors for that purpose, without any authority from the probate court so to do, and without any valid license, is personally liable for the contract price of the liquors so purchased, in the absence of an express agreement that he should not be so held.

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

I. J. Dunn, A. M. Morrissey and *Allen G. Fisher,* for appellant.

J. E. Porter, contra.

SEDGWICK, J.

For some time prior to the 18th day of March, 1908, H. C. Armstrong resided in Sheridan, Wyoming, and owned a saloon and saloon business in Crawford, Nebraska. The business was carried on in the name of H. C. Armstrong & Company, by this defendant as agent for Armstrong. The saloon license was obtained and held in the name of H. C. Armstrong & Company. On the 18th day of March, 1908, Armstrong died, and this defendant continued to carry on the business as before. Mrs. Armstrong was appointed administratrix of his estate, and this plaintiff continued to sell beer and other liquors, upon the order of this defendant, as he had done prior to the death of Mr. Armstrong, except that before Mr. Armstrong's death he charged the account of Armstrong & Company, and soon after he began charging the goods to the defendant individually. In November, following, an order of the probate court was obtained for that purpose, and the saloon business, with the supplies on hand, were sold by the administratrix to this defendant, who still continued to conduct the business for the remainder of the fiscal year under the license in the name of H. C. Armstrong & Company. This action was brought to recover for liquors sold after Mr. Armstrong's death, and before the sale of the business to this defendant by the administratrix. The district court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

There is but little conflict in the evidence; and, since the court has instructed the verdict, we must consider the facts to be as testified to by the plaintiff. Mr. Moise, who represented the plaintiff's company in this business, testified that he was present at the funeral of Mr. Armstrong,

and in a conversation with the defendant suggested the fact that the Armstrong estate would not be liable for goods purchased by the defendant, and that the plaintiff would be compelled to look to the defendant for pay. This is denied by the defendant. The fact that Mr. Armstrong resided in another state, and that there was no license, while Mr. Armstrong lived, in the name of any responsible individual, and that, for these reasons, the supposed license was probably invalid for any purpose even before the death of Mr. Armstrong, are matters discussed quite at large in the briefs. The defense relied upon in this case is that the defendant bought the goods, not for himself, but as agent for the estate of H. C. Armstrong, deceased. If it were possible that the estate of a deceased person could lawfully carry on a saloon business in this state, still the evidence in this case is by no means conclusive that the estate undertook to do so. It is not generally supposed that the administrator of an estate can carry on any trade or business in behalf of the estate, except temporarily and under peculiar circumstances, and with the express authorization of the probate court so to do. Obtaining a liquor license and carrying on a saloon business are in this state peculiarily personal matters, and the probate court would not authorize an individual to carry on such business in a fictitious name at the risk of the estate of a deceased person. It is clear that in this case the estate would not be liable for these goods and that this claim could not be collected from the administratrix. In other words, it is impossible that the estate of Armstrong could have been the principal in the transaction of this business. If this defendant bought these goods as agent, and so is not personally liable, then he was in fact agent for no one, and no one is liable. It appears that Mr. Moise knew that Armstrong was deceased, and in all probability knew that this defendant was assuming to continue the business in the interests of the estate of the deceased, but this would not relieve this defendant from liability. "One who, as agent, assumes to represent a

principal who has no legal existence or status is himself liable." *Learn v. Upstill,* 52 Neb. 271; *Codding v. Munson,* 52 Neb. 580. It is said in the opinion in the latter case that one who assumes to act as agent for a person having no legal status is liable, "unless the agreement was that (the party with whom he contracted) was to look solely to" some other party or fund. In this case there was no other party that could be held legally liable for these goods, and there is no evidence of any express agreement on the part of the plaintiff to look solely to this estate for the price of the goods. Under this evidence, we think the district court should have instructed the jury to find a verdict for the plaintiff.

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

REVERSED.

JACOB MAJERUS, APPELLEE, V. HENRY C. BARTON, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,736.

Easements: PRESCRIPTION: ROADWAY. Where there has been an open, visible, continuous and unmolested use of a roadway across the premises of another for a period exceeding ten years, it will be presumed to be under a claim of right, and not by the license of the owner; and, where one seeks to close a way over his land which has been enjoyed by his neighbor for such period, he has the burden of showing that the use was permissive, and not under a claim of right, and, if he fails to overcome such presumption by a preponderance of the evidence, his case must fail.

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

Reavis & Reavis, for appellant.

C. Gillespie and *E. Falloon, contra.*

HAMER, J.

This is an appeal from a decree of the district court for Richardson county. The plaintiff, appellee, seeks to establish a roadway between his premises, the north half of the southwest quarter of section 12, in township 1, in range 16, Richardson county, Nebraska, and a public road running along the south line of the 80-acre tract adjoining on the south. The plaintiff and his grantors have owned the 80-acre tract in question for a period of about 40 years, and during that time they have traveled to and from the same along the west line of the south eighty to the public road. The right to use this roadway is claimed by prescription. A good many years ago a row of walnut trees was planted within the roadway, and about 7 or 8 feet from a hedge fence on the east side of the said roadway. About 3 years ago a wire fence was built about 6 feet west of the said row of trees. The fence and the row of trees run north and south the full length of the roadway. It is alleged in the petition that the limbs of the walnut trees grew so that they reached over the roadway and prevented the plaintiff from hauling hay and interfered with driving a covered carriage over the same, and, because of the limbs and the fence, it was almost impossible to get through, and especially when the road was wet and muddy; that the plaintiff had asked the defendant to remove his fence and to allow the trees to be trimmed and the rubbish accumulated to be taken out of the roadway, and that the defendant refused to permit this to be done; that, because of the fence and the walnut trees, the plaintiff was prevented from enjoying the free and undisturbed use of such way. The plaintiff alleged in his petition that the west 30 feet of the defendant's tract had been charged with and had become subservient to the easement of the said roadway for an uninterrupted period of 40 years; that the plaintiff and his grantors had been in the open and notorious use of said easement for that time; that the grantors of the defendant admitted that the ownership to said land covered by

said easement belonged to the plaintiff's grantors; that the plaintiff had been damaged in the premises in the sum of $50. There was a prayer for judgment for $50 and costs; that the defendant be ordered to take down the fence; that the use of the roadway of 30 feet be quieted in the plaintiff; and that the plaintiff be permitted to clear the said roadway of all obstructions.

A general demurrer to the plaintiff's petition was overruled, and the defendant answered admitting the ownership, but denied that there was an easement, and alleged that there was a strip of ground approximately 30 feet wide on the west end of the defendant's land which ran north and south leading to the public road from the plaintiff's land, and that the defendant had permitted the plaintiff to go over and upon said strip and to use the same in connection with the defendant and others as a roadway, but that the permission was a mere license granted by the defendant to the plaintiff in common with others; that the defendant was the owner of the row of walnut trees, and that he constructed and maintained a wire fence a few feet west of said trees, that no rights to the said strip had ever been granted to the plaintiff, or had inured to his benefit by prescription, or otherwise; that the plaintiff had due notice that his grantors had no right to said strip of ground, except the right given them by way of license or permission to use the same as a roadway in common with others; that the plaintiff had always recognized the ownership of the land in the defendant; that about the 7th of October, 1906, the plaintiff sought to purchase of the defendant enough of said right of way to give him a road thereon, and offered the defendant $112.50 for the same. Other allegations in the petition were denied.

There was a reply alleging said easement was the only way the plaintiff had of getting to and from the public road; that after the dispute arose plaintiff offered the defendant by way of compromise $125 for the easement; that the offer was made to avoid a lawsuit and trouble

with a neighbor; that plaintiff had always averred that he had complete title to said strip of ground by prescription; that said prescriptive right had existed in plaintiff and his grantors for more than 40 years.

The court refused defendant's application for a jury, and the case was tried to the court. There was a finding and decree for the plaintiff that the title of the plaintiff in the said easement be quieted, and the defendant ordered to remove the fence, and that plaintiff be granted authority to trim the walnut trees in so far as they interfered with the use and enjoyment of the easement, and that the defendant be enjoined from in any manner interfering with the easement, and pay the costs. Defendant appeals.

The principal assignment of errors would seem to be: (1) That the court erred in holding the case to be of an equitable cognizance; (2) in denying the appellant a trial by jury; (3) in finding for the appellee and rendering judgment in his favor. There is no question of the use of the way for a period varying from 35 to 40 years. There seems to be no question but what the limbs of the walnut trees are in the way and obstruct the road. The matter in controversy is whether the plaintiff has a right to the use of the roadway.

It is claimed by the appellant that the evidence shows that the use of the alleged way by Wyatt, who was the early owner of the north eighty, was with the express permission to do so by Mr. Elwell, the first owner of the said south eighty, and that Schuler, who was Elwell's grantee, exercised the same control over the south eighty that Elwell had exercised; that Barton became the owner of the south half a little over a year after the plaintiff became the owner of the north half; that Majerus undertook to buy the right of way from Schuler, and afterwards attempted the same sort of purchase of Barton when Barton became the owner of the south eighty; that Barton's deed called for just 80 acres of land, and that the deed that Majerus got from the Wyatt heirs called for just 80 acres of land, the north half of the quarter section, so that

Majerus bought no land at that point outside of the north half of the quarter section, and did not buy any land in the south half.

It would seem from the testimony of Majerus that, when he bought out the Wyatt heirs, he desired that they should sell him the strip of land on the west end of Schuler's land that had been occupied by the roadway, and which was then owned by Barton, and that the Wyatts refused. Majerus had bought the north eighty, and he also wanted to buy the road over the south eighty out to the public highway. In the brief of counsel for the appellant, they dwell upon the fact that Majerus told Barton, when talking to him about the lane, that he had offered Schuler money for the land, and that Schuler would not sell it.

Henry Wyatt testified that he was born and raised on the north eighty, and that he had lived there about 38 years, and that during that time his father and his father's family traveled through that lane to the public road; that the hedge on the east side of the lane was planted there probably 35 to 38 years before the trial, and that the walnut trees were planted about the same time; that Elwell, who owned the south eighty, had sold it to Charles Schuler about 17 years before the trial; that, when the limbs of the walnut trees grew down into the road and became obstructions to the hauling of threshing machines and loads of hay, he trimmed them; that Elwell had told him that the lane was not his (Elwell's), and to "trim the trees and throw the brush out of the way; he had nothing to do with it." He testified as if he thought that the strip was fenced off to be used as a road. He had first talked to Elwell about trimming the trees 25 years before the trial.

J. R. Messler testified that he had known the land since 1869 or 1870, and that he and McDowell went out to the lane; that the south eighty was then owned by Mr. Elwell and the north eighty by Mr. Charles Wyatt, and that a Mr. Bowers then owned the quarter west of both eighties, being the land now known as the Uhlig quarter: that

Wyatt, McDowell, Elwell, old man Bowers and some other gentlemen were out there to settle "a dispute on that road," and settled it; that they talked the thing over; that the legislature had the winter before made a law that all section lines were roads, "and on that basis they settled the road question right here" (the lane is on a section line); that McDowell was one of the arbitrators, and that the assertion was made in the presence of old man Wyatt, Charles Wyatt, old man Bowers and some other gentlemen. The witness did not know what was done about it, "only *they said it was settled.*"

Ralph Hanna testified that he had known the lane on the west end of the eighty that belonged to Barton for 35 or 40 years; that he had lived in the neighborhood 46 years; that it was 35 or 40 years since the hedge was put in; that the lane had been opened and used for 30 or 35 years. It was also shown that the improvements were on the west corner of the north eighty, that the house fronted west, and that the lane in question ran between two hedge fences, one of which was on the east side of the lane and the other on the west side.

Louis Bippes testified that he had known the lane for at least 20 years, that he had worked with Mr. Wyatt 7 or 8 years, and had been up through the lane at least a dozen times a year or more; that the lane extends from the public road to the Majerus eighty, and that there was a wire fence on the east side and a hedge fence beyond the wire fence.

Barton, defendant, testified that the lane was there when the purchase was made; that it extended up to the Majerus land and stopped there; that there were 50 walnut trees standing in the lane; that there were negotiations between Barton and Majerus for the purchase of the strip, but that the sale was not completed; that he (Barton) was willing that the walnut trees might be trimmed, only he wanted a competent man, Mr. George Chapp, to trim the trees, and was unwilling that Majerus should "potter around there." He seems to have been

afraid that the trees would be killed. He testified that he used the lane in common with Majerus; that he (Barton) trimmed the trees, mowed the weeds, and took care of the lane; he also testified that the fence had been there 3 years, and that during that time the threshing machine and loads of hay had passed up and down. Mr. Barton, on his cross-examination as to what had been said between him and Majerus concerning the settlement of the dispute, was not certain whether Majerus said that he would "rather make a settlement than have a lawsuit." He did not know whether they had talked compromise; that it was about 24 feet from the row of walnut trees to the hedge fence on the west side of the lane, and that he had left "a pass way of 20 feet as an accommodation to the neighbors." He also testified that the wire fence was west of the trees.

Thomas Davis remembered that he had seen Barton taking care of the trees, and he himself had cut the weeds when working for Barton, but he had also seen Wyatt cut limbs off the trees to get through the lane. Herbert Burke testified that he had traveled along the lane and hauled hay through it without difficulty. The testimony of Barton, Davis and Burke in part tends to establish Barton's seeming contention that the lane was free from obstruction. That Barton was willing to leave a pass way across the land for an accommodation to the neighbors suggests that he was not seriously contending that the road should be closed.

In *Smith v. Pennington* 122 Ky. 355, 8 L. R. A. n. s. 149, the way had been used 40 years. The owner of the land across which the way ran had put up gates at the boundaries of his land. After they had been there 15 years he undertook to place a fence where the gates had been. Held, that where he undertook to close the way he assumed the burden of proving that appellee's use of it was merely permissive. As he failed to prove that, the court ordered the gates restored.

In *O'Daniel v. O'Daniel,* 88 Ky. 185, 10 S. W. 638, the

question was whether the plaintiff had a pass way over the defendant's land. The court said: "At common law the long enjoyment of an easement gave the right to the easement, and the use continuing uninterrupted for 20 years or longer, when unexplained, created the presumption that the claim or use was adverse; * * * and it was not necessary to show, by positive testimony, that the appellant had claimed this use as a matter of right, and so proclaimed to his neighbors."

In *Talbott v. Thorn,* 91 Ky. 417, 16 S. W. 88, the court said: "Where the grantee of such way has used it for 15 years, the agreement may be used to rebut the idea of such use being permissive, and as establishing it as a right." In the same case the court held: "From the fact of the verbal agreement, and the user for 15 years, the presumption arises that the user was as a matter of right, and the burden is upon the vendor to rebut this presumption, and to show that the user was, notwithstanding the grant, permissive only, which the appellant has failed to do in this case; therefore, we must regard the appellee's right to the private passway as perfected by time." The principle announced in the foregoing Kentucky cases was declared by this court in *Bone v. James,* 82 Neb. 442, where the court said: "Proof of an uninterrupted use for the necessary period without evidence to explain how it began raises a presumption that it was adverse and under a claim of right, and the burden is upon the owner of the land, if he relies on such a defense, to show that it was by virtue of some license, indulgence, or agreement inconsistent with the right claimed"—citing 14 Cyc. 1196, and authorities there cited.

In *Hammond v. Zehner,* 23 Barb. (N. Y.) 473, affirmed in 21 N. Y. 118, it was said: "If a party claiming the easement shows an open and uninterrupted enjoyment for 20 years, as the defendant did here of the dam which involved the back flow of the water onto the plaintiff's land, proof must come from the other side to show that such use of the defendant's land was by license or permission, or that it was restrained or limited in point of time."

In *Pavey v. Vance,* 56 Ohio St. 162, it was said to be "a general rule that where a person uses a way in the enjoyment of his own land through the land of another, without let or hindrance, for the period of 21 years, in the absence of anything to the contrary, he thereby acquires a right by prescription to continue the use as an incident to his own land, and which will pass by a conveyance or descent of it. The fact of the use is open to explanation. It may be shown to have been permissive. But in such case the burthen is upon the owner of the land to show that the use was a permissive one." In this case it is said: "Prescription was not regarded as a source of title, but as a means of defense against the assertion of an originally superior title, one that would have prevailed but for the consideration given to long time possession."

In *Fleming v. Howard,* 150 Cal. 28, 87 Pac. 908, the court cited Washburn, Easements and Servitudes (4th ed.) 156 (*90), 14 Cyc. 1147, Jones, Easements, sec. 186, and other authorities, and said (quoting): "Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a nonappearing grant; otherwise the presumption stands as sufficient proof, and establishes the right."

In *Nowlin v. Whipple,* 120 Ind. 596, 6 L. R. A. 159, the court held that an executed parol license might become an easement upon the land of another; and that the way across the lands of another, though founded upon a permissive right, was irrevocable where expense had been incurred in perfecting the easement. The agreement had been acquiesced in for more than 30 years. The court said that a court of equity will not permit the license to be revoked.

In *Pierce v. Cloud,* 42 Pa. St. 102, 82 Am. Dec. 496, the defendant claimed a right of way over the plaintiff's land. The plaintiff forbade the defendant from going over the

land, and locked the gate, which the defendant took off its hinges, and went through and the plaintiff brought his action of trespass. Defendant proved the use of the way for 40 years, also that defendant had said to the plaintiff that plaintiff was very kind to allow him a way over the land, and had spoken of purchasing a right of way out from his place. There was a verdict for the defendant, and the court held that the owner of the land "has the burden of proving that the use of the easement was under some license, indulgence, or special contract, inconsistent with the right claimed by the other party," but said, "we do not think the owner made such proof here," and affirmed the judgment of the court below.

The easement is a right which one person has to use the land of another for a specific purpose. *Jackson v. Trullinger*, 9 Or. 393, 397.

The following authorities seem to sustain the appellee's contention: *Steffy v. Carpenter*, 37 Pa. St. 41; *Colburn v. Marsh*, 22 N. Y. Supp. 990; *Nicholls v. Wentworth*, 100 N. Y. 455; *Barnes v. Haynes*, 13 Gray (Mass.) 188, 74 Am. Dec. 629. Nor need there be an allegation that the user was adverse, where it is set forth that the plaintiff used the roadway continuously for 50 years with the knowledge and acquiescence of the owner.

The way is in a lane between two hedge fences, one of which is on the Bowers land and the other on the Barton land. Not only is the place between the hedges the right sort of place for a road, but the defendant's grantors planted a row of walnut trees, such as is usually planted to line a road. The acts of defendant's grantors were such as to indicate their intention to leave a roadway. They seem to have acquiesced in the demand of the owner of the north eighty for a road across the south eighty. It was a necessity to him, and it requires no flight of imagination to suppose that he demanded that which made it possible for him to live there in comfort. If the owner of the south eighty yielded, however slightly, to the demands of the occupant of the north eighty, and so far consented

that the occupant used the roadway until 40 years elapsed, the present owner of the south eighty has assumed a serious and difficult burden of proving that the use for all of these 40 years was merely permissive. Besides, the limbs of the overhanging trees and the weeds have been cut out of the roadway from time to time by the defendant himself, and he has kept the roadway open, assisted by the appellee. There is testimony that the defendant left it open as an accommodation to the neighbors. He gives this testimony himself. What does he intend to establish by keeping it open if it is not a roadway? It is not to be forgotten that this lane is on a section line. Neither is it to be forgotten that the legislature did declare that section lines were to be public roads. It may be true that they are not public roads until they are opened, but it is probably a common belief that they are public roads, and there is nothing strange in the testimony of Messler, who describes the dispute that was had, and he tells how Wyatt, McDowell, Elwell, and "old man" Bowers and some other gentleman went out to that lane to settle the "dispute on that road," and he understood that they did settle it. In the meantime the years have been going by, and four times the usual period to obtain a right by prescription passed before there was an attempted halt. It is presumed, under the authorities above cited, that the right of plaintiff to use the road owes its origin to a grant from the defendant or his grantors to the plaintiff or his grantors, and the defendant is required to overcome this presumption by a preponderance of the evidence. In addition, it may be said that the district judge was close to the witnesses and to all the circumstances of the case, and that he had perhaps a better opportunity to determine the facts than we have. We see no reason to reverse his judgment.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs only in the result.

HENRY WEHNES, APPELLEE, V. WILLIAM ROBERTS, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,834.

1. **Parol Evidence:** ADMISSIBILITY. "Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible." *Huffman v. Ellis*, 64 Neb. 623.

2. **Trial:** INSTRUCTIONS. The instructions examined, and *held* not to be prejudicial to the defendant.

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

J. W. James, for appellant.

J. E. Willits, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Adams county in favor of the plaintiff, Henry Wehnes. In the summer of 1908 the defendant, William Roberts, appellant in this court, sold the plaintiff a threshing outfit consisting of a steam engine and a grain separator, with blower and feeder and water tank with trucks, for the purchase price of which the plaintiff gave his promissory notes to the defendant, one for $600, payable November 1, 1908, and one for $700, payable November 1, 1909. The notes in question seem to have become the property of the Roseland State Bank in the due course of business. The plaintiff sued the defendant, alleging a contract whereby defendant was to furnish all the repairs needed by the threshing outfit for the year 1908, and that defendant was to place them upon said engine and separator when given notice to do so by the plaintiff. This part of the agreement was not evidenced by writing, but rested wholly in parol. The plaintiff gave notice of needed repairs, which the defendant refused to furnish, where-

upon they were purchased by the plaintiff. The plaintiff also alleged a warranty by the defendant that the machine would work, and that the defendant would make it work, and a breach of the warranty. The plaintiff prayed judgment for the value of the repairs and cost of putting them on, and for damage because of the breach of the warranty. The answer admits the sale of the machine, and denies the other allegations. The plaintiff had a verdict and judgment.

It appears from the evidence that the agreement for the sale of the machinery was made in April. This is the contract sued on. Contemporaneous with the making of this agreement, the parties executed a written instrument embodying at least some of the terms of the sale. The written instrument does not appear to have been introduced in evidence, but the testimony of both parties agrees as to what the instrument contains. Upon the trial the plaintiff was permitted to prove, over the defendant's objection, the parol contract sued on. The defendant's objection was that the testimony of the plaintiff himself showed the contract to have been reduced to writing, and that evidence of any agreement not shown by the writing itself was incompetent. While it is not permitted to vary or contradict the terms of a written instrument showing the terms of an agreement, that rule is not violated by evidence of a parol agreement either prior to or contemporaneous with the execution of a written instrument, if the parol agreement is as to some matter collateral to the agreement contained in the written instrument, or if the parol agreement constitutes the inducement for the execution of the written instrument.

In *Norman v. Waite,* 30 Neb. 302, this court held, as stated in the syllabus: "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 the body of the opinion Judge COBB, who delivered the opinion of the court, referred to the case of *Michels v. Olmstead,* 14 Fed. 219, and said that he did not remember to have seen the law on this subject so clearly stated elsewhere as by Judge Krekel in the case cited. He then gives Judge Krekel's charge to the jury: "When parties, without any *fraud* or *mistake,* have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneonsly or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

In *Huffman v. Ellis,* 64 Neb. 623, this court held, as expressed in the syllabus: "Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible."

In *Barnett v. Pratt,* 37 Neb. 349, this court held, as expressed in the syllabus: "A brought suit against B alleging, that C was indebted to A for wages; that B purchased C's business, out of which the debt arose, and in part consideration agreed to pay C's debt to A; that this agreement was omitted from an instrument in the form of a receipt set out in the petition, and containing other terms of the transfer, and that the omission was to prevent a third person from learning of the promise. *Held,* That the petition stated a cause of action." Also held that "such a promise, omitted from a written agreement, may be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise." Also that "such a promise is not within the statute of frauds." In the body of the opinion Commissioner

IRVINE said: "We cannot regard the instrument referred to in the petition as a contract complete in itself. It purports only to be a receipt. It is signed only by W. J. Pratt, and not by the party assuming these obligations, and its whole effect is that of an informal memorandum, and not the expression of a complete contract. 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 *Chapin v. Dobson*, 78 N. Y. 74, the New York court of appeals held, as stated in the syllabus: "The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply where the original contract was verbal and entire, and a part only was reduced to writing; nor does it apply to a collateral undertaking; these facts are always open to inquiry and may be proved by parol."

In *Ferguson v. Rafferty*, 128 Pa. St. 337, the supreme court of Pennsylvania held, as stated in the syllabus: "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 fraud, accident or mistake, parol evidence of the oral stipulation is admissible to add to or change the terms of the written instrument."

In a comparatively recent case this court held in *De Laval Separator Co. v. Jelinek*, 77 Neb. 192, as stated in the syllabus: "If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing." In the body of the opinion this court, through Commissioner AMES, said: "The sole ground, as it appears, upon which the objection was sustained and the instruc-

tion given is that the answer is an attempt to contradict or vary the terms of a written contract by oral testimony. Manifestly it attempts to do no such thing, but does attempt to show that the writing does not express the entire agreement of the parties, nor purport so to do. If it does so purport, it is doubtless as conclusive in that respect as it is with regard to any other matter concerning which it speaks; but, if it does not so purport, then the question whether it does contain the entire agreement, and, if not, what are the omitted terms of the contract, are questions of fact to be determined in like manner as any other fact that is or might be put in issue by the pleadings."

Both parties to the written instrument agree that it provided only for the time of delivery, and the time and manner of payment for the machine. It follows therefore that the contract sued on was collateral to the agreement contained in the written instrument, and in no way tended to contradict or vary its terms.

Complaint was next made by appellant of the giving of certain instructions; they being instructions No. 2 and No. 5. By instruction No. 5 the jury were told that, if they found for the plaintiff, then they were to "find such sum as you believe from the evidence will compensate him for the injury and damage he has suffered, not exceeding the sum of $415.50, and interest thereon from September 15, 1909; and, in determining the amount of such damage, you should take into account the cost of the repairs purchased by the plaintiff, and the value of the labor and time to place said repairs on said threshing outfit." It is contended by the appellant that this instruction had a tendency to mislead the jury, for that it would seem to authorize a verdict of $415.50, when, under the evidence and other instructions of the court, no recovery could be had for the breach of warranty, and, as $200 of the amount claimed was claimed for damages on this account, in no event could plaintiff have recovered more than $215.50. It is hard to see how this instruction could have misled the jury as the amount claimed by the

plaintiff for furnishing repairs and for the breach of warranty is set out by the court. The jury are further told that there is no evidence of damages for the failure of the warranty, and they are further told that the only issue is as to a contract for furnishing the repairs, and the cost of the repairs purchased by the plaintiff, and the cost of putting them on. These instructions, when construed together, state the issue fairly. The verdict returned was for less than the amount claimed as the money expended for procuring the repairs, and the error, if it was an error, was without prejudice.

It is further urged that this instruction and instruction No. 2 lay down an incorrect measure of damages, in that they make the measure of damages the cost of repairs to the plaintiff, rather than their reasonable value. While it is perhaps true that the proper measure is reasonable value and not actual cost, no prejudice resulted to the defendant, because the only evidence of reasonable value shows the reasonable value to be identical with the cost. It follows that this error, if it be an error, is likewise without prejudice. We are unable to discover any error in the proceedings.

The judgment of the district court is

AFFIRMED.

ROBERT J. GADDIS, APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 24, 1912. No. 17,828.

1. **School Districts: GOVERNMENT.** By the school laws of Nebraska (Comp. St. 1911, ch. 79), two distinct forms of school-district government are provided for; that of school districts in incorporated cities having more than 1,500 inhabitants being by boards of education and representative in form, while that of the ordinary district in the country and in smaller cities and villages is democratic in form.

2. ———: ———: **RURAL DISTRICTS.** The ultimate control of the rural

school district resides in the electors, and is exercised at annual or special school meetings; and the directions of the voters as to school buildings and sites must be carried out by the directors strictly within the limits of the powers conferred upon them at the school meeting.

3. ———: ———: CITY DISTRICTS. In city districts which are governed by boards of education, the powers of the district reside in the board of education, and there are no more limitations upon the authority of the board to select school sites and erect school buildings than are placed, in a rural district, upon the electors present at the school meeting.

4. ———: SELECTION OF SCHOOL SITES. Since the repeal of the proviso to section 23, subd. XIV, ch. 79, Comp. St. 1891, there is no requirement that the question of the selection of school sites or the erection of school buildings be submitted to the electors of a city district in order to authorize the board of education to purchase sites and erect buildings.

5. ———: POWERS OF BOARD OF EDUCATION: SCHOOL SITES AND BUILDINGS. Except as limited by the statutes restricting the amount of taxes that may be levied, and the provisions regulating the borrowing of money by the issuance of bonds, the board of education has full power to administer the affairs of the school district as to school sites and buildings.

6. ———: ———: ERECTION OF BUILDINGS: FUNDS. There is no prohibition in the statute against a board of education of a city district, such as the city of Lincoln, from adding money derived from taxation to money obtained from issuing bonds voted for building purposes in order to pay for the erection of school buildings, if in the discretion of the board it deems it for the best interest of the district so to do.

7. ———: ———: FUNDS: LEVY. The direction in section 23, subd. XIV, ch. 79, Comp. St. 1911, is that the board of education shall estimate the amount of money necessary for the support of schools, the purchase of school sites, the erection of school buildings, the payment of interest, and the creation of a sinking fund, and report the same to the county commissioners for levy. There is no distinction made between the collection of money for the support of schools and money for sites or buildings derived from the estimate and levy. The tax is levied in gross for the whole amount of money required as shown by the estimate. The amount levied is equally subject to anticipatory use for all purposes named in the estimate. *School District v. Stough*, 4 Neb. 357; *State v. Sabin*, 39 Neb. 570; *Andrews v. School District*, 49 Neb. 420; *Pomerene v. School District*, 56 Neb. 126, distinguished.

8. ———: ———: CONTRACTS FOR BUILDINGS: INJUNCTION. Where the amount of money required in a contract made by the school district of the city of Lincoln for the erection of certain school buildings does not exceed the amount of money on hand derived from the sale of bonds issued for building purposes, together with the amount of an estimate for building purposes made by the board of education, and a levy of taxes for that purpose made by the county commissioners for the current fiscal year, the contract will not be enjoined at the suit of a taxpayer as being *ultra vires* and void, because all the money is not in the treasury when the contract was made.

9. Injunction: COSTS. Where, at the time a contract for the erection of school buildings was entered into, it was in excess of the powers of the board of education to make, and where by mutual agreement the contract was subsequently modified so as to bring it within the authority of the board of education, the modified contract will not be enjoined upon the ground that it is *ultra vires*. But, since the modification was made after the action was begun, the costs in the district court are taxable to the defendant.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Mahoney & Kennedy, C. S. Allen and *Tibbets & Anderson*, for appellants.

Burr, Greene & Greene, contra.

LETTON, J.

This is an action by a taxpayer to enjoin the board of education of the city of Lincoln from carrying out a contract with the defendant F. P. Gould & Son for the erection of certain schoolhouses, and from paying the contractor any sum upon the contract, for the reason that the contract price exceeds the amount authorized for building purposes, and is in excess of the money and funds on hand at the time of the execution of the contract, that the construction of the Vine street school building contracted for was not authorized by a vote of the electors, and that the contract does not provide for the completion and furnishing of the buildings as voted by the electors, and,

therefore, is unauthorized, *ultra vires,* and void. The contract as originally made provided for the erection of a high school building and two grade school buildings. The price for each was separately fixed. The total amount payable in any event was $546,973, and provision was made so that the absolute liability, if certain options as to material were exercised by the board of education, would not exceed the sum of $493,683. By mutual consent the contract was afterwards modified by eliminating the provisions concerning one of the grade school buildings, so that at the time of the hearing the utmost liability of the district thereunder was $451,837, with optional reductions as stated. The district court found that the contract was void, and granted an injunction as prayed in the petition. Defendants have appealed.

The stipulation of facts agreed upon shows that, at the election which was held to authorize the issuance of bonds, a choice of locations as to the site of the high school building was submitted to the voters, and that as to the bonds the ballot permitted the voters to express themselves for or against "the $350,000 bonds and taxes (1) for erecting, constructing, finishing, furnishing and completing a high school building or buildings to be located on the place and upon the site to be selected by the electors at said election; (2) for erecting, constructing, finishing, furnishing and completing one grade school building (omitting description of location); (3) for erecting, constructing, finishing, furnishing and completing an annex to the Saratoga school, located on block 2, Cottage Grove addition to the city of Lincoln." Before the contract was let the bonds had been sold, and $362,860.61 had been paid into the treasury from the proceeds thereof, out of which sum $3,000 had been paid before letting of the contract. In June, 1912, the board of education submitted to the county commissioners its annual estimate, and included therein the sum of $100,000 for the purchase of real estate and new buildings. The county commissioners levied a tax of 32 mills for maintenance of schools, purchase of

sites, and construction of buildings, which according to the valuation of property in the district, would produce the sum of $13,306 in excess of the amount estimated. There was $41,045 on hand from the gross revenues of the preceding year. No contract for heating, plumbing, and furnishing has been let, nor will such contracts be entered into until the present contract is completed. The estimated cost of plumbing, heating and furnishing for the three buildings is $195,000. The annex to the Saratoga school has been constructed and paid for out of funds derived from 1911 taxes. The contract provides that the time limit for the completion of the Bancroft school shall be the 10th of August, 1913, and for the high school building, February 10, 1914. The architect testifies that if the work on the high school building is prosecuted with such diligence as would complete it on the date fixed in the contract, taking into account the reserved estimates, only about $200,000 would become payable on the contract on or before July 1, 1913, and if the Bancroft building is completed by the date fixed, August 10, 1913, the amount that would be due and payable would be $75,000. These seem to be the essential and determining facts in the case.

It is the contention of plaintiff that no authority is conferred upon the board of education to purchase school sites and erect buildings, unless authorized to do so by a vote of the electors of the district; that if by such vote the board has been authorized to issue bonds for the purpose of erecting, finishing and furnishing certain school buildings, it is beyond its power to enter into a contract to pay for the same more than the amount of money realized from the sale of the bonds on hand at the time the contract is entered into. In support of this contention he cites the case of *School District v. Stough,* 4 Neb. 357, which was an action by the assignee of certain school orders. The facts in this case were that the district was an ordinary country district, and that no authority or direction was given to the school board by the electors of

the district to build a schoolhouse or to let a contract therefor. At the previous school meeting a tax of 5 mills on the dollar had been levied for the purpose of building a schoolhouse. The board assumed that this gave it authority to act. It made a contract for the erection of a school building, issued orders upon the treasurer for the whole amount of the contract price, and delivered the same to the contractors in advance of any work, taking back a bond to secure the faithful performance of the contract. The contractors negotiated the orders the day after they were presented to and accepted by the district treasurer, and never built the schoolhouse. The court held that the orders were not negotiable and did not estop the school district as against a *bona fide* holder for value from availing itself of any defenses in the action which it would have had in an action brought by the original payee. After stating the facts, it said: "On these facts we are well satisfied that the school district is not liable on these orders." This disposed of the case, was all that was necessary to say, and all that was essential to the decision. But, Judge LAKE, writing the opinion, proceeds to say that the district board may not issue orders upon funds not collected, in order to evade the statutory provision that the " 'school district shall have power and authority to borrow money to pay for the sites for schoolhouses and to erect buildings thereon, and to furnish the same by a vote of a majority of the qualified voters of said district present at any annual or special meeting.' But, in whichever way the building fund is raised, it is entirely beyond the control of the district board, except for safe-keeping, until the electors of the district, legally assembled, shall give directions as to how it shall be expended," and, hence, that the action of the board was without authority. While not essential to the decision, the rule thus announced was a wise and salutary one, especially at such an early period in the history of the state, when thousands of schoolhouses were yet to be built. Paragraph 3 of the syllabus is as follows: "Contracts for

the erection of a schoolhouse should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof, on a fund which has been proposed, but not raised by taxation." And it is on this proposition that plaintiff makes his main contention. Other cases cited by plaintiff as following the *Stough* case will now be examined.

In *Gehling v. School District,* 10 Neb. 239, the court merely holds that, where the electors at the school meeting authorized the board to expend $20,000 in the building of a schoolhouse, the board had no authority to contract in excess of this amount, saying: "Not only is the authority to direct and control such expenditures withheld from the school board, but as we see is expressly entrusted to the whole body of the electors, by whom alone it can be exercised."

State v. Sabin, 39 Neb. 570, was a mandamus suit to compel the school district treasurer to pay an order, dated in 1889, and payable in March, 1891. The contract was made in July, 1889, and provided that payment should be made by orders drawing interest and payable a long time in the future. The court say: "This was directly issuing evidence of indebtedness against the school district due respectively in six, twelve, and eighteen months from date. * * * If evidences of indebtedness of the nature of that sought to be enforced in this action are to be held valid and binding, it will render wholly inoperative and useless the provisions of the statute regulating and restricting the issuance of bonds by school districts."

Pomerene v. School District, 56 Neb. 126, was brought to recover on the same contract as was involved in the *Sabin* case. The court held that both the time warrants and the contract were void; the warrants on the grounds stated in the *Sabin* case, and the contract because it provided for payment in illegal warrants.

Andrews v. School District, 49 Neb. 420, was an action brought to recover upon certain orders issued under a

contract made in 1888. The orders were payable in 1891. The court followed the *Sabin* case, and held that the school orders were void, but held that under the facts alleged in the petition recovery might be had upon the contract.

Markey v. School District, 58 Neb. 479, was also an action upon school orders payable at a future date; the contract being made in 1886 and the orders payable in 1890. In the opinion it is said: "School district officers can contract for the furnishing of schoolhouses only with reference to money on hand and at the time available for that purpose. The officers of the school district possessed no authority to make a contract or give a district order payable at a future time." This was a rural district.

Zimmerman v. State, 60 Neb. 633, merely holds that a school board, which at the time it was ordered to remove the schoolhouse had enough money on hand to pay the expense of removal, could not, a year later, justify itself by showing that it had not sufficient money on hand to move the schoolhouse and pay current expenses. It was held that, when a levy for these had been made, the fund might be drawn upon, even though not collected. It is said that the *Stough* case was correctly decided, but did not furnish a precedent in this case.

School District v. Randolph, 57 Neb. 546, follows the *Gehling* case in holding that in rural school districts the qualified electors at school meetings have the sole power to determine as to the erection of a schoolhouse and the extent of the expenditure to be made therefor.

Ladd v. School District, 70 Neb. 438, holds that a school board may not purchase a school site, unless authorized by the electors at a school meeting.

From this examination it appears that, in the only cases (*Andrews v. School District, State v. Sabin,* and *Pomerene v. School District, supra*) which involve school districts in cities in which boards of education are the governing body and in which no school meetings are provided for, the only matter in issue was with respect to the

validity of school orders made payable at a period long in the future, and issued when no levy had been made in order to provide a fund wherewith to pay the same. The question raised in this case as to whether boards of education in the school districts provided for by subdivision XIV, ch. 79, Comp. St. 1911, may lawfully make such a contract as this is still open. It is true some unguarded expressions have been used, particularly in the *Andrews* case, where the matter was not at issue and where the provisions of the particular statute involved here were not considered, but the questions here are new and must be determined from a consideration of the statutes bearing upon the subject.

A chronological examination of the statutes in this respect affords light upon the problem. The first act relating to common schools in the territory of Nebraska was passed in 1855. 1 Complete Session Laws, p. 89. Under the plan of organization provided thereby, the corporate power of the district resided in the electors assembled in school meeting, a board of three directors being elected at that time to carry out, as agents of the district, the powers conferred upon them at the meeting. The organization of the corporation was substantially the same as that provided for schools in rural districts at the present time. A new statute, differing mainly in matter of detail, was passed in 1856. 1 Complete Session Laws, p. 231. In 1858 (1 Complete Session Laws, p. 559) the latter act was repealed, and a new act was passed which created township districts, and placed the management and control of the same in the hands of a board of education. This is the first instance in the legislative history of the territory of the creation of a board of education as distinct from a board of directors. This act provided for the creation of subdistricts, and the election of a board of three directors in each subdistrict. These local directors were vested with similar powers with relation to schoolhouse sites and buildings as held by directors under the former acts, but their powers and authority in respect to such

matters were derived from the township board of education, and not from the electors at a local school meeting. The act provided, in section 12, that the board of education had full power "to build, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rent suitable schoolrooms, and make all other necessary provisions relative to such schools as they may deem proper." By section 21 it was the duty of the township board of education to make annually estimates of the amount of money necessary for the support of the schools, and certify the same to the county clerk, who should assess the same upon the taxable property of the township. By section 22 the board had power "to estimate separately the cost of purchasing a schoolhouse site and erecting or repairing a schoolhouse thereon, in any particular subdistrict of the township, * * * which amount so certified shall be assessed by the county clerk on the property therein subject to taxation and placed on the county duplicate, specially to be collected and paid over in the same manner as other school taxes, and be applied for the specific purpose of providing a schoolhouse in the subdistrict." By section 30 of the same act each city or incorporated village which, with the territory annexed, contains not less than 300 inhabitants was created a separate school district. And it was provided that three persons should be elected in such city district who should constitute the members of the board of education of such district, and who should have the same powers and perform the same duties as a township board of education. This act seems to change the plan of government, and to take away all power from the school meeting, except to elect directors.

The next act of any importance seems to have been passed in 1866. 2 Complete Session Laws, p. 118. It changed the title of the "township board of education" to that of "precinct board of education." It retained in the board of education the powers which they possessed under the former act, conferred certain limited powers

as to central or high school districts in the precinct, but made no change as to the powers of the board of education in city or village districts.

In 1867 by "An act for the revision of the school law" (2 Complete Session Laws, p. 380), a return was made to the system of school districts governed by school meetings, and all powers respecting school sites and buildings were conferred upon the qualified voters in meeting assembled.

In 1869 a new act was passed, entitled "An act to establish a system of public instruction for the state of Nebraska." 2 Complete Session Laws, p. 448. This act, with but a few changes, has been carried forward into our present statutes with respect to the organization and government of rural school districts. It may be said that few of the former acts contain any repealing clause, but this repealed the act of 1867, and all other acts and parts of acts inconsistent with this act.

In 1871 a special act relative to schools in the city of Omaha was passed. 2 Complete Session Laws, p. 608. This act created a board of education with like powers to those possessed by the boards of education in city and village districts under the former acts. It contained, for the first time, provisions authorizing the board of education to issue bonds if necessary for school sites or buildings, with the proviso that no bonds should be issued without the consent of two-thirds of the board of education, and that if the bonds desired should exceed in amount the sum of $15,000 the question of their issuance should be submitted to the electors at a special election.

In 1872 a special act for the government of the schools of Nebraska City was passed (2 Complete Session Laws, p. 640) which constituted the mayor and common council commissioners of the schoolhouse fund, and conferred upon them "all the rights, powers, and authority necessary for the purpose of raising money for erecting, purchasing, or leasing schoolhouses, and procuring sites therefor, and fitting up and furnishing thereof." Sections

4 and 5 of this act are substantially the same with respect to the duties of the commissioners in purchasing sites and building schoolhouses as provided in the Omaha act.

In 1873 a general act was passed, entitled "An act relative to public schools in cities of the first class." 2 Complete Session Laws, p. 698. The same powers and duties with respect to schoolhouses and sites, and the same limitation with respect to the issuance of bonds, are contained therein as in the former acts relating to Nebraska City and Omaha, with the further provision that, if the purchase of sites and the erection of buildings require the expenditure of more than $15,000 for any one calendar year, the question shall be submitted to a vote of the electors, and the board of education shall, previous to such election, designate in at least one daily paper published in the district the locality of the site or sites required and the cost of the building to be erected thereon.

In 1875 (2 Complete Session Laws, p. 885) a similar act was passed relative to cities of the second class, but omitting the provision that the question of expending more than $15,000 for schoolhouses or sites be submitted to the electors.

In 1881 an attempt was made to revise and codify the entire system of school laws into one comprehensive statute. An act was passed, entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. This act, as amended from time to time, is now in force. The first five subdivisions provide for the organization of school districts according to the town meeting plan, except in cities and villages with more than 2,000 inhabitants (now 1,500), and substantially as provided in the act of 1869. Other subdivisions provide for the organization of country high school districts; the qualifications of teachers for normal schools; for the distribution of state school funds, etc. The fourteenth subdivision, which is applicable to the school district of Lincoln, provides for the organization and administration of schools in all incorporated cities having

a population of more than 1,500, and leaves the powers and duties of the board of education practically as they were in the act of 1873. This act specifically repeals the acts of 1867, 1869, 1871, 1873, 1875, and all amendatory acts.

In 1893 the proviso that, in case the purchase of sites and erection of buildings for any one calendar year requires the expenditure of more than $5,000, the question shall be submitted by a notice specifying the locality of the site required and the cost of the proposed building was stricken out by amendment. Laws 1893, ch. 31. This left the question as to the issuance of bonds the only matter as to which the board of education is bound to take a vote of the electors.

The provisions of section 4, relating to ballots for the purchase of sites and erection of buildings, clearly apply to the repealed proviso, and are like the splint bones in a horse's leg, or the hidden and rudimentary legs of some snakes, merely evidence of a discarded function. The argument based upon section 4, therefore, must fail.

From this survey of the course of legislation in the territory and state, it is apparent that two systems of school administration have existed side by side for more than half a century; one vesting the control of the corporation in the electors at the school meeting, and the other making the board of education the governing body. The act of 1873 (Gen. St. 1873, ch. 69), relative to schools in cities of the first class, provided in section 4: "That the affairs of the school district hereby created shall be conducted exclusively by boards of education, except as otherwise provided by this act." This thought is carried forward into section 1, subd. XIV, of the present act (Comp. St. 1911, ch. 79) in the following language: "The board of education, by this subdivision provided, shall have exclusive control of the same (all property of the district) for all purposes herein contemplated." Under the subdivisions relating to country districts, their government and control is almost a pure democracy, while

as to city districts the plan of government by boards of education is representative in form, limited only by the provision for a referendum to the electors on the question whether money shall be borrowed, by the issuance of bonds, for school sites and the erection of schoolhouses. The powers which under the one plan are conferred upon the electors, are by the other conferred upon the board of education. Since the proviso was repealed, there are no more limitations upon the powers of the board of education, to select school sites and erect school buildings, to be found in the statutes, than are placed, in a district organized under the other form, upon the electors present at the school meeting. The board, therefore, possesses all the powers of the electors themselves, except that, if money becomes necessary for the purchase of sites or the erection of buildings in excess of that which may be raised by direct taxation, the question of whether bonds may be issued must be submitted to the electors under section 24. If no bonds are necessary, a board of education with the powers of that of the city of Lincoln may select and purchase sites and erect school buildings thereupon by money derived from taxation. This seems to be the view taken in other states as to the powers of such boards under similar statutes. *Gunnison v. Board of Education*, 176 N. Y. 11, 17, 25; 35 Cyc. 832, note 80; 25 Am. & Eng. Ency. Law (2d ed.) p. 54.

This conclusion as to the power and authority of the board of education disposes of the contentions that the contract is void for the reasons that the contract price exceeds the amount authorized by the electors for building purposes; or because the construction of the Vine street building was not authorized by a vote of the electors; or for the reason that the contract is not in accordance with the authorization of the electors, in that it does not provide for the completion and furnishing of the buildings, and that a further large expenditure will be required for plumbing and heating.

The only question left for consideration is whether the

contract is void because the amount agreed to be paid exceeds the money and funds on hand at the time that the contract was made. As we have seen in our review of the cases, this exact question has never been decided so far as concerns a city district, though it has been assumed that the holding as to rural districts applied. The only provisions of the statute controlling the board of education as to this question are to be found in sections 23, 24, subd. XIV, ch. 79, Comp. St. 1911, and, so far as applicable, are as follows: Section 23. "That the board of education shall annually, during the month of June, report to the county commissioners an estimate of the amount of funds required for the support of the schools during the fiscal year, * * * the erection of school buildings, the payment of interest upon all bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness; and the county commissioners are hereby authorized and required to levy and collect the necessary amount the same as other taxes." Section 24. "That the aggregate school tax, exclusive of school bond taxes, shall in no one year exceed 35 mills."

The direction in section 23 is that the board shall estimate the amount of money necessary for the purchase of school sites, and the erection of school buildings, as well as the money needed for the support of schools, the payment of interest, etc. There is no distinction made between the collection and expenditure of money derived from the same levy for the support of schools, and money to be used for sites and buildings. When the amount required for all school purposes is certified to the county commissioners, they ascertain the percentage, and make the levy necessary to produce the money called for, in gross, and as a general fund. There is no provision in the statute for making distinct levies for each of the many purposes for which the estimate is made and the money required. The tax is levied for the whole estimate and the collector places it all in the same fund. It is presumed that the board will follow the estimate in expend-

ing the money, and perhaps it may be required to do so, but this we do not decide. Moreover, if any benefit from the levy is to be had during the fiscal year next ensuing, it must be subject to anticipatory use for all the purposes mentioned in the estimate. The exact question here is not whether the board may issue warrants upon the current levy, but it is whether the board may lawfully enter into a contract upon which it may become necessary at some time in the future to make payments, at a time when, although the levy has been made, the money has not all been actually collected. The fund being general, and there being no distinction in the law between money levied and collected for building and that for other purposes, we are convinced that the board has power to contract upon the basis of the levy, and before the taxes are collected. *School District v. Fiske*, 61 Neb. 3. The other opinions in *Fiske v. School District*, 58 Neb. 163, 59 Neb. 51, merely decide that the board of education of the city of Lincoln had power to contract for plans for a school building, even if the doctrine of the *Stough* case, *supra*, applied as to the erection of the building itself.

Coming now to the facts: When the contract was let, $359,860 was in the treasury from the sale of bonds and $41,045 from the gross revenue of the previous year, so that $400,905 was actually in the treasury at that time. The contract provides for the payment of $336,622 for the erection of the high school building and $115,215 for the erection of the Bancroft building, so that the total amount required to make the payments under the contract is $451,837, as against $359,860 on hand from the proceeds of the sale of bonds and $113,306 available from the proceeds of the levy outside of that required for other than building purposes. This exceeds the amount payable under the modified contract by several thousand dollars.

As to the contention based upon the fact that the proposal as to the issuance of bonds when presented to the voters contained specifications as to the manner in which the board purposed to expend the money: As we have

seen, no statute makes this a condition to the exercise by the board of its duties in providing school buildings. The result of the submission must be considered, therefore, obligatory as a limitation of the power to issue bonds, and advisory as to the manner of their expenditure. If in good faith the board is attempting to carry out the main purpose for which the bonds are voted, no one is entitled to interfere with its discretion as to details. The money raised by the bond issues may be used, as far as it goes, in carrying out the purpose of the board, but we know of no reason why it may not be added to by money derived from other sources if the necessities of the district require. *McCavick v. Independent School District,* 25 S. Dak. 449.

The stipulation recites: "That the three school buildings proposed to be constructed by said contract are needed for immediate use in said school district; that there are now 375 pupils more than can be accommodated in the present buildings of the defendant; that the school district is compelled to use and does use rooms in store buildings and basements for schoolrooms, and that half-day sessions are general in the lower grades; that at the beginning of the present year there was an increase in the enrollment of 335 pupils, in the grades alone, over the enrollment of the preceding year, which increase is of itself sufficient to fill a grade building of the size contemplated in said contract; that a large number of the present buildings are very old and unsanitary, poorly lighted, and with no system of ventilation; and, while the cost of the new buildings is a considerable sum, it is the lowest figure for which the actual necessities of the public schools of this district can be supplied."

The plaintiff is here seeking the extraordinary writ of injunction against the officers of the school district, to restrain what he asserts to be both a public and private wrong. The presumption is that the officers acted within their authority and did not transgress its scope, and the burden is on the plaintiff to disclose facts which will

justify the court in the issuance of the writ. Nothing should be left for inference.

We are of the opinion that the contract, as modified, is within the power of the board of education to make, and the judgment of the district court is, therefore, reversed. Since, however, when the action was begun, the contract price for all three buildings exceeded the money on hand and available, the costs of the action in the district court were properly taxed to the defendants.

REVERSED.

HAMER, J., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1913.

WILLIAM D. TULLY, ADMINISTRATOR, APPELLEE, V. GRAND ISLAND TELEPHONE COMPANY ET AL., APPELLEES; FAIRMONT CREAMERY COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 16,877.

1. **Master and Servant:** ASSUMPTION OF RISK. One who contracts to perform labor for another takes upon himself the assumption of such risks only as are necessarily and usually incident to the employment.

2. ——: ——: DUTY OF MASTER. If the employer has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the employee to be, he is bound to inform the employee of the fact, and, if he fails so to do, he is liable to the employee, or his representatives, for such damages as may result by reason of such cause.

3. **Pleading:** SUFFICIENCY AFTER TRIAL. It was alleged in the petition, in substance, that plaintiff's intestate, an employee of defendant, was killed by coming in contact with a broken guy wire, heavily charged with electricity, near defendant's place of business, and in the line or track which defendant's employees usually traveled in entering and leaving their place of employment; that defendant knew of the dangerous condition of the wire, but negligently failed to and omitted to remove the danger or warn the decedent of its existence, and the death resulted without negligence on the part of the decedent. *Held*, That when attacked for the first time after judgment, the petition would be liberally construed, and held to state a cause of action.

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

R. R. Horth and *Greene, Breckenridge, Gurley & Woodrough*, for appellant.

O. A. Abbott, A. G. Abbott, W. H. Thompson, Charles G. Ryan, F. W. Ashton and *B. H. Paine, contra.*

REESE, C. J.

Plaintiff, as administrator of the estate of Stewart E. Tully, deceased, brought suit in the district court against the Grand Island Telephone Company, the Grand Island Electric Company, and the Fairmont Creamery Company, corporations, for damages resulting from the death of Stewart E. Tully; said death being caused by the alleged negligence of defendants. Issues were joined, a trial had, when the jury returned a verdict in favor of plaintiff and against all defendants for $2,000. No motion for a new trial was filed by either the telephone or electric company. A motion was filed by the creamery company, but was stricken from the files because not filed within the time prescribed by law, when judgment was rendered against all defendants for the amount of the verdict. The creamery company appeals.

Among the errors assigned was that of the action of the district court in striking the motion for a new trial from the files. That ruling was reviewed by this court, and the decision is reported in 87 Neb. 822; the order of the district court being affirmed.

There remains but one question for decision, which is: Do the allegations contained in the petition state facts sufficient to constitute a cause of action against the appellant, the creamery company? The petition is of considerable length, and its substance only will be here stated. It is alleged that the electric company had its wires of very high voltage strung upon the poles in the streets of the city of Grand Island; that the telephone company also had its wires similarly placed in close and dangerous proximity to the wires of the electric company,

and that in so placing their wires both were negligent; that, at a place near the building occupied by the creamery company, there was a guy wire attached to the pole occupied by the two defendants; that the guy wire came in contact with the wires of said defendants, by which it became heavily charged, the lower end thereof becoming released, and the wire dropping upon the street; that early in the morning the decedent, being in the employ of the creamery company, while passing into the place of business of that company, came in contact with the suspended wire, received a shock therefrom, and was killed. That a cause of action was stated against the other two defendants is not questioned, and the averments need not be repeated here, except as may become necessary to an understanding of those which refer to appellant creamery company. There is some discussion of the evidence in the briefs; but, as we are precluded from consulting the bill of exceptions, the case must stand or fall upon the allegations of the petition alone. It is alleged that the decedent was in the employ of the creamery company; that the fallen wire was lying on the sidewalk and in the street near the building and place of business of that company; that said company employed a large number of employees, and operated its plant night and day; that the decedent was employed by it to work nights; that it was his duty to report in the morning when going off duty; that it was the duty of the company to provide a safe place in which its employees were to work, and provide safe exit from and entrance to its place of business; that, well knowing that its employees and others necessarily used the street and sidewalk, where the wire was suspended, in going to and from its place of business, it carelessly and negligently allowed the said heavily charged wire to hang near the corner of its building down onto its sidewalk and the street, and to lie coiled upon the sidewalk and on the street, directly in the path of persons and employees using the same, and well knowing that the wire carried the heavy current of electricity, dangerous to

human life, and likely to endanger the life of any employee or workman who came in contact therewith, it carelessly and negligently failed and omitted to provide against said danger, either by removing the wire, or warning decedent of the presence of the same or of the danger therefrom; that the said Stewart E. Tully, while in the act of returning to said building to report "off duty," without fault or neglect on his part, came in contact with said wire and was killed, owing to the neglect of said creamery company and its codefendants.

It is provided in section 121 of the code that, "in the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties." The rule of the statute is given its full effect where the contention is made for the first time after the judgment, or in the supreme court. *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Chambers v. Barker*, 2 Neb. (Unof.) 523; *Sorensen v. Sorensen*, 68 Neb. 483; *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309; *Latenser v. Misner*, 56 Neb. 340; *First Nat. Bank v. Tompkins*, 3 Neb. (Unof.) 334. Applying this well-known rule to this case, it appears from the petition that the instrument of death was near to and practically adjoining defendant's place of business, and where it was known to defendant that its employees would have to pass and repass in going to and from the entrance to the building, and that defendant knew of the danger and the exposure of its employees to it, but negligently failed and omitted either to remove the wire or warn its employees of their danger, and, by reason of its failure so to remove the danger or warn decedent of its existence, the decedent was killed.

It is true, as a general proposition, that a defendant cannot usually be held liable for accidents caused by the acts or omissions of others over which he has no control, but a different rule must be applied where the instrument of danger is within such close proximity to his place of

business as to be a menace to his employees, if he has knowledge of the danger and fails to seek its removal or warn his employees against it. In *Baxter v. Roberts*, 44 Cal. 187, 192, it is said: "That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that, if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established." Other cases might be cited to the same effect, but it is not deemed necessary.

Under the well-known rule for the construction of pleadings in such cases, it must be held that the averments of the petition are sufficient to constitute a cause of action.

The judgment of the district court is therefore

AFFIRMED.

JAMES M. WOODCOCK, APPELLEE, V. UNKNOWN HEIRS OF MARY CROSBY ET AL., APPELLEES; E. H. HUBBARD ET AL., APPELLANTS.

FILED JANUARY 16, 1913. No. 16,912.

1. **Adverse Possession.** "One who has been in the open, notorious, exclusive adverse possession of real property for ten years becomes vested with a valid title to the same." *City of Florence v. White*, 50 Neb. 516.

2. ———: EVIDENCE. Evidence of the possession of real property "as owner" is not limited to the declarations or testimony of the claimant under the statute of limitations. The character or quality of the possession and use may be considered as the test.

3. Appeal: HARMLESS ERROR. The fact that the trial court erred in a part of its finding and decree, and the error is in favor of the otherwise losing party, and does not inhere in the general decree in favor of the successful party, and is without prejudice to the appellant, will not require a reversal of the decree.

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

E. A. Burgess and *R. E. Evans,* for appellants.

Alfred Pizey and *Paul Pizey, contra.*

REESE, C. J.

This is an action to quiet the title to a number of lots in the village of South Sioux City, in Dakota county. A large number of persons were made defendants. The basis of plaintiff's claim, by which he alleges he became the owner of the property described in the petition, is that of adverse possession for more than ten years prior to the commencement of the suit. The possession is alleged to have been taken in the month of March, 1892, and continued up to the time of filing his petition in April, 1909. It appears that the defendants were improperly joined, as their record and paper titles are in many instances separate and several. However, answers and cross-petitions were filed, and, in so far as the answering defendants and cross-petitioners, appellants, were concerned, the causes were tried together, and are so presented to this court. The answers and cross-petitions are substantially alike, and consist of, first, general denials of the averments of the petition, with reference to the occupation and ownership of plaintiff; second, allegations of title in the answering defendants, and demand for an accounting of rents for the time it is alleged that plaintiff has wrongfully held possession, the same being declared to be for less than ten years, and that their titles be quieted. Cross-petitions were not filed by all defendants, the answer consisting

of denials. The cause was tried to the court, and a finding and decree were made and entered in favor of plaintiff and against the appealing defendants.

In the brief of defendants it is stated, no doubt correctly, that, as to the parties before this court, there was a waiver of separate trials, and the causes were tried together, upon the same evidence, although three separate and distinct appeals are involved in and presented by this record, to wit, E. H. Hubbard, as trustee for the Gateway Improvement Company, as to lots 2, 3, 4, 5, 7 and 8, in block 16, Railway addition, Second plat; Rose S. Taylor, as legatee and widow of Henry J. Taylor, deceased, and Edward B. Spaulding, who claim to own jointly lots 6 and 10, in block 16, Railway addition, Second plat; and the heirs of Mary Crosby, as to lot 6, in block 4, in Smiley & George's addition to South Sioux City. What disposition was made of the action, as to other lots and against other defendants, does not concern us in this investigation. The assignment of errors may be fairly said to be: That the findings of the court are not sustained by the evidence; that they are inconsistent; that they should have been in favor of defendants; and that the court erred in not dismissing the suit upon the close of plaintiff's evidence in chief, it being contended that the plaintiff had not shown himself entitled to any relief.

In so far as the plaintiff's possession is concerned, there is little, if any, conflict in the evidence. Stated in a general way, it is to the effect that in the year 1891 or 1892 a portion of the ground at least was grown up in brush, when plaintiff took possession, grubbed it, plowed and cultivated it, inclosing it, and has cultivated it ever since, no one questioning his right or possession. Each year that portion of the land has been cultivated by him or his tenants, principally by himself. Block 16 is situated in what is known as the "Y," which is between two railroad tracks, near their junction. The inclosure was made by the construction of a wire fence extending from and between the fences of the railroad along its right of way

upon either side. In late years that portion of the fence has not been kept up. All the other lots involved in this appeal were fenced and in part cultivated from the date and during the time above stated. The whole time of occupation extended over some 14 to 16 years continuously prior to the commencement of the suit. There seems to be no doubt but that the occupation and use of the property was open, exclusive, continuous, and never questioned. It is claimed by appellants that it was not adverse to the true owners, and that, for that reason, the statute of limitations has not run in plaintiff's favor.

The evidence as to the actual possession of the property in dispute by plaintiff was practically the same at the close of his case in chief as upon the close of the trial and final submission, and the contention that the court erred in overruling the motion to dismiss will be disposed of by the review of the whole case, and need not be further specifically noticed.

The further contention that there is an inconsistency in the decree is not without reason, but we are unable to see that the inconsistency referred to so inheres in the decree rendered as to require its reversal. The criticism is with reference to lot 5, in block 24, Railway addition, Second plat, which is claimed by the Crosby heirs. The evidence as to the possession of that lot is the same as that with reference to the other property. There was no difference in the claim of plaintiff between that lot and the others, and yet the court defeated plaintiff as to it, and the defendants as to all the other property. If plaintiff was entitled to recover at all he was entitled to a decree for the whole. He filed no cross-appeal, and therefore the decision as to the one lot is final. We are unable to find any ground for the distinction. It may have been based upon a letter written by plaintiff to T. F. Crosby on the 19th of February, 1909, in which plaintiff sought to purchase that particular lot, giving his reasons therefor, which need not be noticed here. If the plaintiff's title to any of the property was perfect by adverse possession, it

had been so for at least five years before that letter was written, and the offer to buy could not affect that title. If that was the reason for the decision as to that one lot, it was erroneous, but we are unable to see how it can inure to the benefit of defendants. The prejudice, if any exists, is against plaintiff, and he is not complaining. This leaves the case, as to the other property and appellants, to be disposed of upon the evidence and the law applicable thereto. As we are unable to detect any material or controlling difference between the contentions of appellants, if considered separately, we may not be expected to examine each individual appeal separate and apart from the others, as the same principles of law must be applied to each.

It must be conceded that plaintiff was in the open, continuous, uninterrupted and exclusive possession of the property from at least as early as the year 1894 to the time of the commencement of this suit in 1909, a period of at least 15 years. The evidence tends to prove that the possession began in 1892, which would make the duration of the possession 17 years. While this is not seriously disputed or questioned by defendants, it is urged with much earnestness and no little ability that the possession was not adverse nor under any claim of ownership; that the whole of the possession was a wanton trespass without any claim of right; that it was permissive and without any knowledge or suspicion on the part of appellants that any claim of ownership would be made by plaintiff if allowed to remain in the use of the property. There can be no doubt but that if appellants were at all familiar with the property they knew of plaintiff's possession; that he cleared block 16 of the woods thereon, had inclosed and cultivated it during all those years, and yet no objection was made and no permission given. They may have acquiesced, but there is no evidence of permission. They knew the law that the possession might ripen into a title, depending on the quality of that possession. If plaintiff was a wanton trespasser, they had the full ten

years in which to assert their right and oust him. A lease, or other recognition of their rights, would have prevented the running of the statute if his possession should be adverse, yet no steps were taken until long after the expiration of the statutory period. He undoubtedly was a trespasser at the commencement of his possession. He entered by no color of right, but that would not prevent the statute of limitations running in his favor if the possession continued and was adverse. So far as outward indications could go, he exercised all the rights of ownership by inclosing and cultivating the land, thus excluding all others from the possession. By his testimony and actions he occupied the property *as* owner, that is, as any owner would do. There is no direct evidence that at and during the time plaintiff entered upon and occupied the property he then claimed to be the owner of the same. He was asked the question when upon the stand in rebuttal, but, upon objection being made by defendants, he was not permitted to answer. It is well-settled law that, in order to have the protection of the statute of limitations, the possession of the disseizor must be "as owner," but the method of proving the claim of ownership is not limited to his testimony upon the witness stand, nor to his declarations of ownership during the period of occupation within the time provided by statute. The character or quality of the possession and use are proper to be considered as the test. The clearing and the grubbing of the brush and trees growing thereon, its inclosure so as to exclude all persons who might desire to enter, the annual cultivation of the soil, and the renting or leasing of it to tenants, are all acts indicia of ownership, and are sufficient notice to the rest of the world that the possession is adverse. *City of Florence v. White,* 50 Neb. 516; *Horbach v. Miller,* 4 Neb. 31; *Gatling v. Lane,* 17 Neb. 77, 80; *Lantry v. Parker,* 37 Neb. 353; *Lewon v. Heath,* 53 Neb. 707. In *Ryan v. City of Lincoln,* 85 Neb. 539, while the decision was against the claimant on account of his testimony being such as to negative any claim as owner,

Judge ROOT, in writing the opinion of the court, said: "The fact that the tract had been inclosed by a fence more than ten years preceding 1899, and that plaintiff and his grantors during that time had received all benefits that accrued from an exclusive occupation of the land, unexplained by other evidence, would unquestionably support a judgment in his favor. Those acts, in the words of Judge GANTT, 'are presumptive evidence and evincive of intention to assert ownership over and possession of the property.' *Horbach v. Miller,* 4 Neb. 31. If, however, that presumption is met by the sworn admission of the occupant that in exercising dominion over the land he did not claim to own it, the presumption will disappear."

We conclude therefore that the adverse character of plaintiff's possession is sufficiently proved to sustain the decree of the district court. The contention of defendants that, in order to set the statute of limitations in motion, the possession of the occupant must be as owner is fully recognized, but the claim of ownership may be proved by the circumstances attending the occupation. Certain facts are proved which might bear the construction of a disparagement of plaintiff's claim of ownership; but, as they all occurred subsequent to the complete running of the statute, they are not at all conclusive and need not be discussed.

The judgment of the district court is

AFFIRMED.

SAMUEL PATTERSON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED JANUARY 16, 1913. No. 17,637.

1. **Officers:** DE FACTO OFFICERS. Where a person who has been appointed to an office qualifies for the position, assumes the duties of the office, is actually engaged in the discharge of its functions under color and claim of right to the office, acquiesced in by the

public during all of the time of his occupancy, such officer will at least be deemed and held to be a *de facto* officer. *Dredla v. Baache*, 60 Neb. 655.

2. ———: CLAIMANTS: RIGHT TO COMPENSATION. Where a *de facto* officer has discharged all the duties of a state office, has been recognized by the state accounting officers as properly and legally holding the office, paid the salary for the full time out of an appropriation made for that purpose, thus exhausting the fund, a claimant of the office who discharged none of its duties cannot, after the expiration of the term, enforce the payment to himself of the salary from the state. The fact that the claimant was deprived of the right to the office by an injunction wrongfully issued out of the circuit court of the United States, and which was subsequently set aside by the supreme court of the United States on appeal, would not affect the rights of the state in an action by the claimant to recover the salary, the same having been paid to the person who performed all the duties of the office under a claim of right, and whose incumbency was acquiesced in by the state officers and the public.

3. ———: QUALIFICATION: SECRETARY STATE BANKING BOARD. The law requires the secretary of the state banking board to give an official bond for the faithful performance of the duties of the office. The giving and depositing of the bond in the office of the secretary of state is a prerequisite to the holding of the office and the discharge of its duties. Where an appointee to such office executes his bond, files it with the secretary of state, but later withdraws it, leaving no bond in its stead, and discharges none of the duties of the office, he is not entitled to the salary, another having discharged all the official duties under a claim of right and having been recognized by the state and the public as such officer, the salary having been paid to him by the accounting and disbursing officers of the state.

4. States: SALARIES OF OFFICERS: PAYMENT. The state pays a salary but once, if paid through the regular channels provided by law for the payment thereof, and by which the appropriation for that purpose is exhausted.

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

Matthew Gering, for appellant.

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

REESE, C. J.

In the year 1909 the legislature of this state passed what is popularly known as the "Bank Guaranty Law." Laws 1909, ch. 10. Under the authority and provisions of that law, the governor appointed plaintiff to the office of secretary of the state banking board. The salary of that office was fixed by the act at $3,000 a year. The appointment was made after the passage and approval of the act, but before it became effective; there being no emergency clause contained in the bill. Plaintiff accepted the appointment, took the required oath, and executed a personal official bond, which was delivered to the governor. Later he withdrew that bond, and caused a bond issued by an indemnity company to be filed in its stead. It being contended that the guaranty law was unconstitutional and void, a suit was instituted in the United States circuit court for the district of Nebraska by one of the banks in this state, the purpose of which was to enjoin the enforcement of the law. The governor, the state banking board and plaintiff were made parties defendant in that suit. Such proceedings were had as resulted in a final decree perpetually enjoining the defendants therein from enforcing or attempting to enforce the provisions of the law. From that decree the state took an appeal to the supreme court of the United States, where the case was heard, and on the 3d day of January, 1911, a decree was entered finding the act valid and reversing the decree of the circuit court. Prior to the institution of that suit, and under the provisions of the law then in force, Edward Royce was duly appointed the secretary of the state banking board, and entered upon the duties of the office and continued to act until after the decision of the supreme court of the United States was rendered, when he was appointed the secretary under the provisions of the new law, and which office he still holds. The session of the legislature which enacted the guaranty law appropriated the sum of $3,000 a year for and during

the succeeding biennium, making a total of $6,000, to pay the salary of the secretary of the state banking board. Royce continued to act during the whole time, and the accounting and auditing officers of the state allowed and the auditor issued the necessary warrants for the payment of the salary until at the end of the two years, when the appropriation was exhausted, the warrants having been paid as issued. Plaintiff withdrew his official bond, leaving nothing in its stead, and engaged in the banking business on his own account, and paid no further attention to the matter, and never at any time devoted any time or attention to the duties of the office. Under the provisions of the constitution, the bank guaranty law took effect and became of force on the 7th day of July, 1909. On the 30th day of March, 1911, Royce was again appointed secretary of the banking board, and which appointment we understand is conceded to be a legal and valid appointment. Counting from the time the law went into force until this appointment, there was one year 8 months and 23 days during which time plaintiff claims he was unjustly deprived of the office. He filed his claim with the auditor demanding the full two years' salary from July 7, 1909, to July 7, 1911, making a total of $6,000. The claim filed with the auditor was an elaborate statement of the facts upon which it was based, and on the hearing a number of alleged proofs and documents were presented. The auditor disallowed the claim, when the case was taken to the district court for Lancaster county, where voluminous pleadings were filed, and upon a trial the claim was again disallowed. The cause is now in this court on appeal from that decision.

The case is presented upon unusually well and carefully prepared briefs. It is conceded that plaintiff rendered no service to the state. It is also conceded that, after filing his official bond, he thereafter withdrew it from its legal custodian and surrendered it to the indemnity company, causing it to be canceled, and left nothing in its stead, the withdrawal, surrender and can-

celation having occurred on or about December 7, 1909, and it is conceded that the bond cost plaintiff nothing.

The guaranty law, under which plaintiff's appointment was made, requires that the secretary give an official bond in the sum of $25,000. Without such bond he was not entitled to and could not hold the office, nor legally discharge its functions. *Rounds v. City of Bangor,* 46 Me. 541; *Foster v. Justices of the Inferior Court,* 9 Ga. 185; 23 Am. & Eng. Ency. Law (2d ed.) 354; 29 Cyc. 1387; *State v. Paxton,* 65 Neb. 110; *State v. Lansing,* 46 Neb. 514, 35 L. R. A. 124; *Holt County v. Scott,* 53 Neb. 176. It is provided in section 6, ch. 8, Comp. St. 1911, that the secretary, etc., "shall each enter into a bond, to the state of Nebraska, before taking their respective offices, with surety or sureties to be approved by the governor" in the sum of $25,000. Not only did he withdraw the bond, but he devoted himself to his own banking business, evidently giving the affairs of the office no thought or attention.

It is claimed by the defense that the cancelation and withdrawal of the bond was such an act as would effectually deprive plaintiff of the right to any claim for the salary, irrespective of all other grounds upon which he might have based his demand. It is argued, in substance, that, had every impediment to the discharge of the duties of the office been removed after the cancelation and withdrawal of his bond, plaintiff could not have entered into the office without a requalification, and, as that never occurred, he is in no condition to demand the payment of the salary, even had the office otherwise been vacant and no one discharging its duties. While this contention might be entitled to consideration, we are not inclined to dispose of the case upon that ground alone.

It is contended by plaintiff that, having qualified and fully prepared himself for taking charge of the office, he thereby became the secretary *de jure;* that the order of injunction issued by the circuit court could not change his *status;* and that he so continued until the final appointment of his successor, the injunction having been can-

celed and nullified by the judgment of the supreme court of the United States. While this may or may not be true, it cannot be held that the official action of the incumbent was void, nor that of the state accounting officers in paying him for the service rendered. If his acts were valid, he certainly was, to say the least, a *de facto* officer. As to whether Royce was a *de jure* or a *de facto* officer is not to our minds an important question here, for the reason that he did hold the office, did discharge the duties thereof, held under a former appointment under the former law, it is true, but the same office was continued, was recognized by the state officers as the secretary, was paid by them, and the appropriation made for that purpose exhausted. Whether the new law was constitutional or not, the office of secretary of the state banking board was continued—all the time in existence—and the demand for some one to discharge its duties was imperative. The injunction prevented plaintiff from doing so. It also prevented the governor from appointing another. If the new law was void, Royce was the *de jure* secretary. If it was valid, the office of secretary was continued with him as the incumbent in fact, and, his acts being valid, he was the *de facto* officer. The state pays a salary but once. The money is appropriated by the legislature for that specific purpose and could be used for no other. "One who holds and performs the duties of an office and receives the fees and emoluments thereof by virtue of an election or appointment thereto or under color of right, is a *de facto* officer and not a mere intruder." *Holt County v. Scott,* 53 Neb. 176.

In *Dredla v. Baache,* 60 Neb. 655, the question was presented as to the legality of the orders and proceedings of an acting county judge; it being contended that his acts were wholly void from want of authority to exercise the functions of the office. In the opinion by HOLCOMB, J., at page 662, we said: "Whether Wurzburg was a *de jure* or a *de facto* officer, it is unnecessary here to determine. A discussion of the distinction between the two

would be wholly without profit. We may assume that the only question is whether his acts while occupying the position he did are wholly void and unauthorized, or are valid as a *de facto* officer. It is apparent that he was actually engaged in the discharge of the duties of the office during the period mentioned under color of authority by reason of his appointment by the county commissioners and qualification thereunder; that he exercised the functions of the office under color of right and claim thereto, and that such right and authority were acknowledged and acquiesced in by the public and all those dealing with the affairs of the office during the whole period of his incumbency. To constitute a *de facto* officer it is only necessary that he have some appearance of right to the office which would lead the public without inquiry to suppose him to be the officer he assumes to be. Where a person is in the actual possession of an office, in the discharge of the official duties thereof under such color or claim of right to the office, he will be deemed and held to be a *de facto* officer."

In *Haskell v. Dutton,* 65 Neb. 274, the officer was the deputy clerk of the district court, under verbal appointment, without having complied with any of the provisions of the law relative to official bonds and oaths, but had acted in the capacity for a year or more. On deciding the case as to the legality of his acts, we said, SULLIVAN, C. J., writing the opinion: The deputy, "according to the narrowest definition of the term, was a *de facto* officer, and his acts, so far as they affected the parties to the suit, were just as binding and efficacious as they would have been if all the conditions necessary to make him a *de jure* officer had been fulfilled"—citing cases, and quoting from *Norton v. Shelby County,* 118 U. S. 425, wherein it was said by Justice Field: "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the in-

signia of the office, and exercises its powers and functions."

Applying these rules to the incumbency of Royce, it is clear that, to say the very least, he was a *de facto* officer, and that the payment to him of the salary, which he had earned, out of the appropriation, thus exhausting it, was a legal payment, and that the state officers would not be justified in paying it again to plaintiff, who had discharged none of the duties of the office.

It follows that the judgment of the district court must be, and is,

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

ROSE, J., concurring in part.

Plaintiff withdrew his official bond early in the term for which he was appointed. Afterward, his status was the same as if his appointment had never been made, since he did not in fact occupy the office at any time or perform any of the duties thereof. The claim he presented to the auditor of public accounts was a single demand for a warrant for $6,000—the entire statutory compensation appropriated by the legislature for the full term. The allowance of the claim in its entirety was the question presented. In disallowing it, the auditor and the trial court did not err. For these reasons alone, I concur in the affirmance, but express no opinion on other questions discussed by the chief justice.

STATE, EX REL. O. G. LEIDIGH, APPELLANT, V. CHARLES JOHNSON, COUNTY TREASURER, APPELLEE.

FILED JANUARY 16, 1913. No. 17,740.

1. **Counties: CLAIMS: DEDUCTION OF PERSONAL TAXES.** The provisions of section 4466, Ann. St. 1911, confers upon the county board the

authority to deduct delinquent personal taxes from claims allowed against the county, and "issue a warrant for the balance remaining." The law requires the deduction to be made by the board, and it has no authority to delegate that duty to another.

2. ———: ———: ———. In the settlement and allowance of claims against a county, the board acts judicially, and this includes the matter of the deduction of delinquent personal taxes from the amount found due upon the claim and rendering judgment for the "balance remaining."

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

W. B. Comstock, Paul S. Topping and *O. G. Leidigh,* for appellant.

W. F. Moran, contra.

REESE, C. J.

This is an application for a writ of mandamus to the county treasurer of Otoe county to compel him to pay a warrant for the sum of $6, issued in relator's favor upon the treasury of the county. The transcript does not show the allowance of an alternative writ, nor that one was served upon the defendant, nor is there a copy of any writ included in the transcript. There appears a memorandum by some one, whether by the clerk or judge does not appear. It is as follows: "Issuance of writ. February 5, 1912, alternative writ issued, directing respondent to comply with the writ, or show cause why he refuses by 2 o'clock P. M. on the 12th day of February, 1912." This may be a correct history of what was done, but it is certainly no proper part of the court record, nor of a transcript. There being nothing in the record to show that a writ was served upon respondent, we may assume that the service was waived.

On the 10th of February, 1912, the respondent filed a a general demurrer "to the affidavit and petition," the grounds thereof being "that said petition and affidavit

does not state a cause of action of the relator and against the respondent." In the absence of a served alternative writ, the demurrer or answer to the petition is proper practice (*State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476), and the contention of respondent that the writ takes the place of and is substituted for the petition, and no writ being shown in the transcript must defeat the appeal, has no merit. He did not demur to the writ. The demurrer was to the petition.

It is alleged in the petition, among other things, that the respondent is the county treasurer of Otoe county, and his duties as to the payment of warrants are set out; that relator is the owner of a certain warrant issued by order of the county commissioners of said county for the sum of $6, payable to his order out of the general fund; that he presented the order to respondent for payment and demanded payment, but that defendant stamped upon the margin or face thereof the words, "This warrant issued subject to payment of personal taxes," and refused to pay the same; that at said time there were ample unappropriated funds in the general fund to pay the warrant; that no order had been made by the board of county commissioners deducting any delinquent taxes due and owing from relator, and it was the duty of respondent to pay the warrant. A writ of mandamus compelling payment is prayed for. The affidavit accompanying the petition is substantially in the same form, and need not be noticed. As we have shown above, when dealing with another phase of this case, respondent demurred to the petition. The demurrer was sustained, and the proceeding dismissed. Relator appeals.

It is said in the argument and brief of respondent that the county commissioners had previously "made a blanket order directing that said words be incorporated in all warrants delivered to persons owing the county personal taxes, and that the county treasurer deduct from the amount of said warrant the personal taxes owed by the party to whom said warrant was issued." But there is

nothing of the kind shown in the transcript, and that subject cannot be considered. This court cannot take judicial notice of any such fact, and, if it were thought of sufficient importance to merit consideration, it should have been presented in an answer. All averments of the petition well pleaded are admitted by the demurrer. Therefore it is admitted that no action was taken by the commissioners directing, nor ordering deducted, any personal tax, and that the words stamped on the warrant were placed there by respondent without orders or authority so to do. There is no averment that relator owed no personal taxes. If the law is that the action of the county treasurer was void, and that, in the absence of any action by the commissioners directing the deduction, it was the duty of the respondent to pay the warrant without reference to whether the payee owed personal taxes or not, the averment would not be necessary; otherwise it would be.

The statute upon this subject is found in Ann. St. 1911, sec. 4466 *et seq.* In that section it is provided: "The county board of any county, whenever the account or claim of any person against the county is presented to them for allowance, may, in their discretion, procure from the county treasurer a certificate of the amount of delinquent personal taxes assessed against the person in whose favor the account or claim is presented, and may deduct from any amount found due upon such account or claim the amount of such tax, and issue a warrant for the balance remaining." If this section is mandatory and provides the only procedure by which the delinquent personal taxes can be deducted from an allowed claim, it is pretty clear that the demurrer was not well taken, and should have been overruled. The statute was intended as an aid to the collection of delinquent personal taxes. The section under consideration presents an easy and convenient method of collection where the county is indebted to a delinquent. A strict construction should not be indulged in when the requirements of the law are sub-

stantially followed, but some attention should be given to its provisions. The warrant does not appear to have been issued for "the balance remaining" after deducting taxes, but for the whole amount of the claim, which was in clear violation of the duty of the board, if it was the intention to deduct the taxes. While we are of opinion it is not necessary to call upon the county treasurer for the statement of delinquent personal taxes in each particular case, yet it is necessary that the evidence of such delinquency be furnished the board by him, and that they make the deduction. We find no provision imposing that duty upon the treasurer. In the allowance of the claim the board acts judicially. *State v. Buffalo County,* 6 Neb. 454. It follows that the judicial quality of the act extends to the deductions for taxes to be made by them. The deduction is to be made before the warrant is issued, and it shall be only for the balance due the claimant. Nothing of the kind was done, so far as is shown by the record. The matter of making the deduction is left to the discretion of the board. So far as appears, they declined to exercise the power given, allowed the claim, and issued the warrant for the whole amount thereof. If the county, or respondent, has any defense, it should be set up by way of answer.

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

REVERSED.

SEDGWICK, J., dissenting.

1. I do not agree that the law is correctly stated in the syllabus. The board acted in a *quasi*-judicial capacity in considering and determining the amount of the plaintiff's claim against the county. The plaintiff's personal taxes, if any, needed no judicial determination. The statute appears to contemplate that the taxes will be deducted by the board from the amount of the claim as adjudicated by them. But it seems to be unnecessarily

technical to hold that the act of subtracting the taxes, as shown by the records, from the claim as allowed must be performed by the board itself and cannot be performed by any other person. To deduct the taxes, as shown by the records, from the adjudicated claim of plaintiff is not necessarily a judicial act. This question is not presented by this demurrer, and both paragraphs of the syllabus announce the same dictum.

2. The case was decided upon a demurrer to the petition for the writ. The petition alleges that the "relator owns a certain warrant that was legally issued and drawn upon accounts presented to, audited, and allowed by the board of commissioners of said county;" that the warrant was presented to the respondent, county treasurer, and that the county treasurer placed thereon without authority of law the words, "This warrant issued subject to payment of personal taxes." The demurrer to this petition was sustained, and this presents the question to be determined. When a warrant is legally issued upon an allowance of a claim by the county board, and the holder of the warrant takes it to the treasurer for payment, can the treasurer, without any authority from the county board, stamp on the warrant the words quoted above, and then pay only a part of the warrant after deducting the personal taxes? The opinion says that no one but the county board can make this deduction. If that is so, that ends the case. The warrant should have been paid when presented to the treasurer and there is no occasion for sending the case back for another trial.

3. The brief of the appellee urges that this case ought to be affirmed for two reasons: First. The warrant on which the action is based is not signed by the clerk. It is signed by the chairman of the county board of county commissioners and by the deputy clerk. Nothing is said upon this point in the opinion. Second. The main point presented in the brief of the appellee is that the method presented by the statute which authorizes the county board to deduct the personal taxes and allow a warrant for the

balance is not exclusive. He says in the brief that the method "is not mandatory; it is only directory, and any other method that accomplishes the same end will satisfy the statute." This is the real controversy between the parties, but it is not presented by this record.

4. The questions whether the county board could make a blanket order as recited in the majority opinion, and whether any other method is provided for deducting taxes from claims allowed than the method stated in the statute directing county boards to do it—these questions are not presented in this record. There is nothing in the petition demurred to that indicates anything, except that the treasurer wilfully, "without authority of law," stamped on the warrant that it was subject to personal taxes. There is nothing in the record to show that there were any personal taxes due, and there is nothing in the record to show or indicate that the county board has taken any action whatever, or that there is or could be any defense.

5. The amount of this claim is $6. They have had a trial in the district court and have appealed to this court. The parties are represented by strong lawyers. They have presented a technical case here and ask for a technical decision. To order another trial in an action like this, when both parties are so fiercely standing upon the record they have made, and so continue this $6 lawsuit, is not treating the taxpayers fairly. The parties want the law declared upon the record they have made; they are entitled to so much even in a $6 case, but that is all they are entitled to.

The judgment should be reversed and the trial court directed to allow the writ as prayed.

OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT, V. JOHN WITT ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 17,495.

1. Depositions: SUBPŒNA DUCES TECUM: OPPOSITE PARTY. An officer authorized by law to take depositions may, at the request of a party to an action, proceed to take the deposition of the opposing party, and to that end may issue a *subpœna duces tecum*, and compel the attendance of such party or parties as witnesses.
2. ———: ———: ATTORNEY FOR OPPOSITE PARTY. An attorney having the custody of documents and papers belonging to one of the parties may be required to produce such documents and papers as the opposing party to the action may be required to furnish as evidence.
3. ———: INJUNCTION. In such a case a court of equity will not enjoin an officer or a party from taking such depositions, unless it clearly appears that the officer is acting without jurisdiction, or is exceeding his lawful authority.
4. Injunction: PETITION: SUFFICIENCY. In such a case a petition for an injunction which fails to state facts tending to show that the officer is exceeding his jurisdiction, and is requiring or is about to require the production of evidence which is clearly privileged, is demurrable.
5. Pleading: AMENDMENT: WAIVER. Where a demurrer to a petition is sustained, and the plaintiff makes no request to amend, nor tenders an amended petition, but takes time to prepare a bill of exceptions, and procures an order of the court for a supersedeas bond for the purpose of prosecuting an appeal, he will be held to have waived his right of amendment, and the trial court may properly dismiss his action.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Edward F. Pettis, for appellant.

Courtright & Sidner, contra.

BARNES, J.

Appeal from a judgment of the district court for Lancaster county vacating a temporary restraining order and

dismissing plaintiff's petition for an injunction. This appeal was consolidated and has been submitted with *Witt v. Old Line Bankers Life Ins. Co.*, p. 763, *post*.

It appears that on January 12, 1912, the action last above mentioned was pending in the district court for Dodge county, wherein the plaintiff, Witt, sought to recover from the defendant, the Old Line Bankers Life Insurance Company, a certain advanced premium. It further appears that on January 15, 1912, one J. A. Brown, a notary public in and for Lancaster county, at the request of plaintiff in that action, issued a subpœna, the terms of which purported to command J. A. Harley, M. L. Blackburn, and E. F. Pettis, as witnesses in behalf of the plaintiff in the aforesaid action, to appear before him to testify, by deposition, as witnesses in the action pending in Dodge county, as aforesaid, and to bring with them certain documents and papers which the plaintiff sought to procure as evidence in that cause. It also appears that E. F. Pettis was the attorney of the Old Line Bankers Life Insurance Company, who was conducting its defense in the action above mentioned, and that the papers and documents described in the subpœna were in his possession as such attorney.

The plaintiff thereupon brought this action, setting forth in its petition the foregoing facts, together with a description of the papers and documents sought to be produced before the notary public, which are described as follows: "The application of the plaintiff above mentioned for a policy of insurance in the defendant; the medical examination made by O. C. Hopper, accompanying or relating to said application; all letters written by the plaintiff to the defendant or to any of its officers, agents, representatives or physicians from August, 1905, to July, 1906, inclusive; carbon or letter-press copies of all letters written by the defendant or any of its officers, agents, representatives or physicians to the plaintiff from August, 1905, to July, 1906, inclusive; carbon or letter-press copies of all letters written by the defendant to any

of its officers, agents, representatives or physicians to O. C. Hopper from August, 1905, to July, 1906, inclusive; and all letters written to defendant or any of its officers, agents, representatives or physicians by O. C. Hopper from August, 1905, to July, 1906, inclusive." Plaintiff prayed for an injunction restraining any of said witnesses, to wit, Harley, Blackburn, or Pettis, from producing any of the documents or papers mentioned in the subpœna, and that defendants be enjoined from asking the witness Pettis to answer as to any communication whatsoever between himself and his client, and for general equitable relief. Service was had upon the defendant Brown in Lancaster county, and a summons was sent to Dodge county and was there served on defendant Witt. The defendant Brown demurred to the plaintiff's petition, and the defendant Witt filed a special appearance objecting to the jurisdiction of the court over his person. Defendant Brown's demurrer to the petition was sustained, and it was held that the court had obtained no jurisdiction over defendant Witt. Thereupon the temporary restraining order was dissolved and the action was dismissed.

It is appellant's main contention that the district court erred in sustaining the demurrer to plaintiff's petition; and it is argued that a party to an action and a notary public may be enjoined from taking the deposition of an attorney or a party to an action where it is sought to require such attorney to give evidence and produce papers and documents which the opposing party deems necessary for the purpose of properly conducting his case, if it is alleged that the evidence and the production of the papers are privileged. We are of opinion that, where it clearly appears that the notary is proceeding illegally and in violation of his legal authority, such an injunction may be granted; but, as we view the plaintiff's petition in this case, it is entirely insufficient to warrant the relief prayed for.

It must be conceded that in this state the parties to a civil action are competent witnesses, and each may be

compelled to testify in favor of the adverse party the same as any witness; and it has been held that a notary public has power to commit a witness for contempt who refuses to give his deposition in a proper case. *Dogge v. State*, 21 Neb. 272. The rule is also well settled that an attorney may be required to produce papers which his client could be compelled to produce. *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156; *Ex parte Maulsby*, 13 Md. 625; *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693. In *Dogge v. State, supra*, it was said: "From an examination of the statute we are convinced that it was the intention of the legislature, in the enactment of the chapter on evidence, to remove every barrier to the discovery of truth, where the parties to the action have equal opportunity to testify. And, where necessary, either party may call the other to testify as to facts exclusively within his knowledge, provided the questions are not privileged."

In *In re Hammond*, 83 Neb. 636, it was held that a refusal to answer such improper questions as would constitute abuse of process is not a contempt, and may not be punished; and a witness is entitled to his privileges and his immunities, as well when a deposition is taken as when examined in open court. Therefore, if the evidence which was sought to be elicited from the defendant's attorney was in fact privileged, his rights could have been protected without the intervention of a court of equity. It is not seriously contended that an officer authorized to take depositions is not clothed with the power to require the production of papers and documents by a *subpœna duces tecum;* but such a proceeding is often unnecessary and may be improper in a case of this kind, for sections 393 to 395 of the code specifically provide for the production and inspection of papers and documents in the possession of an opposing party. Therefore, in view of the foregoing authorities, it may be stated that a court of equity will not restrain an officer from exercising his authority to take depositions, unless it is clearly shown that he is attempting to do so unlawfully.

We understand the contention to be that all documents and papers in the hands of an attorney belonging to his client are privileged, and therefore plaintiff was entitled to the writ of injunction restraining the defendant from requiring the production of the papers and documents described in the *subpœna duces tecum*. We are of opinion that this contention is too broadly stated, and cannot be sustained. It is true that by the plaintiff's petition it is alleged that the evidence of the witness Pettis was privileged, but this is merely a legal conclusion. It must be observed that the petition contains no direct allegation that the witness was or would be called upon or required to divulge any confidential matter which had been imparted to him as attorney for the defendant in the action in which the deposition was sought to be taken. It follows, therefore, that the plaintiff was not entitled to the extraordinary writ of injunction to prevent the taking of the testimony in question, and the demurrer to the plaintiff's petition was properly sustained.

It is further contended that, where a demurrer is sustained to a petition, the plaintiff has the right to file an amended pleading, and therefore the court erred in dismissing the action. It is a sufficient answer to this contention to say that the record fails to disclose any request by the plaintiff to amend his petition. Not only did counsel fail to make such a request, but, as a matter of fact, he stood upon his petition by excepting to the ruling, by obtaining time to settle his bill of exceptions, and by securing an order of the court fixing a supersedeas bond for the purpose of prosecuting his appeal. Therefore this contention is without merit.

Finally, it is argued that the district court erred in treating the special apearance of defendant Witt as a demurrer to the plaintiff's petition. If this was error, it was without prejudice to the plaintiff's rights. The demurrer of defendant Brown was properly sustained, and the action was rightly dismissed as to both of the defendants.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

FAWCETT, J.

I concur, but upon the ground that the application for relief should have been made in the court where the case in which the depositions were being taken was pending.

STATE, EX REL. FARMERS STATE BANK OF PICKRELL, APPELLEE, V. ELMER L. HEVELONE, COUNTY TREASURER, APPELLANT.

FILED JANUARY 16, 1913. No. 17,533.

1. **Statutes:** AMENDMENT. The legislature may amend a statute by appending a proviso to a section thereof, if the subject of the proviso is clearly within the title to the original act and is germane to its provisions.

2. ———: ———: CONSTRUCTION. The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form.

3. ———: REPEAL BY IMPLICATION. A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication.

4. **Banks and Banking:** DEPOSITORY BANKS: BONDS. So much of the depository law of 1891 as required depository banks to give bonds for the safe-keeping and return of public funds is repealed by section 46 of the banking act of 1909, as amended in 1911 (laws 1911, ch. 8); and a state bank which has complied with all the provisions of that act is entitled to its *pro rata* share of the deposit of public funds without giving a bond for the safe-keeping and return of such funds.

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

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

Field, Ricketts & Ricketts and *Hazlett & Jack, contra.*

BARNES, J.

The relator is a state bank, organized and doing business under the provisions of the banking act of 1909, and the respondent is the county treasurer of Gage county, Nebraska. The relator brought this suit to compel the respondent, as county treasurer, to deposit with it its *pro rata* share of public funds made by him as such treasurer, without giving other security for the safe-keeping of such deposits than that provided for by the depositors' guaranty fund, as required by the guaranty bank act under which it was organized and is doing business. The respondent demurred to the petition. The demurrer was overruled, and he stood on his demurrer. Thereupon, it was ordered that the writ issue in accordance with the prayer of the relator's petition. The respondent has appealed, and the sole question for our determination is whether the relator is required to give security under what is known as the "depository law," in addition to the security provided by the banking act, and known as the "depositors' guaranty fund," to be entitled to participate in the deposit of public funds.

It must be conceded that if the relator was not required to give the depository bond provided for by section 20, art. III, ch. 18, Comp. St. 1891, which is a part of the depository law of 1891, in addition to its compliance with the provisions of the banking act of 1909, in order to entitle it to participate in the deposit of public funds, the judgment of the district court should be affirmed. The appellant contends, however, that so much of the depository law of 1891, known as section 20, art. III, ch. 18, Comp. St. 1891, is still in force; that the bond therein mentioned should have been given by the relator before it would be entitled to receive on deposit its proportionate share of

the public funds. On the other hand, the relator insists that the section above mentioned was repealed by the banking act of 1909, as amended in 1911. An examination of the legislation bearing upon this question may aid in its solution. The act authorizing the deposit of public funds was passed in 1891. Laws 1891, ch. 50. That act was amended in 1907, and comprises, as amended, sections 11364-11374, Ann. St. 1907, and will be hereafter referred to as the "depository act." The provisions of that act, so far as they have any bearing upon the questions under consideration, were that banks, in order to become depositories of public funds, are required to give approved security for the safe-keeping and return of such funds. In 1909 the legislature passed an act, entitled "An act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation." Laws 1909, ch. 10 (Ann. St. 1909, secs. 3700-3792). That act covers the entire subject of the organization, control and supervision of the business of banking in this state, and will be referred to hereafter as the "banking act." The distinctive features of that act, and the principal inducement to its passage, are the provisions made therein for a depositors' guaranty fund, which is created and administered under the provisions of the state banking board, to secure deposits made in such banks, whether of public or private funds. It necessarily follows, if state banks, in addition to maintaining a depositors' guaranty fund, must give approved security when the deposits are public funds, they are required to give double security for the deposits of such funds.

The banking act makes no express reference to the depository act; but it is provided by the banking act that the depositors' guaranty fund shall secure all deposits of public funds as well as private funds, and it may reasonably be presumed that the legislature did not intend the deposits of public funds should be doubly secured, first, by the depositors' guaranty fund, and, second, by approved security as provided by the depository act. It

appears, however, that, in order to avoid any misunderstanding upon that question, the legislature of 1911 amended the banking act of 1909, and among the sections thus amended was section 46. Section 46 as it stood before the amendment of 1911, was as follows: "As soon as said assessments are respectively levied, the banking corporation against which the same are levied shall be notified of the amount of such assessment levied against them, respectively, by the secretary of the state banking board, and said banking corporations shall thereupon set apart, keep and maintain in their said banks the amount thus levied against them, and the amounts thus levied, kept and maintained shall be and constitute what shall be designated as a depositors' guaranty fund, payable to the state banking board on demand for the uses and purposes hereinafter provided." By the amendment of 1911 two provisos were added to this section. The first has no bearing on the present controversy. The second is as follows: "Provided, further, that no bank which has complied in full with all of the provisions of this act shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured." By this amendment it is made clear that the legislature intended the provisions of the banking act requiring a depositors' guaranty fund should operate as a substitute for the approved security required by the depository act, where the deposit is public funds.

It is contended, however, that the amendment is inoperative and void; that the purpose of the legislature in passing it is defeated for the following reasons: First, a proviso is not an available method for making such an amendment; second, the amendment is not within the scope of the enacting clause of the banking act or the amendatory act, and is therefore void; third, the amendment is not germane to section 46, to which it is appended; fourth, the banking act, as amended, is obnoxious to sec-

tion 11, art. III of the constitution, because it amends or repeals the depository act by implication.

Considering the first of the foregoing contentions, it may be said that where a law is plain and unambiguous, whether expressed in general or limited terms, it will be presumed that the legislature intended to mean what they have plainly expressed, and that such intention should control the action of the judiciary; that where the intention is clearly ascertained, and no constitutional provisions are violated thereby, courts have no other duty to perform than to execute the legislative will, without regard to their own views as to the wisdom or justice of the particular enactment. *Hurford v. City of Omaha*, 4 Neb. 336. In *Shellenberger v. Ransom*, 41 Neb. 631, 643, it was said: "The rule is, as we shall constantly see, cardinal and universal that, if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed." In speaking of this subject the author in 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 352 (223) uses the following language: "The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso. The intention expressed is paramount to form." *State v. Searle*, 86 Neb. 259; *Baggaley v. Pittsburg & Lake Superior Iron Co.*, 90 Fed. 636; *State v. City of St. Louis*, 174 Mo. 125, 145, 61 L. R. A. 593. In the case last cited it was held: "The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears, and should be construed with the section with which it is connected. This rule is not, however, absolute, and, if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment."

In considering the question as to whether the proviso is germane to section 46 of the banking act, it should be observed that original section 46 of the banking act provides

that, as soon as assessments are levied by the banking board, the banks shall be notified of the amount of such levy, and are thereupon required to set apart, keep and maintain the amounts thus levied as a depositors' guaranty fund. This fund is payable to the banking board for the purpose of securing the deposit of both public and private funds. The amendment provides that no bank which has complied in full with all of the provisions of the banking act shall be required to give any further security to become a depository of public funds. Nothing could be more relevant to the provisions of that section. Again, the title of the original banking act is broad enough to cover the amendment to section 46. Omitting the repealing clause, the title to that act reads as follows: "An act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation." This is a comprehensive title, and is broad enough to cover any provisions relating to the business of banking. To provide a scheme for the security of deposits was one of the chief inducements to the passage of the act, and the provisions made for a depositors' guaranty fund was the result. The validity of this feature has been tested in the federal courts and completely vindicated. *Shallenberger v. First State Bank,* 219 U. S. 114; *Noble State Bank v. Haskell,* 219 U. S. 104. The depositors' guaranty fund, as provided for in that act, was created to secure all depositors; and it clearly was germane to that subject to provide that depositors of public funds should be secured thereby, and that different or other security should not be required. Therefore, respondent's contention upon this point is unsound.

In disposing of respondent's contention that the banking act, as amended, is obnoxious to section 11, art. III of the constitution, it may be observed that the banking act is complete in itself, and it has been held that an act complete in itself may so operate on prior laws as to materially change or modify them, without being repugnant to this provision of the constitution. *State v. Page,* 12

Neb. 386. In *State v. Moore,* 48 Neb. 870, it was said: "It is also firmly established in this state by a long line of decisions that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implication." The rule as thus stated was approved and followed in *State v. Cornell,* 50 Neb. 526. It is also firmly settled by this court that whatever might have originally been made a part of an act may at any time be engrafted upon it by legislation professing to be amendatory. *Richards v. State,* 65 Neb. 808; *State v. Majors,* 85 Neb. 375. It follows that the amended section takes the place in the banking act occupied by the original section, and should be construed precisely as though it had been originally enacted in its amended form. *Cass County v. Sarpy County,* 63 Neb. 813.

Finally, it is contended that the law does not favor repeals by implication, and therefore the banking act, as amended, does not repeal the provisions of the depository act requiring a bond to secure the safe-keeping and return of deposits. It is firmly established in this jurisdiction, by a long line of decisions, that where an act complete in itself is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute will be construed to be repealed by implication. *Smails v. White,* 4 Neb. 353; *Jones v. Davis,* 6 Neb. 33; *State v. Whittemore,* 12 Neb. 252; *Zimmerman v. Trude,* 80 Neb. 503; *Allan v. Kennard,* 81 Neb. 289.

In conclusion, we are of opinion that the banking act was properly amended, and is not open to the objections urged; that, as amended, that act is clearly in conflict with so much of the provisions of the depository act as requires a bond to secure the safe-keeping and return of public funds, in addition to a full compliance with all of the provisions of the banking act; that such provisions of the

depository act were repealed by implication; that the judgment of the district court should be, and therefore is,

AFFIRMED.

HENRY STEHR V. STATE OF NEBRASKA.

FILED JANUARY 16, 1913. No. 17,539.

1. **Homicide:** CRIMINAL NEGLIGENCE. One charged with the support and control of a child of tender years, suffering with frozen feet, who negligently and wilfully fails or refuses to obtain for it necessary medical aid, thereby causing its death, may be guilty of such criminal negligence as to render him guilty of manslaughter.

2. ———: ———: QUESTION FOR JURY. The degree of negligence in such a case that would make a man criminally responsible can hardly be defined. It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would. The line between the two extremes is a question that must be left, to a great extent, in each individual case, to the common sense of the trial jury. It is for them to determine whether or not the degree of failure of duty is, in fact, criminal.

3. ———: ———. For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended.

4. ———: ———. If the parent has not the means for the child's nurture, it is his duty to apply to the public authorities for relief, and failure to do so is itself culpable neglect, wherever there are public authorities capable of affording such relief.

5. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. An instruction defining a reasonable doubt which commences with the statement that "a reasonable doubt is that state of the case which, after the entire comparison and consideration of all of the evidence, and instructions of the court, leaves your minds in doubt and uncertainty as to the guilt of the defendant," is not rendered prejudicially erroneous by the inclusion of the words "and instructions of the court."

6. ———: ———. Other instructions examined, commented upon in the opinion, and found to be without reversible error.

7. ———: REFUSAL OF INSTRUCTIONS. Where the trial court has fairly instructed the jury upon the defendant's theory of his case, a refusal of other instructions requested by the defendant is not reversible error.

8. Assignments of error in the admission of evidence examined, and found to be without merit.

9. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain a verdict of manslaughter.

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

H. F. Barnhart, M. D. Tyler, William V. Allen and *William L. Dowling,* for plaintiff in error.

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

BARNES, J.

The plaintiff in error, hereafter called the defendant, was convicted in the district court for Madison county of the crime of manslaughter, by negligently causing the death of his stepson, a child about four years of age. He was sentenced to the penitentiary for a term of from one to ten years, and to reverse the judgment of the district court has brought the case here by a petition in error.

It is his first contention that the evidence is insufficient to sustain the verdict. From a careful reading of the bill of exceptions it appears that the defendant is a native of Germany, and prior to his removal to this country resided in the city of Hamburg; that on the 6th day of April, 1909, he was married to one Minnie Loco, who was at that time the mother of an illegitimate child about two years of age, called "Kaurt;" and who, after the marriage, was known as Kaurt Stehr; that in July, 1910, the defendant left his wife, his infant child, and his stepson Kaurt in Hamburg and came to Norfolk, Nebraska; that afterwards, and in the month of October, defendant sent

for his wife and child, with the understanding that the stepson was to be left with defendant's mother in Germany. For some reason, not fully explained, the defendant's mother declined to keep the child, and it was brought, by the defendant's wife, to this country. Shortly after her arrival at Norfolk defendant rented a house and established a home in that city, the family consisting of his wife, their infant child, and stepson, Kaurt. It appears that while in Germany, and after they came to this country, Kaurt was to some extent afflicted with bed wetting, and for that weakness defendant was in the habit of punishing the child frequently and quite severely; so much so that complaint was made against him in Germany, and his friends and neighbors in this country remonstrated with him, and informed him that unless he desisted the child might become idiotic. It should be stated that defendant was without means, except his earnings as a day laborer, and the help furnished him by his wife in laundry work. On the 31st day of December, 1910, there was a severe storm in the vicinity of Norfolk, which is described as a blizzard, and that night the weather was very cold. Defendant allowed the fire to go out altogether, although he had a small supply of coal; and, as stated by him, some time during the night he discovered that Kaurt had wet the bed; that the bedding was frozen stiff; that the room was full of frost; that snow had drifted through the crack of the door and through a broken window pane; and the bedding on all of their beds was frozen stiff. Notwithstanding this situation, defendant built no fire, and, as stated by him, he turned the bedtick, on which Kaurt slept, over, and again placed the child in the bed, alone, where he lay until the next morning. Shortly after this, and as early as the 5th day of January following, it was discovered that the child's feet had been frozen, and had begun to show signs of discoloration. Mrs. Stehr stated that the child's feet looked gray and somewhat green in spots. Defendant thereupon applied hot water and dressed the feet with cloths, saturated with

vaseline. No physician was consulted or called until the 16th day of January following, at which time the child's feet were so badly decomposed that the stench arising therefrom had become unbearable. Defendant's wife then went to a merchant, with whom they were trading, and inquired for a German doctor. Doctor Pilger was recommended, and he called to see the child, but declined the case because the defendant had no money. Doctor Verges, another German physician, was called, who on the same evening visited the child, and also declined the case, but recommended that the city physician be notified of the situation. On the following day Doctor Tashjean, the city physician, who is a skilful surgeon, called at the defendant's house, examined the child, found a gangrenous condition of its feet, and informed defendant that amputation was absolutely necessary. Meanwhile, one of the county commissioners, who was active in securing assistance for the poor, furnished defendant with a supply of coal and other necessaries, and arranged for the amputation. The child was taken to the home of Mrs. Klentz, a professional nurse, and on the following day the operation was performed by Doctors Tashjean and Salter, and everything possible was done for the relief of the child. It was found, however, that sepsis or blood poisoning had developed to such an alarming extent that a recovery was impossible, and on the 22d day of the month the child died.

The indictment charged the defendant with murder in the first degree, which, of course, included the lesser crimes of murder in the second degree and manslaughter. The district court instructed the jury to find the defendant not guilty of first or second degree murder, and the cause was tried and submitted to the jury on the theory that defendant, being charged with the duty to control and support the deceased child, wilfully and negligently caused and permitted its life to be endangered after having knowledge that its feet were badly frozen, and wilfully failed and neglected to summon medical aid or make known its condition, thereby causing its death.

It must be observed that the question actually submitted to the jury was whether or not defendant was criminally negligent in failing to provide medical care for his stepson after he discovered the frozen condition of of the child's feet. It is contended that defendant is an ignorant German, unable to speak the language of this country, was without means to procure medical assistance, and therefore was not responsible for his neglect. The evidence shows, however, that he was a fairly intelligent man; that he was surrounded by his friends and neighbors, all of whom could speak both German and English; that he failed to mention the child's condition, or inform them of his necessities. His own testimony shows that for ten or eleven days he saw the child's feet turn from gray to purple, from blue to green and black, and saw its flesh rotting and dropping away, yet made no effort to procure medical aid until the odor of the rotting flesh became unbearable. It seems idle to assert that he was so ignorant as not to realize the necessity for calling a physician. The degree of negligence in such a case that would make a man criminally responsible can hardly be defined. It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would. The line between the two extremes is hard to define, and is a question that must be left, to a great extent, in each individual case to the common sense of the trial jury. It is for them to determine whether or not the degree of failure of duty is in fact criminal. As we view the evidence, the jury had a sufficient basis for finding the defendant guilty of such criminal negligence as would amount to manslaughter.

Defendant predicates error on the court's instructions from paragraphs 7 to 17, inclusive. We find that paragraph 7 explains the law as declared in section 43, ch. 34, Comp. St. 1911. It incorporates a part of that section, and, as we view it, is not erroneous. By paragraph 8 of the instructions the jury were informed that "to do an act wilfully is to do it voluntarily." No specific objec-

tions are urged to this instruction. Paragraph 9, defining negligence in the care and control of any child, cannot be rightfully criticised, and the general criticism made by counsel is not available as a ground of error. Defendant was charged with the legal duty of seeing to it that the child's life was not endangered. If he realized the condition of the boy's feet and for ten days failed to call a physician, or if he negligently refused to ascertain the condition of the boy's feet in time to call a physician, then the jury would be justified in finding him guilty of criminal negligence. Paragraph 10 of the instructions informed the jury that a failure to provide for the child under such circumstances is gross negligence; and that it was also gross negligence, if he did not have the means to employ medical assistance himself, in not seeking it from others. Paragraph 11 of the instructions informed the jury that ignorance of the laws providing for the care of poor persons would not excuse defendant from the omission of his duty to procure the necessary medical attention for the deceased child. In such a case, where the party charged is unable to supply the necessary succor, he ceases to be responsible, but this responsibility is not divested in cases where poor-laws exist. In such case the person owing the duty should report the case to the public authorities for their relief. In 1 Wharton, Criminal Law (11th ed.) sec. 484, it is said: "Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, to so culpably neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm. To constitute murder there must be means to relieve and wilfulness in withholding relief. If the parent has not the means for the child's nurture, his duty is to apply to the public authorities for relief; and failure to do so is itself culpable neglect wherever there are public authorities capable of affording such relief."

It is claimed, however, that, by instruction 11, the jury were told that it was their duty to determine whether or not there was such omission of this duty as shows heedlessness and indifference by the defendant; and it is argued that this instruction is fallacious because its effect was to tell the jury that the defendant was bound, at his peril, to know that there were poor-laws applicable to cases of this kind. This is an erroneous construction of the instruction, for it merely states the old maxim that ignorance of law excuses no one. The defendant was charged with the duty to see to it that the child's life was not endangered; and it is apparent that he could have performed that duty by informing his neighbors of its condition. The testimony shows that, on the day when information was first given to the Norfolk merchant, medical attention and aid of all kinds were immediately forthcoming.

It is strenuously argued that instructions 7, 8, 9, 10 and 11 are in conflict with instruction 14. By this instruction the jury were told that the defendant should be convicted of manslaughter, if they found, beyond a reasonable doubt, that he realized the condition of the child's feet for such a length of time, previous to calling a physician, that by calling such physician the child's life might have been saved; or that he was culpably negligent in not taking steps to know and realize the condition of the child's feet. We are of opinion that there was no conflict in the instructions.

It is also argued that the words, "and instructions of the court," found in instruction 17, defining a reasonable doubt, rendered the whole paragraph erroneous. It should be observed that this case is one where it was the duty of the court by proper instructions to define the degree of negligence which would render the defendant guilty. Therefore it was the duty of the jury to take into consideration the instructions of the court on that question in order to enable them to reach a proper verdict.

Error is also predicated on the refusal of the court to

give certain instructions requested by the defendant. As we view the record, the trial court carefully covered all of defendant's contentions, and the refusal of the request tendered by the defendant was not reversible error.

Finally, it is contended that the court erred in the admission of evidence showing the existence of bruises, scars and marks on the body of the child. It appears that very little of that evidence was objected to by the defendant. In fact, the witnesses for the defense described the condition of the child's body, and the jury were instructed that evidence of that kind should only be considered in determining whether the defendant's attitude toward the child was such as might cause him to be negligent in his failure to secure medical aid after he ascertained that the child's feet were badly frozen.

It is also stated that the newspapers of Madison county were filled with sensational accounts of defendant's treatment of the child at the time of its death, to defendant's prejudice. It appears, however, that the trial took place some nine months after the child died, and it is not apparent that the newspaper statements complained of, in any manner, influenced the jury in arriving at their verdict.

In conclusion, it may be said that the defendant is a man of at least average intelligence; that the people who advanced him the money with which he paid for the passage of his wife and children lived within a stone's throw of his house, he knew them in Germany, and they had helped him; that at every point of the compass his nearest neighbor was a German with whom he could counsel and advise; that they were a thrifty, charitable people, and a word from him would have brought all of the assistance that he needed; and it appears that, as soon as his wants were made known, medical assistance and material aid were immediately brought to him.

As stated by counsel, this is a difficult case, and suggests a seasonable application for executive clemency; but, as we view the record, it contains no reversible error,

and this court can grant the defendant no relief. The judgment of the district court is

AFFIRMED.

JOHN WITT, APPELLEE, V. OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 17,672.

1. **Limitation of Actions:** AMENDMENT OF PLEADING. The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568.
2. **Contracts:** ACTION: BURDEN OF PROOF. In an action on a written contract where defendant denies plaintiff's allegation that he has performed all of its conditions on his part, the burden is on the plaintiff to sustain such allegation by competent proof.
3. ———: ———: EVIDENCE: DIRECTING VERDICT. In the absence of such proof, it is proper for the court to instruct the jury to return a verdict for the defendant.

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

Edward F. Pettis, for appellant.

Courtright & Sidner, contra.

BARNES, J.

This case is before us on a second appeal. *Witt v. Old Line Bankers Life Ins. Co.*, 89 Neb. 163. As there said: "This is a suit to recover back an advance premium of $237.85, paid by plaintiff to defendant on a subsequently rejected application for life insurance." On that appeal a demurrer was sustained to plaintiff's petition, and the cause was remanded for further proceedings. After the mandate was returned to the district court for Dodge

county, plaintiff was granted leave, over defendant's objections, to file an amended petition, and that ruling, among other things, is assigned as error.

The petition, by way of amendment, alleged that one C. K. Huntington, who signed the written contract on which the plaintiff based his right of action, was the defendant's agent duly authorized to enter into the contract on its behalf. By way of further amendment, it was alleged that plaintiff had complied with all of the conditions and provisions of the contract, and there was set forth certain facts which it was alleged constituted such compliance on his part, and that defendant is now estopped to deny that plaintiff had submitted to a medical examination. The contract, so far as it is material to the controversy, reads as follows: "Received at Scribner, State of Nebraska, this 10 day of August, 1905, of John Witt the sum of two hundred thirty-seven 85-100 dollars, in payment of premium upon $5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue providing said application is approved by said company, otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination shall forfeit the payment herein. * * * (Signed) John Witt, Applicant. C. K. Huntington, Agent." Plaintiff alleged that defendant had neither issued the policy nor returned the premium, and for that reason he sought a recovery.

Defendant, by its answer, admitted that plaintiff paid the premium; admitted the execution of the contract; and denied all of the other allegations of the petition. Defendant further alleged that it had never declined to issue the policy; that it was ready and willing to do so if plaintiff would submit to a proper and suitable medical examination in order that it might determine if the plaintiff was a suitable subject for life insurance; that, if it was so determined, defendant desired to and would issue

the policy, and, if plaintiff was not entitled to the policy, it was ready and willing to return to him the amount of his premium. Defendant alleged that plaintiff, in violation of his said agreement, had refused and still refuses to subject himself to a medical examination; that, until he complied with his agreement, he was not entitled to the policy or return of the premium. Plaintiff's reply, in substance, was a general denial. A trial resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

1. Defendant contends that the court erred in permitting plaintiff to file his amended petition. It appears that the original petition was filed within the statute of limitations, but defendant argues that, by failing to state facts sufficient to warrant a recovery, the petition was a nullity; that the filing of plaintiff's amended petition was in fact the commencement of a new action, which was then barred by the statute of limitations. On the other hand, plaintiff insists that, under the rule announced in *Merrill v. Wright,* 54 Neb. 517, *Norfolk Beet-Sugar Co. v. Hight,* 59 Neb. 100, and *Chicago, R. I. & P. R. Co. v. Young,* 67 Neb. 568, the amendment was properly allowed; that the action was commenced by the filing of his original petition, and was therefore commenced in time to avoid the statute of limitations. We are of opinion that this question should be ruled by the decision cited. In the case of *Merrill v. Wright, supra,* it was said: "A petition is not necessarily a nullity because it does not fully and properly set out a cause of action and because an objection to it is sustained. The question of whether or not the statute of limitations should prevail against an amendment seems to turn, not upon the correctness of the pleading, but upon the identity of the cause of action sought to be set up. If the cause of action attempted to be set forth in the amended pleading is the same, the fact that it was defectively stated in the first petition will not prevent the application of section 19 of the code, which provides that an action shall be deemed commenced,

within the provisions of the statute of limitations, at the date of the summons which is served on the defendants." In the light of our former decisions, we are of opinion that the district court did not err in permitting the plaintiff to file his amended petition.

2. Defendant also contends that the court erred in refusing to instruct the jury to return a verdict in its favor. An examination of the record discloses that plaintiff declared upon the written contract. No rescission of the contract is alleged, and his sole ground for a recovery is based on his allegation that he had complied with its terms by submitting to a satisfactory medical examination. This allegation was denied by the defendant, and the burden of proof on that question was on the plaintiff. It appears that the contract was signed on August 10, 1905; that on October 21, 1905, defendant wrote plaintiff to the effect that he had not furnished his medical examination, and requested him to do so at once. It further appears that his examination was delayed through no fault of the defendant until February 26, 1906, at which time he was examined by one Doctor Hopper, and the result of his examination forwarded to the defendant. The plaintiff testified, over the defendant's objections, that he fully answered all questions put to him by Doctor Hopper, and that his examination was complete; that Doctor Hopper said to him, when he was through with the examination, "That is all." It appears, however, from the report of the examination that Doctor Hopper found that the plaintiff was slightly afflicted with nephritis, which, as explained, was a disease of the kidneys; that upon an examination of the report the defendant's chief medical examiner was in doubt as to plaintiff's physical condition, and desired a further medical examination; that defendant wrote to Doctor Inches, requesting him to see the plaintiff and ascertain whether his condition was temporary or chronic, and to get a sample of plaintiff's urine. It appears that Doctor Inches talked with plaintiff, and was unable to furnish the required information.

The testimony discloses that, about the 10th of April following, plaintiff wrote to defendant stating, in substance, that he had not received his policy, nor his money, and wanted to know what defendant was going to do about it; that, thereupon, Mr. Wilson, the president of defendant, wrote a letter to plaintiff that his application had not been rejected, because the medical department had not had an opportunity of acting thereon; that the company had asked for further information. That thereafter, and some time in the month of June, the defendant, failing to obtain the information it desired, sent one Doctor Lenhoff to Scribner, who called upon the plaintiff, and informed him that the company had sent him to make a further medical examination. He asked the plaintiff to submit to such an examination, and requested that he furnish him a sample of his urine. Plaintiff thereupon refused to comply with Doctor Lenhoff's request, and told him that he would have nothing to do with him; that, later on, plaintiff wrote defendant the following letter: "Gentlemen: I have told you before, and you also know, that I have taken one examination, and this is all I ever will take, even if you send a dozen doctors out here every week. I told your man before that I was through with you, and that is all. I will not open any more of your letters. Respect., John Witt."

We think it fairly appears that the defendant was willing at all times to deliver its policy of insurance to the plaintiff whenever he passed a satisfactory medical examination. In fact, defendant notified the plaintiff that if he would take a satisfactory medical examination, and it was found that the company ought not to write the policy on account of his physical condition, it would promptly return to him his advance premium. In our former opinion it was said: "The examination contemplated by the contract was, of course, the requisite medical examination required by all reputable life insurance companies before assuming a risk. On the face of the contract the assurer was not limited to a single examination by the

physician first designated, like the one pleaded. * * * In the very nature of the policy for which the advance premium was paid, a single examination, if incomplete or unsatisfactory, could never have been within the contemplation of the parties. Safe underwriting forbids such a construction of the contract." It follows that the plaintiff could not rely solely upon the medical examination of February 26, 1906, as a complete and full compliance with the terms of his contract.

As we view the evidence, the plaintiff failed to establish the fact that he had furnished to the defendant a satisfactory medical examination, and had complied with the terms of his contract. It should be observed that time was not the essence of the contract; that plaintiff failed to allege or prove that defendant was guilty of an unreasonable delay in attempting to carry out the agreement, and was not estopped to insist that plaintiff should be required to perform its obligations on his part. We are therefore of opinion that the district court erred in refusing to direct the jury to return a verdict for the defendant.

Defendant assigns many other errors as a reason for a reversal of the judgment, but, in view of what we have already said, it is unnecessary to consider them.

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

REVERSED.

LETTON, J., concurs in the conclusions only.

REESE, C. J., dissents.

HALE DAVIS, APPELLEE, V. A. O. TAYLOR & SON, APPELLANT.

FILED JANUARY 16, 1913. No. 16,882.

1. **New Trial: AMENDMENT OF MOTION.** A motion for a new trial cannot be amended by assigning new grounds after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict.

2. **Appeal: NEW TRIAL.** "Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from verdict, will not be considered by this court." *Gullion v. Traver*, 64 Neb. 51.

3. **Bailment: INJURY TO PROPERTY: BURDEN OF PROOF.** As a general rule, when a bailee returns the property bailed in a damaged condition, the burden is upon him to show that the damage did not occur through his negligence, and an instruction embodying this principle is not erroneous.

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

J. L. Grimm and *R. C. Hunter*, for appellant.

Bartos & Bartos, contra.

LETTON, J.

This was an action by the keeper of a livery stable to recover the value of a horse which he alleged was injured through the negligence of one of defendant's employees to such an extent that it became worthless. Plaintiff recovered, and defendant appeals.

The assignment that the court erred in giving the third instruction to the jury is not entitled to be considered. The record shows that it was not contained in the original motion for a new trial. It was interlined more than 30

days after the motion had been filed, and without any excuse being offered for the delay. *Gullion v. Traver*, 64 Neb. 51.

By the fourth instruction the jury were told, in substance, that if, while in the exclusive possession of a bailee, the property bailed is injured, the law presumes that such injury occurred through the negligence of the bailee, and the burden of proof is upon such bailee to overcome such presumption. It is contended that this instruction was erroneous, for the reason that such a bailee is not an insurer, but is only chargeable with ordinary care, and that the burden of proving negligence is upon the plaintiff. Where a bailee of a horse, hired to be driven, returns the horse injured in a manner that would most probably be caused by negligent and careless driving, a presumption arises from the very fact of injury that such negligence existed. This fact, in the absence of other evidence, makes out a *prima facie* case for the plaintiff. The instruction recognizes this principle. The only burden placed upon the bailee is that, when it is established that the property was injured while in his possession, he must overcome this presumption by his proofs. It is pointed out in *Bissel v. Harris & Co.*, 1 Neb. (Unof.) 535, that there are exceptions to this rule, and that if the bailee establishes that the injury "occurred through inevitable accident or irresistible force, which do not of themselves import negligence, the burden of proving negligence is upon the bailor." While there is a conflict in the authorities upon this proposition, this is the more modern rule, and the one which we believe to be supported by the better logic. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295; *Campbell v. Missouri P. R. Co.*, 78 Neb. 479; 3 Am. & Eng. Ency. Law (2d ed.) 750; 5 Cyc. 217.

As to the assignment that the evidence is insufficient, we think there was sufficient to justify the submission to the jury of the questions whether the driver of the team was negligent in driving in a gullied, rough and washed-

out road at the place of the accident, when there were smooth tracks upon either side upon which others had traveled and upon which he might have driven, and whether the breaking of the horse's leg was caused by such negligence and by his manner of driving.

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

AFFIRMED.

DOUGLAS COUNTY, APPELLANT, V. PAPILLION DRAINAGE DISTRICT ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,888.

1. Drains: RIGHT TO CROSS HIGHWAYS: STATUTE: CONSTITUTIONALITY. Section 24, art. V, ch. 89, Comp. St. 1911, providing as to drainage districts organized under that article that "said district may dig ditches and drains under and across railroads and public highways," is not unconstitutional, as violative of the provision that "the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21.
2. ———: ———: CONDITIONS. The legislature may grant drainage districts the right to cross highways, and if it imposes no conditions for the exercise of this right the county authorities can impose none.

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

James P. English and *George A. Magney*, for appellant.

Courtright & Sidner, contra.

LETTON, J.

This is an action brought by Douglas county to restrain the Papillion Drainage District from digging drainage ditches across public roads in Douglas county. No con-

sent was given by the county authorities to cross the roads, and no condemnation proceedings had been had. The injunction was denied, and the county appeals.

The Papillion Drainage District was organized under and by virtue of chapter 153, laws 1907 (Comp. St. 1911, ch. 89, art. V), which contains the following provision relied upon by defendants to give authority to cross public roads without securing the right of way as they must do over private property: "Section 24. Said district may dig ditches and drains under and across railroads and public highways." The county takes the position that section 24 is unconstitutional and void, as violative of the provision of the constitution that "the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21. We are of the opinion that this provision of the constitution is not involved. The public roads are not "the property of 'any' person." They are public easements under the full control of the legislature, which may authorize them to be used by other public or *quasi*-public agencies, with or without such restrictions as it may deem proper. Elliott, Roads and Streets (3d ed.) sec. 509 (421). In *Krueger v. Jenkins*, 59 Neb. 641, it is said: "The right in this litigation is one belonging exclusively to the public at large. Neither Douglas county nor its citizens have any peculiar interest in it. A county does not hold the legal title to county roads within its borders; it has no power of disposition over them; it has no proprietary interest in them; in performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public." *Alt v. State*, 88 Neb. 259. The license to cross the highway given by the legislature was within its powers to grant. The duty, being cast by law upon the defendants to restore the highway, relieves the county from any pecuniary outlay on account of the cutting of the road. The legislature having imposed no condition upon the license to en-

ter conferred upon the district, we find no warrant for the county authorities to do so.

The judgment of the district court is therefore

AFFIRMED.

JOHN J. BURKE, APPELLEE, V. ANNA WELCH ET AL., APPELLANTS; GEORGE O. BURNS ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,915.

Deeds: REFORMATION. A certain tract of real estate with visible monuments and definite boundaries was pointed out to an intending purchaser, who afterwards received a conveyance erroneously describing the property as being eight feet wider than the tract actually sold. The purchaser took possession and exercised ownership only as far as the true boundary, and made no claim to the eight-foot strip for several years thereafter, the vendor retaining possession and control of the same, and being in possession at the time he sold it, with the remainder of the tract of which it formed a part, to the plaintiff. *Held*, That the fact that there was a mutual mistake in the deed warrants its reformation so that the description may conform to the true intention of the parties.

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

Albert & Wagner, for appellants.

Reeder & Lightner, contra.

LETTON, J.

This is an action for an injunction and to reform a deed by correcting the description. The district court found for the plaintiff, and defendants appeal.

In September, 1903, George O. Burns, who was the owner of lots 3 and 4, block 20, Stevens addition to the city of Columbus, conveyed "the east 54 feet of lot 3" to his daughter, Anna, who was about to marry. In July, 1905, the daughter, Anna Poole, and her husband con-

veyed the same premises by warranty deed under the same description to Anna Welch. Each of these lots is 62 feet wide, so that, after the conveyance to his daughter, Burns remained apparently the owner in fee of the whole of lot 4 and the west eight feet of lot 3. In March, 1907, Burns sold and conveyed lot 4 and the west eight feet of lot 3 by warranty deed to John J. Burke. Mr. Burns bought the property about 15 years ago. He erected his house on lot 4, which is a corner lot. There is an alley runing north and south through the block, which runs on the east side of lot 3. At the time he gave the property to his daughter he measured 54 feet from the center of the alley, pointed out the dividing line to her, and planted a tree at the west line of the property. Mr. and Mrs. Poole erected a house upon the property and took possession up to this line. The house was rented to Mrs. Welch, who occupied it when she bought the property. Mr. Burns testifies that, just before Mrs. Welch purchased it, she asked him to show her where the line was; that he took a ten-foot pole, went with her to the center of the alley, and measured 54 feet over to the tree, then he went to the south side of the lot, and measured 54 feet; that Mrs. Welch put in a stake at that point, and did likewise at the north end; and that she then said: "That is all right, that is all the ground I want." After Mrs. Welch purchased, Burns mowed the grass on the west of the dividing line. Mrs. Welch built a sidewalk extending from the alley to the line of the tree; Burns built the walk from there on. Afterwards Mrs. Welch filled her lot with dirt up to the east side of the line, and Burns filled in 150 loads on his lots and up to the west side of this line. Plaintiff testifies that in March, 1907, when he bought, he took possession up to the line marked by the tree. He remained in possession for about a year, without any question from Mrs. Welch, and afterwards, when she said he was encroaching, he procured the line to be surveyed by one Gottschalk. She admits she never made any claims as to the eight feet east of the pump before the Gottschalk

survey, and that she did not mow the grass on it. The husband of Mrs. Welch testifies that there was no dispute about the line until after Burke bought the property in March, 1907; that Mrs. Welch never claimed the pump or property west of the mark until after the Gottschalk survey was made.

The complaint of the appellant is that the findings and decree are not sustained by sufficient evidence, are contrary to law, and are inequitable. She argues that the presumption is that the deed expresses the true contract; that, to justify the reformation of a written contract on the ground of mistake, it must appear that the mistake was mutual, and the evidence must be clear, convincing, and satisfactory; and that the court should not correct a mistake and conform an instrument to the intention of parties with respect to boundaries, when to do so will defeat their intention as to the quantity. It is further said that there must be an offer to do equity, and there is no such offer made in this case, and that the action is barred by the statute of limitations. While there is a conflict in the evidence, mainly on account of the testimony of Mrs. Welch who denies the existence of a number of material facts testified to by other witnesses, the great preponderance seems to be with the plaintiff. We think the proof is clear, convincing, and satisfactory that all conveyances were made with reference to the actual boundary line marked upon the ground; that Mrs. Welch, before she completed the purchase, knew exactly what property was intended to be conveyed; that she purchased a specific tract of land with ascertained and marked boundaries; that she took possession only as far as this boundary line, and made no attempt to assert title or to take possession to the west of this until after Burke had purchased from Mr. Burns. These facts bring the case within the power of a court of equity to grant relief. *Austin v. Brown*, 75 Neb. 345, 348.

With regard to the defense of the statute of limitations, the record does not show when the action was be-

gun, and, so far as we can see, the action seems to have been brought in time.

As to the claim that there is no offer to do equity on account of Mrs. Welch having paid the taxes on the eight-foot strip, the record shows that Mr. Burke offered in open court to pay any taxes that have been levied upon the disputed strip since the time of the deed to Mrs. Welch. This we think is all that it was possible for him to do, since there was no proof offered as to the proportionate share of the taxes levied thereon. It is also said that he has not offered to do equity because he has not offered to pay the value of the eight feet, but this he was not required to do, since Mrs. Welch was never in fact the true owner of this property.

The decree of the district court is clearly right, and is

AFFIRMED.

RICHARDSON COUNTY, EX REL. MAURICE SHEEHAN ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1, APPELLANT.

FILED JANUARY 16, 1913. No. 17,661.

1. **Drains:** HIGHWAY CROSSINGS: DUTY TO MAINTAIN. Under section 23, art. IV, ch. 89, Comp. St. 1911, drainage districts organized under that article are charged with the duty of restoring a public highway which they cross "to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness." *Held*, That this provision does not operate to relieve such districts from the duty imposed by common law and by section 110, art. I, ch. 78, Comp. St. 1911, to "make and keep in good repair good and sufficient crossings on all such roads."

2. ———: ———: BRIDGES: DUTY TO MAINTAIN. That where a new channel has been made by the drainage district for a stream which has been bridged by the public authorities, if the new channel and bridge relieve the county of the burden of maintaining the old bridge, the new bridge should be maintained by the public, and not by the drainage district.

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

Kelligar & Ferneau and *A. R. Keim,* for appellant.

A. E. Gantt, E. Falloon and *C. F. Reavis, contra.*

Courtright & Sidner, amici curiæ.

LETTON, J.

This was an application for a writ of mandamus to compel the respondent to erect and maintain suitable bridges and approaches at certain specific localities in Richardson county where the ditches dug by the respondent cross public roads. It is alleged that certain of the bridges built by respondent are too short, that others are out of repair and that the approaches are unsafe.

The answer to the alternative writ "admits that among the duties enjoined by law upon this respondent was to provide suitable bridges and approaches thereto in the highways where the ditches of respondents intersect the said highways, but denies that any law of the state of Nebraska enjoined upon said respondent the duty of maintaining said bridges and approaches thereto after the same have been duly installed by said respondent." It also denies that the bridges constructed by it were too short to span the openings, and alleges that, if the approaches and bridges are now impassable, it is due to flood conditions.

The court found (to quote from appellant's brief) "that the Moritz and Preston bridges were properly constructed by the drainage district; that these bridges were put out of repair by an unprecedented flood; that their consequent want of proper condition for public travel was not due to any omission, fault, or neglect on the part of the drainage district; and * * * the duty of replacing the same in proper condition for public use rested, under the law, upon the drainage district." The appellant admits that the findings of fact made by the court

are supported by sufficient evidence, but denies that the conclusion of law was correct.

A brief has been filed by *amici curiæ* requesting the court to re-examine the question decided in *State v. Papillion Drainage District,* 89 Neb. 808, 90 Neb. 477. On account of the importance of the question involved, we have devoted much time to a re-examination of the whole subject.

In this state there are a number of separate acts providing for drainage. How far these refer to roads will now be examined. The first act in point of time was passed in 1873, and is now designated as article I, ch. 89, Comp. St. 1911. The only reference to roads in that act provides that the counties must pay the amount of benefits the highway will receive, if any, toward the cost of the ditch. Article II of this chapter provides for drainage by incorporated companies composed of owners of the lands affected, and was passed in 1877. Laws 1877, p. 160. No provision is found in this act referring to roads. Article III, passed in 1911 (laws 1911, ch. 142), is substantially the same as the act of 1873 with reference to public highways. There are no specific provisions in any of these acts allowing ditches to cut or cross public highways. Article IV, passed in 1905 (laws 1905, ch. 161), also provides that railways and highways shall bear their proportionate share of the cost according to benefits, and in specific terms gives authority to cross streets, highways, railways, canals or ditches. Article V was passed in 1907. Laws 1907, ch. 153. The only reference to roads therein is section 24, which provides: "Said district may dig ditches and drains under and across railroads and public highways." This resume shows that, with the exception of ditches dug by districts organized under the acts of 1905 and 1907, the authority to cut and cross highways at all must be derived by implication.

The appellant is organized under the provisions of the act of 1905, as amended. Comp. St. 1911, ch. 89, art. IV. Section 23, so far as applicable, is as follows: "The said

board shall have the power to construct the said works across any street, avenue, highway, railway, canal, ditch or flume which the route of said ditches may intersect or cross, in such manner as to afford security for life and property, but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the privilege aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land."

Prior to 1887 there appears to have been no general statute in this state regulating the crossing or cutting of highways by corporations or persons having a legal right to do so, or prescribing their duties with respect to restoring the road to its former condition. In that year the legislature passed "An act to compel railroad corporations and others to make and keep in repair crossings." The first section of the act is as follows: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own, or operate any railroad, canal, or ditch that crosses any public or private road, shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary within their right of way." The remainder of the act is mainly concerned with the manner of enforcing this duty. Laws 1887, ch. 73; Comp. St. 1911, ch. 78, sec. 110.

At the common law it was ordinarily the duty of the county to erect and repair bridges; but, where a highway was crossed or cut for any purpose by other than highway authorities, it was the duty of those interfering with

the road to restore the same. Quoting from 16 Halsbury, Laws of England, 191: "Where individuals have for their private purposes created a necessity for a public bridge, e. g., by cutting a canal or drain across an existing highway, or by deepening the water at a ford, and have built a bridge in order to enable the public to exercise the right of passage, they must maintain and repair it, at any rate until they abandon their operations and restore the highway to its original condition. This liability is usually expressly imposed and defined, in the case of a statutory undertaking, by the undertakers' special act; but, apart from any special provision, the liability both to build and maintain a bridge attaches where the highway is interrupted, or rendered seriously inconvenient, either with or without statutory authority." See, also, 3 Comyns' Digest (1st Am. ed. B. 2) 34.

In *King v. Inhabitants of County of Kent*, 13 East, T. R. (Eng.) 220, a navigation company having deepened a ford and built a bridge over the same place under authority of a statute giving them power to alter highways or bridges, "leaving them or others as convenient in their room," was held bound to keep the bridge in repair. The identical argument used by appellant here was used in that case, that the burden of repairing public bridges was by general law cast upon the county, and that there is no provision in the navigation act casting the duty upon the company, but Lord Ellenborough said: "But here the statute gives power to the company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition; and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public." Bayley, J., said: "The act empowered the company to amend or alter such bridges

or highways as hindered the navigation, leaving them or others as convenient in their room; and after altering the bed of the river so as to make it no longer fordable, they could not leave another convenient passage in the highway there without making and keeping up a bridge."

In *King v. Inhabitants of Lindsey, County of Lincoln,* 15 East, T. R. (Eng.) 317, the facts were similar. One of the judges said: "The authority given to the company to make the cut, which rendered the highway impassable without a bridge, must create an obligation in them to erect the bridge, though the word authorize in the act might not of itself create the obligation."

In a later case, *King v. Inhabitants of County of Kent,* 2 M. & S. (Eng.) 513, the facts were that, about 45 years before, a miller had deepened the water of a ford, which was often impassable, through which there was a public highway. He afterwards built a bridge over it, which the public had ever since used. It was held that this case was distinguishable, and that the county was liable to repair because the public had received a direct benefit by the erection of the bridge over the inconvenient ford.

King v. Kerrison, 3 M. & S. (Eng.) 526: Certain commissioners who were authorized to make a new channel for navigation purposes cut through a highway and built a bridge over the channel. It was held that the proprietors, and not the county, were liable to repair. Bayley, J., said: "This differs from the last case of *Rex v. Inhabitants of Kent;* there the county derived a very essential benefit from the bridge; they had before but a passage through the ford, which is always an inconvenient one; but what benefit does this county derive from passing over a bridge instead of a solid highway?" See, also, *Manley, Adm'r, v. St. Helen's C. & R. Co.,* 2 H. & N. (Eng.) 840. The same rule has been almost uniformly applied in the United States. Most of the cases are concerned with the duties of railroad companies, but some with those of canal companies or drainage districts intersecting highways.

In New York where a mill owner who had dug a race across the highway and built a bridge over it was sued by a person injured by reason of the bridge having been allowed to become out of repair, it was held that the person who made the bridge necessary had the burden of maintaining it and was liable for negligence in so doing. *Dygert v. Schenck*, 23 Wend. (N. Y.) 446.

The supreme court of Massachusetts, in speaking of the duty of a railroad company at a point where it had erected a bridge to carry the public highway across its track, said: "In building the bridge, the railroad company have undertaken to make a safe passage for the road, which existed previously, across their railroad. They dispossess the ordinary officers, charged with the maintenance of public ways, from so much of the way as is necessary to effect this purpose. The statute requires them to keep in repair just what it requires them to construct." *White v. Inhabitants of Quincy*, 97 Mass. 430.

In Kansas, it is held that it is the legal duty of an irrigation company to restore the highways which its ditch intersects with suitable bridges adequate to accommodate all public travel, and this independently of statutory requirement. *State v. Lake Koen N., R. & I. Co.*, 63 Kan. 394. The Kansas statute, however, has the further provision that, when such bridges are constructed, they "shall be and become a part of the public highway, and shall be maintained and kept in repair by the authorities having charge of such highways." If the Nebraska legislature had been equally careful to specify upon whom rested this duty, there would have been no occasion for this controversy.

In Pennsylvania, a railroad company, having changed the location of a public road and erected a bridge over a creek for the new road, refused to repair and maintain it. It was rebuilt by the township, which brought an action to recover the cost of the bridge. It was held that, the company having originally built the bridge to meet the necessity of the public, the duty devolved upon it to main-

tain and repair it—citing *Woodring v. Forks Township*, 4 Casey (Pa.) 355, to the effect that, where the owner of land cuts a ditch across a public road for his own purpose, he is not only bound to build a bridge, but to maintain it perpetually thereafter. *Pennsylvania R. Co. v. Borough of Irwin*, 85 Pa. St. 336.

It is held in Illinois that any person or corporation that cuts through a highway for its own benefit must furnish to the public a proper crossing. *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. R. Co.*, 67 Ill. 118. And the drainage statutes did not change this obligation. *Commissioners of Lake Fork Special Drainage District v. Biggs*, 134 Ill. App. 239; *Commissioners of Highways v. Commissioners of Lake Fork Special Drainage District*, 246 Ill. 388. See, also, on the general subject, 1 Elliott, Roads and Streets (3d ed.) sec. 48 (41); *Perley v. Chandler*, 6 Mass. 453; *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *Board of Commissioners v. White Water Valley Canal Co.*, 2 Cart. (Ind.) 162; *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92; *People v. Fenton & T. R. Co.*, 252 Ill. 372.

Returning now to a consideration of our statute of 1887, it is apparent that it is merely declaratory of the common law, and that the same common-sense reasons which led both the English and American courts to the conclusion in the opinions cited were the impelling motives to the enactment of the Nebraska statute. The statute was considered with relation to railways in *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412, and in *Missouri P. R. Co. v. Cass County*, 76 Neb. 396, and was held to apply to highways laid out after the construction of the railroad, as well as to those established and in use before the road was built. In *Nuckolls County v. Guthrie & Co.*, 76 Neb. 464, it is held that, under this statute, the duty to maintain bridges over a millrace on a public highway is upon the mill owner, and that the duty is a continuing one. See, also, *Franklin County v. Wilt & Polly*, 87 Neb. 132.

It is contended that, the drainage district being a public corporation, the statute does not affect it, and, further, that, since the drainage works are for the public benefit, the reasoning of the common law based upon the private advantage to the owner of a mill, a canal, or a railroad does not apply. While a scheme of drainage in this state must be "conducive to the public health, convenience and welfare," as the statute requires, in order to warrant the exercise of the police power in its behalf, yet for pecuniary benefit to the incorporators such districts are usually formed. It would be difficult to find a sufficient number of altruistic individuals to form a district and bear its burdens and expenses without the pleasing prospect of future benefit in increased productiveness of the lands affected or by enhancement in their value. Private advantage is the mainspring of the movement, and the same reasons exist whether the form of the controlling authority be public or private. Without doubt the legislature has the power to apportion among public corporations concerned with the roads the duty to maintain the same, and, if it so decide, to take the burden of erecting and maintaining bridges away from drainage districts and place it upon the public at large, but we are of the opinion that it has not done so by the act under consideration.

While not passing upon the point of constitutionality, the language of Judge SULLIVAN in the opinion in *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, suggests a query: "Why should these companies be put in a class by themselves and be given immunity from the burdens which all others, under similar conditions, are required to bear? Their ditches are not, by the section in question, segregated from other private ditches on account of any peculiar characteristics which they possess. The legislation is manifestly as appropriate to the class excluded as to the class included; and the only reason we can discover for diverse legislation with respect to them is the arbitrary and insufficient one of ownership. The obvious

purpose of the legislature in dealing with both classes was to secure to the public safe and substantial bridges across private ditches, and there was no more reason for exempting some proprietors from the expense of maintaining their bridges, because engaged in the business of irrigation, than there would be for exempting others who used their ditches to drain wet lands or to protect inclosures."

There is, however, another consideration which merits attention. The district is given power to change the channel of streams. In so doing, it is probable that, either at the time of the change or afterwards as the new channel scours and washes and the old fills up, the necessity of maintaining bridges over the old channel ceases. There is a public benefit in the new construction. To maintain the new bridge would impose no greater burden on the public authorities than to maintain the old one, and the straightening of the channel and prevention of floods would undoubtedly tend to lessen the damages which public roads and bridges would suffer from such conditions. *Dygert v. Schenck,* 23 Wend. (N. Y.) 446. In such case the reasoning of the case of *King v. Inhabitants of County of Kent,* 2 M. & S. (Eng.) 513, applies. The public having been compelled to bridge the stream at the old channel and maintain the bridge, if the necessity for its upkeep ends, should be compelled to assume the burden of keeping up the necessary crossing over the new channel. *State v. Chicago, B. & Q. R. Co., supra,* recognizes this principle.

The dominant note running through all the cases is the preservation of the highway. In the old days the pack horse, the stage coach, and the wagon were the only instrumentalities of commerce on land, and the mainteance of the highway was essential to free intercourse. Hence, the care to protect it, to enforce the duty of repair, even by indictment and by penalties for its obstruction. While the railroad lessened the use of the roads for extended journeys, public interest in their preservation

now exists in a growing degree since the automobile and the tractor are to be found upon every highway.

It is claimed that the provisions of section 23 cover the whole subject of the rights and duties of the district with relation to public roads, and that, being a special act, it limits and controls the act of 1887. We do not so understand it. It is declaratory of the duty to restore the highway, and is, equally with the act of 1887, consistent with the common law. As we have seen, similar language has been so interpreted by other courts.

The judgment of the district court is warranted by the law and the facts. It is therefore

AFFIRMED.

PHILIP FASSLER, APPELLANT, V. RUDOLPH STREIT ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,872.

1. **Bills and Notes:** NEGOTIABLE INSTRUMENTS ACT. The negotiable instruments act (Comp. St. 1905, ch. 41) does not apply to negotiable instruments executed and delivered before it went into effect.

2. ———: ASSIGNMENT: DEFENSES. While an assignment indorsed on the back of a mortgage or on a separate slip of paper may be effective to transfer the equitable title to the note secured, it is not a commercial indorsement cutting off defenses which would have been available to the maker of the note in a suit against him by the original payee.

3. **Evidence:** DECREE: ADMISSIBILITY PENDING APPEAL. Where the giving of a supersedeas bond and the perfecting of an appeal stay proceedings until there has been a trial *de novo* in the appellate court, the superseded decree, pending appeal, is not admissible in evidence to prove a final adjudication binding on the parties or determining their rights.

4. ———: ———: ———. Where a party whose rights are affected by a decree in a former suit pleads, in a subsequent action, that the decree is not final and that he intends to appeal, and introduces in evidence a supersedeas bond obligating himself to prosecute his appeal to effect without delay, he cannot, in such a state of his pleadings and proof, use the superseded decree as evidence of a

final adjudication binding on the parties or determining their rights.

5. Appeal: EVIDENCE: REVIEW. The supreme court must consider an appeal on the evidence before the trial court, except in the rare instances where new matter arising after the entry of judgment is brought into the case by supplemental proceedings.

6. ———: NEW EVIDENCE. After an appeal has been taken from the district court to the supreme court, new facts of which the trial court had no knowledge will not be introduced into the record by judicial notice.

7. Evidence: JUDICIAL NOTICE: RECORDS. While a court will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case.

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

Bernard McNeny, for appellant.

L. H. Blackledge and *E. U. Overman, contra.*

ROSE, J.

This is a suit to foreclose a mortgage for $1,300 on a quarter-section of land in Webster county. The note secured was executed February 16, 1904, and by its terms matured March 1, 1909. A payment of $300 was made June 13, 1906. Andrew P. Johnson was payee, and Rudolph Streit and Amelia Streit were makers and mortgagors. Philip Fassler is plaintiff, and pleads that the note was assigned in good faith by the payee to V. S. Hall, June 17, 1907, and by the latter to plaintiff, November 7, 1907, and that he is an innocent holder without notice of any defense. Mortgagors are defendants. June Paulson, Martin Paulson, Carrie Paulson, Nels Paulson, Mary Paulson and Lena Peterson are joined as defendants, and it is alleged that they claim some interest in the mortgaged premises, but that it is inferior to plaintiff's lien.

In his answer Rudolph Streit admitted the execution

of the note and mortgage and the payment of $300, as pleaded by plaintiff, but denied other allegations of the petition, including the *bona fides* of the transfers. He also pleaded that the note and mortgage were given by him in part payment of the purchase price of the mortgaged land; that he purchased it from Johnson, who executed and delivered to him a warranty deed, but that thereafter, and before any actual or pretended transfer of the mortgage, the Paulsons and Lena Peterson set up a claim of title adverse to that of Johnson and his grantee, and in the district court for Webster county an action was instituted wherein the Paulsons were plaintiffs and Lena Peterson and the Streits were defendants; that, upon Streit's answer and cross-petition therein, Johnson and Hall were made parties, and the latter, after having been served with summons, defaulted; that upon issues joined and tried in the former suit it was decreed that the Paulsons had an interest in the mortgaged land adverse to that of Johnson and his grantee, and that collection of the note and enforcement of the mortgage be enjoined pending an accounting between Johnson and his grantee as to the damages on account of the covenants of seizin and warranty in Johnson's deed. It is further alleged in Streit's answer herein that the decree in the former suit was rendered September 24, 1909, and has not become final as to the parties affected by it; that the time for appeal therefrom has not expired; that he is proceeding to perfect an appeal therefrom to the supreme court. In the answer it is also alleged that Hall and plaintiff herein, before the making of the assignments pleaded by the latter, knew of the adverse claims of the Paulsons and of the pendency of their action, and of the liability of Johnson to his grantee, and of the latter's right and intention to recoup his loss out of the mortgage indebtedness, in the event it should be finally adjudged that Paulsons had an interest in the mortgaged land; that plaintiff knew Johnson to be a non-resident of the state. In a reply allegations of new matter in the answer were

denied. For the purposes of this appeal reference to the pleadings of other parties seems to be unnecessary. Upon a trial of the foreclosure suit, the petition was dismissed April 16, 1910, and plaintiff has appealed.

Plaintiff argues there is error in the dismissal of his suit to foreclose the mortgage, because the petition, the evidence, and the findings of the trial court show, as he asserts, that he is a *bona fide* holder of the note for value before maturity, without notice of defenses thereto, and that, therefore, any defense pleaded is unavailing. Do the assignments pleaded amount to commercial indorsements protecting plaintiff as a *bona fide* holder? There is no indorsement of a transfer of any kind on the note. It is payable to "Andrew P. Johnson or order," and his assignment appears on the back of the mortgage in the following form: "Berkley, June 17, 1907. For and in consideration of the sum of One Thousand ($1,000) Dollars to me in hand paid, receipt of which is hereby acknowledged, I have this day assigned all my right, title and interest in the within described property to V. S. Hall of Bladen, Nebraska. Andrew P. Johnson."

What is relied upon by plaintiff as an indorsement to him was written with a pencil on the back of a deposit slip of the Exchange Bank of Bladen, Nebraska. At the time, Johnson was in California, and the note was in Hall's bank at Bladen. The writing is as follows: "June 18, 1907. Purchased of A. P. Johnson Streit Mort. & note. $1,300. Nov. 9, 1907. Sold same to P. Fassler. V. S. Hall."

Referring to the transfers of the note, the trial court found that a formal assignment was made by payee on the back of the mortgage; that the note was not attached to the mortgage and assignment; that the note and mortgage were kept together, but were not physically united or attached to each other; that payee made no indorsement on the note; that no assignment of the mortgage was made by Hall to Fassler; that the note was not indorsed by Hall, but that on a separate piece of paper he made a

notation of the sale of the note and mortgage to Fassler, and signed the same; that the notation was placed with the note and mortgage, but not physically attached thereto, and the three instruments were delivered to plaintiff; that, there being no indorsement on the note or on a paper attached thereto, it is subject to any defense the makers may have against the payee.

Notwithstanding these findings, plaintiff insists he is a holder in due course within the meaning of that part of the negotiable instruments law which declares: "The indorsement must be written on the instrument itself, or upon a paper attached thereto." Comp. St. 1905, ch. 41, sec. 31. Plaintiff insists that the papers were attached, and that he is entitled to protection as an innocent holder, since the trial court, in addition to the findings already mentioned, found that Hall purchased the note and mortgage June 18, 1907, for a good and valuable consideration, without notice of any defense, and that plaintiff likewise purchased them in November, 1907. If plaintiff is correct in asserting that the papers were attached, within the meaning of the negotiable instruments law, and if the language quoted changed the law merchant, questions not decided, the point, as argued, is nevertheless not well taken, because that statute is inapplicable. It went into effect, according to its terms, August 1, 1905. Comp. St. 1905, ch. 41, sec. 198. The note was executed and delivered at an earlier date, namely, February 16, 1904. The act declares: "The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the taking effect hereof." Comp. St. 1905, ch. 41, sec. 193. The rights of the parties must therefore be determined according to the law in force prior to the enactment of the negotiable instruments statute. *Dorsey v. Wellman*, 85 Neb. 262.

Independently of the statute, were the assignments commercial indorsements protecting plaintiff from the defenses pleaded? It has been distinctly held that an assignment indorsed on the back of a mortgage, though

it may operate as an equitable transfer of the note, does not cut off defenses which would be available to the maker in a suit by the original payee. *Doll v. Hollenbeck,* 19 Neb. 639; *Colby v. Parker,* 34 Neb. 510; *Gaylord v. Nebraska Savings & Exchange Bank,* 54 Neb. 104; *Sackett v. Montgomery,* 57 Neb. 424; *Nebraska Nat. Bank v. Pennock,* 55 Neb. 188. In the case last cited it was held: "A transfer by an instrument separate from, and independent of, the note, while it operated to convey the title, did not cut off equities or defenses, as would have been done had this negotiable note been regularly indorsed."

Plaintiff contends, however, that the assignments and the note were kept together, that they were attached, and that they should not be considered as separate instruments. It is true Hall testified, in reference to his assignment on the deposit slip, that it "was made out and 'attached' to the paper at the time of the purchase of the mortgage;" but, when all the testimony is considered, it is apparent he used that word in the sense that, when the papers were kept together, he understood they were "attached." This seems to be the proper interpretation of his testimony, when other evidence shows the trial court properly found that the deposit slip was not physically attached to the note or mortgage. It seems equally clear that neither the deposit slip showing Hall's transfer nor the mortgage on which Johnson's assignment was indorsed can be considered an allonge, since it appears that there was nothing on the back of the note except a credit of $300, and that therefore there was no necessity for an additional slip for indorsements.

It is further argued that the dismissal of the foreclosure suit is erroneous, because there is no competent evidence that Streit was evicted, or that he surrendered possession of the land purchased by him from the mortgagee, or that the consideration for the note failed. Plaintiff's argument on this point has not been successfully refuted. It is not even asserted that Streit was evicted

or that he surrendered possession. The only proof that his title failed is found in the decree in the suit by the Paulsons to quiet their title. This decree, when received in evidence, was inadmissible for the following reasons: Streit alleged in his answer herein that the decree had not become final, that the time to appeal had not expired, and that he was proceeding to perfect an appeal to the supreme court. He is bound by these averments. In addition, he introduced in evidence a properly executed supersedeas bond reciting his intention to appeal and obligating himself to proceed without delay. The effect of the supersedeas bond was to suspend proceedings under the decree. There is nothing in the record to show that his appeal was not prosecuted according to his declared purpose and to the obligation of his bond. In *Riley Bros. Co. v. Melia*, 3 Neb. (Unof.) 666, this court, in an opinion by BARNES, C., announced the following rules:

"The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo*.

"By the perfecting of such appeal the parties are placed in the same situation, and their rights are the same, as they were at the time of the commencement of the action."

While the decision in that case appears to go further than the opinion in the earlier case of *Creighton v. Keith*, 50 Neb. 810, this language is used therein: "A decree is affected by an appeal no further than that proceedings are stayed pending the review, where there has been filed a proper bond, and perhaps the decree is not admissible as evidence."

Under the practice in this state, pleadings, in an appeal in equity, may, under some circumstances, be amended in the supreme court, and the decree of the trial court may be affirmed or modified or reversed, or a different decree may be rendered, after a trial *de novo*. In

jurisdictions where a supersedeas and an appeal have the effect of staying proceedings in the trial court and of bringing up the entire case for a trial *de novo,* the rule generally sanctioned is that the decree, pending appeal, is not admissible as evidence of a final adjudication binding on the parties or determining their rights. *Day v. De Jonge,* 66 Mich. 550; *Souter v. Baymore,* 7 Pa. St. 415; *Naftzger v. Gregg,* 99 Cal. 83, 37 Am. St. Rep. 23; *Sharon v. Hill,* 26 Fed. 337; *Haynes v. Ordway,* 52 N. H. 284; *Byrne, Vance & Co. v. Prather,* 14 La. Ann. 663; *Small v. Haskins,* 26 Vt. 209; *In re Blythe,* 99 Cal. 472; *Sherman v. Dilley,* 3 Nev. 21; *Griffin v. Seymour,* 15 Ia. 30. In *Glenn v. Brush,* 3 Colo. 26, the supreme court of that state said: "The object of a writ of error is to review and correct an error of law, and it is no bar to further proceedings, unless bond and security is given; when that is done the writ operates as a supersedeas; the party cannot afterward proceed to execute his judgment until the appellate court has rendered its judgment thereon. The judgment of the court below in the meantime is suspended; and a suspended or inoperative judgment is not evidence of title. It is suspended for all purposes until affirmed or reversed by the supreme court. If affirmed, it is binding; if reversed, it is a nullity. We are aware there are decisions at variance with this opinion, but it is fully sustained by authority and reason."

Streit, having alleged in his answer that the decree was not final and that he intended to appeal, having executed and introduced in evidence a supersedeas bond, and having offered no proof to show that he had abandoned his appeal or that it had not in fact been taken, or that it had been perfected and dismissed, or that the decree had been affirmed, should not have been permitted to introduce it as evidence of a final adjudication, or of an estoppel, or of a final determination of the rights of the parties. There being no other proof to show that his title failed, the dismissal is not supported by evidence.

To avoid the effect of pleading and proof that the de-

cree was not final, that Streit intended to appeal and that he executed a supersedeas bond, he now asks this court to take judicial notice of its own records which, he says, show that no transcript for an appeal was ever filed here and that the time for appealing has expired. For two reasons this course cannot be pursued: (1) It is a fundamental principle of appellate procedure that courts of last resort must determine an appeal on the evidence before the trial court, except in the rare instances where new matter arising after the entry of judgment is brought into the case by supplemental proceedings. It was not the duty of the trial court, contrary to the alleged purpose and absolute right of Streit to appeal, as shown by his answer and by the recitals in his supersedeas bond, to assume, or to take judicial notice, that no appeal had been, or would be, taken. The reviewing court should not by judicial notice introduce into the record facts of which the lower court had no knowledge. Any other rule would be manifestly unfair to the trial court and to the parties, who are entitled to a full and impartial hearing in the court of original jurisdiction. (2) While a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Allison v. Fidelity Mutual Fire Ins. Co.*, 74 Neb. 366; *Gibson v. Buckner*, 65 Ark. 84; *Ralphs v. Hensler*, 97 Cal. 296; *Downing v. Howlett*, 6 Colo. App. 291; *Streeter v. Streeter*, 43 Ill. 155; *Enix v. Miller*, 54 Ia. 551; *Thayer v. Honeywell*, 7 Kan. App. 548; *Anderson v. Cecil*, 86 Md. 490; *Banks v. Burnam*, 61 Mo. 76; *Daniel v. Bellamy*, 91 N. Car. 78; *Grace v. Ballou*, 4 S. Dak. 333; *Goodwin v. Harrison*, 28 Tex. Civ. App. 7; *McCormick v. Herndon*, 67 Wis. 648.

In another respect, the answer and the proof are insufficient to justify the relief granted to Streit. He did not fully show that there was a total failure of consideration for the note, or that the damages resulting from the original payee's breach of covenant equaled or exceeded the amount due on the note. For the errors

pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurring.

The first assignment, as introduced in evidence, does not assume to assign the note at all. It simply assigns the mortgagee's interest in the land mortgaged. The second paper introduced in evidence was clearly in its form and wording not intended as an indorsement of the note, and that I suppose is the real test. If there had been no room upon the back of the note for a regular indorsement, and a paper was attached purporting and intended as an indorsement, then plaintiff might have been an innocent purchaser.

The findings of the trial court upon the question whether plaintiff is a *bona fide* holder without notice are inconsistent, unless we very liberally construe the first and seventh findings. The sixteenth finding is that the note, not being indorsed in writing or on a paper attached thereto, is subject to any defense that the defendants might have against the original payee, and the decree is based upon that theory; therefore, in the first and seventh findings the court must have meant the plaintiff had no actual notice, and did not refer to the notice that follows from the fact that the note was not indorsed.

The findings of the trial court will not support the judgment dismissing the action. There are no findings as to values or damages, and, of course, if the plaintiff has any interest in the property his action ought not to be dismissed. The case at bar involves the same questions that were presented and litigated in the former action, and, if that former action was not finally determined at the time that the case at bar was tried in the lower court, that court should have continued the case at bar until the former action was finally determined, and then should have rendered his decree accordingly. The case being in

equity and all the parties interested before the court, the court in rendering a final decree should have disposed of the whole matter and fixed and enforced the rights of all the parties.

There is considerable discussion in the briefs as to whether an action, or rather a claim, like that of Mr. Streit, could be presented and litigated before he had been evicted from the premises. Johnson sold him the land and took a mortgage back, and is now trying to foreclose that mortgage. He invokes the powers of a court of equity and should do equity. The question as to the form of a warranty, and whether there must be an eviction pleaded and proved, is immaterial in the case. It would not be doing equity on the part of the plaintiff to sell Streit or his grantor a piece of land and take a mortgage back, and then foreclose the mortgage and take the land and not allow Streit to defend, because he, Streit, had not been evicted. According to the allegations of the petition, the first action was begun before Johnson sold the mortgage itself, and the man Hall, to whom Johnson sold the mortgage, was made a party and duly served with process. He was holding it as a bailee for Johnson, and he could not buy it as an innocent purchaser after that.

In the former action it was found that Streit's title had in part failed, and by the decree he was subrogated to a mortgage which appears to be prior to the title of those who were successful in attacking Streit's title, so that they could not take the land away from Streit without paying the prior mortgage. Clearly, the court in the case at bar should not allow Streit to be foreclosed and removed from the land without hearing and adjudicating his counterclaim. The old mortgage would inure to the benefit of the plaintiff, and the court should, if necessary, have the interest of the parties who were claiming the land against Streit sold under the old mortgage; that is, the court should determine the whole matter and take such action as would, as far as possible, protect all of the

innocent parties, and place the loss, if any, where it belongs.

LA FAYETTE PIERCE, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 16,883.

1. **Street Railways:** VEHICLES: RIGHTS AT STREET INTERSECTIONS. At a street intersection, neither the operator of a street car nor the occupant of a private conveyance has a superior right to cross, but each must exercise his right and perform his duty with due regard to the safety and convenience of the other, and both must act in a reasonable and careful manner.

2. ———: NEGLIGENCE: EVIDENCE. Proof of the running of a street car at an excessive speed across a public street, or of the failure to give proper warning of its approach, is evidence tending to show negligence.

3. ———: ———: ———. In a suit against a street car company for negligently running a street car into a buggy at a public crossing, proof that the car ran more than 150 feet after the collision before it could be stopped, though the brake had been firmly applied, is evidence tending to show excessive speed.

4. **Witnesses:** COMPETENCY. "A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591.

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

Clark & Allen, for appellant.

Flansburg & Williams, contra.

ROSE, J.

While plaintiff was driving east in the city of Lincoln across Twenty-seventh street where it is intersected by Q street, the buggy in which he was riding was struck by a north-bound street car on defendant's track, and he was seriously injured. This is an action to recover resulting

damages in the sum of $10,000. The negligence imputed to defendant consisted in its running the car at an excessive rate of speed, and in failing to ring a bell or sound a gong or otherwise give notice that the car was approaching the crossing. The answer of defendant contained a denial of the negligence charged, and a plea of contributory negligence on part of plaintiff. From a judgment on a verdict in favor of plaintiff for $1,625, defendant appealed.

The sufficiency of the evidence to raise a question for the jury or to sustain the verdict is assailed in different forms and is the principal question argued. Is plaintiff defeated as a matter of law? Defendant has two street car tracks running north and south on Twenty-seventh street, where the accident occurred. On the west track the cars run south and on the east track they run north. About the time plaintiff, while going east on Q street, entered the intersection at Twenty-seventh street, a southbound car on the west track passed in front of him. He did not stop at the crossing, but pursued his course eastward, and a street car running north down a slight grade on the east track struck the rear axle of his buggy. After discussing the evidence at considerable length, counsel for defendant said: "When the plaintiff drove into the intersection, the car going north must have been in sight. If he had looked, he could, and would, have seen it, and he cannot excuse himself by saying that he looked and it was not there, when the very physical situation itself shows beyond dispute that it was there." The deduction of defendant seems to be that, if plaintiff looked, as he said he did, he saw the car; or, if he did not look, he failed to exercise ordinary care; and, in any event, he drove in front of the approaching car and the injury was the result of his own negligence. Is the position thus taken by defendant tenable? In determining whether plaintiff made a case for the consideration of the jury, or whether the evidence is sufficient to sustain the verdict, the relative rights and duties of the parties, in using

a public street at a crossing, must be considered. Plaintiff was familiar with the location and with the ordinary and usual movement of electric street cars at Twenty-seventh and Q streets. There is a public crossing there, where passengers get on and off street cars. At a street intersection, neither the operator of a street car nor the occupant of a private conveyance has a superior right to cross. They cannot occupy the same space at the same time, and one must exercise his right and perform his duty with due regard to the safety and convenience of the other. Both must act in a reasonable and careful manner. *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209; *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767; *Omaha Street R. Co. v. Cameron*, 43 Neb. 297.

Plaintiff testified that, when he was within 12 or 15 feet of the west track, a car from the north passed in front of him; that his horse was jogging along at the rate of 5 or 6 miles an hour and did not stop; that, when a little nearer the west track, he looked north and saw no car, and immediately looked south and saw nothing but the retreating car 6 or 7 rods away, where it obstructed his view; that, when approaching the tracks, he looked both ways and listened; that, when his horse's feet were over the first rail, he espied a car coming from the south and thought it was about 7 rods away; that it was running at the rate of 30 or 35 miles an hour; that, when he first saw the north-bound car, he thought he could cross the track ahead of it, and that he urged his horse with a whip. Further narration of plaintiff's testimony in considering the sufficiency of the evidence is unnecessary. The motorman testified on behalf of defendant that he passed the south-bound car near the alley between Q and P streets, while sounding the gong; that he was running 12 or 15 miles an hour; that he did not see plaintiff until within a car's length of him; that he immediately applied the brake, but could not prevent the collision. Plaintiff and the motorman were the only eye-witnesses, but others heard the report of the impact. One witness testified

that he heard a sharp crash, followed by the sound of the pounding and bouncing of wheels on the track, as if the brakes had been quickly and firmly set, and that after the collision the car ran more than 150 feet past the intersection before it stopped.

Plaintiff's evidence tends to prove that in the nighttime the car, without sound of bell or gong, running down grade at the rate of 30 or 35 miles an hour, approached the intersection at a public crossing, where the rights and duties of pedestrians and occupants of private vehicles are the same as those of defendant; and the proofs of defendant tend to show that the car approached the crossing at the rate of 12 or 15 miles an hour, and that the motorman in charge made no effort to slacken its speed until it was within a car's length of plaintiff. At a street crossing, the running of a street car at an excessive speed, or without giving proper warning of its approach, is evidence tending to show negligence. *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97. Proof of the distance the car ran, with the brake firmly set, after the collision, was evidence tending to show excessive speed. *Indianapolis Street R. Co. v. Bordenchecker*, 33 Ind. App. 138.

Plaintiff's explanation why he did not see the northbound car sooner, as deducible from his testimony, is that it was obscured by the south-bound car when he first looked south. At that time, according to his proofs, it was about seven rods away. Whether his testimony was worthy of belief and whether he was justified in attempting to cross the track when there was no car within that distance were questions of fact for the jury. He said he thought, when he first saw the car, that he could cross the track ahead of it by urging his horse. He used his whip promptly and made the attempt. That he was almost across when his buggy was struck is not disputed. Had the car been running a little slower, the evidence indicates he would have crossed in safety. Under the proofs outlined, the issues were for the jury. *Omaha*

Street R. Co. v. Mathiesen, 73 Neb. 820; *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97, 88 Neb. 209.

Defendant also argued that the trial court erred in permitting plaintiff to testify to the speed of the car. It is insisted that the car was coming directly toward him, and that he had no opportunity or time for comparison with other objects and could make no reasonable estimate of speed. This is not a necessary conclusion. When he first saw the car he was not, according to his own testimony, directly in front of it. He said he saw the headlight and the moving car itself, when it was within about seven rods of him, and that he was not excited. He testified, without objection, that he knew the car was running rapidly, and he had already stated that he was familiar with the location and with the ordinary movement of cars at the place of the accident. He further said he had been a locomotive fireman, was accustomed to observing the speed of cars, and could tell from his experience and observation about how fast this particular car was approaching. When asked for the rate of speed, he answered: "Thirty or 35 miles an hour." His testimony seems to be admissible under the following rule: "A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209. The weight of plaintiff's testimony, under all the circumstances proved, was for the jury. He did not assume to be technically exact about distances, or about the speed of the car, or about the rate at which he was himself traveling, and said so on the witness stand. An effort to discredit his story by mathematical demonstration based on his estimates, which were intended to be approximately correct only, is inconclusive.

A number of rulings in giving and in refusing instructions are criticised, but in these respects no error requiring a reversal has been found.

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion does not discuss or state the errors assigned upon the instructions of the court. It says: "In these respects no error requiring a reversal has been found." The brief says that a part of the tenth instruction given by the court was: "Where one knowingly assumes or takes a place of danger, he thereby assumes all the risk of danger incident thereto. The question is whether, when the plaintiff attempted to cross the track, he knew he was in danger in attempting to do so, and negligently and recklessly went ahead in the attempt." This seems to be a very important instruction in this case. If he took no pains whatever to learn whether he was in danger or not, and drove, without looking, on the track in front of the car, he would not know he was in danger, and he would not be negligent under this instruction. It seems to me that the error here complained of is worthy of consideration.

HAMER, J., dissenting.

The tenth instruction is complained of. It reads: "Where one knowingly assumes or takes a place of danger, he thereby assumes all the risk of danger incident thereto. The question is whether, when the plaintiff attempted to cross the track, he knew he was in danger in attempting to do so, and negligently and recklessly went ahead in his attempt. A driver on the streets has the right to assume cars on the street railway tracks are moving at their usual and ordinary rate of speed, and that those in charge of the car are exercising reasonable care to avoid collisions." I am under the impression that this instruction should have been further elaborated so that it would contain an expression of the idea "that, if he did negligently and recklessly go ahead, he should not be allowed to recover." The instruction as given loses sight of the idea suggested, and excuses the plaintiff for bringing about his own injuries by reason of crossing the track

when danger was apparent. Some such language as I have suggested should have been between the third and fourth sentences in the instruction given. In any event, the instruction as given is defective and calculated to mislead the jury.

JACOB J. VAN VALKENBERG ET AL., APPELLANTS, V. JACOB S. RUTHERFORD ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,913.

1. **Evidence:** CITY ORDINANCES: HOW PROVED. An ordinance of the city of Beatrice may be proved by original records showing that it was regularly passed, though the city charter provides that proof of ordinances may be made by the certificate of the clerk, or by the production of a book or pamphlet purporting to be published by authority of the city.

2. **Municipal Corporations:** SALE OF VACATED STREETS. The statutory power of the city of Beatrice to sell the fee to vacated streets may be exercised by the mayor and council without a vote of the people. Comp. St. 1903, ch. 13, art. III, sec. 48, subd. 4.

3. ———: POWERS: HOW EXERCISED. Where a municipal charter confers in direct terms upon a city the power to perform a particular administrative act, without specifying how it shall be exercised, the mayor and council may proceed by resolution.

4. ———: STREETS: VACATION: DAMAGES. "Where part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation." *Enders v. Friday*, 78 Neb. 510; *Lee v. City of McCook*, 82 Neb. 26.

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

E. O. Kretsinger, for appellants.

Rinaker & Kidd, Hazlett & Jack and *R. W. Sabin, contra.*

ROSE, J.

The mayor and council of Beatrice passed an ordinance vacating Twelfth street for the spaces of three city blocks between the intersecting streets from Monroe to Garfield, leaving the intersections open, and, pursuant to a subsequent resolution, deeded the vacated portions to adjacent owners. This is a suit to annul the municipal action so taken and to reopen the street. Plaintiffs own real estate in the city, but none of it abuts on any vacated part of Twelfth street, nor does the closing thereof interfere with ingress to or egress from their premises. It is insisted, however, that the property of plaintiffs is damaged by the change, and that they are required to travel further in going to and in coming from school buildings and other public places. The mayor and the members of the council, the grantees named in the deeds and the city of Beatrice are defendants. The evidence sustains findings that grantees made their purchases in good faith, that they paid full value for the land purchased, that they have since occupied and improved it, and that fraud on part of any city officer is not shown. The trial court dismissed the suit, and plaintiffs have appealed.

Under the city charter the fee to the streets belongs to the city. Comp. St. 1911, ch. 13, art. III, sec. 6. Plaintiffs insist, however, that there is no proof that an ordinance vacating portions of Twelfth street was passed according to law. It is true that the passage of the ordinance was not proved, as provided in the city charter, by the certificate of the city clerk, or by the production of a book or pamphlet purporting to be published by authority of the city. Comp. St. 1911, ch. 13, art. III, sec. 46. These, however, are not the exclusive methods of making such proof. Every step necessary to the enactment of a valid ordinance was properly shown by the original records, and this was sufficient. *Johnson v. Finley*, 54 Neb. 733.

The principal argument made by plaintiffs is directed to the proposition that the mayor and council had no

power to sell the vacated portions of the street, because they had never been authorized to do so by a vote of the people. The question of making the sale was never submitted to the voters, and defendants contend that such a step was unnecessary, while plaintiffs rely on that part of the charter which grants to the city power to sell real estate, but imposes restrictions as follows: "But they shall not have power to sell any real estate of the city unless authorized so to do by a vote of the majority of the electors of such city at a special election therefor; provided, that upon the affirmative vote of three-fourths of all the members of the city council, the same to be entered of record, such city may by ordinance direct the sale and conveyance of any such real estate which the city may have acquired at a sale for delinquent taxes as herein provided, upon such terms as the council may deem best, without first submitting the question of such sale to a vote of the people." Comp. St. 1901, ch. 13, art. III, sec. 8. When this provision was enacted, land reverted to adjacent owners upon the vacating of a street, and did not become property of the city.

Later, in 1903, the city charter was amended to include this new provision: "Upon the vacation of any street, avenue, or alley, or part of either, the same so vacated shall be and remain the property of the city, but may be sold and conveyed by the city for any price that shall be agreed upon by the mayor and three-fourths of the city council." Comp. St. 1903, ch. 13, art. III, sec. 48, subd. 4.

The earlier provision, requiring a vote of the people, did not apply to land retained by the city upon the vacating of a street, because, when enacted, the city could not acquire property in that way. The later act, which retained title in the city, authorized, in the same sentence, the sale of the land "for any price that shall be agreed upon by the mayor and three-fourths of the city council." The sale is thus authorized without a vote of the people. The effect of the new legislation is to allow the city to retain the land, after streets are vacated, and

to authorize the mayor and council to sell it, in addition to land acquired at delinquent tax sales, without a vote of the people. This is clearly the intention of the legislature. It does not extend the earlier act to new conditions having no application thereto, nor narrow the later act by former limitations at variance with its terms. The new provision is confined to a specific subject, and should not be controlled by general provisions of the former act. If both statutes are considered with reference to the conditions existing when each was enacted, neither interferes with the other, and full effect can be given to all of the legislation. The sale was made in conformity with the later act, and authority to make it did not depend upon a vote of the people.

The transfer of title, the terms of the sale and the making of the deed were authorized by a resolution instead of an ordinance, and this is pointed out as a fatal defect in the proceedings. Power to make the sale is granted, but the method of exercising it is not specified in the grant. Municipal action by ordinance is not required. Under a former decision the resolution must be held effective. *McGavock v. City of Omaha,* 40 Neb. 64.

Finally, plaintiffs contend that the closing of the street and the transfer of the land will damage their property, that this cannot be done without compensation, that the damages have not been ascertained or paid, and that therefore the action of the city is illegal and void. No part of the property of plaintiffs abuts on any vacated portion of the street and there has been no interference with access to their own premises. Though their injury may be greater in degree than that of others, it is one suffered in common with the rest of the community. Whatever may be the rule elsewhere, it has been held here that plaintiffs are not entitled to damages from the city under the facts proved. *Enders v. Friday,* 78 Neb. 510; *Lee v. City of McCook,* 82 Neb. 26.

Plaintiffs have not made a case entitling them to relief, and the dismissal is

AFFIRMED.

FIRST NATIONAL BANK OF UNIVERSITY PLACE, APPELLEE, v. E. M. WHEATLEY, APPELLANT.

FILED JANUARY 16, 1913. No. 16,918.

1. **Banks:** LIABILITY TO DEPOSITOR. A bank is not liable to a depositor for damages resulting from the failure to pay a check in currency upon his demand, where he subsequently accepted a New York draft in lieu of the currency demanded, and never made a subsequent demand upon his banker for currency or offered to return or surrender the draft, but immediately transferred it and used the proceeds for his own benefit, the draft being promptly paid by the bank upon which it was drawn.

2. **Guaranty:** LIABILITY OF GUARANTOR. A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations as a party thereto and deprives the guarantor of the means of preventing the loss protected by the guaranty.

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

George W. Berge, for appellant.

Hainer & Smith and *Julius Weil, contra.*

ROSE, J.

This is an action on a promissory note for $100, dated October 5, 1907, payable 30 days after date to the First National Bank of University Place, and signed by E. M. Wheatley. The payee is plaintiff and the maker is defendant. The answer contained an admission that defendant signed the note, a general denial, and also a cross-petition, pleading, in substance, that he contracted in writing October 5, 1907, with Mary J. Treadway to purchase her house and lot in Lincoln for $1,500, agreeing to pay her $100 in cash and $1,400 within 30 days; that he borrowed from plaintiff the same day $100 to make the cash payment, gave the note in suit, stated the purpose for which he procured the loan, and said that, without yet having received any purchase money, he had sold his

own residence with the intention of buying Mrs. Treadway's; that he deposited in plaintiff's bank October 28, 1907, $1,803.30, procured from plaintiff a certified check for $1,375, and tendered it with $25 in payment of the balance of the purchase price and requested a deed; that the check was refused with a demand for cash; that defendant informed the bank of the refusal, requested cash for the check, and stated that, in case he did not receive it, he would lose the $100 already paid; that plaintiff refused to give him the cash, but suggested payment of the balance of the purchase price by means of a New York draft for $1,375, and guaranteed that defendant would not lose the cash payment of $100, in the event of Mrs. Treadway's refusal to accept the draft, and that, in conformity with the arrangement described, the draft was issued by plaintiff and tendered by defendant with $25 in cash, which were also refused; that, by reason of the facts pleaded, defendant was unable to complete his purchase or to procure a conveyance, and lost his cash payment of $100. Defendant also pleaded that, having sold and lost possession of his own residence, and having failed to procure the property which he agreed to buy, he sustained additional damages as follows: House rent, $60; repairs on leased house, $19; expenses of moving, $8.85; loss of time, $15; interest on loan, $9. The reply was a denial of all facts not admitted in the petition. The trial court directed, and the jury rendered, a verdict in favor of plaintiff for $125, and from a judgment thereon defendant has appealed.

Was the peremptory instruction erroneous? That is the question presented. The testimony of plaintiff tended to prove the facts pleaded in his petition, and he was generally corroborated by other witnesses or by documentary evidence, but that plaintiff assumed liability for any damage or loss resulting from the failure of Mrs. Treadway to accept the draft in payment of the balance of the purchase price of her lot was emphatically denied by officers of the bank. The following facts are established without

dispute: Defendant borrowed $100 from plaintiff October 5, 1907. As part of the transaction he executed and delivered the note in controversy. The entire debt is unpaid. Plaintiff's failure to pay defendant's check in currency grew out of the financial panic of 1907. Plaintiff and other banks in the community temporarily suspended payments in currency, except in small amounts, as soon as they opened their doors for business in the morning of October 28, 1907. Later in the day defendant deposited in plaintiff's bank checks and drafts amounting to $1,803.30. He did not deposit any currency. Before he left the bank he knew that small sums only were then being paid on checks, because he attempted to check out $25, and was put off with $5, which he accepted. Without demanding currency, he drew his check the same day for $1,375 and had it certified by the cashier. The next day he tendered the check and $25 to Mrs. Treadway. She refused to accept anything but money. He appeared at the bank October 30, 1907, stated that his check had been rejected, and demanded the amount thereof in cash. Plaintiff refused to give it to him, for the reason that payment of currency in large amounts had been temporarily suspended on account of the panic. After some discussion defendant, at the suggestion of an officer of the bank, accepted a draft on New York for the amount of the check, and with it and $25 made a second tender, which was also rejected by Mrs. Treadway with a demand for cash. Without returning to the bank or notifying it that the draft had not been accepted, defendant went immediately to Lincoln, promptly transferred and indorsed the draft to the First National Bank, procured a bank credit therein for $850 and received a cashier's check for the balance. After the panic and the resumption of payments in currency, he realized the full amount of his New York draft, which was marked paid through a New York clearing house November 2, 1907. Before November 5, 1907, he had not only withdrawn his deposit from plaintiff's bank, but he had overdrawn his account $5.90. After

the draft had been rejected by Mrs. Treadway, he never presented it to plaintiff, or offered to surrender it, or demanded currency in any sum. For two or three days he failed to notify plaintiff that Mrs. Treadway had refused to accept the draft. As late as November 15, 1907, ten days after the time to make the final payment had expired, under the terms of the contract of purchase, Mrs. Treadway told defendant that she would wait on him a week or ten days "to see if conditions would not loosen up," and that if he could get the money within a reasonable time "she would close the deal." No attempt is here made to state all the facts. The purpose has been to give enough of the uncontradicted evidence to test the peremptory instruction.

Defendant insists that, when the bank refused to pay his deposits in cash, and when it issued the New York draft, it guaranteed he would not lose his cash payment of $100 by any refusal on part of Mrs. Treadway to accept its paper in payment of the purchase price of her property; that she did in fact refuse to accept anything but currency, and, by reason thereof, he was unable to complete his purchase and lost the amount already paid; that there is direct proof of all these facts; that the resulting damages pleaded in his answer were proper subjects of set-off or counterclaim in his cross-petition. His deduction is that there was error in the peremptory instruction. The position thus taken is untenable for the following reasons: He deposited with plaintiff checks and drafts during a panic when such paper was not being paid in currency, and, without demanding a return thereof, accepted $5 in cash after having demanded $25, and left the bank knowing that small sums only were being paid in cash. The bank never refused to return the amount of his deposit in the same medium of exchange in which it was received. After he demanded currency for his own certified check, it was torn up by an officer of the bank in his presence, without protest, and he accepted a New York draft for the same amount upon the suggestion of the

bank that he tender it to Mrs. Treadway instead of currency. He never afterward made a demand on plaintiff for currency. He never returned the draft, but transferred it for his own benefit the day it was issued, and made it the means of reducing his bank account with plaintiff $1,375. He waited two or three days before notifying plaintiff that its draft had not been accepted by Mrs. Treadway. He obtained credit in other banks for the full amount of the draft before the time for completing his purchase had expired, and eventually received the proceeds in currency or its equivalent. By withdrawing from plaintiff's bank his only funds for paying his debt, he took away its means for either paying his deposit in cash or for making a legal tender to Mrs. Treadway. On every principle of fair dealing applicable to banking transactions, his acceptance and transference of the draft, under the circumstances narrated, was a waiver of his former demand for currency. The jury, therefore, should not have been permitted to hold plaintiff liable for its failure to comply with defendant's demand for currency.

Should the jury have been permitted to find plaintiff liable to defendant on a guaranty that he would not lose his payment of $100, if Mrs. Treadway refused to accept the draft for the balance of the purchase price? If defendant intended to hold plaintiff liable on a contract of guaranty, he should have proved that his own obligations and duties in that behalf were fully performed. If plaintiff agreed to protect defendant against a forfeiture, he should not have deprived the bank of its only means of protecting itself from the same loss, nor should he have neglected the performance of any expressed or implied duty on his part. Time was not of the essence of his purchase. This is shown on the face of his contract and by his own testimony. He said Mrs. Treadway told him as late as November 15, 1907, ten days after the time fixed by the contract for closing the transaction, that she would wait on him a week or ten days "to see if conditions would not loosen up," and that if he could get the

money within a reasonable time she "would close the deal." Supension of payments in currency lasted about 60 days. The conditions were such as to excuse strict performance, in absence of a contract to the contrary. After the financial flurry passed, defendant received the proceeds of plaintiff's draft in currency, or in checks convertible into cash, and put his money in a safety deposit vault. He never made a legal tender of the balance due on the purchase price, though he testified he once went to the home of Mrs. Treadway in her absence with the purpose of doing so. Before the time for making the last payment expired, he had transferred the draft, had accepted the proceeds thereof, and had overdrawn his account with plaintiff to the extent of $5.90. After taking and transferring the draft, which had been issued in good faith in the hope that it would be accepted by Mrs. Treadway, he thus deprived plaintiff of the means of either paying his demands in cash or of tendering currency to protect its guaranty, and did not himself make a legal tender, though he could have done so within a reasonable time with the proceeds of the draft issued by plaintiff. On elementary principles of guaranty, defendant cannot hold plaintiff liable for his loss under such circumstances, and the question should not have been submitted to the jury, since there is no evidence to sustain a verdict in his favor on that issue.

In what has been said there is no intention to intimate that a financial panic is an excuse for nonpayment of a bank depositor's check, or that an enforceable contract of guaranty was made, or that defendant's plea for damages was a proper set-off or counterclaim. No opinion is expressed on any of those questions. They are not necessary to a decision, because there is no proof to show liability on the part of plaintiff for failure to pay defendant's demands in currency or for breach of guaranty.

There was no error below in directing a verdict for plaintiff, and the judgment is

AFFIRMED.

FAWCETT, J., concurs in the conclusion.

HAMER, J., dissenting.

I dissent upon the ground that, when the bank received the deposit, it was with the express understanding that it would furnish the money to pay for the house purchased by the defendant. It did not do so, and in consequence the defendant lost the $100 put up as forfeit money. That the money deposited in the bank was afterwards paid is no justification. The bank should not be excused on account of its failure to keep its contract, even if there was a financial flurry which made money scarce; and, if the depositor sustained a loss as the direct consequence of the bank's failure to furnish the money when it had agreed to do so, the loss should be made good, and a set-off against the note should be allowed. The method of this particular bank in declining to pay out more than a very small amount of the money deposited was adopted by many other banks at the time, and is not deserving of censure from a moral standpoint, because it was this method which averted a panic that would have been very destructive, probably, of all sorts of financial and manufacturing interests, and would have swept away the savings of thousands of persons in all parts of the United States, but the method, as it affected the defendant in this case, was without legal excuse and ought not to be justified by the decision of a court.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. J. T. MCLEAN, TREASURER, APPELLEE.

FILED JANUARY 16, 1913. No. 17,687.

1. **Taxation**: LEVY FOR TOWNSHIP PURPOSES. Under township organization, the electors at the town meeting have power, within statutory limitations, to determine the amount of taxes required for township purposes, and the action taken thereat is the foundation for the county board's levy.

2. ———: INJUNCTION: BURDEN OF PROOF. In a suit for an injunction to prevent the collection of township taxes levied by duly authorized officers within statutory limitations, the burden of proving facts which show that the taxes are illegal is on plaintiff.

3. **Towns**: RECORDS: EVIDENCE. It is the duty of the town clerk to keep minutes of township proceedings, and to enter therein at length every order, direction, rule and regulation of the town meeting, and the record thus made is the primary evidence of the business transacted.

4. ———: ———. In counties under township organization, the proceedings of the town meeting and the acts of town officers in relation thereto should be liberally construed with a view to upholding the transaction of essential public business.

5. **Taxation**: LEVY FOR TOWNSHIP PURPOSES: VALIDITY. In reporting to the county clerk the action of the town meeting on the subject of taxation, the failure of the town clerk to enumerate in his certificate the several purposes for which the taxes are needed, or to state the amount required for each purpose, does not necessarily invalidate the levy, where it is made by the proper officers and is within the limitation fixed by statute.

6. ———: ———: ———. The fact that a town clerk, in certifying to the county clerk the amount of taxes required for township purposes, indicates the necessary number of mills as the basis of a levy, instead of stating the specific sums necessary for different township purposes, does not of itself invalidate the taxes, where they are levied by duly authorized officers and are within statutory limitations.

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

Edson Rich and *Martin & Bockes*, for appellant.

W. H. C. Rice, Elmer E. Ross and *Patterson & Patterson, contra.*

ROSE, J.

The relief sought is an injunction against the treasurer of Merrick county to prevent him from collecting unpaid taxes levied in 1911 for township purposes on plaintiff's property in four townships. The revenue law authorizes a township at a town meeting to determine the amount of

money needed for township purposes, requires the town board to certify the result to the county clerk, and imposes upon the county board the duty of levying the necessary taxes. For the year 1911 plaintiff paid what would amount to a 2-mill levy on the assessed valuation of its property in each of the four townships, and assails all taxes in excess thereof as illegal. The name of the township, the number of mills, the tax levied, the amount paid and the balance unpaid are: Central: 5 mills; tax levied, $485.90; amount paid, $194.36; balance, $291.54. Chapman: 8 mills; tax levied, $1,260.76; amount paid, $315.19; balance, $945.57. Vieregg: 3 mills; tax levied, $325.08; amount paid, $216.72; balance, $108.36. Prairie Island: 5 mills; tax levied, $31.70; amount paid, $19.02; balance, $12.68. The substance of what was certified by each town clerk to the county clerk as the basis of a levy follows: Central township: There was a 5-mill levy voted at the annual town meeting "for a general fund." Chapman township: Chapman township levied 8 mills "for all purposes" at the regular annual meeting. Vieregg township: Had the annual meeting March 7 and the levying of "tax was 3 mills." Prairie Island township: The following tax was levied "for general fund:" 5 mills. There is no dispute about the facts. Certificates of the town clerks, records of the county board, and other proofs showing the facts summarized were introduced in evidence and are not controverted. Plaintiff, as indicated by its pleadings and argument, took the position that the certificates of the town clerk were jurisdictional, that they should have enumerated the several township funds to be raised by taxation and stated the amount required for each, and that therefore they were insufficient to authorize the levies made. As to the township taxes, an injunction was denied, and plaintiff has appealed.

One of the points argued is stated thus: "The purpose for which the tax is levied has not been fixed and determined by the township at its annual meeting as required by law." The only proofs offered to establish

this assertion are the certificates of the town clerks, and it is insisted that they are conclusive. Are they? The question presented requires consideration of the powers and duties of a township, of its clerk, and of the county board, in relation to taxation. The electors present at the annual town meeting have power: "To direct the raising of money by taxation for the following purposes: 1st. For constructing and repairing roads and bridges within the town to the extent allowed by law. 2d. For the prosecution or defense of suits by or against the town or in which it is interested. 3d. For any other purpose required by law. 4th. For the purpose of building or repairing bridges over streams dividing said town from any other town. 5th. For the support of the poor within the town; provided, that when the county board of any county shall have established a poorhouse under any statute law of this state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings except sufficient to provide temporary relief. 6th. For the compensation of town officers at the rate allowed by law, and when no rate is fixed for such amount as the electors may direct." Comp. St. 1911, ch. 18, art. IV, sec. 22. Another section of the statute provides: "The moneys necessary to defray the town charges of each town shall be levied on the taxable property in such town, in the manner prescribed by law for raising revenue. The rate of taxes for town purposes shall not exceed, for roads, ten mills on each dollar of the valuation; for bridges, two mills on each dollar of the valuation; for all other purposes, two mills on each dollar of the valuation. The electors at the annual town meeting shall determine the amount of money necessary to be levied for each fund for town purposes, and the town board shall certify to the county clerk, the amount of moneys voted to be raised at the annual town meeting for each of said funds, and said amounts shall be levied by the county board on taxable property in such townships and collected as other taxes

provided, however, that said amount shall not exceed fourteen mills on the dollar valuation as assessed and equalized." Comp. St. 1911, ch. 18, art. IV, sec. 58. The town clerk is made the custodian of all records, books and papers of the town. Comp. St. 1911, ch. 18, art. IV, sec. 47. His duties are further defined by the following sections: "The town clerk last before elected or appointed shall be the clerk of the town meeting, and shall keep faithfully minutes of its proceedings, in which he shall enter at length every order or direction and all rules and regulations made by such meeting, and the same shall be signed by himself and the moderator." Comp. St. 1911, ch. 18, art. IV, sec. 32. "The minutes of the proceedings of every town meeting, subscribed by the moderator and clerk of such meeting, shall be filed in the office of the town clerk within ten days after such town meeting." Comp. St. 1911, ch. 18, art. IV, sec. 39.

Authority to certify to the county clerk "the amount of money necessary to be levied for each fund for town purposes" is found in the following statutory provisions: "The proper authorities of cities, villages, townships, and districts authorized by law to vote bonds or assess taxes, except such cities as are authorized by law to levy and collect their own taxes for municipal and school purposes, shall annually, on or before the first Monday in June, certify to the county clerk the several amounts which they severally require to be raised by taxation, including all amounts due upon legal and valid bonds outstanding against such corporation; provided, that school district taxes shall be certified to the county clerk on or before the first Monday in July." Comp. St. 1911, ch. 77, art. I, sec. 138. The power of the county board to make the necessary levy for township purposes is granted by the revenue law in the following language: "On the last day of sitting as a board of equalization the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, road district, and other taxes required by law to be

certified to the county clerk and levied by the county board." Comp. St. 1911, ch. 77, art. I, sec. 136.

The statutes make it plain that the sovereign power to determine what proportion of the property in a township shall be taken from the owners in the form of taxes for township purposes has been committed by the legislature to the electors at the town meeting. What the town clerk is authorized to do is to make and keep a proper record of the proceedings and to properly certify to the county clerk the result in regard to taxation. The action of the town meeting, and not the certificate of the town clerk, is the foundation of the levy. Any error, irregularity or informality in the certificate should not deprive the township of revenue essential to township government, if the county board in fact levied taxes in conformity with legal proceedings of the town meeting. If its record is considered to be the evidence of what was done, instead of the clerk's certificate, plaintiff adduced no proof to show that the electors did not determine the specific sums required for each purpose for which taxes are leviable. The statute declares that a 14-mill levy is the limit of taxation for township purposes and the record shows that an estimate of 8 mills was the highest rate fixed in any of the townships named. If the township and the taxing officers exercised their powers lawfully, the levies are valid. In absence of proof to the contrary the validity of the taxes will be presumed. Plaintiff has the burden of proving they are illegal. On this subject the supreme court of Illinois ruled: "One objecting to the enforcement of a tax has the burden of showing its invalidity, since the presumption is that the tax is just and that all officers who have had any official connection with it have properly discharged their duties." *People v. Keener*, 194 Ill. 16.

With the exception of the certificate of the town clerk, plaintiff offered no proof to show the proceedings of the town meeting. Had the town clerk certified, and the county board levied, a tax in excess of the amount de-

termined by the town meeting, plaintiff, to prevent enforcement of the illegal tax, could have shown by the record of the town meeting that the clerk's certificate was false. This doctrine was announced by the supreme court of Illinois in the following language: "The record of a town meeting is competent to contradict the certificate of a town clerk to the levy of a tax, where the first step in the levy can be taken only at a town meeting, and a record of every order or direction made by such meeting must be kept." *Baltimore & O. S. W. R. Co. v. People,* 156 Ill. 189.

In the early history of this court the same principle was stated in this form: "By section forty-four of the school law, the director is required to keep a record of all the 'proceedings of the district in a book to be kept for that purpose,' and it is to this, and this alone, that resort must be had to ascertain what the district has done, what taxes have been voted, and for what particular purposes they were levied." *Burlington & M. R. R. Co. v. Lancaster County,* 4 Neb. 293.

Plaintiff has proved nothing to show that the taxes, if collected, will not be lawfully expended pursuant to the directions of the town meeting for the specific purposes enumerated in the statutes. The levies being within the statutory limit, the presumption being that they are valid, the foundation of the taxes being the proceedings of the town meeting and the statute requiring a public record thereof, the burden was on plaintiff to show that the levies did not conform to the action of the town meeting, and, for the purpose of proving that fact, informal and irregular certificates of the town clerk are insufficient. For plaintiff's failure to maintain the burden of proof, the injunction was properly denied.

A decision based on the sufficiency of the certificates of the town clerks must also be adverse to plaintiff. The statutes have conferred on the people of a township the power to impose upon themselves taxes for local purposes. It is understood that such power will often be exercised

by persons who are not familiar with the technicalities of the law and who do not express themselves in accurate language. The proceedings of the town meeting and the acts of town officers should therefore be liberally construed with a view to upholding the transaction of essential public business. In discussing this subject, Judge Cooley in his work on Taxation said: "In voting the tax the people will be acting in their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the limits of the power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that local business is largely and of necessity in the hands of plain people who are unskilled in the technicalities of law and unaccustomed to critical or even accurate use of language." 1 Cooley, Taxation (3d ed.) p. 573.

The certificates were obviously intended to indicate the number of mills leviable for all township purposes, and the county board apparently so understood them. An interpretation in harmony with the views of Judge Cooley leads to a holding that the failure of the town clerk to enumerate the several purposes for which the taxes were needed and to state the amount required in each fund did not invalidate the levy, since the limitation prescribed by law was not exceeded. *Weston Lumber Co. v. Township of Munising*, 123 Mich. 138. Referring to the report of taxes voted by a school district, it was said in *Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 293: "We do not think it was intended, nor would it be reasonable to require that an itemized statement be given of the purposes for which the funds were intended. It certainly could be of no practical use whatever, and the omission to do so could work no possible injury to any one."

The fact that the town clerk reported the necessary number of mills as the basis of a levy, instead of stating the gross sum required for each purpose, did not invali-

date the taxes. This question was once considered by Judge Brewer, who said: "Another objection is, that it appears from the certificates sent by the county clerk of the one county to the county clerk of the other, that the county commissioners in making the levy simply fixed the rate per cent., instead of determining the amount to be raised for these several indebtednesses. We cannot think this a substantial defect; having the assessed value of the property before them, it can make no substantial difference whether the resolution of the commissioners declared that so much money in gross must be raised, or that a certain rate per cent. be levied for such tax; the result is the same, and a mere difference in the form of the expression ought not to weigh against the substantial rights of either party." *Commissioners of Marion County v. Commissioners of Harvey County,* 26 Kan. 181, 202.

For the reasons given, an injunction to prevent the collection of township taxes was properly denied.

AFFIRMED.

HAMER, J., dissents.

FAWCETT, J., dissenting.

To my mind there was scarcely a semblance of compliance with the law by either the voters or the clerk.

MARY A. TRAINOR ET AL., APPELLANTS, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,826.

1. **Judgment: RES JUDICATA.** "A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal." *Yates v. Jones Nat. Bank,* 74 Neb. 734.

2. ———: ———. "The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata*." *Yates v. Jones Nat. Bank*, 74 Neb. 734.

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

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

Albert W. Crites, C. Patterson and *William Mitchell, contra.*

FAWCETT, J.

In 1906 the plaintiffs in the present suit brought suit in the district court for Box Butte county against the present defendant, the Maverick Loan & Trust Company, to recover the same land in controversy here. They were defeated in the district court, and upon appeal to this court the judgment below was, on February 6, 1908, affirmed. *Trainor v. Maverick Loan & Trust Co.*, 80 Neb. 626. The mandate of this court, dated March 20, 1908, was filed in the district court for Box Butte county March 21, 1908. On November 25, 1908, the Maverick Loan & Trust Company conveyed the land to the defendant Alfred R. Wilson, who immediately recorded his deed and went into possession of the premises. On June 5, 1909, the plaintiffs commenced the present suit, making the Maverick Loan & Trust Company and Alfred R. Wilson defendants. Defendants each answered separately and, among other things, pleaded the final disposition of the former case as *res judicata*. If this plea is good, then, as stated by counsel for plaintiff in his brief: "There is no occasion for delving deeper into the matter." We think the plea must be sustained.

For a statement of the ground upon which plaintiffs

are seeking to recover the land, we refer to our former opinion. The petition in the former suit alleges the death of William H. Trainor; that plaintiffs are his heirs; that at the time of his death he was the owner of the land in controversy; that plaintiffs had never sold their interest in the land and were at the time of the commencement of the suit owners of the same; the purchase by defendant Maverick Loan & Trust Company of the lands at tax sale; the amount paid for the same; the amount of subsequent taxes paid; the publication in 1905 of the notice to redeem and attached copy of the notice to the petition; the surrender of the county treasurer's certificate of tax sale, which is made a part of the petition, and the demand on the treasurer for a tax deed; that the treasurer executed and delivered to said defendant a tax deed, which is attached to their petition; that defendant claimed to be the owner of the land by reason of such deed; that the sections of the statute under which the sale was made and deed issued were unconstitutional; that an attempt was being made to deprive plaintiffs of their title and vested right in the land without due process of law; that, although the deed issued by the treasurer "was a deed in form, it was in truth and fact a mortgage, if anything, securing the amount of taxes, interest and costs paid by the defendant, Maverick Loan & Trust Co., under and by virtue of said county treasurer's certificate of tax sale;" that the county treasurer did not own the land, had no right, title or interest in the same, and could not by the deed referred to convey or give to the defendant any right or interest in the same; that the attempt of the county treasurer so to do was without authority, unconstitutional and contrary to section 3, art. I of the constitution; that the amount due the Maverick Loan & Trust Company for delinquent and subsequent taxes, interest and costs was the sum of $14.60, "which said sum is probably secured by said deed on said described land which was issued in lieu of said county treasurer's certificate of tax sale;" that they tendered the said sum of $14.60 to the defend-

ant Maverick Loan & Trust Company, and demanded that said defendant reconvey the said premises to plaintiffs or to the county treasurer of Box Butte county, and surrender said deed to the county treasurer for cancelation; that they also tendered the said sum of $14.60 to the county treasurer for the use and benefit of the defendant, and demanded that the treasurer recall said deed and cancel the same and issue to them a redemption certificate; that they were ready to pay defendant whatever might be justly due it for taxes, interest and costs, and brought into court the sum of $14.60 and deposited the same with the clerk. The prayer of the petition was: That an account be taken of the amount due defendant, and that upon payment of the amount defendant be required to reconvey the premises to plaintiff; that possession of the premises be delivered to plaintiff; that if defendant refused to reconvey the court enter a decree to take the place of such deed; that the court find the deed to be only a mortgage, and that defendant has no right, title or interest in the land except as a mortgagee; that the deed be set aside and be declared null and void, and the cloud cast upon plaintiffs' title by said deed be removed, and that the law under which the deed was issued be found to be unconstitutional; "that the title to said premises may be quieted and confirmed in plaintiffs, and that plaintiffs may be allowed to redeem said premises from said alleged deed, and for such other and further relief as may be just and equitable." To that petition the defendant filed a general demurrer which was sustained, and, plaintiffs refusing to plead further, but electing to stand upon their petition, the suit was dismissed at their costs. The judgment was, as before stated, affirmed by this court.

After the mandate went down, nothing further was done by plaintiffs until June 5, 1909, which was more than six months after the Maverick Loan & Trust Company, evidently deeming the litigation at an end, had conveyed the land to the defendant Wilson, when plaintiffs filed the petition in this suit. In the present petition,

after setting out the preliminaries, as in the former suit, it is alleged in paragraph 4 that the treasurer's deed to defendant Maverick Loan & Trust Company is void because: The taxes were not duly and legally assessed; the sale was not duly and legally advertised; that there is no proof of publication on file in the office of the treasurer, nor proof of any delinquent taxes purporting to cover the taxes included in the deed, or that the real estate was subject to sale or would be sold for taxes; that no notice or proof was placed on file in the office of the treasurer showing the amount of taxes against the real estate for the years covered by the deed; that no notice was served upon plaintiffs by publication or otherwise that a tax deed was about to issue; that no notice was served upon the occupant of the land that taxes were delinquent or that the defendant Maverick Loan & Trust Company would apply for a tax deed or that a deed was about to issue; that no proof of service of the application of the Maverick Loan & Trust Company for a tax deed or that a tax deed was about to issue was placed on file in the treasurer's office; that prior to issuance of the deed no proof was on file with the treasurer that any service had been made on the occupant of the land of the application for a deed, or that a deed was about to issue; that the treasurer had no evidence on record in his office upon which to base the issuance of the deed; that the deed was prematurely issued—in less than two years from the date of tax sale certificate and less than two years from date of sale. By paragraph 5 they again allege that they tendered the Maverick Loan & Trust Company $14.60, and on June 5, 1909, tendered to defendant Wilson $22.50, the same being the total amount of all sums expended by Maverick Loan & Trust Company for taxes on the land, together with lawful interest thereon. By paragraph 6 they alleged that prior to March 1, 1906, plaintiffs were in the open and notorious possession of the land; by paragraph 7, that defendants are attempting to permanently exclude plaintiffs from ownership and possession;

that demand has been made on defendant Wilson, now in possession, that he turn the same over to plaintiffs; by paragraph 8, that plaintiffs have no adequate remedy at law. The prayer demands that the deed from the treasurer to defendant Maverick Loan & Trust Company be canceled; that the deed from said defendant to the defendant Wilson be canceled; that the mortgage from defendant Wilson to defendant Maverick Loan & Trust Company for a part of the purchase money be canceled; that plaintiffs be adjudged sole owners; that defendants have no title; that plaintiffs be awarded possession and defendants be enjoined from interfering with plaintiffs' right of possession, and for general relief.

The above statement of the two petitions filed, and of the relief demanded in each, would seem to render discussion unnecessary. It is urged that the decision of the former case in this court decided but two points, viz.: "(1) An act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. (2) Due process of law does not necessarily require a judicial hearing in matters of taxation." And hence the plaintiffs are not now precluded thereby from proceeding in another suit to establish their right to the possession of the land upon other and different grounds than those settled by the decision in this court in the former case. In this contention we are unable to concur. The decision of this court was that the judgment of the district court be affirmed; and the mandate commanded the district court without delay to carry into effect its judgment. The judgment in the district court adjudicated adversely to plaintiffs their right to relief upon any grounds demanded in the prayer of their petition as above set out. They were thereby denied relief upon their specific demands; that an account be taken, and upon payment of the amount expended by defendant that it be required to reconvey the land to plaintiffs; that the possession of the premises be delivered to plaintiffs; that if defendants refused to convey the

court enter a decree in lieu thereof; that the court find the deed to be only a mortgage; that the deed be set aside and be declared null and void and the cloud cast upon plaintiffs' title by said deed be removed; that the law under which the deed was issued be found to be unconstitutional; that the title to the premises be quieted and confirmed in plaintiffs, and that they be allowed to redeem the land from "said alleged deed."

The petition in the former suit asked that the tax deed be set aside for several reasons: That the deed was only a mortgage; that defendant had no right or interest in the land except as mortgagee; that the deed be set aside and declared void and the cloud cast upon plaintiffs' title thereby be removed; that the law under which the deed was issued be found to be unconstitutional; that the title be quieted and plaintiffs allowed to redeem. It will be seen that the cause of action was in equity to redeem on account of the invalidity of the tax deed, and the allegation that the deed was void is the peg on which the whole case hung. The court found on the facts stated in the petition that the deed was valid and rendered judgment of dismissal. The demurrer was not sustained because the suit was prematurely brought, or for any defect apparent upon the face of the petition. The demurrer went to the merits of the facts presented and upon which the whole cause of action, viz., the right to have the deed set aside, was based. The judgment upon the demurrer was a finding and judgment that upon the facts recited the alleged cause of action was to fail, for the reason that the tax deed was valid. This being so, the subject matter of the suit was adjudicated between the parties, and they have no right to litigate it again. In 2 Van Fleet, Former Adjudication, sec. 304, it is said: "A judgment rendered for the plaintiff for want of an answer, upon overruling a demurrer to his complaint for want of merits, will make the matter *res judicata;* and the same is true in respect to a final judgment for the defendant upon overruling a demurrer to an answer or plea in bar"—citing on the first

point *Johnson v. Pate,* 90 N. Car. 334; and upon the second point, *Wilson v. Ray,* 24 Ind. 156; *Coffin v. Knott,* 2 G. Greene (Ia.) 582, 52 Am. Dec. 537; *Grand Trunk R. Co. v. McMillan,* 16 Canada S. C. 543.

In presenting their first petition plaintiffs said, in effect: "Here is my cause of action, and it is upon these allegations, and these alone, that I claim the right to recover" By its demurrer to that petition defendant said, in effect: "Deeming all these allegations to be true, they do not entitle the plaintiffs to recover." The court, assuming, for the purposes of the demurrer, that the allegations of the petition were true, held that they did not entitle plaintiffs to recover, or, in other words, did not show a cause of action. The truth of the allegations being thus admitted, the case stood upon its merits, the same as if, on a trial, each allegation had been proved, and the ruling on the demurrer was an adjudication on the merits of the case. Plaintiffs might then have amended their petition, and presented additional allegations setting out the facts which they now plead in their second petition, all of which facts were then in existence and a matter of public record. This they declined to do, but stood upon their petition. The judgment entered was, on appeal to this court, duly affirmed. We see no escape from the conclusion that the judgment entered upon the former hearing was a final adjudication upon the merits of plaintiff's claim, to wit, his right to have the deed canceled and that he be permitted to redeem. To this effect is *Gregory v. Woodworth,* 107 Ia. 151, from which opinion much of the language above used is quoted. The fact that the Iowa code differs slightly from ours is not material. Under the reasoning of the Iowa court, the decision would have been the same, regardless of the wording of the code. See, also, *Yates v. Jones Nat. Bank,* 74 Neb. 734, and cases cited on page 743. We recognize the exception to the rule that a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, which do not involve the merits

of the controversy, will not support the plea of *res judicata*. But that is not the case here. As stated, the demurrer on the first trial between these parties was not sustained because the suit was prematurely brought, nor for any defect apparent upon the face of the petition. If in that suit they did not see fit to allege specifically the various other grounds, then shown by the official records of the county, upon which they now claim the deed was void and should be canceled, that was clearly their own neglect. They could not split their cause of action and litigate the matter set out in their first petition to final judgment and again vex their former adversary with another suit based on the same wrong, viz., the withholding from plaintiffs of the title and possession of the lands in controversy under a deed which in both suits they alleged was a nullity.

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. DAVID W. HALE ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,902.

1. **Witnesses:** COMPETENCY: PRINCIPAL AND AGENT. The fact that an agent of a party to an action is deceased at the time of the trial does not render the other party an incompetent witness by whom to prove a transaction with such agent during his lifetime and while engaged in the business of his principal.

2. **Payment:** AUTHORITY OF AGENT. "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal." *Harrison Nat. Bank v. Austin*, 65 Neb. 632.

3. **Principal and Agent:** AUTHORITY OF AGENT. Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business.

4. Evidence examined and set out in the opinion, *held*, amply sufficient to sustain the findings and judgment of the district court.

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

Ambrose C. Epperson, for appellant.

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

FAWCETT, J.

Plaintiff brought suit in the district court for Clay county, to foreclose a mortgage upon lots 8 and 9, in block 12, in the original town of Ong, in said county. From a decree finding that the note, which the mortgage was given to secure, had been paid and dismissing plaintiff's suit, plaintiff appeals.

The petition is in the usual form. It alleges the execution of the note and mortgage by defendants David W. Hale and wife; the subsequent sale of the premises by the Hales to one McCrain, who conveyed to one Nearhood, who conveyed to one Arthur B. Smock; that the Exchange Bank of Ong is the record holder of a mortgage given to it by defendant Smock. Smock and his wife and the bank were made defendants. The bank answered separately, setting up its mortgage from Smock, and prayed that, in case a decree of foreclosure is entered in favor of plaintiff, its mortgage should be taken into account. The defendants Smock answered, alleging ownership of the premises by defendant Arthur B. Smock; that he purchased the same subject to two mortgages from his grantor Nearhood to the defendant bank. Further answering, it is alleged that, at the time the note and mortgage set out in plaintiff's petition were given by the defendants Hale, J. O. Walker of Ong represented the plaintiff in the taking of said note and mortgage, and thereafter continued to represent plaintiff in the collection of the interest, and was authorized by plaintiff to

collect and receive the principal of said note; that on or about the first day of June, 1905, defendant David W. Hale paid to J. O. Walker $300 upon the principal of the note; that after the payment of the $300 defendants Hale sold the land to John M. McCrain, subject to $300 remaining unpaid of the principal; that on or about the 6th day of February, 1907, McCrain paid the plaintiff the $300 and interest to the date of said payment, being the balance of the debt represented by the note, "said payment being made at the town of Ong, Clay county, Nebraska, to J. O. Walker, the representative of the plaintiff and the person who made said loan and who had collected all the interest thereon up to said date;" that defendants purchased the premises January 1, 1908, went into possession thereof, have occupied the same to the time of filing the answer, and that they have never had any notice of the alleged claim of plaintiff until the bringing of this suit; "neither have they paid anything on the principal or interest of said alleged claim;" that the said J. O. Walker, to whom Hale and McCrain paid the debt, was representing the plaintiff at Ong, Nebraska, in the loaning of money, in the collection of the principal and interest on said loans and remitting same to the plaintiff, and that in the taking of the notes sued on and the mortgage given to secure the same, and in the collection of the principal and interest, the said J. O. Walker was the agent and representative of the plaintiff and had authority to receive the money so paid to him thereon in payment, satisfaction, and discharge of the indebtedness represented by said note; denied all other allegations in the petition; and prayed for a decree that the indebtedness represented by the note and mortgage had been fully paid by the payment to J. O. Walker, who was authorized by plaintiff to collect and receive the same in discharge of said debt, and that the premises described in plaintiff's petition be released and discharged from any lien under and by virtue of plaintiff's mortgage; that the mortgage be canceled of record, and for general relief. The reply

to the answer of defendant Smock is a general denial. Defendants Hale answered that the making of said loan and all other transactions in connection therewith were had and done with J. O. Walker, who acted for and represented plaintiff in connection therewith; that all interest payments made by the defendants for the years 1901 to 1905, inclusive, were made to J. O. Walker; allege the payment of $300 of the principal, as alleged in the answer of defendant Smock, and the sale of the premises to McCrain subject to the remaining $300, which McCrain assumed and agreed to pay. The trial court found that, at the times and dates alleged in plaintiff's petition and the answer of Arthur B. Smock and Carrie Smock, J. O. Walker was the agent of the plaintiff at Ong, Nebraska, and as such agent was authorized to make loans, collect principal and interest thereon, cancel the notes and enter satisfaction of mortgages; "that the note and mortgage and the principal debt and the interest thereon were paid to J. O. Walker as alleged in the answer of Arthur B. and Carrie Smock, and is a complete satisfaction and discharge of said debt, and said defendants are entitled to have the mortgage canceled of record," and entered a decree in accordance with such findings.

J. O. Walker was plaintiff's nephew, and cashier of the Exchange Bank of Ong, of which his father, plaintiff's brother, was president. It appears from the evidence that J. O. Walker was the active manager of the bank and had the unlimited confidence of everybody in Ong and surrounding country. He died on or about December 17, 1908, and it was then discovered that through his skilfully manipulated and systematic dishonesty a large number of persons, among them some of his most trusting relatives and friends, were defrauded out of large sums of money, aggregating many thousands of dollars. One of his victims, whom he had deceived for many years, and who must now suffer the loss of a large sum of money by reason of the confidence which he placed in his nephew, is the plaintiff in this case. J. O. Walker seems to have

been no respector of persons. His uncle, with his thousands, and the poor man borrowing a few hundred dollars, alike became his victims.

The first point urged by plaintiff for a reversal is that, "if J. O. Walker was the agent and representative of the plaintiff and he in fact received and failed to remit to the plaintiff the moneys alleged to have been paid him, then upon his death the plaintiff would become his legal representative," and that the testimony of Hale and McCrain as to conversations and transactions with J. O. Walker, who is deceased, is barred under section 329 of the code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation." No time need be spent upon this contention for three reasons: (1) The plaintiff is not the representative of the deceased. The deceased in his lifetime was the representative of plaintiff. (2) Plaintiff himself testified to his correspondence and dealings with J. O. Walker in reference to business generally and the note and mortgage in suit in particular. (3) The point is decided adversely to plaintiff's contention in *German Ins. Co. v. Frederick*, 57 Neb. 538, where we said: "Objection is made to the introduction of evidence as to the transactions of the insured with the agent, on the ground that the agent was dead at the time of trial. This fact seems to have been assumed, but it was not proved. However, the statute makes such testimony incompetent only where the adverse party is the representative of the deceased. Here that was not the case. The deceased in his lifetime had been the representative

of the adverse party. Perhaps such cases ought to be brought within the statute, but they are not now within it."

That payment of the full amount of the debt represented by the note and mortgage in suit was made to J. O. Walker is not disputed. The only question therefore to be determined in this case is, was J. O. Walker, at the time the payments were made to him, the general agent of the plaintiff, at Ong, for the purpose of receiving such payments, and were Hale and McCrain justified, at the time they made the payments to him, in believing that he was such general agent?

It is argued that this mortgage was given directly to plaintiff; that it was negotiated through J. O. Walker; that for a number of years, and during the times in controversy, J. O. Walker was cashier of the Exchange Bank, and that the fact, if it is established, that J. O. Walker acted for plaintiff in placing the loan and in the collection of the interest would be insufficient proof of his agency to collect the principal. It is contended generally that the relation of principal and agent between plaintiff and J. O. Walker did not exist; that they were doing business at arm's length; that they were engaged in the purchase and selling of securities, and at the same time J. O. Walker, as cashier of the bank, was interested in furnishing money to the customers of the bank, and that he was availing himself and his customers of the plaintiff's funds for these purposes; that plaintiff testified that he and J. O. Walker did not always pull together; that plaintiff returned papers sometimes that did not suit him; that J. O. Walker did not have entire control of the papers; that plaintiff did not permit him to do as he pleased; that authority was given with reference to each particular matter as it arose and no general authority was given; that "plaintiff did not know that J. O. Walker was conducting matters in a criminal way until after the transactions important to this case had occurred." The evidence shows that plaintiff made over 100 loans through

J. O. Walker. Sixty-five of the loans were taken in the name of plaintiff direct, while 39 were, as shown by plaintiff's statement from his books, taken in the name of J. O. Walker "for the use of plaintiff;" that, with reference to the latter class of loans, J. O. Walker would write to plaintiff telling him of the loans and the security, and asking if plaintiff desired it; that if approved, and only when approved, would plaintiff make the investment. It is also urged that plaintiff was not dealing with J. O. Walker individually, but in his official capacity as cashier of the bank, and that the bank was the agent through which plaintiff was making his Nebraska loans. We are a little at a loss to see how that fact, if it were a fact, could militate in favor of plaintiff, for, if the bank was his agent and J. O. Walker, who was the cashier and managing officer of the bank, did the things complained of, in his capacity as cashier, still the defendants would have the same right to rely upon him in that capacity as they would if he were acting individually. However that may be, the overwhelming weight of the evidence clearly shows that plaintiff was not transacting his business with the bank, nor with J. O. Walker as cashier. A large number of letters written by plaintiff to J. O. Walker were introduced in evidence, and it was stipulated and agreed that plaintiff wrote him at least a total of 200 letters of like tenor during the years that plaintiff was transacting business through him. Without a single exception, those letters were addressed to J. O. Walker as "Dear Nephew." In not a single instance, in reference to the large number of loans that were made, is it shown that plaintiff dealt with the bank. All of these transactions were with J. O. Walker. The deposition of plaintiff was taken, in which he testified: "Q. Mr. Walker, you say that other officers of the bank knew of your transactions with J. O. Walker, in regard to these loans? A. Yes, sir; his father, my brother, knew it. Q. Isn't it a fact that your brother wrote you and requested you not to be dealing with J. O. in reference to the bank business? A.

He wrote to me, but he didn't tell me not to buy any more of their papers; their notes. * * * Q. Isn't it a fact, too, that you wrote to J. O. about his father telling you that he didn't want you and J. O. to deal any more in the bank papers; you wrote to J. O. about that? A. I did. Q. Did you ever get a letter from him about it? A. I think he answered it. Q. You haven't that letter with you, have you. A. No. Q. You don't know where it is? A. No, I think he answered me. Q. Do you know what he said; what J. O. said? A. I don't know what he said; I suppose he wasn't pleased with his father that he had given me such instructions." Notwithstanding this correspondence, plaintiff continued to transact his business with J. O. Walker precisely as before. Upon the point that, even if J. O. Walker was the agent of plaintiff for the making of loans and collecting interest, he was not thereby empowered to collect the principal of any loans, plaintiff himself testified: "Q. From the time you commenced to loan out in Nebraska till up to the 1st of October, 1908, did you ever receive any remittance of principal or any part of the principal from any borrower direct? A. No, sir. Q. Then, all the interest and principal, whether the latter was paid in full or in part, was collected and transmitted to you by J. O. Walker? A. Yes, sir." The business relations between plaintiff and J. O. Walker covered a period of about 15 years. During that time plaintiff had loaned through him more than $100,000, and received through him more than 100 notes and mortgages. During all of those years plaintiff never collected a dollar of either principal or interest from any borrower, nor did he ever notify any borrower of the maturity of any note or interest payment, but transacted all of that business through J. O. Walker.

The testimony of plaintiff himself shows that he kept a considerable sum of money on deposit in the bank, of which J. O. Walker was cashier, which money was kept there for the purpose of making Nebraska loans. As money would be paid in, which J. O. Walker reported to

him, it was frequently retained by J. O. until it was reloaned. "Q. You don't know whether he kept any open account in your name or in J. O.'s name? A. I couldn't tell that. Q. You didn't stop to inquire whether he kept it in his own name or in your name? A. I don't know, no. * * * Q. As a matter of fact, a great many of his mortgages you thought you were entitled to you never got? A. Yes, sir. Q. In fact, you corresponded with him about that, did you not? A. Yes, sir. Q. And rebuked him for it, did you not? A. Yes, sir; I insisted on having the papers. Q. You didn't get them? A. No, sir. Q. When was the first time he neglected to send you the mortgage you thought you were entitled to? A. I couldn't answer that. Q. As early as 1901? A. It might have been about that time. Q. J. O. was neglectful about a number of those things? A. Yes, sir. Q. In fact, he insisted doing as he pleased in those things, did he not? A. It appears he done business in that kind of a way; he had his own time and way. Q. He was doing that since 1901? A. Along that time, I suppose." His testimony also shows a number of cases, both as to loans made to him direct and as to loans made to J. O. Walker for his use, where neither the mortgages nor assignments were forwarded to him by J. O. It shows at least one instance where J. O. accepted payment of a loan before its maturity. Plaintiff complained to him about this, stating in effect that he would have preferred to carry the loan, but nevertheless he let it go. Not a single instance is shown by him where he ever found fault with or criticised J. O. Walker for collecting a loan which was due. This fact, together with the fact that no payment of principal was ever made to him except through J. O. Walker, conclusively establishes the contention of defendants that J. O. Walker was his agent for all purposes relating to his loan business in Nebraska. It seems to us further discussion is unnecessary. From the large number of loans made in the four counties tributary to Ong, all made through J. O. Walker, everybody in that part of the state, in any

manner interested in any of those transactions, was perfectly justified in believing that J. O. Walker was the general agent and business manager of the plaintiff in the business of loaning money upon real estate, and in some instances upon collateral security. Such being the situation and the relation of the parties, the district court was right in finding that the payments made by Hale and McCrain to J. O. Walker were payments to plaintiff.

The law applicable to a state of facts as above outlined is well settled in this jurisdiction: *First Nat. Bank v. Ridpath*, 47 Neb. 96; *Thomson v. Shelton*, 49 Neb. 644; *Holt v. Schneider*, 57 Neb. 523; *Harrison Nat. Bank v. Austin*, 65 Neb. 632; and *Pine v. Mangus*, 76 Neb. 83, 85, where we said: "The appellee claims that the loan company had no authority to extend the time for the payment of $500 of the principal, nor to collect any part of the principal or interest at any time; and in his deposition states that no such authority existed. But we take into consideration the facts testified to by him, and other evidence showing the relationship which existed between him and the loan company, rather than his opinions or conclusions as to their relations." What we said there we repeat here. The facts testified to by plaintiff and the character of the relations existing between himself and J. O. Walker, as shown by an abundance of evidence, completely outweigh the statement made by plaintiff that no authority existed or had been given to J. O. Walker to collect the principal of any of his loans.

The situation of the plaintiff, who is undoubtedly an honorable business man, is unfortunate; but if the law were otherwise than herein declared the situation of the defendants, and others similarly situated in and about Ong, would be deplorable.

The judgment of the district court is not only right, under the law, but it is just.

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. F. OSCAR RUDD ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,903.

1. **Principal and Agent: AUTHORITY OF AGENT: EVIDENCE.** "That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it, but is a circumstance or fact to be considered in the determination of such question." *Thomson v. Shelton*, 49 Neb. 644.

2. ———: PAYMENT: NEGLIGENCE. Nor is the fact that the payor of a note pays the amount thereof to the payee or his agent, without demanding a cancelation and return of the note, conclusive evi dence of negligence on the part of the payor in making such payment, but the question of negligence or want of negligence is to be determined as a question of fact from all the circumstances of the transaction and the relation of the parties at the time.

3. **Paragraphs 2 and 4 of the syllabus in *Walker v. Hale*, *ante*, p. 829, applied to this case.**

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

Ambrose C. Epperson, for appellant.

M. L. Corey, R. D. Sutherland and *D. T. Barrett, contra.*

FAWCETT, J.

In the main, the issues and the evidence in this case are substantially the same as in *Walker v. Hale, ante*, p. 829. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. We deem it only necessary to call attention to one additional defense pleaded in this case which was not pleaded in that.

The note and mortgage in this case were executed and delivered to plaintiff by William I. and Mary E. Fine. The petition alleges that after executing the mortgage the

mortgagors conveyed the lots in controversy to one Osterberg, who conveyed to Frank T. Rudd, who conveyed to the defendants Oscar and A. William Rudd, who are the present owners; and who will be referred to as the defendants. The answer of defendants pleads the agency of J. O. Walker for plaintiff substantially as it was pleaded by defendants in *Walker v. Hale, supra,* and alleges payment about April 20, 1908, of the full amount of the note and mortgage to J. O. Walker. Plaintiff in his reply alleges that J. O. Walker died December 17, 1908; that defendants, from the time they alleged to have paid the indebtedness to J. O. Walker, made no demand upon plaintiff for a release of the mortgage nor for a cancelation and surrender of the note, but permitted plaintiff to believe that they had not paid the same; "and now on account of the death of said J. O. Walker, and the laches of said defendants, plaintiff cannot procure his evidence of the nonpayment of said indebtedness to him, whereby the plaintiff (defendants) should not in equity assert the payment of said note to him."

In his brief counsel for plaintiff insists that "the defendants, who claim to have acted for and on behalf of their father (Frank T. Rudd) in this transaction, were guilty of carelessness in not looking after their own interests and insisting upon the surrender of the note and a procuring of a release of the mortgage, matters which they had the right to demand of the person whom they entrusted with their money." The agency of J. O. Walker is shown, by the overwhelming evidence in the case, to have been a general agency for plaintiff, with full power and authority to act for plaintiff in the collection, not only of interest, but of the principal of plaintiff's loans in Nebraska. The payment by Rudd to J. O. Walker was, therefore, a payment to plaintiff, and, if plaintiff suffered any damage by reason of not being apprised of the fact of such payment, it was the result of the faithlessness of his own agent. The fact that the party to whom money due another is paid is not in possession

of the instrument by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it. It is simply a circumstance or fact to be considered in the determination of such question, and of the other fact as to whether the party paying the money was guilty of negligence in not demanding his note at the time he made the payment. We think it must be conceded that, if Rudd, under the circumstances shown, had made this payment to plaintiff himself, without demanding a return of the note and cancelation of the mortgage, that act would not be such carelessness as would warrant the plaintiff in insisting upon payment a second time, and in foreclosing the mortgage upon payment being refused. If the circumstances are such that plaintiff would be precluded from proceeding with the enforcement of the mortgage if the payment had been made to him in person, he cannot do so in this case, as payment to J. O. Walker, who was his general agent for the purpose of receiving payment, was in law a payment to plaintiff himself.

For the foregoing reasons and the reasons given in *Walker v. Hale, supra,* the judgment of the district court is

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. LILLIE W. SMITH ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,904.

Principal and Agent: EVIDENCE: PAYMENT TO AGENT. The mortgagee named in the mortgage in suit assigned his mortgage and guaranteed the payment thereof, and thereafter collected the principal and interest, but failed to account for the principal to his assignee, who instituted this suit to foreclose the mortgage. Evidence examined, and *held* sufficient to show that the mortgagee was the agent of his assignee, and the payment to him satisfied the mortgage indebtedness. *Pine v. Mangus*, 76 Neb. 83, followed.

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

Ambrose C. Epperson, for appellant.

S. W. Christy, L. E. Cottle, R. D. Sutherland, D. T. Barrett and *M. L. Corey, contra.*

FAWCETT, J.

So far as the question of the relation of principal and agent existing between plaintiff and J. O. Walker and the dealings of the latter with the defendants and the public generally in and about Ong, the issues and the evidence in this case are substantially the same as in *Walker v. Hale, ante,* p. 829, and those questions will not again be discussed in this case. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. The difference between this case and that only will be considered in this opinion.

The note and mortgage in this case were executed and delivered by the defendants Smith March 1, 1902, to J. O. Walker. The petition alleges: "Before the maturity of the said note, and at about its date, the said J. O. Walker, for a valuable consideration, sold, transferred and assigned the said promissory note to the plaintiff herein, who is now the owner and holder thereof, together with the lien of the said mortgage given to secure the same." It is further alleged that on June 17, 1905, the mortgagors conveyed the property to defendant Montraville M. Hart, who assumed the payment of the mortgage in suit. The answer of defendants Smith alleges that they obtained the loan from J. O. Walker, who represented that he was the agent of plaintiff; that they paid the interest to J. O. Walker for four years, which he accepted as agent for plaintiff. Then follows the general allegations as to the agency of J. O. Walker. The answer of defendants Hart alleged payment of the mortgage to

J. O. Walker about March 1, 1906, the release of the same by J. O. Walker March 9, 1906, and that no assignment of the mortgage from J. O. Walker to plaintiff had ever been recorded. Then follows the allegations as to the agency of J. O. Walker for plaintiff. They further allege that, if the plaintiff had been the owner of the note and mortgage since shortly after its date, he permitted J. O. Walker to collect interest thereon for each year, and permitted him to act as his general agent in the loaning of money and collection of principal and interest for other parties in and about the town of Ong; that, by reason of the premises, plaintiff is now estopped from asserting any lien upon the premises in controversy; and, further, that after the purchase of the premises by them, and after the payment of the principal and interest of the mortgage debt, plaintiff remained silent for more than three years, making no claim against defendants or the premises in controversy or the makers of the note and mortgage, until after the death of said J. O. Walker, which occurred almost two years after the maturity of said note; and that, by reason of such silence and inaction, plaintiff is estopped. For reply to the answer of defendants Hart, which is the only one we deem it necessary to consider, plaintiff alleged, in substance, that the representations by J. O. Walker were without his knowledge or consent; that the note when assigned was guaranteed by J. O. Walker, and the collections made by him were made by reason thereof, and not as agent; that payment was not authorized to be made to J. O. Walker, and, if he received it, it was not remitted to plaintiff, but was converted by J. O. Walker; that plaintiff did not know of the payment until after the death of J. O. Walker and had no reason to believe payment had been made; that J. O. Walker annually remitted the interest; that Hart knew that the note and mortgage had been assigned to plaintiff at the time he purchased the land from the Smiths, and never notified plaintiff of payment, nor demanded return of papers, but negligently made no effort

to secure the same; that, if demanded, "plaintiff could have investigated with said defendants the transactions alleged to have been had with the said mortgagee, J. O. Walker, and ample time would have been had to recover from him the amount paid, if any, for the benefit of plaintiff, by whomsoever was entitled to it. By reason of which neglect and carelessness of defendants, they are now estopped to allege payment of said indebtedness to the said J. O. Walker, for the use and benefit of the plaintiff."

We think a fair construction of plaintiff's petition and of the transcript from his books, which he introduced in evidence, is that, while the mortgage in controversy was taken in the name of J. O. Walker, it was in fact so taken by him for the plaintiff. The transcript from plaintiff's books, referred to, shows this entry: "Lillie W. Smith to J. O. Walker use H. P. Walker, March 1st, 1902, $1,200 mortgage;" and the petition alleges that it was sold to plaintiff "at about its date." If that be true, then our opinion in *Walker v. Hale, supra,* would dispose of every feature of this case. Inasmuch, however, as the parties have argued the case as if it were an original loan by J. O. Walker, subsequently assigned to plaintiff, we will consider it as such. The reply of plaintiff charges that at the time Hart purchased the property from Smith he knew that the note and mortgage had been assigned to plaintiff. This allegation is unqualifiedly denied by the uncontradicted testimony of Mr Hart. The case stands thus: Plaintiff before maturity purchased the note and mortgage from the mortgagee, kept his assignment (if he ever received one, which is not established in this case) from the records, and permitted the mortgagee for a number of years to deal with the mortgagor and his grantee, who had assumed the mortgage, as if he, the original mortgagee, were still the owner of the paper. And now, after such mortgagee has collected the full amount of the debt and duly executed a release of the mortgage, plaintiff comes into a court of equity and as-

serts that the mortgagee was not his agent; that he is not bound by the payment made and the release given, and asks that he be permitted to compel defendants to pay the debt a second time. This cannot be permitted. In *Pine v. Mangus*, 76 Neb. 83, we held: "A mortgagee of real estate assigned its mortgage, and guaranteed the payment thereof, and thereafter collected the principal and interest, but failed to account therefor to its assignee, who instituted this action to foreclose the mortgage. Evidence examined, and *held* sufficient to show that the mortgagee was the agent of its assignee, and the payments to it satisfied the mortgage indebtedness."

We think the evidence, showing J. O. Walker to have been the general agent of plaintiff, would alone have been sufficient to sustain the judgment of the district court that the payment of the amount of the mortgage in controversy to J. O. Walker by Hart was a payment thereof to plaintiff; but, when we add to that the fact that plaintiff, without recording his assignment of the mortgage, permitted J. O. Walker, the owner of the mortgage as shown by the record, to deal with the defendants as if he were still the owner of the mortgage, and to collect from them the full amount of the debt, and in due form release the mortgage, it settles the question beyond all dispute that plaintiff's suit is without equity.

The judgment of the district court is therefore

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. ANDREW J. STEWART ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,905.

The syllabus in *Walker v. Smith*, *ante*, p. 841, applied to this case.

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

Ambrose C. Epperson, for appellant.

Wilmer B. Comstock, R. D. Sutherland, D. T. Barrett and *M. L. Corey, contra.*

FAWCETT, J.

The pleadings and the evidence in this case are substantially the same as in *Walker v. Smith, ante,* p. 841. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. The difference between the two cases only will be considered in this opinion.

In this case, as in *Walker v. Smith, supra,* the mortgage was executed to J. O. Walker. It was signed by William R. and Ella S. Thurber and was to secure a note in the sum of $4,500. It was dated September 21, 1892. The petition alleges that before maturity of said note, "and on or soon after its date," Walker for a valuable consideration sold and assigned the same to plaintiff. It further alleges that after executing the mortgage the Thurbers conveyed the land to defendant Andrew J. Stewart, who is now the owner of the equity of redemption to all of the real estate described in the mortgage, except the west half of the northwest quarter of section 34, which he subsequently sold and conveyed to defendant Franson. In other respects the petition is in the usual form. The Columbia Fire Insurance Company was made a defendant, and filed an answer setting out a mortgage which, for the purpose of this case, need not be considered. The answer of defendants Stewart sets out the transaction by which they obtained their deed from the Thurbers, in which it is shown that they received their deed in exchange for other lands which they conveyed to the Thurbers. In that exchange each was to convey his land to the other clear of incumbrances. It then alleges that, in order to carry out the exchange, it became necessary for the defendants Stewart to secure a loan of $7,000

from the Columbia Fire Insurance Company, and the sum of $5,000 from some other source; that they secured an abstract of title to the lands of the Thurbers, including the lands described in the mortgage in suit, in which J. O. Walker appeared as the mortgagee, and sent it with his application to the Columbia Fire Insurance Company; that, after the company had passed on the title and accepted the same, papers were made out and defendants informed that the title was good and would be accepted; that defendants then signed notes to the Columbia Fire Insurance Company, one of which was for the sum of $4,800, dated June 30, 1905, and covering the Clay county land; that, to secure the balance of money necessary to complete the deal, they borrowed $5,000 in two sums of $2,500 each, secured by a real estate mortgage to J. O. Walker, one of the mortgages being on the Clay county land; that at the same time Thurber, in order to carry out his part of the exchange, borrowed the sum of $2,500 from the Columbia Fire Insurance Company, securing the same by a mortgage on other lands, and also borrowed $3,000 from J. O. Walker and gave a mortgage on the same premises, and secured the money thereon in the full amounts of said mortgages, and with the proceeds thereof paid to J. O. Walker, "the mortgagee of the note and mortgage sued upon herein, the principal and interest due therein in full; and the said J. O. Walker then and there accepted the amounts due thereon in full payment thereof," and on July 8, 1905, in due form released the northwest quarter of section 34, described in the mortgage, and acknowledged payment of the debt therein described; that the release was duly recorded; that on July 20, 1905, Walker in due form released the other 80 acres described in the mortgage, and that the release was duly recorded; that in those releases payment of the mortgage debt is acknowledged. It is further alleged that Thurber paid the interest on the note sued upon from the time of its date, which was in September, 1892, to the time of the release of the mortgages by J. O.

Walker, in July, 1905; that all of such payments were made to J. O. Walker, the mortgagee, and to no other person; that the mortgage was past due about eight years at the time of its payment and release, as above set out; that neither of the Thurbers nor the answering defendants had any interest, either in law or in equity, in and to the note and mortgage sued upon. The answer then sets out the agency of J. O. Walker for plaintiff, substantially as set out in *Walker v. Hale, ante,* p. 829. The reply to the answer of defendants Stewart is a general denial.

The evidence shows that plaintiff never at any time, until after the death of J. O. Walker in December, 1908, had possession of either the mortgage or the assignment, but that during all of the years from the time he alleges that he obtained the assignment on or soon after the date of the note, viz., September 21, 1892, until December, 1908, the mortgage and assignment remained in the possession and custody of J. O. Walker. The evidence also shows that plaintiff claims that each five years after the execution of the note it was extended for another period of five years, and by the extension of 1897 the rate of interest was reduced from 6½ to 5 per cent., but upon cross-examination plaintiff admits that no written extension was ever executed and that they were not made with the defendants. When asked with whom the extension was made, he answered: "The extension was made by J. O. Walker, but there was no writing of that kind; just a communication whether I would extend the time. Q. This application for an extension was made by J. O. Walker? A. Yes, sir. Q. Your reply in writing was to J. O. Walker? A. Yes, sir. Q. Did you ever have any agreement with William R. Thurber or Ella S. Thurber direct with regard to the change of the rate of interest? A. No, sir. Q. There was a payment of $500, I believe? A. Yes, sir; 24th September, 1894. Q. You received the $500 from J. O. Walker, did you? A. I think I did." The evidence, without conflict, shows that the assignment was

never recorded, and that none of the defendants ever had any knowledge or notice of plaintiff's interest in the note and mortgage until plaintiff asserted his claim after J. O. Walker's death. That J. O. Walker had authority to accept payment from the Thurbers of the principal is shown by the fact that about two years after plaintiff became the owner of the note, and nearly three years before its maturity, J. O. accepted a payment of $500 of principal, for which he accounted to plaintiff, who made no objection to the action taken by J. O. either to him or to the Thurbers.

The facts above outlined, together with the general agency of J. O. Walker, as shown by the evidence, make it too clear to require discussion or citation of authorities that the payment of the debt to J. O. Walker was a payment to plaintiff. But it is argued by plaintiff that the evidence offered and admitted to show the payment of the debt to J. O. Walker was incompetent because prohibited by section 329 of the code. That is to say, that the testimony of the Stewarts and the Thurbers, in relation to the payment to J. O. Walker, is incompetent for the reason that, as J. O. Walker was the mortgagee, plaintiff as his assignee is his legal representative, and, J. O. Walker being dead, the testimony of these persons who are directly interested is incompetent. It is unnecessary to discuss this argument for the reason that plaintiff in chief testified in relation to the transactions in a manner that brought these witnesses within the exceptions noted in section 329, and for the further reason that no evidence was offered by the plaintiff to controvert the recitals contained in the releases executed and delivered by J. O. Walker that the debt had been paid to him in full.

We are unable to see where anything could be gained by a further discussion of this case. The judgment of the district court was clearly right, and it is

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. ALBERT F. CARLSON ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,906.

The syllabus in *Walker v. Rudd, ante*, p. 839, applied to this case.

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

Ambrose C. Epperson, for appellant.

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

FAWCETT, J.

The issues tendered by the pleadings in this case and the evidence responsive to those issues are in every essential particular the same as in *Walker v. Rudd, ante*, p. 839. The same judgment was entered by the trial court in this case as in that, and a similar judgment must be entered in this court.

Some evidence was introduced by both sides, and the briefs on both sides contain some slight discussion in reference to a switching of securities, or transfer of the mortgage from the lands described in it, which are located in Clay county, to certain lands in Fillmore county. As no such issue was either tendered by the pleadings or considered and determined by the trial court, it will not be considered here.

That payment of the note and mortgage was made to J. O. Walker is satisfactorily proved; that J. O. Walker was the agent of plaintiff generally in his loan business, and particularly in reference to the loan in suit, is clearly established. Upon the latter point plaintiff testified that he did not know any of the Carlsons, nor where they lived, nor whether there were actually any such persons in existence; that he did not know whether any one was living on the premises; that he did not receive an abstract of

title, and when he took the paper did not know whether he had any security or not, except what was represented to him by J. O. Walker; that, so far as there being a mortgage on any land or land of any value, he relied upon the representations of J. O. Walker; that the only information he had was from him.

Complaint is made of the refusal of the court to require defendants to elect as to the defenses of actual and ostensible agency, both of which were pleaded. The trial was to the court, and, as the evidence sustains both defenses, plaintiff was not prejudiced by the ruling complained of.

Nothing would be gained by a discussion of this case. It is substantially the same in all respects as *Walker v. Rudd, supra,* and, for the reasons therein stated, the judgment of the district court is

AFFIRMED.

FRANK N. PHELPS, APPELLEE, V. JOHN W. BERGERS, APPELLANT.

FILED JANUARY 16, 1913. No. 16,909.

1. **Husband and Wife:** ALIENATION OF WIFE'S AFFECTIONS: EVIDENCE. In an action for damages for the alienation of the affections of the plaintiff's wife, she not being a party to the action, evidence of admissions made by her are incompetent. A witness testified that he saw plaintiff's wife coming out of the house of defendant, and after he followed her a short distance she made admissions in answer to statements of the witness. *Held,* That such admissions were not competent as *res gestæ.*

2. ———: ———: DAMAGES: EVIDENCE. In such action, evidence that plaintiff mistreated his wife, and was intimate with other women during the time in which he alleges that her affections were alienated, is competent as affecting the measure of damages; and when he testifies to injuries to his feelings, mental suffering, and such like matters as enhancing his damages, he may properly be cross-examined as to his conduct tending to show his failure to appreciate and value her affection for him.

3. ———: ———: EVIDENCE. In such action, evidence that the defendant assisted plaintiff's wife in procuring a divorce, in furtherance of his main design to alienate her affections, is competent as a circumstance tending to prove the main issue. Such evidence should not be submitted to the jury as establishing a cause of action in itself.

4. ———: ———: MALICE. When her parent, or one to whom the wife naturally looks for advice, counsels her as to the best course to pursue relative to her marital trouble, the question of good faith or malice on the part of her adviser is important and calls for an instruction to the jury upon that point. When a stranger interferes in the family affairs of others, there is no presumption of good faith. In the latter case, an instruction that it is necessary to prove malice, and that the law presumes malice from wrongful acts, is unnecessary and improper.

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

Byron G. Burbank, for appellant.

McCoy & Olmsted, contra.

SEDGWICK, J.

The plaintiff began this action against the defendant in the district court for Douglas county, and recovered a verdict and judgment from which the defendant has appealed.

In his petition, as amended, the plaintiff alleges that he is 27 years old, and was born in the city of Omaha, and on the 23d day of June, 1906, he was married to Josephine M. Rhoda, who is now about 23 years old; that plaintiff and his wife had one child, a boy, who died in April, 1909, at about the age of 18 months; that the plaintiff and his wife lived happily together until about December 1, 1908, and that from about the 15th of November, 1908, until April 1, 1909, the plaintiff and his wife kept house at 2304 Dewey avenue, in the city of Omaha; and that about January 1, 1909, the defendant, having separated from his own wife, rented, furnished and moved into the house at No. 2321 Dewey avenue, and in close proximity to the

plaintiff's said home; that since about the 1st day of January, 1909, the defendant has lived alone in his said house, except in this, that he kept and keeps there a Japanese or Korean cook or housekeeper; that since November 15, 1908, and until about April 15, 1909, the defendant, well knowing the said Josephine M. Phelps to be the wife of the plaintiff, and wrongfully contriving and intending to injure the plaintiff and deprive him of her company, assistance, love and service, did wilfully and maliciously, and without privity of consent of the plaintiff, and at defendant's said house and elsewhere in the city of Omaha at divers times during said period, persuade and induce plaintiff's wife to visit him at his rooms at 2321 Dewey avenue, aforesaid, and at other places now unknown to the plaintiff in the city of Omaha, and did then and there debauch and carnally know her, the plaintiff's said wife; that frequently during the time since November 15, 1908, and up to about April 15, 1909, and while the plaintiff was enjoying the comfort, affection, companionship and service of his said wife and having a household as aforesaid, the defendant studiously and continuously with wicked intent planned and undertook to deprive the plaintiff of the society, affections and assistance of his wife, and with such intent did so prejudice and poison plaintiff's wife's mind against the plaintiff, and so far alienated her affections from him, as to induce her to desire and seek to obtain a divorce and separation from him; and that the defendant, for the purposes aforesaid, counseled, advised, aided, and assisted the wife of plaintiff in her efforts to procure the commencement of divorce proceedings against plaintiff, and that the defendant did by the means aforesaid so far prejudice and poison the mind of plaintiff's wife against her husband, and so far alienate her affections from him, as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and that she, plaintiff's said wife, acting under such advice and influence, did refuse to recognize or receive the plaintiff as her husband or to live with him as his wife, and

did, without any good cause, about April 1, 1909, sue the plaintiff for a divorce and for the custody of their child, Frank Phelps, and did cause plaintiff to be restrained and enjoined from visiting her, his wife, or their said child. And pursuant thereto, and for the reasons aforesaid, plaintiff's said wife did leave and desert her home and plaintiff, and take with her their said boy, Frank Phelps, and remove him to her mother's home in Omaha, Nebraska, where plaintiff's said child contracted the measles from a servant in that home and died on April 23, 1909, as a consequence thereof; whereby the plaintiff has wholly lost and been deprived of the comfort, fellowship, society and assistance of his wife, and whereby the plaintiff and his wife have lost their child as aforesaid. The plaintiff alleged damages in the sum of $25,000. The defendant answered admitting plaintiff's age and the age of his wife as alleged, and their marriage, and residence of the plaintiff and his wife as alleged, and the birth and death of the child as alleged, and denied all other allegations of the petition. The jury rendered a verdict in plaintiff's favor for $16,666.67. Upon a motion for a new trial, the court required the plaintiff to remit $6,666.67 from the verdict and entered judgment upon the verdict for $10,000.

Upon the trial the plaintiff, as witness in his own behalf, testified that he and his brother on the 12th day of April, 1909, watched the residence of the defendant from about 4:30 o'clock in the afternoon until a little after 8 o'clock in the evening, and that he was at that time about 20 feet from the back door of Bergers' home, and saw his wife come out of the back door of Bergers' house to the sidewalk, and the plaintiff followed her. He overtook her shortly, and they were then joined by plaintiff's brother, Alfred. The plaintiff then by his counsel was asked if he had any conversation with his wife when he first caught up with her at that point, and he answered that he did; and was then asked: "What did you say to her?" This was objected to "as hearsay, incompetent, irrelevant and immaterial; no ways binding upon the de-

fendant." The plaintiff's counsel stated that it was a part of the *res gestæ*. The court allowed the plaintiff to answer, and the defendant excepted to the ruling. The plaintiff answered: "I said, 'Well I have caught you red-handed at last.'" His counsel then asked him: "What did your wife say to you at that time?" The defendant interposed substantially the same objections as before, which were overruled, and the plaintiff excepted. The witness answered: "She said, 'Well, as long as I am caught, I might as well own up to it.'" The admission of this evidence is now assigned as error. This evidence was clearly incompetent. The wife was not a party to the suit. She therefore could not make admissions that would be binding upon the defendant. If the defendant was with her in his house, they were separated at the time this statement was made by her. It is said in *Collins v. State*, 46 Neb. 37: "The term *'res gestæ'* means things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transactions said litigation is based." The statement of Mrs. Phelps was not any part of the transaction that took place at the house, and was therefore nothing more than an admission that she had been in the house of Mr. Bergers without any explanation of her purpose in being there. It is not necessary to determine whether, in the condition of this record, the error in receiving this evidence would be so prejudicial as of itself to require a reversal, since that question will not of course be presented upon another trial.

The defendant insists that the court erred in refusing to permit necessary cross-examination of the plaintiff. The plaintiff had testified substantially that the alienation of his wife's affections and her relation with the defendant caused him great worry and a nervous breakdown, and that by reason of it he was obliged to give up his position in order to recover his health. Upon his cross-examination it was sought to show that, during the time of the alleged intimacy between Mr. Bergers and the plaintiff's wife, the plaintiff himself was upon very

friendly relations with other married women. He was asked: "You have been going around a good deal with Mrs. Kennedy, haven't you?" Objection to this question was sustained, and the defendant excepted, and said: "I offer to show that he had been going around a good deal with Mrs. Kennedy." This was objected to and was refused. The witness was then asked: "Well, you knew, did you not, that Mrs. Phelps was watching you with reference to your conduct with other women, didn't you, from and after April 1, 1909?" Objection was sustained to this question, and defendant's attorney stated: "I offer to show by the witness that he knew that Mrs. Phelps was watching him as to his conduct with other women from and after April 1, 1909." This was objected to and the objection sustained. In view of the plaintiff's testimony and the conditions that he testified to for the purpose of increasing the amount of damages that he might recover, it was clearly competent to show his intimacy with other women in the time specified. The plaintiff insists that this would be a substantive defense, and if relied upon by defendant should be alleged and proved as such. There was no such defense pleaded in the answer. The cross-examination, however, might properly have been allowed as throwing light upon the plaintiff's evidence as to the damages suffered by him in the particulars above mentioned.

The offer of proof made by defendant's counsel was not very comprehensive. It has been said by this court that no offer of proof is necessary upon the cross-examination of witnesses. If, however, it is not apparent from the question asked that the matter which it is sought to investigate is a proper subject of cross-examination, it is necessary to inform the court how the question asked will be connected with the examination in chief. Counsel should make it appear that his questions will legitimately lead to a proper subject for cross-examination of the witness. When it appears from the statement of counsel or offer of proof, in connection with the questions he pro-

pounds, that the matter is a proper and necessary subject of cross-examination, the court will of course allow the questions. The proof offered, and at first excluded, seems to have been substantially admitted later, so that defendant was not prejudiced, unless his evidence of this character was apparently discredited by the rulings of the court thereon.

Plaintiff's wife began an action against him for a divorce on the first day of April, 1909. The court submitted to the jury an instruction stating as one of the issues presented that "the defendant procured or was party to the procuring of a divorce action brought by plaintiff's wife against him in furtherance of a design on defendant's part to destroy plaintiff's said family and home relation with his wife." The main issue tried was whether the defendant had alienated the affections of the plaintiff's wife. Evidence that the defendant assisted her or encouraged her in procuring a divorce was perhaps competent under the circumstances as bearing upon the main issue. It should not have been singled out and given in charge to the jury. This seems to be conceded in the plaintiff's brief, but it is insisted that objection was not made in time, and that the error was immaterial and was waived by the defendant. It is of course not necessary to discuss these features of the matter, as the error of giving this instruction will not be repeated upon another trial.

The court gave the following instruction: "You are instructed that any enticements of the plaintiff's wife, if any, by the defendant, with a view of causing a separation, otherwise than those of an adulterous nature, must be shown to have been maliciously done; but the law presumes malice, if one wrongfully does acts tended to disturb the harmony of the family relations between husband and wife, and concludes that such acts were malicious." It is insisted that it was error to tell the jury that the law presumes malice. There may be some doubt whether the jury would consider the word "tended" as meant for "intended" or for "tending." If the wrongdoer intended

that his wrongful acts should disturb the family relations between husband and wife, such conduct would be malicious. When a parent, or one to whom she naturally looks for advice, counsels a wife as to the best course to pursue relative to her marital troubles, the question of good faith or malice on the part of her adviser becomes important and calls for an instruction upon that point. The usual practice in such cases is to define malice and leave the question to the jury as to whether or not the defendant was actuated by malicious motives. When a stranger interferes in the family matters of others, there is no presumption of good faith. If his acts were wrongful and calculated to alienate the wife's affections from her husband, and did in fact produce that result, he is liable for such damages as he occasions. The first part of instruction No. 5 was erroneous as against the plaintiff, and the latter part as against the defendant. No such instruction in this case is called for.

The defendant insists that there was not sufficient evidence in the record to sustain the verdict based upon the second cause of action alleged in the petition; that is, the seduction by defendant of plaintiff's wife, and committing adultery with her. It is not deemed advisable to determine or discuss this assignment, since the plaintiff may produce different and further evidence upon another trial.

In his petition the plaintiff asked for $25,000 damages. The verdict was for precisely two-thirds of that amount. Upon a motion for a new trial in the court below, affidavits of the jurors who tried the case were filed tending to show how the jury arrived at this verdict. It is insisted that these affidavits show that it was agreed by the jury that each juror should mark the amount that he thought the plaintiff should recover; that these amounts should be added together and the sum divided by the number of jurors to estimate the amount of the verdict, and that this result was so near two-thirds of the amount asked for by the plaintiff that they agreed to accept that amount as the proper verdict. It is insisted that this was

such improper conduct on the part of the jury as to require a reversal. The affidavits of several of the jurors were filed denying that the verdict was so arrived at, and explaining the matter in such a way as to show no gross impropriety in their method. Upon this conflicting evidence the trial court found that there was no such misconduct shown as to require a new trial, and without further discussing the evidence on this point we are satisfied that this finding of the trial court is supported by the evidence.

On the 1st day of April, 1909, the plaintiff's wife began an action for a divorce. They never lived together after that time, and when the case at bar was tried in the district court the divorce had been granted. The plaintiff testified that from the time of their marriage, which was something less than three years before the action for divorce was begun, until some time in November, 1908, their marriage relations had been pleasant and in all respects satisfactory. He testified that in November, or early in December, 1908, their relations were changed. "She became indifferent to me and the home in general." He was asked whether from the 15th day of November, 1908, until April 1, 1909, his wife's attitude toward their infant child and their home was different from what it had been prior to that time, and answered: "It was, she seemed to be indifferent." She testified that during all of their married life he was abusive to her, and was very frequently guilty of acts of personal violence against her. In this she was corroborated by her mother, and to some extent by other witnesses who seemed to be disinterested and reliable. It would seem that, whoever was at fault for the alienation of her affection for her husband, it had been substantially accomplished on or before the 1st day of April, 1909. There is no evidence that she knew or had ever seen defendant prior to some time in January, 1909, several weeks after the process of alienation had begun, according to the plaintiff's testimony. In January, 1909, the plaintiff's wife with a young lady and a small

child, attended the automobile show in Omaha, and there she casually met the defendant. There is no evidence of any impropriety or anything unusual under such circumstances between them on that occasion. The plaintiff testified that on the 26th day of March, 1909, he heard a conversation between his wife and Mr. Bergers on the telephone which would indicate improper relations between them at that time. He is not supported in this testimony, and both his wife and Mr. Bergers deny that they ever had any conversation over the telephone at any time. Several circumstances are testified to as occurring after the divorce proceedings were begun that would indicate similar relations between her and Mr. Bergers. The plaintiff and his brother testify as to having watched Mr. Bergers' house some time during April, and that they saw the plaintiff's wife come out of the back door of the house, and that she then substantially admitted to them that she had been in Mr. Bergers' house for some time. Again, another witness testified that about the 1st of April he saw her coming out of Mr. Bergers' house. This might have been before or after the commencement of the divorce proceedings, as the witness testified, "I don't know anything about the date." Another witness saw her and Mr. Bergers talking in one of the public buildings of the city. This was about the time the divorce proceedings were begun. She and Mr. Bergers both testified that this was a casual meeting and only a few words passed between them, which was not disputed. While the divorce proceedings were pending, and after the case at bar was begun, on the invitation of Mrs. Phelps' parents, Mr. Bergers called at their home, where she was living. From that time on Mr. Bergers seems to have taken an interest in her relations with her husband, and in furthering the prosecution of her suit, as well as in the defense of his own. The plaintiff was very active in watching the actions of his wife while these suits were pending. He says that he was frequently driving with his automobile to keep watch of her and Mr. Bergers. On these occasions he generally took some female

companion with him to assist in the watch, and particularly and frequently a certain married woman, whom he says had formerly been a schoolmate of his, and with whom he was on quite friendly terms. On the other hand, his wife was also watching him, and the evidence shows that Mr. Bergers continually assisted her in this. During this time the plaintiff's wife and Mr. Bergers were frequently seen driving in his automobile, and they made no denial of it on the witness stand.

We think that the evidence upon the main issue presented was sufficient to justify a submission of the case to the jury. There was, however, no evidence to justify a verdict in the amount found. When we consider the relation that had existed between the husband and wife before she had ever seen or known anything of the defendant, and the plaintiff's surroundings and conduct before and after their separation, it is impossible to believe that this verdict of $16,666.67 was based upon any consideration by the jury of the actual damages that the plaintiff might have suffered. It clearly shows that the verdict was derived from something other than the evidence in the case. A verdict so obtained cannot be allowed to stand. The trial court required the plaintiff to remit a large part of the verdict. If the verdict had been of such a nature as to justify the belief that the jury had attempted to derive their verdict from the evidence, a remittitur might be required and an affirmance justified; but when it appears that the verdict must have been reached from passion or prejudice, or through some influence outside of the evidence, it is the duty of the court to set it aside.

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

REVERSED.

ADOLPHUS M. ALLEN, APPELLEE, V. DAWSON COUNTY ET AL., APPELLANTS.

FILED JANUARY 16, 1913. No. 16,919.

1. **Taxation:** LISTING PROPERTY. One who takes cattle and hogs upon his farm to keep and feed for a nonresident of the county has control of them for the owner, within the meaning of section 10927, Ann. St. 1911, and is required to list such property for taxation.

2. ———: INJUNCTION. If such stock is assessed in the name of the person so in control of such stock on the 1st day of April, and he purchases the same after that date, but before they are actually assessed, and afterwards disposes of the stock, he cannot enjoin the collection of the tax against his property generally on the ground that he was not the owner of the stock on the 1st day of April.

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

T. M. Hewitt and *E. A. Cook*, for appellants.

Warrington & Stewart, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Dawson county to enjoin the collection of a personal property tax. The district court enjoined the tax perpetually as prayed, and the county has appealed.

There is no substantial conflict in the evidence. It appears that the plaintiff is the owner of a farm in Dawson county, and that some months prior to the 1st day of April, 1909, one Wulff, of South Omaha, sent several hundred head of cattle and some hogs to the plaintiff's farm, where they were kept and fed. The plaintiff testified that while the cattle were on his farm one William Kountz, who was sent out by Mr. Wulff, had charge of them. The cattle were, however, in plaintiff's yards and were being fed with plaintiff's hay. He testified that Wulff "was to pay me for my teams and men, and for the engine and steam

for grinding and preparing the feed." Without doubt the cattle were in the plaintiff's control within the meaning of the statute. Mr. Wulff, plaintiff testifies, "is a stock-broker, commission man at South Omaha." He also testifies that soon after the 1st day of April, and before the cattle were actually listed for assessment, he bought the cattle and hogs, and still continued to keep them on his farm. The evidence shows that the assessor went to his farm to assess the plaintiff about the 1st day of April, and the plaintiff was not at home. Soon afterwards he called there again, and the plaintiff informed him that he was sick and unable to attend to the matter. The third time he called in the latter part of May, and, the plaintiff still not being at home, the assessor conferred with the men who were in charge of the plaintiff's farm in his absence, and they listed the cattle and hogs, and one of them signed the assessment schedule, signing the plaintiff's name, "by Charles Fletcher," without specifying the capacity in which he signed it. Plaintiff claims that the tax was void because the property was not his property on the 1st day of April and ought not to have been assessed to him. There appears to be no other question presented; and it is not claimed that the property was assessed or taxed, unless this assessment and tax is valid.

We think the district court was in error in enjoining the tax. Section 10927, Ann. St. 1911, requires that every person shall list all personal property controlled by him as the agent or on account of any other person, county or corporation whatsoever. It was then the duty of this plaintiff to list this property as property under his control on the 1st day of April. If he had done so, he would have had a lien upon the property "for the taxes thereon until he is indemnified against the payment thereof." Ann. St. 1911, sec. 10915. If the property had been properly assessed as the property of Mr. Wulff in the name of this plaintiff as his agent, it would have been the duty of the plaintiff to keep possession of the property until he was indemnified, and would of course require him to see that

the taxes were paid. Soon after the 1st day of April, and before the assessment, he bought these cattle himself, and he cannot now be heard to say that he is not liable for the taxes.

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

REVERSED.

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2. Where the consideration for a note was a disputed claim as to whether a prior note had been altered before or after delivery, if the claim was made in good faith, plaintiff need not establish that the maker altered it after its execution. *Musser v. Musser* 387

3. An instruction for plaintiff on the ground that a note was purchased from an innocent holder is erroneous, where reasonable men may properly infer from all the evidence that the holder in making the purchase acted for plaintiff, who had actual knowledge of valid defenses. *Central Nat. Bank v. Ericson* 396

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3. Failure to dismiss a creditor's bill on an answer alleging that plaintiff has possession of unsold collateral security, *held* not reversible error, where plaintiff, before reply, sold the collateral and applied the proceeds, and no one was prejudiced. *Parsons v. Cathers*..... 525

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13. If an expert witness fails to testify to facts and conditions observed on which to form an opinion as to the sanity of accused, or that what he had observed was sufficient to enable him to form an expert opinion, it is error to allow him to testify that he has not observed anything that led to the conclusion that accused was insane. *Larson v. State*..... 24

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cian's testifying to confidential communications between them. *Larson v. State*..... 24

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Deeds.

1. Where a father conveyed land to his daughter by deed, which was returned to the father for correction, and not returned to the daughter, *held* that she had an equitable title to the land. *Holladay v. Rich*..... 91
2. In a suit to cancel a deed as procured by undue influence and by promise of services never performed, decree for defendant *held* sustained by the evidence. *Moore v. Britizus*.. 401
3. A deed to a partnership in its firm name is not void, but vests an equitable estate in the firm for the benefit of the partnership business and creditors, and of the partners. *Dineen v. Lanning*..... 545
4. A mutual mistake in description in a deed will warrant its reformation to conform to the intention of the parties. *Burke v. Welch*..... 773

Depositions. See INJUNCTION, 5, 6.

1. An officer authorized to take depositions may, at the request of a party, take the deposition of the opposing party, and may issue a *subpœna duces tecum*, and compel his attendance as a witness. *Old Line Bankers Life Ins. Co. v. Witt*.. 743
2. An attorney having the custody of documents and papers belonging to one of the parties may be required to produce such documents and papers as the client would be required to furnish. *Old Line Bankers Life Ins. Co. v. Witt*..... 743

Descent and Distribution. See WILLS, 2.

Manner of descent of realty under sec. 1, ch. 23, Comp. St. 1907, stated. *Whitford v. Kinzel*..... 373

Divorce.

1. Evidence *held* to justify a decree of divorce for extreme cruelty and habitual drunkenness. *Boxa v. Boxa*..... 78
2. The mother is the only proper custodian of two children who, at the time she obtained a divorce, were one and three years old, respectively. *Boxa v. Boxa*..... 78
3. Where the amount of alimony cannot be placed in a lump sum without hardship to defendant, and uncertainty to

Divorce—*Concluded.*

plaintiff, the court should provide for the payment of a stated sum distributed over fixed periods of time. *Boxa v. Boxa* 78

4. Decree granting a husband a divorce on the ground of extreme cruelty *held* proper. *Cronk v. Cronk*..... 534

Drains.

1. Sec. 24, art. V, ch. 89, Comp. St. 1911, providing that drainage districts may dig ditches under and across railroads and public highways, is not violative of the constitutional provision that the property of no person shall be taken or damaged for public use without just compensation. *Douglas County v. Papillion Drainage District*..... 771

2. The legislature may grant drainage districts the right to cross highways, and if it imposes no conditions the county authorities can impose none. *Douglas County v. Papillion Drainage District*..... 771

3. Sec. 23, art. IV, ch. 89, Comp. St. 1911, requiring drainage districts to restore public highways which they cross, does not relieve such districts from the duty imposed by common law and by sec. 110, art. I, ch. 78, Comp. St. 1911, to maintain crossings on all such highways. *Richardson County v. Drainage District* 776

4. Where a new channel has been made by a drainage district for a stream which has been bridged by the public, and the new bridge relieves the county from maintaining the old bridge, the new bridge should be maintained by the public, and not by the drainage district. *Richardson County v. Drainage District* 776

Drunkards.

Instruction *held* to be an erroneous definition of drunkenness and intoxication. *Freeburg v. State*..... 346

Easements.

One seeking to close a way over his land which has been used by his neighbor for more than 10 years has the burden of showing that the use was permissive, and not under a claim of right. *Majerus v. Barton*..... 685

Ejectment.

Where parties entitled to the possession of land execute to their attorneys a quitclaim deed to an undivided one-half of the land as security for their services, such deed is in effect a mortgage, and it is not necessary to join the grantees as plaintiffs in an action in ejectment. *Helming v. Forrester*.. 284

Elections. See CRIMINAL LAW, 25.

1. Under sec. 45, ch. 52, laws 1907, the 500 electors who must be present at a mass state convention to form a new political party need not be the identical 500 who sign the agreement to form such party. *Morrissey v. Wait*..... 271
2. Secs. 39, 40, ch. 52, laws 1907, providing for nomination of candidates by a convention or committee, apply to nominations by new parties for general elections, as well as to nominations by old parties in special elections and for offices excepted from the provisions of the act. *Morrissey v. Wait*.. 271
3. Where a new party is formed after the time for holding primary elections, nominations may be made by mass convention, under sec. 45, ch. 52, laws 1907, and certificates of nomination may be filed at the time specified in sec. 40. *Morrissey v. Wait*..... 271
4. Statutes relating to the exercise of the elective franchise and nomination of candidates, either at primaries or by conventions or committees, should be construed in the light of sec. 22, art. I of the constitution, guaranteeing that all elections shall be free. *Morrissey v. Wait*..... 271
5. Ch. 26, Comp. St. 1911, recognizes political parties, and delegates to each party the right to vote at primaries and general elections for their own candidates nominated without interference of members of any other political party. *State v. Wait* 313
6. The preferential vote of a political party at a primary for a candidate for president, while morally binding on delegates to the national convention, has no relation to candidates nominated for presidential electors. *State v. Wait*..... 313
7. Persons nominated at a primary for presidential electors are nominated, not to vote for any particular candidate then known, but for the candidate who may subsequently be nominated by the national convention of the party. *State v. Wait* 313
8. By secs. 125*r*, 140, ch. 26, Comp. St. 1911, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight party ticket; and the governing body or committee of the party may appeal to the court to enforce such right. *State v. Wait*..... 313
9. The national convention of a political party, or its national central committee, is the supreme governing body as to national affairs, and has authority to decide which of rival conventions or committees in the state is the authorized convention or committee of the party. *State v. Wait*..... 313
10. The legislature of this state, in providing for the "closed

Elections—*Concluded.*

primary," has adopted the policy of allowing each political party to select its own candidates. *State v. Wells*..... 337

11. Any one who has the statutory qualifications to fill an office may be a candidate for the office; and if he affiliates with a political party he may become its candidate, or he may become a candidate independently of all parties. *State v. Wells* 337

12. Under the primary law, no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party. *State v. Wells*..... 337

13. If a political party at its primary makes no nomination for an office, a vacancy has occurred, and the proper party committee may fill the vacancy. *State v. Wells*..... 337

Embezzlement.

1. If an agent receives a draft from his principal with instructions to purchase certain property, and the agent obtains the money on the draft and converts it, the jury are justified in finding that he obtained it as agent. *Goldsberry v. State*, 211

2. Indictment under sec. 121 of the criminal code *held* to show that the principal whose agent was charged with embezzlement was a private person. *Goldsberry v. State*..... 211

3. Evidence *held* to sustain conviction of embezzlement. *Goldsberry v. State*..... 211

Eminent Domain. See DRAINS, 1, 2.

1. If one acquiesces in an appropriation of his land for a public use, he cannot regain possession by ejectment, but he may recover the value thereof. *Ensign v. Citizens Interurban R. Co.* 363

2. When the right of flowage of private lands has been acquired under the *ad quod damnum* act for a public purpose, if the use is changed to a different and private purpose, it is an abandonment of the right, but a change to another public use is not. *Lucas v. Ashland L., M. & P. Co*..... 550

3. Owners of riparian lands injured by flowage, and not included in the original *ad quod damnum* proceedings, may proceed under sec. 14, ch. 44, Gen. St. 1873; but after the dam causing the overflow has been built and the mill in operation for many years, they cannot abate the dam as a nuisance, or restrain its use till their damages are adjusted. *Lucas v. Ashland L., M. & P. Co*..... 550

4. In a suit by the owners of riparian lands to enjoin the use of a water power and remove a dam, the court should, if the injunction is refused, allow plaintiffs such damages as they are entitled to. *Lucas v. Ashland L., M. & P. Co*..... 550

Eminent Domain—*Concluded.*

5. Riparian owners whose lands were not included in *ad quod damnum* proceedings should be allowed such damages as are caused by the dam; and those whose lands were included should be allowed such damages as were caused beyond those allowed in the original proceedings. *Lucas v. Ashland L., M. & P. Co*..... 550

6. Whether an undertaking is a public utility is largely within the discretion of the legislature, and, unless it is clearly private, courts will not interfere with its discretion. *Lucas v. Ashland L., M. & P. Co*..... 550

7. The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use. *Lucas v. Ashland L., M. & P. Co*..... 550

Equity.

When equity has taken jurisdiction of a controversy, it will dispose of the whole matter. *Shevalier v. Stephenson*..... 675

Estoppel. See HUSBAND AND WIFE, 3. WATERS, 5, 14.

1. Mandamus brought by a private citizen under sec. 2, ch. 71, Comp. St. 1911, cannot estop the state in other litigation from taking a different position; the state being a nominal party. *State v. Ryan*..... 636

2. Where a grantee conveys land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name. *Butler v. Farmland Mortgage & Debenture Co*..... 659

Evidence. See APPEAL AND ERROR, 12-25. BILLS AND NOTES, 2, 4-6. CRIMINAL LAW. DEPOSITIONS. HUSBAND AND WIFE, 4-9. INTOXICATING LIQUORS, 1, 3. STREET RAILWAYS, 2, 3. TAXATION, 8. TOWNS, 1. WILLS, 4. WITNESSES.

1. In an action between the original parties, it may be shown by parol that a note was delivered on condition that it should be payable only on a certain event. *Musser v. Musser*..... 387

2. Where a written order for advertising shows on its face that it does not contain the entire contract, oral warranties made by the agent and the use of a sample in procuring the order may be shown by parol. *National Engraving Co. v. Queen City Laundry* 402

3. Oral warranties by an agent that goods sold would be equal to samples may be shown by parol. *Providence Jewelry Co. v. Gray Mercantile Co*..... 633

4. Secondary evidence is admissible only when primary evidence cannot be secured. *Deeder v. State*..... 662

5. Evidence of a separate oral agreement between parties to a

Evidence—*Concluded.*

written contract, as to matters on which the contract is silent, is admissible. *Wehnes v. Roberts*..... 696

6. A superseded decree, pending appeal, is not admissible to prove a final adjudication determining the rights of the parties. *Fassler v. Streit*..... 786

7. Where a party whose rights are affected by a decree pleads that the decree is not final, and introduces evidence of an appeal therefrom, he cannot use the decree as evidence of a final adjudication determining the rights of the parties. *Fassler v. Streit*..... 786

8. While a court will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case. *Fassler v. Streit*..... 786

9. A city ordinance may be proved by original records, though the charter provides other methods. *Van Valkenberg v. Rutherford* 803

Exceptions, Bill of. See APPEAL AND ERROR, 16, 17.

Execution.

One not a party to proceedings in which judgment is entered may enjoin the levy of an execution on his property to collect the judgment. *Tierney v. Evans*..... 330

Executors and Administrators.

1. Where a coroner sold personal property to pay funeral expenses, he is entitled to set off the funeral expenses against the administrator's claim for the value of the property sold. *Lenderink v. Sawyer*..... 587

2. Where a coroner sold personal property to pay funeral expenses, he was at most an executor *de son tort;* and the administrator, being bound to pay the funeral expenses, cannot complain because the coroner paid them. *Lenderink v. Sawyer* 587

Fraud. See CONTRACTS, 1. SALES, 4.

Petition *held* insufficient to entitle plaintiff to recover for false representation in sale of horse. *Sherrill v. Coad*..... 406

Fraudulent Conveyances.

1. Decree upholding a conveyance from a husband to his wife *held* proper. *Parsons v. Cathers*..... 525

2. If a husband and wife own two lots as tenants in common, and reside on one of them, which is of the full value of the homestead exemption, the husband's interest in the other is not exempt, and a transfer to his wife without consideration will be set aside as fraudulent. *Valparaiso State Bank v. Schwartz* 575

Garnishment.

One obtaining possession of merchandise purchased in bulk in violation of secs. 31, 32, ch. 32, Comp. St. 1911, is a trustee for the benefit of creditors of his vendor, and liable as garnishee. *Appel Mercantile Co. v. Barker*..... 669

Guaranty.

A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations and deprives the guarantor of the means of preventing the loss protected by the guaranty. *First Nat. Bank v. Wheatley*... 807

Highways. See DRAINS. INDICTMENT AND INFORMATION, 2.

1. If the driver of an automobile sees that a horse driven to a carriage is frightened, he should exercise ordinary prudence to avoid inflicting an injury. *Tyler v. Hoover*..... 221
2. The mere fact that a horse becomes frightened by an automobile on a highway does not render the operator thereof liable for resulting injury. *Tyler v. Hoover*..... 221
3. The law does not denounce the use of an automobile on a public highway, and appellant was not guilty of negligence because he used one on the streets of a city. *Tyler v. Hoover* 221
4. The driver of a horse and carriage has no rights in a highway superior to the rights of a driver of an automobile. *Tyler v. Hoover*..... 221
5. The restrictions which the law imposes on all modes of travel on highways are such as tend to secure to the general public the largest enjoyment thereof, all persons having an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. *Tyler v. Hoover*..... 221
6. The road law of Nebraska does not require a county or municipality to guarantee the safety of its highways, but they must keep them in reasonably safe condition for public travel. *Beebe v. Scott's Bluff County*..... 501
7. Where a county allows an open ditch to remain in the center of a public road, it may be liable for an injury caused thereby. *Beebe v. Scott's Bluff County*..... 501
8. County *held* liable for injuries on highway. *Beebe v. Scott's Bluff County*..... 501

Homestead. See SPECIFIC PERFORMANCE, 3.

1. One whose mental faculties are so impaired that she cannot form a clear intention to abandon her homestead will not be held to have done so merely because she left it for a short time till placed in an asylum. *Whitford v. Kinzel*..... 373
2. All presumptions are in favor of the preservation of the

Homestead—*Concluded.*

homestead, and the burden of proving abandonment is on the one attacking the homestead interest. *Whitford v. Kinzel* 373

3. Two adjoining tracts of land owned by husband and wife, respectively, and operated as a whole, *held* to constitute the family homestead; no rights of creditors being involved. *Whitford v. Kinzel*..... 373
4. A wife is not, by virtue of the marriage relation alone, entitled to recover rents of a portion of the family homestead owned by the husband, either before or after an attempted conveyance by him. *Whitford v. Kinzel*..... 373
5. Evidence *held* insufficient to establish the abandonment of a homestead. *Whitford v. Kinzel*..... 373
6. The term "homestead" in the statute means the house and land where the family dwells. *Meisner v. Hill*..... 435
7. The homestead is subject to execution sale on judgments against the holder of the title if its value exceeds $2,000. *Meisner v. Hill*..... 435
8. If the legal title to the homestead is in the husband, and there are no claims of creditors, on his death it vests in the widow for life, without regard to its value, and in the absence of a will his heirs take it subject to the widow's life estate. *Meisner v. Hill*..... 435
9. Where the homestead is owned by husband and wife as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt. *Valparaiso State Bank v. Schwartz*..... 575

Homicide.

1. Evidence *held* not to sustain defense of insanity. *Prince v. State* 490
2. Evidence *held* to sustain a conviction of manslaughter. *Stehr v. State*..... 755
3. In a prosecution for homicide in negligently causing the death of a child, admission of evidence as to the existence of bruises, scars, and marks on its body *held* not error. *Stehr v. State*..... 755
4. One charged with the care and control of a child, who fails to obtain for it necessary medical aid, thereby causing its death, may be guilty of such criminal negligence as to render him guilty of manslaughter. *Stehr v. State*..... 755
5. Whether the negligence of one charged with the care of a child, which results in death, is such as to make him criminally liable is a question for the jury. *Stehr v. State*.. 755
6. For a parent having special charge of a child to so neglect

Homicide—*Concluded.*

it that death ensues constitutes manslaughter, though death or grievous bodily harm were not intended. *Stehr v. State*.. 755

Husband and Wife. See BILLS AND NOTES, 5, 6.

1. Sec. 1, ch. 53, Comp. St. 1911, has taken away the common-law power of a husband to dispose of his wife's property, and a married woman has the same power to dispose of her property that a married man has to dispose of his. *Marsh v. Marsh* 189
2. Contracts of a married woman must be with reference to her separate estate, and a contract to bind her separate estate binds only the property she has at the time, and the proceeds thereof; and if she assigns specific property the contract is "with reference to her separate estate." *Marsh v. Marsh* 189
3. Though the defense of coverture is based upon lack of power, when a contingent interest in property is so remote as to be incapable of assignment, an attempt to assign it and subsequent conduct, continued until after the assignor's title has become perfect, may create an estoppel to deny the validity of the assignment. *Marsh v. Marsh*..... 189
4. In an action for alienation of a wife's affections, she not being a party to the action, evidence of admissions made by her are incompetent. *Phelps v. Bergers*..... 851
5. In an action for alienation of a wife's affections, evidence that plaintiff mistreated his wife and was intimate with other women *held* competent as affecting the measure of damages. *Phelps v. Bergers*..... 851
6. Where, in an action for alienation of his wife's affections, plaintiff testified to injuries to his feelings and mental suffering, he may be cross-examined as to his having mistreated his wife, and his intimacy with other women. *Phelps v. Bergers*..... 851
7. Evidence that defendant assisted plaintiff's wife in procuring a divorce is competent as a circumstance tending to prove alienation of affections, but not proper to submit to the jury as an issue in itself. *Phelps v. Bergers*..... 851
8. Where a parent or rightful adviser counsels a wife relative to marital trouble, the question of good faith calls for an instruction on that issue. *Phelps v. Bergers*..... 851
9. Where a stranger interferes in the affairs of husband and wife, there is no presumption of good faith. *Phelps v. Bergers* 851

Indictment and Information. See BURGLARY, 1. EMBEZZLEMENT, 2.

1. An indictment must be indorsed and the indorsement sub-

Indictment and Information—*Concluded.*

scribed by the foreman of the grand jury, but the signature of the prosecuting attorney is unnecessary. *Goldsberry v. State* 211

2. An information charging that defendant permitted his son, under 16 years of age, to operate his automobile on the highway, and to drive past a team without giving warning, and to drive past the team at a high rate of speed and return to the road within less than 30 feet from the team, will not sustain conviction, where the evidence showed that the defendant himself was operating the automobile. *Coryell v. State* 482

Injunction. See EXECUTION. MANDAMUS. TAXATION, 12.

1. The district court, in a suit for specific performance of a contract to sell land, may enjoin the prosecution of an action of forcible entry and detainer pending on appeal from justice's court, and may enjoin enforcement of the judgment while the appeal is pending. *State v. Graves*..... 333

2. Equity may enjoin the bringing of successive suits for the same cause against the same parties, in the absence of evidence of good faith of plaintiff. *Shevalier v. Stephenson*... 675

3. If an action at law has proceeded to judgment, and one of the parties brings successive vexatious suits for a new trial, defendant need not establish her legal rights before obtaining on cross-petition an injunction restraining the recommencing of such suit. *Shevalier v. Stephenson*..... 675

4. Where a contract for school buildings was *ultra vires* when suit was begun to enjoin its performance, and before trial it was modified to bring it within the powers of the board, costs are taxable to defendant. *Gaddis v. School District*... 701

5. Equity will not enjoin an officer or party from taking depositions of the opposing party and his attorney, unless it clearly appears that the officer is acting without jurisdiction, or is exceeding his lawful authority. *Old Line Bankers Life Ins. Co. v. Witt*..... 743

6. A petition to restrain a notary from taking depositions which fails to state facts showing that the officer is exceeding his jurisdiction, or is requiring the production of evidence which is clearly privileged, is demurrable. *Old Line Bankers Life Ins. Co. v. Witt*..... 743

Insurance.

1. Ch. 33, Gen. St. 1873, regulating insurance companies, applies to all kinds of insurance except life insurance. *State v. Barton* 666

Insurance—*Concluded.*

2. All companies whose object is to transact insurance business in this state must obtain license as the statute provides. *State v. Barton*..... 666

Intoxicating Liquors.

1. In a prosecution for the sale of whiskey in violation of ch. 50, Comp. St. 1911, evidence *held* to sustain a conviction. *Nixon v. State*..... 115

2. In a prosecution for an illegal sale of spirituous and intoxicating liquor, an instruction that the law provides that all persons who sell any spirituous liquors or any intoxicating drinks without a license are guilty of a misdemeanor, *held* without error. *Nixon v. State*..... 115

3. In a prosecution for an illegal sale of liquor, *held* not error to receive in evidence the federal liquor license issued to defendant; the objection to its introduction being that it was obtained by stealth. *Nixon v. State*..... 115

4. In a prosecution for illegal sale of liquor, an instruction that the name is not material, if the character of the liquor is shown to be intoxicating, *held* proper. *Nixon v. State*..... 115

5. A saloon license purporting to be issued to a deceased person in the company name used by him in his lifetime is invalid. *Willow Springs Brewing Co. v. Newcomb*..... 682

Judgment. See EVIDENCE, 6, 7.

1. Evidence in suit to vacate judgment *held* to sustain finding and decree for plaintiff. *Cusick v. Brodsky*..... 281

2. Revivor of a dormant judgment has no other effect than to reinstate the judgment and authorize execution. *Tierney v. Evans*..... 330

3. One not a party to the original judgment who fails to appear upon service of the conditional order of revivor is not made a party to the judgment by the final order of revivor. *Tierney v. Evans*..... 330

4. In proceedings to revive a dormant judgment, a finding for defendant on conflicting evidence will not be disturbed. *Sandwich Mfg. Co. v. Huckfeldt*..... 350

5. A decree in equity is binding only on parties to the suit, but the matters determined cannot be litigated against a party on the ground that she is jointly liable with others who were dismissed before trial. *Shevalier v. Stephenson*.. 675

6. A cause determined on the merits cannot be litigated by a new proceeding before the same or any other tribunal. *Trainor v. Maverick Loan & Trust Co*..... 821

7. A judgment on a demurrer to the merits is *res judicata;*

Judgment—*Concluded.*

but a judgment on a demurrer based on a technical defect of pleading, a lack of jurisdiction, or the like, is not. *Trainor v. Maverick Loan & Trust Co*..... 821

Judicial Sales.

1. A purchaser at a referee's sale of land, over which a railroad company has an easement of a right of way, cannot impose terms or make a bargain with the referee not authorized by the court. *George v. Pracheil*..... 81
2. Where the court authorized the sale of a tract of land as a whole, *held* that the purchaser took such rights only as the referee could convey, which included the whole tract, subject to a right of way easement of a railroad company. *George v. Pracheil*..... 81
3. Though a bid at a referee's sale may be withdrawn at any time before acceptance, yet the assertion of a claim that a railroad company's right of way across the tract reduced the sum to be paid is not a withdrawal, and the purchaser is liable for the entire amount of his bid. *George v. Pracheil*.. 81
4. Ordinarily judicial sales will not be set aside for inadequacy of price, in the absence of fraud or mistake, when the purchaser pays two-thirds of the appraised value of defendant's interest in the land. *Frederick v. Gehling*..... 204

Justice of the Peace.

The continuance of a civil action by a justice for more than 90 days, without consent of the parties, is a final order, reviewable by proceedings in error in the district court. *Tongue v. Lloyd* 488

Landlord and Tenant. See WATERS, 15, 16.

Licenses.

1. Under subd. 9, sec. 48, art. III, ch. 13, Comp. St. 1911, each city of the first class having more than 5,000 and less than 25,000 inhabitants may levy a tax on every occupation, except those enumerated in the proviso clause. *City of Grand Island v. Postal Telegraph Cable Co*..... 253
2. A city of the first class having more than 5,000 and less than 25,000 inhabitants may enact an ordinance imposing a reasonable license tax on telegraph companies. *City of Grand Island v. Postal Telegraph Cable Co*..... 253
3. An ordinance imposing a tax equal in amount on all telegraph companies is not violative of secs. 1, 6, art. IX of the constitution, requiring uniformity and equality. *City of Grand Island v. Postal Telegraph Cable Co*..... 253
4. An occupation tax is not to be measured by profits of the

Licenses—*Concluded.*
business taxed, but it is an incident to local self-government; and courts will not declare it void, unless clearly shown to be unreasonable or confiscatory. *City of Grand Island v. Postal Telegraph Cable Co*..... 253

Liens.
Two parties having liens on land of sufficient value to pay all liens should act in entire good faith to realize sufficient to satisfy both liens. *Frederick v. Gehling*..... 204

Limitation of Actions. See WATERS, 12.
1. Service of summons in ejectment arrests the running of limitations in favor of a defendant who claims by adverse possession, though the form of action is subsequently changed to a suit to redeem. *Butler v. Secrist*..... 506
2. Limitations do not run against an amended pleading setting forth a more complete statement of the original cause of action. *Witt v. Old Line Bankers Life Ins. Co*..... 763

Mandamus. See ESTOPPEL, 1.
The supreme court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction, if the district court was without jurisdiction to make the order. *State v. Graves*..... 333

Master and Servant.
1. Whether an employee is a fellow-servant or the representative of the master is determined by whether he is charged with the performance of a duty which properly belongs to the master. *Mitchell v. Omaha Packing Co*..... 496
2. Where a master directs an employee to perform a duty personal to himself, he is liable for the employee's neglect. *Mitchell v. Omaha Packing Co*..... 496
3. Telephone company *held* not negligent in placing a distributing pole near the wires of a light company. *Wilkins v. Water & Light Co*..... 513
4. The doctrine of assumption of risks arises from the relation of master and servant, and does not constitute a defense where that relation does not exist. *Wilkins v. Water & Light Co*..... 513
5. Where a machine is unsafe because not properly guarded, and an employee, with full knowledge of its condition, takes charge thereof without objecting, he assumes the risk of injury. *Bradford v. Bee Building Co*..... 571
6. A servant assumes only such risks as are necessarily and usually incident to the employment. *Tully v. Grand Island Telephone Co*..... 719

Master and Servant—*Concluded.*

7. Where an employer has knowledge that the particular employment is hazardous from extraneous causes beyond what it fairly imports or is understood by the employee to be, the master is bound to inform the employee, and, if he fails to do so, he is liable for resulting injury. *Tully v. Grand Island Telephone Co*..... 719

Mortgages. See APPEAL AND ERROR, 4. PRINCIPAL AND AGENT, 7, 9.

1. Notes and mortgage *held* obtained by undue influence and without consideration. *Holladay v. Rich*..... 91
2. By personal service of summons on a mortgagor who is owner of the equity of redemption, the court obtains jurisdiction; and a mistake in the name of defendant, not brought to the court's attention by motion or plea in abatement, does not deprive the court of jurisdiction, nor render the decree subject to collateral attack. *Page v. Bresee*..... 241
3. Where a mortgagee, without an agreement therefor, takes possession before confirmation of a judicial sale, he becomes liable to the mortgagor or his grantees for the rents and profits. *Attwood v. Warner*..... 370
4. A conveyance by a mortgagor to a *bona fide* purchaser vests the purchaser with the right to the rents and profits, which he may have applied on the mortgage debt. *Attwood v. Warner* 370
5. Where one takes title to real estate by his initial letters as his first name, subject to a mortgage, the mortgage may be foreclosed and notice given him by publication by such name. *Lear v. Fickweiler*..... 621

Municipal Corporations. See HIGHWAYS. OFFICERS, 4, 5. TAXATION, 7-10. TOWNS.

1. A judgment in proceedings under sec. 8978, Ann. St. 1907, to detach territory from a village will not be reversed, in the absence of a showing of mistake of fact or law. *Marsh v. Village of Trenton*..... 63
2. Evidence *held* to sustain a judgment detaching territory from a village. *Marsh v. Village of Trenton*..... 63
3. Power conferred on cities by subd. 4, sec. 48, art. III, ch. 13, Comp. St. 1903, to sell the fee of vacated streets may be exercised by the mayor and council without a vote of the people. *Van Valkenberg v. Rutherford*..... 803
4. Where a municipal charter confers on a city power to perform a particular administrative act, without specifying how it shall be exercised, the mayor and council may proceed by resolution. *Van Valkenberg v. Rutherford*..... 803
5. Where part of a street is vacated, only property owners

Municipal Corporations—*Concluded.*

whose property abuts on the vacated part are entitled to damages. *Van Valkenberg v. Rutherford*..... 803

Names. See ESTOPPEL, 2. MORTGAGES, 5.

Negligence. See MASTER AND SERVANT, 2-4. STREET RAILWAYS, 2, 3.

1. A snow storm of such violence as to prevent the moving of trains is an act of God. *Ward v. Chicago, St. P., M. & O. R. Co*..... 183
2. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred. *Ward v. Chicago, St. P., M. & O. R. Co*.... 183
3. Whether an employee of a telephone company was negligent in ascending a telephone pole in proximity to an uninsulated electric light wire *held* a question for the jury. *Wilkins v. Water & Light Co*..... 513
4. Where the manager of an electric light company is informed that an uninsulated guard wire in proximity to a telephone distributing pole has become charged with a heavy current of electricity, a delay of over 36 hours in remedying the defect may constitute gross negligence. *Wilkins v. Water & Light Co*..... 513
5. One who constructs a wall so that if it falls it will injure adjoining premises is bound to so construct it that it will withstand any gales reasonably to be expected. *Schroeder v. Lodge No. 188, I. O. O. F*..... 650

New Trial. See APPEAL AND ERROR, 11.

1. Prior to repeal of sec. 315 of the code, a new trial would not be granted in an action for personal injuries for smallness of damages. *Norton v. Lincoln Traction Co*..... 649
2. A motion for new trial cannot be amended by assigning new grounds after the time for filing such motion has expired, unless the party was unavoidably prevented from presenting the matter within the time. *Davis v. Taylor & Son*..... 769

Novation.

To constitute a novation, there must be an enforceable contract between the new debtor and the creditor, and the creditor must unconditionally release the original debtor. *Goetz Brewing Co. v. Waln*..... 614

Officers.

1. At common law, if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office. *State v. Wait*..... 313
2. Where the incumbent of an office accepts another office, one

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test of incompatibility between them is whether the nature and duties of the two offices are such as to render it against public policy for the incumbent to retain both. *State v. Wait* 313

3. Where acts or events have rendered an office vacant, the authority having power to fill the vacancy may elect or appoint another to fill it. *State v. Wait*..... 313
4. Evidence *held* to show members of board of fire and police commissioners of South Omaha guilty of wilful neglect of duty. *State v. Ryan*..... 636
5. In *quo warranto* to oust members of fire and police board for wilful neglect of duty, evidence *held* to sustain findings of referee against respondents. *State v. Ryan*..... 636
6. An appointee to the office of secretary of the state banking board *held* to be a *de facto* officer. *Patterson v. State*..... 729
7. Where a *de facto* officer discharged the duties of a state office, was recognized as entitled to the office, and was paid the salary, a claimant cannot, after the term, recover the salary from the state, though he was deprived of the office by an injunction wrongfully issued. *Patterson v. State*.... 729
8. Where an appointee to office filed his bond, but later withdrew it, and discharged none of the duties of the office, he is not entitled to the salary, another having discharged the official duties under a claim of right and having received the salary. *Patterson v. State*..... 729

Parent and Child. See HOMICIDE, 4-6.

If a parent has not the means for the child's nurture, it is his duty to apply to the public authorities for relief, and failure to do so is itself culpable neglect. *Stehr v. State*..... 755

Partnership. See ABATEMENT. BROKERS. STATUTE OF FRAUDS.

The fact that a partnership, as a separate entity, is not served with summons in a suit does not affect the validity of the decree as to the equitable interests of the partners who were served. *Dineen v. Lanning*..... 545

Pleading. See APPEAL AND ERROR, 1, 2, 5. BILLS AND NOTES, 5. COMPROMISE AND SETTLEMENT. FRAUD. INJUNCTION, 6. PRINCIPAL AND SURETY, 1.

1. Permitting amendment of answer after trial has begun is within the discretion of the court, and unless abuse thereof is shown the action of the court will be upheld. *Kinney v. Chicago, B. & Q. R. Co*..... 383
2. An answer which admits that a railroad company "is now operating" the railroad, and does not deny that it was the

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owner at the time of an accident, does not raise the issue of ownership or operation at that time. *Kinney v. Chicago, B. & Q. R. Co*..... 383

3. Where the original answer pleaded fraud in obtaining a note and that it was given upon a condition, and the court permitted an amended answer pleading the condition only, *held* no abuse of discretion. *Musser v. Musser*..... 387

4. Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the conclusion to be drawn therefrom. *Schmidt v. Village of Papillion*..... 511

5. If a cause of action is stated, redundant matter will not render the petition demurrable as not stating a cause of action. *Union Stock Yards Nat. Bank v. Lamb*..... 608

6. In an action for death from contact with an electric wire, petition *held* sufficient after judgment. *Tully v. Grand Island Telephone Co*..... 719

7. Where a demurrer to a petition is sustained, and the plaintiff makes no request to amend, but takes time to prepare a bill of exceptions, and procures an order for a supersedeas bond, he waives his right of amendment, and the court may dismiss his action. *Old Line Bankers Life Ins. Co. v. Witt*.. 743

Principal and Agent.

1. A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge. *Singer Sewing Machine Co. v. Barger*..... 539

2. Where a note given for remainder due on a sewing machine provided that the machine was to remain the property of the seller until payment of the price, and the holder, with notice that it has been altered, brings replevin upon the altered note, he thereby ratifies the act of alteration. *Singer Sewing Machine Co. v. Barger*..... 539

3. Where a note was altered by the agent of the holder, plaintiff bringing replevin upon the altered note cannot recover. *Singer Sewing Machine Co. v. Barger*..... 539

4. Authority to act as agent may be inferred if the party charged as principal causes third persons to trust and act upon an apparent agency. *Triller v. Sadle*..... 579

5. Where the name of the principal was signed to a lease by a firm as agents, who took a bill of sale and replevied hay growing on the land leased in the name of their principal, he will be bound by what they did. *Triller v. Sadle*..... 579

6. One assuming to act as agent for the estate of a deceased person in purchasing liquors without authority from the

Principal and Agent—*Concluded.*

probate court and without a license is personally liable for the price of the liquors. *Willow Springs Brewing Co. v. Newcomb* 682

7. Where one has placed his agent for investments in notes and mortgages in such a situation that persons would be justified in regarding the agent as having full authority to make collections, payment to the agent will be deemed payment to the principal. *Walker v. Hale*..... 829
Walker v. Rudd..... 839

8. Whether an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction. *Walker v. Hale*..... 829

9. In a suit to foreclose a mortgage, evidence *held* to sustain a finding that plaintiff's agent had authority to collect the debt and satisfy the mortgage. *Walker v. Hale*..... 829
Walker v. Rudd..... 839

10. That one to whom money due another is paid is not in possession of the evidences of indebtedness is not conclusive that he had no authority to receive payment, but is only a fact to be considered in the determination of such question. *Walker v. Rudd*..... 839

11. That the payor of a note pays it without demanding a cancelation is not conclusive evidence of negligence, negligence being a question of fact to be determined from all the circumstances. *Walker v. Rudd*..... 839

12. Evidence *held* to show that a mortgagee who assigned the mortgage was the agent of his assignee, and that payment to him satisfied the mortgage. *Walker v. Smith*..... 841
Walker v. Stewart..... 845

Principal and Surety.

1. In an action by the surety to recover from a county judge expenses incurred in defense of a action on his bond, petition *held* not to state a cause of action. *American Surety Co. v. Vinsonhaler*..... 1

2. Under a contract of suretyship, the surety is entitled to be protected against all necessary expenses incurred in defending itself against liability on the bond. *American Surety Co. v. Vinsonhaler*..... 1

3. The surety on the official bond of a county judge *held* not entitled to recover unnecessary expenses incurred in defense of an action on the bond, where the surety had no reason to regard the expenses as necessary. *American Surety Co. v. Vinsonhaler* 1

Process. See TAXATION, 2.

Quieting Title.

1. In a suit to quiet title, evidence *held* to require a decree in favor of appellant. *Holladay v. Rich*..... 91
2. Pleadings and proof *held* to sustain a decree for plaintiff. *Peterson v. Lincoln County*..... 167

Quo Warranto. See OFFICERS, 5.

Rape.

1. In a prosecution for rape of a female child under 15 years of age, it is not a defense that others have abused her. *Kanert v. State*..... 14
2. Where the birth of a child is relied on as evidence, and complainant has denied intercourse with any other than accused, she may be cross-examined as to circumstances tending to show that another is father of the child. *Kanert v. State* 14
3. A conviction for rape cannot be sustained upon the uncorroborated testimony of the complainant. *Kanert v. State*.. 14
4. The testimony of the complainant as to the commission of rape may be corroborated by evidence of circumstances showing a disposition to commit the crime and an opportunity to do so. *Kanert v. State*..... 14
5. Where the commission of rape is established beyond question, and there are inconsistencies in the evidence of accused from which it may reasonably be inferred that the testimony of the complaining witness implicating accused is substantially correct, it presents a case for the jury. *Kanert v. State* 14
6. In a prosecution for rape, where the prosecution has elected to proceed on one of several distinct offenses, a certain instruction as to corroborative evidence *held* properly refused. *Kanert v. State*..... 14
7. A sentence of seven years' imprisonment in the penitentiary for rape *held* within the reasonable discretion of the trial court. *Kanert v. State*..... 14
8. That a female child 17 years of age was pregnant and died from the effects of an abortion is sufficient evidence that some one had sexual intercourse with her at an age prohibited by statute. *Thrasher v. State*..... 110
9. Evidence in prosecution for rape, though largely circumstantial, *held* sufficient to be submitted to the jury. *Thrasher v. State* 110
10. On a trial for statutory rape, where the female child died from the effects of a criminal abortion, evidence by the physician who attended her at the time of the miscarriage, as to what they discovered upon an examination, is not prohibited by law. *Thrasher v. State*..... 110

Replevin. See PRINCIPAL AND AGENT, 3.

1. In replevin, where the property is delivered to plaintiff under a bond, and the judgment is for a return of the property to defendant, plaintiff must return it within a reasonable time in substantially the same condition as when taken. *Wallace v. Cox* 354
2. Where judgment in replevin is for defendant, and the replevied property is not redelivered within a reasonable time, and, when tendered, is greatly diminished in value, defendant may refuse to accept it, and may sue on the replevin bond. *Wallace v. Cox*..... 354
3. The measure of damages for failure to return replevied property to defendant is its value as found in the replevin action, with interest and costs. *Wallace v. Cox*..... 354

Sales.

1. An order for goods, sent to a wholesale house, which provides in express terms that it is subject to the approval of the home office, does not become a binding contract until approved. *Crowder v. Tolerton & Warfield Co*..... 250
2. Where the person making an order for goods, on being notified of its nonacceptance, demands and receives repayment of the money forwarded therewith, he rescinds his order, and cannot maintain an action for damages for its nonacceptance. *Crowder v. Tolerton & Warfield Co*..... 250
3. To entitle a vendee to a rescission, he must allege and prove notice of his election to rescind, and a return or an offer to return the property. *Sherrill v. Coad*..... 406
4. The measure of damages for breach of warranty or fraudulent representations by a vendor of personalty is the difference between its actual value and what would have been its value had it been as represented. *Sherrill v. Coad*..... 406
5. A sale of personalty with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent, and on breach of the warranty the property may be restored and the sale rescinded. *Sherrill v. Coad*..... 406
6. In an action for goods sold, where the purchase and receipt are denied, the burden is on plaintiff to prove the sale to the defendant. *Hirsch Distilling Co. v. Roach*..... 624
7. Whether liquors were sold to defendant or another *held*, under the evidence, a question for the jury. *Hirsch Distilling Co. v. Roach*..... 624
8. Where defendant denied purchasing goods, the fact that plaintiff had filed a claim for the goods against the estate of the person ordering them is a circumstance tending to

Sales—*Concluded.*
show that the goods were sold to decedent. *Hirsch Distilling Co. v. Roach*..... 624

9. A purchaser by sample may refuse goods which do not correspond with the sample. *Providence Jewelry Co. v. Gray Mercantile Co*..... 633
National Engraving Co. v. Queen City Laundry..... 402

Schools and School Districts. See INJUNCTION, 4.

1. Under ch. 79, Comp. St. 1911, school districts in cities having more than 1,500 inhabitants are governed by boards of education representative in form, while those in the country and in smaller cities and villages are democratic in form. *Gaddis v. School District*..... 701

2. The ultimate control of a rural school district resides in the electors, and is exercised at school meetings; and their directions as to school buildings and sites must be carried out strictly within the limits of the powers conferred at such school meetings. *Gaddis v. School District*.....701

3. A board of education of a city school district has as full authority to select school sites and erect school buildings as the electors in a rural district. *Gaddis v. School District*.. 701

4. Since the repeal of the proviso to sec. 23, subd. XIV, ch. 79, Comp. St. 1891, the question of the selection of school sites or the erection of school buildings need not be submitted to the electors of a city school district. *Gaddis v. School District* 701

5. Except as limited by the statutes restricting the amount of taxes, and regulating the borrowing of money, a board of education has full power as to school sites and buildings. *Gaddis v. School District*..... 701

6. A board of education may add money derived from taxation to money obtained from bonds for building purposes, in order to pay for the erection of school buildings. *Gaddis v. School District* 701

7. Under sec. 23, subd. XIV, ch. 79, Comp. St. 1911, the board of education estimates the amount of money necessary for all purposes and the tax is levied in gross; and the amount levied is equally subject to anticipatory use for all purposes named in the estimate. *Gaddis v. School District*..... 701

8. Where money required by a contract for school buildings did not exceed the amount on hand derived from the sale of bonds and a tax levy for the current year, the contract was not *ultra vires* because all the money was not in the treasury when the contract was made. *Gaddis v. School District*.... 701

Specific Performance.

1. If one, with knowledge of the facts on which he relies for a rescission of his contract to convey land for a right of way to a street railway company, acquiesces in the construction of the improvement, equity may require him to specifically perform his contract. *Ensign v. Citizens Interurban R. Co.*. 363
2. A parol contract will be enforced, where wholly performed by one party, and its nonfulfillment would amount to a fraud upon him. *Moline v. Carlson*..... 419
3. Where a husband and wife took a child, and orally agreed that, if he would remain with them during their lives and render them service, they would leave him their estates, the statute as to homesteads cannot be pleaded by the heirs as a defense to a suit to enforce the contract. *Moline v. Carlson* 419

States.

The state pays a salary but once, if paid through the regular channels provided by law, and the appropriation therefor is exhausted. *Patterson v. State*..... 729

Statute of Frauds.

An agreement of settlement between a partner and the representatives of a deceased partner of partnership real estate is not within the statute of frauds (Comp. St. 1911, ch. 32, sec. 3), and may be oral. *Majors v. Majors*..... 473

Statutes. See AGRICULTURE. BILLS AND NOTES, 7. CONSTITUTIONAL LAW. CRIMINAL LAW, 22.

1. Ch. 49, laws 1907, providing for succession to estates of decedents, *held* not to violate sec. 11, art. III of the constitution, as to subject or title. *Gaster v. Estate of Gaster*..... 6
2. Where a statute is clear and unambiguous, it must be interpreted in its ordinary sense; but, if doubtful or obscure, an interpretation which will avoid a forfeiture or an injustice will be adopted. *Owen v. Main*..... 258
3. The title of ch. 44, Gen. St. 1873 (Comp. St. 1911, ch. 57), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility and have machinery to be propelled by water. *Lucas v. Ashland L., M. & P. Co*..... 550
4. Where amendments have been made to a bill after its first or second reading in either house, it need not be again read at large on three different days in each house to comply with sec. 11, art. III of the constitution. *State v. Ryan*..... 636
5. Where a bill has been introduced within the time limited by the constitution, amendments within its general purpose may be made thereafter. *State v. Ryan*..... 636

Statutes—*Concluded.*

6. The legislature may amend a statute by appending a proviso to a section thereof, if the subject of the proviso is within the title to the original act and germane to its provisions. *State v. Hevelone*..... 748

7. An act properly amended should be construed as though originally enacted in its amended form. *State v. Hevelone*.. 748

8. An act complete in itself is not inimical to sec. 11, art. III of the constitution. *State v. Hevelone*..... 748

9. Where an act complete in itself is repugnant to a prior act, which is not referred to, the prior act is repealed by implication. *State v. Hevelone*..... 748

Street Railways.

1. Neither the operator of a street car nor the occupant of a private conveyance has a superior right at a street intersection, but both must act in a reasonable and careful manner to avoid injury. *Pierce v. Lincoln Traction Co*.... 797

2. Evidence of the running of a street car at an excessive speed, or of failure to give warning, is evidence of negligence. *Pierce v. Lincoln Traction Co*..... 797

3. Evidence that a street car ran more than 150 feet after a collision before it could be stopped, though the brake had been firmly applied, is evidence of excessive speed. *Pierce v. Lincoln Traction Co*..... 797

Subrogation.

1. The right of subrogation depends upon the facts and equities of the particular case in which it is asserted. *Frederick v. Gehling* 204

2. A mortgagee whose mortgage was on record before an execution sale, and was given to secure a loan with which mortgages prior to the judgment were paid, upon an understading with the mortgagor that it should be a first lien, is entitled to subrogation to the lien of the prior mortgages. *Frederick v. Gehling* 204

Taxation. See LICENSES.

1. In a tax lien foreclosure by a county without a prior administrative sale, where service was had by publication, the purchaser buys subject to the right of one having a lien on the premises to redeem. *Smith v. Potter*..... 39

2. Proof of publication of notice for constructive service *held* to show that the notice was published for the time required by statute. *Smith v. Potter*..... 39

3. In a suit to foreclose a tax lien against unknown heirs, a substantial compliance with sec. 83 of the code, an order of

Taxation—*Concluded.*

court for services by publication and a legal publication of summons confer jurisdiction. *Page v. Bresee*..... 241

4. In a suit by a county against unknown heirs to foreclose a tax lien, the affidavit for service by publication provided by sec. 83 of the code may be made by the county attorney. *Page v. Bresee*..... 241
5. Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure of tax lien to collateral attack. *Page v. Bresee*..... 241
6. Before bringing suit to redeem from tax sale, all taxes subsequent to the sale must be paid; and where paid by the purchaser the amount should be included in the decree allowing redemption. *Lazure v. Maverick Loan & Trust Co*..... 471
7. The electors at a town meeting have power, within statutory limitations, to determine the tax required for township purposes, and their action is the foundation for the levy by the county board. *Union P. R. Co. v. McLean*..... 813
8. In a suit to enjoin the collection of township taxes levied by authorized officers within statutory limitations, the burden of proving that the taxes are illegal is on plaintiff. *Union P. R. Co. v. McLean*..... 813
9. Failure of the town clerk to enumerate in his certificate to the county clerk the several purposes for which the taxes are needed, or to state the amount required for each purpose, does not invalidate a levy made by the proper officers within statutory limitation. *Union P. R. Co. v. McLean*..... 813
10. That a town clerk certified to the county clerk the number of mills required for township taxes as the basis of a levy, instead of the specific sums for the different purposes, does not invalidate the taxes, where they are levied by authorizd officers within statutory limitations. *Union P. R. Co. v. McLean* 813
11. One who takes cattle to feed for a nonresident of the county has control of them for the owner, within sec. 10927, Ann. St. 1911, and must list them for taxation. *Allen v. Dawson County* 862
12. Where live stock is assessed in the name of one in control of it on the 1st day of April, and he afterwards purchases it, but before actually assessed, he cannot enjoin collection of the tax on the ground that he was not the owner on the 1st day of April. *Allen v. Dawson County*..... 862

Towns. See TAXATION, 7-10.

1. It is the duty of a town clerk to keep minutes of township proceedings and to enter therein at length every order, direction, rule, and regulation of the town meeting, and the

Towns—*Concluded.*
record is the primary evidence of the business transacted. *Union P. R. Co. v. McLean* 813

2. Proceedings of the town meeting and the acts of the town officers should be liberally construed with a view to upholding the transaction of essential public business. *Union P. R. Co. v. McLean* 813

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 3. CRIMINAL LAW. DAMAGES, 1. INTOXICATING LIQUORS, 2, 4.

1. Where a law action is tried by the court, findings of fact have the same force as a verdict. *National Engraving Co. v. Queen City Laundry* 402

2. Consolidation of suits to redeem from a mortgage *held* within the discretion of the trial court. *Butler v. Secrist* .. 506

3. If a litigant desires special findings of fact, he should request their submission. *Union Stock Yards Nat. Bank v. Lamb* 608

4. Permitting the jury to take the pleadings with them to the jury room is not ground for reversal, where not prejudicial to complainant. *Schroeder v. Lodge No. 188, I. O. O. F.* 650

5. In ejectment, where the undisputed evidence clearly establishes the right of possession in one of the parties, it is not error to direct a verdict. *Helming v. Forrester* 284

6. Judgment will not be reversed for an instruction not based on the evidence, where a proper instruction on the point in issue has been given. *Kinney v. Chicago, B. & Q. R. Co.* 383

7. In an action for tuition, instruction as to measure of damages *held* erroneous in view of the evidence. *International Text-Book Co. v. Martin* 430

8. To predicate error on the failure of the court to instruct on a particular feature of a case, complainant must request an appropriate instruction thereon. *Schroeder v. Lodge No. 188, I. O. O. F.* 650

9. The frequent repetition of a proposition in the instructions *held* not error, where complainant was not prejudiced thereby. *Schroeder v. Lodge No. 188, I. O. O. F.* 650

10. In an action on a written contract, where defendant denies plaintiff's allegation that he has performed, in the absence of proof of the allegation, it is proper to direct a verdict for defendant. *Witt v. Old Line Bankers Life Ins. Co.* 763

Vendor and Purchaser. See ESTOPPEL, 2.
A purchaser of land near a projected line of street railway and boulevard is not charged with notice that by a change of the projected route a part of his land may be taken for such improvement. *Ensign v. Citizens Interurban R. Co.* 363

Waters.

1. The legislature may delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that the method of procedure is not embodied in the statute does not render due process of law lacking in the proceedings of the board. *Enterprise Irrigation District v. Tri-State Land Co*..... 121
2. In determining priorities of appropriations under the irrigation act of 1895, the transcripts of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication. *Enterprise Irrigation District v. Tri-State Land Co*..... 121
3. Evidence *held* to show that the right of a claimant to an appropriation of water as successor of the original appropriators was not lost by lack of diligence, nonuser, or abandonment. *Enterprise Irrigation District v. Tri-State Land Co.* 121
4. The posting and recording of notices of "claims" to the waters of the state, under ch. 68, laws 1889, *held* to be a public record, of which all parties interested were bound to take notice. *Enterprise Irrigation District v. Tri-State Land Co*..... 121
5. Where plaintiffs stood by for four years with full notice of the claims of defendants to an appropriation of water for irrigation, and permitted defendants to expend nearly $2,000,000 without notice of their claims to a prior appropriation, they are estopped to restrain the diversion of the water. *Enterprise Irrigation District v. Tri-State Land Co*.. 121
6. Before the 1911 amendment to sec. 18, ch. 69, laws 1895, and under the irrigation act of 1889 (laws 1889, ch. 68), one who has constructed a canal, and is ready and willing to furnish water, has made the only application to a beneficial use that he can make, and his right continues until all lands for which water was originally appropriated use it, provided, formerly, that the water be applied within a reasonable time, and, now, within the time limited by statute. *Enterprise Irrigation District v. Tri-State Land Co*..... 121
7. The irrigation act of 1895, creating the state board of irrigation and conferring on it the right to determine priorities, *held* constitutional. *Enterprise Irrigation District v. Tri-State Land Co*..... 121
8. The limitation of 30 days within which to issue a certificate by the board of irrigation, under sec. 21, laws 1895, is merely directory; such certificate not being an adjudication, but merely evidence thereof. *Enterprise Irrigation District v. Tri-State Land Co*..... 121

Waters—*Concluded.*

9. In determining priorities under secs. 15-27, laws 1895, the board of irrigation, though it might recognize and determine existing conditions and limitations, is without power to impose new. *Enterprise Irrigation District v. Tri-State Land Co.* 121
10. It is the duty of one who maintains a ditch to lower the waters of a lake to a river to maintain a dam at the outlet of the ditch sufficient to prevent flood-waters of the river from overflowing adjacent lands. *Christensen v. Omaha Ice & Cold Storage Co*..... 245
11. Where a dam at the outlet of a ditch is negligently constructed, and farm lands are overflowed and crops and personal property destroyed, the person or corporation having control of the ditch and dam is liable. *Christensen v. Omaha Ice & Cold Storage Co*..... 245
12. A cause of action for damages by overflow through negligent construction of a dam arises when the damages are sustained. *Christensen v. Omaha Ice & Cold Storage Co*.... 245
13. That a ditch and dam are situated on land not owned by defendant is no defense to an action for damages by overflow, where defendant operates the dam for his private business. *Christensen v. Omaha Ice & Cold Storage Co*.... 245
14. In an action by a tenant against an irrigation company for damages for refusal to furnish water, defendant *held* estopped under the facts to defend on the ground that plaintiff's landlord had not authorized him to use the water right. *Chalupa v. Tri-State Land Co*..... 477
15. Where rent is payable in kind, the landlord and tenant are owners in common of the crops, and may maintain a joint action for damages thereto. *Chalupa v. Tri-State Land Co*... 477
16. In an action by a tenant against an irrigation company for failure to furnish water, *held* not a defense that the tenant's lease was voidable. *Chalupa v. Tri-State Land Co*..... 477

Wills.

1. A husband cannot lawfully dispose of his property by will, so as to deprive his wife of all interest therein given by ch. 49, laws 1907. *Gaster v. Estate of Gaster*..... 6
2. If a married man disposes of all his property by will, leaving nothing to his wife, she is entitled to the distributive share given her by statute. *Gaster v. Estate of Gaster*..... 6
3. A will will be construed so as to carry out the intent of the testator, unless contrary to state law or public policy. *Heywood v. Heywood*..... 72
4. Extrinsic evidence is admissible to ascertain whether a state

Wills—*Concluded.*

of facts existed at the time a will was written which corresponded with the words used and the aim of the testator, but not to vary the terms of the will or to add to it. *Heywood v. Heywood* 72

5. Evidence *held* to show that a certain 80-acre tract of land was intended to be included in a devise. *Heywood v. Heywood* 72

6 When there are unambiguous expressions in a will, other expressions must be so construed, if reasonably practicable, as to harmonize with them. *Marsh v. Marsh*..... 189

7. The words "legal representatives" are frequently used in wills to mean the persons who succeed beneficially to the property of deceased; and whether they are so used, or the executor or administrator is intended, must be determined from all the provisions of the will. *Marsh v. Marsh*..... 189

8. The use of the expression, "heirs and legal representatives," instead of "heirs, executors, and administrators," may raise the presumption that those beneficially interested in the property of the decedent are intended. *Marsh v. Marsh*.... 189

9. To establish an oral agreement to make a testamentary disposition of property and to set aside a will, the evidence must be clear and convincing. *Labs v. Labs*..... 378

Witnesses. See CRIMINAL LAW, 12-14, 24. RAPE, 2.

1. A witness who sees a moving car, and possesses knowledge of time and distance, is competent to express an opinion as to the rate of speed of the car. *Pierce v. Lincoln Traction Co.* 797

2. That an agent of a party to an action is deceased at the time of trial does not render the other party incompetent to prove a transaction with the agent. *Walker v. Hale*..... 829