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S. W. JACOBY, ADMINISTRATOR, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,216.

1. **Insurance: APPLICATION: FRAUD: REVIEW.** Where the question as to the truth or falsity of the answers made by the assured in an application for a policy of life insurance are submitted to a jury upon conflicting evidence, and under proper instructions, and their finding is that the answers were not false or fraudulently made, the verdict will not be set aside, unless it is found to be clearly wrong.

2. **Instructions** examined, and found to be, as applied to the evidence, a fairly correct statement of the law.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Eugene Burton and *William Mitchell,* for appellant.

B. F. Gilman, B. F. Swisher and *Lloyd H. Brown, contra.*

BARNES, J.

Action on a policy insuring the life of Michael L. Jacoby for the sum of $2,000, brought by S. W. Jacoby, as administrator of the estate of the insured, against the Prudential Insurance Company of America. A trial to a jury in the district court for Box Butte county resulted in a verdict for the plaintiff, on which judgment was entered, and the defendant has appealed.

The petition was in the usual form, and the answer interposed two defenses: First, that the first premium for which the policy was issued was not paid; second, that the answers of the assured in the application for the policy, and on which it was based, were false and were fraudulently made; that they were warranties, without which the policy would not have been issued, and it was therefore void. It was also contended that, if the answers in question were not warranties, they were representations ma-

terial to the risk, which were relied on by the defendant, and without which the policy would not have been issued; that they were false, fraudulent and untrue, and therefore the policy was rendered void. The question of nonpayment of the first premium seems to have been abandoned. It is not referred to in appellant's brief or argument, and therefore will not be considered in this opinion.

It appears that the policy in suit was issued on the 30th day of April, 1904, and by agreement was dated as the 2d day of February of that year. The application for the policy was made on the 25th day of April, 1904, and in the application one question put to the assured was: "Have you ever used malt or spirituous liquors to excess?" To this question the assured answered, "No." Then followed the question: "State the quantity you used each day of malt liquors, wines, spirits?" Answer, "None, none, none." To establish the falsity of the above answers, defendant produced several witnesses whose testimony tended to prove that the assured was addicted to the use of intoxicants, and it was claimed that when the assured died he had under his head an empty bottle which smelled of intoxicating liquor. It must be observed, however, that very few, if any, of the witnesses ever saw the assured drink any intoxicating liquor; but it seems to have been the opinion or impression of those witnesses that he had been frequently intoxicated. None of them could testify to more than twice when it was claimed by them that the assured was under the influence of intoxicating liquors. It may be conceded, however, and we think the testimony fairly establishes, that the assured was somewhat intoxicated on one occasion in October, 1903.

On the other hand, James Graham, in whose store the assured worked as a butcher or meat-cutter from November, 1903, to within two weeks of his death, testified, in substance, that Jacoby was employed by him at the time he signed the application for insurance, and had been in his employ for nearly six months; that Jacoby worked for

him continuously up to within two weeks of June 10, 1904; that during all of that time he never knew of Jacoby taking a drink.

Al Wiker, one of the defendant's witnesses, was night marshal at Alliance, Nebraska, from May, 1903, to June or July, 1904. He testified that during that time he saw Jacoby intoxicated once in the summer or fall of 1903, and once in 1904, but that he never saw him take a drink in his life.

Edwin O'Donnell, one of plaintiff's witnesses, testified that Michael L. Jacoby worked for him in his butcher-shop from December 6, 1902, until March 31, 1903; that he had occasion to observe Jacoby's habits, and that he was a temperate man; that the only time he ever saw him drink anything was occasionally on Saturday nights after he had finished work, between 11 and 12 o'clock, when he and Jacoby would drink a bottle of beer and eat a dish of oysters together; that on those occasions Jacoby never drank more than one bottle of beer; that he never laid off during the time he worked for this witness; that he never saw Jacoby drunk, although he saw him every day during that period of time.

John Leith, one of plaintiff's witnesses, testified that Jacoby worked for him on his farm from July to November, 1903, and that he did not drink while in his employ, or at any other time, as far as he knew; that he saw him nearly every time he went to town, and that he never saw him drunk or drinking any intoxicating liquor.

It appears from the testimony that little was known of the assured prior to about three years before his death, when he came to Alliance. It also appears from the testimony of the witnesses Graham, O'Donnell and Leith that from December, 1902, until the time of his death, with the exception of a short period in the summer of 1903, deceased was employed and worked steadily without losing any time, was absolutely and strictly a sober man, not addicted to the use of intoxicating liquors to any extent; and it must be observed that these men were in a position

to see and know Jacoby, and had every opportunity to observe and know his habits with reference to the use of intoxicating liquors. The witness Graham testified that the deceased did not drink at all while in his employ. It was during the time he was employed by Graham that he signed the application, and when he made answer to the question as to the quantity of malt, wine and spirits he used each day he truthfully answered, "None." The testimony of Graham was supported by the evidence of Henry Blumb, who worked with Graham while Jacoby was employed by Graham.

In addition to this testimony, Doctor L. W. Bowman, who was in the employ of the defendant insurance company as medical examiner, gave testimony touching upon the question of the truthfulness of Jacoby's answer to the question that he had never used malt or spirituous liquors to excess. In answer to questions asked Doctor Bowman, he testified that he made a thorough physical examination of Jacoby, and certified all statements in his report to be true; that his examination was made on April 25, two months before Jacoby died; that he had known Jacoby for two years; that he had no reason to suspect him of intemperate habits; that he found nothing wrong at all with his heart; that his nervous system was perfect, and he found no signs at all of excessive use of intoxicating liquors; that he found him free from all mental and physical defects, and in good health, and passed him as a first-class risk.

Considering this case in the light of the evidence, we are of opinion that the jury were justified in finding that the answers of the assured were not untrue, false or fraudulent.

Complaint is made of the third and fifth paragraphs of the instructions given by the trial court to the jury. By instruction No. 3, the jury were told, in substance, that the only questions presented for their consideration were: Did the deceased ever use wine or spirituous liquors to excess prior to the time of making the application for the

policy on which this action was brought? or did he use some quantity of either malt liquors, wines or spirits daily at the time of making said application? and if they found that the deceased prior to the time he made said application had used malt or spirituous liquors to excess, or some quantity each day of either malt liquors, wines or spirits, the plaintiff could not recover. But if the defendant had failed to establish all of those facts by a preponderance of the evidence, or if the evidence as to those facts should be equally balanced or preponderate in favor of the plaintiff, then their verdict should be for the plaintiff. By instruction No. 5, the jury were told that if they should find from the evidence that the deceased did not, prior to the time of making the application for insurance, use malt, wine or spirituous liquors to excess, and at the time he made said application he did not use any quantity each day of either malt liquors, wines or spirits, the fact that the deceased may have used either wines, malt or spirituous liquors, either daily or to excess after the policy was issued, would not relieve the defendant company from liability. We think these instructions could hardly be misunderstood. The question at issue seems to have been fairly submitted to the jury, and the appellant's criticisms of the instructions are not merited.

Therefore, following the rule announced in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330, and *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ELLA L. DAVIES ET AL., EXECUTORS, APPELLEES, V. AMERICAN INVESTMENT & TRUST COMPANY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,314.

1. **Taxation: FORECLOSURE OF LIEN: PUBLICATION OF NOTICE.** A district court is without jurisdiction to render a default decree foreclosing a tax lien where service upon the owner of the land is made by publication only, the notice having been published only seven times in a semi-weekly newspaper. *Claypool v. Robb*, 90 Neb. 193.

2. ———: ———: **VOID DECREE: RIGHT OF REDEMPTION.** The payment of all delinquent taxes, both before and subsequent to the entry of a void tax foreclosure decree, with interest and penalties, where the land is unimproved, is sufficient to meet the demands of equity and enable the owner to redeem.

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

William E. Shuman, for appellant.

E. H. Evans, contra.

BARNES, J.

Action in the district court for Lincoln county to redeem the northeast quarter of section 29, township 13, range 32, situated in that county, from the lien for taxes, and to quiet the title thereto in the plaintiffs. A trial resulted in a decree for the plaintiffs, and the defendant has appealed.

It appears that Ella L. Davies and Elliot L. Davies are the heirs of Thomas J. Davies, deceased, and, together with W. H. Warner, are executors of his estate; that as such executors they commenced this action against the American Investment & Trust Company and others, alleging in their petition that Thomas J. Davies, at the time of his death, was the owner of the land in question; that in the year 1901 Lincoln county commenced an action of foreclosure to subject the land to the lien for delinquent taxes for the years 1895 to 1900, inclusive. Service was

had upon the defendant by publication. There was a decree of foreclosure, and thereafter the land was sold to Lincoln county. November 12, 1906, the county conveyed the land to Edward R. Goodman, who subsequently, with his wife, conveyed it to the defendant, the American Investment & Trust Company; that the defendant and its grantors have paid all of the subsequent taxes upon this land, and have been in possession of it ever since it was sold by the county to Goodman. Some time after the sheriff's deed conveying the land to Lincoln county had been delivered, Thomas J. Davies, who held the title to this land by an unrecorded deed at the time of the county tax foreclosure suit, died, and the plaintiffs became executors of his estate. This case was tried in the district court upon a stipulation reciting the material facts in question, and therefore nothing but questions of law are involved in this appeal.

The record contains many assignments of error, but one of which is necessary for a determination of this appeal. Service of summons in the foreclosure tax suit was by publication only, and it appears from the proof of publication that the published notice, a copy of which is in the record, was published in a semi-weekly newspaper, published and in circulation in Lincoln county. The affidavit recites: "That the notice, a copy of which is hereto attached, was published in said newspaper for four consecutive weeks, the first publication having been made on the 14th day of February, 1902, and the last on the 7th day of March, 1902; that said notice was published in the regular and entire issue of every number of said newspaper during the period and time of publication." There was no appearance by any one in the tax foreclosure suit, and in this action the trial court found that the court had no jurisdiction to render the tax foreclosure decree. It is alleged that the district court erred in this finding.

The question of the sufficiency of a like notice which was published in the same paper and for the same length of time was before this court in *Claypool v. Robb*, 90 Neb.

193, and it was there held: "The provision of section 79 of the code that 'the publication must be made four consecutive weeks' is satisfied by a publication in a weekly newspaper once in each week for four weeks successively. But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week." In the discussion of the question in the opinion there appears the following: "It is clear that, if the paper in which the publication was made had been published weekly, a notice published on four Fridays would have been sufficient. We think, however, that, while statutory requirement is satisfied by publication in four successive issues of a weekly newspaper, publication in the entire number of issues for each week is necessary to constitute a weekly publication in a paper having more than one issue in each week. In other words, publication in all the regular issues of the paper during the week, whether daily, semi-weekly or weekly, is necessary to the complete publication of the notice for that particular week. *Stevens v. Naylor*, 75 Neb. 325; *Union P. R. Co. v. Montgomery*, 49 Neb. 429; *Union P. R. Co. v. McNally*, 54 Neb. 112. In the cases cited the publication was required to be 'for' the time specified, but we think the decision in this case does not rest upon that distinction, but on the thought that a publication is not complete for any week, unless inserted in every issue of the paper for that week. If we consider each week as beginning on Sunday, the publication for the first week was insufficient, since it did not appear in the two issues of the paper; while, if we consider that each week consists of seven days, beginning with the date of the first publication, the notice is equally insufficient, since there was a later issue of the paper in the last week of publication in which the notice did not appear. Under this rule, it is apparent that the notice was not published for four consecutive weeks. We are not unmindful of the fact that a number of courts have held that under a sim-

ilar statute a publication in a daily or semi-weekly newspaper once in each week is sufficient, but this court has always been inclined to construe with strictness the provisions of the statute allowing constructive service."

The question was before us again in *Smith v. Potter*, 90 Neb. 298, where the holding in *Claypool v. Robb* was affirmed. *Smith v. Potter* was again before the court, and the opinion is found in 92 Neb. 39, where the former decision was adhered to, but it was held that the testimony showed that the notice in that case was sufficient.

It is contended by the appellant that the statements contained in the affidavit, quoted herein, that the notice had been published four consecutive weeks was conclusive. But in the light of the subsequent particular facts set forth, giving the dates and the times of publication, we think this contention is unsound. The statements contained in the affidavit should be considered together, and it follows that, where the particular facts are stated, such statement governs the general conclusion that the notice was published for four consecutive weeks. It sufficiently appears that the notice was only published seven times, whereas it should have been published eight times in order to complete the service.

It follows that the trial court was right in its finding that the court was without jurisdiction to render the tax foreclosure decree. This holding renders it unnecessary for us to determine the other assignments found in the record. It is proper, however, to say that the sheriff's deed was issued on the 21st day of July, 1902, and the county sold the land to Edward R. Goodman in November, 1906, who recorded his deed, and in October, 1907, Goodman sold the land to the defendant investment company. The decree is silent as to possession, and the land was unimproved. It is apparent, therefore, that the ten-year limitation had not expired when this action was commenced. The court required the plaintiffs to pay all of the taxes, interest, penalties and costs as a condition of redemption.

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

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

STATE OF NEBRASKA V. SEVERAL PARCELS OF LAND.

A. J. SEAMAN, HOLDER OF TAX CERTIFICATE, APPELLEE, V. HUBERT C. ROBERTSON, OWNER, APPELLANT.

FILED OCTOBER 17, 1913. No. 18,028.

1. **Taxation**: FORECLOSURE OF LIEN: CORRECTION OF DECREE. Under the provisions of chapter 75, laws 1903 (Comp. St. 1903, ch. 77, art. IX), commonly called the "Scavenger Tax Law," the district court has the power to vacate a decree rendered by default which contains void taxes, and enter a valid decree in lieu thereof, at any time before the final confirmation of sale.

2. ———: ———: REDEMPTION: INTEREST. In order to redeem a tract of land which has been sold under the scavenger foreclosure decree, the owner is required to pay the amount of the decree, with interest at the rate provided for in the statutes relating to scavenger tax sales.

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

B. N. Robertson, for appellant.

Leavitt & Hotz, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Douglas county, confirming a sale of lot 2, block 458, Grandview addition to the city of Omaha, for delinquent taxes, under a decree in a scavenger foreclosure suit.

It appears that the action in which the decree was rendered was commenced in 1904, and on the 21st day of September of that year a default decree was entered. On

the 27th day of February, 1905, the lot in question was sold to the city of Omaha, and a certificate of sale was delivered to the purchaser; the city never assigned the certificate, and no further proceedings were had under the decree until July 27, 1909, when the plaintiff asked leave to have the decree set aside for the purpose of correcting it and excluding therefrom certain void special taxes. The city surrendered the certificate of purchase and had the same canceled, and thereupon the court made the following order: "This cause came on for hearing upon the motion of the plaintiff, represented by the assistant city attorney of the city of Omaha, made in open court, for an order to set aside the sale heretofore made and the decrees heretofore entered in this suit against the following tract or numbers, to wit: * * * Tract No. 12,126, being lot 2, block 458, Grandview addition, * * * all in the city of Omaha, Douglas county, Nebraska, for the reason that the said decrees herein with reference to each of said tracts were entered by default and included therein void taxes or special assessments, and for said reason confirmation of sale cannot be had over the objection of the owner of each of said tracts, and that, to obtain a valid sale thereof, it is necessary to vacate the present sale and the decree heretofore entered against each of said tracts. The court, being fully advised in the premises, finds that for the reasons stated therein the motion should be sustained; and it is therefore ordered and adjudged that the sales heretofore made and the decrees heretofore entered against each of said tract numbers be, and the same hereby are, vacated and set aside, and it is ordered that said case stand for hearing with reference to each of said tracts." On the 4th day of August, 1909, the court entered by default the decree under which the sale in question was made. There was no notice that the plaintiff would ask the court for the order entered on the 27th day of July, 1909, and there was no appearance by any of the defendants at the hearing on the motion. The decree now in question was rendered on the original petition filed by the state of Nebraska as

plaintiff when the case was commenced in 1904, and there was no appearance by the defendants, or any of them, on or at the hearing when the decree of August 4, 1909, was rendered. The decree ordered the property sold to enforce the payment of the amount of taxes found due against the lot in question, which was the same tax that was set out in the petition when the action was commenced in 1904, with the exception that the void taxes were eliminated. On the 8th day of November, 1909, the county treasurer sold the property under the new decree to A. J. Seaman. On Seaman's application to confirm the sale the owner of the lot appeared and contested his right to confirmation. The court ordered the sale confirmed, and it is now the contention of the owner: First, that the order of the court is not sustained by sufficient evidence; second, that the order of the court is contrary to law; third, that the owner of the property has the right to pay his taxes and assessments without regard to the decree of foreclosure in question.

It is argued that the court had no jurisdiction to render the decree of August 4, 1909, and therefore it was error to confirm the sale. We think this contention cannot be sustained. The statute under which these proceedings were prosecuted (laws 1903, ch 75), among other things, provides, in substance, that the state tax suit may be instituted against all lots and parcels of land against which there are unpaid delinquent taxes. The proceedings up to the time of the confirmation of the sale are summary in their nature, and no provisions are made for setting aside the sale, or attacking it in any manner, until confirmation is asked for. At that time interested persons may interpose their objections, as was done in this case. *Prudential Real Estate Co. v. Battelle*, 90 Neb. 549.

In *State v. Several Parcels of Land*, 81 Neb. 770, it was held: "Where taxes which are void and illegal are included in a default decree rendered under the provisions of article IX, ch. 77, Comp. St. 1907, commonly known as the 'Scavenger Law,' and the attention of the court is

called thereto by suitable objections to a motion to confirm, such motion should be denied, and the error in the decree corrected."

In the case of *State v. Several Parcels of Land*, 75 Neb. 538, the question before this court was the right of an owner to open the default decree and defend the action because he had not had notice of the commencement or pendency of the suit, and the court held that the provisions of the statute granting the landowner the right to object to the confirmation of sale, and define the ground of objection, afforded him an opportunity to have the question of the validity of the taxes determined before he is deprived of the property; but he may be required to wait until confirmation is applied for to litigate that question. The court refused to open the default upon the ground that the question of the validity of the taxes might be determined upon the application to confirm the sale.

The state of Illinois enacted a scavenger law at an early day, and several other states have adopted similar legislation. Our statutes seem to have been largely taken from that of Minnesota. But as the Minnesota statutes contain no provision for the confirmation of sales, the construction placed upon it is of no assistance to us, except as indicating how our statutes should be construed had the provisions contained in sections 38 and 39 been omitted therefrom. It is probable that these sections were adopted in order to give the owner the rights which are secured to him in administrative sales for taxes by section 3, art. IX of the constitution.

In *State v. Several Parcels of Land*, 81 Neb. 770, it was said: "It is urged that the proceedings prescribed by the statute are judicial in their nature, and that the decree rendered in pursuance of section 11, *supra*, is final and conclusive, and that it is inconsistent with this view to say that such decree may be opened up or assailed on confirmation. It is a canon of construction that an interpretation which gives effect to all parts of the statute should be sought for, and, if possible, adopted. In this

case all that is urged on behalf of the conclusive character of the decree might be admitted when such decree is attacked in another action or after confirmation, and at the same time effect might be given to the provisions of section 39." Other expressions contained in this opinion seem to convey the idea that the court, having obtained jurisdiction by the commencement of a scavenger foreclosure suit, retains such jurisdiction over all of the proceedings up to the final confirmation of the sale, and we are inclined to hold that the court has such jurisdiction, and has full power and authority to correct the decree by eliminating void taxes, and thus render it possible to correct any errors at any time while the proceedings are pending.

In *Prudential Real Estate Co. v. Hall*, 79 Neb. 805, it was said: "The decree, as affecting the tract involved, was by default, and by it the owner was not deprived of the legal right to have the validity of the taxes determined prior to the confirmation of the sale." On the rehearing in that case (79 Neb. 808) it was said: "The statute pursuant to which this proceeding is had requires of the court the exercise, so far as may be, of the powers of a chancellor in foreclosure cases. It is not doubted that in such cases the court is the vendor, or that he may reject any bid which for any reason appears to him to be inadequate, or that, while the proceeding remains within his jurisdiction, he may vacate any erroneous or improvident order he may have made during its progress. The statute in question does not express an intent either to enlarge or restrict, or in any way to affect, the exercise of this power, which has heretofore been regarded as inherent in a court of equity, and of which it may be doubted that the legislature has the power to deprive it." It may be said that by the application to set aside the confirmation the owner submitted to the jurisdiction of the court. In *State v. Several Parcels of Land*, 75 Neb. 538, it was said: "(1) A person against whose property a default decree upon constructive service has been rendered in a

a tax suit under the 'Scavenger Law' (Comp. St. 1903, ch. 77, art. IX, secs. 1-48) is not entitled, as a matter of right, to have the same opened up after the term, either under the provisions of section 82 of the code, or under the general equity powers of the court. (2) The provisions of the statute granting the landowner the right to object to the confirmation of sale, and defining the ground of objection, afford him an opportunity to have the question of the validity of the tax determined before he is deprived of his property; but he may be required to wait until confirmation is applied for to litigate that question."

From an examination of the scavenger tax law and the foregoing decisions, we conclude that the district court has jurisdiction to set aside and correct a default decree, and enter a corrected decree in its place, under which a confirmation of the tax sale may be had.

Finally, it is contended that the owner had the right to pay the tax assessed against his lot, regardless of the scavenger tax suit and the decree in question, by paying the amount of the tax, with the interest thereon at the rate provided for by the general tax laws. It appears that on the 28th day of November, 1911, the owner tendered to the treasurer of the city of Omaha, the amount of the taxes in question, together with 10 per cent. interest, and $1 as a docket fee, and such payment was refused because of the pendency of the scavenger tax foreclosure suit. The defendant has kept that tender good. By this he seeks to avoid the payment of interest, as provided by the scavenger tax law, upon the decree rendered on the 4th day of August, 1909. Having held that the decree was not void, it follows that the tender in question was insufficient in amount. The owner could only redeem from the decree by paying the same, together with the interest due thereon according to the provisions of the scavenger tax law.

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

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOHN GILLIGAN, APPELLEE, V. JOHN GILLIGAN COMPANY, APPELLANT.

FILED OCTOBER 17, 1913. No. 16,824.

1. **Corporations:** ACTION ON NOTE: ESTOPPEL. In this an action against a corporation to recover upon a promissory note duly authorized and executed by its officers, the defendant denied its legal existence as a corporation. *Held*, That under section 144, ch. 16, Comp. St. 1911, such a defense is not permissible.
2. **Bills and Notes:** ACTION: DEFENSES. Under the facts set forth in the opinion, *held* that the defense of fraud and no consideration were not established.
3. **Appeal:** CONFLICTING EVIDENCE. The findings and judgment of a district court, in a law action tried without a jury, based upon conflicting evidence will not be set aside unless clearly wrong.

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

Edwin Falloon, for appellant.

Paul Jessen and *Matthew Gering, contra.*

LETTON, J.

Prior to 1906 the plaintiff, John Gilligan, was engaged in the business of contracting and bridge building at Falls City, Nebraska. His business was quite extensive, being carried on in a number of states. On or about September 18, 1906, he sold and transferred the entire business to the defendant, the John Gilligan Company, a corporation which was formed for the express purpose of purchasing and carrying on the business. At the time of the sale an inventory or estimate was made out and shown to the prospective stockholders, specifying in detail the character of the assets and property and the value of the respective items of the same. Sixty thousand dollars par value in stock was delivered to Mr. Gilligan in payment for the business. Afterwards, about March 22, 1907, it was discovered that a number of the items scheduled had ap-

parently been overvalued, and the plaintiff then voluntarily surrendered to the corporation shares of stock to the amount of $18,500 in face value in order to reduce the consideration money sufficient to offset the excessive valuation. Immediately after the sale of the business the corporation took charge of it and carried it on. One of the contracts on hand was concerned with drainage or ditching work in Iowa. Mr. Gilligan was not satisfied with the manner in which this work was being managed and dissension arose among the directors. It was then proposed to terminate entirely Mr. Gilligan's connection with and interest in the corporation, by the corporation itself and some of the other stockholders buying the remainder of his shares of stock. This was accordingly done. Two shareholders purchased a portion of the shares and the corporation itself took the remainder at the agreed price of $4,000. This amount was evidenced by two promissory notes of the corporation for $2,000 each. One of these notes was sold by the plaintiff. This suit is brought to recover the amount due upon the other.

The defendant corporation by its answer admitted the execution and delivery of the note, and as a defense alleged that it was given without consideration and was obtained by fraud. In a cross-petition it alleged that in September, 1906, the plaintiff fraudulently induced W. H. Crook and five others (naming them) to take stock and form the corporation, representing that he had $60,000 invested in the bridge and contracting business, and that the investment was netting him 20 per cent. per annum; that, relying on these representations, the persons named became stockholders and paid in the sum of $8,000. It also avers that the property was fraudulently overvalued and the debts understated in the written statement of assets and liabilities, and denies that plaintiff had any goodwill in a number of counties in this and other states for which large amounts were charged in the inventory; that the articles of incorporation were void because not properly signed by the incorporators; that about June 20,

1907, "the plaintiff commenced fighting the business interests of defendant for the purpose of compelling defendant to buy his stock," and that, not knowing the true condition of affairs, defendant bought about one-half of his remaining stock in the corporation, Gilligan agreeing not to compete in certain counties, the other half being bought by stockholders; that the sale was void for the reason that the corporation could not purchase its own stock; that it was against public policy for the corporation and Gilligan to enter into an agreement that Gilligan would not compete against the defendant at any public bridge letting; that Gilligan was insolvent at the time the corporation was formed, and fraudulently procured the stock from the defendant at that time, and that therefore the later sale of the stock and the notes given therefor were without consideration. Ignorance of the frauds until after the notes herein sued upon had been signed and delivered is also averred; and it is claimed that there is now due defendant from plaintiff the sum of $38,201.83.

In reply the plaintiff alleges the defendant is estopped to deny its corporate capacity; pleads that the notes were executed by defendant with full knowledge of the affairs of the corporation and of the value of the stock; that the statement was honestly made from the books; and he denies specifically any attempt to defraud. The court found for the plaintiff, and defendant appeals.

In this court defendant contends that the judgment is not sustained by sufficient evidence; that it was never lawfully organized as a corporation; that all notes given by it were void for the reasons that it was incorporated by one person; that its paid-up capital stock did not exceed $6,000; and that the plaintiff was guilty of fraud in organizing the corporation and procuring the note.

The evidence is voluminous and seems to show that the business, both before and after the sale, had been loosely conducted, but we think it unnecessary to consider it in detail.

1. Section 144, ch. 16, Comp. St. 1911, provides: "No

body of men acting as a corporation under the provisions of this subdivision shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation." In *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200, it was held that a defendant sued as a corporation cannot deny its existence either in abatement or in bar. If the defendant is not a corporation, it cannot appear as such and plead in that capacity. Even if the state were able to question the legal existence of the corporation upon sufficient ground, the defendant could not avail itself of the lack of legal existence and thus commit a sort of legal hara-kiri in a collateral action of this nature. 10 Cyc. 1065, 1066, 1157, 1158, and notes.

2. As to the contention that the note was procured by fraud: The evidence shows that Mr. Gilligan largely relied upon his books as showing the condition of his business affairs before the corporation was organized. The statement which was submitted to the incorporators, and which seems to have been taken from the books, so far as tangible property is concerned, placed a heavy valuation upon "good-will" in certain counties in this and other states. The purchasers were thus apprised that "good-will" in a business which was open to public competitive bidding was one of the articles which they were buying, but they seem to have made no protest as to such an intangible and visionary asset or to question the value placed thereon. Apparently they had ample opportunity to make inquiry and investigation before they purchased and no artifice was employed to hinder them. Mr. John A. Crook, a stockholder who was elected secretary in January, 1907, had been employed in the business since before 1900, and apparently was as familiar with its affairs as Gilligan himself. On March 22, 1907, when it had been definitely ascertained that an overvaluation had been made as to some items, Gilligan voluntarily surrendered to the corporation stock which was presumably agreed to be equal in value to the excess in valuation. Apparently

no further complaint was made. When friction arose between Gilligan and Crook, negotiations were entered into which resulted in the ousting of Gilligan and the transfer of his remaining stock in consideration of the execution of the two notes. At this time the corporation had been in full control of the business from September, 1906, to June, 1907. Large amounts of money had been received upon contracts and large amounts expended under the authority of the directors of the corporation. No court could have the facilities for ascertaining the true value of the assets that this corporation had during the months in which it was in control of the business; and at the time it closed the transaction with Gilligan by the purchase of his stock it was apparently in full possession of all the facts and knew the true value of the stock as well as he did. If the price that it paid was excessive, it bought it with its eyes open and obtained just what it purchased. It is not claimed that any false representations were then made.

3. The contention is made that the sale of the stock was illegal and void for the reason that a part of the consideration was an agreement on the part of Gilligan not to compete in Otoe county. It seems apparent that the desire to oust Gilligan was the principal motive for the purchase of the stock. The finding of the trial court in favor of the plaintiff on this point seems to be supported by sufficient evidence though the evidence is conflicting.

We find no reason to set aside the judgment of the district court, which is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

ETHEL S. BENTLEY, APPELLEE, V. HENRY V. HOAGLAND, SHERIFF, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,332.

Appeal: VERDICT: EVIDENCE. Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted.

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

Burr, Greene & Greene, for appellant.

George A. Adams and *B. F. Johnson, contra.*

LETTON, J.

Plaintiff is the wife of William A. Bentley. A former wife, Christena Bentley, had been divorced from Bentley, and had recovered a judgment for alimony in the sum of about $2,000 which was unsatisfied. Plaintiff and Bentley had some differences, and plaintiff left his home and went to Kansas City. While there she received a letter from L. C. Burr, attorney for the former wife, asking her assistance in the collection of the judgment for alimony, and offering to pay a commission on any money collected on the judgment by her assistance. She came to Lincoln, and, according to the testimony of Mr. Burr and two other witnesses, she stated that the automobile, the ownership of which is in controversy in this action, belonged to Bentley, though she had furnished part of the money to pay for it, and she entered into a written instrument, the purport of which was a recital that Mrs. Christena Bentley was about to issue an execution against Bentley, a statement by her as to Bentley's ownership of the machine, and an agreement that Christena would levy on the automobile, a fur coat, a piano and a sewing machine, and that she (Christena) would bid in the piano and sewing machine at the sale and turn them over to the

plaintiff herein, and pay her expenses from Kansas City; the plaintiff also waived any right to the property levied on and granted the same to Christena. A levy was made upon the automobile, plaintiff pointing out and assisting the deputy sheriff in so doing. Afterwards she became reconciled to Bentley and began this action to recover the automobile. The property was taken under the writ, but no bond was given, and it was returned to defendant. The action then proceeded as one for damages under section 193 of the code.

The testimony of the plaintiff was, in substance, that she furnished the money to buy the machine, borrowing part of it from a bank, and that it was her property. She further testified that the paper introduced in evidence bearing her signature, which disavowed ownership, was not signed by her intentionally; that there were two pages of the document; and that Mr. Burr without her knowledge substituted the page she signed for another of entirely different purport. She denied that she pointed out the automobile to the officer or that she stated to him that it belonged to Bentley. Her mother and a sister gave testimony tending to support her in some matters. On the other hand, this testimony as to the occurrence in the law office is contradicted by a number of witnesses, and the deputy sheriff and Mr. Marlay both testify that she pointed out the machine. The sheriff also states that she said to him, after the levy, that the property levied upon belonged to Bentley. The jury evidently believed her version of the transactions.

A majority of my associates think the judgment should be reversed on the ground that the verdict is clearly against the weight and reasonableness of the evidence, and I defer with hesitation to their views. Their reasoning is as follows: "It is unreasonable to think that the sheriff's office would have levied upon this property under the circumstances testified to by plaintiff and her witnesses. Sheriff Hoagland himself testified that he knew the parties and wanted to be careful in the levying; that

he asked Mrs. Bentley (plaintiff) to whom the property levied on by Mr. Zellars belonged, and she said it belonged to Bentley. The plaintiff told him that Burr & Marlay were willing that she should use the machine, but he told her he would not consent to that; that in the same conversation she stated to him that Bentley deposited the money in the bank in her name and she drew her check for it, but that it was Bentley's money and the machine belonged to him; that he believed and relied upon the representations made by her and would not otherwise have proceeded with the levy and sale.

"It is significant that plaintiff talks all the time about money which she had in the bank, but nowhere in either abstract is it shown how she ever obtained any of the money, except the one statement in her own abstract 'that before that time she worked at the detective business in Mr. Bentley's office and got half the income.' The testimony of Sheriff Hoagland is that she told him, the day after the levy was made, 'that Bentley deposited the money in the bank in her name and she drew her check for it, but it was Bentley's money, and the machine belonged to him.' She denies that she told Sheriff Hoagland that the machine belonged to Bentley, but she does not deny telling him that the money deposited in her name was Bentley's money.

"There is another theory upon which the judgment in this case should be reversed. Conceding that the testimony might be sufficient to take the case to the jury if the action were one against Burr & Marlay for fraud in obtaining the execution of the agreement set out in the abstract, it does not follow that that evidence is sufficient to take the case to the jury in this action against the sheriff for an unlawful levy upon and sale of her property as that of her husband. This is an action against the sheriff alone for damages by reason of the unlawful taking and retention of her property. The defense pleaded by the sheriff is estoppel, the grounds upon which the estoppel is based being that she directed the officer to

levy upon the automobile, at the time stating that it was Bentley's property. Upon this point plaintiff's testimony denying these allegations stands alone, entirely uncorroborated, while against it is the testimony of the deputy sheriff, Zellars, that she did give such direction and make such statement, corroborated by Mr. Marlay, who was present at the time, and further corroborated by Sheriff Hoagland himself, who testified that on the next day she told him the same thing. The question, then, so far as this action is concerned, is: Can we permit a verdict of a jury to stand upon the uncorroborated testimony of this plaintiff as against the sheriff and his deputy and a reputable attorney, Mr. Marlay, who testified positively and unequivocally upon that point?"

There is much weight in this argument. The judgment of the district court is therefore

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. PAUL S. TOPPING, APPELLEE, V. JAMES D. HOUSTON ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 18,157.

1. **Courts**: SPECIAL TRIBUNALS: FINDINGS: CONCLUSIVENESS. Where a special tribunal is created by a statute to ascertain and declare the existence or nonexistence of certain facts, and no provision is made for an appeal or review thereof by the courts, the action of the tribunal, in the absence of fraud or mistake, is final.

2. **Municipal Corporations**: RECALL OF OFFICERS: PETITION: REVIEW. Under section 36, art. III, ch. 14*a*, Comp. St. 1911, containing the provisions for the recall of municipal officers in cities which have adopted the commission form of government, the city clerk is required to ascertain and declare whether the requisite number of qualified signers have signed the petition for a recall election, and, in the absence of fraud or mistake, his determination thereof is not subject to review.

3. ———: ———: ———: DUTY OF COUNCIL. If no fraud or mistake appears, and the petition is regular in form and is accompanied by the proper certificate of the city clerk, the city council must proceed under the statute to convene and fix a date for the election.

4. **Officers**: ABOLITION OF OFFICE: POWER OF LEGISLATURE. An office created by the legislature may, in the absence of any constitutional restrictions, be abolished by that body, and the incumbent of such office has no property interest in it of which he may not be deprived.

5. ———: TERM OF OFFICE: POWER OF LEGISLATURE. In the creation of an office by the legislature, it may impose such limitations and conditions as to its continuance and termination as it sees fit, and in such a case the incumbent takes the office subject to the conditions imposed.

6. **Municipal Corporations**: REMOVAL OF OFFICERS: NATURE OF POWER. The power granted to electors of a city to remove certain public officers is political in its nature, and is not the exercise of any judicial function.

7. ———: RECALL OF OFFICERS: PETITION: SUFFICIENCY. The provision of the statute that a recall petition "shall contain a general statement of the grounds upon which the removal is sought" does not require the petition to contain specific charges of misconduct such as would be required in a judicial inquiry, but its purpose is to furnish information to the electors upon which a political and not a legal issue may be raised at the election.

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

Andrew P. Moran and *John C. Watson*, for appellants.

O. G. Leidigh and *Paul S. Topping, contra.*

LETTON, J.

This is an appeal from the allowance of a peremptory writ of mandamus commanding the respondents James D. Houston, James A. Richardson, and Robert E. Hawley, members of the city council of Nebraska City, to convene as such city council within ten days and to order an election to be held on a date then fixed for "the purpose of submitting to the electors of said city the proposition of

recalling and removing said James D. Houston, present mayor and member of the council of said city, and electing as his successor thereto at such election Paul S. Topping, a legal voter of said city."

In January, 1912, the city of Nebraska City adopted the commission plan of government. The respondents were in April of that year elected as mayor and councilmen, respectively, their terms of office expiring April, 1914. On the 10th day of May, 1913, there was filed with the city clerk of Nebraska City a petition for the recall of Mr. Houston. The city clerk, as provided by the statute, made an examination of the names signed to the petition and certified that he had "carefully examined the names signed to the attached petition, being a petition for the recall of Mayor Houston, enough of them being legal voters equal to 30 per cent. of the highest vote cast at the general election of Nebraska City, held the 2d day of April, 1912." The city council refused to call the election, for the reasons that the petition for the recall and the certificate of the city clerk thereto were not sufficient. Whereupon relator brought this action praying for a writ of mandamus. Objection was made to the issuance of the writ by Andrew P. Moran as *amicus curiæ,* which was overruled. A demurrer was then filed, which was also overruled. Afterwards an amended answer was filed, upon which the case was tried, and after a hearing the writ was allowed to issue.

The respondents make eight assignments of error: First, that the court erred in not sustaining the objections; second, that it erred in not sustaining the demurrer; the third and remaining assignments may be grouped, and in substance amount to the complaint that the court erred in finding the issues as it did and granting the peremptory writ. Applying the rule that this court will ordinarily consider only the points argued, we omit reference to several of the errors assigned.

There are really only two points presented for our consideration: First, did the petition contain the requisite

number of names? and, second, did it contain a general statement of the grounds upon which the removal is sought? If the number of qualified signers required by the statute appended their names thereto, and if it contained a general statement of the grounds upon which the removal is sought, the city council had no discretion in the premises, but it became its duty under the provisions of the statute to call an election within the time specified in the statute.

The inquiry as to whether the petition contains a sufficient number of names must be determined by the language of the statute. Section 36, art. III, ch. 14*a*, Comp. St. 1911, provides: "The procedure to accomplish the removal of any incumbent of such office shall be as follows: A petition signed by such electors equal in number to at least thirty per centum of the highest vote cast at the last preceding general city election, demanding an election of a successor to the person sought to be removed and naming the candidate or candidates proposed for election to succeed him, shall be filed with the city clerk, which petition shall contain a general statement of the grounds upon which the removal is sought. Within ten days from the date of filing such petition, the city clerk shall examine it and from the voters' register, if the petition be filed in any city where registration laws are in force, or, if not, then from such source as may be available to such clerk, ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow such clerk extra help for that purpose, and the clerk shall attach to said petition his certificate showing the result of such examination, and if the clerk's certificate to such petition shows that it is insufficient in point of numbers signed, it may be amended within ten days from the date of such clerk's certificate by the filing of a supplemental petition signed and sworn to as in the case of the original petition, and the clerk shall, within ten days after such supplemental petition be filed, make a like examination of the supple-

mental petition, and if the certificate shall show the supplemental petition, together with the original petition, to contain the requisite number of signatures, the clerk shall submit such original petition, and supplement, together with his certificates, without delay, to the council, and the council shall order and fix, without delay, a date for holding an election, which date shall not be less than thirty nor more than sixty days from the date of the clerk's certificate to the council showing the petition sufficient."

By these provisions the clerk is made the custodian of the authority to determine the sufficiency of the petition. The general rule is that, where any officer or board is vested with authority to determine a question concerned with the administration of his or its duties, his or its decision, if made in good faith, is decisive of the point, in the absence of fraud or mistake. *Smiley v. Sampson,* 1 Neb. 56; *Tyson v. Washington County,* 78 Neb. 211. We have so held with relation to the action of the board of county commissioners in a number of matters where the statute makes that the deciding body. *Dodge County v. Acom,* 61 Neb. 376; *Andrews v. Lillian Irrigation District,* 66 Neb. 461; *Campbell v. Youngson,* 80 Neb. 322; *Lancaster County v. Lincoln Auditorium Ass'n,* 87 Neb. 87. And we see no reason why the same doctrine does not apply with regard to the action of a city clerk in determining the sufficiency of such a petition. This seems to be the view taken respecting like provisions in other recall statutes. *Good v. Common Council,* 5 Cal. App. 265; *Locher v. Walsh,* 17 Cal. App. 727; *Davenport v. City of Los Angeles,* 146 Cal. 508.

In the present case the city clerk was examined and cross-examined as to his method of ascertaining that the persons signing the petition were qualified electors of the city. Objections were made to some of the questions propounded upon cross-examination, which under the state of the pleadings we think were rightly sustained. There is neither pleading nor proof that any persons

whose names are signed to the petition were not qualified electors or that any fraud had been perpetrated or mistake made by the city clerk in making his determination. There can be no question but that when the petition was presented with the clerk's certificate attached, showing that it had been signed by the requisite number of qualified electors, and no fraud, bad faith or mistake appeared, it was the duty of the city council to call the election; provided, of course, that the petition was sufficient in other respects.

This brings us to the second point in the case. The statute requires that the petition "shall contain a general statement of the grounds upon which the removal is sought." The grounds stated in the petition are: "Said Houston, in attempting to discharge the duties and trusts of said office, is grossly extravagant with the public funds of said city; manifestly partial, prejudicial and malevolent in exercising the prerogatives of said office; and because of his nonfeasance and malexecution of the duties of said office; and because of his obvious incompatibility of temperament to discharge the duties of said office economically and to the best interest of the citizens and taxpayers of said city of Nebraska City." The respondents assert that the petition fails to give a general statement of the grounds, as the statute requires, upon which the removal is sought, but only states conclusions of law. As to the first ground alleged, it is said that it was impossible that the mayor could spend money extravagantly in his individual capacity; that appropriations can only be made by a majority of the council; that some other member must have voted with him in order to permit the careless and extravagant expenditure of money; and that as a natural consequence the petition in this respect did not set forth sufficient grounds for recall.

As to the other grounds set forth, it is said that they merely state conclusions of law, and that the relator should be held to a strict compliance with the rules of pleading because he is attempting to remove and recall

a duly elected officer of a municipality and place himself in that office for the unexpired term, and, also, that the charges in the latter portion of the statement are "absolutely meaningless." It is further argued that a recall does not constitute due process of law, since "it condemns without hearing, proceeds without inquiry, and renders judgment without trial," and that, since a bill of attainder is defined as a legislative act which inflicts punishment without judicial trial, the act of recall, whether it emanates from the organic or the statute law, is neither more nor less than a bill of attainder, and therefore violates both the constitution of the United States and the constitution of the state of Nebraska, and that the provisions for the initiative, referendum and recall violate that part of the constitution of the United States which guarantees every state in the Union a republican form of government.

These contentions raise the question as to the intention of the lawmakers when they required "a general statement of the grounds upon which the removal is sought." Was it their intention that the election should be of the nature of a trial or hearing, for which sufficient charges must be preferred showing cause why the officer should be removed, and as to which petition the usual rules with respect to specific charges, applied in impeachment or other proceedings to remove officers for cause, should apply, as respondents contend, or was the object of the statute to make the officer liable to be removed and his term of office determined by the electors at any time when the required majority, proceeding under the statute, should believe that it was detrimental to the best interests of the city to continue him in office until the end of the term for which he was elected?

We find it unnecessary to consider respondents' argument that the provisions for the initiative and referendum are violative of the constitution of the United States. It may be said in passing, however, that in *Kiernan v. Portland,* 57 Or. 454, the supreme court of Oregon took the

contrary view, and that in the *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. Rep. 224, it was expressly decided by the supreme court of the United States that whether or not a state has ceased to be republican in form, within the meaning of the guarantee in the constitution of the United States (article IV, sec. 4), because of its adoption of the initiative and referendum is a political and governmental question which is solely for congress to determine. Is the exercise of the power of recall by the electors a judicial act or is it legislative in character? Some of our former decisions throw light upon this question. We have held a number of times that an office created by the legislature may be abolished by that body, and that the incumbent of such an office has no property interest in it the deprival of which is prohibited by the constitution. *Douglas County v. Timme*, 32 Neb. 272; *State v. Stewart*, 52 Neb. 243; *Dinsmore v. State*, 61 Neb. 418. And, also, that when the power has been given the governor to remove certain public officers that power is administrative in its nature, and not a judicial function, and an order made in the proper exercise of the authority will not be reviewed by the courts. *State v. Hay*, 45 Neb. 321.

In *State v. Somers*, 35 Neb. 322, it appeared that the charter of the city of Omaha gave the mayor power to appoint a commissioner of health, and provided, further: "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office, and until their successors are appointed and qualified, unless sooner removed." It was held: "Where the statute authorizing the appointment contains a reservation of the right of removal without preferring charges, and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease." The court also said: "Where a person is appointed to an office for a definite period and there is a provision that to obtain his removal

charges must be preferred against him, he cannot be removed unless such charges are made; but this rule does not apply to a case where the power of removal is retained and no charges are required."

In a case arising in California (*In re Carter,* 141 Cal. 316) the facts were that the mayor of San Diego removed the fire commissioner of the city, under a charter provision giving the mayor power to remove any person appointed by him by the giving of notice to the person removed, and stating the cause; and it was held that the officer had no property right in the office, and that "in creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it." It was also held that proceedings under such a statute were not of a judicial character. A large number of cases are cited in the opinion. See, also, *Mial v. Ellington,* 134 N. Car. 131, 65 L. R. A. 697, and cases cited in the opinion and note.

The process of removal under the recall statutes did not originate in this state, and the legislature no doubt had in mind the development of the recall idea, and the decisions that had been made in other states upon substantially similar statutes. A few cases from other states will be examined.

Hilzinger v. Gillman, 56 Wash. 228, was an action to enjoin the city clerk from certifying to the city council that a certain recall petition was sufficient and in conformity with the provisions of the charter. A demurrer to the petition was sustained, the action dismissed, and an appeal taken from such judgment. The court said, speaking of section 281 of the charter, which is substantially identical with the Nebraska statute: "Section 281 contemplates a recall of the officer at any time that his official conduct is not responsive to the wish or will of a majority of the electors in his precinct or ward. Whilst this section provides that the reason for the recall shall be stated in the petition,

the charter does not provide that any specific reason shall be necessary or controlling. The whole scheme or system of the charter makes it apparent that the right of recall of elective officers was reserved to the people, to be exercised at any time the public interest was thought to require it. * * * His successor is elected and inducted into office under the recall provision only upon the failure of the incumbent to secure an indorsement of his stewardship by a majority of the electorate. Like the British ministry, an elective officer under the charter is at all times answerable to the people for a failure to meet their approval on measures of public policy."

In *Conn v. City Council,* 17 Cal. App. 705, the petition for recall alleged, "that the six councilmen sought to be removed had been guilty of (1) malfeasance in office; (2) that they had been parties to a political agreement by which the office of city engineer was traded in consideration of other appointments; (3) that such political trafficking was contrary to the spirit of the charter and detrimental to the public interest; (4) that the councilmen had united in denying the petition of a majority of qualified electors in matters of public policy;" and, finally, that the signers of the petition for the recall no longer desire the services of these particular councilmen. The statute required that the petition shall contain "a general statement of the grounds for which the removal is sought." Substantially the same argument as to defective statement of cause was made as in this case, but the court said: "It is a mistaken theory of counsel for the defendant that the charter provisions of the city of Richmond contemplate and require that a recall petition should be drawn with a due regard for the technical niceties and refinements of the rules of law which pertain to the preparation of pleadings in civil and criminal cases;" and, further: "Manifestly, the purpose of the charter in providing for a recall election is to give the people of the municipality the right to cut short the official term of every elective officer whose conduct in office is for any cause unsatisfactory or

distasteful to the body of the community. * * * The petitioners are only required to state generally their grounds or reasons for demanding the removal of the obnoxious officer, for the obvious and only purpose, it seems to us, of furnishing information to the people of the community upon which a political issue rather than an issue at law may be raised and determined."

It has been argued that absurd reasons may be stated in the petition, and that an officer may be called upon to defend his position against frivolous attacks. Doubtless the provision requiring 30 per cent. of the electors to sign the petition before the council are compelled to act was designed to avoid such a contingency. The legislature apparently assumed that nearly one-third of the electorate would not entail upon the taxpayers the cost of an election, unless the charges made approved themselves to their understanding and they were seriously dissatisfied with the services of the incumbent of the office.

The idea of removing public officers at the discretion of the appointing power, as we have seen, is not a novel one. The concept that this may be done at the direct instance and upon the motion of the electors, the ultimate source of power in a republic, only carries back the power of removal one step farther. If it is not obnoxious to the constitution to allow an elected officer to remove an appointed one, how can it be a violation of that law to allow it to be done by the people themselves. They are no doubt better qualified to determine the capability and efficiency of their administrative agent after giving him an opportunity to perform the duties of the office than they were when they first selected him to fill the position. The officer takes the position for a fixed term, with the condition attached that he is subject to removal whenever his services are not desired by the number of his fellow citizens named in the statute. The policy of the recall may be wise or it may be vicious in its results. We express no opinion as to its wisdom with respect to the removal of administrative officers. If the people of the state find, after a trial of the

experiment, that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent, costly, and unnecessary elections, they have the power through their legislature to amend the statute so as to protect honest and courageous officials. This may be done by increasing the number of names required to be signed to the election petition or by requiring specific charges of misconduct to be made therein, and thus allowing the officer attacked to meet the charges made or by adding both of these provisions to the recall feature of the law. Accusations of wrongful acts attributed to an officer merely by innuendo or by vague generalities, as may now be done, are often the most difficult to refute by proof and the hardest to meet by argument. Whether the best public policy is subserved by the statute in its present form is for the legislature to consider, and not for the court, which must declare the law as it finds it.

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

AFFIRMED.

ELLA KELLEY, EXECUTRIX, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,260.

Master and Servant: INJURY TO SERVANT: NEGLIGENCE: DIRECTING VERDICT. Where actionable negligence is not shown by the evidence, in a suit against an employer for negligence causing the death of an employee, the trial court should direct a verdict in favor of defendant.

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

Charles Battelle and *Joseph Carr,* for appellant.

John L. Webster and *W. J. Connell, contra.*

ROSE, J.

While George E. Bradford was in the employ of defendant at the intersection of Twenty-second and Nicholas streets in Omaha, he was fatally crushed between an electric motor car and a freight car on defendant's street railway. To recover resulting damages in the sum of $7,500, this action was brought by the executrix of his will. In the petition it is alleged that Bradford, immediately prior to the accident, had, as an employee of defendant, been cutting grass and weeds; that he was called therefrom by defendant, and under its direction was handling a trolley rope of the electric motor car; that while so engaged he was ordered by defendant's foreman to place a timber between the cars for switching purposes, and to get between them and hold it in place while the switching was being done; that the timber was one of the cast-off and discarded cross-arms upon which electric, telephone and telegraph wires are usually supported, and was unsound and insufficient in strength, and an improper and unsafe tool for the work thus ordered to be done; that when complying with the foreman's directions the timber broke; that the cars collided; and that Bradford was injured in the manner stated. The specific acts of negligence are charged in these words: "The said death of Bradford was caused by the negligence and carelessness of said defendant in providing him, the plaintiff, with unsafe, unsound, weak and an improper timber to be used as aforesaid, and ordering and directing him to use the same as aforesaid." The answer was a general denial. For the reason the trial court was of opinion that plaintiff "failed by her proof to show any negligence on the part of the defendant which entitled her to a verdict," there was a peremptory instruction against her. From a dismissal of her action, she has appealed.

Plaintiff takes the position that defendant was guilty of two negligent acts: (1) In ordering Bradford to use an unsafe and unsuitable cross-arm, the foreman violated the law requiring a master to furnish his servants with reasonably safe appliances for the work in hand; (2) in calling the servant from safe employment and in ordering him into a dangerous place, in which he was without experience or knowledge, where he was required to act without time for reflection, defendant violated the rule that the master may be chargeable with negligence for giving such a command, though the servant may not be negligent in obeying it, the danger not being so obvious that a prudent man, under the circumstances, would disobey his employer. Among the cases cited to sustain the position thus taken is *Alabama Steel & Wire Co. v. Tallant*, 165 Ala. 521. It is contended that the questions of negligence were for the jury.

For proof of the facts constituting the alleged negligence, plaintiff relies on two witnesses. One was the plaintiff herself, who said she witnessed the accident from her porch. In several particulars her testimony is contradictory. The other witness was an employee of defendant, by the name of Sam Musca, who required the assistance of an interpreter. His testimony is somewhat confusing and not entirely consistent. Defendant, with a motor car, was engaged in switching a freight car on its track around a curve. On account of the curve, ordinary couplings could not be used, and a number of wooden cross-arms had been provided for switching purposes. Bradford was watching the trolley rope, or attending to other duties incident to switching. He picked up one of the cross-arms, placed it lengthwise between the motor and the freight car and stepped away. For some reason, it was not kept in place by impact, and it fell. Bradford went back between the cars, picked it up, and reset it. When the motor closed on it, he attempted to hold it in place, but it slipped at one end, and he was crushed between the cars. Plaintiff testified that the cross-arm was

allowed to remain for two or three days near the place of the accident, that she saw it afterward, and that she thought it was broken in the middle. Plaintiff's other witness, who saw what occurred, stated, however, that a sliver had been split off one end of the cross-arm by the impact and that the body of the timber had not been broken. This fact was fairly established by plaintiff, though she said she thought the stick was broken when she saw it after the accident. The evidence fails to show that the cross-arm was unsound or unfit for the work in hand, or that it would not have answered the purpose for which it was used, had it been properly adjusted. The evidence as a whole, which has all been read as given by the witnesses, does not seem to show that the trial court erred on this issue in directing a verdict for defendant.

Was a negligent order of the foreman the proximate cause of the injury? Plaintiff testified in substance that she heard the foreman ordering Bradford to get a cross-arm, to go between the cars, and to put it in place. On the contrary, plaintiff's witness Musca stated positively that the order was given to him, and not to Bradford; that Bradford voluntarily got the cross-arm and attempted to use it; that after he had adjusted it the second time he was peremptorily ordered by both the foreman and the motorman "to get out of there," but that, instead of obeying, he attempted to hold the timber in place. The evidence that these orders "to get out of there" were given to Bradford is uncontradicted. If plaintiff is correct in her propositions of law therefore, evidence of defendant's actionable negligence seems to be wanting. The conclusion is that error does not affirmatively appear in the peremptory instruction in favor of defendant.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

LE ROY HALL ET AL., APPELLANTS, V. CRAWFORD COMPANY ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,286.

Eminent Domain: INJURY TO PROPERTY: REMEDY OF OWNER. An owner of property, who knowingly permits a corporation, having the power of condemnation for a public purpose, to use or damage such property therefor, may be limited to his remedy for damages.

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

Allen G. Fisher and *William P. Rooney,* for appellants.

Albert W. Crites and *J. W. Hartwell, contra.*

ROSE, J.

This is an application for an injunction to prevent defendants from diverting water from the White river above the city of Crawford, Dawes county. The original petition was filed by Le Roy Hall March 2, 1897. Below Crawford he had built a dam across the stream and had used the water-power to operate a mill. As a riparian proprietor he asserted rights superior to the claims of defendants. The Crawford Company, defendant, was seeking a franchise to supply the municipality and its inhabitants with water, and for that purpose had constructed a dam across the same stream above the town. Crawford, though now a city, was then a village. It is one of the defendants. On plaintiff's petition the village was temporarily enjoined from granting to the Crawford Company a franchise for the purpose stated. For 14 years there was no attempt on the part of plaintiff to prosecute his suit to final decree. In the meantime he and the Crawford Company were parties to another suit involving the waters of the White river. *Crawford Co. v. Hathaway,*

67 Neb. 325. In the present case Samuel Swinbank, Peter L. Raben, Emil Raben and Fred Macumber, claiming to be plaintiff's successors in interest, filed an amended and supplemental petition July 7, 1911, praying that judgment be rendered in their favor for damages in the sum of $12,000; that for their protection the preliminary injunction which had been granted in favor of plaintiff and against the village of Crawford, March 3, 1897, be extended to the city of Crawford, and that its officers be enjoined from diverting water from the White river. To this amended and supplemental petition defendants filed answers. Upon a trial of the issues joined, the court below dismissed the action. The last named petitioners have appealed.

Did the trial court err in denying the relief sought? Without reference to the evidence, the amended and supplemental petition shows on its face that as early as July 10, 1907, the city made use of the waters of the White river for municipal purposes. It still continues to do so. Hall and his successors had knowledge of the facts. They knew of the improvements which the village and the city necessarily made before taking water from the White river for the benefit of the municipality and the inhabitants thereof. Hall's petition alleged that the Crawford Company had diverted water from the river above the village before August 7, 1895. The village and the city had power to condemn property rights necessary to a public water system and to grant to a corporation a franchise to supply the city and its inhabitants with water. Comp. St. 1895, ch. 14, art. I, sec. 69, subd. 15. For many years Hall and his successors in interest, with knowledge of the facts, but without any effort to adjudicate in this suit the rights they now assert, permitted the municipality to expend public funds in diverting and in distributing water from the White river for public purposes. The dismissal of the case, therefore, was proper, under the principle of law that an owner of property, who knowingly permits a corporation, having the power of condemnation for a

public purpose, to use or damage such property therefor, may be limited to his remedy for damages.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM D. ARMSTRONG, APPELLANT, V. JAMES M. BATES, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,334.

1. **Statutes**: CONSTITUTIONALITY: APPEAL: BRIEFS. An attack on the constitutionality of an act of the legislature may be disregarded on appeal, where the particular in which the lawmakers disregarded the constitution and the section violated are not pointed out in appellant's brief.

2. **Taxation**: FORECLOSURE OF LIEN: PETITION: DESCRIPTION. In a petition against a nonresident defendant to foreclose tax liens, a description of two 40-acre tracts as "NW¼ SE¼ and SW¼ NE¼" *held* sufficient as against a collateral attack, where the state, range, county, township and section were definitely stated.

3. **Process**: CONSTRUCTIVE SERVICE: AFFIDAVIT. The purpose of an affidavit for publication of notice to a nonresident defendant is to enable the court to determine whether the action is one in which jurisdiction may be acquired by such notice.

4. ———: ———: NOTICE. Notice to a nonresident defendant, inserted in a weekly newspaper for four consecutive weeks, beginning February 8, 1900, and ending March 1, 1900, is a sufficient publication within the meaning of section 79 of the code, providing that "the publication must be made four consecutive weeks in some newspaper."

APPEAL from the district court for Keya Paha county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Andrew M. Morrissey, Allen G. Fisher and *William P. Rooney,* for appellant.

Lear & Lear, contra.

ROSE, J.

This is a suit to redeem 80 acres of land in Keya Paha county from a tax foreclosure sale and to quiet title in plaintiff. Elizabeth Van Ingen was the holder of the record title February 3, 1900, and for "one dollar and other valuable considerations" deeded the land on June 2, 1908, to Charles P. Bresee, who for a like consideration made a similar conveyance to plaintiff, January 15, 1909. Since September 21, 1900, defendant has been in possession under a sheriff's deed executed in the tax foreclosure case, an action instituted by Keya Paha county against Elizabeth Van Ingen, February 3, 1900. Plaintiff pleads title in himself and the invalidity of the foreclosure under which defendant holds possession. From a judgment denying plaintiff relief and quieting title in defendant, plaintiff appeals.

Plaintiff asserts that the district court was without jurisdiction to entertain the foreclosure suit, because there was no valid statute authorizing such a proceeding, the act under which Keya Paha county proceeded never having been legally enacted. Laws 1881, ch. 75; Comp. St. 1901, ch. 77, art. IV. The particular in which the lawmakers disregarded the constitution and the section violated are not pointed out in appellant's brief. The constitutional question may therefore be disregarded. *Boyes v. Summers,* 46 Neb. 308.

Failure to describe in the petition for foreclosure the two 40-acre tracts in controversy is urged as a ground for declaring the tax deed void. Following the name of the county and of the state, the description is: "The NW^4 SE^4 and SW^4 NE^4 of section 1, in township 32 north of range 22 west of the sixth principal meridian." The state, range, county, township and section are definitely stated. The only question then is: Are the two particular 40-acre tracts in the section mentioned sufficiently described? Does the following designation meet the requirements of the law: "NW^4 SE^4 and SW^4 NE^4"? In

this state the abbreviation "4" as thus used, or "¼," is understood by taxing officers, by county treasurer and by tax-debtors generally to mean "quarter." The meaning of that abbreviation was made clear in the published notice in which the land was described as "Northwest quarter (nw ¼) of the southeast quarter (se ¼) and the southwest quarter (sw ¼) of the northeast quarter (ne ¼)." The other abbreviations used are also well understood. In a collateral attack on the decree the description will be held sufficient.

There is also an attack on the sufficiency of the affidavit for constructive service in the foreclosure suit. There appear to be two propositions under this head: The nature of the cause of action was not stated, and it was not shown that defendant was absent from the state. The purpose of such an affidavit has been stated as follows: "An affidavit for service by publication is not for the information of the party to be served, but to enable the court to determine whether the action is one in which jurisdiction may be acquired by such service." *Leigh v. Green*, 62 Neb. 344. The affidavit in the present case was made by the county attorney. It contains the names of the parties to the suit and states that a petition to foreclose tax liens against defendant has been filed in the district court. It describes the land on which the taxes are liens and states the amount thereof. It states that the petition contains a prayer that the land described may be decreed to be sold to satisfy such liens. It also contains the following statement: "All of the said defendants are nonresidents of the state of Nebraska and service of summons cannot be made within the state of Nebraska upon either or any of said defendants." Both attacks are unavailing, when the contents and purpose of the affidavit are considered.

Another assignment of error is that the notice of publication was insufficient to comply with section 79 of the code, which provides: "The publication must be made four consecutive weeks in some newspaper." The publisher of the weekly newspaper in which the notice was

inserted made affidavit that it was published "for four consecutive publications, the first publication having been made on the 8th day of February, 1900, and the last on the 1st day of March, 1900." There being nothing in the record to disprove this statement, the publication was sufficient under former holdings. *Burr v. Finch,* 91 Neb. 417. No error having been found, the judgment is

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

PHILIP MENSINGER, APPELLANT, V. AINSWORTH LIGHT & POWER COMPANY, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,346.

1. **Appeal:** CONFLICTING EVIDENCE. In an action at law for damages, a controverted issue of fact is a question for the jury, and, when they pass on evidence which is substantially conflicting, their finding in that respect will not be set aside on appeal unless clearly wrong.
2. ———: BRIEFS. On appeal, an assignment that there was error in admitting evidence may be disregarded, where appellant in his brief fails to point out the pages in the abstract or bill of exceptions where the challenged ruling may be found.
3. **Harmless error in instructions is not a ground for reversing a judgment.**

APPEAL from the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Weaver & Giller and *J. A. Douglas,* for appellant.

A. W. Scattergood, contra.

ROSE, J.

This is an action to recover damages in the sum of $1,950 for breach of a written contract obligating plaintiff

to furnish meals for each of defendant's employees at the rate of $4 a week. Defendant's workmen were employed to construct a dam at Plum Creek, northwest of Ainsworth, and the contract for their meals covered the entire period of construction. Plaintiff agreed "to furnish all necessary provisions and all necessary help and to furnish three good, substantial meals each day in the mess room." When the contract was partially performed, defendant terminated it without the consent of plaintiff, and the damages sought are the profits of full performance. The substance of the defense pleaded is that plaintiff failed and refused to furnish good, substantial meals for defendant's workmen, but, in violation of his contract, furnished uneatable, spoiled, soured and worthless food, and thus compelled defendant to cancel the contract and thereafter to run its own boarding-house. From judgment on a verdict in favor of defendant, plaintiff has appealed.

The first assignment of error will be disregarded, because it relates to the admission of evidence, and plaintiff in his brief has not pointed out the pages of the abstract or bill of exceptions, where the challenged ruling may be found. *Whitney v. Broeder, ante,* p. 305.

The next point is that the evidence is insufficient to sustain the verdict. There is sufficient competent testimony, if believed by the jury, to support a finding that plaintiff did not furnish the kind of meals required by his contract and to justify a rescission by defendant for that reason. On this issue the evidence was substantially conflicting. The question was therefore one of fact for the jury, and their verdict, not clearly appearing to be wrong, settles it in favor of defendant.

The final argument is directed to a criticism of two instructions on the ground that they do not correctly state the measure of plaintiff's damages. The verdict in favor of defendant was necessarily a finding that plaintiff did not comply with his agreement to furnish good, substantial meals and that he was not entitled to a recovery. The jury, therefore, never reached the question as to the meas-

ure of damages. It follows that plaintiff was not prejudiced by the instructions on that subject, and that they do not require a reversal, even if they are erroneous, a question not decided.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

WILLIAM A. MYERS, APPELLEE, V. JOHANNES PERSSON, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,349.

Evidence: PAROL EVIDENCE: AMBIGUITY. Ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties.

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

Tibbets, Anderson & Baylor, for appellant.

H. H. Mauck, contra.

ROSE, J.

The relief sought is the specific performance of a contract to exchange real estate. William A. Myers, plaintiff, and Cassen Cassens each separately contracted with the state to purchase a 40-acre tract of school land in Nuckolls county for $8 an acre, the appraised value. Both tracts were crossed diagonally by the Missouri Pacific railway. Nineteen acres of the land purchased by Cassens were east of the railroad and four acres of the tract purchased by Myers were west of the railroad. These fractional parts the purchasers agreed to exchange, though they did not at the time have title. Their writings are in form as follows: "I hereby assign, and transfer unto William A. Myers all my right, title and interest in

and to the east part of the S. E. ¼ of the N. W. ¼ east side the M. P. R. R. about 19 acres for the 4 acres west side the M. P. R. R. in the N. E. ¼ of S. W. ¼ sec. 16, town 1, range 7 west by paying me $7.35 per year till we get clear title from the state and settle the differents. Witness our hands this 30th day of April, 1891. C. Cassens. In Presence of Edwin J. Murfin." "I hereby assign, and transfer unto Cassen Cassens all my right, title, and interest in and to the west part of the N. E. ¼ of the N. W. ¼, sec. 16, T. 1, R. 7, about 6 acres west side the M. P. R. R. for the 19 acres east side the M. P. R. R. in S. E. ¼ N. W. ¼, sec. 16, town 1, range seven west by paying him $5.62 per year till we get clear title from the state and settle the differents. Witness our hands this 30th day of April, 1891. W. A. Myers. C. Cassens. In presence of Edwin J. Murfin."

No point is made on an error in description or on the inconsistency in the amount of interest to be paid annually.

After execution of the instruments copied, each party thereto surrendered to the other possession of the exchanged land. Cassens died before acquiring title to the 40-acre tract purchased by him from the state, and his school-land contract was sold to defendant, Johannes Persson, with notice of Cassens' agreement with Myers. As Cassens' successor, Persson paid the state the remainder of the purchase price and procured a deed to the entire 40-acre tract. Plaintiff pleads that he has performed on his part or tendered performance of all of the terms of the exchange contract, and that, within the meaning of the term "settle the difference," he is entitled to a deed for the 19-acre tract east of the railroad, upon paying for 15 acres at the appraised value of $8 an acre and conveying to defendant the four-acre tract west of the railroad. Defendant denied any obligation to make the exchange on a basis other than full value at the time of making transfers, though he admitted that after procuring title he offered to execute a deed and settle the difference on a valuation of $40 an

acre. The trial court decreed specific performance and directed the parties to make the exchange on the basis of the appraised value of $8 an acre. Defendant has appealed.

That defendant bought the school-land contract with notice of the exchange agreement is fairly established. Defendant repeatedly recognized the exchange contract by accepting interest according to its terms. There is some discussion of the question of estoppel, but the evidence is clear that plaintiff did nothing to prevent him from demanding performance.

The controlling question in the case is the meaning of the term "settle the difference," as used in the exchange contract. The trial court admitted testimony to show that the parties understood that settlement should be made on the basis of the appraised value of $8 an acre. Defendant insists that there is no competent testimony of that nature; that recognized rules for construing contracts as written allow him full value, and that he should not be required to perform on any other terms. This position is obviously untenable. Without reference to extraneous matters, the words "settle the difference" do not disclose definitely what was in the minds of the contracting parties. It is elementary that ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties. Proof of this nature was properly admitted, and it fairly shows that the parties intended to settle the difference on the basis of the purchase price of $8 an acre, as fixed by their school-land contracts with the state. They apparently adopted that basis in agreeing on the amount of interest which plaintiff should pay annually. The oral testimony is consistent with the writings and justifies the decree for specific performance.

AFFIRMED.

REESE, C. J., LETTON and FAWCETT, JJ., not sitting.

CHARLES W. YOUNG, APPELLANT, V. CITY OF BROKEN BOW, APPELLEE.

FILED OCTOBER 17, 1913. No. 16,778.

1. **Judgment**: RES JUDICATA. *City of Broken Bow v. Broken Bow Water-Works Co.*, 57 Neb. 548, examined and *held res judicata* as to the validity of the judgments in controversy in this action.
2. ———: DORMANT JUDGMENT: REMEDIES. The right to prosecute proceedings to revive a dormant judgment and the right to maintain an action upon the same are cumulative remedies, and the judgment creditor may have either or both as he sees fit; and where either of such rights is asserted the court may in its discretion, under proper evidence, formally give judgment for the other.
3. ———: ———: REVIVOR. Where in an action, the nature of which is to obtain the revivor of a dormant judgment, such judgment is found to be valid and not fully paid, it will be revived.

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

Rich, O'Neill & Gilbert and *Alpha Morgan*, for appellant.

Silas A. Holcomb and *N. T. Gadd, contra.*

FAWCETT, J.

This suit was instituted in the district court for Custer county upon three judgments obtained by the Broken Bow Water-Works Company against the city of Broken Bow in the years 1892, 1893, and 1894, respectively, and thereafter assigned to plaintiff; all of said judgments now being dormant. From a judgment in favor of defendant, plaintiff appeals.

The controversy between the water-works company and plaintiff, as the assignee of its judgments, and the city has been considered by this court on four different occasions: *State v. Royse*, 3 Neb. (Unof.), 262, 269, 71 Neb. 1, and *City of Broken Bow v. Broken Bow Water-Works*

Co., 57 Neb. 548. For a history of the controversy reference is made to those opinions.

One of the defenses interposed by the city is that all of the judgments are barred by the statute of limitations. Counsel for defendant abandons this contention in his brief, and concedes that under the authority of *Snell v. Rue*, 72 Neb. 571, this defense must fail. The next defense is that the first and third judgments are void for want of jurisdiction of the court over the defendant when they were rendered. To this defense plaintiff pleads *City of Broken Bow v. Broken Bow Water-Works Co., supra*, as *res judicata*. We think this plea is good and that the validity of the judgments in controversy cannot again be inquired into.

The next defense, and the one which counsel for defendant characterizes as "the principal defense in this case," is based upon the proposition that the city has fully discharged its obligation under its contract with the water company for the amounts agreed to be paid for hydrant rentals; that, the judgments being for hydrant rentals, they too are satisfied and discharged; and that the city has exhausted its debt-paying power with respect to its hydrant rentals under its contract with the water company. We do not deem it necessary to consider all of the arguments pro and con upon this point, but leave them to be considered, should they ever subsequently arise, in an action under issues properly framed and which squarely present such questions, which we do not think is true in the present case. The only question which we deem material to decide at this time is the right of the plaintiff to have a revivor of his dormant judgments.

Section 9 of the contract entered into between the city and the water-works company provided: "In consideration of the benefits which shall be derived by the said city and its inhabitants, * * * the city of Broken Bow * * * hereby promises and agrees to pay rent for the said 30 hydrants at the rate of $85 per annum, for each and every hydrant, * * * in semiannual installments, on the

first Tuesday of May, and first Tuesday in November, in each and every year during the said term to the said grantees, their heirs and assigns." The contract was entered into in 1888, and was to run 25 years.

Section 6 of the contract provided: "A sufficient tax, not exceeding seven mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance, when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed."

On April 1, 1904, the city acquired the water plant through a sale by the master in chancery in a suit pending in the United States circuit court for the district of Nebraska, and since that time has controlled and operated the same. Upon the trial of this case it was stipulated as follows:

"It is admitted that each and every year during the existence of the water-works company and while it maintained and operated the plant and until the sale to the city of Broken Bow, April 1st, 1904, there was levied annually by the proper authorities a tax of seven mills on the dollar assessed valuation, such levies being for and designated as hydrant rental, the same being levied for the purpose of paying hydrant rentals.

"It is stipulated, subject to such objections as may be interposed, that at the time of the acquisition of the Broken Bow water-works system by the defendant, the city of Broken Bow, there was on hand in said treasury in hydrant rental fund derived from the seven-mill levy which had been levied annually theretofore $1,566.59, which fund or amount was retained and used by the city; that all other moneys realized from the seven-mill levy, from the beginning of the operation of the water-works plant until its acquisition as aforesaid by the defendant

city, had been collected and applied in satisfaction of the hydrant rentals due under the franchise contract entered into between the city and the water-works company."

It appears from the above stipulation of facts that the defendant city, at the time it acquired the water-works, had in its possession $1,566.59, derived from the seven-mill levy which had been theretofore annually levied. There is no claim that this money has ever been paid over to plaintiff. Counsel for defendant undertakes to justify the city in holding this money by stating that "the deed from the master in chancery in the foreclosure sale under the order and decree of the court conveyed to the purchaser, not only the plant and system, but also 'all rights, interest, title, claim and demands of every name and nature which have in anywise come to the said Broken Bow Water-Works Company, or in anywise arisen under a certain ordinance of the city of Broken Bow, passed on the 23d day of April, 1888, and all debts, dues, rentals, claims and demands of every name and nature however, arising against the said city, whether such have heretofore accrued and are now existing, or may at any time hereafter accrue to said company.' The conveyance from the purchaser at foreclosure sale to the city contained likewise the same provisions as hereinbefore referred to." To our minds this is a very unsatisfactory pretext under which to claim the right to retain over $1,500 which defendant admits was collected under the seven-mill levy, and which under its contract with the water company it agreed should be "levied and kept as a separate fund known as the 'water fund' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed." Plaintiff had, with the full knowledge of the city, become the owner of the three judgments long prior to the commencement of the foreclosure proceedings in the federal court. He thereby became entitled to receive all hydrant rentals derived from the seven-mill levy. Such rentals, as soon as collected, became a trust fund to "be irrevocably and ex-

clusively devoted to the payment" of his judgments. The simple fact that the water company was unable to meet its obligations and its property was sold to meet the same ought not to, and does not, prevent plaintiff from now insisting that the city pay over to him moneys which the city had collected under the law and under its contract with the water company, and which, the moment it was collected, became a trust fund for the specific purpose, "irrevocably," of paying the water company, or its assignee, what the city owed for hydrant rentals. When it purchased the water-works system from the grantee of the receiver, it knew that it had this money, and that the money constituted a trust fund to be applied as above indicated; and the stipulation quoted from the receiver's deed in no manner relieves it from its liability therefor.

The other questions argued in the briefs and at the bar are important questions, which we now think we made a mistake in permitting the parties to press upon us in this action. They are questions which it is not necessary, nor proper, to decide at this time. This action is, to all intents and purposes, one to revive dormant judgments, and will be so treated. The only questions we are called upon to decide are whether the judgments are void, and, if not, whether or not they have been paid. That they are valid judgments is *res judicata;* that they have not been paid is conceded by the stipulation above set out. Hence, the judgments ought to be revived.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment of revivor of the three judgments in controversy.

REVERSED.

REESE, C. J., not sitting.

ROSE, J., dissenting.

HAMER, J., concurring.

This action is brought upon three judgments rendered

in the district court for Custer county in favor of the Broken Bow Water-Works Company and against the city of Broken Bow, in the years 1892, 1893, and 1894. These judgments were purchased by the plaintiff, who is the appellant. They cover the alleged difference between the price at which the water-works company was to supply the city of Broken Bow with water under a franchise contract with that city and the amount raised and paid out of the levy of an annual tax of seven mills on the dollar upon the taxable property within the state. The three judgments are by this action sought to be revived. It is claimed by the defendant that these judgments must be deemed to be paid because the city exhausted its taxing powers for the payment of hydrant rentals when it levied a seven-mill tax. To the defendant's answer that the three judgments were void, the plaintiff replied that the matter in controversy is *res judicata,* and that the judgments are valid because heretofore declared to be valid in a suit between the same parties in a court of competent jurisdiction. Section 9 of the ordinance provides that the franchise and license granted shall remain in full force and effect for 25 years; that the said city of Broken Bow shall take 30 hydrants during said term of 25 years at the rate of $85 per annum until such time as there are 150 water consumers, and thereafter that the rate shall be $75 per annum for each hydrant up to 50, and above 50 that the price paid by the city shall be $60 per annum. There was a specific promise to pay the price stipulated. It is the contention of the city that, notwithstanding its promise to pay the stipulated price for a supply of water to be furnished through these hydrants, yet the promise is not binding because of the further agreement to levy a tax. As the writer understands the oral argument of counsel for Broken Bow, it seems to make the concession that the legislature and contractors may have contemplated that the seven-mill levy to pay for the use of hydrants might be entirely inadequate at the commencement of the term at the contract price for each year, yet

that towns grow in population and that the value of the taxable property increases, and that it may have been considered by the contracting parties that within the full 25-year period or term of the contract the value of the taxable property of the city would probably increase so that the levy might aggregate enough to pay off the debt; but, nevertheless, counsel for the city make the contention that the levies made and applied exhausted the ability of the city to pay, and therefore paid the debt. Every intelligent person knows that the value of the taxable property in a frontier town multiplies rapidly if the town is prosperous. If the full amount for any one year is not raised, then is there any reason why the remainder of the 25 years and the growth of the city during that time and the increase of its taxable property may not be considered? It is the contention of the city that, because the promise to pay contained a condition that seven mills on the dollar should be annually levied upon the taxable property to meet payments under the ordinance, therefore the city was not bound to pay anything more than the tax specified.

In the *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, the city had issued its bonds for water and light, and the ordinance provided that there should be levied and collected for the year 1890, and for each year thereafter, a tax to pay the interest and provide a sinking fund. There was a limit allowed by the constitution of $2\frac{1}{2}$ per cent. on the taxable property of the city for any one year. It was held that the neglect of the city to perform its contractual obligations did not enable the city to escape that duty, and that it might be forced to perform the same by mandamus.

In *East St. Louis v. Amy*, 120 U. S. 600, the city of East St. Louis issued its bonds, and had neglected to make the levy for a number of years, when the plaintiff sued to compel payment. It was objected that a tax could not be levied in any one year sufficient to make good the past defaults. Chief Justice Waite said: "The accumulation

of the debt was caused by their own neglect. * * * We see no reason why it was not in the power of the court to order a single levy to meet the entire judgment."

In *Coy v. City Council of Lyons City,* 17 Ia. 1, the court said: "The object of the suit is to compel payment, and the defense only shows an inability, under the law, to levy sufficient to satisfy it in *one* year, but a clear ability to do it in *subsequent* years. The court * * * will grant complete relief by providing for the payment of the whole debt."

In *City of Cleveland v. United States,* 111 Fed. 341, where there was a limit to which the city could tax, and and it had neglected to make the levy in former years as provided by the contract, the court held that there was no reason why the relator should be without relief simply because it was beyond the power of the city to levy the whole amount in any one year.

Four opinions have been delivered by this court which relate to this case. The first was prepared by Commissioner FRANK IRVINE, who describes the case as "an action by the city of Broken Bow, with which joined a citizen and taxpayer (Taylor Flick) against the Broken Bow Water-Works Company and others to enjoin the defendants from enforcing three certain judgments recovered by the water-works company against the city." *City of Broken Bow v. Broken Bow Water-Works Co.,* 57 Neb. 548. The opinion in that case (which we will call the Taylor Flick case) makes the subject matter of this particular case *res judicata.* After this comes the case of *State v. Royse,* 3 Neb. (Unof.) 262, filed July 1, 1902, three years after the *Flick* case was decided. There was a rehearing in the *Royse* case November 18, 1903, and Commissioner OLDHAM prepared a second opinion 3 Neb. (Unof.) 269. Then there was a second motion for rehearing, and Chief Justice HOLCOMB wrote an opinion filed February 4, 1904, denying the motion. 71 Neb. 1.

The first of the OLDHAM opinions in the *Royse* case contains this statement (p. 266): "A judgment against

a city or county is but an audited demand against such municipality which is no longer open to contest." The first OLDHAM opinion holds that the claim is audited; that it stands against the city; that it is no longer open to contest; and declares that it will not issue the writ of mandamus to compel the levy of a tax, because there is no power then to do so, meaning at that particular time, but not excluding a consideration of the future. It does not follow that the full limit of 10 mills on the dollar will be required to pay the current expenses of the city for each ensuing year. If there should be an excess raised by the levy of 10 mills above that required to pay the general expenses of the city, then it would seem that such sum might be applied. In the second OLDHAM opinion it is said: "We are asked to re-examine and depart from the doctrine of *United States v. County of Macon*, 99 U. S. 582, 591, 25 L. ed. 331, relied upon to support the conclusion reached at the former hearing, because the facts of this case take it without the reason of the rule there established and bring it within the rule laid down in *United States v. County of Clark*, 96 U. S. 211, and, also, in *Ft. Madison Water Co. v. City of Ft. Madison*, 110 Fed. 901. * * * The special taxes provided for by the statutes construed in each of these cases were held to be an additional grant of power to provide 'a particular fund as additional security for the payment of a debt,' and not as limitations on the power to enter into the various contracts." What OLDHAM said is not reversed or in any way annulled by the HOLCOMB opinion.

In *United States v. County of Macon*, 99 U. S. 582, it was said: "The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment." In that case a mandamus was refused, but it was not determined that the money due might not some time be collected.

In *United States v. County of Clark*, 96 U. S. 211, it was held: "That the bonds are debts of the county as

fully as any other of its liabilities, and that for any balance remaining due on account of principal or interest after the application thereto of the proceeds of such tax the holders of them *are entitled to payment out of the general funds of the county.*" In the body of the opinion it was said: "There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the states, and more than once by the federal government. The act of congress of February 25, 1862 (12 Stat. 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per cent. thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to *aid in the payment of a debt are in no sense restrictions of the liability of the debtor.* * * * And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit."

It does not follow that ten mills on the dollar would be required to pay the general expenses of the city every year. Then, if there should be an excess raised by the levy of ten mills above that required to pay the general expenses of the city, it would be proper under the last OLDHAM opinion to apply that sum. In the HOLCOMB opinion it is said: "It is agreed that the judgments owned by the relator *represent an adjudication of the liability of the city of Broken Bow,* for sums due as hydrant rental

or for water supply for fire protection furnished by the water-works company to the city, under an ordinance enacted for that and other purposes, and under which the water-works company is operated." It should be remembered that this court, when that opinion was delivered, was only deciding the question that was then before it, and that question was whether at that time, on the then present valuations, and under the then present statute, and with the then existing conditions, a levy of the tax could be compelled. Suppose the general expenses to run the city require ten mills for one year, but suppose that the next year the value of the property in the city has so increased that it no longer requires ten mills for the running expenses and that seven mills will pay them, then there would be an excess of three mills to be used for the payment and satisfaction of any indebtedness due from the city. It is hardly credible that the city intended to deny to the holder of the contract any right to look beyond the slender provision for the payment of interest and principal furnished by a levy of only seven mills on the dollar. What could have been the purpose of contracting the liability if it was not to be paid? But it was adjudicated in the *Taylor Flick* case and stipulated that the judgments were owned by the plaintiff in this case, and that they represent an adjudication of the liability of the city of Broken Bow for the sums due as hydrant rentals. The three judgments sued on being rendered in 1892, 1893, and 1894, were therefore in existence long before the foreclosure proceedings in the United States circuit court were commenced, and these judgments were the property of the plaintiff in this case and could not have been divested by that proceeding. The contention of the city that the contract originally made is *ultra vires* was disposed of and became *res judicata* against the city and in favor of the plaintiff January 19, 1899, by the IRVINE opinion (57 Neb. 548), and long before the HOLCOMB opinion (71 Neb. 1), filed February 4, 1904. The HOLCOMB opinion could not have decided that which had already been determined

by this court when it delivered the IRVINE opinion. The district court in the *Taylor Flick* case, in which the IRVINE opinion was delivered (57 Neb. 548), held that the original judgments were "null and void" and "perpetually enjoined" the defendants "from collecting or attempting to collect said judgments or any part thereof." But on appeal this court held the case to be "wholly without merit," and reversed the judgment of the district court. The identical questions here sought to be raised were then raised and determined in the district court in favor of the city and the taxpayer, Taylor Flick, and on appeal this court reversed the judgment as announced in the IRVINE opinion.

In *United States v. County of Clark, supra,* a county had subscribed for stock of a railroad corporation, and had issued bonds in payment thereof, pursuant to a law which authorized a levy of a special tax to pay them "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year." Among other conditions, it was urged by the defense that the relator was not entitled to a warrant payable out of the ordinary revenues of the county. The United States supreme court said: "The question presented by the record is, whether the relator is entitled to payment of his judgment out of the *general funds* of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it." An examination of the decision in *United States v. County of Clark, supra,* shows that it was held that the bonds were the debts of the county as fully as *any other* of the *county's liabilities,* and that for any balance remaining due on account of principal or interest after the application of the proceeds of the tax, being not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year, the holders would be entitled to payment *out of the general fund of the county.* This view is clearly and ably expressed by Justice Strong in *Macon County v. Huidekoper,* 33 L. ed. (U. S.) 914 (134 U. S. 332). The first point in the syl-

labus in that case reads: "Under the Missouri law authorizing a county to subscribe to stock of the Missouri & Mississippi Railroad Company, and issue bonds therefor, and levy a tax of one-twentieth of one per cent. to pay same, after applying said tax to the payment of a judgment on interest coupons of said bonds, the balance due on such judgment is a liability of the county to be paid out of its general funds." The second point in the syllabus reads: "The statutes of the state having authorized the county to levy another tax of one-half of one per cent. for county purposes, the owner of the judgment may by mandamus compel the county to levy the full amount of said last-named tax, and apply it to the payment of the said balance due on said judgment *pro rata* with other demands against the county." If we apply the doctrine laid down in the last case above cited to the instant case, it will be seen that the city is liable for the full amount which it promised to pay, and that it has not satisfied the debt by levying and collecting a seven-mill tax and applying the same on the debt, and that, if there is a surplus at any time beyond the ten per cent. for current expenses, it can be applied on the debt, and, if there is a failure to levy the ten per cent. allowed under the law, then that the city can be compelled to make such levy, and that the surplus will be available to apply on the debt.

Under the oral stipulation and by reason of the judgment rendered in the *Taylor Flick* case (57 Neb. 548) the validity of the judgments was determined. Of this *Taylor Flick* case Commissioner IRVINE, in delivering the opinion of this court, says: "The petition did not state a cause of action." He then sets out the contents of the petition, being the ordinance in full, the alleged levy of seven mills tax each year, and the statement that the judgments, with accrued interest, amounted to $8,685.78, all of which the plaintiffs then averred to be in excess of the limit stipulated by said ordinance, and also in excess of the amount that said city could lawfully contract to pay for water service. The question was then discussed

in the opinion that the contention of the city and Taylor Flick was that the city could not lawfully contract to pay more than seven mills on the dollar each year. If that question was fairly submitted before the district court and was determined by it, and an appeal was taken to this court from the judgment of the district court and a new judgment announced, then that ought to forever settle it. The view of the district court is shown by the judgment rendered for the city, and the view of this court is shown by the fact that this court on appeal dismissed the action, and so decided against the city. The IRVINE opinion says that the sum realized by the levy of seven mills on the dollar proved insufficient to pay the company the stipulated rate per hydrant, and that by the year 1892 the deficit amounted to over $4,000, and that the city answered confessing its liability, and that judgment was entered against it, and that in 1893 and 1894, other deficiencies having arisen, judgments were again taken. The petition alleged that the said sum of $8,685.78 was in excess of the limit stipulated in the ordinance, and in excess of the amount that the city could lawfully contract to pay, and this contention was determined against the city of Broken Bow and against Taylor Flick by this court. The IRVINE opinion says: "It is the first time we have heard that one conceiving money to be justly due him is guilty of fraud or any other sin in seeking payment, or in threatening to resort to the remedy afforded by law for that purpose. There is no allegation that any facts were misrepresented, or that the company did other than to threaten suit to recover a demand it deemed just." This court determined that the injunction granted by the district court should not have been granted, that "the case is wholly without merit," and reversed the judgment of the district court. That judgment of this court still stands. This court is not at liberty to decide upon the present record concerning the merits of the controversy because of the fact that the former attack upon their validity and enforceability was decided adversely to the

city by this court, and the city by the judgment rendered at that time is forever barred. If the validity of t' three judgments sued on has become *res judicata,* it is idle to make any inquiry concerning the inherent validity or invalidity of the contract which went into these judgments; for, if the judgments have been declared valid by the action of this court, then the parties and the court are bound by the prior adjudication.

This action is to be regarded as one upon domestic judgments, or as an action to revive dormant judgments *Snell v. Rue*, 72 Neb. 571. The plaintiff owns these judgments; they have not been paid; on their face they are dormant. They ought to be revived.

It is the opinion of the writer that, where a case is tried in the district court upon pleadings which necessarily require a consideration of the issues and facts in dispute between the parties, and such issues and facts are determined by such court in favor of the plaintiff and its judgment is rendered concerning them in favor of the plaintiff, and thereafter on appeal the case is considered by this court, and the judgment of the district court is reversed and this court renders its judgment against the plaintiff and in favor of the defendant, a subsequent examination of the same issues and facts in a new case in the district court between the same parties will be considered barred, and the subject matter of the inquiry and the condition of the parties relating thereto will be regarded as *res judicata.*

SEDGWICK, J., dissenting.

The majority opinion refuses to determine the principal questions presented in the case, but leaves them "to be considered, should they ever subsequently arise, in an action under issues properly framed and which squarely present such questions." Thus, the door is opened and further litigation invited. It seems to me that the issues are "properly framed" and that the matters thus evaded are "squarely" presented. This is an action at law upon

domestic judgments, and the prayer of the petition is for a money judgment "of $6,482.38, together with interest as aforesaid, and costs of suit." There was no application to revive dormant judgments, and no conditional order of revivor. The answer is essentially an equitable defense. It sets up in detail all of the facts relied upon to defeat the collection of the judgments sued upon, with a prayer that the plaintiff be "enjoined from prosecuting his said action further, and from collecting or attempting to collect said judgments and each of them and the amounts alleged to be due (on) them, and that said judgments and each of them may be declared null and void and of no force and effect, and that it may be found and decreed that the defendant, the city of Broken Bow, is not liable to the plaintiff for said sums or for any sum whatsoever," and concludes with a prayer for general equitable relief. To this answer the plaintiff filed a reply. The reply consists of 24 sheets of closely typewritten matter, setting out all of the facts involved in the litigation and all of the equities of the parties. The case is, therefore, a general action in equity to determine and adjust the rights of the parties growing out of these complicated transactions, and the whole matter should be disposed of and the litigation ended.

I am not aware of any other form of action that this plaintiff could bring that would more properly or fairly present the questions that these parties have tried to present. If there can, under our practice, be an action more "properly framed" which would more "squarely present such questions," the majority opinion does not indicate what that action would be.

By the second paragraph of the syllabus it is declared that in an action upon domestic judgments the creditor may have both a new judgment and a revivor of the old, and yet in this case he is allowed only a revivor of the old judgments without regard to equitable defenses.

In statutory proceedings to revive a judgment, if it is conceded that the judgment was originally valid, the only

remaining question is whether since its rendition it has been satisfied. If, because of things that have been done or have occurred since the judgment was rendered, there is no longer any legal liability thereon, the judgment is satisfied and cannot be revived. If this was strictly the statutory proceeding to revive these judgments, the practice a hundred years ago might have been to formally revive the judgments and remit the parties to further litigation. Under the old practice in such cases, the defendant might bring his action on the equity side of the court and enjoin further proceedings at law to revive the judgment until the equities arising thereon after the judgment was rendered could be adjusted between the parties. It has always been considered idle to revive judgments upon which the law will not allow anything to be collected. Our code provides that a defendant may allege any defense that he has, whether legal or equitable, or both. It seems very strange, when an action is brought on a judgment for the sole purpose of determining how much there is due thereon, and equities are alleged in defense showing that a less amount is really due than the face of the judgment sued upon, to evade the issues so presented and tried in the lower court, and change the action into the statutory proceeding to revive, and so avoid passing upon the issues properly presented. Time was when such practice was indulged in by some technical courts, but I supposed that time was long past, especially in this state. These issues cannot be satisfactorily tried in an action of mandamus to compel a levy to pay these judgments, unless the defendant is allowed to present the same equitable defenses that are presented here. Long after the courts had abandoned the old practice of refusing to consider equitable defenses in actions at law upon judgments, they still refused equitable defenses in actions of mandamus. To be consistent with the decision in this case, the majority must therefore refuse all equitable defenses if another action of that nature should be brought. It seems, therefore, impossible to foretell when and where the litigation is to end.

I think the whole matter should be disposed of now in this equitable proceeding where all of the matters in dispute are presented.

The concurring opinion attempts to discuss the merits of the case, but that discussion is unsatisfactory to my mind, and, of course, is useless in view of the decision of the majority of the court.

LETTON, J.

I concur in the opinion of Judge FAWCETT reviving the judgment so as to permit them to be used to reach the money in the hands of the city arising from the seven-mill levy, if the same is properly liable to be so applied, but express no opinion as to that issue.

I think Judge SEDGWICK is right in his dissenting opinion as to the desirability of ending the litigation, and believe that no recovery can be had in excess of the annual seven-mill levy.

JOHN A. RANDALL, RECEIVER, APPELLEE, V. W. H. MCCLAIN ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 17,174.

Insurance: MUTUAL COMPANIES: INSOLVENCY: PROCEEDINGS AGAINST MEMBERS. Record examined, and *held* that the case at bar is ruled by *McCall v. Bowen*, 91 Neb. 241.

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

Stewart, Williams & Brown, Shepherd & Ripley, Baldrige, De Bord & Fradenburg, J. C. Dort, A. D. McCandless, P. W. Scott, L. E. Roach, Brown & Venrick and *B. F. Hastings*, for appellants.

Burkett, Wilson & Brown and *E. J. Clements, contra.*

FAWCETT, J.

The Nebraska Mercantile Mutual Insurance Company

was organized under the laws of 1897, ch. 45, and was doing business, at the time of its insolvency, under such statute, as amended by chapter 48, laws 1903. In January, 1908, the company was adjudged insolvent, and plaintiff appointed receiver. October 27, 1909, plaintiff, as receiver, by direction of the court, filed his amended petition against defendant McClain and some 800 other defendants, residents of 70 different counties of the state. The action is based upon an assessment declared by the district court against the defendants upon their several contracts or certificates of membership, or policies as they are sometimes called, in the company. The suit is a suit in equity brought in the district court for Lancaster county, in which county some of the defendants resided. Service was had upon them, and a summons issued to each of the counties in the state where other defendants resided, where such defendants were duly served by the sheriffs of their respective counties. Some of the members of the company paid their assessments and are not included in the suit. Some, who were included, made default, and judgments by default were entered against them. The appealing defendants appeared specially and objected to the jurisdiction of the court over their persons, for the reason that they are residents of counties other than Lancaster; were served with summons in the counties of their respective residences by the respective sheriffs thereof; that they are not jointly liable with any defendant of Lancaster county upon the causes of action set forth in the petition, and that no summons had been served upon them as required by law. Their special appearances being overruled, they then separately demurred upon the grounds: (1) That the court had no jurisdiction of the persons of defendants; (2) defect of parties defendant; (3) several causes of action improperly joined; and (4) that the petition does not state a cause of action. Their demurrers being overruled, they answered, some separately, and some joining with others of their county. In their answers they preserve the objections made in their

special appearances, and add that the action was one for the recovery of money only and the summons served contained no indorsement of amount for which judgment would be taken in case of default; that the respective claims against the defendants were several, and not joint; that they could not be brought from the counties of their residences into Lancaster county to defend; that at the time of the alleged assessment there was nothing due from the defendants to the receiver; that no proper or legal assessment was made; that the contracts of insurance limited the liability of defendants to the amount of premium stated in the policy; that defendants are not members of the insurance company in the sense that they can be assessed for the liabilities of the company; that there is no multiplicity of suits; and that defendants were entitled to trial in the counties of their residences, and to a jury. The reply to each answer was a general denial. The decree was in favor of plaintiff upon every issue, and a large number of the defendants have appealed.

We deem it unnecessary to consider the various assignments in detail. Counsel for defendants rely largely upon *Burke v. Scheer,* 89 Neb. 80; while counsel for plaintiff pin their faith to *McCall v. Bowen,* 91 Neb. 241. We think this case is ruled by *McCall v. Bowen, supra.* In *Burke v. Scheer, supra,* the case was submitted upon a general demurrer to the petition. That case involved a construction of the statute relating to mutual hail insurance societies, the provisions of which are materially different from the provisions of the law under which the insurance company of which plaintiff is receiver was organized. In *Burke v. Scheer* but two questions were in fact determined, viz., that the legislature, by the act governing mutual hail insurance societies, prescribed both the maximum of a member's liability and the form of action by which payment of that liability could be enforced. The petition in that case did not show that any by-laws had ever been adopted, and it was argued by plaintiff that because the liability of the members had not been limited

by the by-laws their liability was unlimited and that each member or policy-holder was personally liable for all of the debts of the company. We held, and quoted the statute to show, that no member could be required to pay more than the amount of his obligation. We also held that under section 124 (Comp. St. 1909, ch. 43) of the act under which the society was operating, which provided that "suits at law may be brought against any member of such company," etc., there was no authority for the receiver to proceed in equity; that, the legislature having prescribed both the maximum of a member's liability and the form of action by which the payment of that liability may be enforced, "we do not think the fact that the company has become insolvent can in any manner enlarge such liability or change the form of action which may be resorted to for its enforcement." That was all we decided or intended to decide in that case. The discussion in the opinion is predicated upon the statute we were then considering, which, as we will show, is quite different from the statute governing mercantile insurance companies. The statute under consideration here (laws 1897, ch. 45) provides: "Section 3. All persons who effect insurance in any company organized under the provisions of this act shall thereby become members of such company and continue to be during the period their insurance is in force, and no longer." Section 9 provides: "If any member of such company for the space of thirty days after written or printed notice of assessment has been mailed to him or her, postpaid and directed to the post office as stated in the application for insurance, shall neglect or refuse to pay the sum assessed, such company may sue for and recover such amount and cost." There is no such provision as section 3 in the law under consideration in *Burke v. Scheer*, and the section as to the bringing of suit expressly provides: "Suits at law may be brought," etc.

In *McCall v. Bowen*, *supra*, the company was organized under the statute authorizing the organization of hog-raisers mutual insurance companies. The provisions of

that act are set out by Mr. Justice LETTON on page 245 of the opinion, and we held: "The liabilities of a member of a company organized under this act are fully as great as those of a stockholder in an ordinary stock corporation. It is immaterial whether the members of this body corporate be designated as members or stockholders, because during the term that their policy of insurance covers they are as essentially members of the corporate body as owners of stock in a stock corporation are of such a corporation." We reaffirm what is there said. The statute under consideration here being practically identical with the one under consideration in *McCall v. Bowen*, this case must be ruled by that. Having reached this conclusion, defendants' assignments of error must all fail.

AFFIRMED.

SEDGWICK, J., dissenting.

I am not satisfied with the opinion in this case, because it seems to me that the three decisions, *Burke v. Scheer*, 89 Neb. 80, *McCall v. Bowen*, 91 Neb. 241, and the opinion herein are inconsistent with each other and leave the law very much in doubt.

It is said in the majority opinion that this case is ruled by *McCall v. Bowen*, and this is stated in the syllabus as the point of law decided. One reason is stated as determining that this case involves the same question as that decided in *McCall v. Bowen*, and two are stated as determining that it does not involve the question upon which *Burke v. Scheer* depends. None of these reasons, as it seems to me, can be applied at all. The first is that the statute governing this case provides: "All persons who effect insurance in any company organized under the provisions of this act shall thereby become members of such company and continue to be during the period their insurance is in force, and no longer." Laws 1897, ch. 45, sec. 3. A similar provision was held in *McCall v. Bowen* to constitute the policy-holders, as "members" of the

company, liable jointly and severally for all of the liabilities of the company. This was in *McCall v. Bowen* made the test by which to distinguish that case from *Burke v. Scheer*. If a member must contribute an indefinite amount, his proportionate share of all the liabilities of the company, a court of equity alone can, upon an examination of the whole case, ascertain the amount of liabilities of the company and fix the proportionate share of each member. In such case there is a joint liability and the action may be in equity, making all members of the company parties and adjusting the equities between them. This is the point decided in *McCall v. Bowen*. When the liability of the policy-holder is limited and fixed by the law or the contract, it is held in *Burke v. Scheer* the amount of the liabilities of the company and the liabilities of the policy-holders are alike immaterial to him. He has a fixed amount to pay, and no more under any conditions of the business. There are, therefore, it is there held, no equities between policy-holders and no joint liability or interest.

Section 3 of the act above quoted might by itself be considered to make policy-holders jointly liable for all debts of the company, as the similar provision was considered in *McCall v. Bowen*, if it were not otherwise especially provided in the act we are now construing. The amendment of the act in 1903 was for two purposes. It amends two sections. By section 69*k*, ch. 43, Comp. St. 1901, which was the tenth section of the original act, the company was not allowed to do business outside of the state, and could not do business in both cities and villages. That section was amended so as to allow the company to do business in both cities and villages in the United States. Section 69*q*, ch. 43, Comp. St. 1901, which was section 16 of the original act, provided: "No member, his or her heirs, executors, administrators or assigns, can avoid liability to such company for unpaid claims of the company accruing while a member." By the amendment of this section in 1903 (laws 1903, ch. 48) it was provided that the company may in its by-laws limit the liability of its

policy-holders for premiums or assessments to such sums as may be agreed upon, and that it must make such limit of liability on all its policy-holders before going out of the state to do business. Pursuant to that requirement the company did make a by-law limiting the liability of its policy-holders to a specific sum, and the policy issued to the defendants specifically limited the liability of each defendant to a specified amount. This appears to bring the case at bar entirely within the decision in *Burke v. Scheer,* and this case cannot be decided as in the majority opinion without overruling that case. The reasons stated in the majority opinion for holding that *Burke v. Scheer* does not control in this case are that the legislature prescribed "the maximum of a member's liability and the form of action by which payment of that liability could be enforced." The statute plainly does both of these things in the case at bar. I have quoted above the statute in this case prescribing "the maximum of a member's liability," and the statute also provides that, if any member shall fail to pay the assessment "as stated in the application for insurance," such company may sue for and recover such amount and costs. Comp. St. 1901, ch. 43, sec. 69*j*. If, therefore, the fact that a policy-holder may be sued for the amount specified in his application and policy adds any reason for holding that there is no joint liability, and no ground for equitable jurisdiction, we have it in this statute as well as in that construed in *Burke v. Scheer.* For my part I do not see how this fact adds anything, or, if *Burke v. Scheer* is right, that anything needs to be added to the fact that the statute we are construing authorizes and requires that the policy-holder's liability shall be limited and definitely fixed by the by-laws and policy, and that this was done in this case. This case, then, is not "ruled by *McCall v. Bowen,*" but the decision is plainly inconsistent with *Burke v. Scheer.* This decision appears to me to leave the law still more in doubt than it was before.

CITY OF ALBION, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,218.

1. **Highways**: ROAD DISTRICTS: CITIES. Cities of the second class and villages were road districts within the meaning of section 76 of the road law as it existed prior to the amendment of 1901.

2. **Constitutional Law**: TAXATION: ROAD FUND. The power conferred upon a county to raise a road fund by taxation is not in violation of section 7, art. IX of the constitution, but is a political power, and the application of such fund, when collected, is clearly within the power of the legislature.

3. **Highways**: ROAD FUND: CLAIMS AGAINST COUNTIES: POWER TO COMPROMISE. When a county has collected money for the road fund upon property of a city or village, one-half of such money belongs to the city or village, and the officers of the city or village have no power to compromise the right to such money. *State v. Bisping*, 89 Neb. 100.

4. ———: ———: COUNTY A TRUSTEE: LACHES. In such a case, as between the county and city or village, the county does not hold such collections in its own right, but the possession of the one is the possession of the other. The possession of the county is precarious, and not *animo domini;* and, being trustee, it cannot acquire the trust fund by lapse of time, but is charged with the continuing duty to pay the same over to such city or village. *City of Chadron v. Dawes County*, 82 Neb. 614.

5. ———: ———: ———: ———. Nor will the failure of the city or village to demand payment of its portion of said road fund for a series of years, either with or without knowledge on the part of the officers of the city or village of the fact that the county is using all of such fund upon the county roads, constitute laches on the part of such city or village.

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

Jesse L. Root, O. M. Needham, W. J. Donahue and *Albert & Wagner*, for appellant.

John J. Sullivan, F. J. Mack and *C. E. Spear, contra.*

FAWCETT, J.

From a judgment of the district court for Boone county,

in favor of the plaintiff, a city of the second class, for one-half of the road tax levied and collected by the defendant county upon the taxable property within the limits of plaintiff city, during the years 1883 to 1906, inclusive, except the year 1902, defendant appeals.

A plea of *res judicata* is interposed as to all of the years prior to and including 1902. The allegations in support of this plea are that in 1904 plaintiff filed a claim with the county for certain sums which it claimed were then due as plaintiff's share of the county road fund tax; that on October 4, 1904, this claim was adjudicated by allowing the same in part and disallowing it as to the other part; that the amount allowed was $362.22, which it is alleged plaintiff accepted in full and complete settlement of all such taxes due, and that it was understood and agreed between plaintiff and defendant that such sum was to be and was accepted as such full settlement. It is further alleged that no appeal was ever taken from that adjudication by the board. The reply admits that no appeal was taken, but denies that there was any adjudication by the board of any portion of its claim except the specific item for the year 1902; alleges that the claim filed by plaintiff at that time was itemized for the years 1900, 1901 and 1902; that the board took no action whatever as to the claims of 1900 and 1901; that it indorsed on plaintiff's claim the word "allowed" after the item as to the year 1902, and as to the years 1900 and 1901 indorsed the claim as follows: "No action taken on claims for 1900 and 1901." The plea of *res judicata* must fail for two reasons: (1) The record sustains the allegations of the reply as to the action of the board October 4, 1904, with respect to the claim for the years 1900 and 1901. (2) Even if the officers of plaintiff city had attempted to compromise the city's claim against the county by accepting payment of one year as a full settlement of all preceding years, such attempt would have been in excess of their powers and therefore futile. *State v. Bisping,* 89 Neb. 100.

It is urged that section 7, art. IX of the constitution, is a bar to plaintiff's right to maintain this action for any part of the road fund tax levied by the county authorities. This section reads: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." We are unable to see any application of this section of the constitution to the case at bar. The legislature has not anywhere in the road law under consideration attempted to "impose taxes upon municipal corporations." It has simply directed the manner of distribution of the taxes levied by the duly constituted county authorities. This it had a perfect right to do. The power conferred upon a county to raise a road fund by taxation is a political power, and its application, when collected, is clearly within the power of the legislature.

By the seventh assignment it is urged that plaintiff's action is barred by the statute of limitations. This assignment is not seriously contended for in the brief, the main stress upon this branch of the case being laid upon the eighth assignment, that upon the undisputed facts of the case plaintiff has been guilty of such laches that this action ought not to be maintained. These two assignments must both be disposed of adversely to plaintiff on the authority of *City of Chadron v. Dawes County*, 82 Neb. 614, and the authorities there cited.

The remaining assignments are that plaintiff's petition does not state facts sufficient to constitute a cause of action; that the finding and judgment of the district court are not sustained by sufficient evidence, and that they are contrary to law. If the assignment that the judgment is contrary to law fails, the other assignments must also fail. This brings us to the controlling question in the case: Does the law, viz., the statutes of this state, sustain the judgment? In deciding this point, we need not do more than consider section 76 of the road law as it has existed from 1881 to the time of the commencement of this action. So far as this section has stood from 1901 to the

present time, it is ruled by *City of Chadron v. Dawes County, supra.* That case has since been followed in *City of Crawford v. Darrow,* 87 Neb. 494, and *State v. Bisping, supra.* We are satisfied with the holding in those cases and adhere to them.

With reference to section 76 (Comp. St. 1899, ch. 78) as it stood prior to 1901, we might well rest our decision upon *Libby v. State,* 59 Neb. 264, which was decided November 9, 1899. In the opinion in that case (p. 268) it was said by SULLIVAN, J.: "In an earnest endeavor to discover the will of the lawmaking body, we have followed the learned counsel for respondent into a jungle of enactments, ancient and modern, among which the mind loses itself and can find no way out. The truth of the matter is that no very tangible evidence of the legislative purpose touching the disposition of money like that here in dispute is anywhere discernible. And yet we think there is enough to warrant us in holding that section 76 of the road law is applicable to incorporated municipalities, and that they are to be regarded as road districts within the meaning of that section." Notwithstanding the warning here sounded by the learned judge, we have again followed counsel into this "jungle of enactments, ancient and modern," endeavoring, while in this jungle, to keep the mind from losing itself, and to find a clear way out. The difference between section 76 prior and subsequent to 1901 is that prior thereto the section did not specifically include cities of the second class and villages within its requirement that the county commissioners, after levying the same rate of road tax on property within any incorporated city, might retain one-half of the tax so levied and collected and should pay the other half to the council of said cities to be used for road purposes. It is now argued that, there being no statutory provision prior to 1901 requiring the county board to pay over to cities of the second class and villages one-half of the tax collected from property within the corporate limits of such city or village, plaintiff cannot maintain this action for the taxes

so collected for the years 1883 to 1899, inclusive. We were quite strongly impressed with the argument of counsel for defendant at the bar upon this point, and in our tentative consultation at the close of the argument we were rather inclined to the belief that the contention would have to be sustained; but upon more careful consideration of the question, and after a painstaking examination of the statutes for each year from 1881 to 1899, inclusive, we are constrained to hold that defendant's contention upon this point must also fail. Section 76 as it stood in 1881 (Comp. St. 1881, ch. 78) provides: "In counties not under township organization, one-half of all the moneys paid into the county treasury in discharge of road tax shall constitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county, for road purposes; the other half of all moneys paid into the county treasury in discharge of road tax, and all money paid in discharge of labor tax, shall constitute a district road fund, which shall be paid by the county treasurer to the overseer of the road district from which it was collected, and expended by him only for the following purposes: *First.* For the construction and repair of bridges and culverts, and making fire-guards along the line of roads. *Second.* For the payment of damages of the right of any public road. *Third.* For the payment of wages of overseers, and for the expense of procuring the necessary guide-boards. *Fourth.* For the payment of wages of commissioners of roads, surveyor, chainmen, and other persons engaged in locating or altering any county road, if the road be finally established or altered as hereinbefore provided. *Fifth.* For work and repairs upon road." The section stood thus until 1891, when, without other change, there was added to it this proviso: "*Provided,* that the county commissioners of counties not under township organization may levy the same rate of road tax upon the property within any incorporated city of the metropolitan class and cities of the first class as is levied upon the property situated within the several

road districts, and all moneys paid into the county treasury in discharge of road tax levied upon property within the incorporate limits of any such city shall constitute a part of the general road fund of the county, and be subject to the disposal of the county commissioners for the general benefit of the county and city, one-half of which shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." The section stood thus until 1899, when the concluding clause of the proviso was changed so as to read: "And one-half to the council of said cities to be used under the direction and control of the board of park commissioners of such cities in the construction and improvements of roadways in the system of parks, parkways and boulevards of such cities." At the next session of the legislature the proviso was again amended so as to include cities of the second class and villages with cities of the metropolitan and first class, and by providing that one-half of the tax levied upon property within any incorporated city of any of the classes named "shall go to the county for road purposes and one-half to the council of said cities to be used for road purposes." The section stood thus until 1905 when it was again amended. This amendment, however, did not affect cities of the second class and villages, the provision as to them remaining the same as it was fixed in 1901, the only change in 1905 being as to cities of the metropolitan class, as to which the one-half is to be used under the direction and control of the park commissioners. In 1907 the section was again amended, and portions of the section as it originally stood were eliminated, but still providing that one-half of all such taxes levied upon property within any of the cities named should, when collected, be paid to the city or village where levied. And so the section has remained ever since.

A careful reading of this section, as it appears from time to time through all of the years named, shows that it was always the legislative intent that only one-half of the moneys paid into the county treasury in discharge of road

taxes should constitute a county road fund which should be at the disposal of the county commissioners, and that as to the other half of the moneys so collected it was always the intent of the legislature that such portion should be used by the proper officers and expended for the benefit of the particular district from which it was collected. The legislative intent being thus clearly ascertainable, it seems to us to be immaterial that in some of the years the section required the portion of the tax collected within any particular district to be paid to the overseer of that district, while in others it provided that it should be paid to the council of an incorporated city. It is clear that the legislature never intended that the county commissioners could levy a tax upon all property in the county, and, when that tax was paid in, use the whole of it for any particular roads or bridges in the county it saw fit, thus compelling certain districts of the county to pay road taxes upon the property within those districts without having any voice in the distribution or any benefit from the use of any portion of it. The justice of the legislative intent is apparent. All of the county roads in a county are maintained for the benefit of the citizens of the entire county, and the citizens of the entire county should contribute something towards the support of all of the roads in the county; and the legislature in its wisdom concluded that it would be just to take one-half of all the road taxes collected within the county and place that fund in the hands of the county commissioners "as a county road fund," to be used "for the general benefit of the county, for road purposes." Having done that, the legislature felt that, as to the other half of the money paid, the citizens who were required to pay it should be entitled to have that portion of the tax used in their own locality. That this is eminently just, when applied to incorporated cities and villages, is still more apparent when we consider that cities and villages, if the portion which they receive from the road fund is not sufficient to keep their streets and alleys in a reasonably safe condition for travel, not only

by residents of the city but by the inhabitants of the county generally, must raise such additional sums as may be necessary to keep them in such condition; and this additional fund they must raise by a tax on property within their corporate limits. So that, while incorporated cities are contributing one-half of the road tax levied upon their property to the county, for the benefit of the roads and bridges, they receive nothing from the county except the one-half of the tax levied upon their own property with which to keep their streets and alleys in good condition, and must themselves raise such additional sums as may be required for such purpose.

This brings us to a consideration of *Libby v. State, supra,* in which, after considering the condition of the road law as it had existed prior thereto, we held that "incorporated municipalities are road districts within the meaning of section 76 of the road law." The decision in that case was handed down, it must be remembered, prior to the amendment of 1901, at a time when cities of the second class and villages were not specifically included within section 76 of the road law. When we decided *City of Chadron v. Dawes County, supra,* we considered *Libby v. State,* and particularly that portion of the decision which held that incorporated municipalities are road districts within the meaning of section 76, and held that, "considering the question as a new one, we are constrained to reach the same determination." In the light of these cases, which we still adhere to, we hold that during all of the years in controversy here plaintiff was entitled to have paid over to it one-half of all of the road tax levied and collected upon property within its corporate limits.

The judgment of the district court being in harmony with this holding, it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

VILLAGE OF CEDAR RAPIDS, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,219.

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

Jesse L. Root, O. M. Needham, W. J. Donahue, and *Albert & Wagner,* for appellant.

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County, ante,* p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

VILLAGE OF PETERSBURG, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,220.

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

Jesse L. Root, O. M. Needham, W. J. Donahue and *Albert & Wagner,* for appellant.

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County, ante,* p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

VILLAGE OF ST. EDWARD, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,221.

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

Jesse L. Root, O. M. Needham, W. J. Donahue and *Albert & Wagner,* for appellant.

F. J. Mack, contra.

FAWCETT, J.

The pleadings and the evidence in this case, and the law applicable thereto are in all respects the same as those in *City of Albion v. Boone County, ante,* p. 494, except only as to the amount of the plaintiff's claim and the amount of the judgment entered thereon.

For the reasons stated in the opinion in that case, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

REAGINALD J. MACK, APPELLEE, V. ARTHUR MACK, APPELLANT.

FILED OCTOBER 17, 1913. No. 18,030.

1. **Trial:** INSTRUCTIONS: DAMAGES. The instruction set out in the opinion, approved.
2. **Appeal:** ADMISSION OF EVIDENCE. The rulings of the court in the admission and exclusion of evidence set out in the opinion, approved.
3. ———: CONFLICTING EVIDENCE. A verdict based upon conflicting evidence will not be disturbed unless manifestly wrong.

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

W. W. Young, for appellant.

Allen & Dowling, contra.

FAWCETT, J.

This case is before us a second time. For a statement as to plaintiff's claim, and the answer thereto, reference is made to our opinion on the former hearing. *Mack v. Mack*, 87 Neb. 819. We there reversed the judgment of the district court in favor of defendant, which was based upon a directed verdict on the theory that the contract set out by plaintiff was void, as against public policy, and without consideration. Upon a retrial plaintiff recovered a verdict for $2,000. upon which judgment was rendered, and defendant appeals.

It is first urged that the court erred in giving instruction No. 5½, as follows: "If you find the plaintiff entitled to recover, you will assess the amount of her damages in such sum as the evidence may show she has sustained, not exceeding the sum of $6,000. And in assessing her damages you will take into consideration her age, her life expectancy, the amount that will be reasonably necessary to make provision for her support in furnishing her shel-

ter, food, clothing and other necessary expenses in sickness and in health, and from all facts as disclosed by the evidence you will determine the amount of her recovery." It is argued that this instruction was broader than the evidence upon which it was based, and in substance told the jury that if they desired to do so, upon the evidence, they might return a verdict in the sum of $6,000, that being the amount prayed for in plaintiff's petition. We do not think the court erred in giving this instruction for two reasons: First, that if plaintiff was entitled to recover at all there is evidence in the record which would have justified a verdict for the full $6,000; and, second, under the lowest amount testified to by plaintiff as the amount necessary for her support, viz., $25 a month, it is conceded that the value of her expectancy, as shown by the Carlisle table, would have amounted to $2,750, or $750 more than the jury allowed. It is clear, therefore, that the instruction was not prejudicial to defendant.

It is next urged that the court erred in admitting oral testimony as to the contents of a letter, claimed by plaintiff to have been written by defendant to Henry Johnson, a member of the firm of Johnson Brothers. It is true that Henry Johnson, on cross-examination, stated that "the envelope was addressed to Johnson Brothers, but the letter was written to me personally." Taking his testimony as a whole, together with that of plaintiff, who saw the letter, the court and jury were warranted in believing that the letter was written to Henry personally. Henry is a nephew of the plaintiff. The objection to the admission of oral testimony as to the contents of the letter is that no sufficient foundation had been laid; that no testimony was offered to show that a search had been made for the original, etc. Mrs. Mack testified that she saw and read the letter; that after reading it she returned it to Henry; that "Henry asked me for it, so I gave it back to him." Henry testified that he received the letter; that it was in the defendant's handwriting; that it was written in California and "sent to me direct. It was in my posses-

sion, but has become lost." In answer to the question as to whether he knew where the letter is now, he answered, "No." Conceding that the letter may have been temporarily placed in Johnson Brothers' safe, it appears that the firm had been dissolved prior to the time of trial, and that Henry gave his testimony by deposition in California, to which state he had removed. His brother John, the other member of the firm, testified that no such letter had been received. Under such circumstances, a request for John to make a search for the letter, or the issuance of a *subpœna duces tecum* directing him to bring the letter into court, would have been a useless ceremony. The court did not, therefore, err in the ruling complained of.

The next contention is that the court erred in permitting plaintiff and witnesses called in her behalf to testify as to the cruel treatment of plaintiff's husband. This testimony was clearly admissible. The very foundation of plaintiff's claim was that she was living separate and apart from her husband because of his wrong-doing, consisting of drunkenness and cruel treatment. It was absolutely necessary for her to prove a justifiable absence from her husband, or her alleged contract with the defendant would have been without consideration. If a wife is away from her husband without just cause, it is her duty to return to him whether he be then in sickness or in health, and a contract with a third person that she would return would, under such circumstances, be without consideration.

Another contention is that the court erred in denying to defendant the right to cross-examine the plaintiff as to claims made by her, after her husband's death, to certain real estate standing in the name of the defendant, but which she alleged was the property of her deceased husband. We think this testimony was properly excluded. We are unable to see how that fact would throw any light upon the question as to whether or not the contract between plaintiff and defendant had been entered into.

Lastly, it is urged that the verdict of the jury is not

supported by the evidence. Upon this point there is a direct conflict between the parties. The evidence, we concede, is close. If the testimony of plaintiff is to be believed, she is entitled to the recovery she obtained. If the defendant is to be believed, no contract was ever entered into. The jury were the judges of the credibility of the witnesses. The case was tried by able counsel on both sides, and all of these matters were doubtless urged with vigor and skill to the jury. The jury found the facts as testified to by plaintiff, and the trial judge sustained their finding. We cannot disturb it.

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

AFFIRMED.

REESE, C. J., ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. CHARLES M. MURDOCK, APPELLANT, V. JACOB A. REULING ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 18,095.

Mandamus: INTOXICATING LIQUORS: LICENSE. Where it clearly appears that an attempted appeal by a remonstrant from the granting of a saloon license by the mayor and council of a city is without merit, and is not being prosecuted in good faith nor with reasonable diligence, and, after a lapse of three days from the granting of such license, remonstrant having taken no affirmative action to perfect such appeal, the council orders the license to issue, mandamus will not lie to compel the council to reconvene and recall the same.

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

E. O. Kretsinger, Ernest L. Kretsinger and *C. M. Murdock*, for appellant.

A. D. McCandless and *F. E. Crawford, contra.*

FAWCETT, J.

This action was instituted by relator in the district court for Gage county, to compel the mayor and city council of the city of Wymore to meet in special or regular session and revoke a saloon license which had been issued to one Daniel O'Donnell. From a judgment denying the writ and dismissing relator's action, relator appeals.

The record shows that in March of the present year O'Donnell and three others applied to the city council of the city of Wymore for saloon licenses. On April 18 the relator filed a remonstrance against all four of the applicants. Upon final hearing the city council, at about the hour of midnight of April 28, overruled the remonstrance and granted a license to each applicant. The relator, who was present at the meeting, tendered a written notice of his intention to appeal and demanded a transcript of the pleadings and evidence. At the commencement of the hearing it was stipulated by the applicants and remonstrator "that the evidence taken upon this hearing shall be taken in shorthand by Ernest J. Kopecky, and by him reduced to longhand in transcript form on demand by the parties in case of appeal to the district court, and his certificate as to the correctness of that evidence to have full faith and credit in the said court." In accordance with remonstrator's demand, Kopecky was ordered to immediately extend his notes, which he promptly did, and had the same ready for delivery at an early hour on the morning of April 30, at which time he delivered it to the city clerk, who filed it at 7 A. M. that morning. There is a conflict in the testimony as to what transpired with reference to this transcript of the evidence during the next three or four days. There is, however, a clear preponderance to the effect that relator knew that the transcript had been delivered by Kopecky to the clerk, within an hour after it had been so delivered; that it remained in the clerk's office all of that day except for about an hour and a half, when Mr. McCandless, attorney for O'Donnell,

had the transcript out for the purpose of having Mr. Kopecky attach his certificate thereto; that it also remained in the clerk's office all of the next day, May 1; that relator made no request of the city clerk for an inspection of the transcript; that on the morning of May 2 the city clerk took the record to Beatrice and in person delivered it to the clerk of the district court; that in the evening of May 1 counsel for O'Donnell called upon relator and told him that he was going to Beatrice next morning and would be prepared to try the appeal at that time. The interview does not appear to have been a very friendly one, and the attorney, after accusing relator of not acting in good faith with him, departed. On the morning of the 2d counsel for O'Donnell appeared at the district court, and there also appeared present counsel for relator, who stated that he had just received a long-distance telephone from relator, asking him to look into the matter, but stated, in effect, that he had not yet been formally retained. He testified on the present hearing that the transcripts were lying on the clerk's desk, and, upon inquiry by him of the clerk as to whether or not they had been filed, he was informed that they had not; that he then asked counsel for O'Donnell why he did not file them, and was told that the relator had to file them; that, upon inquiry of the clerk, it was learned that the transcripts in two cases were there, being the case of O'Donnell and the case of one Walsh, and that the filing fee for the two cases would be $7; that he then called up relator by long-distance telephone and advised him as to the situation; that relator stated that he could not be in Beatrice that day; that he had never had the privilege of seeing the transcript; that counsel for O'Donnell had it in his possession; that relator promised to send the filing fees that day or bring the amount up next morning. Nothing was done about filing the transcript with the clerk of the district court that day, and in the evening the city council at a special meeting, called for that purpose, ordered the licenses to issue. On the next day, May 3,

relator, who had already withdrawn his objection to the granting of licenses to all of the applicants except O'Donnell and Walsh, formally withdrew his remonstrance and appeal as to the latter. He appeared at the office of the clerk of the district court on that day and asked for the transcript, stating that he wanted to take it to the office of his counsel for examination. The clerk at first declined to let him take the record out of the office, but, after consultation with the presiding judge, he was permitted to do so. The record was taken by him to the office of his counsel and retained until about the middle of the afternoon, when it was returned to the clerk. During the afternoon of that day a demand was made upon the mayor to convene the council and recall the license that had been issued to O'Donnell, which the mayor declined to do. The transcript, which the city clerk deposited with the clerk of the district court, was certified to by Mr. Kopecky, in accordance with the stipulation, but did not bear the certificate of the mayor or city clerk, nor did the record contain the copy of the remonstrance which had been filed by the relator. On the strength of this, it is contended by relator, in effect, that his appeal had not been perfected by reason of the failure of the city clerk to transmit to the clerk of the district court a proper transcript.

With matters standing thus, relator on May 5 commenced the present action. On May 7 a corrected transcript was filed with the clerk of the district court. This transcript contained the remonstrance and was duly certified to by the city clerk. Upon a hearing of this case May 9, the district court found that the appeal of the remonstrator from the action of the city council was not in good faith; that reasonable diligence had not been used by him in taking or attempting to take such appeal; and that the city council was justified in believing that said appeal would not be perfected and in issuing the license to O'Donnell on May 2. In addition to what has been said

above, there was evidence before the court which, if the learned district judge believed, was sufficient to show that the remonstrance in the first instance was not filed in good faith by relator. The evidence to which we refer was that the hearing of the application had been set down for an earlier date than April 28; that in conversation with counsel for the applicant the relator stated in effect that he had learned that the council was going to limit the number of licenses to four; that what he desired was to make the saloon business as odious as possible in Wymore, and he therefore wanted licenses issued to a number of saloons; that if they would issue licenses to all of the applicants, of which it was then supposed there would be five or six, he would not file any remonstrance. When the hearing was had, relator made out quite a strong case against the applicant Walsh, but the transcript of the evidence before the council, which has been preserved in the record before us, shows that he utterly failed to make out a case which would justify the council in refusing a license to O'Donnell. After the hearing, and after putting the city to the expense of getting out four transcripts, he first withdrew his appeal as to the applicants Pisar and Frederick, and later withdrew it as to Walsh, the only one of the applicants against whom he could, with any hope of success, have prosecuted an appeal, and allowed the transcript as to O'Donnell to remain in the office of the city clerk for two days and in the office of the clerk of the district court for one full day, without taking any affirmative action to have the appeal docketed. Counsel for O'Donnell, knowing that an appeal as to O'Donnell would be without merit, and learning that the appeal as to Walsh had been abandoned, concluded that all had been abandoned, and demanded that the license issue to his client.

The above is a fair statement of the record that was before the district court at the time he made the findings above set out and dismissed relator's action. The action

of the court in so doing was fully justified by the record. The judgment is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

NATHAN RAY FORSHA, APPELLANT, V. NEBRASKA MOLINE PLOW COMPANY, APPELLEE.

FILED OCTOBER 17, 1913. No. 18,071.

1. **Appeal:** JOINT TORT-FEASORS: INCONSISTENT VERDICT. In an action for negligence against several defendants, if the allegations and evidence relate wholly to the negligence of a third party not sued, who was at the time acting for all of the defendants jointly, and no direct act of negligence on the part of any party to the suit is shown, a verdict in favor of one defendant and against others is inconsistent.

2. ———: REVERSAL ON CONDITION. In such case, if after all of the evidence is taken and general instructions as to all defendants are given, the jury is instructed to find a verdict in favor of one defendant, and the record fails to show any disposition of the case as to the other defendants, and upon appeal by plaintiff it is stated by his attorney in open court that a verdict was in fact rendered and judgment entered against the other defendants, and that, if the judgment in favor of the one defendant is reversed, he will cause the judgment against the other defendant to be vacated also, the reversal of the judgment appealed from will be made conditional upon the vacation of the judgment against the other defendants also.

APPEAL from the district court for Nuckolls county: JOHN B. RAPER, JUDGE. *Reversed on condition.*

Stubbs & Stubbs and *H. H. Mauck*, for appellant.

Rich, Nolan & Woodland and *R. D. Sutherland*, *contra.*

SEDGWICK, J.

This case was first tried with a jury, and upon appeal to this court the judgment was reversed (89 Neb. 770),

and motion for rehearing was overruled (90 Neb. 736). Upon the second trial in the district court the jury were instructed to find in favor of the plow company and a verdict was rendered thereon. The plaintiff has appealed.

The second trial was upon the same pleadings and evidence. The evidence upon the former trial was read from the bill of exceptions. The question presented is as to the instruction in favor of the plow company. It is insisted that the former decision was that the plow company is not liable. Upon the first appeal it was held that, if upon this evidence the Murdocks were not liable, it could not be held that the plow company was liable. The verdict was therefore "in irreconcilable conflict with itself," as said in *Gerner v. Yates*, 61 Neb. 100, and approved in *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 585, and for that reason it could not stand for any purpose, and so upon the motion for rehearing the judgment was reversed as to all defendants.

The expert Bartlett was responsible for the management of the machinery. Both the plow company and the Murdocks relied upon him as one having expert knowledge, and, under this evidence, if there was negligence which caused the injury, it was the negligence of Bartlett. The question was whether these defendants were responsible for his conduct. The answer of the jury in the first verdict was that the plow company was responsible for Bartlett's conduct of the demonstration, but that the Murdocks were not. The majority of this court thought that this verdict was inconsistent. The place of the demonstration was at or near the place of business of the Murdocks, a place selected by them. If this was a dangerous place for the purpose, they are not less responsible for that fact than is the plow company. The Murdocks were interested financially; they expected to reap profits from the sales which this demonstration would induce; they were present, had notice of the details of the arrangements and countenanced the proceedings, and undoubtedly had authority to stop them if bystanders were endangered

thereby. The plow company selected and recommended the expert, and was also financially interested, and although not present, and without notice of the details of the arrangements, it was not intended to hold, as matter of law, that the Murdocks might be liable and that the plow company was not. We are satisfied that this evidence shows conclusively that Bartlett was acting for both of these parties, and a verdict in favor of one party and against the other is inconsistent and cannot be allowed to stand.

We are constrained to add that there are unfortunate expressions in our former opinion which might mislead the most prudent trial court. The fault of this unfortunate mistrial is not with the trial court, nor yet necessarily with the writer of the former opinion, but is chargeable to the writer hereof and others of the majority who insisted upon certain expressions, without sufficient thought of inconsistencies caused thereby.

The record shows that the case was tried against all defendants, and, after the court had fully instructed the jury, the plow company asked for an instruction to find in its favor. The court thereupon so instructed the jury, and there was a verdict and judgment in favor of the plow company and against the plaintiff. From this judgment the plaintiff has appealed.

There is in the record no verdict or judgment upon the issues presented as against the other defendants. So far as this record shows, the action against the Murdocks is still pending. The plaintiff's attorney, however, stated upon the argument that the jury found a verdict in favor of plaintiff and against the Murdocks, and that, if this judgment in favor of the plow company was reversed, the judgment against the Murdocks would be set aside and vacated.

If the plaintiff, within 30 days, files in this court a certificate of the clerk of the district court showing that the judgment against all other defendants has been set aside and vacated, the judgment in this case in favor of

the Moline Plow Company will stand reversed at the costs of the defendant, the Nebraska Moline Plow Company; otherwise the judgment will be affirmed.

REVERSED ON CONDITION.

REESE, C. J., concurring.

I concur in the decision and judgment in this case, but base my concurrence upon the final action of this court on the motion for rehearing as reported in 90 Neb. 736, in which the judgment against the plow company was reversed and the cause "remanded to the district court for a new trial, with leave to the plaintiff to proceed against both of the defendants." In my opinion this was a specific direction to the district court to proceed against both defendants by a new trial of all the issues involved in the case without reference to any suggestions or expressions contained in the opinion reported in 89 Neb. 770.

WILLIAM D. ARMSTRONG, APPELLANT, V. WILLIAM O. GRIFFITH, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,337.

1. **Taxation**: FORECLOSURE OF LIEN: CONSTRUCTIVE SERVICE: VOID SALE: REDEMPTION. Where jurisdiction in a tax foreclosure case is sought to be acquired by publication, there should be a strict compliance with the provisions of the statute; and, if the notice published is insufficient, a sale under it will be considered void in an action to redeem brought by one who holds the legal title.

2. ———: ———: ———: SUFFICIENCY. Where notice of publication was not addressed to the defendant, and the title of the case and the court in which it was brought were not set forth in the introductory paragraph of such notice, and it was not alleged in such paragraph that a petition had been filed, the service will be deemed insufficient because of the defects stated.

APPEAL from the district court for Keya Paha county: JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

Allen G. Fisher, William P. Rooney and *Andrew M. Morrissey*, for appellant.

Lear & Lear, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Keya Paha county. The plaintiff, William D. Armstrong, alleges ownership of the land in controversy as grantee of the Muscatine Mortgage & Trust Company, and sues to redeem from a sale made under a decree of foreclosure of alleged tax liens. He claims that the deed made under the foreclosure proceedings is void for want of any notice to the Muscatine Mortgage & Trust Company or any appearance by it. The defendant had judgment. The publication notice was not directed to the defendant in the foreclosure proceeding, the Muscatine Mortgage & Trust Company. For a notice to be a good notice by which jurisdiction is acquired, it should address the defendant or defendants intended to be served. It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice. The notice is addressed, "Notice to nonresident defendants," without saying what are the names of the defendants. Nor does the notice read as such notices are sometimes made to read by publishing the title of the case at the head of the notice. Where that is done, and the names of the parties appear as plaintiffs and defendants, and the court is mentioned, it is apparent that the desire of the plaintiffs is to bring the defendants into court in the particular case mentioned.

Section 79 of the code as it existed at the time of the publication, and as it now exists, reads: "The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, in

some newspaper printed in the state, of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer." In this case the publication fails to mention the court wherein the petition has been filed, and leaves out the word "petition" in the first paragraph of the notice, so that that paragraph fails to allege that any petition has been filed in the district court for Keya Paha county, or anywhere else. The first paragraph of the notice reads: "You and each of you will take notice that on the 9th day of July, 1900, the county of Keya Paha, plaintiff herein, filed in the district court in and for the county of Keya Paha, and state of Nebraska, against Muscatine Mortgage & Trust Company, nonresident defendants, the object and prayer of which are to foreclose the tax liens hereinafter described." As the publication is not directed to the Muscatine Mortgage & Trust Company, the defendant to be served, and that company is not pointed out as the defendant intended, therefore the notice published cannot be a sufficient notice. These provisions of section 79 are mandatory, and, unless complied with, there is no jurisdiction.

Section 80 of the code as it existed when the publication was made, and as it still exists, reads: "Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer or his foreman or principal clerk, or other person knowing the same." As the publication was not made in the manner prescribed by section 79, the proof by affidavit fails, and there is no basis upon which to assume jurisdiction. This court has insisted on a strict compliance with the statute in cases of this character. It also has been inclined to place upon the statute such a liberal interpretation as its terms might warrant touching the right to redeem. *Smith v. Carnahan,* 83 Neb. 667.

In Wade, Law of Notice (2d ed.) secs. 1135, 1136, it is, among other things, said: "In some of the states the original process by which the court obtains jurisdiction of the defendant is no longer styled a *writ of summons,* but is called simply a notice. * * * This process, being first in order, is also of primary importance in the institution of a suit either at law or in equity; for its due service, actually or constructively, is necessary to give the court jurisdiction either of the *defendant,* in personal actions, or of the *thing,* in actions *in rem.*"

In *Pomeroy v. Betts,* 31 Mo. 419, it is said: "An order of publication, where there are nonresident defendants, may be made by the court (or clerk, in vacation), upon an allegation in the petition or an affidavit, alleging the fact of such nonresidence, and *directed to the nonresidents,* notifying them, etc.

"Where a statute directs the publication of a notice having reference to personal right or to property, the requirements of the statute are to be strictly pursued." 29 Cyc. 1119, under the heading "By Publication."

The judgment of the district court is reversed and that court directed to proceed in harmony with this opinion. The plaintiff should be allowed to redeem upon the payment into court for the benefit of the defendant of such sum as will pay the amount of the interest and taxes and value of improvements. *Hayes County v. Wileman,* 82 Neb. 669.

REVERSED.

ROSE and SEDGWICK, JJ., dissenting.

HENRY BURROUGHS V. STATE OF NEBRASKA.

FILED OCTOBER 17, 1913. No. 18,112.

Criminal Law: ARRAIGNMENT. Under section 448 of the criminal code, a conviction of a felony will not be sustained where the defendant enters his objection after the verdict, unless the record affirmatively discloses that the accused was arraigned, and that he pleaded to the information or indictment before the trial. *Barker v. State*, 54 Neb. 53; *Browning v. State*, 54 Neb. 203.

ERROR to the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

S. D. Killen, for plaintiff in error.

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

HAMER, J.

The plaintiff in error was tried in the district court for Gage county and found guilty of burglary in breaking into a car belonging to the Rock Island Railroad Company and in stealing therefrom ten sacks of sugar of the value of $61, the property of Eugene S. Stevens. The petition in error alleges that section 448 of the criminal code was disregarded in the trial because the accused was not arraigned. That section reads: "The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged." Attention is also called to that part of section 451 of the criminal code which provides: "If upon the arraignment the accused offer no plea in bar, he shall plead 'guilty' or 'not guilty;' but if he plead evasively, or stand mute, he shall be taken to have pleaded 'not guilty.'" This court in *Barker v. State*, 54 Neb. 53, held that section 448 of the

criminal code must be complied with and could not be disregarded.

In *Browning v. State,* 54 Neb. 203, the former opinion is followed by an exhaustive opinion containing many authorities. The opinions referred to were delivered by Judge NORVAL. Since the delivery of these opinions, the legislature has been in session several times and has not repealed the sections in question. If it had desired to repeal the same, it would no doubt have done so. It is argued with a considerable degree of force in the brief of the attorney general that the defendant could waive the statute, and that he has in effect done so by neglecting to raise the question before his trial and conviction. The sections quoted seem to place the burden upon the court to make a record and show that the provisions of section 448 have not been disregarded. In the face of these sections of the criminal code, we are without power to declare the trial a valid and proper trial, although we may feel that no actual injury has been done to the defendant.

In *Barker v. State, supra,* it is said in the fourth paragraph of the syllabus: "A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial."

In *Browning v. State, supra,* it is said in the third paragraph of the syllabus: "When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraigning the accused, entering his plea, and causing the jury to be resworn and the witnesses to be re-examined." In the body of the opinion in the *Browning* case it is said: "This court held, in *Barker v. State,* 54 Neb. 53, that it was indispensable to the validity of a conviction of a felony that the record affirmatively show the accused, before trial, was arraigned, and that he pleaded to the information or indictment, or, in case he stands mute or refuses to plead, that the court enter the plea of not guilty for him. A re-examination of the

question satisfies us that the conclusion then reached is sound and should be adhered to." The court then cites a long list of cases, after which it remarks: "There are a few decisions which hold that an arraignment and plea may be waived by the prisoner in all except capital cases, but such decisions, for the most part, were rendered under statutes different from ours." It is further said: "The object of requiring an arraignment and plea in a criminal case is to inform the accused of the nature of the charge against him, and to make up an issue for trial. Until a plea of not guilty is entered, there is no issue of fact for the jury to determine. * * * There can be no valid trial for a felony without an arraignment and plea before the trial is entered upon."

In Clark, Criminal Procedure, sec. 128, it is said: "In the arraignment the defendant must be called to the bar of the court, the indictment must be distinctly read to him, and he must be asked whether he pleads guilty or not guilty. If he stands mute, and obstinately refuses to answer, a plea of not guilty is entered for him by the court. * * * Not only is the arraignment necessary, but the plea is equally so, for without a plea there can be no issue to try."

In 2 Bishop, New Criminal Procedure (2d ed.) sec. 733, subd. 4, it is said: "Without plea, there can be no valid trial. It is so even though the defendant went voluntarily and without objection to trial, knowing there was no plea. It must be before the jury are sworn; afterward, the plea is too late."

If we apply the rule as above laid down to the instant case, it must be said that, as the defendant did not have the complaint read to him and did not plead to it, therefore no issue was ever tried.

In *Bowen v. State,* 98 Ala. 83, the court said: "The record nowhere shows that the defendant pleaded to the indictment, or that the court interposed the plea of 'not guilty' for him, or that issue was joined on plea." The judgment was reversed.

In *People v. Corbett,* 28 Cal. 328, it is said: "A verdict, in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon."

In *Bowen v. State,* 108 Ind. 411, the court said: "Where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous, to say the least."

In *Parkinson v. People,* 135 Ill. 401, it is said in the first paragraph of the syllabus: "The arraignment and plea of the defendant * * * are essential to the forming of an issue, without which there is nothing to try, and nothing on which to base a verdict or judgment."

In *State v. Ford,* 30 La. Ann. 311, it is said in the syllabus "that a plea on his behalf should be filed to the indictment found against the accused, that the failure to file such a plea will vitiate the proceedings, and justify the setting aside of the verdict."

In *Jefferson v. State,* 24 Tex. App. 535, it is said in the body of the opinion: "It is nowhere made to appear that the defendant pleaded to the charge in the information, nor that a plea to the same was entered for him. Without a plea there was no issue to try."

In *State v. Vanhook,* 88 Mo. 105, it was said of the failure to arraign the defendant: "This is a fatal error, and it is for the legislature, and not for this court, to change the law on the subject."

In *Wilson v. State,* 42 Miss. 639, the court said: "The defendant cannot waive his arraignment, nor can he plead by attorney. The plea by attorney is no plea."

In *Crain v. United States,* 162 U. S. 625, it was said: "Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try."

So far as we have made an examination of the cases cited by the attorney general, there is a difference in the

proceedings or a difference in the statute, so that the cases are not in point.

Section 448 of the criminal code is not applicable to indictments and informations for misdemeanors. The section itself specifically provides that the arraignment may be waived in such cases. That the legislature intended that there should be no waiver in case of indictments and informations charging felonies is apparent from the language of the section. If we disregard the expressed will of the legislature, we substitute the views of the court in place of the legislative enactment. This we decline to do.

In the face of the uniform holding of this court, supported as it is by the great weight of authority, we do not feel like overruling the decisions of the court contained in *Barker v. State* and *Browning v. State, supra.* The judgment of the district court is reversed and the case remanded.

REVERSED.

FAWCETT, J., concurring.

The language of section 448 of the criminal code is plain, unambiguous, and mandatory, and the construction placed upon it in *Barker v. State,* 54 Neb. 53, and *Browning v. State*, 54 Neb. 203, is clear and explicit. If the code is to be amended, such amendment should be made by the legislature, and not by the court.

SEDGWICK, J., concurring.

I concur in this decision solely because it seems to be required by the statute, which will admit of no other construction, and the statute was enforced in an early decision of this court which has been subsequently followed. Many courts that adopted such a technical rule in the absence of a controlling statute have since changed their views, and I think have done wisely in so doing. When the defendant is prosecuted by information and not by indictment, a copy of the information is required by our statute to be served upon him before the trial. He is al-

ways represented by counsel; there is nothing secret or hidden in the proceedings taken against him in open court, and if he goes to trial without objection, and does not ask for any further information as to the charge against him until after the trial is over, and he has been fully heard upon all matters alleged and urged against him, it seems unreasonable to set aside the whole proceeding upon an immaterial technicality. The court, however, is powerless to remedy the matter. The statute is unequivocal. It says (criminal code, sec. 448): "The accused shall be arraigned by reading to him the indictment." This is followed by the provision that, *in case of misdemeanor,* it may be waived by the accused. This provision, as a part of the same section, that it may be waived in misdemeanor cases makes it conclusive that the legislature's intention was that it could not be waived in felony cases, and, although this plain statute was reluctantly enforced by the court many years ago, the legislature is manifestly satisfied with the technical rule which it has established. No change and, so far as I know, no attempt to change the statute has been made. If the statute was at all ambiguous, and would admit of any other construction, the court might conclude that a rule more in harmony with the policy of the courts in modern times was intended by the legislature. But as it is, if the court should overturn this rule, it would be the rankest kind of judicial legislation. The decisions of courts in other jurisdictions where the legislature has not decided the matter are of no use in ascertaining the duty of this court under this statute and those long-standing decisions enforcing it.

LETTON, J., dissenting.

I most earnestly dissent from the conclusion in this case. It seems to me to be a blind adherence to a bad precedent, and that the court now has an opportunity to take a better stand.

The record shows that an information was filed charging the appellant with burglary; that a true and certified copy of the information was served upon the accused; and that at his request the case was continued to the next term of court. At the next term defendant again requested and procured a continuance, and at the next succeeding term the cause was tried. Instruction No. 2 states to the jury that the defendant "has been arraigned on said information and has pleaded not guilty," etc., but no journal entry shows this to be the case. Not until after the verdict of guilty had been rendered was the complaint made that he had not been arraigned. So far as the journal shows, the only thing lacking was the reading aloud of the information in open court, and the request for him to plead. The trial was conducted in all respects as if this had been done. I cannot agree to the doctrine that one who for months before the trial had been in possession of a copy of the information with the names of the witnesses indorsed thereon, who repeatedly requests and secures continuances, appears with his counsel on the day of the trial, takes part in selecting and impaneling the jury, and thereafter produces witnesses in his own behalf, and submits his case to the jury after argument by his counsel, has not waived the formality of having the information read to him and an entry made by the court that he pleaded not guilty, or stood mute. It seems to me that such a rule permits and encourages trifling with the administration of justice. Of course, the reason for arraignment is to let the accused be fully informed as to the charge which he is called upon to meet, but this had already been done by the service of the information upon him. The accused has suffered no injury to any substantial right, and his conviction should not be set aside for the lack of such an empty form. The more modern and better rule is announced in a very recent case in Michigan, *People v. Weeks*, 130 N. W. 697 (165 Mich. 362): "The presence of accused in court through a trial of a felony case upon the merits, repre-

sented by counsel, who failed to call attention to the omission of arraignment and plea, was a waiver of accused's right thereto."

It is true that in the *Browning* and *Barker* cases this court, some 15 years ago, adhered to the doctrine established in the days when the accused seemed to have no rights, when the whole machinery of the law seemed designed for the purpose of conviction, and when courts were prone to establish technical rules, and require strict compliance therewith, in order to aid persons probably innocent, but handicapped in their defense, and subject to harsh punishment out of all proportion to the gravity of the crimes charged. But, the more modern and sounder doctrine also finds support in this court in the case of *Allyn v. State*, 21 Neb. 593. It is true that the conviction was for a misdemeanor, but in support of the decision the case of *State v. Greene*, 66 Ia. 11, where the accused was convicted of a felony, is quoted from at length, apparently with approval, and Maxwell, Criminal Procedure, p. 541, is also quoted, a portion of the excerpt being as follows: "A party who personally and by his counsel voluntarily goes into court, practically on a plea of not guilty, should not, after verdict, be permitted to assign as a reason for setting aside the verdict that he was not asked to say whether he was guilty or not guilty before the trial. He has had the benefit of the plea of innocence in his favor and has been prejudiced in no right." Before the *Barker* case was decided, many courts took the contrary view to the rule then stated. Since that time other courts have seen the light and have declined to adhere to decisions so contrary to the spirit of the reformed procedure.

The supreme court of Wisconsin, in *Hack v. State*, 141 Wis. 346, directly overruled several cases in that state holding to the ancient rule. In the opinion of Chief Justice Winslow, and the concurring opinion of Justice Marshall, sound and weighty reasons are given for the decision. I commend a reading of these opinions to those interested in the question.

It is given, in the majority opinion, as one of the reasons for the conclusion that the sections of the criminal code prescribing that the accused shall be arraigned, and the manner of entering his plea to the indictment, have not been repealed, though the legislature has been in session several times since the *Barker* and *Browning* cases were decided. This argument is fallacious. No one contends that these sections should be repealed. They apply to the trial of all classes of criminals subject to prosecution by indictment, but the accused, at least in cases not capital, should be held to have waived these, as he may other requirements of the criminal code.

WALTER J. DAMRON, APPELLEE, V. MARY E. NOBLES, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,072.

Sales: BILL OF SALE: CONSTRUCTION: REVIEW. A written bill of sale, which described the property sold as "all of the furniture and furnishings in all the rooms (except room No. 10, and except one carpet and one bed) on the second and third floors of the building, No. 229 North Eleventh street," was construed by the district court as reserving all the furniture in room numbered 10, and, in addition thereto, reserving a carpet and bed in other parts of the house; that the only ambiguity was in the identification of the carpet and bed so reserved, and to which, over defendant's objections, the proof was limited upon the trial. *Held*, That under the oral evidence it does not sufficiently appear that the holding was erroneous.

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

Talbot & Allen, for appellant.

R. H. Hagelin and *F. C. Foster*, *contra*.

REESE, C. J.

This is an action in replevin whereby plaintiff seeks

the possession of a "brass bed and one carpet, a green Wilton rug, 12x15 feet, of the value of $30." It is to be inferred, though not shown by the record, that the suit was commenced in one of the courts having justice of the peace jurisdiction, and taken on appeal to the district court, where a jury trial was had, resulting in a verdict and judgment in favor of plaintiff. Defendant appeals.

It appears from the record before us that, on and prior to the 29th day of December, 1909, plaintiff was conducting a rooming house in the city of Lincoln, and on that date consummated a sale of certain of the furniture and furnishings therein to defendant. A bill of sale was prepared, signed by plaintiff and his wife, and delivered to defendant, who, on the first of January following, took possession. The property sold is described in the bill of sale as "all of the furniture and furnishings in all the rooms (except room No. 10, and except one carpet and one bed) on the second and third floors of the building, No. 229 North Eleventh street, Lincoln, Nebraska, together with the sign on the front of said building, as set out in the inventory attached hereto and made a part hereof." There is no inventory attached to the contract shown in the record, nor is there any proof as to the floor on which room numbered 10 is situated. The result of the suit hangs upon the construction to be given to this description of the property sold. It is conceded by both parties that the description is ambiguous. By reason of that ambiguity the parties are involved in this suit, which must be a losing one to both. It is claimed by plaintiff that all the furniture and furnishings in room numbered 10 are reserved to plaintiff, and in addition thereto a carpet and bed "on the second and third floors" of the building, while it is insisted by defendant that the contract should be so construed as to except only the carpet and bed in room numbered 10. The trial court apparently adopted the view that there was no ambiguity in the provisions regarding the contents of room numbered 10, holding that all in that room was reserved, that there was no

ambiguity in the clause reserving a carpet and bed, but that the ambiguity was as to which particular carpet and bed were reserved. The jury were instructed, "as a matter of law, that the bed and carpet *sold* would be one not contained in room No. 10;" that they were to determine by their verdict "whether the bed and carpet replevied are the ones agreed upon by the parties as the ones reserved by the plaintiff;" that, if they were, the finding should be in his favor; thus shutting out all defenses except that one question. Accepting the language of this carelessly and defectively written description of the property intended to be sold as that which is to govern, we cannot say but that the holding of the court was correct, although the testimony was conflicting. On the day preceding the one on which the contract was executed, and on the day when defendant, with plaintiff, inspected the property to be sold, and when the alleged reservation was first orally made, plaintiff gave written instructions to his agents to sell his entire holdings in the rooming house, saying, "We reserve the furniture in the room now occupied by us. Will give immediate possession on delivery of the bill of sale and receiving the $500 and secured papers for balance," etc. The price in this written authority was $1,400, and the sale was made for $1,435. The reservation contained in this written authority of the room occupied by plaintiff referred to room numbered 10, and no other or different one. This paper, however, was excluded by the court, on the ground that it was sought thereby to vary the terms of the contract. There was no error in this ruling.

While the writer does not fully agree with the holding of the trial court, it is probable, all things considered, that the court did not err, and that the judgment should be affirmed, which is done.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM HOLLINRAKE, APPELLANT, V. JOHN F. NEELAND ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,437.

Injunction: REMEDIES AT LAW: POSSESSION OF REAL ESTATE. A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate.

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

Allen G. Fisher and *William P. Rooney,* for appellant.

Edwin D. Crites, contra.

BARNES, J.

This action was commenced in the district court for Dawes county to obtain an injunction restraining defendants from trespassing upon a certain tract of real estate situated in that county. A temporary injunction was allowed, but upon the final trial of the cause the injunction was dissolved and the plaintiff's action was dismissed. Exceptions were taken, and plaintiff has appealed.

Among other errors complained of, it is contended that the court erred in permitting defendants to answer while in contempt for a violation of the temporary order of injunction. It is a sufficient answer to this assignment to say that there seems to be no adjudication in the record that defendants were guilty of a violation of the injunction. Again, it was in the discretion of the district court to allow defendants to file an answer to plaintiff's petition, and it is not claimed that the court abused its discretion.

The other assignments of error may be disposed of under the general contention that the court erred in giving the judgment against the plaintiff.

It appears from the record that plaintiff, in April, 1901, leased the half section of land on which the alleged trespass was committed from the state, the same being known as school land; that the rest of the school section was leased from the state by defendant John F. Neeland (the other defendants having disclaimed any interest or liability to the plaintiff in this action); that the land upon which the alleged trespass was committed was uninclosed prairie land, without trees or cultivation of any kind, and was wholly in a state of nature; that it was entirely surrounded by the land owned or leased by defendant; and it also appears that it was leased of the plaintiff by the defendant about the year 1901, who took possession of it, and who appears to have held over under his lease up to the time of the commencement of this action; that defendant has paid the rent reserved by plaintiff in full up to the month of June, 1910, either voluntarily or by the payment of a judgment recovered by plaintiff in the justice court of said county. Plaintiff claimed that he had terminated defendant's lease prior to the commencement of this action by serving him with a notice to quit; but the record contains no competent evidence tending to establish that fact. It is not claimed that plaintiff was in actual possession of the land, but it is insisted that he was entitled to such possession. It clearly appears that the land in question was surrounded by a large body of other land owned or leased by the defendant, which is inclosed by fences and was used as a pasture for defendant's cattle; that defendant has never driven nor herded his cattle upon the plaintiff's land; but it seems clear that defendant's stock has, at will, run thereon. Upon this evidence the district court held that plaintiff was not entitled to invoke the aid of a court of equity to restrain the alleged trespass.

The land in question was actually in the possession of the defendant. It was within the inclosure used by him as a pasture for his cattle. Plaintiff had leased it to the defendant for a year, and plaintiff says that defendant held

it from year to year thereafter. Plaintiff had received the rents and profits therefor up to June, 1910, and this suit was commenced in July of that year. Even if defendant's possession of the land was wrongful, the plaintiff was not entitled to an injunction, the effect of which would be to remove him therefrom, in the absence of a showing that the ordinary remedies at law, such as ejectment, or forcible detainer, would be unavailing. There seems to be no reason why one or the other of those remedies could not have been employed in the case at bar.

For the foregoing reasons, it is apparent that the judgment of the district court was right, and it is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ELEONORE BUTSCHKOWSKI, APPELLANT, V. WILLIAM BRECKS, APPELLEE.

FILED OCTOBER 31, 1913. No. 16,632.

1. **Courts**: CONSTITUTIONAL LAW: TREATIES. Under section 2, art. VI, constitution of the United States, "all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary, notwithstanding."

2. **Pleading**: JUDICIAL NOTICE: TREATIES. State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence.

3. **Appeal**: QUESTIONS REVIEWABLE. Questions presented as to the rights of the husband of a deceased nonresident alien in lands lying in this state not having been presented or decided in the district court will not be decided here, but the cause will be remanded for further proceedings.

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

S. L. Geisthardt, L. H. Cheney and *E. P. Pyle,* for appellant.

W. S. Morlan and *Lambe & Butler, contra.*

LETTON, J.

The plaintiff brought this action seeking to partition certain lands in this state. She alleged that Frederick Brecks, the owner of the land, died intestate leaving surviving him as his only heirs the plaintiff, who is his sister, and the defendant, William Brecks, his brother, a resident of this state; that by the laws of this state the property descended to the heirs at law, and that she claims an undivided half interest in the land as one of the heirs. The defendant answered that the plaintiff is a nonresident alien, a citizen and resident of Prussia, and therefore had no interest in the land. Plaintiff replied admitting that she was a nonresident alien, as alleged. A motion for judgment on the pleadings was filed and argued, and the case taken under advisement. An amended reply was then filed without leave of court, pleading a treaty between the United States and Prussia, by the terms of which citizens of Prussia are entitled to sell and withdraw the proceeds of real estate which they would inherit if citizens of the United States. At the next term there was filed a motion to strike the amended reply, which was sustained for sufficient reasons. In passing upon the motion for judgment on the pleadings, the court stated the issues as above, and said: "In this condition of the pleadings there was no attempt on the part of the plaintiff to claim under or by virtue of any treaty or other agreement in any way superseding said statute; but, on the contrary, the petition discloses that she claimed only under the laws of this state. The motion of defendant for judgment on the pleadings is, therefore, sustained." The plaintiff's cause of action was then dismissed, and the title was quieted in the defendant. An appeal was perfected to this court. The plaintiff afterwards died. A motion was

made to revive the cause in the name of Herman Butschkowski, the husband of the deceased, which was sustained and the cause revived, leaving the question open as to the property right of the survivor. *Butschkowski v. Brecks*, 93 Neb. 604.

We will first consider whether the court erred in its judgment on the pleadings. This seems to depend upon whether the court will take judicial notice of the existence of a treaty between the United States and Prussia, or whether it is necessary for one who seeks to take advantage of the provisions of a treaty to plead the same.

Section 2, art. VI, constitution of the United States, declares: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary, notwithstanding."

It has been repeatedly declared that treaties are the supreme law of the land, and that a self-executing treaty requires no legislation to put it into operation. *Yeaker's Heirs v. Yeaker's Heirs*, 4 Met. (Ky.) 33, 81 Am. Dec. 530; *Cunard Steamship Co. v. Robertson*, 112 U. S. 580, 5 Sup. Ct. Rep. 247. And statutes have often been declared void so far as in opposition to the terms of a valid treaty. *Baker v. City of Portland*, 5 Saw. (U. S. C. C.) 566; *Fisher v. Harnden*, 1 Paine (U. S. C. C.) 55. A treaty giving citizens of a foreign country the right to take lands by descent in this country is superior to and controls any state legislation against the holding of lands by aliens. *Kull v. Kull*, 37 Hun (N. Y.) 476; *Hauenstein v. Lynham*, 100 U. S. 483; *In re Stixrud's Estate*, 58 Wash. 339; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 232. See, also, a full collection of cases on this subject contained in Ann. Cas. 1912 A, 1101, annotating *Ahrens v. Ahrens*, 144 Ia. 486.

In *Cunard Steamship Co. v. Robertson, supra*, the

court, after quoting the constitutional provision before referred to, say: "A treaty, then, is the law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

Schultze v. Schultze, 144 Ill. 290, 19 L. R. A. 90, was an action for partition. The complainant was a resident of Bremen, and several of the defendants were citizens of this country. One of the defendants answered that the complainant was a nonresident alien, and that by a statute of Illinois such an alien was not capable of acquiring title to the lands in that state. So far as the report shows, no reference was made in the pleadings to the existence of a treaty. Both the lower court and the supreme court of Illinois held that, under the treaty, the plaintiff could recover, and that its effect was to suspend for three years the operation of the alien law of Illinois, so that nonresidents might dispose of the property and withdraw the proceeds. It will be seen that the pleadings in that case are substantially the same as in the case at bar. See, also, *Ex parte McCabe,* 46 Fed. 363, 373; Bliss, Code Pleading (3d ed.) sec. 185.

We reach the conclusion that it was no more necessary to plead the terms of the treaty than it would be to plead the terms of a domestic statute, or a provision of the constitution of this state or of the United States. Article XIV of the treaty of 1828 between the United States and Prussia provides: "And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exempt from all duties of detraction, on the part of the government of

the respective states." When the facts brought the case within the provisions of this treaty, it was the duty of the court to enforce its terms just as fully as those of a statute of the state. In so far as the local statutes are in conflict with the treaty, the provisions of the treaty must govern. We are satisfied, therefore, that the court erred in entering judgment upon the pleadings against the plaintiff.

A further question, however, has arisen since the death of plaintiff. Her husband is in this court setting up a property right in the land by virtue of a paper in the nature of an agreement between husband and wife with respect to the descent of their respective separate property. It is unnecessary to set out the instrument at length. Nothing has been produced showing that the instrument is of any validity, or that it can operate in any manner to transfer the property rights of Mrs. Butschkowski in the real estate to her husband on her decease. Furthermore, an affidavit in the record on the motion to revive seems to show that the plaintiff died in 1911. By section 1 of the decedent act of 1907 (laws 1907, ch. 49: Ann. St. 1907, sec. 4901), the real estate of deceased persons shall descend: "Fourth. One-half to the husband or wife if there be no child, nor the issue of any deceased child or children, surviving. Fifth. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving." Under these provisions of the statute, it may be that the husband of deceased is entitled to a portion of the real estate in controversy by descent. The questions as to the effect of the writing mentioned or as to the heirship of the husband are not before us, but should be presented in the proper forum.

For these reasons, we deem it proper to reverse the judgment and remand the case to the district court, with

directions to permit the parties to make up issues as to the property rights of the husband, and to take such other steps as may be deemed necessary to establish the same, if any he may have.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CARR & NEFF LUMBER COMPANY, APPELLEE, V. PETER KROGH, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,353.

Mechanics' Liens: TIME FOR FILING. Where a tenant, in June, 1909, purchased, under authority previously given by his landlord, material for the erection of a barn and the repair of a house and fence upon the landlord's property, which material was furnished in that month, the fact that in the latter part of September the landlord authorized the purchase of other material to be, and which was, used in making a potato cellar does not operate to extend the time for filing a lien for the material furnished in June to four months from the last delivery under the September contract.

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

Williams & Williams, for appellant.

G. J. Hunt, contra.

LETTON, J.

Action to foreclose mechanic's lien. The petition alleges that between June 12, 1909, and November 8, 1909, the plaintiff, under a verbal contract, delivered to defendant certain building material to be used in the construction and repair of a dwelling house, barn, potato cellar, and other buildings upon defendant's premises; that a lien was duly filed within four months of the time

of furnishing the material. An itemized account is attached to the petition. The defendant denies that he ever bought or ordered of plaintiff, or that he was ever furnished, any lumber or building material of any kind prior to the 28th of September, 1909, but admits that the material alleged to have been purchased from that time to November 8, 1909, inclusive, was sold and delivered to him. He admits the filing of the lien, and pleads that he was then indebted to plaintiff in the sum of $97.70, which he has since fully paid.

The real controversy seems to be as to whether the purchase of the items furnished before September 28 was authorized by the defendant. It is undisputed that the material furnished was used in making improvements upon defendant's farm. The testimony shows that plaintiff furnished the material at the request of one Farmer, who was defendant's lessee. Farmer testifies that at the time he leased the land Krogh directly authorized him to procure the material used in building the barn and repairing the house and fences upon the farm. These items were all furnished in June, 1909. This is corroborated by other witnesses, who testified, with respect to admissions made by Mr. Krogh, that he had told Farmer that he would stand good for the lumber and material he got that was necessary to use on the place. There is other testimony that, when presented with a bill for the whole amount of material furnished, he said: "That is all right; he had given Mr. Carter an order for some lumber, and when he got through with it he would settle the whole thing." While denying authority to Farmer to buy the specific items in the bill, Krogh himself testifies: "I did tell Mr. Wiggins at that time that I had told Mr. Farmer I would pay for all the lumber he had ordered that was necessary on the place." There seems to be no dispute but that all material ordered was used upon the farm. The only other matter that is in controversy is whether the material furnished in June was furnished under a separate contract from that furnished in September. If so, then the

purported lien filed upon the premises was filed more than four months after the furnishing of the material, and is therefore void.

While we agree with the district court, upon conflicting evidence, that the purchase of the material in June was authorized by Mr. Krogh, still we find no evidence in the record that authority was then given to Farmer to purchase material for the potato cellar. The undisputed testimony shows the material for the house, barn and fence was all that was embraced in the June contract. This being so, we are of opinion that the four months' time in which to file a lien for the June bill expired before December 31, 1909, when the lien was filed, and that the court erred in holding that a lien attached for the amount of the June bill, since all other items are shown to have been paid.

The judgment and decree of the district court is therefore modified by setting aside that portion which finds that plaintiff is entitled to a lien upon the premises, but in all other respects the judgment is affirmed; all costs in this court taxed to appellee.

AFFIRMED AS MODIFIED.

REESE, C. J., BARNES and HAMER, JJ., not sitting.

OSCAR TALCOTT, APPELLANT, V. CHARLES W. RICE ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,370.

Malicious Prosecution: DIRECTING VERDICT: EVIDENCE. In this an action for malicious prosecution, the district court directed a verdict for defendants and dismissed the action. *Held*, That since the evidence fails to disclose the existence of malice or the want of probable cause the judgment was right.

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

Nelson C. Pratt, for appellant.

W. W. Slabaugh, contra.

LETTON, J.

This is an action for malicious prosecution. In 1909 the plaintiff was the owner of a pool hall in the village of Valley, the defendants Coy, Byars and Butts were members of the board of trustees, and defendant Rice was marshal of that village. The petition charged that the defendants caused a complaint to be filed against the plaintiff in the county court of Douglas county, which contained three counts, the first two charging him and two others with unlawfully keeping intoxicating liquor for the purpose of sale without a license, and a third count charging that about March 12, 1909, the plaintiff and the same persons unlawfully sold to one James Snodgrass one quart of whiskey without having obtained a license; that the complaint was signed and sworn to by the defendant Rice on the advice and connivance of the other defendants maliciously and without probable cause; that they caused a warrant to issue and the plaintiff to be arrested; that plaintiff appeared for a preliminary examination, and that after a full and complete hearing he was acquitted and discharged. He avers that he was innocent of the charges, and that he has been greatly injured in his credit and reputation, and has been damaged in the sum of $7,000.

The answer of each defendant pleads his official station, his duty to maintain the peace and dignity of the village and to enforce the laws and ordinances of the village relating to the sale of malt, spirituous and vinous liquors, and that the complaint was filed with probable cause and without malice. After the evidence had been adduced, the district court, on motion of defendants, directed the jury to return a verdict in their favor, which was done and the cause dismissed at the plaintiff's cost. The motion for a new trial and assignments of error made

here are substantially for the reasons that the court erred in directing a verdict, and in excluding evidence that the reputation of the witness Snodgrass for truth and veracity was bad at the time he made certain statements to the defendant Byars.

The question which lies at the root of the whole matter is whether the evidence was sufficient to require the submission of the case to the jury.

The undisputed testimony shows that plaintiff conducted a pool hall in the village from November 13, 1908, to April 20, 1909. In connection with the pool hall he sold confectionery, cigars and soft drinks, and had a card table at which chips were used in playing. In March, 1909, a complaint was sworn to by one Harrier and a search warrant issued against plaintiff, but the officers found no liquor except a small amount of whiskey in a quart bottle. This complaint was dismissed for a defect therein. A second complaint was filed and sworn to by Harrier. Defendant Rice, as marshal, was the official who made the search. He arrested defendant on that complaint, but found no liquor at that time, and the defendant was discharged. A third complaint was filed that day by Rice himself, which is the prosecution on which this action is founded, charging Oscar Talcott, Peter Sawyer and Joseph Loretz, instead of Talcott alone. A hearing was had upon this latter complaint, and the defendants were discharged for want of probable cause.

Plaintiff testified that he had not kept liquor for sale in the pool hall, nor at any other place, and that he did not sell intoxicating liquor in the pool hall nor authorize anyone to sell liquor for him, and quite a number of witnesses testified to being in the pool hall and seeing no liquor sold there. On the other hand, the defendants each testified to many complaints being made that liquor-selling and gambling were going on at the pool hall. Mr. Byars testified that he saw a great many beer and whiskey bottles about the pool hall in the alley or back street; that a number of citizens of the village were complaining

that there were open violations every day, and that he was not doing his duty in failing to prosecute; that one James Snodgrass, a young man about 19, who had been working for Talcott, made a statement that he could give testimony that the law was being violated; that Snodgrass made a written statement and affidavit to that effect, and that one Carlson, one of the witnesses to the statement, said he could make a similar affidavit and would testify to the same effect; that other persons told him they saw a number of men come out of Talcott's place on Sunday so drunk they could hardly walk. He testified, also, to other suspicious facts coming under his own observation. Defendant Butts testified to seeing the statement made by Snodgrass, and of numerous complaints as to liquor-selling by Talcott made by other citizens. Defendant Coy testified substantially to the same purport. Each of the defendants testified that his action was without malice and in performance of what he believed to be his duty as an officer of the village.

James Snodgrass testified specifically to illegal sales by Talcott. A strong attack is made upon the credibility of his testimony, on the ground that the witness is of weak intellect and that no credence can be placed in his statements or testimony, and facts which strongly impeach his truthfulness were developed at the trial. Error is predicated upon the exclusion of evidence that the reputation of this witness for truth and veracity was bad at the time he made the statements to Byars. We think it unnecessary to consider this assignment. In considering the case, we have treated his evidence as if he had been successfully impeached.

The question remains whether, after disregarding the testimony of Snodgrass, there is sufficient in the record to show that the defendant as public officers had reasonable grounds to believe that the plaintiff had been guilty of the unlawful sale of liquor by himself or by his agents and servants. The testimony on rebuttal of a number of the witnesses for the plaintiff himself throws some light

on the question. One of these witnesses, after testifying he never bought any liquor in the pool hall, said: "I was in there one morning when the talk was had about the town being dry, and Sawyer walked to the back room, and I followed him, and there were two bottles of beer there that we drank. Talcott was not there." Another testifies that he was intoxicated in the pool hall, but also says that he got the liquor at Elkhorn and had it with him when he went into Talcott's; that the only time he ever drank at Talcott's was the time he was taken by Sawyer into the back room. Another witness testifies that he was in Talcott's one day when a Mr. Hixon came in with a bottle of beer, and said, "Have some?" that at the time he drank this beer there were several bottles in the back room; that Hixon said it was his, that he shipped it in. Sawyer says that he worked for Talcott in the pool hall; that he had a case of beer shipped in; that he took a number of persons into the back room and each drank a bottle; that he had the beer come in Talcott's name so that it would come to the pool hall and he could take it home. Talcott also testifies that he saw the case of beer that Sawyer brought there, and that at that time it only had five or six empty bottles in it; that Sawyer told him that it came in his name; and he told him not do it again; that Sawyer was in charge of the pool hall.

From all the testimony in the record we are satisfied that there were circumstances shown as to the manner of conducting the pool hall which, even if possibly they led to a wrong conclusion, were enough to justify the village authorities in attempting to stop the illegal sale of intoxicating liquors in the village; and that the evidence upon which they acted would indicate to an ordinary mind that much of the liquor was being procured at Talcott's pool hall. The testimony also shows that reputable counsel was employed and the action of defendants was taken under his advice. Considering all the testimony, while the suspicious circumstances were perhaps susceptible of explanation, we are satisfied that a case has not

been made as to the existence of malice or want of probable cause.

The district court properly directed a verdict for defendants, and its judgment must be, and is,

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

ANNIE MCNEILL ET AL., APPELLANTS, V. MATTHIAS SCHUMAKER, APPELLEE.

FILED OCTOBER 31, 1913. No. 17,380.

1. **Mortgages: FORECLOSURE: REDEMPTION: LIMITATIONS.** Where the purchasers at a foreclosure sale, which is claimed to be void on account of defective proceedings, took actual possession, claiming title, and they and their grantees have held the same adversely for more than ten years after the attainment of their majority by the heirs of the mortgagor, the right to redeem from the mortgage and to recover the possession of the land is barred.

2. **Limitation of Actions: INFANTS: TOLLING THE STATUTE.** "The fact that certain of the plaintiffs in such an action are minors, who claim title through descent, does not toll the statute, where it appears that the statute had commenced to run during the lifetime of their ancestors." *Lyons v. Carr*, 77 Neb. 883.

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

Allen G. Fisher, William P. Rooney and *Andrew M. Morrissey*, for appellants.

John J. Sullivan, James Rait and *Reeder & Lightner, contra.*

LETTON, J.

This is an action to quiet title and to redeem from a mortgage lien. Thomas O'Neill died in September, 1886, seized of 240 acres of land. Plaintiffs are his widow and

heirs. The tract of 160 acres involved in this case, with 80 acres more involved in the case of *McNeill v. Storitz*, p. 547, *post*, comprised the tract upon which O'Neill and his wife, now Anna McNeill, executed the mortgage of which redemption is sought. In 1889 the mortgage was foreclosed in an action in which the widow and heirs were made parties defendant. An order of sale was issued and the land sold to Messrs. Sullivan and Reeder on December 28, 1889. The sale was confirmed on January 27, 1890, and a sheriff's deed executed and delivered to the purchasers, which was recorded on January 28, 1890. The purchasers immediately thereafter took possession of the property, and they and their grantees have continued in the sole, open and notorious possession of the same, claiming to be the exclusive owners, ever since, paying all taxes, and making valuable improvements thereon.

The plaintiffs allege that the proceedings to foreclose the mortgage were defective and void, and that the sale was unauthorized for a number of reasons. The defendant contends that the foreclosure and sale were regular in all respects, but the only defense which it is necessary to notice is that the action is barred by the statute of limitations. The petition alleges that when the father died in September, 1886, John was of the age of 10 years and Charles was 8 years of age; that Delia was born March 6, 1883; that Mary was born in August, 1880, and Willie in May, 1886; that Mary married one Cave, and died August 1, 1900, leaving two children, the plaintiffs Ora May and Vern Cave. By these allegations it is shown that John O'Neill became of full age in 1897, and Charles became of full age in 1899. The evidence of the mother shows that Delia was born on March 6, 1882, instead of 1883, as alleged; she, therefore, attained her majority on March 6, 1900. It is also shown that Willie died in 1891, aged five years. The mother also testified that her daughter Mary was married four or five years before she died. This seems to be the only testimony in the record in regard to the date of her marriage. Under the statute her minority

terminated upon her marriage, which was at least four years before August, 1900. At that time the grantees in the sheriff's deed and their grantees had been in the actual, open and notorious possession for five or six years, claiming title. Even if we should consider that the statute did not begin to run as to Mary until she was 18 years old, instead of at her marriage, this event occurred in August, 1898; ten years from that time, or August, 1908, would be the latest date upon which a suit could have been begun by her if she still lived. She died in 1900, leaving two minor children, who are plaintiffs in this case.

It is an established principle that where the statute of limitations has begun to run before the death of a person then entitled to maintain a suit for possession, his death does not toll the statute, but it continues to run as against his heirs. *Hardy v. Riddle,* 24 Neb. 670; *Ballou v. Sherwood,* 32 Neb. 666; *Lyons v. Carr,* 77 Neb. 883. No action, therefore, would lie on the part of the Cave heirs after August, 1908. To recapitulate, the statute had run against Mrs. McNeill in 1900, against John in 1907, against Charles in 1909, against Delia on March 6, 1910, and against Mary and her heirs in August, 1908. This action was begun in November, 1910, more than 10 years after the disability of each of the surviving children and heirs of Thomas O'Neill had ceased, and more than 10 years after the statute had begun to run as against Mrs. Cave and her children. The evidence also shows that Mrs. McNeill had always asserted to the children and family that her rights in the land had never been barred, yet, with this knowledge, none of them had ever sought to disturb the hostile possession of the defendant or his grantors. While it would seem from a cursory examination of the record that the court had full jurisdiction in the foreclosure proceedings, we think it unnecessary to consider this matter, for the reason that, even if all the proceedings were void for want of jurisdiction, the right to redeem or recover the land was barred before the present action was begun.

The judgment of the district court must, therefore, be

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

ANNIE MCNEILL ET AL., APPELLANTS, V. JOHN STORITZ, APPELLEE.

FILED OCTOBER 31, 1913. No. 17,379.

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

Allen G. Fisher, William P. Rooney and *Andrew M. Morrissey,* for appellants.

John J. Sullivan, James Rait and *Reeder & Lightner, contra.*

LETTON, J.

This is a sister action to *McNeill v. Schumaker, ante,* p. 544, brought to recover 80 acres of the original 240-acre tract. The conclusion reached in that case determines the disposition of this. The judgment of the district court is

AFFIRMED.

HARRY W. SHACKELFORD, APPELLANT, V. FRANK ZIMMERMAN, APPELLEE.

FILED OCTOBER 31, 1913. No. 18,108.

Intoxicating Liquors: LICENSE: PETITION: RESIDENT. If otherwise qualified, it is not essential that the signer of a petition for a liquor license has resided in a village for the length of time required to make him a legal voter. It is essential that there be a residence in good faith, and not merely a temporary residence for the purpose of signing the petition.

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

Harry W. Shackelford, pro se.

James T. Begley and *E. C. Page, contra.*

LETTON, J.

This is an appeal from an order of the district court affirming the action of the village board of Springfield granting the applicant, Frank Zimmerman, a license to sell intoxicating liquors.

At the hearing it was stipulated that all the 31 names which appear upon the petition were upon the petition at the time of filing, except that of Mrs. Fackler, which was added on April 28, 1913; that the remonstrator is a practicing attorney of Omaha, and has never lived in Springfield or in Sarpy county; that at the last preceding municipal election the question of license or no license was submitted to a vote of the electors and the license proposition carried by the requisite legal vote.

The principal objections made are that sufficient notice of the hearing was not given, and that 30 qualified freeholders had not signed the petition. It appears that when the notice was published 30 names were signed to the petition. After the publication had been begun one signer withdrew his name, but before the license was granted the name of another qualified signer was affixed. This was sufficient. *Livingston v. Corey,* 33 Neb. 366; *In re Hartwig,* 91 Neb. 779.

After allowing the withdrawal, the names of 30 persons were left on the petition at the time of the hearing. It was stipulated that 22 of the signers were resident freeholders. This left only 8 persons whose qualifications were in dispute, whose names were numbered respectively, 1, 3, 4, 14, 20, 23, 24, 27, as they appear in the petition. The county clerk and *ex officio* register of deeds was called and asked whether he had made an examination of the

deed records of the county for the purpose of ascertaining whether or not real property in the village of Springfield stands at the present time in the deed records of Sarpy county in the names of each of 21 signers of the petition (including the eight persons whose qualifications are in dispute). He answered that he had; that this examination was made on Monday of that week, and that no filings had since been made affecting the title; that he took up each name separately and made the examination. Original deeds of real estate in the village to four of the eight persons were produced at the hearing. It was also stipulated that another was an heir at law of a deceased freeholder who died intestate seized of real estate in the village of Springfield, and that he is a resident of the village. Three others each testified that he owned real estate in Springfield, and that he was a resident of the village. It was also stipulated that the remaining signer was a resident of the village. There was no evidence on the other side. It was contended that, because one of the signers became a resident on the day he signed the petition, he was not qualified so to do. The essential qualification is *bona fide* residence, and it is unnecessary that the signer has not acquired such a residence as would permit him to be a legal voter. The evidence shows this man had long been a resident of the county and was a resident in good faith of the village.

It is true that as to one signer, who is stipulated to be a resident, the evidence as to his ownership of real estate is not of much weight, but we think that, in the absence of anything to the contrary, there was sufficient to make a *prima facie* case as to him. *In re MacRae,* 75 Neb. 757.

Considering the whole case, we are satisfied that the district court did not err in affirming the action of the village board. Its judgment is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

E. M. BERKLEY, APPELLANT, V. ANDREW J. STEWART ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 16,967.

Principal and Agent: AUTHORITY OF AGENT: PAYMENT. "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; *Walker v. Hale*, 92 Neb. 829.

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

Charles H. Sloan, Frank W. Sloan and *J. J. Burke*, for appellant.

R. D. Sutherland, D. T. Barrett, M. L. Corey, F. B. Donisthorpe, S. W. Christy and *L. E. Cottle, contra.*

ROSE, J.

Plaintiff brought this suit to foreclose a mortgage for $1,800 on a quarter-section of land in Clay county. The mortgage and the note secured were executed by Andrew J. Stewart and Ada Stewart, June 25, 1898, and were payable June 25, 1903. In a cross-bill, F. J. Walker, defendant, pleaded a mortgage on the same land for $1,200, executed by the same mortgagors, dated June 25, 1898, and payable in five years. After execution of these instruments, mortgagors transferred their interests in the land to William R. Thurber, who, with his wife, executed in favor of J. O. Walker, July 1, 1905, a mortgage for $3,000, due July 1, 1910. As J. O. Walker's assignee, the Citizens Bank of Geneva, defendant, pleaded the Thurber mortgage in a cross-bill and prayed for a foreclosure thereof. The Stewarts in their answer pleaded that they

paid to J. O. Walker, as agent of mortgagees, their indebtedness in full. The trial court found in favor of the Stewarts and canceled their mortgages. There was also a finding that a balance of $577.88 on the mortgage held by the Citizens Bank of Geneva was unpaid and a decree of foreclosure to pay the same was entered. Plaintiff and F. J. Walker have appealed.

That the debt and interest secured by the canceled mortgages were paid by mortgagors to J. O. Walker is not disputed. Were mortgagors justified in making payment to him as the agent of mortgagees? This is the controlling question. In borrowing the money the debtors dealt with J. O. Walker, as agent of the creditors. Through him mortgagees received from mortgagors several years' interest and part of the principal. J. O. Walker received also the unpaid balances due, but did not turn the funds over to mortgagees. The evidence relating to his conduct and authority has been carefully examined. Similar transactions in which he was a participant have been scrutinized by this court in other litigation. *Walker v. Hale*, 92 Neb. 829; *Walker v. Rudd*, 92 Neb. 839; *Walker v. Stewart*, 92 Neb. 845; *Walker v. Carlson*, 92 Neb. 850; *Walker v. Hokom*, *ante*, p. 399. In those cases the following rule was adopted and applied: "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.

Under the principle stated, the evidence justified the finding of the trial court that J. O. Walker was the agent of mortgagees, when he received the balances due on the mortgages canceled in the present case. The decree below is therefore AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM C. DUGGER ET AL., APPELLEES, V. ELIZA C. SMITH, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,143.

Appeal: BILL OF EXCEPTIONS: AUTHENTICATION. On appeal, a document appearing in the record as a bill of exceptions, when not authenticated as such by the certificate of the clerk of the district court, will be disregarded.

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

G. J. Hunt, for appellant.

Williams & Williams, F. A. Wright and *J. G. Mothersead, contra.*

ROSE, J.

For the purpose of burning grass and weeds in an irrigating ditch running through a meadow of defendant, she set out a fire, which spread to the lands of plaintiffs. This is an action to recover resulting damages in the sum of $393. She denied the negligence imputed to her, but the jury rendered a verdict against her for $247. From a judgment thereon, she has appealed.

The rulings assailed cannot be reviewed without an examination of the evidence. The bill of exceptions is challenged by motion, because it is not authenticated as such by the certificate of the clerk of the district court. In this respect there was a failure to comply with a mandatory provision of statute. Code, sec. 587*b*. For this reason, the evidence cannot be considered on appeal. *Union Stock Yards Nat. Bank v. Lamb*, 92 Neb. 608. The judgment must therefore be affirmed. A consideration of the testimony as disclosed by the document purporting to be a bill of exceptions would not, however, result in a reversal.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EMERSON-BRANTINGHAM COMPANY, APPELLEE, V. ROBERT MCNAIR, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,342.

Trial: DIRECTING VERDICT: EVIDENCE. **It is not error to direct a verdict for plaintiff, where the evidence is sufficient to support his cause of action, but is insufficient to sustain the only defense pleaded.**

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

Albert W. Crites, for appellant.

Allen G. Fisher, William P. Rooney and *E. G. McGilton, contra.*

ROSE, J.

This is an action to recover from defendant $342.50 for an engine plow manufactured by plaintiff. Defendant was plaintiff's agent at Crawford, and for some time had been in possession of the implement under a technical contract of agency which made him liable for wholesale prices of articles sold by him. At a time when he was authorized to return to plaintiff the plow as unsold stock, he sold it and shipped it to the purchasers, and so notified plaintiff by a letter in which he requested the manufacturer to ship directly to them some specifically described attachments. The substance of the defense pleaded is that, before the plow was sold, the agency had been terminated and defendant ordered to return to plaintiff the stock in his possession; that the goods on hand, including the plow in controversy, were prepared for shipment to plaintiff; that, before they were in fact shipped, there was an opportunity to sell the plow, and that plaintiff, upon being notified thereof, directed defendant to ship to the purchasers such parts of the plow as were in his possession, the missing parts to be shipped directly from head-

quarters; that defendant followed such directions; that thereafter plaintiff took charge of the transaction, sent experts to set up the plow and to make settlement therefor; that plaintiff credited defendant with a return of the plow. The trial court directed a verdict in favor of plaintiff, and defendant has appealed.

Defendant concedes: "The only real question in the case is whether or not there was evidence which should have been given to the jury?" The evidence shows without contradiction that, with the exception of some attachments, the plow was in the hands of defendant as plaintiff's agent; that the price, to the agent, was $342.50; that by the agent the plow was shipped from Crawford to the purchasers; that he directed plaintiff by letter to ship to them the necessary attachments; that the purchasers received the plow and attachments, but never paid for them or returned them; that plaintiff never received the purchase price; and that the property was never returned or tendered back. The correct interpretation of the contract of agency and of letters binding defendant is that he sold the goods as agent. Evidence establishing a defense without varying or contradicting writings by which defendant is bound has not been pointed out by him. Error in the record does not affirmatively appear.

AFFIRMED.

HAMER, J., dissenting.

I am unable to agree with the majority opinion in this case. The real question would seem to be whether there was evidence which required a submission to the jury. The defendant ran a retail establishment at Crawford, Nebraska. He had been the agent of the plaintiff. He had received from the plaintiff a steam plow. He was to sell the plow as the agent of the plaintiff. Before the plow was sold his agency seems to have terminated. Before the plow was shipped he got an opportunity to sell it, and thereupon he notified the plaintiff concerning such opportunity, and received directions from the plaintiff to

ship the plow, or such parts of it as were in his hands, to the proposed purchasers. He shipped such parts of the plow as he had to Kendrick & Hollinrake. They were the proposed purchasers. The defendant claims that the plaintiff took charge of the transaction; that it sent its own experts to set up the plow and to make settlement for it, and that the defendant never had any control over the matter, but that he shipped the plow as he was directed to by the plaintiff. In the brief of the plaintiff (appellee) a letter is copied on page 2. It is directed to the plaintiff company before its name was changed. It reads: "We have a chance to dispose of a part of the steam plow outfit that we were to return to you. We find in getting this plow ready to load that we are short the following parts, which you will kindly rush to Kendrick & Hollinrake, Marsland, Nebr., via B. & M." Then there is a description following, which purports to contain a list of the parts of the plow which the defendant did not have, and also certain details about other matters. It would seem to be evident that, if what was done was done under the specific direction of the plaintiff, then the defendant is not liable. The defendant, McNair, testified that he was the owner of his business at Crawford, and that he looked after things occasionally. There seems to have been evidence tending to show that the plow was sent to Marsland, or at least such parts of it as were in the hands of the defendant, and that the plaintiff sent the other parts direct to Marsland from headquarters. There was wrangling about the matter and considerable correspondence showing an attempt to settle.

In the mind of the writer the case was one eminently proper for the determination of a jury. The question is not what we would do as judges if the case had been submitted to us. The jury should have been allowed to exercise its peculiar functions. It had that right over and above the court, and it was no part of the duty of the court to take away from the jury its prerogative. The defendant was entitled to have the jury express their

opinion. If the court had overruled the plaintiff's motion for a directed verdict and the case had been submitted and the jury had found for the defendant, there would have been evidence enough to sustain the verdict. That is one of the ways by which the correctness of the ruling of the trial court may be tested when a motion for a directed verdict on behalf of the plaintiff is sustained. The courts cannot be too careful in protecting the rights of litigants. One of their rights in a law case is a submission of the facts to a jury under proper instructions of the court.

STATE, EX REL. CITY OF OMAHA, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 31, 1913. No. 17,621.

1. **Statutes:** VALIDITY: RAILROADS: CONSTRUCTION OF VIADUCTS. The statute authorizing the city of Omaha to require railway companies to construct above their tracks at street crossings such viaducts "as may be deemed and declared by the mayor and council necessary for the safety and protection of the public" is a valid exercise of police power.

2. **Municipal Corporations:** POLICE POWER: RAILROADS: VIADUCTS. Within constitutional and statutory limits, the mayor and council of the city of Omaha are the sole judges as to when and how the police power of the municipality shall be exercised in requiring railway companies to construct viaducts over their tracks where they cross public streets at grade.

3. ———: ORDINANCES: VALIDITY: RAILROADS: VIADUCTS. In considering the validity of an ordinance directing railway companies to construct a viaduct over tracks which cross a public street at grade, it will be presumed that the mayor and council acted with full knowledge of existing conditions relating to municipal legislation on that subject.

4. ———: POLICE POWER: RAILROADS: VIADUCTS: CLOSING STREETS. The city of Omaha, in the exercise of its police power, may require railway companies to construct a viaduct over their tracks, without making provision for closing the street where the tracks cross it at grade.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

William Baird & Sons, B. H. Dunham, Herman Aye and *Edgar M. Morsman, Jr.,* for appellants.

Benjamin S. Baker, John A. Rine, W. C. Lambert and *L. J. Te Poel, contra.*

ROSE, J.

Relator applied for a peremptory writ of mandamus compelling defendants to construct at their own expense on Nicholas street, in Omaha, a viaduct running east and west over their intersecting railway tracks. Defendants resist the application on the ground that the city attempted to require the construction of the viaduct without making provision for closing the street where their tracks cross it at grade. The writ was allowed, and defendants have appealed.

Was the writ properly allowed? Conforming to statutory procedure, the city, by adoption of plans, by resolution, and by ordinance, directed the railway companies to construct a viaduct on Nicholas street over their tracks, but made no provision for closing the street where the tracks cross it at grade. The plans for the viaduct require a roadway 24 feet wide and a sidewalk space 8 feet wide, the whole to occupy about half the street along the north side. A witness for defendants testified: "The plans of this proposed viaduct, so far as I know, are as well arranged as might be possible." That the structure planned would be sufficient to accommodate the traffic of Nicholas street is not questioned. Defendants admit that the grade crossing is dangerous and that a proper viaduct is essential to public safety. Did the city exceed or abuse its authority? Power to require railway companies to construct above their tracks at street crossings such viaducts "as may be deemed and declared by the mayor and council necessary for the safety and protection of the public" is

in direct terms conferred by the legislature upon the city of Omaha. Comp. St. 1911, ch. 12*a*, sec. 128. Such an enactment is a valid exercise of police power. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Phœnix Mutual Life Ins. Co. v. City of Lincoln*, 91 Neb. 150; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556; *Northern P. R. Co. v. Duluth*, 208 U. S. 583; *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380.

To justify their refusal to comply with the demands of the city, defendants argue that its action is void, because it attempted to burden them with the expenses of a viaduct which will not promote the public safety. In support of this defense they offered proof tending to show that they are willing to comply with proper plans for a viaduct; that the one planned by the city would be a detriment to them in the operation of their trains across Nicholas street, and that, to avoid inclines at the approaches and exposure to wind, rain, heat, and cold, the public would continue to use the unclosed street where it crosses the tracks at grade. What is a proper viaduct? It is not the province of the railway companies to determine that question as a police regulation. The municipal action which resulted in the demand for a highway over defendants' tracks, where they cross Nicholas street, was the exercise of police power—an attribute of sovereignty committed by the legislature to the city, but not to defendants. Within constitutional limits, the mayor and council are the sole judges as to when and how such police power shall be exercised. *State v. Withnell*, 91 Neb. 101. In considering the question presented, defendants' conception of a proper viaduct, therefore, is immaterial, except in so far as it may indicate in some way that the city abused or exceeded its authority. There is no greater merit in the assertion of defendants that the viaduct planned by the city would be detrimental to them in the operation of their trains across Nicholas street. The statutory justification for the exercise of the police power is "the safety and pro-

tection of the public." This was the primary object, rather than the convenience of the corporations which created a place of danger by crossing a public street at grade.

Would the public generally continue to use the grade crossing? Would obstructions supporting the viaduct and failure to use it make traffic on Nicholas street more dangerous than before? In attempting to answer these questions in the affirmative, defendants offered to prove that at Argenta, Kansas, where they say there is a viaduct similar to that planned by Omaha, 90 per cent. of the travel by foot and wagon crosses the railway track at grade. Proof of this nature was rejected by the trial court, but its admission and consideration would not result in a holding that the city of Omaha abused or exceeded its power. It is conceded that the viaduct planned would be sufficient to accommodate the traffic of Nicholas street. Provision has therefore been made for the safety of the public. If 90 per cent. of the people would voluntarily abandon a safe and convenient viaduct for a place of danger on railroad tracks among moving trains and engines, as defendants assert, the city would nevertheless have control of the grade crossing and of the public travel there. It would still have power to close the street and to protect the public. Its authority in that respect can neither be abandoned nor bartered away. It should not be presumed in advance that official obligations to protect the public will be neglected. Notwithstanding the offered proof, it will be presumed that the city, in passing ordinances, acted with full knowledge of the conditions relating to the subject of municipal legislation. *State v. Withnell,* 91 Neb. 101. While defendants were operating their railways at grade, industries sprung up on adjacent land. The owners thereof may have vested rights. Private individuals own real estate abutting on Nicholas street near the tracks of defendants. The closing of the street may interfere with private rights and damage private property. In passing ordinances, it was proper for the mayor and council to consider existing conditions and to relieve the city and

the defendants from unreasonable or unnecessary burdens. The consideration of such burdens may account for the present failure to close the grade crossing. The right of the city to require defendants to construct the viaduct does not depend upon the closing of that part of the street in controversy. *People v. Union P. R. Co.*, 20 Colo. 186. In *Missouri P. R. Co. v. City of Omaha*, 197 Fed. 516, a case involving a similar ordinance of the city of Omaha, Judge Hook, speaking for the United States circuit court of appeals (Eighth circuit) said: "It is also urged that the ordinance is void because the grade crossing of the railroad tracks under the viaduct was left open for travel, thereby negativing that necessity for an overhead structure upon which the power of the city depended. This is but another way of asserting that the requirement of a viaduct must be accompanied by a complete vacation or abandonment of the surface crossing—that the city is without power to require a railroad company to build a viaduct for less than all the street traffic. The contention is untenable. The necessity for the safety and protection of the public is the statutory warrant for the ordinance, but its extent is for the judgment of the municipality. Conditions might exist in which a mere foot-bridge for pedestrians would be regarded as sufficient. It is probable that in the present case the grade crossing was left for the convenience of those owning property and doing business under the viaduct and to lessen the injury to abutting property which would follow its vacation. But whether so or not, we cannot say as matter of law that an abuse of the power conferred by the statute has been shown."

The conclusion is that the writ was properly allowed.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DODGE COUNTY BANK, APPELLEE, V. COURTNEY & COMPANY, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,244.

Appeal: AFFIRMANCE: DIRECTING VERDICT. Where the record contains sufficient evidence to sustain a directed verdict, and such verdict is the only one which, under the pleadings and evidence, could be permitted to stand, the judgment rendered thereon will be affirmed.

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

Frank H. Woodland and *Carl E. Herring,* for appellant.

D. L. Johnson, H. C. Brome and *S. O. Cotner, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county upon a verdict directed for plaintiff, in an action on a promissory note, defendant appeals.

The note in suit was dated February 12, 1909, payable six months after date to the order of Courtney & Company, for $5,000, with interest at 6½ per cent., signed, "Tolf Hanson, Chas. R. Courtney," and the collection of same guaranteed by the written indorsement of the payee, Courtney & Company. The answer alleges, substantially: First. That the money which it is claimed constituted the consideration for the note in suit was loaned to A. E. Tunberg prior to the execution of the note in suit; that plaintiff loaned the money to Tunberg, and that that loan was the consideration for Tunberg's note, and is the identical money for which the plaintiff seeks to recover, all of which was well known to plaintiff; that the bank then had existing loans to Tunberg in amount of 20 per cent. of its capital stock and surplus, and, for the purpose of avoiding the banking laws, the note in suit was executed and deposited with plaintiff bank with full knowledge of all the

facts and for the purpose set out, and at the special instance and request of the bank; that Tunberg is solvent and the principal debtor for the consideration of the note in suit. Second. Want of consideration. Third. That the note is void, for the reason that it was knowingly and wilfully accepted by the bank in violation of section 3732, Annotated Statutes of Nebraska, and that the bank devised the scheme or artifice to avoid "said banking laws." Fourth. Payment in full. The reply denies all allegations in the answer not specifically admitted, and then pleads at considerable length facts and circumstances which will be substantially covered in the discussion of the case.

Defendant's brief contains no formal assignments of error, and argues but two points: That the record presents a "question of fact for submission to the jury;" and, the "law applicable." The former of these two propositions is all that need be considered, as the "law applicable" to a question of that kind is too well settled to require citation or consideration of authorities. If the case presents sufficient evidence to have sustained a verdict in favor of the defendant, if one had been returned, or is not sufficient to sustain the judgment directed for plaintiff, then in either case the judgment must be reversed. Otherwise, it must be affirmed.

The rule is well settled in this state that a trial court is not required to submit a case to the jury, unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it. *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8; *Iowa Hog & Cattle Powder Co. v. Ford,* 87 Neb. 708. This rule applies as well to a defense tendered by answer as to a cause of action tendered in a petition. The execution and delivery of the note being admitted, is there sufficient evidence in the record to have sustained a verdict for defendant, had the case been submitted to the jury and such a verdict returned? In *First Nat. Bank v. Smith,* 57 Neb. 454, we held: "Where the conclusion reached by the jury was the only one permissible under the evidence, the judgment

rendered on the verdict will be affirmed." This is now the settled rule in this court, and we think it is equally applicable to a case where the record shows that a directed verdict is the only one, under the pleadings and evidence, which could have been permitted to stand. Applying that rule to the case at bar, an affirmance must follow.

A careful examination of the abstract and supplemental abstract, we think, shows, without room for reasonable disagreement, or inference to the contrary, the following facts: Plaintiff is a banking corporation located at Hooper, Nebraska. One A. E. Tunberg was a business man at Hooper and a patron of plaintiff bank. Tolf Hanson was engaged in the restaurant business in Omaha. Charles R. Courtney was a member of Courtney & Company, and the manager of its grocery business in Omaha. Hanson was a stockholder in the company, and, as stated by Mr. Courtney, was considered as Courtney & Company's best customer. Tunberg and Hanson were cousins. They were both born at the same place in Sweden, and were acquainted before they came to the United States. In 1908 Hanson had become seriously involved financially, so much so that his credit with the Omaha banks had been exhausted. Courtney was his best friend. Tunberg was his cousin. Both were men of financial standing and credit, and to them he appealed for assistance in his extremity. In response to a request from Hanson, Tunberg made a trip to Omaha. Hanson's necessities were discussed. Upon being interrogated by Mr. Tunberg as to the sum required, Hanson stated that he needed $10,000. Mr. Tunberg was unable to supply the money. After considering the matter in an effort to devise some plan by which the money might be obtained, Tunberg signed a note, dated October 1, 1908, for $10,000, payable one year after date, to the order of Hanson, with interest at 6 per cent., and Hanson gave him in exchange therefor his note for a like amount. Hanson then tried, unsuccessfully, to discount the note he had received from Tunberg at the First National Bank in Omaha. Having failed there,

Tunberg tried to secure money for Hanson from his own bank (plaintiff) at Hooper. He had already borrowed from the plaintiff all, or substantially all, that plaintiff, under the law, could lend to one person. Tunberg disclosed to plaintiff the use to which he intended to put the money, or rather the person for whom he was desiring to secure the loan. The president of the bank being absent from home, the cashier agreed to make a loan of $5,000 to Hanson upon a note to be signed by Hanson and Courtney. Thereupon Tunberg gave the bank his own note for $5,000, and obtained a draft payable to the order of Tolf Hanson for that sum, under an agreement that he would obtain the note of Hanson and Courtney and substitute the same for the note he was then giving. In accordance with that arrangement, Tunberg mailed, or personally took, the draft to Hanson, and, under date of February 12, 1909, a note for the amount of the draft was signed by Hanson and Courtney, payable six months after date to the order of Tunberg. This note Tunberg delivered to the plaintiff bank, and received from the bank the note which he had given at the time he obtained the draft. The note remained in the bank for something like two months, and until the return home of the president. When the president saw the note, payable to Tunberg and indorsed by him to the bank, he objected to it upon the ground that Tunberg, as an indorser of the note, incurred a liability to the bank, which, added to his personal obligations to the bank, would be in excess of the amount the bank could legally lend to any one person. Thereupon, the president prepared the note in suit and handed it to Tunberg, telling him to have it signed by Hanson and Courtney and indorsed by Courtney & Company, and substitute it for the note to which the president was objecting. This matter was explained by Tunberg to Hanson and Courtney, whereupon they each executed the note in suit, and Mr. Courtney executed the indorsement upon the back thereof. The note was then taken by Tunberg to the bank and substituted for the other note signed by Hanson and Courtney, in which

Tunberg appeared as the payee, and the latter note was delivered to Tunberg, who mailed it to Hanson.

In the light of these facts, defendant's contention is not sound that Tunberg was acting as the agent of the bank in obtaining the note from Hanson and Courtney, indorsed by Courtney & Company, in order to enable the bank to make an excess loan to Tunberg. On the contrary, there is no room for doubt that Tunberg was acting as the agent of Hanson, with the full knowledge and concurrence of Courtney, in an endeavor to obtain money for Hanson to help him in his hour of need. The bank knew that this money was being obtained for Hanson. It was unwilling to make any further loan to Tunberg, or to even accept him as an indorser, not because it did not believe he was solvent, but because it had already made him loans, personally, substantially up to its limit. The bank knew that it was making the loan to Hanson, and it wanted Hanson's note, with what it considered a good signer with him. It did not desire, and evidently did not think it needed, the indorsement of Mr. Tunberg. The transaction on the part of the plaintiff seems to have been a perfectly straightforward business transaction.

But, it is said by defendant that the note, so far as Courtney was concerned, was without consideration, for the reason that Hanson had already obtained the money, and that when the bank parted with the $5,000 to Tunberg, and took his note, it was a closed transaction, and therefore the note, so far as Courtney is concerned, is without consideration. This theory is not borne out by the testimony of even Mr. Courtney himself. As shown in the supplemental abstract, he testified that he signed the note payable to the order of Tunberg, on the day it bears date, in Hanson's office; that Hanson told him that Tunberg had the $5,000; that he said: "Alex got the money, but we have got to sign a note. You will do it, won't you?" He admits that at that time he saw the draft, or the paper purporting to be the draft. He testified that that was the time when Tunberg said he owed

the bank $4,000, and that the bank wanted a couple of friends to sign the note; that it would be an excess loan, and that that was "all the bank wanted us to sign the note for. He did not use the language 'excess loan,' but that is what he meant." He testified that he had had no talk with Tunberg about raising money for Hanson before February 12, the date the first note was signed, but had had lots of talks of that kind with Hanson. He then testified that four weeks later he signed the note in suit. He says that at that time he was told by Tunberg that the president of the bank, on returning from Texas, was not satisfied with the note that had been previously signed, "because it defeated the object of the note, and that he, Mr. Lyman, had made out a note and sent it down for us to execute." It is clear, therefore, by Mr. Courtney's own testimony, that the note in suit was signed with the knowledge that it was going to take the place of the note which he had signed with Hanson to Tunberg as payee, on February 12, 1909, upon which latter note he knew that at the time it was signed Hanson was receiving a draft for $5,000 from the bank. It is made clear, therefore, by all of the testimony in the case that the making and deposit by Tunberg of his individual note and obtaining the draft thereon was under an agreement that he would substitute the note of Hanson and Courtney therefor; that the note by Hanson and Courtney to Tunberg and the subsequent note by them to Courtney & Company and indorsed by Courtney & Company and delivered to plaintiff bank, and the surrender by plaintiff bank of the original Tunberg note to Mr. Tunberg, were all parts of one single transaction, that the money passed from the plaintiff bank to Hanson as a result of that transaction, and that the purpose of the transaction was to bring about that result.

In the light of these facts, no verdict could have been permitted to stand other than the one which the trial court directed.

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

CHARLES BOWERS, APPELLANT, V. JAMES RAITT ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,956.

Contracts: RESCISSION: EXCHANGE OF PROPERTY. Where a party of full age and competent to contract has full opportunity to acquaint himself as to all of the particulars of a proposed exchange of properties, and personally inspects the property, which he is about to receive in such exchange, before the exchange is made, he cannot go ahead and consummate such exchange, and then, upon ascertaining later that he has made an unwise trade, invoke the aid of a court of equity to undo what he has himself carelessly or negligently done.

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

George L. Loomis and *Courtright & Sidner,* for appellant.

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

FAWCETT, J.

This suit was instituted in the district court for Dodge county, to cancel a contract for the exchange of a note of $11,500 and certain real estate of plaintiff in Holt county for a flour mill property situated at Prague, in Saunders county. From a finding and judgment for defendants, plaintiff appeals.

The assignments of error are: (1) The court erred in finding for the defendants. (2) The finding and decree are not supported by the evidence. (3) The court erred in overruling plaintiff's motion for a new trial. (4) The court erred in refusing plaintiff permission to file a supplemental motion for a new trial on the ground of newly discovered evidence and misconduct of the prevailing party. Three points are argued in plaintiff's brief: (*a*) "Representations as to value," meaning the value of the mill property; (*b*) "representations as to profits," mean-

ing the profits which had been realized by the former owners of the mill; and (*c*) "supplemental motion for a new trial."

We will consider the last point first. The decree was entered November 19, 1910. Immediately thereafter, and on the same day, a motion for a new trial was filed. On the next day a supersedeas bond was filed. Nearly 11 months later, on October 11, 1912, plaintiff asked and was given leave to file a supplemental motion for a new trial, supported by affidavit. This motion was based upon two grounds: First, newly discovered evidence; and, second, misconduct of the principal defendants R. G. Lyon and James Raitt. The substance of the affidavit filed in support of the motion is that the defendants Lyon and Raitt and their attorneys attempted to influence the testimony of the witnesses Kastle, Wolf, and Kaspar, in that, knowing that they were material witnesses upon the part of plaintiff, they entered into a contract with the witness Kastle, by which contract defendants entered into a secret agreement with the witnesses whereby the defendants sold to Kastle the note for $11,500, which was the principal consideration of the contract between plaintiff and defendants, and agreed to take from Kastle the Texas land which defendants had traded to him in a prior deal for his interest in the mill property. On November 9, 1912, the court overruled both the original and supplemental motions. The evidence is not clear that the deal, whatever it was, between the defendants and Kastle, was of the character and for the purpose claimed; but, whether so or not, if the defendants had the thought in mind that by making such a deal with Kastle it would influence the testimony of the three witnesses named, their testimony, when called by plaintiff, must have dispelled that thought. They proved to be fair and candid witnesses, and we are unable to discover from an examination of their testimony that any one of them in any particular deviated from the truth. It is clear, therefore, that plaintiff was not prejudiced by the acts complained of.

As to the other two points, viz., "representations as to value," and "representations as to profits," we think, as the trial court evidently did, that the evidence preponderates in favor of the defendants. It would serve no good purpose to set out the testimony in full in this opinion. To sum up in a few words, plaintiff and defendants Lyon and Raitt, the agent of defendant Lyon, were all three traders of more or less experience. Plaintiff is a man over 50 years of age. Before making the trade, plaintiff and Raitt visited and inspected the mill, and on the same evening entered into the contract of exchange, from which plaintiff now asks to be released. If defendant got the better of the trade, we do not think it was by reason of any misrepresentations by, or on account of any undue influence of Raitt over plaintiff. Plaintiff had every opportunity to fully advise himself both as to the value of the mill and the amount of profits that had been earned by the former owners. If he saw fit to refrain from investigating those questions and to make the deal without doing so, it was his own fault. Where a party of full age and competent to contract has full opportunity to acquaint himself as to all of the particulars of a proposed trade, he cannot go ahead and consummate a deal, and then, upon ascertaining later that he has made an unwise trade, expect a court of equity to undo what he has himself carelessly or negligently done.

We think the judgment of the district court is right, and it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILBUR F. BRYANT, APPELLANT, V. JARED T. RUNYAN, APPELLEE.

FILED OCTOBER 31, 1913. No. 17,125.

1. **Attorney and Client**: ACTION FOR SERVICES: EVIDENCE: COMPETENCY. In an action by an attorney at law to recover for services rendered in the defense of defendant's son, who was tried upon a charge of felony, there being evidence tending to prove that defendant employed and undertook to pay plaintiff for his services, evidence that plaintiff knew when he entered upon the employment that defendant's "financial condition was good" and that the son "was financially insolvent" is competent.

2. ———: ———: ———. If in such case plaintiff testifies that before he undertook the employment the defendant told him, "There will be no fancy attorney fee paid," and "I will have the attorney fee to pay, Charlie (the son) has nothing," and the defendant testifies, admitting a part of the language so attributed to him, the defendant's testimony that "I did not at that time promise to pay him" will be regarded as defendant's construction of the words used by him, and not as a denial that he used them.

3. ———: ———: ———. If the defendant made statements to the plaintiff which under the circumstances might reasonably be construed to amount to his employment of the plaintiff, the defendant's further statements in the same connection that "I didn't want him in the case personally, myself; I didn't want him. I said Charlie (the son) wanted him all right"—should not be construed as a denial that the defendant employed plaintiff to defend defendant's son because the son wanted him to do so.

4. ———: ———: ———. Evidence tending to show that plaintiff agreed to accept the same fee that his associate counsel had accepted is not considered, since there is no evidence tending to show that plaintiff has been paid the same amount as was paid his associate, and such agreement, if proved, would not therefore justify the general verdict for defendant.

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

George W. Ayres, for appellant.

B. Ready and *Mockett & Peterson, contra.*

SEDGWICK, J.

The plaintiff brought this action to recover a balance alleged to be due him for services as attorney at law in the defense of the defendant's son, who was prosecuted upon a charge of assault with intent to murder. The jury in the district court for Cedar county found a verdict for the defendant, upon which judgment was entered, and the plaintiff has appealed.

The plaintiff testified in his own behalf, showing somewhat in detail the services rendered by him in the criminal prosecution against the defendant's son, and testified that the services rendered by him were of greater value than the amount sued for. This testimony is not denied. The plaintiff also testified that shortly before the trial of the criminal case he had an interview with the defendant, in which the plaintiff wanted to continue the criminal case over the term, and the defendant objected to its being continued. The defendant wanted an immediate trial, but the son, who was being prosecuted, was indifferent about it, and in that conversation the defendant said to the plaintiff: "There will be no fancy attorney fee paid," and "I will have the attorney fee to pay, Charlie (the son) has nothing." The defendant was also a witness in the case, and in his testimony referred to the same conversation, admitted that he told the plaintiff that there was not going to be any fancy attorney fee paid to any one, and testified: "I did not at that time promise to pay him." He did not deny that he stated to the plaintiff, as the plaintiff testified, "I will have the attorney fee to pay, Charlie has nothing," but seems to have construed this as not being a direct promise to pay him.

The defendant also testified that he told the plaintiff that "I didn't want him in the case personally, myself; I didn't want him. I said Charlie wanted him all right." He now asks to have this language construed as meaning that he himself was not to pay the plaintiff, but Charlie was to pay him. In the light of the other evidence, it

would seem rather to be properly construed that he was willing to pay the plaintiff for the services simply because Charlie wanted him, and not because he, this defendant himself, thought it was advisable to employ him.

The plaintiff, while upon the witness stand, offered to prove that he knew at the time he undertook the employment that the son was financially insolvent, and was also acquainted with the financial standing of the defendant in the case and knew that his financial condition was good. This evidence was objected to, and was excluded by the court. The evidence should have been admitted, and, in connection with other evidence in the case, as the case then stood, would have required a verdict for the plaintiff. There was no substantial defense to the plaintiff's claim.

There was some evidence tending to show that the plaintiff agreed to accept the same fee that his associate counsel had accepted, and his associate counsel accepted a less amount than the amount sued for. This issue is not very fully presented, and its importance is not considered here, because the evidence does not tend to show that the plaintiff has already received the same compensation as received by his associate counsel.

While the action was pending in this court, the defendant died, and the action was revived against his widow, Sarah Runyan.

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

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

HENRY J. DAVIS, APPELLEE, V. HENRY E. CLARK, APPELLANT.

FILED OCTOBER 31, 1913. No. 17,144.

Appeal: CONFLICTING EVIDENCE. When the trial court, without objection, submits the case to the jury upon one question of fact involved in the issues, and the evidence upon the question so submitted is substantially conflicting, a general verdict of the jury will not be set aside upon appeal to this court, unless the finding upon the issue so submitted is clearly wrong.

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

G. J. Hunt, for appellant.

Williams & Williams, contra.

SEDGWICK, J.

This action was begun in the county court, and afterwards appealed to the district court for Morrill county. The plaintiff alleged that he sold one of his cows to a butcher for $26, and afterwards the defendant claimed to be the owner of the cow, and by reason of the threats of the defendant the plaintiff did pay to the defendant the sum of $50, under duress, and asked for a judgment for the $50 and interest. The defendant alleged that the cow in question was his, and denied the allegation that plaintiff paid the money under duress. The jury rendered a verdict in favor of the plaintiff for $50 and interest, and judgment was rendered thereon, from which the defendant has appealed.

There was a large amount of evidence introduced on both sides, and apparently without objection, as to the ownership of the cow. This evidence appears not to be conclusive either way. The witnesses for the plaintiff are quite positive, and identify the cow as his. The witnesses for the defendant are equally positive, and identify

the cow as the property of the defendant. The parties both kept other stock, and it appears that it was not unusual for the animals to stray from one herd to another, so that the parties relied principally upon the brand for identification of the animal. After this animal had been slaughtered, many witnesses examined the hide, and about an equal number on each side testified positively to the brand. The question was whether the brand which they found was an "II" or a "4." It appears that the county judge and another officer had carefully examined the hide upon the trial in the county court, and they testified that it was impossible to tell whether the brand was an "H" or a "4." These witnesses were disinterested and their evidence upon this point was undoubtedly reliable. It appears, then, that as to the ownership of the animal the evidence is in doubt and the question is apparently incapable of solution. Such questions have more than once resulted in almost interminable litigation, with loss to both parties.

The court instructed the jury that "the question as to who was the owner of the animal in question, the plaintiff or the defendant, is not an issue in this case." It appears that the parties so considered it, and no objection was taken to this instruction, and no modification or explanation asked for, although the evidence is mainly directed to the question of ownership. They have not required the jury to consider the ownership of the property as bearing upon the good faith or want of good faith of the respective parties. They have tried and submitted the case upon the sole question as to whether the plaintiff paid the $50 to the defendant to avoid arrest. The court and the parties no doubt considered that it would be impossible to determine satisfactorily the ownership of the property, and that equity under such circumstances is with the party in possession, and, in order to have a speedy end to such unprofitable litigation, made the result depend upon the simple question, whether the plaintiff paid defendant the $50 as a voluntary payment on his

part or to avoid arrest and litigation. Upon this question the evidence is very conflicting. Mr. Hunt and other apparently fair and competent witnesses testified to facts indicating that the plaintiff was convinced that he had made a mistake in selling the defendant's cow, and on that consideration paid the $50, rather than because he was afraid of arrest. On the other hand, many witnesses testified to facts indicating that the plaintiff paid the money solely for the purpose of avoiding an unjust prosecution.

We cannot determine this controverted question of fact as an original question, but, the evidence being substantially conflicting, we are controlled by the verdict of the jury, and, as the result of this litigation was made to depend upon this question of fact, the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EUGENE VAN HOVE, APPELLANT, V. MARIA LEONIA VAN HOVE ET AL., APPELLEES.

FILED OCTOBER 31, 1913. No. 17,254.

1. **Parent and Child: ILLEGITIMATE CHILD: HEIRSHIP.** One not the father of an illegitimate child does not make such child his heir by marrying the child's mother and signing the marriage record in which it is recited that the "husband and wife agreed taking as their lawful children and to recognize them as such," naming the said child with other illegitimate children of the woman.

2. ———: ———: ———. The father of an illegitimate child may make such child his heir by marriage with the child's mother and adopting such child into his family; but, when the child is 20 years of age, sending such child money with which to pay passage from a foreign country, and allowing him to live in the family for a short time thereafter, is not adopting him into the

family, within the meaning of section 4931, Ann. St. 1911. It is not necessary to decide in this case whether said section applies to any other than the father of the illegitimate child.

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

Albert & Wagner and *D. A. Harrington,* for appellant.

M. F. Harrington and *Mapes & Hazen, contra.*

SEDGWICK, J.

The plaintiff seeks to establish an interest in certain real estate as the heir of August Van Hove, deceased. The district court for Boyd county dismissed his case, and he has appealed.

Plaintiff was the illegitimate son of Maria Leonia Audenaert, a citizen of Belgium, who intermarried with August Van Hove in Belgium in 1887; the plaintiff then being seven years of age. There were then two other illegitimate children of his mother, one of whom died in infancy, and the other was brought to this country by Mr. and Mrs. Van Hove soon after their marriage. They have since resided in this country, and two children have been born to them since.

The contention is that the plaintiff has been made an heir of August Van Hove under section 4931, Ann. St. 1911. The record of the marriage in Belgium recites that "The above named husband and wife agreed taking as their lawful children and to recognize them as such: Eugene Audenaert, born at Sinay, the 9th of March, 1880." The record appears to have been signed by August Van Hove, and it is contended that this satisfied the statute, which provides: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." Ann. St. 1911, sec. 4931. This record is clearly insufficient for that purpose. *Lind v. Burke,* 56 Neb. 785; *Moore v. Flack,* 77 Neb. 52.

Plaintiff remained in Belgium until he was about 20 years of age, and then came to this country and lived for a short time in the family of August Van Hove, who sent money to pay plaintiff's passage to this country. Plaintiff's passport described him as son of Van Hove. The evidence is that plaintiff was not the natural son of Van Hove, and even if he was, the circumstances are far short of establishing that Van Hove adopted him into his family, within the meaning of said section 4931. Under the laws of Belgium, which are shown in the record, it does not appear easier to establish heirship in such cases than under our statutes.

The judgment of the district court is clearly right, and is

AFFIRMED.

REESE, C. J., LETTON and HAMER, JJ., not sitting.

WILLIAM B. MILLER, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED OCTOBER 31, 1913. No. 17,377.

1. **Municipal Corporations:** ORDINANCES: PASSAGE. Under the provisions of the statute governing the city of Lincoln, when an ordinance has been read on three different days, and is then substantially amended, it is irregular to immediately pass the amended ordinance without further reading, unless such reading has first been formally dispensed with by a two-thirds vote of all members of the council. But if more than two-thirds of the members elected are present and vote for the amendment and for the passage of the ordinance as amended, the statute is substantially complied with in that respect.

2. ———: ANNEXING LAND. The statute governing the city of Lincoln provides that "territory contiguous or adjacent (to the city) which has been by act or acquiescence of the owner subdivided into tracts of not over 20 acres" may by ordinance be included in the city. Under the conditions stated in the opinion, it is *held* that the council had power by ordinance to include plaintiff's land in the city.

3. Taxation: ASSESSMENT: VALIDITY. Plaintiff being the owner of land known as "irregular tract 29," which was crossed by a boulevard of the city, sold and conveyed to the city that part thereof lying on one side of the boulevard. The part sold to the city was thereupon designated as "lot 78" and plaintiff's tract as "lot 77." Taxes were afterwards assessed against both tracts, jointly described in the assessment as "lot 29." The evidence is not definite and exact as to the acreage of either tract, nor as to the relative value thereof. *Held*, That, as it is impossible to ascertain the equitable proportion of the tax chargeable against plaintiff's tract, the assessment is void, and the plaintiff was not required to tender any portion of the tax before bringing his action to cancel the same.

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

George W. Berge and *C. J. Campbell*, for appellant.

Fred C. Foster, D. H. McClenahan and *Charles R. Wilke, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Lancaster county to enjoin the collection of real estate taxes levied by the city of Lincoln and to cancel the same. The plaintiff was the owner of a tract of land lying just outside the limits of the city of Lincoln, known as "irregular tract 29," and sold between two and three acres to the city, which was afterwards known as "irregular tract 78." He retained the remainder of 29, about 7 or 8 acres, afterwards known as "irregular tract 77." The boulevard, which is maintained jointly by the city and by Lancaster county, lies between 77 and 78. The district court found the issues in favor of the city, and the plaintiff has appealed.

1. The first contention is that the ordinance of the city incorporating lot 29 within the city is void, and therefore the plaintiff's lot is not within the city and the city is without authority to levy taxes thereon. On January 29, 1906, an ordinance, No. 359, was introduced in the coun-

cil, which was a general ordinance extending the limits of the city and including lot 29. Afterwards an amended ordinance was introduced, defining the limits of the city and substituted for No. 359. It also included lot 29, and was read on three different days, and was then amended, but no change was made directly affecting lot 29. It was then passed as amended without any further reading, and plaintiff contends that it was not "fully and distinctly read on three different days," as the statute and general ordinances of the city require, and was therefore void. The record shows that all councilmen were present except one, and that all present voted for the amendment of the ordinance, and also for its final passage as amended. Both the statute and the ordinance provided that the rule requiring reading of the ordinance on three different days shall be enforced, "unless the council shall dispense with this rule by a two-thirds vote of the members elected." Comp. St. 1905, ch. 13, art. I, sec. 73. No formal vote was taken dispensing with the rule, but more than two-thirds of all members elected voted for the passage of the ordinance. Cases are cited from the courts of New Jersey, and perhaps other courts, holding that there must be a formal vote dispensing with the rule, but this is altogether too technical for this court to overthrow the will of the council plainly expressed. The precise point has been heretofore expressly determined by this court in *Nelson v. City of South Omaha*, 84 Neb. 434. In that case the court said: "It appears to us that the passage of a formal motion to suspend the rules by two-thirds of the members of the council would have been an idle formality. Two-thirds of the council could have carried such a motion, and then a majority vote could have ordered the second reading by title."

2. The second contention is that the plaintiff's land is not "suitable for city purposes," and could not under the law be included in the corporate limits of the city. There is in the record an exhibit showing a portion of the east part of the city and some adjacent territory. This ex-

hibit is not entirely self-explanatory, and we have not been referred to evidence in the record that fully and satisfactorily explains the relation of the surrounding tracts to the city. It appears, however, that lot 29 was in the form of a square, and that Normal boulevard, above mentioned, runs diagonally through this tract. That part of the tract sold to the city lies on the south and west of the boulevard and is incorporated into the city park, so that the plaintiff's lot 77 adjoins the boulevard. On the same side of the boulevard there are several tracts of land that have been platted into lots and streets, and some of these lots are occupied by residences. There is a sewer and water-main maintained by the city through the park, both crossing the plaintiff's land. The city maintains electric lights within 400 or 500 feet of the land, and some of the platted additions on that side of the street are incorporated in the city. The statute provides (Comp. St. 1905, ch. 13, art. I, sec. 4) that "territory contiguous or adjacent (to the city) which has been by act or acquiescence of the owner subdivided into tracts of not over 20 acres" may by ordinance be included in the city. It seems clear that such tracts of land, situated with reference to the city and its advantages as this tract is, and lying adjacent to one of the principal boulevards of the city, are within the province of this statute.

3. The final contention is that the taxes in question were illegally assessed. It appears from the record that, although the city became the owner of that part of lot 29, afterwards known as lot 78, in 1906, taxes for that year and subsequent years, including the year 1908, were assessed against lot 29, although that description in 1906 had been abandoned.

The defendant invokes the principle that "he who seeks equity must do equity," and contends that the plaintiff should be required to pay that portion of the taxes for the years 1907 and 1908 which are equitably chargeable against his lot. The case of *Challiss v. Hekelnkæmper*, 14 Kan. 474, is cited as authority for this proposition. In

that case "the value of the adjacent lot was three times that of the one in controversy," and the court said: "Clearly, therefore, as taxes are based upon value, the lot in controversy should have paid one-fourth and only one-fourth of the joint tax." If that case should be followed as authority in this state, it does not control in the case at bar. We cannot find in this record a clear basis upon which to compute the portion of tax properly assessable to lot 78 and the portion assessable to lot 77, the lot in controversy. The brief for defendant states the assessed value of lot 29 for the years 1907 and 1908, and the amount of land embraced in each of lots 77 and 78, and concludes that the tax properly chargeable against each lot, respectively, would be in direct proportion to the acreage of each. But no reference is made to any evidence in the record which would establish that lot 78 within the city park is of the same value, acre for acre, as lot 77 on the opposite side of the street. On the other hand, we have observed evidence tending to show that there is such difference in the character and condition of the two lots as to render it probable that lot 78 includes more valuable land than the average of the land in lot 77. The evidence as to the amount of land in each tract, so far as it has been brought to our attention, is not definite and exact. The trial court found that "the evidence is not sufficient to determine the exact amount that should be remitted from said taxes." So far as we are advised, this finding is supported by the record. The trial court, however, concluded that, "it appearing to the court that no tender has been made by the plaintiff and no offer by plaintiff to do equity by paying whatever amount should be justly due, no equitable relief can be allowed plaintiff in the premises as to those taxes for 1907 and 1908." In this conclusion we think the court was in error. If there was no basis upon which to determine what "amount should be justly due," no such tender could logically be made. If the plaintiff's pleading and evidence established that an assessment of taxes had been made upon his prop-

erty jointly with property of the city, and it was impossible to ascertain how much of that assessment should be charged against his property, it would be idle to offer to pay such a portion of the tax as should be so charged. The trial court included in its findings the statement that "the mutilation of the tax records is disapproved of; the cancelation of a tax should be done without erasure or mutilation of the record, and should affirmatively appear on the record, so that the history of the tax will not become confused or hidden." This criticism is just, and it must be conceded by all that the loss of this revenue to the city is the fault of its officers, and not of this plaintiff. The tax assessed for 1906 was afterwards canceled by the city authorities. The taxes assessed for the years 1907 and 1908 should be canceled also.

The judgment of the district court is reversed and the cause remanded, with instructions to perpetually enjoin collection of the taxes upon the assessment complained of against lot 29 for the years 1907 and 1908, so far as the same affect lot 77.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

SIEMON GOEMANN V. STATE OF NEBRASKA.

FILED OCTOBER 31, 1913. No. 18,136.

1. **Criminal Law**: ARRAIGNMENT: WITHDRAWAL OF PLEA: DISCRETION OF COURT. The complaint in the preliminary examination for gambling, a misdemeanor, charged that the defendant committed the crime with three other persons, naming them. In the district court an information was filed charging that the defendant and two others of the three named in the complaint in the lower court committed the crime with the third party named, and correcting the allegation of the name of one of the parties. The defendant entered a plea of not guilty to the information as filed in the district court and demanded a separate trial. After-

wards defendant asked leave to withdraw his plea of not guilty for the purpose of objecting to the variance between the information and the original complaint. *Held*, That it was not an abuse of discretion of the trial court to refuse to allow the plea to be withdrawn for such purpose.

2. ———: INSTRUCTIONS: JOINT INFORMATION: SEPARATE TRIAL. When three parties are jointly charged in an information for a misdemeanor in the district court and one of them demands a separate trial, it is not error to instruct the jury that the defendant is so charged, without naming the other parties charged with him.

3. ———: ———: ACCOMPLICE. The failure to caution the jury as to the evidence of an accomplice in a misdemeanor case, in the absence of a special request so to do, is not reversible error.

4. ———: ———: REASONABLE DOUBT. In an instruction as to reasonable doubt in a misdemeanor case, the statement that a reasonable doubt "is an actual substantial doubt arising either from the evidence or want of evidence in the case" is not erroneous.

5. Statutes: AMENDMENT: CONSTITUTIONALITY. Chapter 108, laws 1887, amended section 214 of the criminal code by adding a proviso "for the recovery of money or other property lost in gambling." A similar proviso was held valid in *Perry v. Gross*, 25 Neb. 826. It is not necessary to reconsider the question in this case, since it does not depend upon that proviso.

6. Criminal Law: ASSISTANT PROSECUTOR: APPOINTMENT: DISCRETION OF COURT. It is not an abuse of discretion of the trial court in a misdemeanor case to appoint a former prosecutor, who during his term of office began this prosecution, to assist the present prosecutor in the trial of the case, for the sole reason that such former prosecutor has prosecuted a civil suit against the defendant to recover for services of another attorney rendered in this case.

7. Gaming: SUFFICIENCY OF EVIDENCE. The evidence is examined, and found sufficient to support the verdict.

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

C. H. Hendrickson and *H. E. Siman*, for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Wayne county of the crime of gambling. He asks for a reversal of the judgment upon several grounds.

1. Complaint was filed in the county court charging that this defendant did on the 23d day of December, 1911, in the county of Wayne, and state of Nebraska, "unlawfully and feloniously play with Earl Moffit and George Ghenther and Sam Miller, at a game called 'draw poker' for money, to wit, $2, by means of a certain gambling device, viz., a pack of cards." The preliminary examination resulted in holding the defendant for trial in the district court, and in that court an information was duly filed charging defendant in substantially the same words, except that Ed Moffett was named instead of Earl Moffit. A similar information was filed in the district court charging the said Sam Miller with gambling by playing with the defendant and Ed Moffett and George Ghenther, and another information charging George Ghenther with gambling by playing with the defendant, Sam Miller and Ed Moffett. Afterwards the county attorney and Frederick S. Berry, a member of the bar, appeared in open court, together with the three defendants above named, and said Berry assuming to act as attorney for the three defendants, and agreed that the three cases should be consolidated and "information shall be filed against the defendants jointly." The county attorney then filed an information charging Siemon Goemann, Sam Miller and George Ghenther jointly with gambling by playing with Ed Moffett. Except as this information charged the defendants jointly, it was in substantially the same words as each of the former informations in the district court. "And thereupon the said defendants, being in court with their counsel, in open court waive service of copies of said information, time to plead thereto, and consented to immediate arraignment thereon; whereupon said defendants

were duly arraigned by the reading of said information to them, and each entered a plea of 'not guilty' thereto."

About a year later, the case having been several times continued because of the absence of witnesses for the state, and attorney Berry having withdrawn from the case, this defendant appeared by another attorney, and asked to withdraw his plea of not guilty, and tendered a plea in abatement, which alleged that the court was without jurisdiction because "no preliminary examination has been had as by law provided." In support of this proposition, it was alleged that the original complaint in the county court charged the defendant with gambling with Earl Moffit and George Ghenther and Sam Miller, and that in the information filed in this court it was alleged that Ed Moffett, George Ghenther and Sam Miller were the parties played with. There was no allegation, nor is there any evidence that shows that Earl Moffit and Ed Moffett are two different persons. On the other hand, it appears that the same person is intended, and that there had been in the county court a mistake in his name. The trial court refused to allow him to withdraw his plea for the purpose of taking advantage of this technicality. The case had been pending for a long time and was about to be put upon trial. There is no doubt of the right of a defendant in misdemeanor cases to waive such technicality, and it was apparently in his own interest, as well as in the interest of the state, that he should do so. We think that the trial court did not abuse his discretion in refusing to allow the withdrawal of the plea for such a purpose.

2. The court instructed the jury that the information charged that the defendant "did play a game of chance, called 'draw poker,' with said Ed Moffit for money, with a pack of cards, by betting money on the result of said game." This instruction is complained of because the information alleged and the proof tends to show that, not only the defendant played with Ed Moffit, but that also two other parties named in the information joined with

him in so doing. We think the instruction was right; although the three were jointly informed against, they were not necessarily tried together, and the guilt or innocence of one of them would not necessarily depend upon guilt or innocence of the others charged with them.

3. The court also instructed the jury: "And you may give to the testimony of one witness greater weight than you do to that of a greater number of witnesses, if you deem his testimony entitled to greater weight." It is conceded in the brief that "as an abstract proposition of law" this instruction is correct, but it is contended that one of the witnesses against the defendant was an accomplice, and that the court should have so informed the jury and should have told the jury that evidence of an accomplice should be closely scrutinized. We do not find that any instruction of this nature was requested by the defendant, and the evidence in the case is not of such a character as to create a necessity for such an instruction, so as to require a reversal on account of its omission, in the absence of any request for further instruction.

4. The instruction of the court defining a reasonable doubt is complained of. In that instruction the court said that a reasonable doubt "is an actual, substantial doubt arising either from the evidence or want of evidence in the case." The instruction is quite comprehensive, and, when considered as a whole, we do not think the language complained of was misleading.

5. It is contended that section 214 of the criminal code, as amended in 1887, is unconstitutional because it contains more than one subject, and "it is in effect amendatory of other sections and acts which it does not contain."

Sections 214 and 215 of the criminal code were amended by chapter 108, laws 1887. There was added to section 214 a proviso, "to provide for the recovery of money or other property lost in gambling," and the argument seems to be that this proviso is unconstitutional. A similar proviso was held to be valid in *Perry v. Gross*, 25 Neb. 826, and it is not necessary to reconsider the question in this

case, because, even if the proviso should be found to be invalid, it cannot be found that this case depends in any way upon this proviso. This statute, as amended, has been treated as valid legislation when assailed upon other grounds. *Bowen v. Lynn,* 73 Neb. 215.

6. It is also contended that the court erred in overruling the objection to the appointment of A. R. Davis, special prosecutor in this case. The ground of this objection is that Mr. Davis represented the attorney Berry in an action which he brought against this defendant to recover attorney's fees for his services in the preliminary examination in this case. Mr. Davis, however, was county attorney at the time that the prosecution was begun, and conducted the preliminary examination for the state, and afterwards filed an information in the district court. His term of office having expired, the county attorney at the time of the trial requested the court to appoint Mr. Davis to assist in the prosecution, and we cannot find that there was any abuse of discretion on the part of the trial court in so doing.

7. The final contention is that the evidence is not sufficient to support the verdict. There is, however, no ground for this objection. Some of the parties who had been complained against testified that they were not playing poker, and were not playing for money, but were playing pitch. The evidence of Ed Moffett, who was in the game with them, was direct and positive, and was strongly supported by the officers who made the arrest and by other circumstances in the case. The question of the guilt of the defendant was for the jury, and, so far as we have found, was fairly submitted, and their verdict must be conclusive.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JAMES TOWLES, APPELLANT, V. FRANK T. HAMILTON ET AL., APPELLEES.*

FILED NOVEMBER 12, 1913. No. 17,359.

1. **Adverse Possession:** PAROL RELINQUISHMENT. Where the title to real property has been perfected by a disseizin so long continued as to take away the right of entry, and bar an action for the land, that title cannot be divested by a parol abandonment or relinquishment (see *School District v. Benson*, 31 Me. 381), unless such abandonment or relinquishment has existed through the statutory period of limitations.

2. ———. "One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter paying rent to the owner of the paper title." *Martin v. Martin*, 76 Neb. 335.

3. ———. "A possession of land, open, notorious, adverse and exclusive, indicates a claim of right, and will constitute a disseizin, unless controlled or explained by other testimony." *School District v. Benson*, 31 Me. 381.

4. **Forcible Entry and Detainer:** NATURE OF ACTION. An action for the forcible detention of real property, instituted and carried to a judgment in favor of the plaintiff in such action, who was not the owner of the legal title, and after the title has vested in the defendant therein by limitation, cannot have the effect of extinguishing the title of such defendant. The action is merely possessory, and the question of title cannot be either tried or determined in such case.

5. ———: PARTIES. The rule of the code of civil procedure that every action must be prosecuted in the name of the real party in interest applies with as much force in forcible entry and forcible detainer cases as in any other.

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

S. I. Gordon, for appellant.

Francis A. Brogan, contra.

* December 24, 1913. Order entered to reverse and remand generally, striking the specific directions; each party to pay his own costs.

REESE, C. J.

This is an action to quiet the title to lot 5, in block 318, in the city of Omaha. Since the appeal was filed in this court the plaintiff has departed this life, and the cause has been duly revived in the name of Walter Towles, his son and only heir. Reference herein to plaintiff will be to the deceased Towles. It is alleged in the petition that plaintiff "has been in the open, notorious, exclusive and adverse possession of all of the said property for about twenty-six (26) years, claiming to own the said property as his own against all persons whomsoever; that he is now in possession of the said property, and has remained continually in possession of the said property from the year A. D. 1884." It is further alleged that defendants claim some interest in the lot in question, but their rights as against those of plaintiff are subject to his, and are denied. Defendants answered by admitting that they claim the property, and alleging that they are the owners thereof. All other averments of the petition are denied. As an affirmative defense defendants plead the entry of a judgment of ouster at the suit of Frank Murphy against the plaintiff, rendered by the district court for Douglas county on the 8th day of November, 1902, the issuance of a writ of possession, and that on the 19th day of said month and year plaintiff was ousted from the possession of the property by the sheriff of Douglas county. Reply, a general denial. A trial was had, which resulted in a finding and decree in favor of defendants and dismissal of plaintiff's petition. Plaintiff appeals.

This being a case in equity, the law requires that the decision thereof must be without reference to the conclusion reached by the district court.

It is beyond dispute that plaintiff took possession of the lot in question in, or prior to, the year 1886, and has retained the possession thereof continuously ever since. If this possession was adverse to the true owner the title became vested in him, unless such title was destroyed by

what followed in the years 1900 and 1902. If plaintiff and his witnesses are to be believed, and they were in no way impeached, his possession was adverse, he claiming the property as the owner thereof, but without color of title. It is shown that the lot was low, some referring to it as swampy, that he made improvements thereon, by fencing it, causing the whole surface to be filled up, the depth of the filling being from six inches to three or four feet, that he raised hogs and chickens, had a barn thereon, and annually cultivated it as a garden, raising vegetables for family use, etc., his house standing in part at least upon the lot and part upon the adjoining lot owned by him, the two lots being inclosed as one property, and the two used as his home for himself and family.

A number of witnesses testified to his declarations while in possession that he owned the lot, and he testified that his possession during the whole time was as owner. In the year 1900 he was called upon and requested to go to a bank in the city to see Mr. Frank Murphy about the lot, and it is said that both on the way to the bank and in the presence of Mr. Murphy, the attorney for Mr. Murphy and another he declared that he had no claim on the lot; that it was suggested to him that he accept a lease for one year, to which he agreed; that a lease in duplicate was prepared by Murphy's attorney, both being signed by Mr. Murphy and by plaintiff, who signed by making his mark; that one copy was delivered to Mr. Murphy, the other to plaintiff; that the consideration for the lease was one dollar, but plaintiff had no dollar, and the other person present, who was a witness on the trial, offered plaintiff the dollar, which was accepted, the dollar being passed to him, which he in turn handed to Mr. Murphy, when Murphy passed it back to the witness who had "loaned" it to plaintiff. The witness testified that Murphy "got it (the dollar) across the table, and after a while why—he knew I was around there like I am today, not very much money—I think he slipped me the dollar before I went out, and I went off," and thus the dollar was im-

mediately returned to the place from which it came. It is conceded that the lease, if made, was made in the name of Murphy as lessor, and that Murphy had no interest in the lot, and never has had. Unfortunately he died before the case was tried, and his evidence could not be had, but it is said that the then owner of the paper title to the property was his sister, and he had the general management of her property. How this was is not clearly shown. All the testimony as to plaintiff having made any admissions against his interest, and that there was any lease ever made, is denied by him. He testified that no dollar was given him, and he signed no papers. Strict search has been made through the papers and effects of Mr. Murphy since his decease, but no lease of the kind referred to has been found, nor was such a lease ever recorded. So far as is shown by the evidence, such a lease has never been seen subsequent to the time it is alleged to have been made. At the time the lease is alleged to have been given by Mr. Murphy he not only was not the owner of the lot, but there is no proof in the record that he had legal authority to execute such a lease. It may be further observed that at that time plaintiff, by all the evidence upon the subject, had been in the possession of the property for at least 14 years, which was four years more than the statutory period of limitations. If his possession was adverse, the title had before that time become fully vested in him, and his acceptance of the lease or the payment of rent could not divest him of that title. *Martin v. Martin*, 76 Neb. 335, and cases there cited. See *Woodcock v. Unknown Heirs of Crosby*, 92 Neb. 723. It is elementary that where the title has become fully vested by disseizin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed. *School District v. Benson*, 31 Me. 381. We therefore conclude that from any point of view, whether a lease was made or not is not a material matter.

It must be apparent that the writ of possession offered in evidence, issued in a cause when Mr. Murphy was plaintiff and this plaintiff was defendant, with the return of the sheriff thereon, can have no effect upon the solution of this case. Murphy was not the owner of the land, had no interest in it, and, so far as is shown by this record, was not a proper party plaintiff. The rule of the code that every action must be prosecuted in the name of the real party in interest applies with as much force in forcible entry and detainer cases as in any other, but, even had that suit been prosecuted in the name of the real party in interest, the probative effect of the record offered in evidence could amount to little or nothing in this case, as the question of title could not be litigated nor tried therein, and the result could accomplish nothing more than had he voluntarily, without suit, removed himself, family and effects to other property. In that case if defendants, or any other, had taken possession, plaintiff could have ousted them by law on the ground that the title was in him.

The decree of the district court is reversed and the cause is remanded to that court, with directions to reinstate the case and enter a decree quieting plaintiff's title in the property as prayed for in the petition, taxing all costs to defendants.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. FRANK W. HOLLINGSWORTH, APPELLEE, V. ALVIN H. ARMSTRONG, MAYOR, ET AL., APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,432.

Appeal: MOOT QUESTION: DISMISSAL. The supreme court will on its own motion dismiss the respondents' appeal from an order of the district court requiring the respondents to reinstate relator's saloon license, where the record shows that the term for

which the license was issued has long since expired, and that during its existence appellants made no motion to advance the case for determination. *Heesch v. Snyder*, 85 Neb. 778.

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

Fred C. Foster and *D. H. McClenahan,* for appellants.

T. J. Doyle and *E. J. Murfin, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county, rendered July 30, 1911, granting to relator a peremptory writ of mandamus requiring the respondents to assemble and reinstate a license previously granted to him to sell intoxicating liquors in the city of Lincoln, Nebraska.

The license expired in May, 1912, and no one will be benefited or injured by the decision of this case. Why it is being prosecuted we do not understand, because no motion was made to advance the case, and, the license having expired, the case now presents a moot question only for our consideration. We have steadfastly refused to decide such questions, and we do not feel called upon to make an exception in this case. *Heesch v. Snyder*, 85 Neb. 778; *Brown v. Buckley,* 86 Neb. 572.

We therefore decline to pass upon the question presented, and the appeal is

DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CUSHING STATE BANK, APPELLEE, V. ROBERT SALING, APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,436.

Appeal: CONFLICTING EVIDENCE. Where a case is tried by a jury on conflicting evidence, the supreme court will not set aside the verdict and grant a new trial, unless the verdict is against the clear weight of the evidence, and is manifestly wrong.

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

T. T. Bell, and *W. A. Prince,* for appellant.

F. J. Taylor and *W. H. Thompson, contra.*

BARNES, J.

The plaintiff brought this action on a promissory note given by the defendant to the plaintiff bank for the sum of $50. The defendant admitted that he gave the note in suit to plaintiff and that it had not been paid, and by way of a set-off alleged in his answer that plaintiff was indebted to him in the sum of $250 for one-half of the commission in a real estate transaction where the defendant procured a purchaser for land the plaintiff had for sale, under an agreement that the plaintiff would give the defendant one-half of its commission for procuring a purchaser for the land. The plaintiff admitted that the land was sold to the party the defendant claimed to have procured, and that plaintiff's commission amounted to something like $500, but denied any agreement to divide the commission with defendant. The verdict was against the defendant on his set-off and in favor of the plaintiff upon the original cause of action. Judgment was rendered on the verdict, and the defendant has appealed.

It is the sole contention of counsel for the defendant that the verdict of the jury was not supported by the evidence, and should have been for the defendant for the dif-

ference between the amount due on plaintiff's note and defendant's set-off, and that the district court erred in overruling the defendant's motion for a new trial. It is conceded in the brief filed by defendant's counsel that the evidence, on the question of the defendant's set-off, was conflicting; but it is argued that, notwithstanding such conflict of evidence, the verdict was clearly wrong. As we read the record, it seems clear that there was a sharp conflict in the evidence relating to the question of any agreement of the plaintiff to divide the commission for the sale of the land in question with the defendant. In fact the defendant's witnesses testified positively that they, the officers of the bank, never had or made any agreement with the defendant in relation to the division of commissions on the sale of any real estate. The defendant's cashier, with whom defendant claimed the agreement was made, denied positively that he ever had any talk or consultation with the defendant in relation to the sale of land or the division of commissions. On the other hand, the testimony of the defendant was, in substance, that there was an agreement with the defendant's cashier by which there was to be a division of commissions, and some evidence was produced tending to some extent to corroborate the defendant's testimony, but on the whole there was such a clear and direct conflict of the testimony as would warrant the jury, if they believed the plaintiff's evidence to be true, in returning a verdict against the defendant on his counter-claim. It follows that, under such circumstances, this court is not warranted in setting aside the verdict of the jury and granting a new trial.

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

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

EDWARD WESTOVER, APPELLEE, V. ABRAHAM L. HOOVER ET AL., APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,990.

Limitation of Actions: AMENDMENT OF PETITION: NEW CAUSE OF ACTION. When this action was commenced it was brought and was tried on the sole theory of a failure of a master to provide a safe place for his servant to work. Plaintiff recovered, and on appeal to the supreme court it was held that the relation of master and servant did not exist between plaintiff and defendants at the time the plaintiff received his injuries. When the cause was remanded to the district court the plaintiff filed an amended petition eliminating the allegations relating to master and servant, and alleged that plaintiff was working for an independent contractor at the time he was injured, and was on the defendants' premises by their invitation; that he received his injuries by reason of defendants' negligence as inviters upon their premises. *Held*, That the amended petition having been filed more than four years after the plaintiff's injuries occurred, the cause of action stated therein was barred by the statute of limitations.

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

E. C. Strode, Jesse L. Root and *M. V. Beghtol,* for appellants.

E. P. Holmes and *G. L. De Lacy, contra.*

BARNES, J.

This case is before us on a second appeal. Our former opinion is reported in 88 Neb. 201, where the facts of the case are fully stated, and, except such of them as may be necessary to a determination of this appeal, will not be repeated in this opinion.

The former appeal resulted in a reversal of the judgment of the district court, and when the cause was remanded for further proceedings the plaintiff amended his petition and sought a recovery on the ground that, while he was employed by an independent contractor, he was at

work upon the defendants' premises by invitation, and was injured by the negligence of the defendants in not furnishing a safe place to work, in not having the premises sufficiently lighted, and by negligently failing to warn the plaintiff of the dangers there existing by reason of the installation and operation of an ice machine in close proximity to the place where the plaintiff was working. Among other defenses the defendants pleaded the statute of limitations. On the second trial the plaintiff had the verdict and judgment, and the defendants have appealed.

It is contended that the court erred in not sustaining the plea of the statute of limitations, and in not directing a verdict for the defendants. When this action was commenced it was one to recover for personal injuries alleged to have been sustained by the plaintiff while in the defendants' service on account of having been set to work by one De Vore, the defendant's foreman, in an unsafe place containing an ice machine in operation, the premises not being properly lighted, the machine being composed in part by a piston and revolving wheel, which was left unguarded, and no warning was given to plaintiff as to the danger, by reason of which his heel was caught and crushed by the revolving wheel and piston. The case was tried upon that theory, and there was no suggestion that the defendants had incurred any other liability than that of a master to his servant. On the former appeal it was held that the relation of master and servant did not exist between the plaintiff and the defendants at the time when the injury was sustained, and for that reason the judgment of the district court was reversed and the cause was remanded for further proceedings. When the mandate was returned to the district court the plaintiff amended his petition by eliminating the allegation that he was defendants' servant at the time he received his injuries, and there was substituted the allegation that plaintiff was working for an independent contractor, and was upon the defendants' premises by their invitation; that he was injured by their negligence, as above stated. The amended

petition was filed more than four years after the plaintiff sustained his injuries, and, if in effect it stated a new and different ground of recovery, then the bar of the statute was complete, and the trial court should have directed a verdict for the defendants in compliance with their request.

In support of their contention the defendants cite the case of *Johnson v. American Smelting & Refining Co.*, 80 Neb. 250. In the opinion on a rehearing in that case (p. 255) the rule contended for is stated as follows: "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged."

In an opinion by the present chief justice of the United States in *Union P. R. Co. v. Wyler*, 158 U. S. 285, the effect of a departure from the theory first presented in an action is discussed, and, in disposing of the argument that all the facts necessary to entitle the plaintiff in that case to recover were alleged in the original petition, it was said: "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law."

Martin v. Pittsburg R. Co., 227 Pa. St. 18, was an action brought originally to recover for the death of the plaintiff's husband. The negligence charged was shown to be unfounded, and it was held that plaintiff could not amend by setting up a different theory charging different negligence after limitations have become a bar. Where an action is brought to recover for the death of a person, not an intending passenger, at a street crossing, and the evidence shows no negligence on the part of defendant

railroad company, an amended statement alleging that the person injured was an intending passenger will not be allowed after limitations have become a bar.

Allen v. Tuscarora V. R. Co., 229 Pa. St. 97, was an action brought by a brakeman against a railroad company for injuries received while coupling cars. The original statement was in trespass at common law alleging that the injuries were caused by defendant's negligence in using a coupler more dangerous than the ordinary coupler employed by railroads. An amendment alleging that the defendant was, at the time of the injury, engaged in interstate commerce, with its cars equipped with couplers in violation of the act of congress, March 2, 1893 (27 U. S. St. at Large, ch. 196, p. 531), making it unlawful for a carrier to use cars in interstate traffic not equipped with automatic couplers, and providing that employees injured by a car or train not so equipped shall not be deemed to have assumed the risk occasioned thereby, was held to set up a new cause of action which was barred by the statute of limitations. It was there said: "A departure in pleading may be either in the substance of the action or defense, or in the law on which it is founded."

In *Elrod v. St. Louis & S. F. R. Co.,* 113 Pac. 1046 (84 Kan. 444), the court held: "Where, in an action for injuries to a licensee, there was no allegation that defendant was negligent in failing to light its depot platform, the petition could not be amended so as to charge such failure as a ground of negligence after limitations had run against it."

Chicago & A. R. Co. v. Scanlan, 170 Ill. 106, was an action for injuries caused by the falling of a scaffold. The original declaration averred that the scaffold fell owing to its faulty construction. An amended declaration, filed after the statute of limitations had run, charged negligence in overloading the scaffold. It was held that this stated a new cause of action and the statute was a bar.

Where a complaint set up simple negligence, or wilful,

wanton or reckless conduct on the part of the defendant, and an amendment charged that the damages were caused by wilful, wanton or reckless conduct on the part of the defendant's servant, the court held that the amendment set up a new ground of liability, and, in determining whether the action was barred by limitations, the time should be calculated up to the date of filing the amendment. *Freeman v. Central of G. R. Co.*, 154 Ala. 619, 45 So. 898.

In *Whalen v. Gordon*, 95 Fed. 305, Judge Sanborn, writing the opinion, said: "An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegation in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required in his pleading to state the facts which constitute his cause of action."

Appellant also cites the case of *Van de Haar v. Van Domseler*, 56 Ia. 671. In that case the original petition charged the defendant with seduction, and the amended petition charged him with rape. It was there held that as there was but a single transaction there could not be but a single cause of action, and as the charge of rape was made for the first time when the amended petition was filed, such cause of action was barred, and the demurrer correctly sustained. That case has been cited a great many times under decisions on this subject, and the reasoning there seems applicable to the case now under consideration.

In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, it was said: "What is a cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action. * * * The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other, *and these appear by the facts of each separate case.*" It was further said: "In an action to recover damages for negligence, 'the cause of action,' as used in pleading, is not the injury wrongfully inflicted through defendant's negligence, but is the fact or facts that justify the action, or show the right to maintain it." On page 258 of the opinion, it was said: "The cause of action in any case embraces not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action." This appears to be a true definition of a cause of action, and a cause of action has never consisted simply of negligence or duty or injury standing alone. All of these three things must be combined, and when one of the elements of the combination is charged a change takes place in the cause of action itself. This rule is followed in *Langenfeld v. Union P. R. Co.*, 85 Neb. 527, where it is said: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure." In this case the original petition stated a cause of action against the defendants based on a violation of their duties as master. The violation of those duties constituted the cause of action. In the amended petition the attempt to recover upon that basis and for a violation of that duty was abandoned, and necessarily so, otherwise a directed verdict would have resulted. A new and different duty measured by other and different rules

is claimed to have been violated by the defendant under the amended petition, and the recovery is sought for a violation of those duties and obligations against the defendants as the owners of the premises and inviters to the plaintiff, Westover, as an invitee. It will not be claimed that a petition could present both causes of action, and that the two causes of action could be tried and submitted to the same jury. The time came when the plaintiff was obliged to choose between an attempt to hold the defendants for a violation of their duty to him as his master, and for a violation of their duty to him as the owner of the premises extending to him an invitation thereon. In the first case he attempted to recover because he was injured, and because of a violation of the duties of the defendants as master to plaintiff as their servant. In that cause of action he failed, and in the present case he seeks to recover because he was injured, and because of the violation of the duty of the defendants as owners of the premises and inviters, and himself as invitee. The cause of action resulting from the violation of that duty was not presented until more than four years after it had accrued, if it ever existed.

Counsel for plaintiff cite and rely largely upon *Gatta v. Philadelphia, B. & W. R. Co.*, 24 Del. 293, 76 Atl. 56. In that case the original petition alleged that the decedent was an employee of the defendant railway company, and a recovery was sought on that theory. An amended petition was filed alleging that plaintiff's intestate was not an employee of the defendant company, but was an employee of the Pullman company, and that the defendant was engaged in hauling the cars of the Pullman company, and charged negligence because the defendant did not warn plaintiff of the movement of the cars. It was held that the new petition did not state a new cause of action because it did not involve any change in the subject matter of the action, but was merely a variation in stating the cause of action, and corrected a misdescription of the same cause of action; that the imperfect state-

ment of the cause did not cause the correct statement of it to be a different cause of action, and did not convert the original suit into a new and different one, and therefore the plea of the statute of limitations was overruled.

We think that case is fairly distinguishable from the one at bar; but it may be conceded that there is a division of the authorities upon this question, caused largely by the language of the codes of the different states relating to the question of amendments. But, so far as we have been able to review the authorities, it seems clear that the great weight of authority sustains the contention of the defendants that the amended petition stated a new and different cause of action, and the new cause of action was barred by the statute of limitations.

It follows that the plea of the statute should have been sustained, and the jury should have been directed to return a verdict for the defendants. By thus disposing of the main question presented by the appellants, a discussion of the other errors assigned are rendered unnecessary.

The judgment of the district court is reversed, and the plaintiff's action dismissed.

REVERSED AND DISMISSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

STATE OF NEBRASKA V. FRANK T. FREIBURGHOUSE.

FILED NOVEMBER 12, 1913. No. 18,052.

Intoxicating Liquors: INDICTMENT: DUPLICITY. Under the provisions of section 8, ch. 50, Comp. St. 1911, each act of selling any of the liquors named in the section, as well as the act of giving away any of them to a minor, is a crime. An indictment which charges in the same count the selling and giving to a minor any of the liquors named in the section is defective, and it is not error to sustain a motion to quash the indictment for duplicity. *State v. Pischel*, 16 Neb. 490; *Smith v. State*, 32 Neb. 105.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Exceptions overruled.*

Alden C. Plantz and *M. F. Harrington,* for plaintiff in error.

Roscoe L. Wilhite and *Fisher & Rooney, contra.*

BARNES, J.

It appears that at the April, 1913, term of the district court for Sheridan county there was returned by the grand jury an indictment containing ten counts each, charging that one Frank T. Freiburghouse, at the dates and times therein specified, did unlawfully sell and give to certain minors, named therein, spirituous and intoxicating liquors, the defendant then and there being a person licensed to sell such liquors within the village of Rushville, in Sheridan county, Nebraska. To this indictment a motion to quash the several counts contained therein because the same were "duplicitous," among other things, was sustained. The county attorney excepted, and has brought his exceptions to this court.

In *State v. Pischel*, 16 Neb. 490, it was said: "Under the provisions of section eleven of the license law of this state, each act of selling any of the liquors named in the section is an offense, punishable by indictment. An indictment which charges the selling and giving away of all the liquors named in the sections with a continuando, *held* bad."

The question was again before the court in *Smith v. State*, 32 Neb. 105. In that case Judge NORVAL wrote the opinion, and it was there held: "Under the provisions of section 11 of chapter 50 of the Compiled Statutes, each act of selling any of the liquors named in the section, as well as the act of giving away any of them without a license so to do, is a crime. An information which charges in the same count the selling and giving away of two or more of the liquors named in the section is defective, and

is liable to a motion to quash"—citing *State v. Pischel,* 16 Neb. 490. That decision contains our last expression on the question presented by the exception.

It is contended by the county attorney that in *Johnson v. State,* 88 Neb. 328, a different rule was established. We do not so understand that case. There the defendant was indicted for a violation of section 6 of the criminal code, and it was there said: "An indictment under section 6 of the criminal code should not charge in the same count that the defendant used and employed, and advised to be used and employed, instruments to procure an abortion, but such an indictment is not demurrable for duplicity, since the allegation that defendant advised such instruments to be used and employed does not state an offense without alleging that some person other than the defendant committed the act; it is immaterial that the defendant advised the act which he committed himself, and such allegation should be rejected as surplusage."

Again, it is clearly provided by section 8, ch. 50, Comp. St. 1911, that to sell intoxicating liquors to a minor is an offense, and it is equally clear that it is made an offense to give such liquor to a minor. Therefore an indictment which charges both the selling and giving of such liquors to a minor in the same count is "duplicitous," and the charge is also uncertain in its effect.

Many cases from other jurisdictions are cited in support of the exception, and we think it may be conceded that if the question were now before this court for the first time the indictment might not be held to be "duplicitous;" but we decline to overrule *State v. Pischel,* and *Smith v. State, supra,* and thus sustain the exception. The practice seems to have been well settled and thoroughly understood by the district courts of this state, and it would hardly be fair to the trial court to establish a new rule at this time. Therefore, in view of the situation, the exceptions are not sustained.

EXCEPTIONS OVERRULED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

VALPARAISO STATE BANK, APPELLANT, V. JUL PETERMICHEL ET AL., APPELLEES.

FILED NOVEMBER 12, 1913. No. 17,355.

1. **Husband and Wife**: TRANSACTIONS BETWEEN: BONA FIDES: EVIDENCE. Where the undisputed evidence shows that a judgment debtor is in possession at his home, and in such control of money in the form of bills that his wife, at his express direction, deposits a part of it as indemnity for his release on bail, and his wife afterwards, in a controversy with his creditors, claims that the money is hers, but does not so testify, the principle that transactions between husband and wife by which creditors are prevented from collecting their just dues will be scrutinized closely, and proof of their *bona fides* required, will be applied.

2. ———: ——: EVIDENCE. In such a case, *held* that the dominion and control over the fund exercised by the husband establishes *prima facie* his ownership of the money, in the absence of any evidence to the contrary.

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

E. J. Clements, for appellant.

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

LETTON, J.

This is an action against garnishees on account of unsatisfactory answers in garnishment proceedings. The appellant is a judgment creditor of C. J. Schwartz. On August 30, 1909, an execution was issued on the judgment, which was returned unsatisfied. On the same day an affidavit in garnishment was filed, and a summons in garnishment issued and served on the Oak Creek Valley Bank and Jul Petermichel as garnishees. On November 22, 1909, the bank and Petermichel appeared as directed, and answered as garnishees that they had no money or property of C. J. Schwartz in their possession or under their control. On August 28, 1909, C. J. Schwartz, who

is the husband of the appellee, Betty Schwartz, was arrested, charged with a violation of the liquor laws of the state, and was taken by the sheriff to Wahoo, the county seat. At the time of his arrest he desired to give bond, and in the presence of the sheriff he called Mr. Petermichel, who is the cashier of the Oak Creek Valley Bank at Valparaiso, by telephone, told him he was under arrest and had to give a $500 bond, and asked Petermichel to furnish it. Mr. Petermichel testifies that he told him he could not do so unless Schwartz put up a cash deposit; that Schwartz then told him to see Mrs. Schwartz; that he went to see her at the restaurant in Valparaiso, which was the home of Mr. and Mrs. Schwartz; that Mrs. Schwartz went into the back room of the restaurant, and brought in and handed to him a roll of bills of about $550; that he took $500, and returned the balance to her. He further testified that at the time the summons in garnishment in this case was served upon him he still had the $500 in his possession. On cross-examination he stated that it was after Mrs. Schwartz talked to her husband over the telephone that she procured the money. He also stated there was no order made by the court in the garnishment proceedings, and that he had been released from liability on the bond in the criminal prosecution; that afterwards he received an order from Mrs. Schwartz requesting him to turn over to Simpson & Good the $500 placed in his hands as security as soon as he was released from liability, and that on December 14, 1909, a draft for $500 was drawn on him by Simpson & Good, which was paid and charged to his account; that he received the draft and the order from Mrs. Schwartz on the same day, and that Simpson & Good guaranteed that if he had to pay the money they would repay it to him.

The sheriff testified that he heard one side of the conversation which Schwartz had over the telephone with Petermichel and Mrs. Schwartz; that Schwartz told his wife that he had been arrested and would have to lie in jail unless he was able to give a bond; that he had spoken

to Petermichel, who had demanded indemnity, and that "he told her to go in the back room and get $500 out of the money and bring it over to the Oak Creek Valley Bank and deposit with Jul Petermichel."

Plaintiff then called Mrs. Schwartz as a witness, endeavored to elicit by a series of questions, and offered to prove, that she had the telephone conversation with Schwartz with regard to furnishing a bond, and that at his request she deposited in the hands of Petermichel $500 of his money. Objections to the questions and to the offer of proof were made on the ground that the wife was incompetent to testify against her husband; that the transaction and conversation was a communication between husband and wife, to which she is incompetent to testify during the time that the marriage relation existed. The objection and the offer to prove were sustained, to which plaintiff excepted. No further evidence was produced, and the court found for defendants and dismissed the case.

The answer of the garnishees alleges that the answers made by them in the proceedings were truthful, and that the district court made no order upon them in the case. The answer of Mrs. Schwartz pleads that she is the owner of the $500; that the money was her separate estate and did not come to her from her husband; and that the indebtedness of the other defendants created by depositing the money is due to her alone. Plaintiff's reply denied the affirmative allegations in the answer.

The appellant maintains that the uncontradicted evidence shows that the money belongs to C. J. Schwartz. He also relies upon the principle that transactions between husband and wife by which creditors are prevented from collecting their just dues will be scrutinized closely and proof of their *bona fides* required. *First Nat. Bank v. Bartlett*, 8 Neb. 319; *Lipscomb v. Lyon*, 19 Neb. 511; *Hill v. Fouse*, 32 Neb. 637.

Schwartz did not request that his wife deposit *her* money as security. He merely directed her to "go into the back room and get $500 out of the money * * *

and deposit it with Jul Petermichel." He also directed Petermichel to go to Mrs. Schwartz, who, apparently in obedience to her husband's direction, went to the back room, procured the money, and delivered it to him. The fact that Schwartz had such power and control over the money as to govern its disposition is a strong indication that it belonged to him. Apparently it was in his possession at his home and subject to his authority. Counsel for appellant suggests the query that, if he had telephoned to a son, a daughter, or an employee, the identical instructions which he gave his wife, and they had procured the money and deposited it in the same manner as Mrs. Schwartz did, no further proof being offered as to ownership, would any one question that the money belonged to Schwartz? We are of opinion that the facts related being undisputed, and no other evidence as to ownership being before the court except that Mrs. Schwartz afterwards gave her attorneys an order for it, the court erred in finding for the defendants. The fact that Mrs. Schwartz failed to testify that the money was hers is also entitled to some weight in considering this question. Her silence seems inconsistent with her claim of ownership.

Having reached this conclusion, it is unnecessary to consider the question as to whether Mrs. Schwartz was a competent witness.

Appellant takes the position that this is an action in equity which this court tries *de novo*, and that if we find the evidence is sufficient we should proceed to enter a decree in its favor. In this we think he is mistaken. An action against a garnishee for a false or unsatisfactory answer in proceedings in garnishment merely is a suit at law ancillary to the main case in which the judgment is rendered. Perhaps upon a new trial Mrs. Schwartz may be able to prove by sufficient competent evidence that the money actually belonged to her. For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings. REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

S. W. MAYNARD ET AL., APPELLANTS, V. NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE.

FILED NOVEMBER 12, 1913. No. 17,387.

1. **Eminent Domain: DRAINAGE: REMOVAL OF DAM: MEASURE OF DAMAGES.** The proper measure of damages on appeal from condemnation proceedings to remove a mill-dam is the difference between the value of the mill property before the removal of the dam and loss of the water-power and its value after the removal has taken place.

2. ———: ———: ———: ———: **PROSPECTIVE PROFITS.** Prospective profits which may in the future be derived from the use of the water-power for the development of electricity are too remote and speculative to be taken as elements of damage, where there is no proof of a present and immediate intention and purpose to make such development.

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

S. P. Davidson and *William G. Rutledge,* for appellants.

Kelligar & Ferneau, contra.

LETTON, J.

This is an appeal from condemnation proceedings brought to remove a mill-dam in the Nemaha river which was appurtenant to a small flouring mill of appellants, for the reason that the dam is so located that it obstructs the main channel of the proposed ditch improvement. Appraisers were appointed by the county court. They appraised the damages occasioned by the removal of the dam at $3,500. From this appraisement an appeal was taken to the district court, where, after a trial, judgment was rendered for the same sum.

At the trial a number of witnesses were called by appellant to testify as to the value of the dam. One Beardsley, an expert hydraulic engineer, testified that the water-

power, if it was fully developed for the generation of electric power and connections made with various towns in the vicinity, was actually worth $135,000. Another engineer, after testifying to the size of the dam, the extent of the drainage area of the stream, and the amount of power the dam would develop, was asked what the dam was worth. An objection was interposed that the witness had not shown himself competent to answer, and that the question was irrelevant, immaterial and incompetent. The objection was sustained. Appellants then offered to prove that the value of the dam, estimated from the amount of power it produced at the normal flow of the river and with the development existing before its removal, was $35,000. This testimony was excluded. Appellants also offered testimony to show that the additional cost of running the mill by steam power over the cost of running it by water-power for each year would not be less than $1,425, as affording a basis upon which to estimate the value of the dam. The exclusion of this evidence is the chief complaint of appellants.

The determining question is what is the proper measure of damages for the removal of a dam which is appurtenant to a flouring mill. The rule which seems to have been adopted by most courts is the difference between the market value of the property before the power is destroyed and afterwards. Mr. Farnham, in speaking of the measure of damages for the diversion of waters generally, says: "If the diversion is permanent and cannot be suppressed, the measure of damages is the difference in value of the property immediately before and immediately after the diversion of the water is effected, or the value of the land with the water flowing to it and its value without such flow." 2 Farnham, Waters, sec. 510. With reference to the destruction of a water-power, the supreme court of errors of New Jersey lays down the rule as follows: "In ascertaining just compensation for the diversion of water from a mill, the difference between the market value of the mill before the diversion and its market value afterwards

is usually a simpler and safer criterion than estimates of the probable cost of producing by steam at the mill the power which the diverted water would supply, and than estimates of the probable value of the water-power at the mill, based on the rental value of power at other places more or less distant and dissimilar." *Sparks Mfg. Co. v. Newton*, 60 N. J. Eq. 399. This seems to be the general rule. *Lee v. Springfield Water Co.*, 176 Pa. St. 223; *Illinois C. R. Co. v. Smith*, 110 Ky. 203; *City of Syracuse v. Stacey*, 169 N. Y. 231, affirming 45 N. Y. App. Div. 249; *Illinois C. R. Co. v. Village of Lostant*, 167 Ill. 85. "Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted. It is not competent for the owner to show to what use he intended to put the property, nor what plans he had for its improvement, nor the probable future use of the property. Nothing can be allowed for damages to an intended use." 2 Lewis, Eminent Domain (3d ed.) sec. 709 (480).

It seems clear that an estimate of the value of the property based upon or considering as an element of value what it would be worth after costly and valuable improvements and additions had been made to it, or upon a use not contemplated by its owner in the near future, is so speculative and remote and depends so much upon other factors and contingencies that it really affords no criterion of its present value. *Illinois C. R. Co. v. Chicago*, 169 Ill. 329. It is evident that the damages cannot be more than the value of the whole property before it is interfered with by the improvement, and cannot be less than the depreciation in money value after the improvement has been made. The difference in the value of the whole property before and after the dam was taken out was the measure of damages adopted by the trial court, and this we believe to be the proper rule.

The evidence shows that the erosion of the fertile soil of the Nemaha valley and its consequent deposit in the bed of the stream has seriously interfered with the capacity of the river to furnish water-power. This fact was

taken into consideration by the witnesses for the appellee and by the court in estimating the value of the property before and after the destruction of the dam.

We find no error in the ruling of the court upon the points complained of. The judgment is supported by the evidence, and is therefore

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

COMMONWEALTH POWER COMPANY, APPELLANT, V. STATE BOARD OF IRRIGATION, HIGHWAYS AND DRAINAGE, APPELLEE.

FILED NOVEMBER 12, 1913. No. 18,116.

1. **Waters: IRRIGATION: "APPROPRIATION."** Under that portion of the irrigation statutes of Nebraska (Comp. St. 1911, ch. 93a) which deals with the procedure necessary to procure water rights after the law of 1895 went into effect, the word "appropriation," used in its strictest sense, denotes an appropriation which has been legally initiated by the filing of an application with the state board of irrigation, highways and drainage, and the granting of a permit by that body, and completed by the construction of the works as specified therein, and the application of the water to a beneficial use within the time limited in the permit, or subsequent extensions. But, while this is the meaning of the word "appropriation" when used in the statute in its most exact and proper sense, it is often more loosely used to mean the contingent or inchoate right to an appropriation and the right of priority, derived under a permit from the state board.

2. ———: ———: **APPLICATION: PRIOR RIGHT.** A permit had been granted to an applicant for practically all the unappropriated water in a stream to be used for the development of power, which permit was still in force and effect. A subsequent application for the same amount of water, to be diverted above the proposed head-gate of the prior applicant, for the same purpose, and at a point in proximity thereto, was refused by the state board, for the reason that the rights asked were approximately the same as already granted under the prior application, and in conflict therewith. *Held*, That the action of said board and of the district

court in affirming its order in the premises were justified by the facts.

3. ———: ———: PAYMENT OF FEES. Under the provisions of section 8*a*, art. II, ch. 93*a*, Comp. St. 1911, it is the imperative duty of the secretary of the state board of irrigation, highways and drainage to pay the money received for fees for filings for water to the state treasurer. No right can be predicated as against the board by reason of the secretary complying with this direction.

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

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

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

LETTON, J.

On September 30, 1912, the Commonwealth Power Company, appellant, filed its application No. 1,229 with the State Board of Irrigation, Highways and Drainage seeking to divert 2,700 second feet of the waters of the Loup river for power and other purposes, and at the same time paid the state engineer the lawful fees for such filing in the sum of $2,150. The board dismissed this application on November 25, 1912. From this dismissal an appeal was taken to the district court for Nance county, where the action of the state board was affirmed. From this judgment said company has appealed to this court.

As a result of an examination of applications previously granted for water from the Loup river for irrigation and power purposes, made by the state engineer, a citation was served upon all persons claiming a right to the waters of the river under these applications to show cause by a certain date why the permits granted should not be canceled and annulled. A hearing was had as specified. The Nebraska Power Company, appeared, claiming rights under a number of the applications. The Commonwealth Power Company, appellant, also appeared by its counsel

adversely to the Nebraska Power Company. On September 30, 1912, the whole matter was finally submitted on the evidence. On the same day the appellant filed application No. 1,229 and paid to the state engineer $2,150 filing fee. This sum was paid into the state treasury by the state engineer, as required by law, where it is still retained. On November 25, 1912, the board found that all applications under which the Nebraska Power Company claimed were lapsed, except application No. 709, as to which it found that a portion of the work had been performed. An application for extension of time having previously been filed, the board extended the time for construction under this application for six months, and provided that at the expiration of that time, if a showing was made that the project would be completed within two years of the date of the hearing, a further extension would be granted.

On the same day the board found and determined that the rights asked for under application No. 1,229 by the appellant "are approximately the same as have already been granted to the Nebraska Central Irrigation Co. (H. E. Babcock) under application No. 709 and the two are in conflict," and the application of appellant was dismissed. The record also shows that application No. 1,029 was filed with the board on September 30, 1910, by one Koenig asking for 3,200 cubic feet of water per second, taking water near the same point of diversion as applications No. 709 and No. 1,229; that, the title to application No. 1,029 being in litigation, the board took no action, leaving the matter to be disposed of after the supreme court had rendered its decision in the case.

The average flow of the Loup river for nine months in the year at and near the respective diversion points named in these applications is 2,700 cubic feet per second. The point of diversion of application No. 1,229 is a little above and the place of return of the water to the river is far below the diversion points of Nos. 709 and 1,029 so that its allowance and the completion of the work would take

all the water specified in Nos. 709 and 1,029. If the works are completed and the water applied to a beneficial use under application No. 709 within the time limited there will be no unappropriated water in the river susceptible of being granted either to Koenig or the appellant.

The appellant's contention is that there can be no appropriation until the works are completed and the water applied to a beneficial use, and that since, without taking into consideration permit No. 709, there was sufficient unappropriated water in the Loup river to satisfy the amount requested in its application No. 1,229, the board erred in refusing its application. Much of appellant's argument is devoted to establishing a proposition which needs no argument, namely, that, in cases arising under that portion of the irrigation act of 1895 which deals with water rights to be acquired thereafter, an appropriation is not perfect and complete until the works are completed and the water is applied to a beneficial use. Used in its strictest sense under such a statute the word "appropriation" denotes an appropriation which has been legally initiated by the filing of an application for a permit with the state board, the granting of a permit by that body, the construction of the works as specified therein, and the application of the water to a beneficial use within the time limited in the permit or subsequent extensions. The initial step is the application for the permit. Its issuance gives the applicant a contingent or conditional right which becomes a final and complete appropriation only when the works are completed and the waters beneficially used. It also confers upon him the prior right to the water against all subsequent applicants during the progress of the work if he finally fulfil the conditions of the permit. But, while this is the meaning of the word "appropriation" when used in the statute in its most exact and proper sense, it is often more loosely used to mean the contingent right to an appropriation and the right of priority derived under a permit from the state board. It is so used in the statute itself. In section 28, ch. 93*a*, art. II, Comp.

St. 1911, it is provided that applications to appropriate water shall upon being accepted "take priority as of date of original filing subject to compliance with the future provisions of the law and the regulations thereunder. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same by indorsement thereon, etc. * * * The priority of such appropriation shall date from the filing of the application in the office of the state board. * * * If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force." In the next section (section 29), requiring the filing of a map or plat of the work within six months from the allowance of the application, it is provided: "A failure to comply with this section shall work a forfeiture of the appropriation and all rights thereunder." In section 62, providing that the work under a permit shall be begun within six months after the approval of the application, it is also specified: "A failure to comply with this section shall work a forfeiture of the appropriation and all rights thereunder." In these sections the word "appropriation" seems to be used more loosely to denote the prior right to an appropriation which has been obtained by virtue of an application being granted and a permit issued. This is not an unusual use of the term. "'Appropriation,' as applied to water rights, is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured." 1 Words and Phrases, p. 473, and cases cited.

An applicant who obtains a permit under the statute acquires thereby a contingent "appropriation" to the extent of his grant which gives him the prior right to the use of this water against all subsequent claimants. It is in effect pledged to him for the period of time fixed by the board within which he may complete and perfect the appropriation, and is an "appropriation" to that extent, but no more.

The state board pleads that the allowance of appellant's application would be "detrimental to the public welfare," which is one of the grounds upon which it may, under the statute, refuse a permit. It no doubt considered the fact that in all probability the allowance of two or more conflicting permits to the use of all available water at or near the same point of diversion would result in defeating all projects. Capital is timid and would be very apt to be loth to enter into the development of the water-powers of the state if it were subject to the conflicts, litigation and interference with its work that would probably result if such a construction was given to the statute. The object of the law is to encourage and not to hinder the development of the state by the use of its waters for the purposes of agriculture or the generation of power, and the board was entitled to consider whether the allowance of conflicting claims to the same water at practically the same place would tend to accomplish or defeat the legislative purpose. *Young & Norton v. Hinderlider,* 15 N. M. 666, 110 Pac. 1045.

We think the board was justified in refusing to grant appellant's application, and the district court was right in affirming its order.

While it seems unjust that the state should retain the $2,150 paid by the applicant, under the provisions of section 8*a*, art. II, ch. 93*a*, Comp. St. 1911, it was the imperative duty of the secretary of the board to pay the money to the state treasurer at the end of the month. No rights can be predicated as against the board by reason of the secretary complying with this direction.

For these reasons, the judgment of the district court is

AFFIRMED.

BARNES, J., not sitting.

KATHERINE GIELEN, APPELLEE, V. CITY OF FLORENCE, APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,354.

Municipal Corporations: INJURY TO PEDESTRIAN: QUESTIONS FOR JURY. In an action against a city for damages for personal injuries resulting from plaintiff's having stumbled at night over a pile of bricks which had been allowed to remain for two weeks on a sidewalk continually used by the public, whether the obstruction existed for a length of time sufficient to charge the city with notice, whether the city was negligent in failing to restore the sidewalk to a reasonably safe condition for travel before plaintiff was injured, and whether plaintiff, who knew two or three weeks before the accident that single bricks were scattered along the sidewalk, but had no later knowledge of conditions, was guilty of contributory negligence, *held* to be questions for the jury.

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

C. W. Haller and *C. E. Herring*, for appellant.

W. W. Slabaugh, contra.

ROSE, J.

While walking on a sidewalk in Florence, plaintiff stumbled on a pile of eight or ten bricks and was severely injured. This is an action against the city to recover resulting damages in the sum of $3,000. From judgment on a verdict in favor of plaintiff for $2,900, defendant has appealed.

The principal ground urged for a reversal is that the verdict is contrary to the evidence. In discussing this assignment, defendant asserts that there is no disputed

question of fact; that the obstruction of the sidewalk was a necessary one preparatory to paving; that plaintiff abandoned a safe and direct route to her destination on the evening of the accident, and that, with full knowledge of the existing conditions at the place of the injury, she deliberately selected the route leading thereto and assumed the incidental risks, being guilty of contributory negligence.

The accident occurred on Main street after dark, March 31, 1910. For several months preceding that date all of the sidewalk along the block where plaintiff was injured, except a space about 18 inches wide, had been covered with a solid row of bricks four or five feet high. They had been piled there by a city contractor preparatory to paving Main street, which was temporarily closed between the curbs. During the winter, single bricks were scattered along the unoccupied portion of the sidewalk, though it had been left open and was continually used by pedestrians. In the daytime, two or three weeks before plaintiff was injured, she had used the same sidewalk and had observed the conditions described. In addition, there is proof of the following facts: While walking carefully on the sidewalk at night plaintiff stumbled on a pile of eight or ten bricks. The pile was a new obstruction of which she had no knowledge. She could not see it at night, because it was in the shadow of the row of bricks which partially covered the sidewalk. It was not there when she last passed that place. It had been allowed to remain on the sidewalk about two weeks. In view of such evidence, did the obstruction remain on the sidewalk a length of time sufficient to charge the city with notice? Was the city negligent in failing to restore the sidewalk to a reasonably safe condition for travel before plaintiff was injured? That these questions were for the jury is shown by many adjudicated cases. *Smid v. Mayor*, 17 Jones & S. (N. Y.) 126; *Kunz v. City of Troy*, 1 N. Y. Supp. 596; *Foels v. Town of Tonawanda*, 75 Hun (N. Y.) 363; *Briel v. City of Buffalo*, 90 Hun (N. Y.) 93; *City of Palestine*

v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147; *City of Fort Wayne v. Duryee*, 9 Ind. App. 620; *Norton v. Kramer*, 180 Mo. 536; *Wedderburn v. City of Detroit*, 144 Mich. 684; *City of Aurora v. Cox*, 43 Neb. 727.

If the row of bricks on the sidewalk was a necessary obstruction, the pile of eight or ten on the unoccupied portion was not. The evidence was sufficient to justify a finding that the city was chargeable with notice, and that it was negligent in failing to remove the unnecessary obstruction before plaintiff was injured. It should not be decided as a matter of law, therefore, that she was guilty of contributory negligence because she did not act on the assumption that the city would allow the dangerous conditions to continue an unreasonable length of time, and select a different route. She testified, in effect, that she was careful, because she had known that single bricks had been scattered along the sidewalk, but that the obstruction of a pile of eight or ten bricks was a new danger of which she had no knowledge. It follows that the trial court did not err in allowing the jury to determine the questions as to negligence and as to contributory negligence. In this view of the case the instructions are not open to criticism, though some of them are challenged as erroneous.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLES DENGLER, APPELLANT, V. FRANK FOWLER ET AL., APPELLEES.

FILED NOVEMBER 12, 1913. No. 17,373.

1. **Vendor and Purchaser:** CONTRACT: EVIDENCE. By exchange of letters in due course of mail, the writers may enter into a valid contract for the sale of land.

2. **Landlord and Tenant:** LEASES: OPTION TO PURCHASE. In a written

land lease, an option granting to lessee, upon expiration of the stipulated term, the right to purchase the land upon definite terms, is an enforceable contract.

3. ———: ———: ———: CONSIDERATION. A five-year land lease may be modified after its execution, so as to grant to lessee an enforceable option, upon expiration of the lease, to purchase the land on definite terms, and for that purpose the rentals stipulated in the original lease and the subsequent promise to pay the purchase price are valid considerations.

4. ———: POSSESSION AS NOTICE. The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge.

5. **Vendor and Purchaser**: RIGHTS OF LESSEE. A purchaser of land, in possession of a tenant who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor.

6. ———: ———. The notice imparted by a recorded lease for a five-year term does not put an end to inquiry as to the rights of a tenant who, for a long period of years, has been in possession of the demised premises, where he is conducting a store in buildings erected at his own expense.

7. ———: ———. Purchasers of land, with notice that a lessee in possession has an option to buy the demised premises at the expiration of his lease, may be required to perform lessor's agreement to convey the lot to lessee.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

Burr, Greene & Greene, F. Dolezal and *George L. Loomis,* for appellant.

Courtright & Sidner, contra.

ROSE, J.

This is a suit for specific performance of a contract obligating Martha E. Green, a resident of Utica, New York, to sell and convey to plaintiff a lot in Fremont, Nebraska. As her tenant he was in possession of the lot for many years, where he conducted a retail furniture business in a building erected at his own expense. The last

lease executed by them is in writing, is dated May 14, 1905, and is duly recorded. It covered the period from June 1, 1905, to June 1, 1910, required plaintiff to pay to lessor quarterly an annual rental of $150, and prescribed conditions under which he was permitted to remove his improvements. He is still in possession. He pleads in his petition that, by exchange of letters soon after the execution of this lease, he and lessor agreed that, upon expiration of the five-year term, she should sell and convey the demised property to him for $3,000, one-third of the purchase price to be paid in cash, and the balance to be secured by a mortgage on the premises, to be payable in 10 years, and to draw interest at the rate of 6 per cent. per annum. Plaintiff further pleads that, with knowledge of his rights, Frank Fowler, defendant, procured from Martha E. Green, lessor, April 12, 1910, in the name of his wife, Jessie Fowler, defendant, a deed to the leased lot, and that grantee holds the title subject to plaintiff's right of purchase. Defendants denied the existence of the agreement on which plaintiff relies, alleged they bought the lot in good faith from lessor for $3,600, asked to have grantee's title quieted, and demanded damages on account of the failure of plaintiff to surrender possession June 1, 1910. The findings of the trial court were in favor of defendants on all of the issues raised by the answer, and from a judgment in their favor plaintiff has appealed.

Did lessor and plaintiff make the agreement pleaded in the petition? Was there a valid consideration? Did defendants purchase the lot with notice of plaintiff's rights? These questions are to be determined from the evidence. Plaintiff insists that he proved his contract by the exchange of letters in due course of mail. A binding agreement may be thus established. *Helwig v. Aulabaugh*, 83 Neb. 542. Some of the correspondence is missing, but plaintiff testified orally to the contents of letters not produced. In the testimony the right asserted by plaintiff is frequently called an "option," and defendants suggest that the use of such a term is an intimation that no enforceable

contract was made. The suggestion, however, is not important. In equity the term employed by a party to describe a transaction is not controlling. The inquiry should be directed to what the parties agreed to do. Plaintiff testified, without contradiction, that his transactions with lessor were limited to the lot in controversy. That their correspondence related thereto will be taken for granted, since there is nothing to the contrary in the record. Plaintiff had been transacting business in the name of his wife, M. L. Dengler, and from all of the evidence it is clear that letters addressed to her in answer to his own should be considered a part of his correspondence. For 25 years lessor owned the lot, while plaintiff occupied it with his buildings and retail furniture store. When her Fremont agent presented to him for his signature a lease covering the period from June 1, 1905, to June 1, 1910, it contained a provision requiring him to vacate the premises upon 6 months' notice, in case of a sale. The evidence is conclusive that he refused to make the lease on such terms, and that he signed it after this provision was erased. On the witness-stand he said that in May, 1905, after execution of the lease, he sent a letter to lessor at her proper address in Utica, New York, containing, in substance, these words: "Have seen in lease that you want to sell the lot. Will you please give me best terms and price on the same?" In reply he received a letter directed to M. L. Dengler. It was dated May 24, 1905, and in part reads thus: "In reply to your letter would say that the best that I can do on a sale is $3,000, you to pay $1,000 down, and the other $2,000 to be covered by a mortgage. I will pay for the selling of the property. Have written Courtright & Sidner this day." The original letter is in evidence. The partners mentioned were lessor's agents for the purposes of lease and sale. She gave her deposition. It shows that she directed the writing of the letter described. Plaintiff says he made the following reply thereto, but did not keep a copy of it: "I have not got any money just now to buy lot, but will buy same after expiration of my lease. Please

give me best price and terms on same." He testified this was answered June 13, 1905, as follows, in a lost letter signed by lessor and received by him: "I will sell you lot for $3,000, $1,000 paid down, and $2,000 payable in ten years at 6 per cent. interest, and I will pay commission for selling it." He further stated that in a letter properly addressed to her and posted, he afterward wrote: "I hereby accept your offer for lot." Two witnesses testified they had seen lessor's letter containing the option which permitted plaintiff to buy the lot at the expiration of his lease for $3,000, one-third to be paid in cash, and the balance to be secured by mortgage. One of the witnesses gave the rate of interest on the deferred payment at 6 per cent. and the other at 5 per cent. To others plaintiff asserted the existence of this option before the time to exercise it had expired. While lessor contradicted testimony that the option had been given and accepted, the more convincing proofs indicate that plaintiff told the truth. His failure to produce the letter dated June 13, 1905, does not discredit his testimony, when his peculiarities and the conditions surrounding the negotiations are considered. It is undisputed that nearly five years before his lease expired he began negotiations for a longer occupancy, when he learned the lot was for sale. His lessor made him an offer. Why should he abandon his purpose before its consummation? He evidently thought a change in location would ruin his business. The terms of the option were more profitable to lessor than the terms of the lease. His negotiations were consistent with his business interests and purposes. The lot increased in value. Defendants offered $3,600 for it. There was a temptation for lessor to avoid a sale to plaintiff. When the whole case is considered, her testimony is less convincing than that adduced on behalf of plaintiff. The finding is that the agreement of lessor to sell the lot to plaintiff was proved as pleaded. It is definite in its terms. Plaintiff tenders full performance on his part. Should the contract be enforced? It is argued that the offer or

option is not enforceable, and that there was no consideration. The contract proved by the correspondence, when considered with all of the circumstances disclosed by the evidence, amounts to a modification of the lease, so as to permit lessee to buy the lot upon expiration of the stipulated term. Considered as an option, the agreement is enforceable. The quarterly rental and the promise to pay the purchase price are valid considerations for the modification. *Knerr v. Bradley,* 105 Pa. St. 190; *Bowman v. Wright,* 65 Neb. 661. Considered as an independent contract, the result is the same.

Defendants were not innocent purchasers. They knew before they accepted lessor's deed that plaintiff had been in possession of the lot for many years, and that in buildings which he had erected he was conducting a store on the premises. With such notice, they were bound to inquire about his rights. *McParland v. Peters,* 87 Neb. 829. His possession was notice to the world of his interests in the lot. *Draper v. Taylor,* 58 Neb. 787; *Best v. Zutavern,* 53 Neb. 604; *Scharman v. Scharman,* 38 Neb. 39; *Uhl v. May,* 5 Neb. 157. Defendants argue that the possession of plaintiff does not charge them with notice of his option, because it is not embodied in his recorded lease, and is not to be found in any other public record. This argument seems to have support in an isolated case *Hamilton v. Ingram,* 13 Tex. Civ. App. 604. The decisons generally, however, announce a contrary doctrine. The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge. A purchaser of land, in possession of a lessee who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor. The notice imparted by a recorded lease for a five-year term does not put an end to inquiry as to the rights of a tenant who, for a long period of years, has been in possession of the demised premises, where he is conducting a store in buildings erected at his own expense. Cases announcing

these principles of law and the reasons on which they are based are collected in an editorial note to *Garbutt & Donovan v. Mayo,* 13 L. R. A. n. s. 58, 98 (128 Ga. 269). The doctrine of the cases generally on this subject is in harmony with former rulings of this court. *Smith v. Gibson,* 25 Neb. 511; *Friedlander v. Ryder,* 30 Neb. 783; *Kahre v. Rundle,* 38 Neb. 315. Having accepted title with notice of the rights of plaintiff, defendants should be required to perform lessor's agreement to convey the lot to him.

The judgment of the district court is therefore reversed, with directions to enter a decree in favor of plaintiff for specific performance at the costs of defendants in both courts.

REVERSED.

MARGARET LAMB, APPELLEE, V. JOHN E. LAMB ET AL., APPELLANTS.

FILED NOVEMBER 12, 1913. No. 17,045.

1. **Appeal:** TRIAL DE NOVO. This being an action in equity, we are upon appeal required to try the issues *de novo*, without reference to the decision of the lower court. Upon the evidence in the record, which is outlined in the opinion, it is found that the decree is not supported by the evidence.
2. ———: REVERSAL: DIRECTING DECREE. When, in an action in equity, it is apparent upon appeal to this court that no further evidence can be furnished, this court will, upon reversal, direct such decree as the pleadings and evidence require.

APPEAL from the district court for Nance county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

John J. Sullivan, for appellants.

W. F. Critchfield, contra.

SEDGWICK, J.

The plaintiff, Margaret Lamb, began this action in the district court for Nance county to set aside and cancel a

deed for a quarter section of land in that county which she had executed to defendant John E. Lamb. The court found the issues in favor of the plaintiff and entered a decree accordingly, and the defendants have appealed.

The plaintiff was the widow of Bartholomew Lamb, and owned several quarter sections of land and other real estate in her own right, and also certain pieces of land which had been devised to her by her husband. She had three sons and three daughters, and concluded to make a division of the lands among her sons and daughters and two grandchildren. For that purpose she employed and consulted with the defendant Shields to assist her in making the division, and this was done without the assistance and apparently without the knowledge of her children and grandchildren to whom she had decided to convey the property. Her purpose was to make an equal division among her children as far as practicable, and she appears to have given the matter careful consideration, and executed eight several deeds, one to each of her six children and one to each of the two grandchildren. She also procured a lease of each of the tracts of land to be prepared to be executed by each of the grantees, respectively, leasing the land to her during her natural life. These deeds and drafts of leases she placed in the hands of the defendant Shields, the deeds to be delivered to the grantees, respectively, and with instruction to procure the execution of the leases. Afterwards this defendant John E. Lamb executed the lease and delivered it to Mr. Shields for the plaintiff, and claimed that Mr. Shields had delivered the deed to him. It is alleged in the petition that the plaintiff had made a mistake in the description of the land in the deed to the defendant.

The case, as it is presented here, involves the determination of two questions of fact: Was the deed for the land in question delivered to the defendant John E. Lamb by authority of the plaintiff? And, if so, was there such a mistake of fact on the part of the plaintiff in the execution of the deed as to require a cancelation of the deed on that account?

The evidence upon the questions so presented must be considered in the light of the conditions and circumstances surrounding the whole transaction. The plaintiff was about 75 years of age, and was in feeble health, and appears to have had an equal regard for all of her children, and an earnest desire to make an equal division of the property among them. She desired, as she says, to avoid any trouble and dissension, and to that end she determined to make the division herself, with the help of Mr. Shields, in whom she had confidence, and who appears to have acted in an honorable and disinterested manner in the whole transaction. Her son, Bartholomew Lamb, was dissatisfied, and when his deed was presented to him, and he ascertained that the quarter section of land which is involved in this litigation had been deeded to the defendant John E. Lamb, he complained to his mother, and she then requested Mr. Shields to change the deed so that Bartholomew should get this land. In the division two deeds had been executed in favor of Bartholomew, one conveying a quarter section of land and the other another tract. He accepted the deed of the smaller tract, and took possession of the land and made some improvements thereon, but refused to accept the deed and execute the lease of the quarter section. After the trouble arose in regard to the deed of the land in dispute, Mr. Shields, under instructions from the plaintiff, and apparently with consent of all the parties, delivered other deeds to the respective parties for whom they were intended, which were placed on record, and the life leases, duly executed, were delivered accordingly. Mr. Shields testifies that he delivered the deed of the quarter section in this litigation to the defendant John E. Lamb, who then gave him $1 as recording fee, and requested him to place the deed upon record, and also executed the lease and delivered it to Mr. Shields for the plaintiff, and that this was in accordance with his instructions from the plaintiff. The defendant John E. Lamb testifies to the delivery of the deed to him and execution of the lease by him, as stated by Mr. Shields.

The plaintiff testifies that she did not authorize Mr. Shields to deliver any of the deeds until all of the leases were executed and delivered to him. The plaintiff's testimony is not very satisfactory upon any of the matters to which it relates. She was evidently very much disturbed over the dissension which had arisen between her two sons, and was vacillating and uncertain in the position which she took in her testimony at different times, as well as in her interview with different parties interested. She consulted her attorney, and instituted these proceedings, apparently upon her own responsibility at the time, but she afterwards declared when under oath, as well as when she was not under oath, that she did not want this litigation to continue and that she wanted the action dismissed. She testified: "I was satisfied with it, but since it made the trouble I discovered there was a mistake." After the action was pending in this court she signed a formal motion to "reverse the judgment and dismiss the action," which was filed in the case in this court. An application was then filed in the probate court for Nance county to place her under guardianship, and that court appointed Mr. Shields as guardian of her person and property. Mr. Shields, as her guardian, then resisted her motion to reverse the decree of the trial court and dismiss the action in this court, and asked that this case be determined upon the evidence taken on the trial below. He filed a transcript of the record of his appointment as guardian, and affidavits were filed by both parties supporting and resisting the motion. It was agreed by the parties that the motion should be determined upon the final submission of the case. It is not necessary to determine the merits of that motion, because of the conclusion that we have reached upon the evidence in the record. The notary who took the acknowledgment of the deed testified that his understanding was that none of the deeds were to be delivered until all of the leases had been executed. He does not explain how he arrived at that understanding, and does not testify to any of the instructions that the plaintiff

gave Mr. Shields in regard to the delivery of the deeds by Mr. Shields. We think that the evidence shows, substantially without contradiction, that Mr. Shields was authorized to deliver the deed to the defendant upon his execution of the lease, and that he delivered the deed, as testified to by him.

The plaintiff testifies that, when Bartholomew called her attention to the matter, she discovered that she had made a mistake in the division. The evidence shows that, while she was making a division of the property and instructing Mr. Shields as to the preparation and execution of the deeds, they had an atlas or chart of the lands which she owned, and upon that she pointed out the lands which she wanted to deed to each of the parties. This particular quarter section in litigation lay just south and adjoining what was called the "home place." This was shown upon the atlas, and she at first designated this quarter section as one to be deeded to her son Bartholomew. Afterwards, upon consideration of the value of the lands to be conveyed to the respective parties, she discovered that, if this quarter was conveyed to Bartholomew, it would, under the division as she then proposed, give to Bartholomew much more in value than to any of the others, and her desire was to make an equal division. She therefore partially rearranged the matter, and instructed Mr. Shields to draw the deed of this particular quarter section to the defendant. It is clear that she made no mistake as to the particular piece of land that she deeded to the defendant, but the mistake that she accused herself of making was in not making the division so that it would be satisfactory to all of the beneficiaries of her bounty. She says that Bartholomew wanted this particular quarter section of land, and it appears that when she was with him and under his influence, or under the influence of those who were assisting him, she was convinced that she had made a mistake in not arranging it so that Bartholomew would be satisfied. This controversy is plainly between the two sons, Bartholomew and John, and it illustrates the wisdom of the

plaintiff in making the division upon her own responsibilty, and in avoiding the controversy that she feared would arise if she attempted to satisfy all of the parties before the division was made. It appears that the division as made gives to each of the parties substantially the same value. Bartholomew's contention is inconsistent. He appears to attempt to keep a part, at least, of the land conveyed to him, and at the same time inspire his mother to cancel the deed to his brother John so that that quarter may be conveyed to him also. The petition involves only the one quarter, and there is no attempt made to place the plaintiff in a position to make redivision of the land.

The decree is not supported by the evidence, and is reversed and the cause remanded, with instructions to enter a decree for the defendant, requiring a delivery of the deed in controversy to him.

REVERSED.

BARNES, LETTON and ROSE, JJ., not sitting.

KIMBALL-MATHEWS COMPANY, APPELLEE, V. ADAH TUCKER, APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,434.

Sales: ACTION FOR GOODS SOLD: EVIDENCE. This action was to recover the price of a bill of goods shipped by plaintiff to defendant pursuant to a written order. Defendant claimed that the goods were damaged, and immediately returned them to plaintiff, and telegraphed plaintiff to "cut the order in two," and to fill the order so changed with a different description of goods. The plaintiff received the returned goods, and held them until after the commencement of this action; also accepted the changed order, and prepared and shipped to defendant the goods accordingly. These goods were received and paid for by defendant. *Held*, That the original order was canceled by these transactions, and that defendant cannot be required to receive and pay for the goods originally ordered.

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

Field, Ricketts & Ricketts, for appellant.

Burkett, Wilson & Brown, contra.

SEDGWICK, J.

The plaintiff recovered a judgment for $86.25 in the district court for Lancaster county, and defendant has appealed.

Notwithstanding the smallness of the claim, we have had the assistance of two firms of eminent attorneys, and they have presented technical questions in the law of vendor and purchaser of personal property. Several witnesses testified upon the trial, but the determination of the fine points presented appears to depend upon the construction and effect of the written contract of sale and purchase and subsequent writings between the parties. The attorneys for the respective parties appear to have interpreted these writings differently, influenced possibly by the different interpretations thereof by the parties themselves. The cause was tried to the court without a jury, and we find ourselves constrained to take a different view of the meaning to be given to the contract from that taken by the trial court.

The defendant was proprietor of a photograph studio, and ordered a bill of "fancy buff-colored coverings" to be used in her trade. When the goods arrived she thought they were damaged, and telegraphed plaintiff: "Stock ruined in transit; will reship; cut order in two and fill with uncut paper; rush"—and immediately reshipped the goods to plaintiff. Plaintiff appears to have understood this telegram to be an additional order for goods, and prepared and shipped to defendant one-half of the amount originally ordered. Defendant understood the telegram, together with the return of the goods, damaged as she supposed, to be a rescission of the original order and the plac-

ing of a new order in place thereof. The point argued in the briefs is as to the rights of the respective parties under the original contract. The principal question discussed is as to the ownership of the property after it had been duly consigned to the defendant, and whether, if the goods were damaged in transit, it would be the loss of the plaintiff or of the defendant; whether the defendant would have the right to examine the goods and, if found damaged, to return them, without regard to whether the damage in transit was the fault of the plaintiff in packing and shipping them or solely the fault of the transportation company. We think it unnecessary to determine these interesting questions under the facts in this case.

It is clear that the defendant thought that the goods were damaged so that they were entirely unfit for her use, and she claimed the right to rescind the contract and make a new one, and if the plaintiff acknowledged that right, and accepted the new order in place of the original order, she would not be bound by the original contract. She immediately returned the goods furnished under the original contract, and the plaintiff executed her new order, so that it is only necessary to find the meaning of her telegram and the subsequent correspondence between them in relation thereto. The telegram told the plaintiff that the goods shipped were ruined, and that she would return them, and then directed the plaintiff to "cut the order in two and fill with uncut paper;" that is, in place of the original order, she now ordered one-half of the amount that she ordered before, and directed that it be filled with uncut paper, instead of as the original order was. The plaintiff did not answer by telegram, but immediatedly upon receipt of the telegram wrote the defendant a letter, in which the plaintiff said that it would "hardly be worth while" to return the goods, and stated that a claim for damages against the transportation company would have to be made by the defendant, because "when we take receipt for goods from the transportation company the goods become the property of the consignee." The plaintiff did not de-

cline to receive the returned goods when they arrived, and appears to have held possession of them until after the commencement of this action in the court below. The order by telegram was filled and the goods shipped within five days after the telegram was sent. The defendant's proposition in the telegram clearly was that the plaintiff should accept a return of the damaged goods, and should prepare and ship to the defendant goods of a different description and one-half of the quantity in the original order. If the plaintiff had not been at fault and was entitled to insist upon the original contract, this proposed substitution of a different order might have been rejected and the original contract insisted upon. This the plaintiff did not do. It accepted and executed the substituted order, and cannot now insist upon the performance of the original contract.

If this is a correct construction of the contract and conduct of the parties, the judgment of the district court is wrong, and it is therefore reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

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

FILED NOVEMBER 12, 1913. No. 18,064.

1. **Appeal:** TRIAL DE NOVO. When in an action of ejectment the defendant alleges an equitable title to the land and right of possession thereunder, and all other defenses have been eliminated, the trial of the issue so presented is essentially the trial of an action in equity, and, upon appeal, this court will try the issue *de novo*, "without reference to the conclusion reached in the district court." Code, sec. 681*a*.

2. ———: ———: CREDIBILITY OF WITNESSES. When several witnesses who disagree as to an important fact have testified in the pres-

ence of the trial judge, and the court has had an opportunity to observe their manner and the many circumstances that tend to give confidence or arouse distrust as to the reliability of their testimony, this court will take into consideration the estimate of the trial court as to the reliability of the evidence.

3. EVIDENCE: LETTERS. A letter of the then owner of the legal title, written 26 years ago in pencil upon coarse brown paper, in which it appears that some words have been retraced and some figures rewritten, under the circumstances mentioned in the opinion, is considered of little, if any, value as evidence.

4. ———: EQUITABLE TITLE TO LAND. Evidence to establish an equitable title to land, as against the legal title, must be clear and satisfactory. The evidence in this case is examined and sufficiently quoted in the opinion to show its general character, and *held* insufficient to establish an equitable title.

5. EJECTMENT: EQUITY. When the owner of real estate is indebted to his son for money loaned, and puts the son in possession of the real estate upon the mutual understanding and agreement that the son shall have the possession and use of the land until settlement between them, and after many years the father dies without having made such settlement, the devisees and heirs of the father will not be allowed in equity to recover possession of the land without accounting for and payment of the amount due the son.

6. **Limitation of Actions.** In such case the statutes of limitation have no application either to the right of the devisees and heirs to possession of the land or to the claim of the son to reimbursement for the money loaned to his father.

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

H. M. Sinclair and *W. D. Oldham,* for appellant.

Fred A. Nye and *J. Arthur Tillson, contra.*

SEDGWICK, J.

This action was begun as an action in ejectment by the administrator of the estate of Achsah Holloway, deceased, to recover possession of 320 acres of land in Buffalo county. The defendant answered, among other things, alleging an equitable right to the land, and upon his former appeal from an adverse judgment this court held

(90 Neb. 481) that the trial court had failed to determine the issue presented by this equitable defense and the case was remanded for that purpose. It was held that all other issues pleaded in the case had been correctly determined in favor of the plaintiff therein. Upon the second trial in the district court for Buffalo county much of the evidence upon the former trial was again introduced by the parties, with other evidence, and the court found the issues in favor of the plaintiff and rendered a judgment for the possession of the land, from which the defendant has again appealed.

The legal title to the land was in the name of Ira Holloway, the defendant's father, and upon his death the title passed by his will to his wife, Achsah Holloway, the defendant's mother. The defendant alleged that his father had sold the land to him in consideration of money which he had loaned to his father. The details of his answer are set out in the former opinion and it is unnecessary to repeat them here. About 30 years ago the defendant's father, who was a resident of Ohio, and shortly after removed to Michigan where he resided until the time of his death, purchased the land in question, and also procured a timber claim upon an adjoining quarter section. Afterwards the timber claim was transferred to the defendant, and he has resided thereon for nearly 30 years. It appears from the evidence that the defendant's father was indebted to several of his children in a considerable amount. His indebtedness to the defendant in the sum of at least $1,500 appears to be established by the preponderance of the evidence. There is some evidence tending to show that his father owed the defendant an additional amount, possibly $3,000 more. The defendant took possession of the land in dispute in 1884 or 1885 and has ever since been in possession thereof. Soon after taking possession of the land he fenced the same and has since made some other improvements thereon. He never was called upon for any rent until after the death of his mother in 1907. The defendant was not allowed to testify to any transactions or

oral agreements between himself and his father and mother, being incompetent under section 329 of the code. There are nine children and heirs of his father and mother, and there appears to have been an unfortunate disagreement among them. One of his brothers testified as to the indebtedness of his father to the defendant, and Mrs. Hambrook, one of his sisters who resided in Michigan, testified that she had heard her father, before the defendant came to Nebraska, say "that Chester was to have the land." She could not state the language used by her father, nor any other part of the conversation. She had never seen the land and did not know how much land her father or her brother had in Nebraska. She did not make it clear whether her father referred to some or all of his land in Nebraska, or to the timber claim which the defendant did have, or to the land in dispute. Another sister, Mrs. Gribben, who resides in Iowa, testified that she had heard her mother say that the defendant "has got no heirs and we will get the land anyway." They were talking about the defendant holding the land, and it does not appear that her mother's statement had anything to do with the defendant's right to the land. She also testified that she had heard her brother, C. C. Holloway, say that the land was the defendant's, and had heard the defendant say the same thing. C. C. Holloway was a witness upon the trial, and of course neither his statement not under oath, nor the statements of defendant himself, could be evidence in this case. Samuel King testified that he had heard defendant say that the land "belonged to his mother, and that it belonged to his father, and that it belonged to him," and, when asked what the defendant said about its belonging to him, he answered: "That is about all I ever heard him say; its belonging to them."

Defendant's exhibit 2 purports to be a long letter written by Ira Holloway in 1886. It is on coarse brown paper and written in pencil. It covers a variety of subjects, and contains a sentence which defendant claims should be read: "I rec'd a letter from Chester last week that he had

an offer of 4.00 per acre for 480 of his ranch in cash. I told him to do as he thot best. He may sell." The plaintiff insists that the paper is wholly incompetent; that it shows on its face that it has been changed in material parts. Some of the words and figures of the above quotation have been retraced, and there is some appearance of erasure and substitution. The trial court overruled the objection to the admission of the paper in evidence, and said that he would consider it "for what in his judgment he considered it worth." Such evidence is not very satisfactory, and even if it is considered genuine, and read as the defendant contends, it does not so strengthen defendant's evidence as to overcome the evidence of plaintiff and require a judgment in the defendant's favor. The defendant was then more than 40 years of age, and that he should obtain his father's consent to sell the land is significant. As a ranch it was used only by the son, and might for that reason be spoken of as "his ranch." In the clause "480 of his ranch," the figures and parts of words appear to have been rewritten. The whole tract occupied by him was exactly 480 acres, so that the words "480 of" as they appear in this paper have no especial force, but with the words "his ranch" they have an awkward appearance. The paper is of very little value as evidence.

There is, perhaps, other evidence in the record that might be considered as indicating that the defendant is the owner of this land, but it is not of sufficient importance to make it advisable to extend this opinion by reciting it here.

The evidence produced by the plaintiff is amply sufficient to rebut the defendant's evidence, and to establish that Ira Holloway never agreed to transfer the legal title to the land to the defendant. It is not necessary to recite and review the great volume of evidence. We will call attention to a few items as illustrating its general character: One of the appraisers of the estate testified that when he and his associates were making an inventory of the property of Achsah Holloway, deceased, he called upon the de-

fendant and asked him for a statement of her property, and, among other things, he stated this land in dispute as the property of Achsah Holloway. This witness appears to be interested in the estate, and his testimony is denied by the defendant.

Under our present statute, we are required to try this case *de novo*, without reference to the decision of the trial court. When several witnesses who disagree as to an important fact have testified in the presence of the trial judge, and the court has had an opportunity to observe their manner and the many circumstances that tend to give confidence or arouse distrust as to the reliability of their testimony, this court will take into consideration the estimate of the trial court as to the reliability of the evidence.

On the evening after the funeral of Achsah Holloway, several of the heirs being present, and the defendant with them, some of the papers of the deceased were examined, and several of the persons present testified upon the trial that the defendant was asked to state the property of the deceased, within his knowledge, which he did, and among other things stated this land in dispute and the probable value thereof. This testimony is denied by the defendant, and by his two sisters, above named, who were also present. The evidence of some of these witnesses was taken by deposition, but some of them testified to this conversation in open court, and the trial judge appears to have believed their testimony.

During all of these years the taxes on this land have been paid, principally, if not entirely, by the parties who held the legal title, or by some one in their behalf. The defendant testified that for one or two years, 25 or 30 years ago, he paid the taxes. He took receipts in his father's name, but paid them, as he says, with his own money. There is other evidence in the record, some of it strongly tending to show that this land was regarded by all, including the defendant, as the land of Ira Holloway, during his lifetime, and after his death as the land of

Achsah Holloway, and there is also some evidence of the same nature, but of less force and importance. The evidence fails to show that Ira Holloway sold this land to the defendant, or agreed that the defendant should have the land as his own, or that the defendant has held the land adversely so as to acquire title by adverse possession. We are satisfied, however, that this evidence does prove that Ira Holloway put the defendant into possession of the land and allowed him to retain possession because of his indebtedness to the defendant, and because of the use which he had of the defendant's money; that both parties intended and expected that a settlement would be made between them, and the defendant held possession of the land under an implied agreement that he might do so until his money was returned to him. Under such circumstances, the statutes of limitation would not run either against Ira Holloway's right to the land nor the defendant's claim for the money which his father owed him. The defendant ought not now to be dispossessed of the land without a settlement and adjustment of the amount due him from the estate. The evidence is not sufficient to enable us to determine with certainty the amount due defendant.

The judgment is therefore reversed and the cause remanded, with instructions to take further evidence, if necessary, and find the amount due defendant with simple interest at 7 per cent. per annum. Against this, offset the value of the use of the land, and enter a decree in favor of plaintiff for possession of the land upon payment of balance due defendant as so found. Unless the same is paid within 90 days from the entry of the decree, the land shall be sold, and costs and defendant's claim paid out of the proceeds, and balance to the plaintiff.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JAMES WHELAN, APPELLEE, V. CHARLES DANIELS, APPELLEE; CITY GARBAGE COMPANY, APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,345.

1. **Municipal Corporations:** ORDINANCES: VALIDITY: DEAD ANIMALS. The city of Omaha by an ordinance, in effect, declared that the carcasses of all dead animals found within the city, which were not slain for food, should at once become the property of the public contractor, whose name was contained in the ordinance; such ordinance is void, so far as it attempts to take private property without due process of law.

2. ———: ———: DISPOSITION OF DEAD ANIMALS. The owner should be permitted to remove such animals or to cause the same to be removed within a reasonable time fixed by such municipality, and be allowed to receive the value thereof, or to put the same to a beneficial use.

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

Will H. Thompson, for appellant.

I. J. Dunn and *J. J. O'Connor, contra.*

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

HAMER, J.

The defendant, the City Garbage Company, appeals from a judgment for costs in the district court for Douglas county. In that court there was a finding in favor of the plaintiff to the effect that at the commencement of the suit the plaintiff was entitled to an injunction against the defendants as prayed for in the petition; but, the contract upon which the suit was brought having expired, the injunction was denied for that reason only. Judgment was entered against the defendant, the City Garbage Company, for costs.

The plaintiff alleged that he was a citizen and resident

of the city of Omaha, and that on the 10th day of March, 1908, he entered into an ordinance contract with said city to remove and make use of all dead animals, not slain for human food, necessary to be removed during the period of three years on and after May 4, 1907; that under the contract the plaintiff was to remove *all dead animals wherever found in the city of Omaha*, whether on the streets, alleys or public grounds of the city, or on any private premises within the city, free of charge to the city, and free of charge to the residents thereof, said animals to be removed at once when notified by any one, and that a failure to remove any such dead animals, when so notified by the health office, within 12 hours after such notice, would subject the plaintiff to forfeit to the city $5, and $5 additional for a failure so to do for every 12 hours thereafter; that it was further agreed that the carcass of any dead animals so removed should not be allowed to be exposed to the air, or decay on any lot within a radius of three miles of the city limits, and that such dead animals should be disposed of in such manner that there would be no danger of producing a nuisance or unsanitary condition; that the plaintiff supplied himself with wagons and teams and all necessary equipment to do the work, and arranged to dispose of all dead animals so hauled as required by the terms of the contract, and that he incurred great expense in getting ready to carry out the terms of such contract; that the city of Omaha contains about 125,000 inhabitants and covers a large territory, and from day to day large numbers of dead horses, cows, cats, dogs, etc., are to be found upon the streets and on private premises within the city; that the prompt and efficient removal of the same from the city is absolutely necessary to the health and comfort of the inhabitants; that, unless the plaintiff is protected from the interference of the defendants and their associates, he cannot make an income *sufficient from said business for the same to become profitable,* and that he will suffer great loss and financial injury; that the plaintiff's right to remove *all such dead animals is exclusive;* that

said contract is for the benefit of the public; that the defendants and their servants, ever since the execution of such contract between the city of Omaha and the plaintiff, continuously interfere with the business of the plaintiff, and remove said animals and appropriate them to their own use, and deprive the *plaintiff of property in the same;* that said defendants are doing said work contrary to the provisions of the said ordinance of the city of Omaha; that they claim that plaintiff's contract with the city is invalid, and that the ordinance relating to the removal of dead animals is invalid; that the plaintiff is greatly damaged thereby; that the ordinance provides that no person who *has not a contract so to do* shall haul dead animals within the city of Omaha; that said ordinance is not enforced; that the police judge of said city has decided that the ordinance is void, and declines to permit prosecutions against persons engaged in violating the said ordinance. The prayer is that the defendants, their servants, and agents may be enjoined during the life of the plaintiff's contract from carrying on said business on said premises within the limits of the city of Omaha, and from hauling or removing or disposing of dead animals within said city, or in any way interfering with the plaintiff in the discharge and execution of his said contract.

The agreement entered into was by an ordinance whereby the plaintiff for a term of three years received from the city of Omaha the sole and exclusive right to haul and remove all dead animals (not slain for human food) wherever found in said city.

The City Garbage Company answered that it was engaged in the removal and disposal of the carcasses of dead animals since the 10th of May, 1908, and for some time prior thereto, and that the said carcasses were the property of the defendant, the City Garbarge Company; that the carcasses were removed within 10 to 20 hours from the death of the animals and before they became a nuisance or detrimental to public health, and that they were removed in a sanitary way; that, if the defendant had

failed to remove the carcasses, the same would in many instances have become a nuisance and a menace to the public health because of the fact that no one else would have removed the same; that said carcasses have been allowed to remain for a much longer period than 12 hours before being removed, sometimes remaining on the premises where they died as long as two or three days.

It is seemingly claimed by the plaintiff that he should recover a judgment and be held to be entitled to the ownership of all the dead animals that die in the city, and to have the right to remove the same in order to be able to maintain himself in the business of hauling dead animals for the city. Inferentially this is a contention that the property of one man may be taken for the benefit of another, that is, that the fat dead horse or cow of one man may be taken by the contractor so as to enable him to remove the lean, mangy, dead horse of another man, and the lean, hidebound, tallowless cow of still another, as also dead cats and dead dogs having no value. It would seem to be contended that the business of the plaintiff as a contractor with the city may not be carried on because of the danger of his financial failure and the failure of the business, unless he is given the *exclusive* right to take *all* the dead animals which die in the city and to become the owner of the same. If A should lose by death a fat, well-conditioned Galloway or Polled-Angus cow, her hide when removed might have a value of $10 to $20, possibly more. The body of the animal alone might be worth nearly or quite as much. The theory of the plaintiff is that under the ordinance he should be held to have A's cow, including the valuable robe which might be made from her hide, and without any compensation to A, and so as to enable him to remove B's dead cow that is lean, hidebound, tallowless; and of little or no value. It must be conceded that, if the owner of the dead animal does not remove the body within a reasonable time, the safety of the public being endangered by the presence of the same, the city has a right to direct that the body shall

be removed; but to take the property of A so as to enable the plaintiff to haul away the dead bodies of animals belonging to B, C and D, without expense to them or to the city, is not due process of law as to A, and is in no sense justifiable. The following cases support our views: *Knauer v. City of Louisville,* 20 Ky. Law Rep. 193, 41 L. R. A. 219; *State v. Morris,* 47 La. Ann. 1660; *Yates v. Milwaukee,* 10 Wall. (U. S.) 497; *Underwood v. Green,* 42 N. Y. 140; *Schoen Bros. v. City of Atlanta,* 97 Ga. 697; *Campbell v. District of Columbia,* 19 App. D. C. 131; *River Rendering Co. v. Behr,* 77 Mo. 91; *City of Richmond v. Caruthers,* 103 Va. 775; Freund, Police Power, sec. 522; *Iler v. Ross,* 64 Neb. 710.

An examination of the authorities cited shows, as it was specifically held in *Knauer v. City of Louisville, supra,* that the municipality cannot, under the claim that the carcass of the dead animal is a menace to the public health, authorize its contractor to take possession of it and to convert it to his own use, and, if he does so, it is confiscation. It was held in the same case that the owner's rights did not cease at the death of the animal, but that the municipality might prescribe a time in which the owners should be permitted to remove the dead carcasses or cause them to be removed. In *State v. Morris, supra,* it was said: "If the property is not a nuisance, the owner should not be prevented from obtaining its value and should not be denied the right to make any disposition of it (however innocent and useful)." The court also said: "It is not possible, under police regulation, to take property from one man and give it to another. The city might, as a sanitary measure, after having given the owner an opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use." In *Yates v. Milwaukee, supra,* it was held that it could never be necessary to take from one man his property and give it to another until the property was in such condition that it was about to become a nuisance, and that an opportunity should be given the

owner to make such disposition of his property as would prevent the apprehended danger. In *Underwood v. Green, supra,* it was held that a dead hog was not *per se* a nuisance; that it was not necessarily dangerous to the public health; and that the owner might put it to a useful and innocent purpose, and that the municipal authorities would not arbitrarily deprive him of his property by giving it to another. In *Schoen Bros. v. City of Atlanta. supra,* it was held: "That where an animal dies or is found dead within the corporate limits, it shall not be allowed to remain there beyond a specified reasonable time, and that the owner shall within that time remove it or cause it to be removed beyond such limits, and to a specified reasonable distance, and that, unless he does so, the carcass shall be taken charge of by the agent of the corporation and dealt with as a nuisance *per se.*" But in that case the particular ordinance under which Schoen Brothers were tried was declared unconstitutional and void. In *Campbell v. District of Columbia, supra,* it was held that the refusal by the municipal authorities of a permit to remove the carcass in a manner conformable to the police regulations governing the transportation of dead animals through the city was unjustifiable and an attempt to deprive the owner of his right of property in the carcass. In *River Rendering Co. v. Behr, supra,* it was held: "A city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they became a nuisance." In *City of Richmond v. Caruthers, supra,* it was held that an ordinance like the one in question was in conflict with the fourteenth amendment to the constitution of the United States forbidding that any person shall be deprived of his property without due process of law.

It is clearly within the police power of the state by ordinance of its towns and cities, and within the limits

prescribed by the legislature, under the constitution, to protect the public health. In the exercise of such power and acting in good faith, a city may provide for the removal of dead animals if the owner neglects to do so within a reasonable time to be prescribed by the ordinance, and its right to do so may not be seriously questioned. The owner of a dead animal, when it dies upon the owner's premises, may have a reasonable time to remove the same, such time to be prescribed by the ordinance. The owner has a property interest in the dead animal which he should be allowed to protect, and if the ordinance fails to give such opportunity it is in that respect unconstitutional because it takes private property without due process of law.

The city authorities may, without doubt, under the police power, regulate and control the removal of dead animals, and, to that end, may provide for and appoint a suitable person, under proper restrictions and regulations, to manage and control such removal, and make it his exclusive duty so to do. *Smiley v. MacDonald*, 42 Neb. 5. *Iler v. Ross*, 64 Neb. 710, must not be construed to overrule the former case. The officers of the city must be allowed a large discretion in determining when and how such garbage must be disposed of, but the rights of property in the individual must not be unnecessarily violated. The defendant, the City Garbage Company, a corporation organized for that purpose, assumed the right to engage in a general garbage removal business in the city of Omaha, and there is no doubt of the authority of the city, in the exercise of the police power, to prevent the defendant from interfering with the city's duly authorized official in the discharge of his duty. The plaintiff's right to an injunction to protect his property interest in the garbage to be removed is not so clear, but it is not necessary to further investigate that question in this case, since his contract had expired before the trial of the case in the district court, and that court was not clearly wrong in refusing him an injunction for that reason.

The writer does not think that the plaintiff, at the time he commenced his action, was entitled to any relief as against the defendant, the City Garbage Company. But the majority think that he was. In such case the apportionment of costs is within the sound discretion of a court of equity, and it does not appear that there was an abuse of discretion in that regard by the trial court.

The decree of the district court is

AFFIRMED.

ROSE, J., dissents.

CHARLES R. WHITLOW, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 12, 1913. No. 17,384.

1. **Railroads:** ACTION FOR DAMAGES: NEGLIGENCE: QUESTION FOR JURY. In an action for damages against a railroad company because of the injury to property occasioned by its alleged negligence, it is for the jury to say, under proper instructions from the court, whether the acts proved constitute negligence for which the company is liable.

2. **Negligence:** QUESTIONS FOR COURT AND JURY. While the court may say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants. *Omaha Street R. Co, v. Craig*, 39 Neb. 601.

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

Edgar M. Morsman, Jr., and *Will H. Thompson*, for appellant.

Lambert & McCarty, contra.

HAMER, J.

This case was brought in the district court for Nemaha county against the defendant, the Missouri Pacific Railway Company, to recover damages for the alleged de-

struction of a wagon, water-tank, pump and harness. The articles mentioned were destroyed at a public crossing, where there was a collision between the wagon and the water-tank of the plaintiff and a train of cars belonging to the defendant. The plaintiff had a verdict and judgment, from the latter of which the defendant prosecutes an appeal.

It is undisputed that there was a collision, and the question is against whom should the blame attach.

The petition alleged that the bell on the locomotive was not rung nor the whistle blown at a distance of 80 rods or more from the railroad crossing where the collision occurred; that the team and wagon was in charge of an employee of the plaintiff, who was exercising due care and prudence in the handling of the team, and that the destruction of the property by the locomotive was without any fault or neglect of the plaintiff or his agent or employee, and that it was wholly caused by the negligence and carelessness of the defendant. The property destroyed was being used in the hauling of water for the purpose of supplying an engine that furnished power to run a threshing machine in the neighborhood of the crossing. The answer of the defendant admitted that it was a corporation owning the railroad which extended between the city of Auburn and the city of Omaha, in the state of Nebraska; also admitted that the plaintiff was the owner and in possession of the articles destroyed; also admitted that there was a collision between the wagon and water-tank of the plaintiff and the train of cars of the defendant; but denied that the collision was due to any negligent act or omission on the part of the defendant or its agents or servants; also alleged that, if the plaintiff received any injury, the same was caused by the negligence of the plaintiff and his employee who had the custody of the property; that the plaintiff placed the custody of the property in the hands of a young and inexperienced boy, who was driving the wagon at the time of the collision, and that this boy negligently and carelessly drove upon

and over a public crossing without using due care in looking out for the approach of the defendant's train, and after hearing and seeing the approach of the train.

The driver testified on behalf of the plaintiff that he was 16 years old; that the team consisted of a mule and a horse; that a holdback strap had been broken; that the wagon pushed down on the horse, which had no holdback, and that the mule had to do all the holding back that was done. The boy was hauling water for a steam thresher. He got a load of water and started back to the thresher. He had to cross the railroad track. He crossed it on a public road running east and west, while the railroad track ran north and south. He was driving down a hill near the crossing as the train approached. The wagon came down the hill onto the crossing where the collision happened, probably accelerated by the condition of the broken holdback strap. The witness testified that the train was going north, and that it was about 50 feet from him when he first saw it; that the *engine did not whistle until the train hit the wagon, and that the bell did not ring;* that, as he was crossing the track, he looked up and saw the train on the track just a short distance from him, and that he jumped off the wagon, and, just as he jumped, the train hit the tank and broke it all to pieces. Fortunately the team was not injured.

The last paragraph of instruction No. 5, given at the request of the plaintiff, and quoted in defendant's brief, is as follows: "And if from the evidence you believe that the injury alleged by the plaintiff did occur, and that the defendant railroad company caused the same, as alleged in plaintiff's petition, and you further find that in the causing of said accident the defendant was guilty of negligence under the rules laid down to you in the instructions given, you shall find for the plaintiff." When this part of the instruction is read in connection with the part not quoted, the instruction, as a whole, is clearly not erroneous. In the part not quoted the jury were told that, in determining whether the plaintiff was guilty of con-

tributory negligence, they might take into consideration whether he looked and listened for the train the distance from the track at which he could first see it, the obstructions to his view, and all the circumstances and conditions shown then to have existed, and if from all the evidence they found that the person in charge of the team, wagon and other property exercised the care and caution in attempting to cross the railroad track that a prudent and careful man would have exercised under such circumstances, then that the plaintiff was not guilty of contributory negligence. The foregoing, in substance, was introductory to the matter quoted and qualifies the same.

At the plaintiff's request the court gave to the jury instruction No. 1, as follows: "You are instructed that section 104 of chapter 16 of the statutes of Nebraska, which applies to this section, is as follows: 'A bell of at least thirty pounds weight or a steam whistle shall be placed upon each locomotive engine, and shall be rung or whistled at the distance of at least 80 rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect.' Now, in this case, if you find from the evidence that, as the engine of the defendant railroad company approached the public crossing where the accident happened, the whistle was not sounded nor the bell rung, as required by the statute, and that the accident complained of was caused by the failure so to ring the bell or blow the whistle, and without any fault or negligence on the part of the plaintiff or his employee or servant who was at that time in charge of the property injured, then you shall find for the plaintiff."

It was evidently the intention of the trial court to submit to the jury the question of the defendant's alleged

negligence in failing to ring the bell or to blow the whistle as the train approached the crossing. It is contended by the appellant that, as the trial court told the jury to find the defendant railroad company liable if the bell was not rung or the whistle was not blown at the distance of at least 80 rods from the crossing, then that the instruction relating thereto was, in effect, to say to the jury that they should exclude from their consideration any and all other facts relating to the case, and that they should rest their verdict solely on the failure to ring the bell or to blow the whistle; but this contention loses sight of the fact that instruction No. 1, quoted last above, contains the further provision that, if the accident complained of was caused by the failure so to ring the bell or blow the whistle, and *without any fault or negligence on the part of the plaintiff or his employee or servant,* then there could be a finding for the plaintiff. That the broken hold-back strap on the horse which prevented him from holding back the wagon, and which compelled the mule to do all the holding back that was done, may have accelerated the speed of the wagon down the hill as it approached the crossing, and may have thereby contributed to the accident, is possible, and perhaps probable; but whether there was negligence of a contributory character attaching to the plaintiff because of this fact was a matter peculiarly within the province of the jury, as also whether the bell was rung or the whistle blown, and, if not, whether the failure to do so on the part of the defendant caused the injury.

Instruction No. 1, complained of, was apparently copied from the instruction given on behalf of the plaintiff in *Union P. R. Co. v. Elliott,* 54 Neb. 299. That instruction was not given in a case on all fours with the instant case. In that case one Elliott was an employee of the railway company, and while standing between two tracks in a switch-yard he was struck by a passing engine. He had a verdict and judgment. Of the instruction given this court said: "But, if the instruction was erroneous, we do not think it prejudiced the railway company, as, after all, the

effect of the instruction was to tell the jury that if Elliott's injury, without negligence on his part, was caused by the failure of a bell to be rung or a whistle to be blown on the switch engine, then the railway company was liable. The quoting of the statute by the court in the instruction added nothing whatever to it, as, irrespective of a statute, the starting or running of a switch engine in a switch-yard filled with a network of tracks, upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence."

While it was unnecessary to inform the jurors that a penalty of $50 might be inflicted upon the corporation owning the railroad for every neglect to ring the bell or blow the whistle, it was quite proper to tell them that the railroad company was liable for all damages sustained by the plaintiff in this case by reason of such neglect, provided they so found. If the instruction may have been erroneous because of the statement touching the $50 penalty which might be inflicted for neglect to ring the bell or blow the whistle, it does not therefore follow that the error was so far prejudicial that the verdict was induced by it, and should, because of that fact, be set aside. The trial court quoted the statute probably as the easiest way of telling the jury the liability which the defendant incurred if it was negligent; and, while there was no necessity to tell them of the punishment which might be inflicted in *another* and *different* proceeding, if the company should be prosecuted and found guilty, it does not follow that the verdict was brought about by the statement made. It was for the jury to find the facts under proper instructions. The evidence sustains the verdict, and, in any event, the defendant does not make the contention that it fails to do so. It complains only of the instructions. We are unable to find any prejudicial error therein.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

G. A. CRANCER COMPANY, APPELLANT, V. WILLIAM COMBS, APPELLEE.*

FILED DECEMBER 4, 1913. No. 17,442.

1. **Replevin:** NATURE OF ACTION. In an action of replevin the wrongful detention of the property in dispute and plaintiff's right to possession constitute the gist of the action.
2. **Appeal:** THEORY OF CASE. On appeal to the supreme court the cause will be treated and disposed of upon the theories presented by the parties upon the trial, if a liberal construction of the pleadings as construed by them will permit the same to be done.
3. **Replevin:** DEMAND: INSTRUCTIONS. Where, in an action in replevin, the evidence showed conclusively that a sufficient demand for the possession of the property had been made before the commencement of the suit, an instruction by the court, whether right or wrong, that proof of a demand was necessary in order to permit the plaintiff to recover could work no prejudice to the plaintiff.

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

C. M. Skiles and *F. H. Mizera,* for appellant.

L. S. Hastings, contra.

REESE, C. J.

This is an action in replevin, instituted in the county court of Butler county, by plaintiff against the defendant for the possession of an upright Brewster piano, which was alleged to have been wrongfully detained by defendant, plaintiff claiming the ownership and the right to the possession thereof. Defendant answered, admitting that plaintiff was the owner of the piano at the time of the commencement of the suit and was entitled to the possession thereof, but alleging that no demand had been made for the property prior to the commencement of the suit. In addition to a general denial, he pleaded a "counterclaim set-off," alleging, in substance, that an agent of plaintiff took the piano to the home of defendant, stating

* Reversed. See opinion, Vol. 95, p. —.

that he had sold the instrument to a neighbor of defendant, who was not quite ready to receive it, and asked permission to leave it at defendant's residence for one or two weeks, and by the consent of defendant's wife placed it in defendant's home; that after the expiration of said time defendant notified plaintiff's agent to remove it or storage would be charged therefor; that plaintiff paid no attention to said demand, but left the property in defendant's house for some eight months, and that a reasonable charge for such storage would be the sum of $45, for which judgment was demanded with costs. A reply consisting of a general denial was filed. A jury trial was had, which resulted in a verdict finding that at the time of the commencement of the action the defendant was not wrongfully detaining the possession of the property, and assessing his recovery "on his counterclaim" at the sum of $25. Plaintiff moved for a new trial, upon the ground that the verdict was excessive; that it was not sustained by sufficient evidence; was contrary to law; for errors occurring at the trial; and that the court erred in giving certain specified instructions to the jury. The motion for new trial was overruled, and judgment rendered in favor of defendant for the sum of $25 and costs of suit. Plaintiff appeals.

It is to be regretted that more careful attention has not been given to the provisions of the code governing suits in replevin, and to the rules of pleading in such actions as established by a long series of decisions by this court. It is difficult to see how the admission that plaintiff was the owner and entitled to the possession of the property in dispute at the time of the commencement of the action can be well harmonized with the general denial pleaded in the same answer. The gist of the action is the right to the possession of the property. If plaintiff was the owner and entitled to the possession thereof, as admitted in the answer, it was entitled to judgment without further proof. If defendant had a lien on the piano for the storage, plaintiff was not entitled to possession, and a general

denial was the only pleading necessary, for by it every averment of the petition was denied, including that of the right of possession. *Jenkins v. Mitchell,* 40 Neb. 664; *Davis v. Culver,* 58 Neb. 265. If defendant were held strictly to his pleading, it is doubtful if there was any issue to be tried. However, as all parties seemed to be satisfied with the presentation of issues, and tried the case upon defendant's counterclaim or set-off without objections and as if no admission had been made in the answer, we will be equally liberal and determine the case upon the record brought to this court.

The evidence is conclusive that plaintiff has at all times been the owner of the property. The only question is as to defendant's lien for storage and care. There was evidence tending to prove that at or about the expiration of the two weeks defendant notified plaintiff that the piano would have to be removed or storage would be charged. It was not removed for many months thereafter. While it may be that the jury were somewhat liberal in their verdict, we cannot say it was so excessive as to call for a reversal of the judgment or require a remittitur.

The court instructed the jury, in substance, that before plaintiff could recover he must prove a demand for the property before the commencement of the action. This instruction was excepted to, and is now assigned for error. As there was ample proof of demand, the instruction could work no prejudice, even if wrong. It was in accord with the theory upon which plaintiff tried the case. Plaintiff cannot now complain.

Finding no error requiring a reversal of the judgment, it is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

W. N. FORD ET AL., APPELLANTS, V. PERRY E. THOMPSON, APPELLEE.

FILED DECEMBER 4, 1913. No. 18,143.

Intoxicating Liquors: LICENSES: POWER OF BOARD. Where the electors of a city or village at a legal election held therein under the provisions of section 1, ch. 75, laws 1911 (Comp. St. 1911, ch. 50, sec. 25) have voted upon the question of "license" or "no license" for the sale of intoxicating liquors, and a majority of the votes cast are in favor of "no license," the city or village board have no authority to issue a license during the then current year.

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

A. C. Plantz and *M. F. Harrington,* for appellants.

Allen G. Fisher, William P. Rooney and *R. L. Wilhite, contra.*

REESE, C. J.

An application was made to the chairman and board of trustees of the village of Rushville for a license authorizing Perry E. Thompson to sell intoxicating liquors in said village. The petition was signed by the requisite number of resident freeholders of the village, and notice of the time for hearing was duly given. A remonstrance was presented, in which it was alleged that prior to the first Tuesday in April, 1913, a petition signed by 54 resident freeholders of the village had been presented to the clerk asking that the question of whether license should be issued for the sale of liquors therein be submitted to the legal voters at said election, that the question was duly submitted, and that at said election a majority of the electors voted against the issuance of such license. At the hearing before the village board it was stipulated that the election was duly held, and that the result thereof was as alleged and fully set out in the remonstrance. The

applicant filed a motion to strike from the remonstrance the averments relative to said election, upon the grounds: "(1) That said pretended remonstrance does not state facts sufficient to constitute a remonstrance; (2) that said remonstrance does not state facts sufficient to constitute a legal objection to the issuance of a license; (3) for the reason that the facts stated in the pretended remonstrance are not sufficient to constitute a repeal of the present ordinance permitting the issuance of license in said village now in full force and effect." This motion was sustained and the license ordered to issue. The remonstrants appealed to the district court, where the action of the village board was affirmed, and the appeal dismissed. The remonstrants now appeal to this court.

As we view the case, the only question is as to the effect of the election upon the question of "license" or "no license," for it is conceded that a legal and proper election was held. It is provided in section 25, ch. 50, Comp. St. 1911, that "in incorporated cities and villages of less than 10,000 inhabitants, if thirty legal resident voters, or if there are less than sixty, a majority, who are also freeholders within the corporate limits of the city or village, at least thirty days before a municipal election, petition the proper authorities to have the question of 'license' or 'no license' submitted thereat, the question shall be submitted in the manner prescribed by existing law for the submission of other questions and the majority vote of those voting on the question shall be mandatory upon the licensing authorities." The contention that this provision of the statute is subject and subordinate to any ordinance that the board may enact cannot be maintained. It is true that before any license can be issued there must be an ordinance providing for the same (*State v. Andrews*, 11 Neb. 523), but that does not carry with it the imposition of the duty to issue a license where the board is satisfied that for any legal reason the license ought not to issue. The discretion of the board is not destroyed by the passage of such an ordinance. It is to be observed

that by the provision of the statute it is left with the people of the village or city to direct the action of the board, when they see proper to do so, and when they do take action in the manner prescribed their decision shall be final, and, in so far as to whether license may or may not issue, the action of the majority should be mandatory upon the licensing authorities. "A 'mandatory' provision in a statute is one which must be observed, as distinguished from a 'directory' provision, which is one which leaves it optional with the department or officer to which it is addressed to obey it or not, as he may see fit." 5 Words and Phrases, 4332. "Mandatory. Containing a command; preceptive; imperative; peremptory." Black, Law Dictionary (2d ed.) 754. "In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void." 2 Bouvier, Law Dictionary (Rawles' revision) 305. See 26 Cyc. 513. "Mandatory Statute. A statute the effect of which is that, if its provisions are not complied with according to their terms, the thing done is, as to it, void." Century Dictionary. "Mandatory. Containing a command; peremptory." Cyclopedic Law Dictionary. See *Hurford v. City of Omaha*, 4 Neb. 336, 351. Without citing any further authorities, and there are many others, it is clear that the provisions of the statute above quoted require that they *must* be obeyed, and that any act done in violation of its provisions is void. It was the clear purpose and intention of the legislature to remove the agitation of the question of "license" or "no license" from the jurisdiction and authority of the village board in all cases where the electors of the municipality assumed to take the matter in hand and decide the question for themselves. The board had no other jurisdiction nor authority than to do as directed by the people. If the "no license" vote was in the majority, their power over the question was entirely taken away and no license could legally issue for the current year. If the "license" vote was in the majority, the board might not arbitrarily re-

fuse to grant any licenses, but their discretion as to particular cases was not destroyed. It follows that the action of the board in granting the license was void.

Objection is made to the record presented to the district court, and now to this court. Prior to the hearing before the village board, it was stipulated that the proceeding might be taken down by the official stenographer of the district court, who was present, and that his transcript should be certified by the village clerk and deposited in the office of the clerk of the district court, should an appeal be desired by either party. While in some respects there may have been a departure from the usual course, we see no good reason why the parties might not, in the economy of time, enter into and follow such a stipulation. The transcript was duly certified by the village clerk, filed in the office of the clerk of the district court, and is certified to this court by the latter. But, even if the validity of the authentication of the evidence should be open to question, that fact could make no difference. It was shown by the remonstrance that a valid election had been held. All the board could then do was to examine the proofs of the fact, the evidence of which, attached to the remonstrance, was before them. If the election had been held resulting in a majority vote for "no license," they had no jurisdiction over the matter, and the only thing they could lawfully do was to obey the mandate of the statute and go no further with the hearing. The mere fact that an election had been held and "no license" voted deprived them of all power to act. The jurisdiction of the district court and this court cannot therefore be questioned.

Our attention is called to a certificate of the secretary of state setting out the legislative proceedings of 1881, by which chapter 50, Comp. St. 1911, was passed, and it would seem from the reading of appellee's brief that the regularity of the passage of the act by the legislature is attacked. This question was not submitted to the district court; the date of the certificate showing that it was

issued long after the hearing in the district court, and nearly three months after the appeal was filed in this court. New questions cannot be sprung upon a case in that way in the appellate court.

It is claimed that the provisions of chapter 32, laws 1897, though never in force in the village of Rushville, should be considered here as throwing light upon the intention of the legislature of 1911 in passing the provision for election on "license" or "no license" herein above quoted. It is so plain that the two acts are separate and independent of each other, we will give the subject no further attention.

The judgment of the district court is reversed and the cause is remanded, with directions to reverse the order of the village board, cancel the license, and dismiss the application therefor. As the pretended license can afford no protection to the licensee, the action of the board should be taken at once.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

W. N. FORD ET AL., APPELLANTS, V. GEORGE E. DAVIS, APPELLEE.

FILED DECEMBER 4, 1913. No. 18,144.

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

A. C. Plantz and *M. F. Harrington*, for appellants.

Allen G. Fisher, William P. Rooney and *R. L. Wilhite, contra.*

REESE, C. J.

This is a companion case to that of *Ford v. Thompson, ante,* p. 658. It is submitted on a similar record and upon

the same briefs and argument. The decision is therefore the same as in that case. The judgment of the district court is reversed, with directions the same as in that case.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

WILLIAM O. KEARNS, APPELLEE, V. OTTO F. BLUM, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,484.

1. Instructions complained of examined, and found to correctly state the issues made by the pleadings; and, while not very clear, they are *held* to be without reversible error.
2. Appeal: CONFLICTING EVIDENCE. Where the issues made by the pleadings are submitted to a jury on conflicting evidence, their verdict will not be set aside, unless it clearly appears to be wrong.

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

W. S. Morlan, for appellant.

John Everson, contra.

BARNES, J.

This action was commenced in justice court. It was appealed to the district court, and plaintiff there sought to recover $75 alleged to be due him from the defendant, and also a balance alleged to be due him from the defendant for hauling, and pasturing a horse, amounting to $29.75. The total amount claimed by plaintiff was $104.75.

By his answer the defendant admitted the purchase of the horse, but alleged that he received it in payment for a balance due to him from plaintiff on an old account, and

denied each and every other allegation contained in plaintiff's petition. Defendant further alleged that plaintiff leased certain real estate situated in Harlan county, Nebraska, from defendant, and was a tenant upon the land so leased, beginning on the 1st day of March, 1907, and ending on the 1st day of March, 1911; that for the first three years of said time plaintiff and defendant owned cattle and hogs which were kept on said farm, and the plaintiff, under the terms of his lease, was to cultivate said land and feed and care for all of said stock, and when said stock was sold each of the parties was to receive a share thereof; that the defendant was also to receive a share of the cream and other property sold from said farm; that in the fall of 1908 plaintiff became indebted to defendant for defendant's share of cattle, cream, hogs and wheat sold by the plaintiff, to the amount of $170; that in the fall of 1909 plaintiff became indebted to defendant in the sum of $77, a balance due the defendant from the plaintiff for his interest in the cattle sold to plaintiff, and for certain cattle purchased by plaintiff from the defendant; that during the last year of said tenancy the plaintiff, under the terms of his lease, was to pay defendant $75 for pasture rent, and was to deliver to defendant one-third of all corn crops grown on the premises, and also two tons of baled hay; that plaintiff failed to pay to the defendant the sum of $75, due under the lease for 1910, and failed to deliver to defendant the two tons of baled hay, as provided for in said lease, and the said hay at the time it should have been delivered to the defendant was reasonably worth $5 a ton; that at the time of the purchase of said horse plaintiff also owed defendant the sum of $8 for a wheat drill sold and delivered to plaintiff by the defendant; that the sums due from plaintiff to the defendant on account of said items amounted to $190, for which sum, with costs of suit, defendant prayed judgment.

The plaintiff, by his reply, admitted that he entered into the possession of certain lands of the defendant on

or about the 1st day of March, 1907, but not as a tenant, as alleged by defendant; that their contract was in writing, and by its terms expired March 10, 1910; that the contract constituted a partnership agreement, and was not a lease, as alleged by defendant; that plaintiff occupied said premises for the year ending March 1, 1911, as a tenant, as set forth in defendant's answer; that by the terms of the written contract the parties thereto were interested jointly in the property mentioned in the answer of the defendant, and each and every item of the charges constituting the alleged cause of action in said answer and cross-petition of the defendant, it was alleged, "relate wholly to said partnership property dealings;" that no settlement of their partnership accounts has ever been made, and no balance has ever been struck in favor of either party, though the plaintiff has made repeated demands upon the defendant for a settlement thereof, and defendant has refused to tender to the plaintiff an account of the items claimed against him. Plaintiff denied each and every other allegation contained in the answer, and prayed that the items claimed by the defendant under the written contract might be excluded from consideration until a settlement thereof had been made by a court of equity.

A trial was had to a jury, and on the 12th day of December, 1911, a verdict was returned in favor of the plaintiff for the sum of $95.97. A motion for a new trial was overruled, judgment was rendered upon the verdict, and the defendant has brought the case to this court by appeal.

On the trial the defendant put in evidence a written contract which contained the lease in question, and an additional agreement as follows: "That first party is to furnish the following stock, to be placed on said premises during the term of this lease, under the terms herein named, to wit: Ten head of cows, to be valued at $250, or $25 per head; eleven head of yearling cattle and calves, valued at $170; ten head of brood sows, valued at $91,

and two-thirds interest in one Poland-China boar, valued at $6. The said second party is to furnish on said place the following personal property, to wit: Five head of milch cows, valued at $125; five head of brood sows, valued at $55; and five head of calves, valued at $50; and one-third interest in said boar, valued at $3; said property of each party to be fed and cared for on the place by said second party out of the crops raised on said place, but from this date, to the crop is raised on said place, second party is to furnish two-thirds of the grain and feed for said stock, and first party is to furnish one-third of the same, and at the expiration of this lease and agreement said stock is to be sold, or divided, as follows: First party is to take sufficient stock or cash from the sale of the same, in equal value of the stock he now furnished, to wit, $454, and second party is to take out of the proceeds of the sale of said stock, or stock of the value of the amount he now furnishes, to wit, $233, said stock to be sold or divided as parties may agree upon, and if parties cannot agree to settle the matter by arbitration, each party selecting a man and them a third. * * * After said parties each are paid back, the value of the stock herein agreed to be placed on the place, as above specified, the balance of said stock, including increase, to be divided as follows: Second party is to have two-thirds, and first party one-third. All feed, crops, grain, stock and cream sold from the place during the pendency of this agreement is to be divided as follows: Second party two-thirds, and first party one-third, but the property herein placed on the place is not to be sold at any time without the consent of both parties."

In their testimony both parties, in speaking of this agreement, called it a partnership agreement; and their testimony was evidently taken into account by the district court in construing the contract to be in effect a partnership agreement as far as it related to the live stock.

The defendant assigns error for the giving of the

second and third instructions, and argues that those instructions erroneously stated the allegations of the defendant's answer. By instruction No. 2 the court told the jury that the defendant admitted buying the horse of the plaintiff, but alleged that the price of the horse was to be applied on an indebtedness owing by the plaintiff to the defendant, and that the burden of proof was upon the defendant to convince the jury by a preponderance of the evidence that the plaintiff agreed to allow the value of the horse to be applied on such alleged indebtedness; and, if the defendant failed to establish said agreement by a preponderance of the evidence, then the jury should return a verdict for the plaintiff for a balance due on the horse; and in such sums as they might find due, from the evidence, for pasture and feed for a horse, and for hauling, if any, unless the jury should further find that defendant has by a preponderance of the evidence proved a settlement of the partnership accounts, as alleged in his answer, and the amount which plaintiff acknowledged to be due thereon. By instruction No. 3 the jury were informed that the defendant had pleaded a settlement and a balance due on a certain partnership account, that the burden was upon the defendant to prove that he and the plaintiff made a settlement in 1908, and that plaintiff acknowledged that there was a balance due from plaintiff to defendant, and the amount of said balance; that the burden of proof was upon the defendant to show that he and the plaintiff made a settlement of their partnership accounts in the fall of 1909, and that they agreed upon the amount due from plaintiff to defendant, and that if defendant failed to convince the jury by a preponderance of the evidence that such settlements were made, and that the amount due was agreed upon, and failed to convince them by a preponderance of the evidence that plaintiff agreed that the purchase price of the horse might be applied upon the indebtedness owing by the plaintiff to the defendant, then the verdict should be for the plaintiff in a sum not to exceed $104.75, with 7 per cent. interest

thereon from March 1, 1911. As we view the pleadings and the testimony, the instructions complained of fairly stated the issues which the jury were required to determine.

The defendant also assigns error in giving instruction No. 4, which reads as follows: "In the reply filed by the plaintiff in this case the plaintiff alleges that the items sued on by the defendant relate to a partnership which existed between the plaintiff and defendant under exhibit 'A,' which was introduced in evidence, and that no settlement of the partnership matters and accounts has ever been made. The court instructs you that, under the provisions and conditions of said contract, it is a partnership agreement; and if you find that the items claimed by the defendant in his answer refer to or arose out of the transactions under and by virtue of said contract, and you further find that there has been no settlement or agreement whereby the same have been settled and a balance assented to between the parties of all of the items of both parties thereon, then you will disregard all of the items arising under said contract and sued for by the defendant, even though those items sued upon by defendant may have been agreed to and admitted to be correct on the part of the plaintiff Kearns."

It is contended that this instruction was erroneous; that the contract was not one in the nature of a partnership agreement; and that as the evidence failed to show any final settlement between the parties, the jury were prevented from considering the justness of defendant's claims. As we view the record, the court correctly interpreted the contract so far as it related to the live stock placed upon the farm by the plaintiff and the defendant, and to that extent the agreement was a partnership agreement. It follows that the instruction, although it was not so clear as it might have been, was not erroneous.

It is also contended that the verdict is unsupported by the evidence, and is contrary to law. An examination of the record discloses that there was a sharp conflict in the

evidence. The plaintiff produced evidence supporting, or tending to support, his cause of action. The defendant in effect admitted the sale of the horse, and testified that he was to have it for an old debt that the plaintiff owed him. This plaintiff positively denied. The defendant introduced the written contract in evidence, and gave testimony tending to show that there was a balance due him under the terms of the agreement. On the other hand, the plaintiff produced evidence showing that he had paid the defendant certain sums of money arising from the sale of the live stock and the other property in question, and that there was nothing due from him to defendant on account of those transactions. As a matter of fact both parties produced evidence tending to establish their several claims. It is evident from the record that the jury believed the plaintiff and his witnesses to the exclusion of those of the defendant, and we do not see our way clear to set aside their verdict.

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

AFFIRMED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

WILLIAM J. COURTRIGHT, APPELLANT, V. DODGE COUNTY, APPELLEE.

FILED DECEMBER 4, 1913. No. 18,220.

1. **Taxation:** ASSESSMENT. "A state may make the ownership of property subject to taxation relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods of the year." *Shotwell v. Moore*, 129 U. S. 590.

2. ———: ———. Section 37, art. I, ch. 77, Comp. St. 1911, requires the assessor to list property brought into this state by any person

after April 1st and before July 1st, which is found in the possession of the owner, for taxation; and provides that the owner, in order to escape taxation thereon, shall show to the assessor, under oath, and by producing a copy of the assessment duly certified to by the proper officer of the state or county in which said property was assessed, that said property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that said property has been received by him in exchange for money or property listed for taxation during that year.

3. ———: ———: EVIDENCE. An affidavit of the owner of such property that he did not own it on the 1st day of April, and did not bring it into the state since that date, is insufficient to authorize the assessor or the county board of equalization to strike such property from the assessment rolls.

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

Courtright & Sidner, for appellant.

F. W. Button, contra.

BARNES, J.

Appeal from a judgment of the district court for Dodge county, affirming an order of the board of equalization of that county assessing an automobile for taxation for the current year. The cause was tried upon the following stipulation: "It is admitted by the parties to this action that on April 15, 1913, the appellant, Wiliam J. Courtright, purchased an automobile, the same being the one which was assessed to him; that previous to said time he did not own, have charge of or have in his possession any automobile; that he did not return any automobile for assessment, but assessment was made by the county assessor after the return was made, and on June 9, 1913; that said automobile was purchased at Omaha, Nebraska, on April 15, 1913, and the same was delivered to appellant on said date at Omaha, Nebraska; the purchase of said automobile being made from the Rambler Motor Company, which the parties to this action understand to be

a branch office or a branch of the Thomas B. Jeffery Company, a corporation which manufactures said automobiles outside of the state of Nebraska, and that said automobile is of the 1913 model, and was brought into Nebraska by the Rambler Motor Company of Omaha prior to April 15, 1913.

"It is further stipulated and agreed by the parties to this action that there was no arrangement or contract entered into between the purchaser and the Rambler Motor Company before the purchase originated on the 15th day of April, 1913.

"It is agreed by and between the parties to this action that this case shall be and is hereby submitted to the court without a jury under the foregoing stipulation of facts, and the court shall determine as to whether or not the appellant shall be assessed for said automobile. It is admitted that the appellant is and has been a resident of Dodge county, Nebraska, for years past."

It thus appears that the automobile in question was owned by appellant, Courtright, on the 15th day of April, 1913, and was found in his possession in Dodge county, Nebraska, immediately after that date. It also appears that appellant did not own the machine on April 1, 1913, and that he did not himself bring it into this state before that date, but it was brought here by some other person.

On the foregoing facts it is contended by the appellant that because he was not the owner of the machine on the 1st day of April, 1913, and did not bring it into this state, it is not taxable to him for that year; in other words, that he is not required to pay the tax thereon which the board of equalization assessed against him. To determine the question thus presented requires an examination of some of the provisions of the revenue law of 1903. Section 28 of that law (Comp. St. 1911, ch. 77, art. I) provides: "Every person of full age and sound mind, being a resident of this state, shall list all his moneys, credits, bonds, or stocks, shares of stock or joint stock or other companies, when the capital stock of such company is not

assessed in this state, moneys loaned or invested, annuities, franchises, royalties, and all other personal property." To that end the revenue act provides that a schedule containing a full list of the various forms of personal property liable to assessment shall be furnished by the assessor to each taxpayer, who shall make out, and verify by his oath, a statement of all personal property which he is required to list for taxation. The taxpayer, after completing his list, is required to attach thereto the oath, which reads as follows: Section 52. "I, ———, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on the first day of April, including all personal property pertaining to merchandising, whether held in actual possession or having been purchased with a view to possession or profit. * * * I further swear that, since the first day of April of last year, I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind, or transferred or transmitted the same to any person or in anywise for the purpose of evading the assessment thereof, and that my answers to the foregoing interrogatories are true."

It is appellant's contention that only such property as a taxpayer owned on the 1st day of April is liable for taxation for the current year, and this contention seems to be based on the proposition that the oath attached to the schedule is required to be made with reference to that date. This contention, were there no other provisions relating to the assessment of property contained in the revenue act, would be unanswerable, but the legislature, in order to prevent property owned by the taxpayer which is acquired by him during the period provided for making the assessment from escaping taxation for the current year, by section 37, art. I, ch. 77, Comp. St. 1911, provided: "When any person shall bring personal property into the state after the first day of April and prior to the

first day of July in any year, it shall be the duty of the assessor to list and return such property for taxation that year, unless the owner thereof shall show to the assessor, under oath, and by producing a copy of the assessment duly certified to by the proper officer of the state or county in which said property was assessed, that the same property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that said property has been received by him in exchange for money or property already listed for taxation during that year."

In construing the provisions of the revenue law all parts of it should be considered together; and, as we view its provisions, it was the evident intention of the legislature to provide for the taxation of property acquired by the taxpayer at any time after the 1st day of April, when he is supposed to have made oath to the schedule of property returned by him, and the 1st day of July of the current year, and it is made the positive duty of the assessor to list property found in the possession of the taxpayer and owned by him which has been brought into the state by any person during that period. To sustain the appellant's contention would in effect destroy the whole purpose of the provision of the revenue law above quoted. This provision cannot work a hardship to the taxpayer, because it is within his power, and the law makes it his duty, to make oath, and produce a copy of the assessment duly certified by the proper officer of the county in which the property was assessed, that said property had been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that the property in question has been received by him in exchange for money or property already listed for taxation during that year.

As above stated, the assessor of Dodge county found the automobile in question in the possession of and owned by appellant shortly after the 15th day of April, 1913. It thereupon became the plain duty of the appellant, if he

desired to escape taxation of the automobile for that year, to make oath and produce the certificate showing that the property had been assessed, either in some other county in this state, or some other state or territory, or that he had obtained it in exchange for other money or property which he had already listed for taxation for that year. The appellant did not comply with the provisions of this section of the revenue law, and therefore the trial court had no alternative but to sustain the action of the assessor and the board of equalization in listing the automobile for taxation.

Appellant cites *Gaar, Scott & Co. v. Sorum,* 11 N. Dak. 164, and relies principally upon that decision to sustain his contention. As we understand it, that decision is based upon the revenue law of the state of North Dakota, which differs materially from the revenue law of this state. To follow the rule there announced would in effect annul all of the provisions of the revenue law relating to the taxation of property other than that which was actually owned by the taxpayer on the 1st day of April of the current year, and hence we decline to follow it. Again, the revenue law provides for the taxation of live stock brought into this state from other jurisdictions between the 1st day of April and the first day of July of each year, and this provision has been upheld by this court. In *Mercantile Incorporating Co. v. Junkin,* 85 Neb. 561, it was said: "The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself. The maxim, *'expressio unius est exclusio alterius,'* does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." In *Shotwell v. Moore,* 129 U. S. 590, it was said: "A state may make the ownership of property subject to taxation relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods

of the year." It thus appears that these provisions of the revenue law are sustained by respectable authority.

We come now to consider the objection made by the appellant to the board of equalization, which reads as follows: "To the County Board of Equalization of Dodge county, Nebraska, and to Charles R. Schaeffer, County Assessor: You are hereby notified that on April 1, 1913, I did not own any automobile and had not contracted for the purchase of any, and have not brought any automobile into the state of Nebraska, and that your assessment or proposed assessment to me of an automobile is without authority and improper and contrary to the statutes, and objection and exception is hereby taken thereto. You are requested to cancel said assessment, if one has been made." (Signed and verified by W. J. Courtright.) No other evidence was offered before the board of equalization in support of this objection, and the only evidence introduced at the trial in the district court was the stipulation above quoted. It therefore seems clear that the appellant failed to establish any fact which would authorize the assessor or the board of equalization to permit him to escape taxation on the automobile in question for the current year.

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

AFFIRMED.

HENRY B. PEITZMIEIER, APPELLEE, V. COLFAX COUNTY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,402.

1. **Counties: BRIDGES: CONSTRUCTION AND MAINTENANCE.** In this state, counties, in the construction and maintenance of bridges, are bound to provide for such uses as may fairly be anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where the bridge is situated.

2. **Evidence examined, and *held* sufficient to support the verdict.**

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

W. I. Allen and *B. F. Farwell*, for appellant.

A. E. Garten and *George W. Wertz, contra.*

LETTON, J.

The plaintiff, a resident of Colfax county, was the owner of a steam threshing outfit. He attempted to cross a bridge in that county with the engine and separator, when the bridge gave way, and the machinery, with the plaintiff and others, were precipitated into the creek, breaking the plaintiff's leg and otherwise injuring him severely, practically destroying the separator and damaging the engine. The petition alleges that the bridge was defective in construction and dangerous to public travel; that the iron work was insufficiently fastened to the piers; that the bridge, in a number of particulars set forth, was improperly constructed, and that plaintiff was without notice of such defects. The answer was a general denial, with a plea of contributory negligence. Judgment for plaintiff for $3,000, from which the county appeals.

The testimony of an experienced bridge engineer on behalf of plaintiff was to the effect that the bridge was defectively constructed; that a number of the bolt holes in the knee braces in which bolts should have been placed in order to make a firm and substantial structure had no bolts in them at the time he examined the bridge, and the condition of the paint in the steel work showed there never had been bolts in these holes; that the trusses under the bridge were not properly fastened to the piers; that one of the piers was considerably out of plumb; that the bridge was improperly braced and not held rigidly in place; that, on account of such defective construction, when weight came upon this bridge it would have a tendency to buckle and give way. Plaintiff testified that he and his men laid plank upon the flooring of the bridge for

the engine and separator to cross upon; that just after the engine had gone upon the bridge they stopped, at that time the separator then being upon the approach. The object in stopping was that the two planks over which the engine had moved could be removed and placed ahead in order to complete the planking across the span; that the engineer then moved the engine ahead slowly about six feet, when the bridge swung to the west, buckled, and gave way; that plaintiff fell into the water partly under the engine breaking his leg at the ankle. This testimony was corroborated by a number of other witnesses who were there present. They also corroborated the testimony with respect to the insufficient fastening of the bridge to the piers, and as to one pier being from 16 to 18 inches out of plumb. Another witness testified he had crossed this bridge in June of the same year with a load of sand, and that the bridge trembled and shook so under the load that he became frightened; that his four horses, wagon and load, all taken together, weighed nearly 6½ tons. Plaintiff's evidence also shows that the engine weighed about 11 tons without water and coal; that at the time of the accident he had one barrel of water and one-half ton of coal in the tender; that the separator weighed about 5 tons; that, when the engine started just before it fell, the separator stood on the approach still coupled to the engine.

On behalf of defendant it was shown by a number of owners of threshing machines that their general custom in crossing bridges is to uncouple the engine from the separator, cross the bridge with the engine, then fasten a cable to the separator and draw it across separately; that if the flooring of the bridge is good and sound it is unnecessary to plank the bridges. But on cross-examination it developed that several of these witnesses had never crossed a steel bridge with their machinery. The county surveyor testified that he examined three of the knee braces to the bridge the day after the accident and found all the bolt holes properly filled with bolts. On cross-

examination this testimony was weakened by the fact that upon being shown exhibit "K," afterwards identified as one of the knee braces taken from the bridge, he admitted that the bolt hole seemed to be filled with red paint of the same color and character as applied to the outside of the steel, thus bearing out the testimony of plaintiff's witnesses that a number of the bolt holes were filled with paint. The foreman of the work on the bridge and several other witnesses testified that bolts were put into all the places required, and described the method of fastening the bridge to the piers. The foreman of the work further testified that the bridge was erected in all respects in a proper manner. One of the county commissioners testified that soon after the erection of the bridge he examined it and found all bolts in place; that on the day of the accident he pulled out three of the anchor bolts from the piers, and he produced them in court. Another member of the county board also testified to examining the bridge at the time of its completion. An experienced bridge engineer testified that the knee braces were properly constructed, and that the method of placing the anchor bolts was that approved by competent engineers. It was also shown that the weight of the entire machinery of the plaintiff was about 35,000 pounds; that the engine weighed about 23,600 pounds without water or fuel, and the separator about 11,000 or 11,500 pounds. On cross-examination it was shown that there were three or four 20-horse power Reeves engines of the same type in Colfax county.

On rebuttal it was shown that there were seven 20-horse power engines in Colfax county at that time, and some larger ones, and four separators of about the same size as plaintiff's. Plaintiff also testified that the usual method of moving threshing machinery is to pull it across if the bridge is safe, but if unsafe to cable across. The testimony is voluminous, but the essential features are as related.

Four points are argued in the brief of the appellant. The first two are that the verdict is not sustained by suffi-

cient evidence, and is against the clear weight of the evidence. There was a direct conflict in the testimony as to nearly all the material points. The jury evidently believed that the bridge was defective, and that the plaintiff was not guilty of contributory negligence, and we think the evidence is sufficient to justify such conclusions.

The third assignment is that the verdict is contrary to law. Under this assignment the plaintiff has quoted at length from the note to *Kovarik v. Saline County,* in 27 L. R. A. n. s. 832 (86 Neb. 440) to establish the principle that "municipalities, in the construction and maintenance of bridges, are bound to provide for such uses as may fairly be anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where the bridges are situated, but that they are not bound to provide for the support of unusual and extraordinary loads." And, further: "But where the use of the highways by such machines (heavy traction engines) in the locality is unusual and extraordinary, the bridges need not be constructed and maintained in a condition to carry them, and the municipalities cannot be held liable for damages resulting from their insufficiency."

The trial court, at defendant's request, instructed the jury, as follows: "The jury are instructed that, in an action against a county to recover damages alleged to have been caused by the breaking down of a bridge while the plaintiff was attempting to cross it with a steam traction engine and separator, it is for the jury to determine, from the evidence, whether or not the bridge was properly constructed and maintained, and whether the use the plaintiff was making of it was unusual and extraordinary, and such as the county was not bound to anticipate.

"The jury are instructed that, in maintaining a bridge for public use, the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unusually

heavy loads, but it is only bound to provide what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which plaintiff drove on the bridge in question was an extraordinary or unusually heavy load is a question for you to determine from the evidence before you. * * *

"The jury are instructed that a county cannot be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge from which injury and damages occur to the person using it is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examinations have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent or undiscovered defects.

"The jury are instructed that, if they find that the use the plaintiff was making of the bridge was unusual and extraordinary and such as the county was not bound to anticipate, then the jury should find for the defendant."

These instructions seem to lay down the law in accordance with defendant's contention and with our views as expressed in *Seyfer v. Otoe County,* 66 Neb. 566, *Johnson County v. Carmen,* 71 Neb. 682, and *Kovarik v. Saline County,* 86 Neb. 440.

The bridge was built in the latter part of 1909. The accident occurred early in August, 1910. It had been safely crossed a number of times by 16-horse power engines, with separators weighing nearly as much as that belonging to plaintiff. The use of 16-horse power engines with large separators was common in Colfax county. A number of other engines and separators of larger size were also used therein. The bridge should have been made in the first place at least of ample strength to carry 16-horse power threshing machinery. The evidence shows that the difference in weight between 16-horse power en-

gines and 20-horse power engines of the same make is only 2 or 2½ tons. If but a small margin of safety had existed in the bridge over the strength absolutely required to carry ordinary threshing outfits, it would have been amply strong enough to carry the additional weight. The whole matter was left to a jury of the county, who were no doubt better fitted to judge of the sufficiency of the bridge to carry the loads reasonably to be expected in that locality than is this court.

Complaint is made of the reception in evidence of some of the knee braces taken from the bridge as incompetent, irrelevant and immaterial. The pieces were taken from the bridge the night before by unscrewing bolts which attached them thereto. This was nearly nine months after the accident. The evidence was not subject to the objection urged. Its weight and probative value may have been impaired by the long delay considering the chance of fabrication, but this, which is the ground argued here for exclusion, was for the jury. The objection to the question whether the contractor was under bond to the county should have been sustained, but the answer was so uncertain and indefinite we think the ruling without harm.

The case seems to have been fairly and impartially tried. The judgment is moderate in amount as compared with the injuries and damages proved. We find no prejudicial error, and the judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

JOSEPH DEPPE, APPELLEE, V. COLFAX COUNTY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,632.

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

W. I. Allen and *B. F. Farwell,* for appellant.

A. E. Garten and *George W. Wertz, contra.*

LETTON, J.

This is an action for personal injuries sustained by the plaintiff in the same accident involved in the case of *Peitzmeier v. Colfax County, ante,* p. 675. The two cases were argued and submitted together, the same alleged errors being relied upon. The decision in that case controls this. The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

RAINARD B. WAHLQUIST ET AL., APPELLEES, V. ADAMS COUNTY; U. S. ROHRER, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,417.

Elections: PRINTING OF BALLOTS: LIABILITY OF COUNTY. It is the duty of a county to furnish ballots to be used at general elections. The county clerk is the duly authorized agent of the county to procure and furnish such ballots. Where by a mistake of the clerk the ballots first printed, which had been paid for by the county, were rendered useless, this fact did not relieve the county from the duty of procuring and furnishing at public expense new ballots for the use of the voters.

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

M. A. Hartigan and *John Snider* for appellant.

H. F. Favinger and *J. W. James, contra.*

LETTON, J.

In 1910 the county clerk of Adams county ordered from the plaintiffs, who are engaged in the newspaper and job printing business in Hastings, 10,000 official and 10,000 sample ballots to be used at the general election in November following. The ballots were printed and furnished, a claim was filed, a warrant issued by the county for $165, and the amount paid. The county clerk made an error in the preparation of these ballots. On discovering this he made the necessary correction, and ordered the plaintiffs to print as corrected 10,000 official and 10,000 sample ballots. These were printed and furnished to the county. Plaintiffs filed a claim for $100 for this work, which was allowed by the county board. The appellant Rohrer as a citizen and taxpayer appealed to the district court, where a trial was had and judgment rendered in favor of plaintiffs for $90. Mr. Rohrer appeals to this court. No bill of exceptions was preserved.

The appellant demurred to the petition and objected to the introduction of evidence at the trial on the ground that the petition did not state facts sufficient to constitute a cause of action. His brief is confined to a discussion of this point. He bases his contention upon the provisions of sections 5807, 5820, Ann. St. 1911. Section 5807 provides, so far as applicable, as follows: "That all ballots cast in election for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of ballots and cards of instruction for the electors in each county, and the delivery of the same to the election officers, as hereinafter provided, shall be a county charge, the payment of which shall be provided for in the same manner as the payment of other county expenses." Section 5820 provides, in substance,

that the county clerk shall provide 75 ballots of each kind for every 50, or fraction of 50, voters registering or voting at the last general election in each election precinct or district; and further provides: "When a precinct or district shall be divided or the boundaries changed, the clerk must ascertain, as nearly as possible, the number of voters in the new district or districts, and provide therefor a sufficient number of ballots in the above proportion." By this section it will be seen that the number of ballots to be printed is not a fixed and certain quantity. It is a result of computation, and is subject in some degree to the discretion of the clerk. Section 5821, Ann. St. 1911, makes it the duty of the clerk, upon his own motion, to correct without delay any patent error which he may discover in the ballots or which may be brought to his attention, and provides a summary method of coercion if he fail so to do. Following section 22, art. I of the constitution, so jealous is the law of the rights of the voter that, if the clerk neglected to correct and furnish the electors with ballots as required, he is liable, under section 5833, Ann. St. 1911, to forfeit his office and to be fined and imprisoned.

The appellant's argument is that the statute makes no provision for reprinting the ballots, nor for payment for the same; that if, after the number of ballots for which the law provides have been printed and furnished, a mistake is discovered, then it is the duty of the clerk, and not of the county, to pay for the printing of correct ballots; that the clerk had no power to contract so as to make the county liable for the printing of more than the number of ballots fixed by the statute, which became a part of the contract, and that plaintiff could not recover for more than such number. The petition counts upon a contract made by the county clerk, who under the statute is the only authorized agent of the county to procure the printing of the ballots. The petition does not allege that the 20,000 ballots first ordered were all that were printed or required for the November election, and there is no allegation of the number which the clerk was authorized to procure.

The statute requires a computation to be made by the clerk as to the number of ballots necessary for each precinct or district, and, where divided, he must use his own judgment as to the number required. He alone is vested with the power to determine the number of ballots necessary. This being so, the presumption is that he kept within the terms of his authority.

Moreover, the county is bound to have legal ballots printed so that a legal election as to each officer may be held. If the clerk through mistake has caused ballots to be printed which, if used, would invalidate the election in whole or in part, this would not relieve the county, upon ascertaining that such an error had been made, from the duty of procuring other and legal ballots. The fact that it had already paid for the erroneous ballots could not operate to relieve it from the duty of furnishing the voters with proper and legal ballots to be used at the election. It might lead to serious consequences if the court should hold that the refusal of a clerk to furnish new ballots at his own expense could operate to invalidate an election and thus disfranchise the citizens of a county. The county is the principal in the transaction; the clerk is merely its agent, and, regardless of what the relations of the county may be to its agent with respect to the matter, the printer was entitled to his just compensation from the county.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ALMA F. HOWARD, APPELLEE, V. JOHN DUNCAN, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,362.

Vendor and Purchaser: FALSE REPRESENTATIONS: RESCISSION. False representations by vendor that irrigable land in Colorado will produce particular crops of sufficient value to meet deferred

instalments of the purchase price as they mature annually, that sufficient water for irrigation is available, and that the land is worth $100 an acre, though its value is only $40 an acre, may be sufficient to justify a rescission of the contract of sale, when made to and relied upon by a vendee residing in Nebraska, who never saw the land and was ignorant of its character and value.

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

Charles A. Robbins, for appellant.

Hall & Bishop, contra.

ROSE, J.

This is a suit in equity to cancel a contract bearing date June 3, 1907, and obligating plaintiff to purchase from defendant for $6,460 an 80-acre tract of land in Bent county, Colorado. Plaintiff also demands judgment for $2,650, the amount paid on the purchase price. The right to rescind is based on alleged fraudulent representations inducing the sale. Defendant denied the fraud imputed to him, and pleaded that the real consideration for his land did not exceed $5,000; that the expressed consideration included inflation in the value of real estate exchanged by plaintiff for the Colorado land; that plaintiff ratified the sale and defeated rescission by continued occupancy, by leasing the premises, by collecting rentals for two seasons, and by listing for sale at an increase in price the land conveyed to her. The trial court canceled the contract and entered a judgment in favor of plaintiff for $2,260, and defendant has appealed.

Plaintiff agreed to purchase the 80-acre tract of Colorado land for $6,800, being $85 an acre. She was allowed a credit of 5 per cent. of the total as the commission of her son, H. B. Murphy, for making the sale for defendant. The difference, or $6,460, was the consideration mentioned in the contract. Defendant agreed to accept as part of the purchase price, and plaintiff conveyed to him, an im-

proved lot in Lincoln, Nebraska. It was exchanged at a valuation of $4,250 and was mortgaged for $1,600. The difference, or $2,650, was acknowledged as a payment on the Colorado land. The balance of the purchase price of the 80-acre tract, $3,810, was to be paid by plaintiff in seven annual instalments, the first and second being $545 each, and each of the others $544, all bearing interest at the rate of 6 per cent. per annum. The evidence justifies a finding that the Lincoln property was exchanged at its fair market value. It was sold and transferred by defendant before this suit was commenced, and for that reason plaintiff sought and recovered judgment for its value in lieu of the property itself. Defendant had an option to buy for $40 an acre the quarter-section of which the land in controversy was the west half. Before he acquired title he tried to find a purchaser for it. With that end in view his agent, D. R. Cone, took plaintiff's son, H. B. Murphy, a prospective purchaser, from Fremont, Nebraska, to Colorado to see the land. There they met defendant. He and Murphy crossed the tract. Murphy was on the premises for perhaps an hour. He subsequently entered into a contract to purchase the east half. Defendant engaged him to negotiate with his mother for the sale of the west half, agreeing to pay him for his services in that capacity a commission of 5 per cent. on a purchase price of $6,800. Murphy talked with his mother on the subject. Defendant made two trips to Lincoln to see her, and he talked with her about the matter on both occasions. The first conversation lasted from 15 to 30 minutes and the last consumed perhaps half an hour. Thus far the facts narrated, except as to the value of the Lincoln property, are established without substantial conflict in the evidence, though defendant insists that Murphy was his mother's agent.

Proof that defendant made false representations is directly contradicted by him, and from his standpoint his counsel has ably presented his case. In determining the issue of fraud, the relative situations of the participants in the transactions should be considered. The land re-

quired irrigation. Defendant was an experienced dealer in real estate. He had lived in Colorado. He was familiar with the land and with the means of irrigating it. As an engineer he had been employed by the promoters of irrigation projects in the vicinity. Plaintiff lived in Lincoln. She had never seen the property and knew nothing about irrigation or irrigated lands. Her son was a commercial traveler, and, except for his visit to Colorado, was no better advised than his mother.

Plaintiff relies on representations made by defendant to her and to her son. There is proof that the representations to each were practically the same. For the purpose of testing the evidence of fraud, Murphy should be regarded as the agent of defendant. That defendant made representations to Murphy for the purpose of inducing him to purchase at least half of the quarter-section cannot be successfully refuted. Defendant's own testimony shows that he engaged Murphy to sell the west half of the quarter-section to his mother. The effect of the agency thus established was not destroyed by the subsequent act of the son in directing defendant to allow plaintiff credit for the commission. Defendant should be charged with any instrumentalities employed by his agent to bring about the sale to plaintiff.

Under the circumstances of this case, it is immaterial on the issue of fraud whether the representations were made to the son or to the mother, since they were communicated to her by defendant or by his agent or by both. She testified in substance that defendant, during his conversations with her, before she entered into the contract, described the particular growing crops and the purposes to which the soil is adapted, giving quantities and values. In this connection she said: "He assured me that I could realize enough on the land from the proceeds of it to finish paying it out." While the truthfulness of this testimony is denied by defendant, he admits that the son had procured from some source data from which he made calculations to show that the deferred payments could be met

with the proceeds of the land. The inference from all of the circumstances is that this data came directly or indirectly from defendant, and that plaintiff told the truth. There is convincing proof that the representations to which she testified were false. Plaintiff further testified in effect that defendant told her the land he was offering for $85 an acre was worth $100 an acre and could be sold for that. At that time he had an option to buy it for $45 an acre. More than a year later he listed it for sale at $65 an acre. There is also proof indicating that defendant misrepresented the amount of water available for irrigation. When plaintiff's ignorance of conditions and defendant's knowledge and experience are considered with her absence in Nebraska and his presence in Colorado, the fraudulent representations proved are material. That plaintiff relied upon them there can be no doubt. She sold her mortgaged home to make the initial payment. She was without means to make the first deferred payment on the purchase price when the proceeds of the land purchased proved to be insufficient. The demands of brevity have prevented an extended reference to the evidence, but all of the proofs and the observations of counsel thereon have been examined and considered.

The defenses of laches and ratification are not fully established. Having perpetrated fraud in the manner indicated, defendant, for reasons already suggested, is not in a position to exact of plaintiff extreme vigilance in discovering and renouncing it. He received property of the value of $2,650 and attempted to forfeit plaintiff's contract for nonpayment of the first deferred instalment of $545. Her right to redress should not be defeated because she retained the Colorado land more than a year. At the end of that period she was not fully advised of the fraud. She still hoped that another season would be more propitious.

Neither should relief be denied on the ground that plaintiff listed the land for sale at $100 an acre. This act indicated a reliance on defendant's representations before she realized the extent to which she had been overreached.

Defendant was credited with the first season's rentals. Plaintiff testified that she did not receive a cent from that source for the second year, and the evidence does not sufficiently show what her son received or his authority to act for her in making collections.

The findings below are here adopted as correct.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE OF NEBRASKA V. HENRY ROY.

FILED DECEMBER 4, 1913. No. 17,419.

Criminal Law: APPEAL: DISMISSAL. An appellate proceeding under section 515 of the criminal code to settle a point of law in a prosecution, wherein accused was discharged, may be dismissed for failure of the county attorney to refer in his brief to the volume, page or section where acts of congress, on which the ruling below is based, are published or may be found.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Dismissed.*

Grant G. Martin, Attorney General, P. H. Peterson and *E. A. Houston,* for plaintiff in error.

W. A. Meserve, contra.

ROSE, J.

In a prosecution by the state in the district court for Knox county, the county attorney filed an information charging that Henry Roy committed an assault upon Lucy Brokenjaw with intent to commit rape. Accused filed a plea in abatement, asserting that he and prosecutrix are Indians, that the place of the alleged assault is on an

Indian reservation in Indian country on land allotted to an Indian and over which the United States has exclusive jurisdiction. The state filed an answer to which accused demurred. The trial court sustained the demurrer and dismissed the prosecution. For the purpose of settling the question of law raised by the demurrer, the county attorney, under section 515 of the criminal code, was permitted to present here an exception to the decision below.

Did the district court for Knox county have jurisdiction to try accused and to punish him, if guilty? The determination of this question depends upon provisions of certain acts of congress. The county attorney in his brief has not pointed out the volume, page or section where these laws are published or may be found. In this respect there is an utter disregard of court rules. To determine the merits of the exception would require a research and references which should have been made by counsel. The rights of other litigants, the dispatch of business and the enforcement of court rules require the dismissal of the appellate proceeding. Appellate proceeding

DISMISSED.

EDWARD M. BIRDSALL, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,439.

Trial: QUESTION FOR JURY: NEGLIGENCE. The issue of negligence should be submitted to the jury, where reasonable men may draw diverse inferences from all of the circumstances proved.

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

A. A. McLaughlin, Wymer Dressler and *Edgar R. Hart,* for appellant.

Albert W. Crites, contra.

ROSE, J.

This is a suit to recover the value of a mare alleged to have been killed on defendant's railroad track. The substance of the case pleaded by plaintiff is that at a farm-crossing about a mile west of Chadron defendant negligently left a gate open between a pasture and the railroad; that the animal strayed through the opening upon the railroad track and was struck by a locomotive; that defendant was negligent in operating its train, failing to stop it in time to prevent the collision. Defendant denied negligence. The case was tried to a jury. There was evidence on both sides. The trial court directed a verdict for plaintiff, and from a judgment in his favor for $197.35 defendant has appealed.

One of the assignments is that the trial court erred in directing a verdict for plaintiff. The parties do not agree on the facts proved or on the inferences to be drawn therefrom. Though two abstracts have been filed, the entire bill of exceptions has been read to find a justification for the peremptory instruction.

1. From the evidence, would reasonable men draw the inference only that defendant was negligent in leaving the gate open? The right of way had been fenced by the railroad company. The next friend, the father of plaintiff, owned the pasture. The ranch of which the pasture was a part was occupied by a tenant. The gate and the farm-crossing were maintained for the convenience of the landowner and his tenants, but were frequently used by others. The accident occurred December 27, 1909. Plaintiff proved by one of his witnesses that the gate was found open and left closed Christmas morning. How it was afterward opened before the mare was killed or by whom is not proved. Actual knowledge of defendant that it was open between December 25 and December 27 is not shown. Whether defendant was chargeable, if at all, with constructive notice that it was open in the interim in time to close it before the mare strayed from the pasture would,

in the aspect most favorable to plaintiff, be a question for the jury. A witness for plaintiff said that the gate was made of boards and was not long enough to slide between two posts which stood at the end where it closed. He admitted, however, that it would rest against one of the posts, and there is nothing to show that in this condition it would not protect stock from the railroad track. Besides, a defect in the gate or in the fence was not pleaded. The issue that the gate was negligently left open was not established as a matter of law.

2. Was it established as a matter of law that the negligent operation of defendant's train was the proximate cause of the injury? Plaintiff asserts that the mare was struck in daylight on a track where she could be seen from defendant's engine for nearly a mile. There is no testimony by any eye-witness. When or by what train the animal was struck is left in doubt. Evidence tending to show that the accident occurred in the daytime conflicts with other proof. In addition, plaintiff adduced evidence that between the gate and the place where the mare was struck there were horse tracks beside the railroad grade on one side of the right of way, if not on both. For anything appearing in the record the mare may have run suddenly and unexpectedly onto the track ahead of a train which could not be stopped in time to prevent a collision. Reasonable men may draw different inferences from all of the circumstances which tend to show negligence on part of defendant. The sufficiency of the evidence to sustain a verdict in favor of plaintiff is neither presented nor decided.

For the error in directing a verdict, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. MICHEL A. HARTIGAN ET AL., APPELLANTS, V. JOHN H. UERLING, APPELLEE.

FILED DECEMBER 4, 1913. No. 17,447.

1. **Counties and County Officers:** REGISTER OF DEEDS: ACCOUNTING. As soon as the register of deeds makes, and the county board approves, his annual accounting, it is his duty to turn over to the county treasurer all fees in excess of statutory compensation for official services.

2. ———: ———: ———: MANDAMUS. Where the annual accounting between the county board and register of deeds has been duly made and approved, the latter may be required by mandamus to turn over to the county treasurer all fees in excess of statutory compensation for official services.

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

M. A. Hartigan, for appellants.

Tibbets, Morey & Fuller, contra.

ROSE, J.

This is an application on behalf of Adams county for a peremptory writ of mandamus directing respondent as register of deeds to turn over to the county treasurer the balance of the fees in his hands for the year 1910, after deducting the statutory compensation for the official services of himself and his deputy. There is no dispute about the facts. For the year 1910 respondent collected in fees $3,246.80. He lawfully retained $1,500 for himself and $1,000 for his deputy, leaving in his hands at the close of the year's business, after an accounting approved by the county board, $746.80. Upon demand respondent refused to turn the balance over to the county treasurer. To coerce performance of that duty is the purpose of this proceeding. The writ is resisted on two grounds: (1) As register of deeds respondent properly retains the money to guard against any deficiency in the amount of fees avail-

able for payment of salaries during the remainder of his official term. (2) Mandamus is not the proper remedy. The trial court denied the writ, and relators have appealed.

1. Has respondent a right to retain the funds? A statute applicable to Adams county provides that each register of deeds whose fees in the aggregate exceed the sum of $1,500 "in any one year after the payment of the necessary deputy and clerk hire shall pay such excess into the treasury of the county." Comp. St. 1911, ch. 18, art. I, sec. 77*a*. A year is manifestly the statutory period for an accounting. The county treasurer is the lawful custodian of any balance in favor of the county as soon as the correct amount is shown by a duly approved accounting or settlement. How he shall protect and handle such funds for the benefit of the county is the subject of other legislation. He does not share this responsibility with respondent. At the end of each year it is the duty of the register of deeds to turn over to the county treasurer all fees in excess of statutory compensation. Whether the county must make good deficiencies in compensation for succeeding years is a question not involved or decided.

2. Is mandamus the proper remedy? When relators made their application for the writ, it was definitely settled that respondent had in his hands $746.80 in excess of lawful compensation for official services for the year 1910. The extent of the excess is not in controversy. To turn the balance over to the county treasurer is an official duty enjoined upon respondent by law. Mandamus is the proper remedy.

The judgment is therefore reversed, with directions to the district court to allow the writ at the costs of respondent in both courts.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ANNA K. BOWMAN, APPELLEE, V. WALTER GOODRICH ET AL., APPELLANTS.

FILED DECEMBER 4, 1913. No. 17,389.

1. **Forcible Entry and Detainer:** DEFENSES: LANDLORD AND TENANT: SALE OF PREMISES. Where land leased has been sold under a decree in a suit to foreclose a lien for delinquent taxes, in which suit the lessor was a party and whose rights were foreclosed by such decree, and such sale has been duly confirmed and a deed issued to the purchaser thereat, and the lessee, upon exhibition to him of the sheriff's deed, in order to avoid eviction by the then owner of the paramount title, in good faith attorns to him, such action on his part may be interposed as a defense to an action by his lessor to recover possession.

2. **Justice of the Peace:** JURISDICTION: TITLE TO REALTY. And when such facts are made to appear in an action pending before a justice of the peace, the title to the real estate is drawn in controversy and it is the duty of the justice to refuse to proceed further.

3. ———: ———: ———: APPEAL: DISMISSAL. And if the justice wrongfully holds jurisdiction and enters judgment awarding plaintiff possession of the land, it is the duty of the district court on appeal, when such facts are made to appear in that court, to dismiss the action for want of jurisdiction.

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

Leavitt & Hotz, for appellants.

Weaver & Giller, George W. Shields and *John Q. Burgner, contra.*

FAWCETT, J.

This is an action of forcible entry and detainer, commenced in a justice court of Douglas county, to recover possession of a portion of lot 7, block 93, in the city of Omaha, known as 914 Dodge street. From a judgment in plaintiff's favor in justice court, defendants appealed to

the district court, where plaintiff again recovered, and the case is here for review.

The complaint is in the usual form and is based upon an oral lease which it is alleged was terminated by reason of nonpayment of rent about November 1, 1909. The answer challenged the jurisdiction of the court over the subject matter of the action, for the reason that the title to the real estate in controversy was necessarily involved and drawn in question. The trial court by its rulings in the course of the trial adhered strictly to the rule that a tenant cannot dispute the title of his landlord, and excluded evidence offered by defendants to show that, subsequently to their entry under the oral lease of plaintiff, a purchaser under a sale in a suit to foreclose a lien for delinquent taxes on the property in controversy, in which suit the plaintiff here was a defendant and whose rights were foreclosed by that decree, exhibited to them the sheriff's deed and served them with a "notice to quit;" and also refused to permit defendant to show that after the service of this notice they recognized such purchaser as their landlord, and thereafter paid rent to him. This raises the controlling question in the case. That is to say, could defendants, in order to avoid eviction by the owner of the paramount title under the sheriff's deed, attorn to him and use such action on his part as a defense to plaintiff's action to recover possession? We think this question must be answered in the affirmative.

The plaintiff's testimony shows that defendants went into possession in September, 1909, under an oral lease; that they paid one month's rent to October 10, 1909, and no more; that on November 11 she served the notice to quit and this action followed. The evidence offered by defendants, a part of which was at first received and then excluded by the court, shows the tax foreclosure proceedings, the regularity of which is not questioned, shows that the sheriff's deed to Henry W. Pennock was acknowledged October 27, 1909, and recorded the same day. The testimony of one of the defendants was that on October 29 the

agent of Mr. Pennock exhibited this deed to him and on the same day served him with notice to quit. As already stated, he was not permitted to testify as to what he did subsequently to receiving the notice. We are unable to agree to the position taken by the learned district court. As soon as the above facts were made to appear, the question of title was drawn in controversy and it became the duty of the justice to refuse to proceed further. The justice having failed to take this course, the district court, on appeal, should have dismissed the action for want of jurisdiction. Our statute is plain and explicit that where the title to real estate is drawn in question a justice of the peace is without jurisdiction. Code, sec. 907. This holding is well sustained by authority. *Teich v. Arms,* 5 Cal. App. 475; *Simers v. Saltus,* 3 Denio (N. Y.) 214; *Corrigan v. City of Chicago,* 144 Ill. 537.

It follows from what has been said that the district court erred in the rulings complained of. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

BARNES, LETTON and ROSE, JJ., not sitting.

LINCOLN SAVINGS & LOAN ASSOCIATION, APPELLEE, V. HARRY H. WEBBER ET AL.; NEBRASKA MATERIAL COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,401.

1. **Mechanics' Liens: ITEMS OF ACCOUNT: ENTIRE CONTRACT.** Where a materialman contracts with the owner to furnish material for the construction of a building, and during the course of construction a portion of the building is so damaged by fire as to necessitate the reconstruction of such portion, and the materialman, without further contract with the owner, furnishes the extra material required for such reconstruction, all of the material furnished will be treated as having been furnished under one contract.

2. ———: DESCRIPTION OF PROPERTY. "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guiou v. Ryckman*, 77 Neb. 833.

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

Talbot & Allen, for appellant.

Burkett, Wilson & Brown, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Lancaster county, to foreclose a mortgage on lot 2, in block 1, Replat of Sewall's Subdivision of Lincoln, Nebraska. The mortgage was recorded July 19, 1909. The defendant Lincoln Stone & Supply Company filed an answer and cross-petition claiming a lien under five judgments obtained July 7, 1910. The defendant Nebraska Material Company filed its answer and cross-petition for the foreclosure of a mechanic's lien, the same being for materials furnished the owner of the premises for the erection of a building upon the lot in question, and alleges that the first item of material was furnished March 20, 1909, and the last item May 27, 1910. The court found for the plaintiff and established its mortgage as a first lien; found for the defendant Lincoln Stone & Supply Company and established its claim as a second lien; found that the defendant Nebraska Material Company was not entitled to a lien and dismissed its action. The defendant Nebraska Material Company appeals.

The grounds upon which plaintiff and the stone company justify the decree entered below are: (1) That the material company's lien was not filed within the time required by law. (2) There was not a sufficient description of the property contained within the lien. We will consider these points in the order named.

1. The first item of material was furnished March 20, 1909. When the building was only partially constructed the owner of the property moved into the basement and continued to reside in the building until after its completion. His testimony as to just when he moved in is somewhat uncertain, but it was probably some time in the early summer of 1909. The work upon the building appears to have progressed slowly. About Christmas of that year the building was damaged by fire. The roof was badly damaged, as were also the plastering and one of the walls. This necessitated a restoration of the damaged wall and the repair of the damage to other parts of the building. The material furnished by the material company consisted of sand and hollow blocks. It made deliveries of material each month, after the fire, down to and including the month of May. On May 25 and 27 it made the last two deliveries. The lien hinges upon these two dates, as it was filed September 24, 1910, which would be within four months thereafter. It is urged that these later items were not furnished under the original contract for the erection of the building, but were furnished for repairs, which had been necessitated by the fire, and hence were furnished under a separate and subsequent contract. The evidence of the owner as to the contract is that, when he was about to begin the erection of the building, he purchased the sand, stone and cement from the material company, and that the company was to deliver it as he wanted to use it; that it was to be delivered when called for. He also testified that the material covered by the material company's lien was delivered at his place and used by him in the construction of the house. This testimony is not disputed, so that the only question upon this point is, was the material necessary, for the restoration of the work which had been partly finished and which had been damaged by the fire, so that the building could be completed in the manner contemplated when it was begun? We are unable to see how there can be any difference of opinion upon this point. The material company was to furnish the material

for the construction of the building. The building was not completed until the company had furnished the material in May, 1910. This long delay had doubtless been occasioned by the fire, but the material company was not responsible for the fire, nor was any additional or subsequent contract entered into between it and the owner of the building. There were 19 deliveries of material after the fire, viz., eight in January, 1910, four in February, one in March, four in April, and the last two in May. Suppose, instead of the fire which occurred at Christmas time, a high wind had blown down the wall and damaged the roof, or suppose that, through some blunder of the mechanics who were constructing the building for the owner, the wall and roof had been so defectively constructed that the owner would have required that they be torn down and rebuilt. Could that fact, by any rule of law or of equity, militate against the materialmen? We think not. In *Watkins v. Bugge*, 56 Neb. 615, we held: "Each order and delivery of material made at different times does not necessarily constitute a separate contract. To constitute a single contract it is not necessary that the materials should all be furnished at one time, but may be obtained at different times and still be embraced in a single contract, if such was within the contemplation of the parties." Was it within the contemplation of the parties, viz., the owner and the material company, that the latter was to furnish material for the erection of the buildings about to be constructed, until its final completion? Clearly, yes. The fact that the final completion was delayed, or the amount of material required was increased by reason of an accident that occurred in course of construction, in no manner destroys or modifies the principal fact which "was within the contemplation of the parties." We think the construction of the building, from the time it was begun until it was completed, months after the fire, was a single transaction, and that the material furnished by the material company was furnished under one contract.

2. Was the description contained in the affidavit at-

tached to the lien a sufficient description? The affidavit recites that the itemized account is true and correct; that the material was furnished for the owner "under a verbal contract, for the erection of a dwelling and other improvements and appurtenances, pertaining to and belonging on the following described lot, piece, or parcel of land, viz.: Lot number two (2) in block number one (1) in the Replat of Sewall's Subdivision." It will be observed that the affidavit does not state where the Replat of Sewall's Subdivision is located. It does not name the state, county or city. The rule is settled in this state that, "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guiou v. Ryckman,* 77 Neb. 833. It is also the settled rule that, the object of the mechanic's lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. *Rogers v. Omaha Hotel Co.,* 4 Neb. 54. Cited with approval and followed in *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb. 207, 221. Applying these rules, was the description sufficient? In other words, would any one "familiar with the locality," that is to say, with Sewall's subdivision, be able with reasonable certainty to locate lot No. 2 in block No. 1, in that subdivision? It is said, no state, county or city is named. We think these omissions, while careless, are not sufficient to defeat the lien. The lien was duly filed in Lancaster county. The records of Lancaster county would show where, in that county, the property included in the Replat of Sewall's Subdivision was located. Any abstracter would have shown the lien in an abstract of title to the lot named, and, if by an examination of the records the location of that subdivision could have been ascertained, the identification of the property would have been easy. In *Drexel v. Richards,* 48 Neb. 732, in considering the statute providing for the filing of a lien, we said: "Such

statute requires that in the affidavit filed to procure the lien there should be such a description of the real estate as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with the real estate with notice of the lien claimed against it." The plaintiff and the stone company were the parties dealing with this real estate. The plaintiff knew when it made its loan that the building was in course of construction, and was charged with knowledge of the fact that the material company was furnishing material therefor. The stone company obtained its judgments after the material company had commenced furnishing the material and while it was still continuing to furnish the same. It likewise was charged with notice of the material company's rights. Being charged with this knowledge, and knowing that the property upon which they were asserting liens was lot 2, block 1, in the Replat of Sewall's Subdivision, they could not have been misled by the fact that the description given in the affidavit attached to the material company's lien did not state that Sewall's subdivision was in the city of Lincoln. The protection provided for laborers and material men by the beneficient statute enacted for their benefit cannot be taken from them on so slender a technicality. We have not overlooked the authorities cited in the briefs of the plaintiff and defendant stone company. We have examined them and find nothing therein which conflicts with what we have above held.

The judgment of the district court is reversed and the cause remanded, with directions to establish the lien of the defendant Nebraska Material Company as a first lien upon the premises in controversy.

REVERSED.

BARNES, LETTON and ROSE, JJ., not sitting.

MARIE HURST, ADMINISTRATRIX, APPELLANT, V. HAYDEN BROTHERS ET AL., APPELLEES.

FILED DECEMBER 4, 1913. No. 17,405.

1. **Partnership, Evidence of.** Evidence examined and set out in the opinion *held* insufficient to show a partnership between the defendants.
2. **Negligence, Evidence of.** Evidence examined and set out in the opinion *held* insufficient to establish actionable negligence against either of the defendants.

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

Weaver & Giller, for appellant.

Greene, Breckenridge, Gurley & Woodrough, John M. Macfarland, Charles E. Foster and *A. J. Kinnersley, contra.*

FAWCETT, J.

Plaintiff, as administratix of the estate of Thomas Hurst, deceased, brought suit in the district court for Douglas county, against Hayden Brothers, a corporation, and Martin Reum, an individual, to recover damages by reason of the death of her husband, as the result of alleged negligence of the defendants. From a directed verdict in favor of the defendants and a judgment thereon, plaintiff appeals.

The petition alleges that Hayden Brothers Company operated a large retail department store in the city of Omaha; that the meat department in its store is managed and operated by defendant Reum; that there exists between the defendants "some sort of a partnership agreement as to the profits arising from said meat department; that Hayden Brothers furnish the room, lights, elevator service, janitor service, and some of the help in said department, and furnish a portion of the advertising for

said meat department; that Hayden Brothers and said Martin Reum each receive a portion of the receipts from said meat department and are partners in said business." It is then alleged that the decedent during his lifetime was an employee of defendants in the meat department as a salesman; that in the course of his employment as such salesman it became necessary for him to enter a room, belonging to the defendant Hayden Brothers, and adjoining the general salesroom of the meat department, for the purpose of replenishing his stock of supplies; that the room referred to is a narrow room about 30 or 40 feet long and 10 or 12 feet wide, and is supplied with only one light of a very small candle power; that, while so engaged, the decedent "stepped upon a nail which was sticking up through a board, which said board had been previously removed from some of the boxes of supplies, and the nail thus stepped upon by said Hurst penetrated his foot, causing tetanus, and death resulted therefrom a few days thereafter;" that defendants and each of them were negligent, in failing to provide decedent a safe place in which to perform his work; in failing to provide a room or place where refuse boards and other refuse matter could be kept separately from the supply-room; in failing to have the nails removed from the boards as they were taken from the boxes; in failing to furnish sufficient light for the supply-room where the employees were compelled to go to get supplies; in failing to keep the room properly lighted so that employees could see where they were stepping when getting supplies; and in failing to keep the supply-room in a reasonably safe and clean condition; that, by reason of the negligence of each of the defendants, decedent received the injuries which caused his death. The defendants each answered separately with a general denial.

The legality of a partnership between a corporation and an individual, such as is set out in this case, may well be questioned. We think the rule is quite well settled that, in the absence of express power in its charter, a corporation has no authority to enter into a partnership with a

natural person. 1 Morawetz, Private Corporations (2d ed.) sec. 421; *Gunn v. Central Railroad,* 74 Ga. 509; *Central R. & Banking Co. v. Smith,* 76 Ala. 572; *Whittenton Mills v. Upton,* 10 Gray (Mass.) 582, 598; *Sabine Tram Co. v. Bancroft & Sons,* 16 Tex. Civ. App. 170. We deem it, however, unnecessary to decide this point, for the reason that the judgment below must be affirmed upon the merits.

There is no conflict in the evidence. The contract between Hayden Brothers Company and defendant Reum was in writing and is set out in full in the abstract. An examination of it shows that the corporation had no interest whatever in the profits and was in no manner liable for any of the losses sustained by Reum in the conduct of his meat business. It shows that the corporation leased to Reum certain space in its building in which to conduct his meat market, which space included the room where decedent received his injury. In addition to the space furnished, the company was to furnish light and heat. As a consideration for these concessions, Reum was to pay the company 7 per cent. of the gross receipts of his business, and was to expend a sum equal to 2 per cent. of his gross sales in advertising his department. The company furnished two cashiers for the department, with cash registers. All the moneys taken in were turned over to these cashiers. At the close of business each day Reum would read the machines, and the cashier would then take the money and turn it over to the company. From the money thus received the company would deduct its 7 per cent., and pay the balance over to Reum whenever he demanded it, which could be every day, but was usually two or three times a week. Reum bought his own stock and paid for it himself. He kept his own bank account, hired all his help, and paid them their salaries. Reum had 2 delivery wagons and the company had 15 or 20. All were lettered "Hayden Brothers." The two wagons owned by Reum were used for hauling his invoices from the depot to the store and for delivering down-town sales, while his sales in the

outlying portions of the city were delivered in the company's wagons. The advertising matter in the newspapers read: "Hayden Brothers Meat Department, Martin Reum, Manager." These advertisements did not always appear in connection with Hayden Brothers' general advertisements, but often appeared in some other place in the newspaper, and, so far as the evidence shows, they were paid for by Mr. Reum, probably out of the 2 per cent. of gross sales required of him by his contract. We see nothing in any of these facts to established a partnership between Hayden Brothers Company and Mr. Reum. The contract between them amounted to nothing more than the renting of floor space to Reum by the company for a rental of 7 per cent. of his gross sales. This was a fixed and certain rental, in no manner dependent upon the question of whether Reum was conducting the business at a profit or a loss. We therefore hold that no partnership is shown.

There is nothing in the evidence to show that Hayden Brothers Company had or attempted to exercise any control of the storeroom where the accident occurred. This room opened off from the meat salesroom, separated by a partition which extended from the floor to within a few feet of the ceiling. Incoming stock was received and unpacked in this storeroom. The work of unpacking was done by the employees of the meat department, of which decedent was one. When the boxes and barrels were opened, the boards were not at once removed, nor were they piled up with any care by the men. They were allowed to accumulate for days at a time, and sometimes would so obstruct the room that the men, including the decedent, would go out and have a partial cleaning up. The sausage grinding was done in this room. The employees of the salesroom also used the room as a cloakroom. When the noon hour arrived on the day of the injury, decedent went into the room to lay off his meat-cutting clothes and put on his street clothes, in order to go to his noonday meal. While crossing the room to where his garments were, he stepped upon a nail protruding from

a board, and received the injury, set out in the petition, from which he died.

When plaintiff rested, separate motions were made by the defendant company and defendant Reum to direct a verdict in their favor for various reasons, one of which was that there was no evidence to show actionable negligence against the defendants. The district court properly sustained the motions. We are unable to discover any theory upon which a verdict for the plaintiff could have been sustained.

The judgment is therefore

AFFIRMED.

BARNES, LETTON and SEDGWICK, JJ., not sitting.

WILLIAM D. WAY V. JOSEPH J. CAMERON ET AL., APPELLANTS; F. C. PHILLIPS COMPANY, APPELLEE.

FILED DECEMBER 4, 1913. No. 17,411.

1. **Mechanics' Liens: NOTICE: SURPLUSAGE.** A recital in a notice of a mechanic's lien, filed by a subcontractor, that the materials furnished were furnished for the owner of the property under a contract, is an unnecessary recital and will be treated as surplusage.
2. **———: DESCRIPTION OF PROPERTY.** "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *Guion v. Ryckman*, 77 Neb. 833.
3. **Mechanics' Lien Law: CONSTRUCTION.** The object of the mechanics' lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.

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

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

Charles S. Roe, contra.

FAWCETT, J.

This suit was originally commenced in the district court for Lancaster county by one William D. Way against Otto D. and Minnie Helming, owners of the property in controversy, Joseph J. Cameron, the contractor who erected a dwelling-house on the property, and various subcontractors and materialmen, including F. C. Phillips Company, a subcontractor, to foreclose a mechanic's lien on lots 11 and 12, block 25, Dawson's addition to South Lincoln, Nebraska. At the time of the trial all of the mechanics' liens except those of F. C. Phillips Company had been paid or discharged of record, including that of the plaintiff Way. The case proceeded to trial upon the cross-petition of F. C. Phillips Company, whom we will style plaintiff, against the Helmings, whom we will style defendants, and the property above described. There was a decree for plaintiff, and defendants appeal.

The first contention of defendants is that the lien filed by plaintiff "was insufficient in law to give a lien against the property." The lien filed was as follows: "Lincoln, Nebraska, Apr. 29, 1910. O. D. Helming, Esq., to F. C. Phillips Co. Dr." Here follow items constituting plaintiff's claim. The affidavit attached recites: "G. H. Giesler being first duly sworn on his oath says that the foregoing itemized account of work, labor, skill, and materials, is a true and correct account of the work, labor, skill, and materials done and performed and furnished by this affiant for the said O. D. Helming under a contract for installation of plumbing on the following described lot, piece, or parcel of land, viz.: Lots 11 & 12, block 25, between 10th & 11th and Pine & Rose street. And this affiant further says that he has, and hereby claims, a lien on the said premises for the amount of his said account, to wit: The sum of $275, together with interest thereon

at the rate of 7 per cent. per annum from the twenty-ninth day of April, A. D. 1910, and further affiant says not. F. C. Phillips Co., by G. H. Giesler, Sec'y. Subscribed in my presence and sworn to before me this 29 day of April, A. D. 1910. John Giesler, Notary Public. (Seal.)"

It is said in the argument that the contractor's name is not mentioned, and that the statement claims a contract with O. D. Helming, the owner of the property; and it is argued that plaintiff had in fact filed a claim under section 7100, Ann. St. 1911, and was attempting to foreclose under section 7101. The fact that plaintiff in the notice of lien filed entitled it "O. D. Helming, Esq., to F. C. Phillips Co. Dr.," and that in the affidavit attached to such notice it is said that the materials were furnished "for the said O. D. Helming under a contract," is insufficient to destroy the force of the paper as a lien. As early as *Marrener v. Paxton*, 17 Neb. 634, we said: "We have no doubt that in a proper case, one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. The furnishing of the material is notice to the owner of the rights of the party, and until the time for filing a lien has expired, he is directly liable to such party for the value of the same." In *Garlichs v. Donnelly*, 42 Neb. 57, we held: "It is not necessary to the sworn statement and claim of lien required to be filed by subcontractors that there should be attached thereto a copy of the written contract under the terms of which the rights of such subcontractor have accrued; neither is it necessary that the ownership of the property benefited should be set forth therein." The recital in the notice of lien, that the materials furnished were "for the said O. D. Helming under a contract," was an unnecessary recital and should be treated as mere surplusage.

It is further said that the description of the property in the lien was not sufficient. The description in the affidavit attached to the notice of lien gives the property as "Lots 11 & 12, block 25, between 10th & 11th and Pine & Rose street." The technically correct description of the property is lots 11 and 12, in block 25, Dawson's addition to South Lincoln. The building erected was at the northwest corner of Eleventh and Rose streets. This description, together with the fact that, at the time plaintiff furnished the plumbing, fixtures and material, Mr. and Mrs. Helming both went to plaintiff's place of business and looked at the fixtures, decided what they wanted and made changes, and that the extras were selected by Mrs. Helming, shows very clearly that defendants were in no manner misled by the description given in the notice. In *Guiou v. Ryckman,* 77 Neb. 833, we held: "In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." We think the description of the property in the notice of lien was sufficient.

We deem it unnecessary to pursue the matter further. The defenses sought to be interposed are too technical to be permitted to prevail. In *Rogers v. Omaha Hotel Co.,* 4 Neb. 54, speaking through Mr. Justice MAXWELL, it is said: "The object of the law under consideration being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." This language is quoted with approval in *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb. 207, 221.

The judgment of the district court is

AFFIRMED.

BARNES, LETTON and ROSE, JJ., not sitting.

EGBERT H. EVERIST, APPELLEE, V. MANGELSDORF BROTHERS COMPANY, APPELLANT.

FILED DECEMBER 4, 1913. No. 17,422.

Brokers: ACTION FOR COMMISSION: REVIEW. Record examined, and *held* free from any prejudicial error.

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

C. E. Eldred, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Red Willow county, for $210.23, claimed to have been earned as commission in purchasing alfalfa seed for defendant. Verdict and judgment for plaintiff. Defendant appeals.

The answer admits a balance due, in the sum alleged, but as a defense to the action alleges that plaintiff is not the real party in interest; that defendant's contract was with the firm of Relph & Everist, of which firm plaintiff is a member, and also alleges that plaintiff included in one car of seed 25,550 pounds claimed to have been purchased from his copartner Relph, and for which he claimed to have paid $8 per bushel, when the same was worth not to exceed $7.20 per bushel, for the reason that the seed had not been properly cleaned and therefore contained 14 per cent. of chaff and other foreign matter, to defendant's damage in the sum of $338.40, which it was alleged left a balance due from plaintiff to defendant of $128.35. The reply was a general denial.

Upon the trial plaintiff took the stand in his own behalf, and testified substantially that the contract was with him individually; that his partner Relph had no interest in the contract and took no part in the performance of the

service. Defendant offered no evidence to controvert plaintiff's testimony, but contends that because plaintiff on cross-examination admitted that in buying the alfalfa seed for defendant he used the firm money, that he deposited the drafts received from time to time from defendant, aggregating something over $10,000, to the credit of the firm in the latter's bank, and also turned over to the firm his commission earned in the purchase of the seed, it necessarily follows that the transaction was a firm transaction. We think it is immaterial what money plaintiff used in paying for the alfalfa seed, or what he did with the commission which he earned in representing defendant. The question is, was he acting individually for the defendant? The uncontradicted evidence of the plaintiff is that, when defendant's representative called upon him, he said he wanted to get a man in that locality to buy alfalfa seed; that plaintiff expressed a willingness to represent him in that capacity; that before making the contract plaintiff and defendant's representative drove into the country on two different occasions and examined alfalfa seed at different places, at which times defendant's representative had plaintiff examine the seed and pass his judgment upon it, so as to demonstrate whether or not he knew good seed from poor and what amount of dirt and foreign matter would actually be in the seed; that after applying this test he said he thought plaintiff's judgment was fairly good, and thereupon engaged plaintiff to represent defendant in purchasing two car-loads of seed. The district court fairly submitted to the jury the question as to the relationship of the parties; that is to say, as to whether or not defendant contracted with plaintiff individually or with the firm of Relph & Everist, and the evidence sustains the verdict upon that point.

Defendant objects to instruction No. 5½. We have examined this instruction carefully and are unable to find any error in it. Defendant also urges that the court erred in giving instruction No. 7. We are not prepared to say that instruction No. 7 is free from error, but if it is in

any respect erroneous the error is against plaintiff, and not defendant. It is next urged that the court erred in refusing to give instruction No. 4, requested by defendant. The concluding paragraph of this instruction is: "You are instructed that, under such circumstances, the plaintiff being an agent of the defendant, would have to exercise absolute good faith and should be held strictly accountable to defendant for all of his acts in connection with the purchase of said alfalfa seed from his partner, T. J. Relph, for defendant, and that all his acts connected therewith should be subjected to the strictest scrutiny, and he is liable to the defendant for any negligence or carelessness on his part in the inspection and purchase of said alfalfa seed." The objection to this instruction is, there is no evidence in the record to sustain the allegations of defendant's answer that plaintiff was guilty of any negligence or carelessness in the inspection and purchase of seed from Relph. Had the allegations of defendant's answer been sustained by proof, then defendant's objection upon this point would probably have been good. It may be that defendant had a valid counterclaim against plaintiff, as alleged in the answer, but there is no proof of that fact.

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

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

LILLIAN M. MAUL, APPELLEE, V. RAYMOND V. COLE ET AL., APPELLANTS.

FILED DECEMBER 4, 1913. No. 17,392.

1. **Principal and Agent: FRAUD OF AGENT: ACTION: DEFENSES.** One who undertakes to act as agent of another for the sale or exchange of real estate cannot defend, in an action for damages caused by

his fraud in such employment, on the ground that his contract of agency was void because not in writing, as required by section 74, ch. 73, Comp. St. 1911. The fact that such contract is voidable will not protect the parties thereto in perpetrating fraud upon each other.

2. ———: ———: ———: ———. If the agent receives an offer of exchange which would be advantageous and desired by his principal, and fraudulently conceals the offer and misrepresents it to his principal as being much less favorable than it in fact was, and so prevents an exchange to the damage of his principal, and a tenant of the principal holding an outstanding lease which would prevent the exchange without the consent of the tenant has agreed orally with the principal to transfer the lease to the property taken in exchange, if such exchange can be made, the agent cannot defend against the action of this principal for damages caused by the fraud of the agent on the ground that the agreement of the tenant to make such transfer was not in writing and was therefore voidable. The fact that the agent has such influence with the tenant that he could induce the tenant to avoid his oral agreement is no defense, in the absence of any other motive on the part of the tenant than to assist the agent in perpetrating the fraud upon his principal.

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

Brome, Ellick & Brome and *W. C. Fraser,* for appellants.

Hugh A. Myers and *Charles Battelle, contra.*

SEDGWICK, J.

In June, 1911, plaintiff was the owner of lot 7, block 108, in the city of Omaha, and the McCague Investment Company proposed to exchange lot 6 therefor, its purpose being to secure the erection of a large hotel building on lots 7 and 8. The plaintiff informed the investment company that the defendant McKay was authorized to act for her in the matter, and the investment company then made a formal proposition of exchange, and offered $40,000 as a cash difference between the two lots, less a commission of $1,000. The exchange was not effected, and afterwards

the plaintiff brought this action in the district court for Douglas county, alleging in her petition that she employed the defendant McKay as her agent to attend to the business for her; that the defendants were special partners in the business; and that when the defendants received the above proposition they fraudulently concealed the same from her and represented to her that the investment company had offered $8,000 difference in the proposed exchange, and because of the fraud of defendants she lost the bargain which she might have made. The trial resulted in a verdict and judgment for plaintiff, and the defendants have appealed.

The foregoing statement of the details of the issues is sufficient for an understanding of the two grounds urged for reversal of the judgment in the brief of defendants.

1. The first contention is that, as the employment of these defendants as agents of the plaintiff was not in writing, the contract was void under section 74, ch. 73, Comp. St. 1911, and it is said: "She is suing them because she says they did not properly perform the duties of their contract of employment, and the basis of her action is, and of necessity must be, a valid contract of employment for a breach of the conditions of which she may invoke the aid of the court." We do not think that this action depends upon the validity of the contract of employment of the defendants as agents of the plaintiff. They undertook to act as her agents with her consent, and in that capacity received a proposition for her which she had a right to know and would have been to her advantage if known to her, and they fraudulently concealed it from her to her damage. The statute above cited was intended to shield landowners from fraudulent claims of commission of agents. Such contracts as the one in question, if not in writing, are voidable and cannot be enforced by either party, but the parties are not prohibited from acting upon them if they desire to do so, and if they act upon them they must act fairly. The fact that the contract is voidable will not protect the parties thereto in perpetrating fraud upon each other.

2. The Cole-McKay Company, a corporation of which these defendants were two principal officers, has a valid lease and possession of lot 7. There was evidence that the defendants, as officers of the corporation, had agreed orally that if the exchange was made the building on lot 7 should be removed to lot 6 and the corporation would accept a transfer of its lease accordingly. The remaining ground for reversal urged in defendants' brief is that the agreement to release the right of the company to use lot 7 under its lease and accept the use of lot 6 in lieu thereof was void because not in writing, and therefore the plaintiff could not comply with the proposition of the McCague Investment company, and so was not damaged by the defendants' action. It will be observed that the lease of lot 7 was owned by the corporation, and while these defendants were two of the principal officers of the corporation they are here sued as individuals, and as such they are not to be considered as the corporation. The plaintiff's agreement with the corporation provided that the expenses of removal, and any other loss that the corporation might suffer, should be reimbursed by the plaintiff. The contract was a fair one so far as the interests of the corporation were involved. It was not void as being *malum in se*. If the plaintiff could consummate the exchange of so much advantage to her, it would be a gross breach of faith on the part of the corporation to refuse to perform its agreement and wantonly cause great loss to the plaintiff. These defendants surely are not in a position to assert that the corporation would refuse to perform its contract for the sole purpose of enabling them to avoid liability for their misconduct. If the plaintiff could have made the exchange, but for the fraud of the defendants, she was entitled to recover her damages caused by that fraud. *Rice v. Manley*, 66 N. Y. 82; *Jackson v. Stanfield*, 137 Ind. 592. The evidence is that plaintiff could have made the exchange, and these defendants are not in a position to assert that she could not. If this point is to be controlled by technicalities, it might be said that the defendants, not being

parties to the agreement to exchange the lease to lot 6, cannot defend upon the supposition that the parties to that agreement will avail themselves of the statute of frauds to enable them to violate it. *Rickards v. Cunningham,* 10 Neb. 417; *Cresswell v. McCaig,* 11 Neb. 222.

Neither of the points urged by defendants requires a reversal, and the judgment of the district court is

AFFIRMED.

BARNES, LETTON and ROSE, JJ., not sitting.

THADDEUS I. C. PEMBERTON, APPELLANT, V. EUNICE PERRIN ET AL., APPELLEES.

FILED DECEMBER 4, 1913. No. 17,449.

1. **Parent and Child:** AGREEMENT FOR ADOPTION. An agreement to adopt a child "as our own, and * * * provide for, educate and rear him accordingly," may, if upon a sufficient consideration, be construed, in a contest between such child and other heirs, to make such child an heir, but it could not prevent a free disposal of the property by deed or will as the owners thereof might see fit.

2. **Wills:** IDENTIFICATION OF DEVISEE. A will describing the devisee as "my nephew John Conrod, of Coldwater, Michigan," sufficiently identifies John Conrod Swart, who resided at Coldwater, Michigan, at the time the will was made, and was the only nephew of the testatrix residing there.

3. ———: DESCRIPTION OF DEVISE: PAROL EVIDENCE. If a will describes the land devised as "the northwest quarter of the northeast quarter (N. W. ¼ N. E. ¼) of section eight (8), township seventeen (17), range nine (9) east, in Washington county, Nebraska," it may be shown by parol evidence that the testatrix owned 40 acres of land in range 10, otherwise described as in the will, and owned no other land, and that the intention was to devise the land owned by testatrix, and that it was described as in range 9, instead of range 10, by mistake.

4. ———: ———: MISTAKE: PLEADING AND PROOF. The allegation that the mistake of inserting 9 instead of 10 as the number of the range was the mistake of the scrivener who wrote the will is sustained

by proof that the mistake of the scrivener in inserting the wrong number of the range was induced by an oversight or ignorance of the testatrix as to the true number of the range.

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

F. Dolezal, for appellant.

W. S. Cook, J. C. Cook and *Herman Aye, contra.*

SEDGWICK, J.

In 1863 George Pemberton and Margaret A. Pemberton, his wife, made a contract in writing with Kate A. Griffith, the mother of this plaintiff, by which they agreed to adopt the plaintiff, who was then about two years of age. After the death of Mr. and Mrs. Pemberton the plaintiff brought this action to establish and quiet title in and to 40 acres of land which Mrs. Pemberton owned at the time of her decease. The plaintiff claimed this land by virtue of the contract of adoption. The defendant derived his claim through the will of Mrs. Pemberton. The district court for Washington county found the issues in favor of the defendant and dismissed the plaintiff's case. The plaintiff has appealed.

No legal adoption of plaintiff was ever made, but the contract with the mother provided that Mr. and Mrs. Pemberton should take the child into their custody and "adopt him as our own, and will hereafter provide for, educate and rear him accordingly. And we do further agree to clothe, educate and in every way provide for said child in a suitable condition and according to our pecuniary and social standing," and other similar agreements. The plaintiff relies apparently upon the following provisions in the said contract: "We do further agree that at our death the said child shall be an equal heir to his portion of our estate the same as our own children, it being the express understanding that we are to treat, control and in every way provide for said child as our own, we

having hereby adopted it as such, and it is mutually agreed that from this date said child shall be known and called by name 'Charles Pemberton.'"

Mr. and Mrs. Pemberton had no children at that time, and the plaintiff insists that the contract must be considered as an irrevocable agreement, upon a valuable consideration, to leave to him whatever property they might have at the time of their decease. There might be ground for contending that this contract could be enforced as an agreement to make the plaintiff an heir of the deceased under the former decisions of this court, but there appears to be no ground for the contention that this agreement gave the plaintiff such an interest in the property that Mr. and Mrs. Pemberton then had or might thereafter acquire that they could not freely dispose of the same by deed or will as they saw fit.

A short time before her death Mrs. Pemberton made a will whereby she devised to "my nephew John Conrod, of Coldwater, Michigan, the northwest quarter of the northeast quarter (N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of section eight (8), township seventeen (17), range nine (9) east, in Washington county, Nebraska, in fee simple." When the will was offered for probate in the county court of Washington county it was contested, and afterwards upon appeal to the district court for that county it was found to be the last will of Margaret A. Pemberton, and judgment was entered accordingly. It is objected that this will does not convey title to John Conrod Swart. The objection that he is not described in the will by his full name is, of course, without merit. The oral evidence at the trial shows that the testatrix had no other nephew named John Conrod and residing at Coldwater, Michigan, and fully identifies the defendant as the person intended as the devisee in the will.

It is also objected that the will describes the land devised as in range 9, whereas the plaintiff claims a 40 acres in range 10, which the evidence shows was owned by Mrs. Pemberton at her death. The description of the land in

the will is complete and accurate except as to the range. The answer alleges that the testatrix owned 40 acres in range 10, but had no land in range 9, and no other land than the 40 acres in range 10; that that forty was the one intended by the testatrix, but range 9 was inserted in the will, instead of range 10, by mistake of the scrivener who wrote the will. It is conceded that evidence supports all of these allegations, except the allegation that the mistake was made by the scrivener. It appears to be contended that evidence that the testatrix intended the land in range 10, but made a mistake as to the number of the range, is incompetent under the allegation that the wrong number was inserted by mistake of the scrivener; that allegation and proof must agree, and that this evidence is such a departure from the allegations of the answer that it must be disregarded. This is altogether too fine a distinction for modern jurisprudence. If the scrivener inserted in the will the wrong number of the range in which the land intended was situated, he made a mistake, even though that mistake was induced by the oversight of the testatrix, and evidence that he inserted the wrong number because the testatrix erred in the directions given him was competent under the allegations of the answer.

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

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CATHERINE TIEHEN, ADMINISTRATRIX, APPELLEE, V. NETTIE M. CORNELL, APPELLANT; FARMERS BANK OF PRAIRIE HOME, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,976.

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

E. Falloon and *Burkett, Wilson & Brown,* for appellant.

John C. Mullen and *C. S. Polk, contra.*

PER CURIAM.

This is a motion to dismiss an appeal from an order confirming a judicial sale, for the reason that the appeal is without merit and frivolous. No defense was made to the foreclosure of the mortgage and no objections were made to the appraisement before the sale, but objections were thereafter filed to the confirmation. A number of affidavits were used at the hearing, but none of them have been preserved in a bill of exceptions. Six objections are made to the confirmation. The first, second, third and fifth are to the appraisal, and were waived by reason of not being filed before the sale. The fourth objection is that the notice was published in a paper dated July 24, and the paper was not placed in the mail until July 27. The sixth objection is that the sheriff had not taken or received, at the time of the sale, the cash for which the land was sold. There is no proof of either of these facts in the record.

The motion to dismiss the appeal is

SUSTAINED.

LINCOLN STONE & SUPPLY COMPANY, APPELLANT, V. MAUDE M. LUDWIG ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,423.

1. **Contracts:** BUILDING CONTRACT: ACTION FOR PRICE: COUNTERCLAIM. Where a party contracts with another to build him a dwelling-house, and to that end furnishes the plans and specifications therefor, a claim that the work was done according to the plans and specifications is not available as a defense to a counterclaim or set-off for damages for a defective construction of the building.

2. ———: ———: BREACH: MEASURE OF DAMAGES. In an action for

breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skilful workmanship.

3. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain the judgment of the trial court.

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

C. S. Polk, for appellant.

S. L. Geisthardt, contra.

BARNES, J.

This was an action in the district court for Lancaster county to foreclose a mechanic's lien for the sum of $417.14, alleged to be due the plaintiff on a contract for the erection of a dwelling-house for the defendants. By the terms of the contract defendants were to pay plaintiff the sum of $3,000 for the completion of the work. It was alleged that defendants had only paid plaintiff the sum of $2,610, and had failed to pay the balance of $390, although often requested so to do.

It appears that plaintiff had duly perfected its mechanic's lien on the premises, and that fact was not denied. The defendants, by their answer, claimed $2,000 damages for a breach of the plaintiff's contract in failing to properly construct the house in question. The defendant's allegations were denied by the plaintiff's reply. The cause was tried to the court without the intervention of a jury, and after the evidence was concluded, by the request of both parties, the presiding judge viewed the premises. The court found that the plaintiff had failed to construct the building according to the specifications contained in the written contract, and awarded the owner, Maude M. Ludwig, a judgment for $1,000, and canceled the plaintiff's lien. The plaintiff has appealed, and now contends

that there was no competent evidence of any proper measure of damages.

The testimony clearly shows that the construction was in many respects defective, and that plaintiff had failed to comply with the terms of his contract. One of the defendants' witnesses was a Mr. Tyler of this city, who is an architect and builder of many years' experience. He testified as to the condition of the building, and by his evidence it appears that there were two cracks in the east wall, one over the kitchen door and one over the French window; that there was also a crack in the angle of the projection on the north side of the house. He gave the length of those cracks in detail, showing the separating of the walls and the cracks in the plastering. He also testified that there were stains on the plaster from water that had come through the cement blocks, of which the house was constructed. He estimated the north wall as being from three to three and one-half inches out of plumb. He said that the other walls were out a little. He condemned the flat roof; but it appears that the roof was constructed in accordance with the specifications. The witness considered that the cement blocks were a fair average lot, but testified that they were not properly laid in the construction. He also testified that the floors had settled and were sloping; and also described many other defects in the construction.

The defendant Walter Ludwig testified as to the manner and method of construction, and claimed that he had repeatedly called the plaintiff's attention to matters that were unsatisfactory to him, but could get its foreman to pay no attention to them. He described the condition of the house shortly after it was completed, and gave evidence of its defective condition. He also testified that the specifications and plans were made by Mr. Lahrack, who was the plaintiff's foreman. He showed that the building was left in a defective condition; that the blocks were poorly laid; and he testified that you could see daylight anywhere in the house through the blocks; that the joints were not

properly filled; that many of the blocks were cracked; that the specifications called for wire lath to keep the corners from cracking, and no such wire lath was used; that the outer walls are bulging out, and that the east wall will eventually fall down; that the north wall is three inches out of plumb; that there is not a square joint in the corners of the building; that the mantel has fallen down and is thrown out into the alley; that the stones are so cracked that when it rains the wind drives the moisture in across the floor; that it rains through on the north and east side of the house, and that the day after the house was turned over to the defendants it rained in so that it had to be wiped up from the floor. He also testified that he could turn the hose on the side of the house and in five minutes the water would be in on the floor; that the interior is mouldy, and the plastering is turning yellow and green, and the porch is falling away from the house, and the joints are all poor; that on the east side of the house the pointing is all crumbling, and on the south side it is practically gone; that the floors are not even in any part of the house, and you cannot set a chair or table down without its rocking; that there are cracks in the wall of over a half of an inch; that the plastering is cracked, and on the east side one can see clear through the wall; that the house has settled so that you cannot lock the doors; that the upstairs is divided into three rooms, a large room running east and west, and a bedroom; that you can stand in this bedroom and see the sky through the cracks in the east wall. This testimony was corroborated in part by the witness Tyler, by one G. J. McDougal, who was a carpenter and contractor who did work on the house, and T. P. Harrison, who was also a contractor and had been in the business for some 26 years.

On the measure of damages, Charles T. Knapp testified that he was in the real estate business, and had lived in Lincoln for nine years; that he was well acquainted with the value of buildings and property in this city; that he was acquainted with the Ludwig house, and had examined

it inside and out; that he was acquainted with the value of buildings and property in this locality, and the building as built is in a dilapidated condition. The floor had evidently sunk away from the partitions; there were a good many cracks in the sides of the house and in the plastering and walls, and that you could see daylight "clean through." Two of the walls were somewhat out of plumb, and the mortar had washed out of the east wall to some extent; that one of the mantels had fallen down and had practically fallen to pieces; that there were cracks in the cement floor, and the window and door casings were all loose; that the condition of the house would impair its market value; that the depreciation in value, compared with what it would have been worth if built in a substantial condition, would be fully $2,000; that to make a good job the house would have to be torn down and rebuilt.

E. P. Hovey testified that he was engaged in the insurance and real estate business, and had been for 15 years, in the city of Lincoln; that he was acquainted with the value of real estate in this city during all of that time. He said: "I have examined the Ludwig property in controversy, both inside and out. I examined it for the purpose of ascertaining its value. The walls seem to be settled or fallen away so that there was a large crack so that you could see daylight; also discolored walls indicating that the water came through. * * * Am acquainted with the value of property in this locality, and was two years ago. * * * If the building was in the same condition two years ago as now I would say that it was only worth one-half price. If the house had been properly constructed it would be worth not far from $5,000; I certainly would not give more than $2,500 for it when I saw it."

As opposed to this testimony, the plaintiff claimed that it had constructed the house in question according to the plans and specifications. It developed, however, in the testimony that plaintiff, by its foreman, Lahrack, fur-

nished the plans and specifications on which the house was built, and therefore this defense is unavailable. Lahrack testified that he had not examined the interior of the house since the fall it was completed; that he observed at that time that the floor joists had been cut in order to install a heating plant, and that would cause the outside walls to bulge; that the original plans for the building were two feet larger each way, and the floor joists were to be 2 by 10; that afterwards they changed the plans so as to make the house two feet smaller and reduce the cost to $3,000, and that the floor joists used in the construction were then 2 by 8, instead of 2 by 10. His testimony described the manner of the construction, and he claimed that the bulging of the walls and cracks were caused by the settling of the partitions and cutting the joists; that if wire lath was used and the partition did settle, instead of breaking small cracks in the angle it would have opened as far as the lath extended and the plastering would have fallen off. The material for pointing a house is Portland cement and fine sand; that white cement sets too fast to be easily worked; that the porch which is falling away is not provided for in the specifications. His testimony was supported to a certain extent by the testimony of H. S. Allsbrow and Samuel Vincent, who was the foreman who had charge of the work when the house was constructed. The defendants' witnesses all testified that they saw no joists cut for installing the heating plant.

It will thus be seen that there was a sharp conflict in the testimony as to the manner of the construction of the house, and the condition in which it was left when completed. It was provided by the terms of the contract that in case of any disagreement between the owner and the contractor as to any of the provisions of the contract or of the plans or specifications, or of any payment thereunder, the disagreement should, at the request of either party, be submitted to the arbitration of three men, each party to select one, and the two to select a third, and the

decision of said board of arbitration should be final; and it was agreed that each party should pay one-half of the expense of such arbitration, regardless of the decision. Defendants alleged that they had offered to arbitrate the question in dispute with the plaintiff, and that plaintiff had declined to take any action in that behalf. It was agreed in the contract that all work and material used in the construction of the house in question should be first class, and the work should be done in a workmanlike manner.

It is evident from a reading of the record that the plaintiff did not comply with the terms of the contract, and that the defendants were entitled to recover a substantial amount of damages therefor.

In *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S. W. (Ky.) 477, it was said: "In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skilful workmanship."

In *Small v. Lee & Bros.*, 4 Ga. App. 395, 61 S. E. 831, it was said: "Where a builder has in good faith intended to comply with a contract and has substantially complied with it, although there may be slight defects, caused by a misconstruction of the terms of the contract, and the house as built has been received by the owner, and is reasonably suited for the purposes intended, the contractor may recover the contract price, less the damage on account of such defects. In such case the true measure of damage is the difference between the value of the house as finished and the house as it ought to have been finished under the contract, plans, and specifications." This rule is supported by *Norcross Bros. Co. v. Vose*, 199 Mass. 81; *Fleming v. Lunsford*, 163 Ala. 540, 50 So. 921; *Morton v. Harrison*, 52 N. Y. Super. Ct. 305; *Moulton v. McOwen*, 103 Mass. 587; *Norway Plains Savings Bank v. Moors*, 134 Mass. 129.

From an examination of the authorities, we conclude that the testimony of the defendants' witnesses as to the measure of damages was competent, and was properly received.

Again, it must be remembered that the trial court examined the premises, and thus gained a knowledge of the conditions there existing, which are not available to this court; and, in view of this fact, together with evidence contained in the record, it cannot be said that the evidence fails to support the judgment rendered by the trial court, and it is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CLARA E. BATTEY, APPELLEE, V. LOSADA L. BATTEY ET AL., APPELLEES; D. A. SHUTER ET AL., APPELLANTS.

FILED DECEMBER 24, 1913. No. 17,451.

1. **Wills:** BEQUEST OF MORTGAGEE'S INTEREST IN LAND: EFFECT. A will which gives to a devisee the use of real estate on which the testator held a mortgage at the time of his death will pass the interest of the mortgagee, as it actually existed, with all of the rights and interests of the debt, and in the land itself growing out of that relation to it. As to such property interest the testator cannot be said to have died intestate.

2. **Executors and Administrators:** POWER OF SALE: MORTGAGEE'S INTEREST IN LAND. An executor, in such case, who is given the power by the terms of the will itself to sell and dispose of such property, having taken title to the land in satisfaction of the mortgage debt, will hold the same as personalty belonging to the estate, and may sell and convey the land to a *bona fide* purchaser without an order of court.

3. ———: ———: ———: TITLE OF PURCHASER. In such case the purchaser will take a good title to the land, and subsequent proceedings of the county court in another state cannot divest him of his title.

4. ———: SETTLEMENT OF ACCOUNTS: ESTOPPEL. When it appears that

the executor has settled his accounts with the devisee and the estate of the testator, and has been discharged from his trust relation, the devisee being at all times of full age and responsible for his acts, such devisee will be estopped from claiming any interest in the land so disposed of by the executor.

5. ———: ESTOPPEL. In such case the executor, who is one of the heirs of the testator, is also estopped by his own acts to afterwards claim any interest in the land thus sold and conveyed by him to the purchaser.

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

Tibbets, Morey & Fuller, for appellants.

W. P. McCreary, J. C. Stevens and *B. F. Hastings, contra.*

BARNES, J.

This action was a suit in equity, brought in the district court for Perkins county, to quiet the title to the north half of section 31, township 11, range 39 west, situated in that county, in the plaintiff, and cancel certain deeds, under which the defendants claimed title, as clouds upon the title of the plaintiff.

When the action was commenced, plaintiff confessed defendants' demurrer to her petition, and on the 10th day of April, 1910, she was allowed 90 days in which to file an amended and supplemental petition. When the amended petition was filed, defendants Shuter and Westphalen answered, claiming title by mesne conveyances from one W. L. Rutledge, who purchased the land in question from Galen S. Battey, as executor of the will of Pauline A. Battey, deceased, who conveyed the land to Rutledge in pursuance of his purchase. The other defendants made no appearance, and default was entered against them. There was a reply which put in issue the allegations of the answer. A trial to the court resulted in general findings and a decree for the plaintiff, and the defendants Shuter and Westphalen have appealed.

The record discloses that one Pauline A. Battey departed this life in Bureau county, Illinois, in the year 1897, leaving surviving her a husband, Owen W. Battey, and Losada L. Battey and Galen S. Battey, her two sons, and sole heirs at law. She also left a will by which it was provided, among other things: "I further devise and bequeath to my son, Losada L. Battey, the use of the following described property, with the provision that the executors of this my last will have the power and are hereby instructed to sell all or any of the property hereinafter described, if it is in their judgment profitable so to do, and invest the proceeds in other desirable property for the benefit of the said Losada L. Battey during his life." (Here follows a description of the property.) It was further provided by the terms of the will as follows: "I also give and bequeath to my son, Losada L. Battey, the use of all the north half (½) of section thirty-one (31), in township eleven (11) north, of range thirty-nine (39) west, situated in the county of Perkins and state of Nebraska. * * * I nominate and appoint as executors of this my last will and testament, my husband Owen W. Battey and my son Galen S. Battey, without bond." This will was duly probated in the county and state where the testator died, and Owen W. Battey and Galen S. Battey were appointed executors; Galen living at that time in Jewell county, Kansas. Afterwards, Owen becoming disqualified by infirmity, which was soon followed by his death, one Frank J. Nye was appointed administrator *de bonis non*. The bulk of the estate consisted of real estate in Jewell county, Kansas. Galen S. Battey had this will probated in that state, and himself appointed executor according to the nomination of the will. As a step in carrying out the provisions of the will and closing the estate, Galen S. Battey presented the will for probate in the county court of Perkins county, Nebraska, and, after due notice, the same was duly admitted to probate as a foreign will operative upon real estate in that county, and Galen S. Battey was duly appointed executor thereof without bond, according to the provisions of the will.

It further appears that at the death of the testatrix she was the owner of two notes for $750 each, secured by a mortgage on the land in Perkins county. Meantime Galen S. Battey, as executor of her estate, had made a settlement with one Cannon, who was at that time the owner of the Perkins county land, had dismissed a foreclosure suit that had been commenced in the lifetime of the testatrix, and had satisfied the mortgage by taking a deed from Cannon to the land in full settlement of the debt due to the estate, which deed was dated August 1, 1898; that in the year 1901 Frank J. Nye was finally discharged as administrator *de bonis non,* and no further proceedings were ever had in the county court of Bureau county, Illinois, until after the commencement of this action. On the 28th day of July, 1902, Galen S. Battey, as executor, sold and conveyed the land in question to one W. L. Rutledge for its then full value, and the defendants Shuter and Westphalen are the *bona fide* grantees of said Rutledge.

It further appears that on April 16, 1902, Losada L. Battey and his wife, Mary L. Battey, conveyed by quitclaim deed to the plaintiff all their interest in and to the land in question, and that by a clerical mistake in writing said deed the land was described as the "north half of section thirty (30), in township eleven (11) north of range thirty-nine (39)," instead of the "north half of section 31," and on the 31st day of October, 1903, said quitclaim deed was recorded in the records of Perkins county, Nebraska; that on the 7th day of May, 1907, Galen S. Battey conveyed to the plaintiff, who is his wife, his interest in said land by a quitclaim deed, and on May 11, 1907, said deed was recorded in the deed records of Perkins county, and it is under the above described quitclaim deeds from the sole heirs of Pauline A. Battey that the plaintiff claims title to the land in question.

It is further disclosed by the record that after the demurrer was confessed, and before the amended and supplemental petition was filed, such proceedings were had

in the county court of Bureau county, Illinois, that Frank J. Nye was reappointed administrator *de bonis non*, and the executor, Galen S. Battey, went through the form of settling his accounts with the estate of Pauline A. Battey. The settlement was afterwards approved by the county court, and an order was entered distributing the estate, and the administrator Nye was directed to convey the land in question in this suit to the plaintiff by an administrator's deed, which was accordingly done, and Nye was finally discharged as such administrator. Thereupon the proceedings and the deed above mentioned were set up in the amended petition as a part of plaintiff's cause of action.

As we view this case, the last-mentioned proceedings gave the plaintiff no additional right of action other than that possessed by her when her suit was commenced. The appellants contend that the court erred in its findings and judgment for the plaintiff, and that the findings and judgment are contrary to law.

The first question presented for our determination may be stated as follows: Was the will of Pauline A. Battey operative upon her interest in the Perkins county land on which she held the mortgage, the use of which was devised to Losada L. Battey? This question seems to have been settled in *Woods v. Moore*, 4 Sandf. (N. Y. Super. Ct.) 579, 589. It was there said: "The rule established is very plain that, where it is clear that there was an intent that the property in question should pass, it will be held to pass, notwithstanding a misdescription, so long as there is enough of correspondence to afford the means of identifying the subject of the gift. The rule comes to this that, where it is necessary to carry out the intent that the will shall operate on the real estate, it will be held so to operate, although the object is not thus described, and *vice versa*. So when the devise is of land, and it turns out that the testator's interest was a mortgage upon the same land, the law may pass his estate as mortgagee, such as it actually existed, with all his rights and interests in the debt,

and in the land itself growing out of that relation to it." This rule is supported by *Covey v. Dinsmoor*, 226 Ill. 438; *Heirs of Wright v. Minshall*, 72 Ill. 584; 2 Boone, Real Property (2d ed.) sec. 344; *Seebrock v. Fedawa*, 33 Neb. 413; 1 Jarman, Wills (6th ed.) p. 672 (*647). "A devise of specific realty of which testator is mortgagee will show testator's intention to pass the mortgage by that description." Page, Wills, sec. 483. Schouler, Wills (3d ed.) sec. 495; Hawkins, Wills (2d ed.) p. 35; 2 Redfield, Law of Wills (3d ed.) p. 135. Many other authorities could be cited in support of this proposition. It therefore seems clear that the will of Pauline A. Battey conveyed her interest as mortgagee in the Perkins county land to Losada L. Battey, during his life, and as to that interest she did not die intestate.

The next question for our determination is: Did the power of sale contained in the will authorize the executor to sell and dispose of the interest thereby conveyed? Upon that question the will provided: "I further devise and bequeath to my son, Losada L. Battey, the use of the following described property, with the provision that the executors of this my last will have the power and are hereby instructed to sell all or any of the property hereinafter described." Her interest as mortgagee of the Perkins county land was contained in the description of the property devised. It is conceded by all the parties that Galen S. Battey, as executor, had the power under the will to take title to this land in payment of and to cancel the mortgage debt. This was done, and when the title was conveyed to him as executor he took and held the same as personal estate, and was charged therewith as such administrator. Where land is taken in payment of debts due the estate, such land becomes assets of the estate, and may be sold without an order of the court, even though no power of sale is contained in the will. 18 Cyc. 351. Such land will be treated as personalty, and may be sold by the executor without an order of the court in those jurisdictions where he is not required to obtain leave of court to

sell personalty. *Stevenson v. Polk,* 71 Ia. 278; *Williams v. Towl,* 65 Mich. 204. In *Edney v. Baum,* 70 Neb. 159, 167, it was said: "At common law the executor had the full title and *jus disponendi* of the personal estate. 1 Woerner, American Law of Administration (2d ed.) sec. 175; Schouler, Executors and Administrators (3d ed.) sec. 239; *Field v. Schieffelin,* 7 Johns. Ch. (N. Y.) *150; *Petersen v. Chemical Bank,* 32 N. Y. 21, 88 Am. Dec. 298. All of the above authorities hold that heirs, devisees or creditors have no right to pursue this property in the hands of one who has acted in good faith and in no way united with the trustee in a *devastavit.* Unless a different rule is established by statute, then, the right of disposing of these goods as if they were their own belonged to these executors." In the instant case the power was vested in the executor, Galen S. Battey, to sell the Perkins county land, and it was unnecessary for him to obtain authority of the court so to do. In 11 Am. & Eng. Ency. Law (2d ed.) 1007, it is said that the statutes requiring an order of the court to sell personal property are for the protection of the executor and are directory only. *Flynn v. Chicago G. W. R. Co.,* 141 N. W. (Ia.) 401. It follows that when Galen S. Battey sold the land in question to W. L. Rutledge in good faith for full value, and conveyed the title thereof to him by executor's deed, Rutledge obtained a perfect title thereto, and the administrator was required to account to the estate for the purchase price thereof.

It further appears that Galen S. Battey, at the proper time, settled all of his accounts with the administrator *de bonis non* of the estate of Pauline A. Battey, and was discharged as such administrator; that Frank A. Nye, administrator *de bonis non,* settled his accounts with the estate, and has been discharged. It is not claimed or intimated that the estate or that Losada L. Battey had not received the purchase price of the land in question and converted it to his own use, and the presumption is that it was so received and converted. It appears that at all times during the settlement of the estate of Pauline A. Battey all of

the persons interested therein were of full age and legally responsible for their acts. It follows that, at the time Losada L. Battey and wife made the quitclaim deed under which the plaintiff claims title, neither of them had anything to convey, and Losada was clearly estopped from making any claim to the land in question. *Borcher v. McGuire*, 85 Neb. 646; *Kulp v. Heimann*, 90 Neb. 167; *O'Donnell v. Heimann*, 90 Neb. 172; *Weekes v. Heimann*, 90 Neb. 173; *Mote v. Kleen*, 83 Neb. 585. For the reasons given in those cases, Galen S. Battey was also estopped from claiming any interest in the land in question, and his deed conveyed nothing to the plaintiff. It follows that the proceedings of the county court of Bureau county, Illinois, had after defendants obtained their title to the land in question, could in no way divest them of that title.

As we view the record, the defendants were entitled to the findings and judgment, and the cause is reversed and remanded to the district court for Perkins county, with instructions to dismiss the plaintiff's action and render a judgment for the defendants Shuter and Westphalen, quieting their title to the land in question.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NEWTON RULE, APPELLANT, V. SIOUX COUNTY, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,494.

1. **Appeal:** CONFLICTING EVIDENCE. Where the question of the amount of damages which a landowner has sustained by the opening of a county road has been fairly submitted to a jury upon conflicting evidence, the verdict will not be set aside unless it is clearly wrong.

2. **Highways:** OPENING: DAMAGES. Section 46, p. 130, laws 1879 (Comp. St. 1905, ch. 78, sec. 46), accepting the grant provided by the act of congress of 1866 (Rev. St. U. S. sec. 2477), reserves to

landowners the right to recover damages for the opening of public roads on section lines in this state. *Scott's Bluff County v. Tri-State Land Co.*, 93 Neb. 805.

APPEAL from the district court for Sioux County: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

Fern S. Baker, Allen G. Fisher and *William P. Rooney, contra.*

BARNES, J.

Appeal from a judgment of the district court for Sioux county awarding the plaintiff certain damages alleged to have been sustained by him as a landowner for the establishment of two county roads by the commissioners of said county.

It appears that in July, 1906, the county board of Sioux county established a highway, called the Hecker road, on the section line between sections 25 and 26, township 30, range 55 west. This road divides the land of Mr. Rule so as to segregate the southwest quarter of section 25 from the remaining three quarters of his farm, and appropriates six acres of his land. At or about the same time the commissioners established another road on the section line between sections 26 and 30 of said township and range, which segregated plaintiff's farm from a tract of land which plaintiff's son had filed on as a homestead prior to his death, which occurred before he had made any improvement thereon. Plaintiff claimed damages to this tract of land, as well as to his own farm, for the opening of the highway, which is designated as the Trowbridge road. Plaintiff filed his claims for damages, which were disallowed by the county board, and on an appeal to the district court a jury awarded him a verdict for $139. Judgment was rendered on the verdict, and plaintiff has appealed. The county has also filed a cross-appeal.

The plaintiff contends that the jury disregarded plaintiff's evidence, and perversely returned a verdict for a less amount than the testimony warranted. We have examined the record with considerable care. It appears that by the opening of the two roads above mentioned there was appropriated about nine acres of the plaintiff's land. The plaintiff's testimony, and that of some of his witnesses, estimates the value of this land at from $10 to $25 an acre. It must be observed that the testimony of all of plaintiff's witnesses was based on what the land would be worth to them, and not as to its market value. The testimony was clearly incompetent, and could not be considered as furnishing the proper measure of damages. On the other hand, the defendant's witnesses all testified that the market value of the land taken for road purposes was from $4 to $5 an acre. Taking the highest amount shown by this evidence, plaintiff would be entitled to $45 for the land thus taken. It further appears that plaintiff would be required to move one-half a mile of fence by reason of the Hecker road, and construct another half mile of fence on the opposite side of this road, the cost of which is estimated by the defendant's witnesses at from $70 to $80. By the opening of the Trowbridge road plaintiff was required to move his chicken house and a few rods of fence along the side of his corral. This the testimony seems to indicate would cost him in the neighborhood of $10. Plaintiff also claimed damages for the building of a fence along the line of the Trowbridge road; but it appears that no fence had ever been built along the line of that road, and, when it is built, it could be as inexpensively constructed upon the line of road as upon the section line. He also claimed damages for the digging of a well. But it appears that the road was laid out so as to avoid interfering with the plaintiff's well. Much of the damages claimed by the plaintiff was merely speculative, and the evidence tends to show that it was his theory that, by reason of the establishment of the roads in question, the county was liable to pay him for all of his fences, and all

his necessary improvements, when constructed by him, regardless of real existing conditions.

As we view the testimony, it was so conflicting that we are not inclined to disturb the verdict, for it would seem that the amount awarded the plaintiff was a fair measure of the damages actually sustained by him.

On the cross-appeal of the county, it is contended that the act of congress of 1866, granting the right of way over public lands, having been accepted by the legislature of Nebraska, plaintiff is not entitled to any damages for the opening of the section-line roads in question. As was said in *Scott's Bluff County v. Tri-State Land Co.*, 93 Neb. 805, "This statute (meaning the statute accepting the grant) dispenses with formal, preliminary proceedings in the opening of highways on section lines, but preserves the landowner's right to compensation for property taken or injured. *Scace v. Wayne County*, 72 Neb. 162; *Barry v. Deloughrey*, 47 Neb. 354." The grant in question is limited by the proviso contained in the act of acceptance, that "any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided." The enactments to which the proviso refers provide a method of compensating an owner for land taken or damaged for highway purposes. Comp. St. 1905, ch. 78, secs. 18-29. The word "owner" as used in the statute applies to all persons having an interest in the estate taken or damaged.

It has been consistently held by this court that the right of damages for the dedicating of land for section-line roads is given to the owner by the act above quoted, and we adhere to our former decisions upon this question.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

144 N.W. 813

ERNEST C. PACKARD ET AL., APPELLEES, V. LEROY A. DE VOE, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,519.

1. **Appeal:** INSTRUCTIONS. Where the record clearly shows that no exceptions were taken to the instructions given the jury by the trial court, error cannot be predicated on the giving of such instructions.

2. ———: ASSIGNMENTS OF ERROR: BRIEFS. If appellant's brief fails to set out particularly errors asserted and intended to be urged for a reversal, vacation or modification of the judgment, final order or decree alleged to be erroneous, such alleged errors will not be reviewed on appeal.

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

A. Muldoon and *Leroy A. De Voe,* for appellant.

William E. Shuman, contra.

BARNES, J.

This action was commenced before a justice of the peace of Keith county to recover $160 for services rendered by plaintiffs to defendant in the sale of certain land situated in said county. The plaintiffs had the judgment, and the defendant appealed to the district court, where, on a trial to a jury, the plaintiffs were given a verdict and judgment for the sum of $122.92, and the defendant has brought the case to this court by an appeal.

It appears that the defendant bid in a half section of land at a referee's sale on January 22, 1910, which sale was not confirmed until after the defendant resold the land to a purchaser with whom the plaintiffs put the defendant in touch; that, without any outlay on defendant's part, the sale was made at an advance of $500 over the sum bid at the referee's sale. The defendant filed a general denial to plaintiffs' petition, and upon the trial it was shown,

beyond question, that defendant had by certain letters authorized the plaintiffs to assist him in making the sale, which was afterwards consummated. The district court, among other things, instructed the jury as follows: "The jury are instructed that it is no defense that the defendant sold the land for less than the price at which he requested the plaintiffs to sell the land. The plaintiffs, even if such is true, are entitled to compensation for such services as they rendered, if said plaintiffs were the procuring cause of the sale of said land." The testimony disclosed the fact that plaintiffs found the purchaser, and informed the defendant of that fact, and put the parties in communication with each other; that there was some negotiation about the price of the land, and that defendant finally sold it to the purchaser for a less price than he had quoted it to the plaintiffs. We find from an examination of the record that no exceptions were taken by the defendant to any of the court's instructions, and the cause was tried upon the issues presented by the instructions without objection.

It is next contended that there was a defect of parties, and the plaintiffs cannot recover under the contract; that the suit is brought in the name of Ernest C. Packard and Otis B. McLaughlin, and that there was no evidence to show that the defendant in any manner listed the land with the plaintiff, Otis B. McLaughlin, or the partnership as such. The letters, with other evidence produced by plaintiffs, clearly established the fact that defendant understood the land was listed with the plaintiffs, and the defendant's contention cannot be sustained.

It is also contended that the verdict is excessive, but we find from an examination of the record that the evidence fully sustains the amount of the judgment.

This record is a peculiar one. It contains no objections, except as to the sufficiency of the letters to constitute a contract, and no exceptions of any kind appear therein. Appellant's brief fails to comply with the provisions of section 675c of the code, which provides: "The brief of appellant shall set out particularly each error asserted

and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous." In such case, assignments not so made and definitely discussed in the brief will not ordinarily be considered. *Waxham v. Fink*, 86 Neb. 180; *First Nat. Bank v. Hedgecock*, 87 Neb. 220.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

IN RE ESTATE OF ANNA FRANCIS.

ABRAM C. STRONG, APPELLANT, V. HATTIE S. POTTS ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,524.

Wills: PROBATE OF COPY: PROOF REQUIRED. On an application to probate an alleged copy of a will made 19 years after the original will was executed, it is incumbent upon the proponent to show what became of the original will, in whose custody it was placed, account for its nonproduction, and produce some competent proof of its contents, in order to authorize the county court to probate such a copy.

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

John Everson, for appellant.

Lambe & Butler and *C. A. Ready, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Hayes county in a proceeding in error from a judgment of the county court of that county, probating an alleged copy of the will of one Anna Francis, *nee* Strong, who departed this life in the state of Colorado. It appears that no will of the deceased was ever probated in the state

of Colorado, where she died, and that on or about the 20th day of May, 1907, one George Strong filed what purported to be a copy of a will alleged to have been made and executed by Anna Francis, *nee* Strong, in Hayes county, Nebraska, about the year 1887, by which she devised to her sister, Hattie Potts, the northeast quarter of section 27, township 7, range 35 west, situated in said county and state. Such proceedings were had in the county court that the purported copy of the will was admitted to probate. From the judgment of the county court the contestant prosecuted error to the district court.

It was first contended that no petition for the probate of the copy of the alleged will was ever filed in the county court, and therefore that court was without jurisdiction. The transcript, however, recites that such a petition was filed, and, although no copy of it is found in the record, still the recitation of the fact of the filing of such a petition will be taken as true, and therefore the court was not without jurisdiction.

It is next contended that the execution of the original will, an alleged copy of which was presented for probate, was not sufficiently proved to entitle the same to probate. The transcript discloses that the proponent produced the following evidence: First. An *ex parte* affidavit by one J. T. Meredith made before a notary public, in the state of California, which reads as follows: "I hereby certify that about the year 1887 or 1888 I signed as a witness a will, attached hereto, in substance. Same was a will signed by Anna Strong, in favor of Mrs. Ed. Potts. The exact wording of same will I cannot remember. This will was made at Hayes Center, Hayes county, Nebraska. (Signed) J. T. Meredith." Subscribed and sworn to before a notary public. Second. Proponent produced an *ex parte* affidavit made by one M. E. Davis in Cannon county, state of Idaho, as follows: "I hereby certify that the above is a true copy of a will drawn by Anna Strong at Hayes Center, Nebraska, in the year 1888 or 1889 as I remember it. (Signed) M. E. Davis." Subscribed and sworn to before

a notary public. Third. Proponent also produced the following affidavit: "I hereby certify that the document hereto attached is a true copy of a will drawn by me for Anna Strong at Hayes Center, Nebraska, as I now remember, in 1888 or 1889. (Signed) Jesse Davis." Subscribed and sworn to before a notary public.

There was a partial hearing, and thereafter the proponent produced one Rosa May as a witness before the county court. Her testimony was reduced to writing and made a part of the transcript, and reads as follows: "My name is Rosa May. I am a resident of Hayes county, Nebraska, and 52 years of age. I was acquainted with Anna Francis, *nee* Strong, the deceased, in her lifetime. Said Anna Francis, *nee* Strong, at the time of her death was a resident of Colorado, and had resided in said county for at least four years next before her decease. Said Anna Francis, *nee* Strong, departed this life on or about the 12th day of August, 1897, in said county. I am not one of the subscribing witnesses, but I heard her say that she made this will to Hattie S. Potts. Anna Francis, *nee* Strong, at the time she executed said instrument was of sound mind and memory and under no restraint whatever, and was about the age of 21 years."

Upon this evidence the purported copy of the will was admitted to probate, and from that judgment or order of the county court the contestant, a brother of the deceased, prosecuted error to the district court, where on the 19th day of September, 1911, the judgment was affirmed.

It is contestant's argument that the testimony found in the transcript from the county court is insufficient to sustain the judgment admitting the will to probate. The record, as it appears, contains no testimony explaining the absence of the original will; nothing is shown relative to its custody from the time it is claimed it was executed until the alleged copy was presented for probate, which was some 19 years after it was alleged to have been executed. Its loss is not shown, and no explanation is given showing, or tending to show, who made the copy of the

will, or from whom it was produced. It is contended, however, that, as there was no bill of exceptions settled by the county court and made a part of the record, the presumption would obtain that there was sufficient evidence to authorize the entry of the judgment from which error was prosecuted; and that neither the district court nor this court will attempt to review the findings of the county court for that reason. Ordinarily this would be true, but the record contains the transcript from the county court, which sets forth the application which was to probate a copy of an alleged will, without any allegations which would authorize the court to act without the production of the will itself. The original will was not produced, its whereabouts were not accounted for in the application for probate, and no reason was given why it was not produced. The district court could not presume that under the application such proof was in fact made as would authorize the court to probate the copy produced.

As we view the record, the district court erred in affirming the judgment of the county court, and therefore the judgment of the district court is reversed and the cause is remanded, with directions to that court to reverse the judgment of the county court and remand the cause to that court for further proceedings. REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ABRAM C. STRONG, APPELLANT, V. HATTIE S. POTTS ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,525.

Wills: PROBATE OF COPY. The right to prosecute this action depends upon the result of the application to probate the alleged will in *In re Estate of Francis, ante*, p. 742.

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

John Everson, for appellant.

Lambe & Butler, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Hayes county dismissing plaintiff's action for the partition of the northeast quarter of section 27, township 7, range 35 west, situated in said county.

It appears that Abram C. Strong filed his petition in said cause alleging that he is a brother of Anna Francis, *nee* Strong, who died intestate in the state of Colorado, seized of the land above described; that she left no children surviving her, but left the following named heirs: Hattie S. Potts, George Strong, Sarah F. West, Alida Bull, Jennie Doyle, Walter Calkins, Mabel Hall, Mary Clemons, and the plaintiff; that plaintiff inherited an undivided one-eighth interest in said land, and is the owner by purchase of the interest of certain others of the heirs. The petition also sets forth the proceedings to probate a copy of an alleged will of the deceased had in the county court of Hayes county, and alleged that said proceedings were void, and prayed for a decree partitioning said real estate between said heirs. To this petition the defendant Hattie S. Potts filed an answer and cross-petition admitting that Anna Francis was Anna Strong; that said Anna Strong died as in said petition alleged, and that the names of her heirs are therein correctly set forth. In her cross-petition it was alleged that on or about the 23d day of May, 1907, and after the death of said Anna Strong, whose name at the time of her death was Anna Francis, a petition was filed in the office of the county judge of Hayes county, Nebraska, to probate a copy of her alleged will, and thereafter a notice was duly published in form required by law, and a date was fixed by said court for a hearing upon said petition; that thereafter such proceedings were had that the copy of said will was admitted to probate, and that by said will the land in question was devised to her; and concluded with a prayer to quiet her title thereto.

A trial of the case was had to the court in all respects as though a reply had been filed to the answer and cross-petition, but by mistake or inadvertence no such reply was filed until the testimony was all taken. It was then discovered that the plaintiff had neglected to file his reply, and an application was made to the court for leave to file the same, which was denied, and the court rendered a judgment dismissing plaintiff's suit.

It appears that since the case was brought to this court by appeal plaintiff departed this life, and the action has been revived in the name of Clara Strong, as executrix of his estate.

It is first contended that the district court erred in refusing to permit the plaintiff to file his reply. It appears that the cause was tried in all respects as though a reply was on file during the entire time of the trial. The reply contains no allegations of new matter, and no reason has been suggested why the court refused to allow the same to be filed. As we view the record, it was error for the court to refuse the plaintiff leave to file his reply.

Again, it is contended that the judgment in this case should be reversed because the defendant pleaded and relied upon the probate of a copy of an alleged will made by Anna Francis, *nee* Strong, by which the land in question was devised to the defendant, Hattie S. Potts. On that question it is sufficient to say that in *In re Estate of Francis, ante*, p. 742, it was held that the county court erred in admitting the alleged copy of the will to probate, and that cause was reversed and remanded for further proceedings.

It follows, therefore, that the district court erred in dismissing the plaintiff's action, and the judgment of that court is reversed and the cause is remanded for further proceedings dependent upon the result of the petition to probate the alleged will described in *In re Estate of Francis, ante*, p. 742.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOHN WITT, APPELLANT, V. OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 24, 1913. No. 18,080.

1. **Insurance:** ACTION TO RECOVER PREMIUM: PLEADING AND PROOF. In an action to recover an advanced premium paid on an application for a policy of life insurance, where plaintiff alleges that he has refused to submit to such a medical examination as was provided for in the application and requested by the company, it is incumbent on the plaintiff to allege and prove that the contract has been rescinded, or facts which amount in law to such a rescission, in order to maintain the action.

2. ———: ———: PETITION: SUFFICIENCY. The averments of the plaintiff's amended petition examined, and found to be insufficient to sustain a judgment in his favor.

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

Courtright & Sidner, for appellant.

C. Petrus Peterson and *G. L. Loomis, contra.*

BARNES, J.

This case is before us on a third appeal. When the mandate was returned to the district court after the case was decided the second time, the plaintiff filed an amended petition which contains certain allegations, in addition to those set forth in the original petition, relating to certain letters which passed between plaintiff and defendant, and which explained the delay which occurred in making the medical examination of plaintiff. Then followed the facts relating to the medical examination, and the subsequent proceedings; and plaintiff alleged that, on or about the 6th of April, 1906, he wrote and delivered to the defendant a letter as follows: "I have been waiting for some time for either a policy or the return of my note. Unless I receive one of the two very soon I shall start proceedings at once." On April 12, 1906, defendant wrote and de-

livered to plaintiff a letter as follows: "We have your favor of the 6th. Your application was taken August 10. Your examination was not received until six and one-half months later, so there is no indication that you were in any great hurry. If your note is past due you can pay it, and if you are declined the money will be paid back to you. I think no doubt the matter will be settled in a short time. I hope the policy will be issued. The agent has paid us for your insurance, so we have not the note in our possession. He probably discounted it at the bank." It was then alleged that plaintiff heard nothing further from the defendant until about the 1st of July, 1906, at which time a party representing himself to have come from the defendant called on the plaintiff and requested a further medical examination, which plaintiff at said time refused to give. It was further alleged that this was the first time that defendant had any knowledge that any further examination was desired; and that no other communications, oral or written, were had between the plaintiff and the defendant. It was also alleged that the distance from the place where said application was taken, being at the residence of plaintiff in Dodge county, Nebraska, to the home office of the defendant at Lincoln, Nebraska, was and is 77 miles, and there then was, and always has been, at least two mail trains each day between said points; that 30 days after the receipt of the medical examination by the defendant was an abundance of time for the defendant to either accept or reject said application, and in which to notify the plaintiff of its action in that respect; that the defendant delayed for an unreasonable time the execution and delivery to the plaintiff of a policy on his application previous to plaintiff's letter of April 6, 1906, and again delayed said matter for an unreasonable time after plaintiff's letter of April 6, 1906, and such unreasonable delays, and each of them, and also the letter of defendant to plaintiff on April 12, 1906, constituted refusals to issue to plaintiff a policy upon his application, each and all without notice to plaintiff that any further medical examina-

tion was desired, and by said delay and refusal, as herein more particularly stated, the defendant on March 26, 1906, and again on April 12, 1906, and again 30 days thereafter, was in default of the terms of its contract to deliver to plaintiff a policy by reason of such unreasonable delay, and defendant has been continuously from April 12, 1906, in default of its contract to either return to plaintiff the premium paid by him or to issue to him the policy of life insurance upon the said application, and said default and breach of the terms of said contract by the defendant was complete previous to the transaction of about July 1, 1906, when the defendant first made known to plaintiff its desire for a further medical examination; that defendant declined to approve plaintiff's said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to the plaintiff; that no part of said payment made to the defendant by plaintiff has ever been returned to the plaintiff, and there is now due and unpaid from defendant to plaintiff $237.85, with interest thereon, for which sum the plaintiff prayed judgment. To the amended petition the defendant interposed a general demurrer, which was sustained. The plaintiff declined to further plead; judgment was entered for the defendant, and the plaintiff has appealed.

Plaintiff now contends that the amended petition stated facts sufficient to entitle him to a judgment in his favor, and it is argued that by the averments found therein, which were not contained in the original petition, it is shown that plaintiff had rescinded the written agreement on which the action was originally founded before the action was commenced; or that by reason of those averments plaintiff was entitled to consider the contract rescinded, and therefore could maintain this action.

In construing the amended petition all of its allegations must be considered together. So construing the petition, it must be conceded that at the outset plaintiff sought to recover under the terms of the written contract. Time was not of the essence of that agreement, for it was said

in the opinion written upon the first appeal (89 Neb. 163): "The stipulations relating to the return of the premium and requiring plaintiff to submit to the examination are: 'Policy to date at issue, provided 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.' 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. The report of the examiner may have omitted some fact vital to the assuming of the hazard. Symptoms requiring an examination by a specialist may have been reported to defendant as a result of the examination pleaded. Plaintiff's right to the policy for which he stipulated depended upon an examination commensurate with the risk to be assumed. 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. For anything appearing in the allegations relating to performance on the part of plaintiff, his own capricious refusal to submit to further examination may be the sole cause of defendant's failure to issue the policy."

We adhere to the rule there announced, and it follows that when the plaintiff, in the amended petition, alleged that he had refused to submit to any further medical examination, it was then incumbent upon him to show that his refusal was justified as a matter of law and entitled him to declare the contract rescinded. Plaintiff's attempt to plead such a justification falls far short of constituting a sufficient legal excuse on his part. His letter of April 6, 1906, did not declare the contract at an end,

or that he had rescinded the same, it simply notified the defendant that, if he did not receive the policy or his money back within a short time, he would take some action thereon. In answer to this letter the secretary of the company wrote the plaintiff that his application was taken August 10, and his examination was not received until six and one-half months later; so that there was no indication that he was in any great hurry. The letter than informed plaintiff that his note was past due, and if his application was declined the money would be paid back to him, and indicated that the matter would be settled in a short time, and expressed the hope that the policy would be issued. It is averred in the petition that, on or about the 1st of July, a party representing himself to have come from the defendant called on the plaintiff and requested a further medical examination, and that plaintiff at that time refused to submit to such further examination. This was a direct breach of the contract upon the plaintiff's part. As before stated, time nowhere appears to be the essence of the contract, and it is not averred in the amended petition that the plaintiff had ever notified the defendant that he considered the contract at an end. It appears that up to February 26, 1906, there were no objections on plaintiff's part to the delay in making the medical examination. In fact, it appears that the delay was for plaintiff's benefit, and was acquiesced in by him.

It has been the theory of this court from the time the case first came here on appeal that the plaintiff, by submitting himself to such a complete medical examination as the defendant required, would be in a position to receive his policy; or, in case his application was rejected, to recover back his money, and we are still of the same opinion. It seems quite clear that, if the plaintiff should submit himself to the proper medical examination, it would then be the duty of the defendant to either issue the policy or return to him the money he paid as an advance premium. If, upon such an examination, it should appear that the plaintiff was not a suitable risk for life insurance,

the defendant would be obliged to reject his application, and his right to recover the advanced premium would then be complete. On the other hand, if the result of his medical examination should be such as to entitle him to a policy, then it would be the duty of the company to issue it to him, and, in case it should refuse to do so, he would be entitled to recover such advanced premium.

Counsel for the defendant has at all times persisted in the theory that all the plaintiff had to do was to declare his agreement at an end, and recover back his money. We think this theory was a mistaken one, and is not warranted by the terms of the written agreement. Plaintiff's averment that 30 days was a sufficient time from and after the 6th day of April, 1906, for defendant to issue the policy or repay the advanced premium is simply a construction that the plaintiff's counsel has put upon the terms of the written contract between the parties, to which we cannot agree.

It is urged that, if this judgment is affirmed, the plaintiff will lose his advanced premium and is without any remedy. But, as suggested in this opinion, plaintiff may still present himself to the defendant company for a further or complete medical examination, and upon such examination will be entitled either to receive his money or a policy of insurance in accordance with his application.

Viewing the record in the light of our former decisions, there was nothing left for the trial court to do but to sustain the demurrer to the plaintiff's amended petition, and therefore the judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

REESE, C. J., concurring.

Having dissented from the decisions in the former presentations of this case, I do not deem it necessary to restate my views upon the merits. I agree to the opinion

upon the express consideration that, should plaintiff submit to another examination and the application be accepted, he shall receive a policy without further cost or expense to him than if a policy had been issued upon the first examination, and that the annual premium be not increased. Should defendant fail or refuse to accede to these conditions it is liable to plaintiff for a return of the advance premium paid with legal interest from the time of payment.

STATE, EX REL. WILLIAM E. MILLER, APPELLEE, V. WILBUR F. BRYANT, COUNTY JUDGE, APPELLANT.

FILED DECEMBER 24, 1913. No. 18,351.

1. Constitutional Law: "JUVENILE COURT LAW:" PUBLIC POLICY. The provisions of chapter 59, laws 1905, entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," are not opposed to sound public policy. On the contrary, they tend to foster and promote such a policy.

2. ———: ———: COURTS: JURISDICTION. The provisions of the act above described defining the power and jurisdiction of the district court is not unconstitutional as creating a new court; such court being an existing court of general common law and equity jurisdiction, and recognized by the constitution.

3. ———: ———: QUÆRE. The proviso to section 2 of the act giving concurrent jurisdiction to the police judge in cities having a population of 40,000 and upwards, within the limits of such city, was not an inducement to the passage of the act, and it is not necessary in this case to determine its constitutionality.

4. ———: ———: ———. The legislative amendment of 1913 (laws 1913, ch. 38) to the act, which relates to the pensioning of dependent children who have indigent parents, is not involved in this controversy, and its validity is not decided.

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

Wilbur F. Bryant, pro se.

William E. Miller, contra.

BARNES, J.

Appeal from a judgment of the district court for Cedar county awarding the relator a writ of mandamus to compel the county judge of that county to file a petition, under the provisions of the juvenile court law of 1905, to issue the process of the court and proceed to a hearing thereon.

It appears that the relator prepared and tendered to the county judge, in the absence of the judge of the district court from Cedar county, a complaint in due form charging that one Leo Tatro, a child 13 years of age, living with his father at Hartington, in said county, is a neglected child, in that he has never been sent to the public school of the district in which he resides, or to any other school, as provided by the statutes of this state; and that he is kept at hard manual labor above and beyond his strength. The prayer of the petition was for process, and an examination before the court, and for such order as might be found necessary and proper in the premises. Relator at the same time tendered to respondent the necessary fees, which he refused to accept or receive, and thereupon respondent declined to file said petition, and refused to take any action thereon. Relator then commenced this action in the district court in mandamus. On a hearing on a demurrer to the application, the writ was awarded, and the respondent has appealed.

The respondent contends that the juvenile court law of 1905 (laws 1905, ch. 59; Comp. St. 1911, ch. 20, art. II) is against public policy, and summarizes his argument as follows: First, that this law makes the state the supreme authority over a child, while its parents are mere trustees; second, that section 14 of the original act permits brokerage in children; third, that the legislative amendment of 1913, which relates to the pensioning of children who have indigent parents, is unconstitutional and void.

The law in question, substantially in its present form, has been adopted by many of the other states, and the courts of those states have often been called upon to de-

termine its nature, scope, policy, and validity. It may be said that its purpose is to help, not punish, the child. Its functions are largely parental, and it acts in the interests of the child, not adversely thereto. The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help.

The policy and constitutionality of a statute very like our own was before the supreme court of Pennsylvania in *Commonwealth v. Fisher,* 213 Pa. St. 48, 62 Atl. 198. It was there said: "The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over the child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered. The conclusions above expressed are in accordance with adjudications elsewhere with but very few exceptions."

In *In re Sharp,* 15 Idaho, 120, 96 Pac. 563, the court uses the following language: "We may premise our citation of authorities, however, by a general statement that this statute is clearly not a criminal or penal statute in its nature. Its purpose is rather to prevent minors under the age of 16 from prosecution and conviction on charges of misdemeanors, and in that respect to relieve them from the odium of criminal prosecutions and punishment. Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better

and more elevating influences and of educating and training him in the direction of good citizenship, and thereby saving him to society and adding a good and useful citizen to the community. This, too, is done for the minor at a time when he is not entitled, either by natural law or the laws of the land, to his absolute freedom, but rather at a time when he is subject to the restraint and custody of either a natural guardian or a legally constituted and appointed guardian to whom he owes obedience and subjection. Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint."

In *Mill v. Brown,* 31 Utah, 473, 88 Pac. 609, the court said: "Such laws are most salutary and are in no sense criminal and not intended as a punishment, but are calculated to save the child from becoming a criminal. The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him the educational requirements necessary to attain that end. To effect this purpose some restraint is essential."

Statutes of the nature of the one in question, unless they plainly conflict with the constitution, are generally taken by the courts to be the best evidence of an enlightened public policy. It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is found in the enactments of our legislatures. To say that such a law is of an immoral tendency is disrespectful to the legislature who no doubt designed by its adoption to promote morality. This court has gone so far as to hold that, before a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out. *Boyes v. Summers,* 46 Neb. 308. And it has been universally held that the party who claims the act is unconstitutional must be able to point to the particular section with which it is in conflict. *State v. Van Duyn,*

24 Neb. 586; *Rosenbloom v. State,* 64 Neb. 342; *State v. Nolan,* 71 Neb. 136. The respondent has failed to comply with this rule. A careful examination of the act in question convinces us that it is not opposed to, but is directly in line with, sound public policy.

The respondent's second contention is that the act in question violates the constitution because it establishes a new court not provided for therein, and defines its jurisdiction. Section 2 of the act provides: "The district court of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this act." It further provides, in substance, that the county court in each county shall have concurrent jurisdiction with the district court, but that such jurisdiction shall not be exercised except in the absence of the judge or the judges of the district court from the county; that, where a proceeding has been instituted under the act before any county court, the jurisdiction of that court is continued until the final disposition of the case, and an appeal is provided for to the district court in the same manner as in civil cases. The section also provides for the calling of a jury in case a delinquent child is charged with a crime against the laws of the state. The section concludes with a proviso as follows: "In cities having a population of 40,000 and upward, the police judge thereof shall have jurisdiction under this act concurrent with the county judge within the limits of such city." By section 3 it is provided: "In counties having over 40,000 population, the judges of the district court shall, at such times as they shall determine, designate one or more of their number, whose duty it shall be to hear all cases coming under this act. A special court-room to be designated as the juvenile court-room, shall be provided for the hearing of such cases, and the finding of the court shall be entered in a book or books to be kept for that purpose, and known as the 'juvenile court record,' and the court may for convenience be called the 'juvenile court.'"

It appears that the legislative assembly of the state of Pennsylvania passed an act similar to the one in question, and conferred jurisdiction upon the court of quarter sessions in all cases arising thereunder. The constitutionality of that law was challenged in *Commonwealth v. Fisher, supra,* and the act was declared constitutional. Section 9, art. V of the constitution of that state, provides: "Judges of the court of common pleas learned in the law shall be judges of the court of oyer and terminer, quarter sessions of the peace and general jail delivery, and of the orphans' court, and within their respective districts shall be justices of the peace as to criminal matters." Section 26, art. V of the constitution of that state, also provides: "All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgment of such courts, shall be uniform; and the general assembly is hereby prohibited from creating other courts to exercise the powers vested by this constitution in the judges of the court of common pleas and orphans' courts." The contention was the same as in the case at bar, and the supreme court of that state, in passing on the question, said: "No new court is created by the act under consideration. In its title it is called an act to define the powers of an already existing and ancient court. In caring for the neglected or unfortunate children of the commonwealth, and in defining the powers to be exercised by that court in connection with these children, recognized by the state as its wards requiring its care and protection, jurisdiction is conferred upon that court as the appropriate one, and not upon a new one created by the act. The court of quarter sessions is not simply a criminal court. The constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and, by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in no way connected with its criminal jurisdiction. Innumer-

able statutes upon our own books during the last two centuries attest this. With its jurisdiction unrestricted by the constitution, it is for the legislature to declare what shall be exercised by it as a general police court, and, instead of creating a distinctively new court, the act of 1903 does nothing more than confer additional powers upon the old court and clearly define them."

By the act under consideration no new court was created, but the already existing district court was given new and additional powers and jurisdiction. That court is a court of general common law and equity jurisdiction, and it was clearly within the power of the legislature to require that court to exercise the powers and jurisdiction provided for by the juvenile court law. At the same time the legislature provided that the county court should exercise the jurisdiction given the district court, in the absence of the judge or judges of that court from the county where the proceedings were instituted. The statute also properly provided that when a cause was commenced before the county judge he should retain jurisdiction until it was completed, and an appeal was provided for from his orders or judgment to the district court. Thus the matter of the administration of the law was placed in the district court. In *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 325, in discussing the constitutionality of the juvenile court statute, the court said: "Such legislation as that under consideration is but a transfer of the jurisdiction which formerly reposed in the court of chancery, in the exercise of the right of the king as *parens patria* to the guardianship of children, to the juvenile courts which perform the duty of seeing that the child is properly cared for." We are therefore of opinion that the act in its main provisions violates no section of the constitution of this state.

It is urged, however, that the proviso to section 2 was the inducement for the passage of the entire act, and, the proviso being unconstitutional, the whole act must fail. An examination of the act discloses that it contains 19

sections. Most of them provide for the mode of dealing with juvenile delinquents or dependents; and we cannot presume that the proviso giving to police judges in certain cities jurisdiction concurrent with that of the county judge was the inducement for the passage of the entire act. It is apparent that the proviso, if unconstitutional, can be eliminated without in any way affecting the other provisions of the act. In such case the remainder of the act being intelligible, complete and capable of execution, should be upheld. *Scott v. Flowers*, 61 Neb. 620.

Finally, it is argued by the respondent that the amendment to the act passed by the legislature of 1913, relating to pensions for indigent parents of neglected children, is unconstitutional. The amendment in question could not of course have been an inducement to the passage of the original act. The question of its validity is not involved in this proceeding, and therefore is not determined.

As we view the act in controversy, it does not offend any of the provisions of the constitution, and the judgment of the district court is

AFFIRMED.

JOHN F. BRADY, APPELLEE, V. JOHN B. MCGINLEY ET AL.; ANNA HOOKSTRA, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,467.

1. **Tax Foreclosure: RIGHT OF REDEMPTION.** In an action to redeem from a tax foreclosure sale and to set aside a sheriff's deed based thereupon, there was an error in the description of the land in the petition by the omission of a 40-acre tract, but the plaintiff offered to pay the amount of the taxes and interest found due on the whole tract by the foreclosure decree, and specifically described the tax proceedings and the sheriff's deed he desired set aside. The answer of defendant and a motion by a subsequent grantee to be let in to defend set forth specifically and correctly the entire tract. An amended petition was filed after the time for redemption had expired correctly describing the whole tract by including a specific description of the omitted 40 acres. *Held*, That the filing of such original petition, the tender of the redemp-

tion money, and the answer defending as to the whole of the land involved in the tax foreclosure, preserved the right to redeem the entire tract.

2. Appeal in Equity: MOTION FOR NEW TRIAL. Where it is sought to review rulings of the district court with reference to the introduction of evidence made during the trial of a suit in equity, a motion for a new trial must be filed, so that the alleged errors may be called to the attention of that court and an opportunity be given it to correct the same before recourse is had to this court. *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256.

3. Tax Foreclosure: REDEMPTION. Where the owner of land seeks to redeem from a valid sale under tax foreclosure proceedings to a person other than the plaintiff in the case, the purchaser is entitled to the amount of his bid with 12 per cent. interest thereon. *Butler v. Libe*, 81 Neb. 740, 744.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Affirmed as modified.*

W. R. Butler, for appellant.

F. M. Tyrrell, contra.

LETTON, J.

This is an action to set aside a sheriff's deed, issued in tax foreclosure proceedings, and subsequent conveyances, and to be allowed to redeem from the lien of taxes. The sheriff's deed was dated February 25, 1902. This action was begun in January, 1903. An answer was filed in February of that year, but no further proceedings were taken until April, 1908, when a motion to be let in to defend was filed by one Anna Hookstra, claiming through the title acquired by defendant McGinley, the grantee in the sheriff's deed. She was permitted to answer. The cause came on for trial in December, 1908. After the evidence was taken and the cause submitted, the plaintiff discovered that his petition described only 120 acres of the 160 purchased at the tax sale, and that the deed from Erastus Stevens, under which the plaintiff claims title, also misdescribed the land. Plaintiff was allowed to amend his petition so as to bring in his grantor as defendant, and

to ask for a reformation of the deed. The cause was continued for that purpose. An amended petition was filed setting forth the mistake in the deed from Stevens and praying for its reformation; alleging knowledge by defendant Hookstra of the fact that plaintiff had purchased the 160 acres described in the foreclosure proceedings, but that the deed only conveyed 120 acres of this tract; tendering the taxes due with interest at 12 per cent. from the date of sale, and also offering, if this be found to be insufficient, to pay whatever amount may be found due by the court.

The answer of defendant Hookstra denies that Stevens ever intended to convey or plaintiff to buy the northeast quarter of the northeast quarter of section 28; pleads that the amended petition was not filed until more than eight years after the date of the tax sale, and that the right to redeem the same expired more than six years before the amended petition was filed. As to the other land described in the original petition, the defendant admits that plaintiff is entitled to redeem by paying the taxes and interest, and providing that he pay defendant the amount due upon a mortgage given by a former owner of the land, in 1886, to one Jones. It is also pleaded that by plaintiff's deed he took title subject to the mortgage, which he assumed and agreed to pay; that defendant is the owner and holder of the mortgage and is entitled to the amount due thereon. The reply pleads that whatever right Jones had in the real estate was foreclosed and barred in the tax foreclosure proceedings, and his right to redeem expired two years after the sale; that the right of redemption of all the defendants in the action, except the plaintiff's grantor, Stevens, expired at the same time. At the trial the court reformed the deed from Stevens to plaintiff, found that the plaintiff was entitled to redeem the land from the tax sale upon the payment of $450.15, this sum being made up of $203.62 with interest at 7 per cent. from December 23, 1901, amounting to $136.95, and the further sum of $109.58 for subsequent taxes paid by the defendants

McGinley and Hookstra. No motion for a new trial was filed.

The evidence shows that Brady wrote to Stevens, who lived in Iowa, that there was a foreclosure pending against his land, and after some negotiations Stevens accepted $10 for his equity; that the plaintiff wrote the erroneous description in the deed, that he intended to describe the 160 acres which McGinley purchased, and that about that time he told McGinley he was going to commence an action to redeem the land. The record of the tax foreclosure proceedings shows that the real estate itself was made a party defendant, as well as Stevens, Jones, the mortgagee, and Mary R. Phelps, the assignee of the mortgage.

There are three contentions made by the appellant: First, that the two years allowed for redemption from tax sale had expired as to the 40 acres not described in the original petition before it was brought into the case by the amended petition; second, that the court should have required the plaintiff to tender or pay the amount of the mortgage and interest before permitting redemption; and, third, that the decree is erroneous with respect to the allowance of interest.

An examination of the record discloses a succession of errors. The plaintiff erroneously described the land when he drew the deed from Stevens to himself; another and different error was made in the description set forth in his petition; the decree of the court in describing the land which Stevens sold to Brady, if correctly copied in the transcript, omits one 40-acre tract; and the defendant's attorney, in the abstract, does not set forth the description as shown in the decree, or even as it should be. The 160 acres is properly described in the tax foreclosure proceedings and in the deed to McGinley. In the deed from Stevens to Brady 20 acres is properly described, but the southeast quarter of the northeast quarter of section 28 is included, which the grantor did not own, and the northeast quarter of the northeast quarter of that section, which he did own, was omitted. In the first petition filed, the

plaintiff pleads in detail the tax foreclosure proceedings, and shows that his desire is to set aside the sheriff's deed executed to McGinley. In the answer, McGinley alleged that he is the owner of the whole 160 acres by virtue of the foreclosure proceedings, describing the land correctly in all respects, and apparently defending as to the entire tract. This answer was on file when he parted with the title, and when Mrs. Hookstra moved to be made a party defendant. In this motion she described the 160 acres correctly, and set forth that "McGinley conveyed all his interest in said real estate deeded to him by the sheriff of Holt county, Nebraska," and that this defendant is now the owner and holder thereof.

It is apparent from this review of the proceedings that, when we consider the petition and the answer of McGinley, the redemption of the whole 160 acres was the purpose of the action; that Mrs. Hookstra was aware of this she showed by the recitals in her motion to be let in to defend. She cannot now insist that the 40 acres omitted from the petition by mistake was not involved in the controversy until after the plaintiff's amended petition was filed. When the issues were first made up the time for redemption had not expired, and the beginning of the action and the tender of redemption money was sufficient to prevent the bar of the statute falling as to the whole tract.

As to the claim that plaintiff should be compelled to pay the mortgage as a condition of redemption: The note and mortgage were not received in evidence, upon objections made by the plaintiff. No motion for a new trial was filed. Where it is sought to review rulings made during the trial, it is necessary that a motion for a new trial be filed, setting up the alleged errors, so that the attention of the district court may be called to the same and he be given an opportunity to correct any material error before recourse is had to this court for a new trial. *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256. This complaint, therefore, cannot be considered.

With respect to the amount of interest allowed in the

decree: In a case of this kind, where the owner of land seeks to redeem from what seems to be a valid sale under a tax foreclosure to a person other than the plaintiff in the case, it is his duty, under the statute, to pay the purchaser the amount of his bid with 12 per cent. interest thereon. *Butler v. Libe*, 81 Neb. 740, 744. The plaintiff in his amended petition offers to pay 12 per cent., and it must have been by an oversight that the decree was otherwise.

For these reasons, the judgment of the district court is modified so as to require the plaintiff to pay the amount of the bid with 12 per cent. interest, instead of 7 per cent., and the decree is corrected so that the title of the plaintiff, if he comply with the conditions of redemption, be quieted in the 160 acres described in the tax foreclosure proceedings. In all other respects the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

IN RE ALFRED BOLING.

ALFRED BOLING, APPELLANT, V. W. H. JONES, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,470.

Appeal: DISMISSAL: MOOT QUESTION. A. was arrested upon a criminal charge and required to give a recognizance in the sum of $500 to appear before the district court. After having given the same, and after having been released and discharged from custody, he was again arrested under a warrant issued by the same magistrate on a motion to increase the amount of the bond, and the bond was increased to $1,000. Failing to give this he was committed to the county jail. Habeas corpus proceedings were then brought in the district court to secure his release. From an adverse judgment he appealed to this court. No attempt was made to advance the case, and pending proceedings he was tried on the original charge and acquitted. Upon a motion to dismiss the appeal, *held* that, having obtained his liberty by due course of law, the question has become one in the abstract, and the appeal is dismissed.

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

Lambert & McCarty, for appellant.

F. G. Hawxby, contra.

LETTON, J.

Alfred Boling was arrested upon a criminal charge filed in the county court of Nemaha county. He had a preliminary examination before the county judge, who held him to appear at the next term of the district court. Bail was fixed at the sum of $500; and he was remanded to the custody of the sheriff in the meantime. Two days afterwards he appeared before the county judge with a qualified surety and entered into his recognizance in the sum fixed. He was released and discharged from custody. This was in the forenoon. On the same day a motion was filed in the county court by the county attorney to increase the amount of the bond, whereupon a warrant was issued directing the sheriff to again arrest Boling and bring him before the court. This was done and the amount of the bond increased to $1,000. He refused to give the increased bond and was committed to the county jail. This proceeding in habeas corpus was brought to secure his release. The district court found "that said county judge had authority to order the rearrest of relator, and that by the rearrest of relator the surety on his bond or recognizance was released, and that he now stands charged with a crime before the said county judge without bail." The application was denied and Boling was remanded to the custody of the sheriff. A motion has been filed in this court to dismiss the petition in error for the reason that the record of the county court shows that the defendant immediately gave a new bond in the sum of $1,000, to which sum it was increased by the county judge; that since the decision of the district court was rendered Boling has been tried in the district court upon the charge and has been acquitted

and discharged, and the question presented is a moot one which it would be a waste of time for this court to consider, and without any benefit to the appellant.

The hearing was had in the district court on September 12, 1911. The transcript on appeal was not filed until January, 1912. No effort has been made in this court to have the case advanced for a speedy hearing. In the meantime the petitioner has been tried and acquitted, and is now free. In this condition of the record, the motion to dismiss the appeal is sustained and the petition in error dismissed at the costs of the petitioner.

DISMISSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

FRANK J. HETZEL, APPELLEE, V. SOPHIA L. BENNETT, ADMINISTRATRIX; GEORGE M. FADNER, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,474.

Judgment: REVIVOR. A judgment was rendered upon an account in an action aided by attachment. The goods attached were replevied from the sheriff by a third party claiming to own the same. The sheriff obtained judgment in the replevin action for the value of the goods, which judgment was assigned to the original plaintiff. An action was afterwards brought by the original plaintiff against the sureties upon the replevin bond, which resulted in a judgment in an amount in excess of the first one, and which was afterwards satisfied by the plaintiff for a valuable consideration. Following this satisfaction the replevin judgment was assigned to A., and the original judgment was assigned to B., who satisfied the same of record. *Held*, That under these facts the judgment in the replevin case was satisfied and the assignee was not entitled to a revivor of the same.

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

William Baird & Sons, for appellant.

Lyle I. Abbott and *I. J. Dunn, contra.*

LETTON, J.

This action was brought by the assignee of a judgment to procure a revivor. The facts are as follows: In 1892 D. M. Steele & Company, a copartnership, brought an action against Levi G. Hetzel and obtained judgment against him for the sum of $4,108.89. A stock of goods belonging to him, which was then in possession of Frank J. Hetzel, was attached in the action. Frank J. Hetzel replevied the attached goods from the sheriff, who died. The suit was then revived in the name of his administratrix, who recovered a judgment for return of the property taken and damages in the sum of $2,555.56, and, in case of failure to return, for $10,800.98, with interest. Afterwards the administratrix, by order of court, assigned to D. M. Steele & Company a portion of this judgment, amounting to $4,024.08, with interest from November 4, 1892. Before the beginning of the replevin suit and the assignment of the judgment, the Steele-Smith Grocery Company, a corporation, succeeded to the copartnership of D. M. Steele & Company, and took over and became the owner of all its assets, including the judgments against the Hetzels. On January 29, 1903, John M. Steele, an original member of the firm of D. M. Steele & Company, assigned the judgment against Frank J. Hetzel to the appellant George M. Fadner for a consideration of $250. After the assignment to Fadner, on May 8, 1903, Lysle I. Abbott, as attorney for Frank J. Hetzel, procured an assignment of the original judgment against Levi G. Hetzel from the Steele-Smith Grocery Company, and also procured an assignment of the judgment against Frank J. Hetzel, which appellant now seeks to revive. These judgments were both discharged and satisfied of record, except as to costs, by Abbott on May 8, 1903. In August, 1898, an action was instituted in the district court for Douglas county by D. M. Steele & Company against Walter L. Selby and Jane Johnson, administratrix of Frank C. Johnson, deceased, as sureties upon the replevin bond given by

Frank J. Hetzel, to recover the sum of $4,024.08, with interest, being that portion of the judgment recovered by the sheriff's administratrix against Frank J. Hetzel and assigned to D. M. Steele & Company. In that action judgment was rendered against Walter L. Selby in favor of D. M. Steele & Company for $5,736.66, with interest, and the cause was continued for service as to the other defendant.

On December 4, 1898, a satisfaction of this judgment was filed in the district court, signed "D. M. Steele & Company, by Dudley Smith, member of said firm," which recited that, in consideration of the assignment to plaintiff of two certain bonds of indemnity, "D. M. Steele & Company releases and acknowledges full satisfaction of the certain judgment rendered in its favor in the above entitled case against the said Walter L. Selby, and the clerk of said court is hereby empowered and directed to release the judgment upon the presentation of this paper to him."

The court found, in substance, that the assignment to Fadner made by John M. Steele was ratified by the Steele-Smith Grocery Company; that the assignment to Abbott of the judgment against Levi G. Hetzel was made after the assignment of the judgment against Frank J. Hetzel to appellant, and after Frank J. Hetzel had notice thereof; that the two judgments to the extent of $4,108.89 were for the same indebtedness; that the assignment and release of the judgment against Levi G. Hetzel "was, in legal effect, a payment and satisfaction of the replevin judgment in the case of Sophia L. Bennett, administratrix, against Frank J. Hetzel, which was assigned to D. M. Steele & Company; that the satisfaction of the judgment in the main case against Levi G. Hetzel carried with it all dependent questions, of which the Frank J. Hetzel judgment was one." The petition for revivor was denied. Fadner appeals.

Appellant's brief is mainly devoted to establishing the proposition that the assignment made to him by John M. Steele of the Frank J. Hetzel judgment was authorized

and ratified by the Steele-Smith Grocery Company, and that the later assignment to Abbott by the Steele-Smith Grocery Company of the judgment against Levi G. Hetzel with notice of the assignment of the other judgment, and the satisfaction of the Levi G. Hetzel judgment by him, could not operate to defeat the assignment to appellant. We are of opinion that the evidence supports the finding of ratification, but that this is really immaterial under the legal principles involved.

The judgment in the replevin case against Frank J. Hetzel and the judgment in the action upon the replevin bond against the surety were both rendered in aid of the collection of the principal debt evidenced by the judgment against Levi G. Hetzel. As long as all three judgments stood unsatisfied upon the court records, D. M. Steele & Company were entitled to one satisfaction, but it could not at the same time receive a valuable consideration for the satisfaction and release of one and at the same time keep in force and effect another judgment based fundamentally upon the same cause of action. The assignment of the judgments could not alter this condition. 2 Freeman, Judgments (4th ed.) sec. 467; *Craft v. Merrill*, 14 N. Y. 456; *Bones v. Aiken*, 35 Ia. 534; *First Nat. Bank v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5; *Cox v. Smith*, 10 Or. 418. The satisfaction of any one of the three judgments would have satisfied the others, except, perhaps, as to the matter of costs. The assignee of any one of them took it subject to this contingency, since he could have no greater rights than his assignor. In this case two of the three judgments have been satisfied of record—first, the judgment on the replevin bond; and, second, the judgment against Levi G. Hetzel in the original action. The satisfaction of any one of these judgments was a satisfaction *pro tanto* of all, and the appellant is not entitled to a revivor.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

EDWARD MACGOWAN ET AL., APPELLEES, V. VILLAGE OF GIBBON, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,514.

1. **Limitation of Actions:** MUNICIPAL CORPORATIONS: DETACHING TERRITORY. The statutory right of the owners of unoccupied territory within a village to petition for its detachment, "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected," is one to which the statute of limitations, as such, does not apply. Comp. St. 1911, ch. 14, art. I, sec. 101.

2. **Municipal Corporations:** DETACHING TERRITORY: ESTOPPEL. By signing a petition for an election to vote municipal bonds, the owner of unoccupied territory in a village does not estop himself to assert his statutory right to have such territory disconnected from the village.

3. **Appeal:** AFFIRMANCE. In a statutory proceeding to disconnect unoccupied territory from a village, the judgment of the district court will be affirmed, "unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisenius v. City of Randolph*, 82 Neb. 520.

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

Thomas F. Hamer, for appellant.

W. D. Oldham and *H. M. Sinclair, contra.*

ROSE, J.

This is a proceeding to detach agricultural lands of plaintiffs from the village of Gibbon under the statutory provision that owners of unoccupied territory within and adjacent to the corporate limits of any city or village may file in the district court a petition for detachment of such territory. Comp. St. 1911, ch. 14, art. I, sec. 101. The relief sought by plaintiffs is resisted on three grounds: (1) The proceeding is barred by the statute of limitations. (2) A former owner of part of the territory in question signed a petition for an election to vote municipal bonds, and

thereby estopped the present owner, plaintiff Rodgers, from claiming the right to have her lands detached from the village. (3) On the merits of the case plaintiffs are not entitled to relief. Upon a trial of the issues the district court found that justice and equity required the detachment of the territory in controversy and granted the prayer of the petition. Defendant has appealed.

1. The territory disconnected had been within the corporate limits of the village since 1885. Is defendant entitled to a dismissal on the ground that the proceeding is barred by the statute of limitations? The power to change lawfully established boundaries of a municipality and to define the terms on which territory may be detached therefrom is legislative. *City of Wahoo v. Dickinson,* 23 Neb. 426; *State v. Dimond,* 44 Neb. 154; *City of Hastings v. Hansen,* 44 Neb. 704; *Winkler v. City of Hastings,* 85 Neb. 212. In the present case the statutory condition under which plaintiffs or petitioners are entitled to relief is that justice and equity require the detachment of their agricultural lands from the village of Gibbon. Comp. St. 1911, ch. 14, art. I, sec. 101. When this condition was found to exist, the district court had no alternative, and the statute, in effect, changed the boundaries of the village and declared the severance of the lands of petitioners. It has been held that the district court may inquire into the facts and make such a finding, when the evidence shows the existence of the statutory condition. *City of Wahoo v. Dickinson,* 23 Neb. 426; *Village of Hartington v. Luge,* 33 Neb. 623; *Bisenius v. City of Randolph,* 82 Neb. 520. The right of the owners of unoccupied territory within a village to assert such a condition is not limited by the village charter to any particular time. On the face of the statute the right continues. Under the specific terms of the village charter, the right to petition for redress may be asserted "whenever" the owners of such unoccupied territory "shall desire to have the same disconnected." Comp. St. 1911, ch. 14, art. I, sec. 101. For these reasons, the statute of limitations, as such, does not apply.

2. Should plaintiff Rodgers be denied relief on the ground of estoppel, because a former owner of her land petitioned for an election to vote municipal bonds? In *Barber v. Village of Franklin*, 77 Neb. 91, it is said: "The fact that the party has submitted for some years to municipal taxation from which she was in nowise benefited is not an argument in favor of longer imposing upon her the burden of municipal taxes." Since the voluntary payment of municipal taxes does not prevent the assertion of the right to a severance of agricultural lands, the signing of a petition to vote bonds to be paid by means of taxation should not operate as an estoppel.

3. On the merits of the case the finding of the trial court is clearly right. In any event the rulings below should be sustained under the following rule applicable to this proceeding: "The judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." *Bisenius v. City of Randolph*, 82 Neb. 520.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

J. W. SHAW ET AL., APPELLANTS, V. GURLEY A. ALEXANDER, APPELLEE.

FILED DECEMBER 24, 1913. No. 18,133.

1. **Municipal Corporations: ORDINANCES: ENACTMENT: EVIDENCE.** The silence of the record of a village board is not conclusive evidence of the nonexistence of a fact which should be recorded in enacting an ordinance.

2. ———: ———: **PROOF.** The passage of an ordinance may be proved by common law methods, unless otherwise provided by statute.

3. **Intoxicating Liquors: LICENSE: PETITIONERS: RESIDENCE.** The residence of a person, for the purpose of testing his qualifications as a petitioner for a saloon license, is where he has his established

home, the place where he is habitually present, and to which, when he departs, he intends to return.

4. **Appeal:** BRIEFS. On appeal, an assertion by appellant that the evidence sustains an assignment of error may be disregarded, where no reference is made in his brief to the pages or to the places in the record where such evidence may be found.

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

J. C. Dort, for appellants.

Hazlett & Jack and *Walter A. Vasey, contra.*

ROSE, J.

The validity of a license authorizing Gurley A. Alexander to sell intoxicating liquors in the village of Table Rock for the municipal year ending May 1, 1914, is assailed in this proceeding. Alexander presented his petition to the village board. Howard P. Young and others filed a remonstrance. After a hearing a license was granted. Remonstrators appealed to the district court, where they were again defeated. By appeal from the judgment sustaining the action of the village board the attack on the license is here renewed.

Remonstrators assert there is no valid ordinance authorizing the issuance of the license and that therefore it is void. Such an ordinance was introduced in evidence, but it is attacked as invalid because the record of the village board fails to show that it was read the third time and passed as required by law. The village board and the district court upheld the ordinance, and it is not affirmatively shown that they were in error. "The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact, which ought to be recorded therein, regarding the enactment of a law." *State v. Frank*, 60 Neb. 327; *State v. Dean,* 84 Neb. 344. The passage of an ordinance may be proved by common law methods. *Johnson v. Finley,* 54 Neb. 733; *Van Valkenberg v. Rutherford,*

92 Neb. 803. What is shown by the records of the village board and by other evidence sustains the trial court's ruling.

It is further argued that the license is void because licensee's petition is not signed by 30 resident freeholders of the village. Thirty-three names appear upon the petition. The parties stipulated that 23 of the petitioners were qualified. Among those not included in the stipulation, but who signed the petition, are the following: William Petraska, A. R. Wopata, Steve George, Christina George, James Fritch, Frank L. Fencl, and Mrs. Frank L. Fencl or Mattie Fencl. If the record shows that seven of those named are legal signers, the trial court properly held the petition to be sufficient.

The qualifications of Petraska are clearly shown by the evidence and are not seriously controverted by remonstrators. The same may be said of Wopata.

There is a dispute about the Christian names of the Georges. Remonstrators call them "Sue and Chestney." Licensee says they are "Steve and Christina." The signatures themselves do not decide the controversy, but there is evidence that Steve George and Christina George, who are husband and wife, signed the petition when they owned a lot in Table Rock, and that they have resided there four or five years. The county clerk's certified copy of a recorded deed conveying the lot to them is in the record. It is clearly shown that they are "freeholders" within the meaning of the word as used in the statute. It is asserted that they are Gipsies, and not residents. While it is shown that they have a camping outfit and travel in the summer, and that the husband trades horses, the evidence is direct and positive that their house in Table Rock is furnished the year round, and that they spend their winters there and reside there. The residence of a person is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. *Berry v. Wilcox*, 44 Neb. 82; *Wood v. Roeder*, 45 Neb. 311. Except for proof of the temporary

absence of the Georges and of their mode of life, the evidence that they reside in Table Rock is uncontradicted. It is sufficient to show that they are qualified petitioners.

It is conceded that James Fritch is a freeholder, but his residence is challenged. It is insisted that he resides on a farm in Pawnee county outside of the village. The evidence shows that he has lived in Pawnee county 45 years; that three days before he signed the petition he bought a home in town, paid for it, and moved into it; that he afterward spent the nights in town and the days on his farm; that he did not move to town for the purpose of qualifying himself to sign a petition for a license; and that he had made up his mind a year before to change his residence from the farm to the village. A banker, who participated in the negotiations for the purchase of the village property, said Fritch had been talking for two years of moving to town. The evidence tending to show Fritch's intention to reside in Table Rock, where he in fact moved, carries conviction.

Frank L. Fencl and wife seem to be challenged because they were not freeholders when they signed the petition and because they acquired title to real estate for the purpose of qualifying themselves as petitioners for a saloon license. Remonstrators make no reference to the pages or to the places in the record where evidence relating to these issues may be found, though the testimony is voluminous. In this respect there is disregard of court rules. Under the circumstances, time to which other litigants are entitled will not be devoted to the sifting of a large volume of testimony to see if the assertions of remonstrators are correct and if the judgment of the trial court is erroneous.

The 23 petitioners to which no objections were made and the 7 others named make the 30—the requisite number. A place in the record containing error has not been pointed out. The judgment below is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ASHER D. WARNER, APPELLANT, V. MICHAEL CAVEY ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 18,270.

1. **Highways:** OPENING: SECTION LINES. Section lines are by statute declared to be public roads which may be opened by the county board whenever the public good requires it. Comp. St. 1911, ch. 78, sec. 46.

2. ———: ———: DISCRETION OF COUNTY BOARD: REVIEW. "The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review." *Howard v. Supervisors*, 54 Neb. 443.

3. ———: ———: ———: COMPENSATION FOR DAMAGES. The only limitation upon the discretion of the county board in respect to opening section-line roads is the fundamental one of compensation for private property taken or damaged. *Rose v. Washington County*, 42 Neb. 1.

4. ———: ———: ———. A county board may open a highway in the form of a *cul-de-sac* on a section line.

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

H. C. Vail, for appellant.

W. J. Donahue, contra.

ROSE, J.

This is a suit for an injunction to prevent the members of the county board of Boone county and a road overseer from carrying out threats to open a road running east and west for half a mile on the section line between the west halves of sections 21 and 28, in township 20, Boone county. Plaintiff owns land south of that part of the section line described and also the 40-acre tract with its southeast corner at the western terminus of the proposed road. The relief sought is based on allegations that the road, if opened, would be a *cul-de-sac* with the west end terminating at private property, and that therefore the road would

be a private one, for which the property of plaintiff cannot lawfuly be taken without his consent. To the petition defendants demurred. The demurrer was sustained, and from a judgment of dismissal plaintiff has appealed.

The ruling on the demurrer is not erroneous. Plaintiff pleads that defendants are threatening to open a road on a section line, and fails to allege that resulting damages have not been ascertained or paid or tendered. Section lines are by statute declared to be public roads which may be opened by the county board whenever the public good requires it. Comp. St., ch. 78, sec. 46. This provision is by construction a part of the contract under which plaintiff acquired title to his lands. A court of equity should not hold, contrary to a specific legislative enactment, that a section line, when regularly opened and improved for public travel, is not a highway. The county board is not required to open at one time, pursuant to a single order, a section-line road a mile or more in length. Expensive bridges may be required at different places. The damages and the cost of construction are burdens which may properly be assumed at different times. Next year, or at some later time, the county board may, in its discretion, extend the road in controversy until it connects with another public highway on the west. Under the statute and the decisions the law is: "The propriety or necessity of opening and working a section-line road is committed to the discretion of the county board, and its decision is not subject to review." *Howard v. Supervisors,* 54 Neb. 443. The only limitation upon the discretion of the county board in respect to opening section-line roads is the fundamental one of compensation for private property taken or damaged. *Rose v. Washington County,* 42 Neb. 1. The county board's power and discretion having been thus determined, the following language from a text-book correctly states the rule applicable to the present controversy: "County commissioners having authority to establish highways may, in a proper case, establish a highway which is a *cul-de-sac.*" 1 Elliott, Roads (3d ed.) sec. 2.

Plaintiff, under his own petition, is not entitled to an injunction, and his case was properly dismissed.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JULES ALTHAUS V. STATE OF NEBRASKA.

FILED DECEMBER 24, 1913. No. 18,281.

Constitutional Law: CHATTEL LOANS ACT. The act providing that "A rate of interest not exceeding one per cent. per month may be charged by agreement on loans not exceeding $250, made for a period of one year or less, where such loans are secured only by a chattel mortgage on household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits, or choses in action," and providing penalties for exacting excessive interest and for otherwise violating the act, is void, because it violates the constitutional provision prohibiting the legislature from passing local or special laws regulating the interest on money. Laws 1913, ch. 250; Const., art. III, sec. 15.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed and dismissed.*

Smyth, Smith & Schall, for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Jules Althaus was convicted of violating the legislative enactment providing that "A rate of interest not exceeding one per cent. per month may be charged by agreement on loans not exceeding $250, made for a period of one year or less, where such loans are secured

only by a chattel mortgage on household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits, or choses in action," and providing penalties for exacting excessive interest and for otherwise violating the act. Laws 1913, ch. 250. For the offense described defendant was sentenced to pay a fine of $100. As plaintiff in error he now presents for review the record of his conviction.

Defendant takes the position that the judgment below is erroneous, because the legislative act under which he was charged, convicted and sentenced is unconstitutional and void. A specific objection to the act is that it violates the constitutional provision prohibiting the legislature from passing local or special laws regulating the interest on money. Const., art. III, sec. 15. One purpose of the constitution is to require general laws operating alike upon similar rights and upon all persons of a class, and to prevent legislation affecting diversely property of like character and persons similarly situated. The wisdom of this constitutional provision is not open to controversy. Without it the equal protection of the laws to which all are entitled would be lost. To respect that part of the supreme law prohibiting special or class legislation and to allow the utmost legislative freedom consistent with constitutional limitations, the following doctrine was announced in an opinion by Judge SULLIVAN: "The rule established by the authorities is that, while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1.

Tested by this rule, does the act legalizing a rate of interest not exceeding one per cent. a month on loans of $250 or less, where they "are secured only by a chattel mortgage on household goods, musical instruments, wearing

apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits, or choses in action," violate the constitutional provision prohibiting the legislature from passing local or special laws regulating the interest on money? The act by its terms protects from the rapacity of those who loan money on chattel security only owners of the particular items of personal property enumerated. A lender who charges extortionate interest and accepts security on the chattels enumerated by the legislature may be punished. Another lender who makes a loan on identical terms, except that he includes in his chattel mortgage an article not enumerated in the act, but similar to those mentioned therein, goes free. If the avarice and greed of those who thrive on the poverty or the misfortune of the owners of "household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits or choses in action," are to be wisely and justly curbed by law, as such abominations should be, why should not the law apply also to those who lend money on other chattels of a similar nature? Why should the mortgagor of diamonds be protected by the criminal law from extortionate rates of interest and the mechanic, who mortgages his tools to buy bread, when out of employment, go without protection? In the eye of the law, why should the owner of household goods, which are being moved from one tenement to another, be protected by statute from the extortion of the lender on chattel security, while the owner of the cart in which such goods are moved is left to the unpunishable avarice of the chattel lienor? Questions suggesting similar classifications which the legislature attempted to make could be multiplied indefinitely. In a law regulating the interest on money are the classifications made in the act permitted by the constitution? The answer to these questions is that there is no "substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." Reasoning or re-

finement which would harmonize such classifications with the constitution would make of the supreme law, of the act of the legislature and of the judgment of the court a farce or a delusion. If the legislature had not attempted to legalize a special rate, but had merely added a penalty to that created by the existing statute and had made it applicable to a class reasonably selected, a different question would be presented. *State v. Sherman,* 18 Wyo. 169, 27 L. R. A. n. s. 898. The classifications are on their face unreasonable and arbitrary. The act is the kind of legislation the constitution was intended to prohibit. The court does not strike down the act of the legislature. It is void, because it was passed in direct violation of a plain constitutional provision which all departments of government must respect. There can be no valid conviction for the violation of such an act.

The judgment of the district court is therefore reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF CATHERINE KUHMAN.

CHARLES KUHMAN, APPELLEE, V. MARGARETTE MILHAULIN ET AL., APPELLANTS.

FILED DECEMBER 24, 1913. No. 17,388.

Wills: CONTEST: EVIDENCE. Record examined, and found to be free from error.

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

Quackenbush & Neal and *S. P. Davidson,* for appellants.

Lambert & McCarty, contra.

FAWCETT, J.

Catherine Kuhman died August 27, 1910, leaving an instrument purporting to be her last will and testament. The probate of the will was contested by appellants. The decision of the county court was appealed from. Upon the hearing of the case in the district court for Nemaha county, the court directed a verdict sustaining the will, and the contestants have appealed.

The grounds for the contest relied upon are: First, that the testatrix neither signed nor declared the instrument to be her last will; second, that at the time the will is alleged to have been executed the testatrix was not competent mentally to execute the same; and, third, that at the time the will was executed the testatrix was under the control and influence of the proponent and his brother, and that she was unduly influenced and controlled by them in the execution of the same; that the will was not and is not her own voluntary and uninfluenced will.

That the will was duly executed is established by the clear and undisputed testimony of the subscribing witnesses.

There is an entire absence of evidence even tending to show that at the time the testatrix executed the will she was not of perfectly sound, disposing mind and fully competent to execute the same. Upon this point complaint is made of the rulings of the court in refusing to permit sundry witnesses on behalf of contestants to give their opinion that the testatrix did not have mental capacity to transact ordinary business or to make and execute a will. In each instance there was a complete failure to lay a foundation for such an opinion by the witness. It would serve no good purpose to set out the record. It so utterly fails to lay the necessary foundation for such an opinion that it would be a waste of time to do so.

The testimony by which it is sought to prove undue influence was the testimony of Catherine Randall, who was a daughter of the decedent. The offer was: "To prove by

the witness, and she will testify, if permitted, that from the time of her marriage down to her mother's death her brother Charles was consulted by her mother in the management of her business, and was controlled and influenced by him in the management of all the business that she did of any importance." The testimony of this witness shows that in 1879, at the age of 16 years, she ran away from home and was married in the state of Missouri; that within two years thereafter she returned home and remained about two weeks; that she then went to Iowa, and from there to Kansas, where she lived seven years, during which time she did not see her mother; that she removed from Kansas to Idaho, where she remained 12 years, during which time she never visited her mother; that she returned to Nebraska in 1906, five years after the execution of the will; that after returning to Nebraska she lived with her mother about a year. How this lady could possibly testify to the fact included within the offer is a mystery to us.

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. MICHEL A. HARTIGAN, APPELLEE, V. SPERRY & HUTCHINSON COMPANY, APPELLANT.

FILED DECEMBER 24, 1913. No. 18,058.

1. **Quo Warranto**: CORPORATIONS: OCCUPATION TAX: JUDGMENT OF OUSTER: EVIDENCE. Where a corporation, delinquent in the payment of an occupation fee, as provided in section 4260, Ann. St. 1911, applies to the secretary of state to be reinstated, as provided in section 4261, and in good faith pays to such secretary the full amount of fee and penalty demanded by him, the fact that the secretary may, through oversight or under a misconstruction of the law, have demanded a less sum than is required, will not, in the absence of a demand upon the corporation to pay the required balance and a refusal or failure on its part to make the payment, sustain a judgment of ouster against such corporation.

2. Constitutional Law: POWER OF LEGISLATURE: POLICE POWER. Statutes enacted by the legislature in the exercise of the police power must not violate rights guaranteed to the people by the constitution. The legislature may not under the guise of protecting public interests arbitrarily interfere with private business.

3. Courts: JURISDICTION: LEGISLATIVE ENACTMENTS: "GIFT ENTERPRISE." And the fact that the legislature, in an act making it a criminal offense for any person to engage in any gift enterprise, describes a legitimate private business enterprise, and provides that any person engaged in such business shall be held to be engaged in a gift enterprise within the provisions of the act, will not oust the jurisdiction of the courts to determine the true character of the business so attempted to be prohibited.

4. Constitutional Law: POWER OF LEGISLATURE: POLICE POWER. Chapter 179, laws 1911, set out in the opinion, in so far as it might be construed to prohibit the business of giving and redeeming what are commonly known as "trading stamps," is an unreasonable interference with a lawful business, not within the police power of the legislature, and is in conflict with article I of the Bill of Rights and the fourteenth amendment to the Federal Constitution.

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

Frank P. Wolcott, Talbot & Allen and *Tibbets, Morey & Fuller,* for appellant.

J. W. James, M. A. Hartigan and *Don C. Fouts, contra.*

FAWCETT, J.

The relator, the county attorney for Adams county, instituted proceedings in *quo warranto* in the district court for that county, to oust the respondent from the state of Nebraska, and from a judgment of ouster the respondent appeals.

The pleadings, consisting of the amended information, the answer and reply, are voluminous and will not be set out. A reference to the real points in issue will be sufficient. The judgment of ouster was based solely on the following findings:

"The court further finds that on August 25, 1911, after

the respondent had been doing business in the state of Nebraska for three or more years without having paid an occupation tax, it appeared before the secretary of the state and filed with him a statement that it was delinquent under the law and that it wished to be reinstated. The court further finds that at the time it complied with the law on this subject in all respects, except that it failed to pay a sufficient amount as an occupation tax, as will be hereinafter more specifically set forth; that it paid $10 for occupation tax, together with $10 penalty, for the year ending June 30, 1910, and was thereupon reinstated; that on the same day the respondent paid to the secretary of state a $10 occupation fee and $10 penalty for reinstatement to cover the year ending June 30, 1911; that on the same day respondent paid to the secretary of state $10 to cover the occupation permit for the year ending June 30, 1912, and that subsequently the respondent paid to the secretary of state $100, being the occupation tax for the year ending June 30, 1913. The court further finds that said respondent at the time of its application for reinstatement and upon the payment of the sums heretofore set forth was thereupon duly reinstated by the secretary of state. The court further finds that under the law the respondent should have paid $100 for each of the years for which it paid only $10, and that the respondent, therefore, in this respect failed to comply with section 4260, Cobbey's Statutes of 1911. The court further finds that at the time of reinstatement of the respondent by the secretary of state such corporation was in default under section 12031, Cobbey's Statutes of 1911, providing for the filing of a report with the attorney general of the state of Nebraska. The court, therefore, finds that the respondent, by reason of having neglected to comply with the requirements of the statute relative to foreign corporations as above set forth, has forfeited its rights to do business in the state of Nebraska, and is now wrongfully doing business in this state, and that it should be ousted therefrom."

In deciding the case upon these findings, the court ig-

nored the main ground upon which relator seeks to oust the respondent, viz., that the business in which respondent is engaged is prohibited by chapter 179, laws 1911. That relator considers this the main ground, and the only one which would permanently give the full relief he seeks, is shown by the fact that his counsel, in his brief, by not discussing, practically abandons all of the other grounds of complaint set out in his amended information, and directs his argument wholly to the constitutionality of this act.

The record shows that at the time respondent was reinstated it paid to the secretary of state the full amount of occupation tax and penalty demanded by the secretary for each of the years named, and by its answer it alleges that it "is willing and desirous and stands ready to comply with all and every lawful provision of the statutes of said state." The fact, if it be a fact, that the secretary of state may have erred as to the amount required to entitle respondent to reinstatement is not sufficient to sustain a judgment of ouster, and especially so when respondent was before the court offering to fully comply with every statutory requirement. The record also shows the filing by respondent of its reports with the attorney general. The court, therefore, erred in its findings upon which it based its judgment.

We might rest here, and remand the case for further proceedings, but, as such a course would not end the litigation, we have concluded to consider the main question, which has been so ably argued by counsel on both sides in their briefs and at the bar.

Chapter 179, *supra,* is as follows: "An act to prohibit gift enterprises and to provide punishment for a violation of the same.

"Section 1. (Gift Enterprise.) It shall be unlawful for any person or persons to engage in any gift enterprise in this state. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition

or performance, or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of, any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be held to be engaged in a gift enterprise within the provisions of this act.

"Section 2. (Same—Penalty.) Any person or persons who shall engage in any gift enterprise in this state shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both, at the discretion of the court."

The amended information alleges substantially that in violation of this act respondent is conducting a gift enterprise at Hastings, Nebraska; that the method of conducting its business is to hold out the promise of a gift or bestowal of certain trading stamps to any person who may purchase goods, and their redemption at its place of business, for the benefit of a certain institution, to wit, Stein Brothers, with the intent of building up and maintaining a monopoly and obstructing open competition; that Stein Brothers conduct clothing, grocery, millinery and furniture departments; that respondent and Stein Brothers have been and are now engaged in the violation of this act. The method of issuing trading stamps by merchants to their customers and of their redemption by the trading stamp company is a matter of common knowledge and need not be detailed here. The business has grown to enormous proportions and is now being carried on in practically every state in the Union. As a result of present-day agitation along the line of what some of the courts have characterized as governmental paternalism, the legislatures of many states have been induced to pass laws substantially similar to the one under consideration here. While they differ somewhat in phraseology, they are, as

we have said, substantially the same. A reading of them will show that, while their real purpose is attempted to be concealed in the language used, it is apparent that such real purpose is to abolish the trading stamp system as a method of advertising by retail merchants. The question is: Is it within the power of the legislature to do so? The police power of the state has in recent years, at the demand of a persistent and in many cases an aggrieved public, been greatly extended by judicial construction; but the courts have not yet, except in very few instances, gone so far as to hold that under this power a legislature may forbid contracts which have always been held to be within the constitutional right of persons in every state to possess and acquire property, to transact legitimate business, and to fully enjoy freedom of contract in relation thereto.

In considering a similar statute, in *Young v. Commonwealth*, 101 Va. 853, 867, a case in which the business of the respondent here was being considered, it is said: " 'The act, as we construe it, prohibits a person from selling a given article, and at the same time, and as a part of the transaction, giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring that it is illegal for a man to give away one article as a premium to the buyer for having purchased another; for, as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our state constitution and also by the fourteenth amendment to the constitution of the United States. * * * This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and

provided also that it is not a business which is affected with the public use or interest.' * * * In the case at bar the element of chance or lottery is entirely wanting. There is no uncertainty or indefiniteness about the premiums. The articles are certain and fixed. They are kept constantly on exhibition, so that the person about to collect a book of 990 stamps has full opportunity to make up his mind what article he will select from the store of the trading stamp company when he is ready to have his book of stamps redeemed. From the facts certified it appears that the articles for the redemption of stamps are on exhibition at the store of the company, that the customer who bought the tomatoes and received the stamps knew through the advertisements of the company that the defendant gave the stamps with all cash sales, and for that reason purchased from the defendant in preference to some merchant who did not give the stamps; and that said customer knew the general value and character of the articles from which he would be entitled to have his selection in redemption of stamps collected by him. We can find nothing in the contract between the Sperry & Hutchinson Company and the defendant, nor the transactions with customers in pursuance of such contract, that is not a legitimate exercise of one's right to prosecute his business in his own way. As already said, 'it appears to be simply one of the many devices fallen upon in these days of sharp competition between trades people' to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any other of the many forms of advertising. * * * Indulging every possible presumption in favor of the validity of the statute now under consideration, we are constrained to the conclusion, upon reason and authority, that it is not a valid exercise of legislative power. It attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business."

In April, 1911, the legislature of the state of Massachusetts, under a practice prevailing in that state, submitted to the supreme court a bill prohibiting gift enterprises,

with this interrogatory: "Would the provisions of the bill now pending in the general court, which prohibits gift enterprises, being House Bill No. 1097, a copy of which is transmitted herewith, be constitutional if enacted?" To this the chief justice and the six associate justices of that court, in *Opinion of the Justices*, 208 Mass. 607, gave the following answer:

"We, the justices of the supreme judicial court, having considered the question upon which our opinion is required under the order of April 4, 1911, a copy of which is hereto annexed, are constrained to answer it in the negative. The principles applicable to statutes of this kind were considered and discussed in *Commonwealth v. Emerson*, 165 Mass. 146, *Commonwealth v. Sisson*, 178 Mass. 578, and *O'Keeffe v. Somerville*, 190 Mass. 110. In the last of these cases a statute was held unconstitutional in part upon grounds which are equally applicable to the house bill referred to in the order, and which require us to hold that the provisions of this bill are unconstitutional.

"The bill is drawn in broad terms, and it purports to forbid transactions that are not different in principle from contracts of sale which always have been held to be within the constitutional right of persons in every state to possess and acquire property, to transact legitimate business, and to buy and sell and get gain. * * * There is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves any element of chance. Such statutes and ordinances have been held unconstitutional by the highest courts in a large number of states. (Citing an unusually large number of cases from many states.)

"The court of appeals of the District of Columbia, in its decisions in *Lansburgh v. District of Columbia*, 11 App. Cas. D. C. 512, and in *District of Columbia v. Gregory*, 35 App. Cas. D. C. 271, stands almost alone, although it has been followed by one or two federal judges, in reaching an opposite conclusion." To that opinion the court attached the following syllabus: "A statute making it a

criminal offense to engage in any gift enterprise, and providing that a person who in any manner holds out a promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any article or thing shall be deemed to be engaging in a gift enterprise within the meaning of the statute, would be unconstitutional." In addition to the many cases there cited, holding in harmony therewith, we add *Leonard v. Bassindale,* 46 Wash. 301; *Territory of Hawaii v. Gunst & Co.,* 18 Hawaii, 196.

As opposed to this formidable array of authorities, relator is compelled to rely upon *Lansburgh v. District of Columbia, supra, State v. Hawkins,* 95 Md. 133, and *Humes v. City of Ft. Smith,* 93 Fed. 857, the last being an opinion by a district judge. As against the last case respondent cites *Humes v. City of Little Rock,* 138 Fed. 929, the opinion being by another district judge in the same state. *State v. Hawkins, supra,* is completely destroyed as an authority in this case by *State v. Caspare,* 115 Md. 7, 80 Atl. 606, in which case the Maryland court gets squarely in line with the many other states cited and followed by the supreme court of Massachusetts.

We deem it unnecessary to prolong this opinion, as the reasoning in support of our conclusion exhaustively appears in many of the cases cited by the Massachusetts court. The reasoning of those cases compels our concurrence. We therefore hold that chapter 179, *supra,* in so far as it might be construed to prohibit the business in which the respondent is engaged, is in conflict with article I of the Bill of Rights, and the fourteenth amendment to the Federal Constitution.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissents.

GEORGE CONROY ET AL., APPELLEES, V. FLORENTIUS M. HALLOWELL, APPELLANT.

FILED DECEMBER 24, 1913. No. 18,176.

County Judges: REMOVAL FROM OFFICE. The only method of removing a county judge from office in this state is by impeachment, as provided in section 14, art. III of the constitution.

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

H. M. Sinclair, W. D. Oldham, Thomas F. Hamer and *John A. Miller*, for appellant.

Edward B. McDermott, Charles G. Ryan and *Ralph R. Horth, contra.*

FAWCETT, J.

From a judgment of the district court for Buffalo county, removing appellant, who will be referred to as defendant, from the office of county judge of that county, he prosecutes this appeal.

The action was instituted by appellees, who will be designated as plaintiffs, to remove defendant from his office for causes enumerated in section 1, art. II, ch. 18, Comp. St. 1911. The district court, by consent of parties, referred the case to Honorable T. O. C. Harrison to take testimony and report findings of fact and conclusions of law. The findings of fact and conclusions of law by the referee were adverse to defendant. No proper bill of exceptions of the evidence taken before the referee has been preserved in the record. The case must therefore be determined purely upon the questions of law raised by the motion for a new trial and assigned here, one of which is that the district court is without jurisdiction to remove a county judge; in other words, that the statute, under which the complaint was filed and prosecuted, in so far as it permitted the removal of a county judge for any

other offenses than those enumerated in the constitution, and in any other manner than by impeachment as provided in the constitution, is void.

Section 1 of the act referred to provided: "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following: *First.* For habitual or wilful neglect of duty. *Second.* For gross partiality. *Third.* For oppression. *Fourth.* For extortion. *Fifth.* For corruption. *Sixth.* For wilful maladministration in office. *Seventh.* For conviction of a felony. *Eighth.* For habitual drunkenness." Section 2 provided: "Any person may make such charge, and the district court shall have exclusive original jurisdiction thereof by summons." Section 3 provided that the proceedings should be as nearly like those in other actions as the nature of the case would admit of. Section 4 provided that the complaint should be by "an accuser against the accused," and should contain the charges with the necessary specifications, and be verified by the affidavit of any elector of the state. Section 5 provided that it would be sufficient that the summons require the accused to appear and answer a complaint for "official misdemeanor;" and that a copy of the complaint must be served with the summons. Section 6 provided that no answer or other pleading after the complaint is necessary, but that the defendant might move to reject the complaint or demur thereto upon any ground rendering such motion or demurrer proper. Section 7 provided that the questions of fact should be tried as any other action, and if the accused should be found guilty judgment should be entered removing him from his office and declaring the office vacant. This act was adopted in 1866. Turning to the constitution of 1866, we find the following provisions:

Section 28, art. II, provided: "The house of representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the senate; and the senators,

when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators."

Section 29 provided: "The governor, secretary of state, auditor, treasurer, and judges of the supreme and district courts, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust or profit, under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment, according to law. All other civil officers shall be tried for misdemeanors in office in such manner as the legislature may provide."

Section 31 provided: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy where no provision is made for that purpose in this constitution."

In *Brittle v. People*, 2 Neb. 198, 211, Mr. Justice CROUNSE gives us a little inside information as to the birth of this constitution: "As is well known, the constitution was originally drafted in a lawyer's office by a few self-appointed individuals. These importuned the legislature then sitting to submit it to a vote of the people." On page 214, in speaking of the matter again, the learned justice said: "Yet we have seen that it was born in a law office, instead of a convention; that it was made by no one under any authority whatever; and that it might as well have been made by any one else as by those who did draft it. Again, we have noted that it was submitted by nobody lawfully empowered to do so; that no one was obliged to vote, and no one could be punished for voting a thousand ballots at the pretended election. And we have further seen that, whether carried by a majority vote in fact or not, we are nevertheless a state working under the constitution so voted for." It is not surprising that the people were not satisfied with a constitution drafted, submitted, and voted for under the conditions above outlined,

and in the short period of six years thereafter they procured the adoption of a new constitution, prepared by a constitutional convention composed of many of the best men in the state, a few of whom are still living and reflecting honor upon our commonwealth, notably our present Chief Justice M. B. REESE; the president of that convention, Honorable John Lee Webster; United States District Judge William H. Munger, and Governor O. A. Abbott. As a result of the careful and extended deliberations of this convention, the constitution of 1875 was drafted, submitted to a vote of the people, and duly adopted.

It will be conceded on all sides that there was no conflict betwen the statute set out and the quoted provisions of the constitution of 1866; and the important question involved is what change, if any, was made by the constitution of 1875? To that point we now direct our attention. Further reference to sections of the constitution will be to the constitution of 1875.

Section 18, art. XVI, provides: "If this constitution be adopted the existing constitution shall cease in all its provisions on the first day of November, A. D. 1875." In *Wheeler v. City of Plattsmouth*, 7 Neb. 270, in considering that section, we held: "The old constitution did, then, *cease in all its provisions*, and must be considered, except as to transactions past and closed, as if it never existed."

Section 1, art. VI, provides: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

Section 4, art. X, provides: "The legislature shall provide by law for the election of such county and township officers as may be necessary."

Section 13, art. XVI, provides: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election, which shall be on the second Tuesday in October, 1875. All state, district, county, precinct and

township officers, by the constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. Judges of the supreme, district and county courts, all elective county and precinct officers, and all other elective officers, the time for the election of whom is not herein otherwise provided for, and which are not included in the above exception, shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office."

Section 14 provides: "The terms of office of all state and county officers, of judges of the supreme, district and county courts, and regents of the university shall begin on the first Thursday after the first Tuesday in January next succeeding their election."

Section 15 provides: "The supreme, district and county courts established by this constitution shall be the successors respectively of the supreme court, the district courts and the probate court, having jurisdiction under the existing constitution."

Section 16 provides: "The supreme, district, and probate courts now in existence shall continue, and the judges thereof shall exercise the power and retain their present jurisdiction until the courts provided for by this constitution shall be organized."

Section 20, art. III, provides: "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution."

Section 14, art. III, provides: "The senate and house of representatives in joint convention shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of

a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention for the purpose of acting upon such resolution within three days of such notification. A notice of an impeachment of any officer, other than a justice of the supreme court, shall be forthwith served upon the chief justice, by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capital within ten days after such notice to try the impeachment. A notice of an impeachment of a justice of the supreme court shall be served by the secretary of the senate upon the judge of the judicial district within which the capital is located, and he thereupon shall notify all the judges of the district court in the state to meet with him within thirty days at the capital, to sit as a court to try such impeachment, which court shall organize by electing one of its number to preside. No person shall be convicted without the concurrence of two-thirds of the members of the court of impeachment, but judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust in this state, but the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law. No officer shall exercise his official duties after he shall have been impeached and notified thereof, until he shall have been acquitted."

Section 5, art. V, provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office."

An examination of these sections of the constitution shows not only that the office of county judge is a constitutional office, but that the framers of the constitution deliberately segregated that office from other offices elected within a county, and placed county judges in a separate and distinct class with judges of the supreme and district courts, and has, in substantially every instance, classed county courts with the supreme and district courts as a

part of the judicial system of the state; and, while a county judge may be a county officer in the sense that he is an officer elected by the voters of a single county, he is not a county officer as contemplated by the framers of the constitution and within the meaning of that instrument. By section 13, art. XVI, above quoted, this distinction will be seen standing out very clearly. It is there declared: "Judges of the supreme, district and county courts, all elective county and precinct officers, and all other elective officers," etc. Here the county courts are distinctly segregated from *"all* elective *county"* officers. Again, in section 14 it is provided: "The terms of office of *all* state and *county* officers, of judges of the supreme, district and *county* courts," etc., showing, as clearly as language can make it appear, it seems to us, that county courts are in a class with supreme and district courts, and are not to be considered as classed with "county officers."

If we are right in this, then how can such officers be removed? Has the constitution provided for their removal and determined how their offices shall become vacant? The answer must be in the affirmative. The provision of section 29, art. II of the constitution of 1866, *supra,* that the governor, secretary of state, auditor, treasurer, and judges of the supreme and district courts should be liable to impeachment, and that all other civil officers should be tried for misdemeanors in office in such manner as the legislature may provide, is completely superseded by sections 14 and 20, art. III, and section 5, art. V, of our present constitution. It will be seen that section 5, art. V, adds to the causes for impeachment specified in section 20, art. III, the additional cause of "misdemeanor in office." This general term is broad enough to cover any cause set forth in section 1, art. II, ch. 18, *supra,* and it is significant that the framers of the constitution added this general cause, so as to cover every kind and character of maladministration in office, but adhered to the method of removal, viz., by impeachment. Having provided, fully, by section 20, art. III, and section 5, art. V, the grounds

upon which a constitutional office may become vacant, we do not think it is within the power of the legislature to add any other or additional grounds; and, having provided the manner in which the office shall be declared vacant, viz., by impeachment of its incumbent, it is not within the power of the legislature to provide for any other or different method of removal. If this be not so, then the legislature may by statutory enactment provide that the governor, or any other state officer, may be put upon trial upon the accusation of any individual elector, upon some ground other than contemplated by the constitution, and before the district court, and compel him to defend his right to his office upon such complaint, based, it may be, upon prejudice, or prompted by a desire for revenge, instead of giving the official, who has been elected by the people, the right to hold his office until the legislature in joint convention assembled has deliberately decided, by a majority vote of all the members elected, that he should be put upon his trial, and that when so put upon trial it should be in the supreme court. That there are a few cases inferentially holding that way, we concede; but the weight of authority and the better reasoning are to the contrary.

It is claimed that this court has adopted the other view in *State v. Lansing,* 46 Neb. 514, 530. This claim is not well founded. The facts in that case are: In 1891 Lansing was elected county judge of Lancaster county and duly qualified and discharged the duties of his office for the full term. At the general election in 1893 he was re-elected and a certificate of election issued to him, but he did not execute an official bond and file the same in the office of the county clerk within the time required by law. The relator charged that, by reason of his failure to so file his bond, together with his oath of office, the office had become vacant. At the election of 1894, which would be during the middle of that term, the relator was a candidate for election to fill the vacancy. The section of the statute which Judge Lansing failed to comply with provides: "Official

bonds, with the oath indorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election on or before the first Thursday after the first Tuesday in January next, succeeding the election." Comp. St. 1891, ch. 10, sec. 5. Section 15 of the chapter provides: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." Section 17 provides: "When the incumbent of an office is re-elected or re-appointed he shall qualify by taking the oath and giving the bond as above directed." Judge Lansing failed to file his bond and oath on or before the first Thursday after the first Tuesday in January, 1894, but did file the same on January 25, and the question involved in that case was whether the office thereby became vacant. The district court sustained a general demurrer to the information and entered judgment for the respondent. This court reversed the judgment and remanded the case. The learned commissioner who wrote the opinion, in his customary scholarly manner, considered the questions actually involved in the case before the court, and then on page 530 indulged in the dictum upon which plaintiffs now rely for an affirmance of this case. At the page indicated, section 20, article III of the constitution, is quoted, and the commissioner then says: "It is contended that the expression of these events as creating vacancies is the exclusion of all others, and there are a few decisions in other states lending color to the argument. It would be a sufficient answer to this contention to say that this court has always carried in view the principle that the state constitution is not to be considered as a grant of power, but that its provisions are purely restrictive and that legislation is valid unless prohibited by the state or the federal constitution. Therefore, in such cases

as the present, the maxim *'Expressio unius est exclusio alterius'* is not applicable, and the legislature may adopt any provision not prohibited by the constitution. (Citing cases.) To put it differently, the constitutional provision quoted creates a vacancy upon the happening of any of the events covered by the provision, and the legislature would be prohibited by that provision from enacting any law whereby such an event would not create a vacancy. But it is not prohibited from enacting that vacancies shall be otherwise created." The language of the commissioner immediately following what we have quoted shows that what was above said is pure dictum, viz.: "But aside from this, section 20, article III of the constitution, manifestly refers to events occurring after an induction into office. The case presented is not one of that character. It is not the case of ousting one already legally inducted into office for events occurring after his induction, but, on the contrary, it is questioning the right of one to claim an office in the beginning. The distinction has already been alluded to, but throughout it should be borne in mind that we are here discussing the right of a person to claim a term of office, and not the right of another or of the public to oust one from a term already legally begun." What was said by the learned commissioner in the discussion above set out was in all probability not the result of careful deliberation, nor was it said in a case where the question was involved, and in which he had been favored with the assistance of counsel in argument, as we have been in this case. The reasoning of the commissioner does not apply because, as we have shown, the legislature has not added any additional cause, but all causes specified in the statute under which these proceedings are being prosecuted are covered by section 5, article V of the constitution, above set out. Moreover, if this dictum were permitted to stand as a holding of the court it would not be decisive of the present case, for the reason that it goes no further than to hold that the legislature might add to the causes for removal fixed by the constitution, and does not in any man-

ner attempt to discuss or decide the mode of removal for any added cause. A careful consideration of the dictum quoted satisfies us that it is unsound when attempted to be squared by the several provisions of our constitution above set out.

Plaintiffs also place reliance in *Donahue v. County of Will,* 100 Ill. 94, which, they insist, was approved and followed in *State v. Oleson,* 15 Neb. 247. The office involved in *Donahue v. County of Will* was the office of county treasurer, and that involved in *State v. Oleson* county sheriff. For the reasons which we have set out in this opinion, we think a clear distinction must be drawn between the office of county judge and county offices properly so called. But even as applied to the office of county sheriff, the opinion in *State v. Oleson* was written with grave misgivings as to the soundness of the holding in *Donahue v. County of Will.* The opinion by Mr. Chief Justice COBB, in concluding (p. 250), says: "I think, upon a careful consideration of the whole subject, that it is safe to follow this precedent, though that the case is entirely free from doubt cannot be said." We think *State v. Oleson* is clearly distinguishable from the case at bar.

In *Lowe v. Commonwealth,* 60 Ky. 237, it is held: "Wherever the constitution has created an office and fixed its terms, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or *suspend* him from office for any other reason or in any other *mode* than the constitution itself has furnished." In *Commonwealth v. Williams,* 79 Ky. 42, it is said: "Mr. Cooley says 'that, when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases.' Constitutional Limitations, p. 78, 4th ed." The opinion then cites *Lowe v. Commonwealth,* and quotes the holding of that case as above set

out, and then proceeds: "This doctrine was approved in *Brown v. Grover,* 6 Bush (Ky.) 1, and has been followed in many unreported cases since that time."

Counsel for defendant cite *People v. Board of Supervisors,* 40 Mich. 585. In that case the syllabus holds: "Probate judges are not county but state officers, and are not subject to the control of any authority inferior to the legislature." In the opinion (p. 588) it is said: "It is very clear to us that the duties performed by probate judges are in no sense services performed for their respective counties, and that they are in no sense county officers. They exercise a portion of the judicial and prerogative power of the state, and cannot be subjected to the direction of any body inferior to the legislature. * * * The legislature is the only body having charge of the state interests. It cannot be liable to the local passions and prejudices which may and often do produce confusion in local affairs, and which, if allowed free action, may destroy the independence and break up the business of one of the most important branches of our judicial system." In the brief of counsel for plaintiffs, the only comment made upon the Michigan case is that "this decision is overruled by implication in the later case of *Secord v. Foutch,* 44 Mich. 89." We have examined that case, but are unable to discover how it in any manner overrules or departs from the case of *People v. Board of Supervisors, supra.*

After a careful examination of our constitution and of every case cited by counsel on both sides, we are constrained to hold that the only method of removing a county judge from office is by impeachment. It follows that the district court was without jurisdiction in the present action.

A number of other important and very interesting questions are discussed in briefs of counsel, but, inasmuch as the conclusion we have reached on the question of jurisdiction finally disposes of the case, they will not be considered.

The judgment of the district court is reversed, the action dismissed, and defendant reinstated in his office.

REVERSED AND DISMISSED.

REESE, C. J., concurring.

I agree to the judgment dismissing this case, but prefer to base my opinion upon what I conceive to be the conceded facts of the case.

As I understand the case, there is nothing in the evidence tending in any degree to show any moral turpitude in any act of defendant. True, during his previous terms he charged and collected more fees in certain cases than the law allowed, under the belief that it was his duty to make such collections. Under the provisions of our statute he became liable to each and every person so overcharged, the amount of damages being fixed by law, and that without reference to his knowledge or intention at the time of making the charge. But, the effort to remove one from office is an entirely different matter. As I understand the record, the charges were made under the belief that they were legal, and that all were accounted for to the proper officers of the county and nothing retained or appropriated to his own use; in short, that he had erroneously construed or read the law, but without any intention of profiting thereby. If public officers are to be turned out of office and disgraced for every error in judgment, no matter how conscientiously committed, there would seem to be no protection to any person from the highest to the lowest officers of the state, whether executive or judicial. To remove a man from office should require evidence of an intention to do wrong. At any rate, where such intention is so fully negatived as to convince the mind that no wrong was intended, the effort to remove should fail.

SEDGWICK, J., concurring.

The constitution of 1875 provides: "All civil officers of this state shall be liable to impeachment" (article V,

sec. 5), and "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind" (article III, sec. 20). If, therefore, judges of the district court and judges of the county courts hold offices created by the constitution, they are subject to impeachment by virtue of the latter provision. Judges of the district courts were also made subject to impeachment by section 29, art. II, constitution of 1866, but there is no other provision in our present constitution for the impeachment of judges of the district court, except section 20, art. III, which provides that all offices created by this constitution shall become vacant by impeachment, unless they be regarded as "officers of the state." It seems to me there can be no doubt that the district courts and county courts are created by the constitution. Both of these offices are well defined by the constitution, and the judges of both are given large jurisdiction which cannot be taken from them by legislation. The provisions of the constitution in regard to district and county courts are self-enforcing, so that such courts would exist and have ample jurisdiction without any legislation whatever. Section 14, art. III, provides the same method of trial for all impeached officers, except judges of the supreme court. "Any officer other than a justice of the supreme court" is to be tried before that court. If, then, district and county judges are subject to impeachment by virtue of the provisions of the constitution, the legislature can provide nothing in regard to their removal from office that it could not provide as to any other officer whose impeachment is provided for in the constitution. Can the legislature provide for the removal from office of the governor, judges of the supreme court, and the other state officers? If not, how then can it be thought that the judges of the district court and county courts can be removed by or under legislative enactment?

The various provisions of the constitution bearing upon this question are not as definite as might be wished. The

question is a difficult one. It is desirable that all doubt as to the meaning of the constitution shall be removed as far as possible, and for these reasons I concur with the majority.

LETTON, J., dissenting.

I am unable to concur in the majority opinion, and deem the matter of such importance as to require my reasons to be stated. The majority opinion holds that a statute providing for the removal of county officers for misdemeanors in office was repealed by the adoption of the constitution of 1875, at least so far as the office of county judge is concerned.

The solution of the question presented depends upon the construction to be given certain sections of the constitution of 1875. Bearing in mind the rule that repeals by implication are not to be favored, and the rule of constitutional interpretation that the courts in endeavoring to ascertain the meaning of language used in the instrument may look to existing conditions at the time the constitution was adopted—practically a corollary of the ancient rule that courts will look to the old rule, the mischief, and the remedy—it seems to me that the intention of the constitutional convention is not difficult to ascertain. The constitution of 1866 (article II, sec. 29) provided for the removal by impeachment of the judges of the supreme and district courts and the four officers of the executive department of the state only, but gave the legislature power to provide for the removal of county officers and justices of the peace for misdemeanors in office by proceedings "analogous to impeachment," as Judge IRVINE says in *Hopkins v. Scott*, 38 Neb. 661, 669. The statute in question was enacted in the exercise of this power. The new constitution changed the impeaching body from the house to the legislature as a whole, provided a new court for the trial of impeachments, and added to the list of impeachable officers by making "all civil officers of this state * * * liable to impeachment." Article V, sec. 5.

The majority opinion is based upon the proposition that the framers of the constitution of 1875 "classed county courts with the supreme and district courts as a part of the judicial system of the state," and the conclusion is drawn that, while a county judge is a county officer in the sense that he is elected by the voters of a single county, he is not a county officer within the meaning of the constitution, and that therefore the statute was repealed by implication when that instrument was adopted. This view seems to be largely based upon the provisions of sections 14, 20, art. III, and section 5, art. V, of the 1875 constitution. Section 14, which is set forth in the majority opinion, confers the power of instituting impeachment proceedings upon the legislature in joint session, and provides: "A notice of an impeachment of any officer, other than a justice of the supreme court, shall be forthwith served upon the chief justice," etc. Section 20, art. III, is set out in the opinion of the majority. It provides how vacancies may occur in offices created by the constitution. Section 5, art. V, provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office." These sections are the only provisions of the 1875 constitution which treat of the subject of impeachment.

In the opinion great stress is placed upon the fact that the powers and jurisdiction of county courts are enumerated in article VI of the constitution relating to the judiciary department. I can see no reason for distinguishing in this respect between the county court and other inferior courts or judicial officers named in the article. Section 1 provides: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, *justices of the peace, and police magistrates,* and in *such other courts* inferior to the district courts as may be created by law for cities and incorporated towns." Section 21 of the same article provides that, "in case the office of any judge of the supreme court, or of any district court, shall become vacant * * * the vacancy shall be filled by appointment by the governor," etc.; and that "va-

cancies in all other elective offices provided for in *this article* shall be filled by appointment * * * in such manner as the legislature may provide." A clear distinction is here drawn between the courts of counties and smaller subdivisions, and the higher courts of the state. The more important office of judge of the supreme court or of the district court must be filled by the governor until an election can be had, but the legislature may determine how a vacancy in the office of county judge, a justice of the peace, or a police magistrate may be filled. If the dividing line lies between the county judge and the other magistrates, as the majority think, why this distinction? Again, the district judge may hold court in any county in the state upon the request of the judge of that district. The salary of a district judge is paid by the state and is fixed in the constitution. Section 20, art. III, providing how offices created by the constitution shall become vacant, is not entitled in this connection to the importance given it in the majority opinion, because impeachment is only one of the six causes for a vacancy. Some of the offices may become vacant by resignation, others by conviction of a felony, and others by impeachment. It is also to be noticed that the same section provides that "the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this constitution." It will be seen by reference to other provisions of the constitution that if a vacancy occur in the office of governor, the duty shall devolve upon the lieutenant governor, and that in case of a vacancy in the office of auditor of public accounts, treasurer, secretary of state, attorney general, commissioner of public lands and buildings, and superintendent of public instruction, it shall be filled by appointment by the governor. There runs throughout the constitution a distinct division. The executive and judicial offices and offices of importance and dignity, when vacant, are to be filled by the governor, and such officers can only be removed by impeachment. The cause for declaring other offices vacant may be designated by the

legislature, and the legislature may also provide for the manner of filling vacancies.

As to county judge, the constitution says: "There shall be elected *in and for each organized* county one judge, who shall be judge of the county court *of such county.*" Const. art. VI, sec. 15. The amount of his compensation is fixed by the legislature. He received it in a manner directed by that body, and from fees collected in the county. By no allowable stretch of the imagination can he be said to be a "civil officer of this state." The meaning of the phrase "officers of the state," or "state officers," has many times been construed. While in one sense almost every county and city officer indirectly is an officer of the government of the state, used in such a connection the courts interpret the words "civil officers of this state" to mean officer of the *state,* as distinguished from those of any county, municipality, or other governmental subdivision. *State v. Dillon,* 90 Mo. 229; *Opinion of Justices,* 167 Mass. 599; *Turner v. Cotton,* 93 Tex. 559; *Ex parte Wiley,* 54 Ala. 226; *In re Speakership,* 15 Colo. 520, 11 L. R. A. 241. I can see nothing in the reasoning of the opinion as to the office of county judge which is not equally applicable to the offices of justice of the peace or police magistrate. I can nowhere find authority conferred upon this court to draw a line between justices of the peace, police magistrates, and county judges, when the constitution itself draws no such line. The argument that, if the legislature has power to provide for the removal of county judges otherwise than by impeachment, it also has the power to remove judges of the supreme and district courts and state officers in like manner seems to be unsound. Where in the constitution special reference has been made to particular officers, and a special tribunal created for the impeachment of such officers, the special provisions control.

The case of *Lowe v. Commonwealth,* 60 Ky. 237, relied upon in the opinion is entirely consistent with these views. The legislature has no power to enact a statute such as this and make it apply to the office of supreme and district judge or state officers, because as to such officers, to quote

from that opinion, the makers of the constitution "declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term," but there is no restriction to be found as to other officers.

With respect to the quotation from the case of *People v. Board of Supervisors*, 40 Mich. 585: This case was decided in 1879. The opinion was written by Judge Campbell, the controversy being over whether the county supervisors had the power to change the compensation fixed by the legislature for probate judges, and it was held that the power to fix salaries lay in the legislature. The very next year the same judge, in *Secord v. Foutch*, 44 Mich. 89, which was an action to try the title to the office of probate judge, said: "The facts were all agreed upon, but the circuit judge, on the hearing, decided he had no jurisdiction, and dismissed the case. He did so on the ground that this court had held that the judge of probate was not a county officer, but was a part of the judiciary system of the state. Such judges are not 'state officers' in the sense in which that term is used in the statutes." The former case, therefore, is no authority upon the point presented.

To sum up: The constitution of 1866 provided for the impeachment of certain officers therein named. The constitution of 1875 added to the number of executive officers, and provided: "All civil officers of this state shall be liable to impeachment," etc. The statute was in force providing for the removal of county officers, as was done in this case, and nothing in the new constitution, either directly or impliedly, repealed it. It seems to argue very little practical common sense in the constitution makers to say they took the view that the cumbersome and unwieldy machinery of impeachment was necessary in order to remove a county judge for misdemeanors in office. I am satisfied that the wisdom, the experience and the sound judgment of that distinguished body of men was such that they never contemplated the possibility of such a construction of the constitution as is adopted by the majority opinion.

WILLIAM A. BIGLEY, APPELLEE, V. NATIONAL FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,268.

1. **Libel**: WRITING LIBELOUS PER SE. In an action for libel, language in the alleged libelous publication which, under the circumstances and in the connection in which it is used, would, by persons of ordinary intelligence and prudence, be understood to charge the commission of a crime is libelous *per se*, although if stated entirely by itself it might not be technically so construed.

2. ———: JUSTIFICATION. The language contained in a letter may be libelous *per se*, and the writing and publication of the letter not constitute a libel. If it charges a crime and is therefore libelous *per se*, still, if it is true of the plaintiff, and is written and published with good motives and for justifiable ends, it is not a libel of the plaintiff.

3. **Appeal**: INSTRUCTIONS. If the instructions as a whole correctly state the law, the judgment will not be reversed because of illogical arrangement of the several instructions, if it appears from the whole record that the jury were not misled thereby.

4. **Libel**: EVIDENCE. In an action for libel, it is not competent to prove wide and general circulation of the libel for the purpose of establishing the falsity of the charge or that the defendant was responsible for the libel.

5. ———: PUBLICATION. One who publishes a libel is responsible for such distribution and general circulation thereof as is the natural result of his act, such as under the circumstances he might reasonably suppose would follow as a result of the publication. He is not liable for an independent subsequent publication of a similar libel not induced by his own act.

6. ———: ———: QUESTION FOR JURY. If it clearly appears that the publications complained of were such independent publications, the evidence thereof should be excluded by the court. If it appears that the facts from which it might be determined whether the defendant was responsible for the publications are in doubt, and the evidence upon that point is substantially conflicting, the question whether the defendant is responsible for such publications should be submitted to the jury under proper instructions.

7. ———: DAMAGES: AMOUNT. The evidence as to plaintiff's damages is found sufficient to justify the amount of the judgment.

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

E. J. Hainer and *De Bord, Fradenberg & Van Orsdel,* for appellant.

George W. Berge, contra.

SEDGWICK, J.

This plaintiff was in the employ of the Burlington railroad working in the shops at Havelock as a boiler-maker. He was also in his spare hours a solicitor of insurance, acting as such for the defendant company, and to some extent for other companies. He also collected money from policy-holders in the defendant company. In December, 1909, George W. Wolfle, who was manager of the accident department of the defendant company, wrote letters to various policy-holders at Havelock, which purported to be letters from the defendant company, and to which Mr. Wolfle signed the name of the company by himself as manager. Those letters were, in substance, as follows: Omaha, Nebr., Dec. 18, 1909. Mr. Nelson B. Eshom, Havelock, Nebraska. Dear Sir: You are hereby notified to pay all premiums, when due, to Mr. Cuthbert Ayre, at the boiler-shops in Havelock, or to Mr. Frank L. Marstellar, Manager of the Lincoln Agency, Room 18, Burlington Block, Lincoln. You are also advised that Mr. Bigley is no longer an agent of this company. He has collected premiums from policy-holders in Havelock and retained the money for himself. Thanking you for your patronage and assuring you that both Mr. Ayre and Mr. Marstellar will endeavor to give you the best of service, we are, very truly yours, National Fidelity & Casualty Co. Geo. W. Wolfle, Manager Accident Department.

The plaintiff brought this action in the district court for Lancaster county, alleging damages for libel in writing and publishing these letters. The jury returned a verdict in favor of the plaintiff for $4,000 damages. The

court required a remittitur of $1,000, and entered judgment upon the verdict for $3,000. From this judgment the defendant has appealed.

The defendant denied that Mr. Wolfle "was expressly or impliedly authorized to write said letters or to state in said letters, in substance, that the plaintiff had collected premiums from policy-holders in Havelock and retained the money for himself." The defendant also contended that the letters were not libelous *per se,* and that they were privileged, and also contended that the charge contained in the letters against the plaintiff was true. The statement in the letters, "He has collected premiums from policy-holders in Havelock and retained the money for himself," if stated entirely by itself, would not technically charge the defendant with embezzlement, since it does not state that the money was wrongfully retained or that it was retained without the consent of the company. However, under the circumstances and in the connection in which it was made, the language used would not ordinarily be understood with any other meaning than that the plaintiff had unlawfully appropriated the defendant's money to his own use. The language used, then, was libelous *per se,* and the trial court correctly so considered it.

In the first instruction given by the court to the jury the court stated: "In this case the plaintiff seeks to recover from the defendant for certain libelous language used in a letter sent by the defendant to people in Havelock." The court then in the same instruction stated the definition of libel, which, if we understand the defendant, is conceded to be substantially correct; but the defendant says in the brief: "The jury in effect are told that the defendant has been guilty of using libelous language of the plaintiff; in other words, that the defendant has libeled the plaintiff, and then the definition giving in full what constitutes libel is certainly prejudicial to the defendant in this case, as it defines libels of many kinds in no way applicable to this case, and the statement that the defendant has used libelous language of and concerning

the plaintiff is certainly prejudicial." The instruction does not merit this criticism. The language contained in a letter may be libelous *per se,* and yet the writing and publication of the letter may not constitute a libel. If the language charges a crime and is therefore libelous *per se,* still if it is true of the plaintiff, and is written and published with good motives and for justifiable ends, the writing which contains it is not a libel. We have seen that the court was right in characterizing the language used as libelous *per se.* It would perhaps have conveyed a clearer idea to the jury if, instead of giving technical definition of libel, the court had in that connection told the jury in plain words under what circumstances language libelous *per se* would or would not constitute a libel against the plaintiff for which he could recover; but if the definition of libel given by the court was not in itself erroneous, and the jury in another instruction were informed under what circumstances the defendant would be liable for publishing the libelous language, we cannot say that the jury were misled by this instruction.

As to the truth of the language complained of, the evidence is somewhat conflicting. The burden of establishing the truth was upon the defendant, and the defendant not only fails to establish the truth of this allegation by a preponderance of the evidence, but it appears that the evidence clearly preponderates against the defendant upon this proposition. Mr. Wolfle's duties were in the principal office of the defendant, which was in Omaha. Mr. Marstellar was the local agent for the company at Lincoln, and was the plaintiff's superior in the business. The premiums were generally collected from the policy-holders at Havelock, and usually Mr. Marstellar went there for that purpose. Mr. Morrison was a policy-holder, and it appears that three premiums upon his policy, amounting to $6, were not received at the company's office in Omaha. Mr. Marstellar testified that these premiums were paid to the plaintiff, and that he had several times called the plaintiff's attention to the matter

and the plaintiff had not paid the money over to him. The plaintiff testified, and he was entirely corroborated by Mr. Morrison, that when the Morrison premiums were paid the plaintiff and Marstellar were together at a pool-hall in Havelock; that they were making these collections jointly. One of them received the money from the policy-holder and the other noted the receipt on a sheet of paper which they had for that purpose, and when the collections were completed the money and papers were turned over to Mr. Marstellar. It would seem from the whole evidence upon this point that between these two men some mistake was made in keeping their account and that this resulted in the failure to properly remit the money.

The defendant having admitted the writing and publication of these letters, even if the jury should find that the libelous language contained in the letters was true of the plaintiff, the defendant would be liable, unless it could establish by a preponderance of the evidence that the letters were published with good motives and for justifiable ends. It is insisted that this question was not properly submitted to the jury. In this connection it is said in the brief that the court instructed the jury, using Latin expressions which could not be understood by the jury. In the fourth instruction the court stated fully to the jury the question whether Mr. Wolfle, in writing and publishing the letters, was acting within the scope of his employment, and then said: "If you find from the evidence that said Wolfle was acting within the scope of his employment, then you are instructed that the letters taken as a whole are libelous *per se*. This being true, the law presumes that the libel is false; that the defendant in writing and in sending out the letters acted maliciously, and that the plaintiff has been damaged by the circulation of said letters." It was not so important that the jury should understand the meaning of the Latin words *per se*, as it was that they should know what issues remained for them to determine. They were still to determine whether the defendant was responsible for the letters, and,

if so, whether the charge made against the plaintiff was true or false, and, if true, whether it was made by defendant "with good motives and for justifiable ends." The plaintiff had the burden of proof that the defendant was responsible for the letters, and the defendant had the burden as to the truth of the matter charged and that it was published with good motives and for justifiable ends. When the court told the jury that the law presumed that the libel was false; that the defendant, in writing and in sending out letters, acted maliciously, and that the plaintiff had been damaged by the circulation of said letters, it would have been better if in that connection the court had also told the jury that this was only a presumption of fact and merely meant that the burden of proof as to these matters was upon the defendant, so that, if they found from the whole evidence that the matters charged against the plaintiff were true and were with good motives and for justifiable ends, they must find for the defendant. But this was, in substance, told the jury in another instruction, and we cannot find that the jury must have been misled by the instruction complained of.

Complaint is made of the amount of damages allowed by the jury. In this connection it is claimed that incompetent evidence was admitted affecting the measure of damages. The petition named six policy-holders of the defendant company, each of whom had received a duplicate of this letter. The evidence tended to show that others had received the same letters also. There were from 500 to 600 employees in the shops where the plaintiff worked. The plaintiff testified that, immediately after these letters were received by the various policy-holders, some of them showed the letters to the plaintiff, and that the matter became a general subject of discussion and remark among the employees of the shops and other persons with whom the plaintiff had been doing business. Other witnesses were called by the plaintiff, and over the objection of the defendant were allowed to give similar testimony. The defendant now insists that this testimony

was highly prejudicial, and was incompetent and ought not to have been received. Of course, such evidence would not be competent for the purpose of proof that the defendant had made the charge against the plaintiff as alleged. It could be competent only for the purpose of throwing light upon the extent of the plaintiff's damages. For this purpose it would not be competent to show that some other person had independently published the same or a similar statement concerning the plaintiff. In *Schmuck v. Hill,* 2 Neb. (Unof.) 79, it was held that "one who publishes a libel is liable for any subsequent publications which are the natural result of his acts," and this was repeated in *Fitzgerald v. Young,* 89 Neb. 693. The question is whether these conversations and discussions among the shopmen and others, which were in reality subsequent publications of the same statements, were the natural results of the defendant's act in sending these letters to the policy-holders. If they were not, but were clearly independent libels, the evidence should be excluded by the court. If the question whether they were the natural results of the act of the defendant was not clear, so that reasonable minds might differ as to whether they were or were not, then the evidence should be received and should be submitted to the jury upon proper instructions by the court. We think that under the circumstances in this case it was not erroneous to submit this question to the jury.

It is insisted that in any event the judgment is excessive and is not warranted by the evidence. The plaintiff, in his regular employment as a boiler-maker, has for many years received the compensation of 39 cents an hour and has generally earned a little more than $80 a month. He had been acting as solicitor of insurance for this defendant and other companies for about six months when these letters were published. There is no evidence as to the amount of his profits in this employment except that of the plaintiff himself. He testified that from his business as insurance solicitor he realized from $150 to

$200 a month, and that after the publication of these letters this business was substantially destroyed. He was living with his family, his wife and one child, and he tesfies to the injury that he sustained in his business and social relation and in other ways. There is no absolute test of damages suffered under such circumstances and it is very difficult to determine the extent of the injury inflicted. The amount of this verdict, even after the remittitur was required by the trial court, seems large, but it is not impossible that the plaintiff has been damaged to the amount of this judgment. It is peculiarly a matter for the jury to determine, and while, of course, there is a limit beyond which the jury could not be allowed to go, the court cannot interfere with their verdict in such cases, unless it clearly appears that the verdict was induced by passion or prejudice or some consideration other than the evidence in the case. With some hesitation we have concluded that we are not justified in interfering with the verdict on those grounds, and the judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NELLIE A. HERZOG, APPELLEE, V. UNION DEBENTURE COMPANY ET AL.; DIERKS LUMBER & COAL COMPANY, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,369.

1. **Mortgages**: TRANSFER. The transfer of one of 70 negotiable bonds all secured by the same real estate mortgage transfers the mortgage *pro tanto*.

2. ———: FORECLOSURE. The foreclosure of such mortgage by one who owns a part of such bonds will not bar a subsequent foreclosure by an innocent purchaser and holder of another of the bonds; such purchaser not having been a party to the first foreclosure.

3. ———: ———: SALE: TITLE ACQUIRED. A purchaser at a foreclosure sale takes only the title of the parties to the suit.

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

John S. Kirkpatrick and *C. H. Holcomb,* for appellant.

Sullivan & Squires, contra.

SEDGWICK, J.

The Custer Realty Company, being the owner of real estate in Custer county, conveyed the same by mortgage to the Union Debenture Company to secure the payment of 70 negotiable, interest-bearing coupon bonds of $500 each. The bonds were payable to bearer, and the Union Debenture Company sold and delivered one of the bonds to this plaintiff. Afterwards, the defendant, the Dierks Lumber & Coal Company, began an action in the district court for Custer county to foreclose several mechanics' liens upon the mortgaged property. The Union Debenture Company was made a defendant in that action, and answered, alleging the execution and delivery of the coupon bonds and the mortgage securing the same, and that it was the owner of 10 of those bonds, and asking for an accounting of the amount due thereon and a foreclosure of the mortgage. The referee appointed by the court reported that the debenture company was the owner of 10 of the bonds, and that the amount thereof and interest thereon was due and unpaid, and the mortgage was foreclosed and the property sold to the defendant, the Dierks Lumber & Coal Company, to pay the debenture company the amount so found due. Afterwards this plaintiff began this action in the district court for Custer county to foreclose the mortgage as security upon the bond held by her. The district court entered a decree of foreclosure in her favor, and the defendant has appealed.

Two grounds are urged for reversal: First, that the plaintiff did not prove that there had been no action at law to collect the amount of the bonds; and second, that

the foreclosure on the cross-petition of the Union Debenture Company is a bar to this action.

1. The petition alleges that there has been no action at law to collect the amount due the plaintiff. The defendant's original answer contained a general denial, which denied the existence of the bonds and mortgage, as well as that there had been no action at law. The defendant afterwards, with the permission of the court, filed an amended answer, which we have not found in this record, and we are not able to say whether it contained a denial or admission of the plaintiff's allegation. Moreover, a witness for the plaintiff stated directly that there had been no action at law, and there is no evidence in the record that there had been. There is therefore no merit in this contention.

2. The bond is payable to bearer, and contains specific provisions that it shall be paid to the holder or holders thereof. The mortgage contains the same provisions and fully describes the bond. The transfer of such a bond transfers the mortgage *pro tanto*. *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Todd v. Cremer*, 36 Neb. 430; *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166. After the debenture company had transferred this bond, it could not longer exercise any control over it, nor represent in any capacity the owner thereof. The purchaser at a foreclosure sale takes the title of the parties in the action in foreclosure.

The judgment of the district court is right, and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

FRANK THURESSON, APPELLEE, V. CHARLES E. SEIFERT, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,431.

1. **Adverse Possession.** Possession or occupancy of land by permission of the owner can never ripen into an adverse title.
2. **Vendor and Purchaser:** BONA FIDE PURCHASER. The purchaser of real estate, with knowledge of his grantor's rights therein, takes only those rights.

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

William B. Price and *Ray J. Abbott,* for appellant.

Stewart, Williams & Brown, contra.

SEDGWICK, J.

The plaintiff obtained a decree in the district court for Lancaster county enjoining the defendant from maintaining a stairway over a lot of the plaintiff in the city of Lincoln. The defendant has appealed.

In 1881 George Seifert was the owner of the adjoining lots Nos. 18 and 19. There was then a brick building on lot 18, and on the south side of this building there was a stairway extending over lot 19. George Seifert then sold lot 19 to one Dorr, and in the following year Dorr sold and conveyed the lot to one Thackara. When Dorr and Thackara took the conveyance of lot 19 from George Seifert, they verbally consented and agreed with Seifert that he might maintain a stairway over lot 19 until such time as they should desire to improve and build upon the lot, and Seifert agreed to remove the stairway when it was desired to build upon the lot. The deed from Dorr to Thackara contained the following clause: "Subject to an agreement in regard to the maintaining by one Seifert of the stairway on his building, between said buildings and

the premises conveyed." Afterwards George Seifert conveyed lot 18 to the defendant Charles E. Seifert, who now claims the right to maintain the said stairway by prescription.

It is a general rule of law that possession or occupancy of land by permission of the owner can never ripen into an adverse title, and it seems clear that that rule is applicable in this case. When George Seifert conveyed lot 19 his deed purported to convey the whole of that lot, and, notwithstanding he conveyed the whole lot, he desired to continue the use of a part thereof for his stairway. His grantees gave their qualified consent to his so using it, and under that consent he continued to use it. His use therefore was plainly permissive. He therefore had no easement in lot 19 when he conveyed lot 18 to the defendant. The most that he could convey was his permissive right to use that part of lot 19 encumbered by his stairway, and his conveyance from George Seifert would not change the character and effect of that permission. The defendant did not allege nor attempt to prove that he was a purchaser without notice of the plaintiff's rights in the property, or that he took any other or different title or right than that of his grantor.

The judgment of the district court is clearly right and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

H. J. BACKES, APPELLEE, V. FRITZ TRUMPETER, APPELLANT.

FILED DECEMBER 24, 1913. No. 17,445.

Appeal: SUFFICIENCY OF PLEADINGS. When a case, within the jurisdiction of a justice of the peace, is tried in the district court without any objection to the sufficiency of the pleadings either during the trial or after judgment, the issues actually tried will be considered in this court as though properly pleaded.

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

James J. Harrington and *Hodgkin & Power,* for appellant.

Arthur F. Mullen, contra.

SEDGWICK, J.

This was an action upon a contract by which the plaintiff sold some nursery stock to the defendant, and was within the jurisdiction of a justice of the peace, and begun in the county court of Holt county. It was afterwards appealed to the district court for that county, and, from a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The contention of the defendant is that the evidence shows that the defendant countermanded the order for the nursery stock before it was delivered, and that the plaintiff has sued upon the original contract for the purchase price thereof. Under such circumstances it is contended that the plaintiff's cause of action was not upon the original contract, but was for damages in countermanding and refusing to perform the contract. The defendant in his answer set up at great length allegations of fraud and misrepresentation in procuring the contract, and alleged that for that reason he had countermanded the contract. This allegation was denied in the reply. The court submitted to the jury in its instructions the question whether the contract was procured by fraud or was a valid contract in its inception, and also the question whether the contract or order had been countermanded by the defendant, and stated correctly what the measure of damages would be in case the jury found that the contract was valid and had not been countermanded, and what the measure of damages would be in case they found it was valid and had been countermanded by the defendant. It is objected that this instruction was erroneous

because the petition counts upon the contract itself, and did not contain any allegation of damage by reason of the contract having been countermanded. We think that the defendant cannot now avail himself of this objection to this instruction because all of these questions were fully tried by the parties without objection, and, these issues having been fully tried by these parties in the district court, they cannot now allege, for the purpose of reversing the judgment of the district court, that the issues so tried were not properly presented in the pleadings. The evidence shows that the defendant did formally notify the plaintiff that the order for the nursery stock was countermanded, and that he did not want the same; but, upon the whole record, the evidence is substantially conflicting as to whether the defendant insisted upon this countermand or afterwards waived it, and his pleadings and the whole course of the trial strongly indicate that he waived the defense of countermand, and rested wholly upon fraud and misrepresentation in procuring the contract. The jury rendered a verdict for the contract price of the property. They must therefore have found that the defendant had waived and had not insisted upon his countermand, and this finding is not so clearly wrong as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

MICHAEL J. O'CONNELL, APPELLANT, V. SIOUX COUNTY, APPELLEE.

FILED DECEMBER 24, 1913. No. 17,493.

1. **Counties: DISALLOWANCE OF CLAIM: REVIEW.** When the county board disallows a claim duly filed, and the record shows affirmatively that the board considered and acted upon the merits of the claim, and did not consider that the claimant had compromised his claim by receiving a part thereof, and the district court, upon

appeal, confines the issue to that presented to and decided by the county board, such holding of the district court will not be reversed upon appeal to this court.

2. ———: POPULATION: EVIDENCE: COMPENSATION OF COUNTY ATTORNEY. Under section 19, ch. 7, Comp. St. 1907, providing that the salary of county attorneys "in counties having from four thousand (4,000) to eight thousand (8,000) population" shall be $700, but not providing how the population shall be determined, the latest general census of the federal government does not necessarily control for years subsequent to the taking of such census. The fact is to be determined by the best competent evidence that can be procured under the circumstances.

3. ———: ———: ———. While there is no fixed ratio between the population of a county and the number of votes polled therein, in the absence of a census or other direct evidence, it may be competent to prove the number of votes polled as tending to show the population, since there must be at least as many voters as there are votes polled, and the population is always greater than the number of legal voters.

4. ———: ———: ———. When the number of inhabitants is known for a given year by the government census for that year, and the number of school children in the county is also known from the school census taken in the same year, this tends to show the ratio of population to the school children for other years, but is not conclusive, and, if inconsistent with other evidence, will not establish the number of inhabitants in the years in question.

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

Albert W. Crites, for appellant.

Fern S. Baker, Allen G. Fisher and *William P. Rooney, contra.*

SEDGWICK, J.

This plaintiff was the county attorney for Sioux county for the years 1907, 1908, 1909, and 1910. For the first three years of those named and for the first three-fourths of the year 1910 he was paid the salary at the rate of $500 a year, and afterwards he filed a claim with the county board for $750 balance due him for salary for the time

named, claiming that he was entitled to $700 a year instead of $500. The county board rejected his claim, and upon appeal to the district court for Sioux county he was allowed $150 only. From this judgment of the district court he has appealed.

1. During the time specified he filed claims for his salary quarterly at the rate of $500 a year, which were allowed, warrants duly drawn, and by him presented and paid. The first contention of the county is that, by filing these claims and accepting these warrants, he is now estopped to make any further claim for salary. The trial court, upon demurrer, held that this was no defense, and we think that this ruling in the trial court, under the condition of this record, was correct. Under the statute, as it then was, the salary of the county attorney depended upon the number of inhabitants of the county. In counties of 4,000 or more and less than 8,000 inhabitants the salary was fixed at $700 a year, and the record of the action of the county board upon the plaintiff's claim recites: "The claim of M. J. O'Connell for $750 for back pay as county attorney for years 1907, 1908, 1909, and first 3 quarters of 1910, claiming that the number of inhabitants exceeded 4,000 or more, was taken up, and owing to the fact that the board has no way of ascertaining that the population of Sioux county was 4,000 or more for the above years mentioned, on motion the claim was rejected." The record shows that no other issue was presented to or determined by the county board than the issue so determined. The answer filed in the district court presented only this issue. This record shows that it was conceded by the county in the action of its county board that the justice of the plaintiff's claim depended solely upon the number of inhabitants in the county during the years of his services. An amended answer was filed alleging the estoppel relied upon, but, upon demurrer, this issue was by the court stricken from the answer. Under these circumstances the case ought now to be determined upon the issue so tried and determined.

2. The question is whether during the years named Sioux county contained 4,000 or more inhabitants. Section 19, ch. 7, Comp. St. 1907, fixes the salaries of county attorneys in these words: "In counties having from four thousand (4,000) to eight thousand (8,000) population, seven hundred dollars ($700.)" It did not specify how the number of inhabitants should be determined. By the federal census of 1900 Sioux county contained 2,055 inhabitants, and by the federal census of 1910 it contained 5,599. In some cases, and for some purposes, the statute requires that the population of a given political subdivision can be determined only by a duly authorized census. In other cases it contemplates that the number of inhabitants may be determined by other methods. It has been several times held by this court, and uniformly so far as the writer recalls, that when, as in this case, the statute makes no provision as to the method or time of ascertaining the number of inhabitants, the latest general census of the federal government does not necessarily control. The salary of the county attorney for any year depends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances. *State v. Long,* 17 Neb. 502; *Kokes v. State,* 55 Neb. 691; *State v. Davis,* 66 Neb. 333. In the opinions in these cases there is some peculiar discussion as to the ratio between the number of votes cast at a general election and the number of inhabitants of the voting precinct. In *State v. Long, supra,* Judge MAXWELL, in the opinion of the court, said: "The votes polled at the election in 1883, when multiplied by the well-known ratio of population to the number of voters in a county, is evidence tending to prove the number of inhabitants." And in *Kokes v. State, supra,* HARRISON, C. J., in the opinion of the court, commented quite at large on this expression, and, apparently without disapproving of evidence of the number of votes polled as determining the number of inhabitants, concludes that the evidence in that

case was not sufficient to prove that Valley county at the time under consideration had a population of 8,000. The expression of Judge MAXWELL above quoted we think, if rightly considered, is not subject to criticism. There may not be a fixed ratio between the number of votes polled and the number of the inhabitants in the precinct, because there is no fixed ratio between the number of voters in the precinct and the number of votes polled. There is, however, a ratio between the number of voters in the precinct and the number of inhabitants therein, and if the exact ratio is not known it is uniformly found that there are at least a certain number of inhabitants for every given number of voters residing in the precinct. There is also a comparatively uniform proportion between the number of children of school age in a given precinct and the actual residents of the precinct. To say that the number of inhabitants can be accurately determined by knowing the number of children who actually attend school, or knowing the number of voters who do actually exercise the elective franchise, would, of course, be a *non sequitur*. There must, of course, be as many school children in the county as attend school therein, and as many voters as the votes actually polled. If the number of votes polled in the county is multiplied by the ratio of population to the number of voters residing in the county there must be as many inhabitants in the county as the number so obtained, since the number of voters in the county must always be at least as great as the number of votes polled. It is not necessary in this case to inquire whether there is a well-known and uniform ratio between the population of a county and the voters and school children therein. We have the number of inhabitants by the census of 1900, but the record does not show the census of school children in that year, and we have no basis from which to find the ratio of the number of school children to the number of inhabitants for the years in question. The number of school children in the county in 1910 was 1,696. This number multiplied by 3.25 was very near the population

of the county as shown by the government census. The number of school children in 1907 was 863, multiplied by 3.25 is 2,804.75. The number of school children for 1908 was 931; for 1909 it was 1,348; for 1910 it was 1,696. In 1908 the total vote cast was 1,034, but in 1909 the vote cast was only 616, and in 1910 it was 880. If, therefore, we say that this evidence was competent and tends to show that the ratio of school children to the population during the respective years was 3.25, it shows affirmatively that the population in two of the years was less than 1,000, and the whole evidence does not establish with sufficient certainty the plaintiff's claim for any year, except the year 1910, which was allowed by the district court.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

LOUIS RAAPKE ET AL., APPELLANTS, V. JAMES E. BEACOM ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,518.

Fraudulent Conveyances: BONA FIDE PURCHASERS. If the vendor of property intends by the sale to hinder or delay his creditors, the purchaser will not be protected as a purchaser in good faith as to the purchase price not paid or placed beyond his control prior to his notice of the intended fraud.

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

McGilton, Gaines & Smith, for appellants.

Alfred Pizey and *Sullivan & Griffin, contra.*

SEDGWICK, J.

The plaintiffs recovered judgments against the defendant James E. Beacom, and, executions having been returned thereon unsatisfied, they began this action in the district court for Dakota county to subject a tract of land in that county to the lien of their judgments. John P. Beacom, brother of James E. Beacom, was made a defendant in the action, and it was alleged that the defendant James E. Beacom had transferred the title of the land to the defendant John P. Beacom in fraud of his creditors. The defendants answered, admitting the judgments and the transfer, and alleged that the sale of the land to the defendant John P. Beacom was in good faith and without intent to defraud creditors. The trial court found the issues in favor of the defendants, and the plaintiffs have appealed.

It appears that James and another brother, Owen, were engaged in the grocery business in Omaha, and John resided in Dakota county and was not interested in that business. James bought goods of these plaintiffs in the spring and summer of 1910, for which he was indebted to the plaintiffs, and upon which said judgments were obtained. In May of that year he executed a deed to John conveying the land in question, but the deed was not recorded, and was afterwards surrendered for cancelation and a new deed executed in lieu thereof. The consideration recited in the first deed was $7,000, and in the second the specified consideration was $6,400. John testified upon the trial that the true consideration was $5,500. John had been in possession of the land for some years, and continued in possession during the time involved in these transactions. He also testified that, upon the making of the first deed in May, he paid $500 in cash thereon; that there was a mortgage of $1,900 then upon the property, and that the remaining $3,100 was to be paid by the giving of his notes to his brother James and his brother Owen, who was formerly in partnership with James, as above stated. In

pursuance of this agreement, he did, shortly before he was testifying, and a long time after this action was begun, execute and deliver to his brother Owen a note for $1,500, payable in 1910, and to his brother James his note for $1,600, payable May 2, 1920.

Various questions are discussed in the briefs, such as the good faith or want thereof on the part of the defendant John in buying the land; the effect of withholding his deed from record; and whether, if both parties acted in good faith in making the sale and purchase, the defendant John would be protected in making final payment after he had notice that the result would be to defraud the creditors of his grantor. We do not find it necessary to discuss these questions, since we think that this evidence shows that James intended to hinder and delay his creditors when he made the first deed. He was then purchasing goods of these plaintiffs from time to time, for some of which he was indebted when he made the deed to his brother, and intended to, and did, continue such purchases. In the meantime, as a means of obtaining credit, he represented to the plaintiffs and others that he still owned this land and that its value was such as to make his credit good. On these representations he incurred further liabilities to these plaintiffs, which he finds now that he is unable to pay, and, if this transaction is carried out as intended, will not be able to pay for many years. He was not a witness in the case, and there is no direct evidence that he acted in good faith. There are other circumstances in the record indicating bad faith on his part, and, under this evidence, it must be found that he intended to hinder and delay his creditors.

In *Hedrick v. Strauss, Uhlman & Guthman,* 42 Neb. 485, it is held: "In order to constitute one an innocent purchaser of property sold for the purpose of defrauding the creditors of the vendor, the whole consideration must be actually paid before the purchaser had notice of the fraudulent intent. If, after part of the consideration has been paid, the purchaser receives notice of the fraud, he will

only be entitled to protection to the extent of the consideration paid, or parted with, before notice. As to the purchase price not paid, such vendee will not be regarded as an innocent purchaser of the property."

This is declared to be the law by this court in other cases. The defendants concede that this rule of law would be applicable in this case, unless both parties to the transaction acted in good faith, and upon this feature of the case rest their defense upon the proposition that James acted in good faith in the sale of this land. As we are compelled from the evidence to find otherwise, the judgment of the district court is reversed and the cause is remanded, with instructions to enter a decree that the said deed is void as to the said $3,100 remaining unpaid, and that the land be sold to satisfy the plaintiff's judgments after satisfying prior liens or charges upon the land.

REVERSED.

LETTON, FAWCETT, and HAMER, JJ., not sitting.

IN RE ESTATE OF BRIDGET SWEENEY.

PETER O'MALLEY, EXECUTOR, ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,348.

1. **Wills: PROBATE: PARTIES.** A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will.

2. **Descent and Distribution: PARTIES.** An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court, the proceeding being *in rem*, and all persons interested in the distribution of such assets will be considered parties; and, if A asks for an order of distribution that will exclude B from participation in the

assets, he cannot afterwards object to the appearance of B for the purpose of protecting his interest in the county court, or afterwards upon appeal to the district court. *In re Estate of Creighton*, 91 Neb. 654.

3. ———: ———. Where the court is called upon to determine the probate of a will, it is acting upon the *res* of the estate, and when an appeal is taken from the county court by the executors to the district court it removes the whole case to the district court, and all parties interested in the distribution are necessarily parties in the district court and are entitled to be heard there. Following *In re Estate of Creighton*, 91 Neb. 654.

4. Wills: PROBATE: APPEAL: BURDEN OF PROOF. When the proponents in this case took the case to the district court for the purpose of having that court probate the will and determine that it was valid, they took it there with the burden upon them to prove its due execution and the capacity of the testatrix to make it at the time of such execution.

5. ———: ———: TESTAMENTARY CAPACITY: REVIEW. The evidence examined, and *held* that the executors failed to establish the testamentary capacity of Bridget Sweeney at the date of the alleged will, and that their failure to prove the will and establish it, as required by the statute, leaves them without any standing in this court.

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

George E. Bertrand and *Guy R. C. Read*, for appellants.

Mahoney & Kennedy, contra.

HAMER, J.

This case had a beginning in the county court of Douglas county. It was to probate the will of Bridget Sweeney. She died May 5, 1909, in Douglas county. The will was dated January 28, 1909. It was offered for probate upon the petition of Peter O'Malley who was named therein as executor. It was filed in the county court of Douglas county May 28, 1909. That court fixed the hearing for June 7, 1909. It ordered notice by publication, and this was given. On June 7, 1909, James P. English, who was

the county attorney for Douglas county, filed objections to the probate of said will. He alleged that he did it under instructions from the attorney general and on behalf of the state of Nebraska. His claim was that the state of Nebraska was interested in said estate by reason of the fact that the deceased died without heirs, and, if intestate, "her entire estate will escheat to the state of Nebraska, and contestant objects to the probate of the alleged will now on file in this court for the reason that at the time the said deceased is stated to have executed said will she was of unsound mind and incapable of making any testamentary disposition of her property." There was a motion on behalf of Peter O'Malley to dismiss the objection of the state, for the reason that the state was not a proper party, had no interest, and that neither the attorney general nor the county attorney had authority to appear in that court or in that action; that said objections did not state facts entitling the state to the relief prayed for by it, and that the contestant was not entitled to appear or be heard. The county court overruled said motion, and found that said instrument was not the last will and testament of Bridget Sweeney and that it should not be admitted to probate. August 5, 1909, Peter O'Malley and Ellen O'Malley, hereinafter called the proponents, filed their appeal bond in said case, and the same was approved, and subsequently they perfected their appeal from the said judgment of the county court to the district court.

On February 19, 1910, John Burchill and Michael Burchill filed in the district court their petition of intervention in said proceeding, in which they alleged that they were the heirs at law of the deceased, Bridget Sweeney, being the sons of John Burchill, deceased, who was a half-brother of Bridget Sweeney. In their petition they recited the proceedings theretofore had, and alleged that by reason of their relationship to the deceased they had an interest in the matter in litigation and in the successful upholding of the order of the county court denying probate; that at the date of the will the testatrix was a woman

of advanced years, in feeble health of body and mind, being of unsound mind and incapable of making any testamentary disposition of her property; that the signature of Bridget Sweeney to said will was procured by the improper acts and undue influence exerted over her by Ellen O'Malley, the chief beneficiary therein, and her family. The proponents, Peter O'Malley and Ellen O'Malley, severally moved to dismiss the petition of intervention because it did not state facts sufficient to entitle the petitioners to intervene; that they were not entitled to intervention; that the petition was filed too late; that the action was begun in the county court and tried there, and setting up the date of the judgment rendered and the date of their appeal. The motions to dismiss were overruled.

On the 23d day of May, 1910, the Burchills filed an amended petition of intervention, substantially the same as their original petition, with the additional allegation that the interveners had no knowledge of the death of Bridget Sweeney, nor of the proposed probate of said will, nor of the objections thereto by the state of Nebraska for several months after said proceedings took place; but affiant (Michael Burchill) "did not learn said facts until this cause was pending in this court." The proponents then severally moved to dismiss the amended petition of intervention, repeating substantially their motion against the original petition, overruled June 14, 1910. Proponents further moved the court to strike certain portions of said amended petition therefrom, from paragraph 7 the words, "a woman of advanced years, in feeble health of body and mind," and from the same paragraph the words, "and that the pretended will offered for probate is not the will of Bridget Sweeney," and all of paragraph 8 introducing the new issue that the signature to said will was procured by the undue influence of Ellen O'Malley and her family, for the reason that said allegations changed the issues presented to and tried by the county court; the sole question there being raised by the objection that "she was of unsound mind and incapable of making any testamen-

tary disposition of her property." Said motions were overruled and exceptions taken. The proponents then answered, admitting the allegations recited in the record, adopted the original petition for probate as part of their answer, and specifically denying the remaining portions of said petition. The state of Nebraska did not appear in the case after the trial in the county court, and made no appearance whatever in the district court. There was in the district court a trial, a verdict, and a motion for a new trial, and a judgment denying the probate, from which judgment Peter O'Malley and Ellen O'Malley appealed to this court.

On behalf of the appellants it is argued that the intervention of the Burchills, who were designated in the appellants' brief as the defendants, was too late. There is quoted from section 50*a* of the code, the following: "Pending or to be brought in any of the courts of the state of Nebraska, * * * either before or after issue has been joined in the action, and before the trial commences." It is alleged that the Burchills might have intervened in the county court either before or after issue joined between the proponents and the state, or before the trial commenced in that court; but that thereafter they were precluded from intervening either in that court or in any other court to which the case might be taken. It is further alleged that, conceding for the purpose of this argument the rights of the contestant to intervene, they could not in the district court interject into the record a new or additional objection to the probate of the will. It is also alleged that the court erred in overruling the proponents' motion to strike from contestants' amended petition the new issue of "undue influence" made by paragraph 8, as well as the objectionable words of paragraph 7. It was argued that the issue presented was doubly objectionable; that, in addition to its being a changed issue, it was contrary to the old issue which was retained—that the testatrix was of unsound mind and incapable of making any testamentary disposition of her property. As a part of

the argument it was said that "undue influence in this regard can only be exerted upon one who has testamentary capacity." It was further urged that the court erred in giving its instruction upon undue influence and in submitting this issue to the jury, and in submitting to the jury a separate finding on this subject, because there was no evidence tending to support a finding that there was "undue influence" exerted or attempted. To this there was the retort of the contestants that the jury's finding on the subject was in favor of the proponents, and, consequently, that there was no prejudicial error.

Bridget Sweeney at the time of her death was 80 years old. The instrument presented as the last will and testament of said Bridget Sweeney purported to make some small gifts to charity, and then undertook to dispose of the remainder of her property, which consisted of about $8,000 in money, by the seventh paragraph. It reads: "As neither my husband John Sweeney, deceased, nor myself have any brothers, sisters, or near relatives, it is my will, and I give, devise and bequeath to my dear friend Ellen O'Malley, who for many years has been near and dear to me, all the rest, remainder and residue of my property both real estate and personal property of any nature whatsoever of which I may die seized or possessed." At the trial of the case there was a general verdict, in which the jury found that the instrument offered for probate was not the last will and testament of Bridget Sweeney, deceased. There were also special findings in respect to interrogatories submitted by the court. (1) "Was Bridget Sweeney on January 28, 1909, of sufficient mental capacity to make a will?" A. "No." (2) "Was the signature of Bridget Sweeney to the document dated January 28, 1909, procured by the undue influence of Ellen O'Malley and her family?" A. "No." After the return of the foregoing verdict and special findings there was a motion for a new trial filed by the proponents, and the same was overruled, and judgment entered finding the instrument was not the last will and testament of Bridget Sweeney.

The appellants contend, first, that the Burchills should not have been permitted to intervene after the case had been appealed to the district court. This question seems to have been considered in *In re Estate of Creighton*, 91 Neb. 654. In that case it is said in the second paragraph of the syllabus: "An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem*, all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court." In that case it was said in the body of the opinion that the proof of the so-called unnamed heirs presents unquestioned authority to stipulate the proposition that the decree of the probate court in the settlement of estates upon matters within the jurisdiction of that court is final unless appealed from, and cannot collaterally be attacked. It was also said that the disposition of that question did not determine the question of the right to appear in the district court after the case had been appealed. The court then makes reference to the case of *Blatchford v. Newberry*, 100 Ill. 484, and says: "What that court decided was that new parties could not appear and present new issues in the appellate court. This, however, does not decide the question that is before us. The proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*. Every one interested is a party in the probate court, *whether he is named or not*, and this is particularly true as to the question of the distribution of the estate. Under our statute it is not necessary to give any notice of the hearing upon the distribution of the assets of the estate. Everybody interested in that distribution is a party to the proceeding, whether he has appeared in the probate court in the proceeding or not, and so, if the state, in behalf of this charity, was interested in the distribution of the assets

in the probate court, it was necessarily a party before that court, *whether it appeared there or not.* The court was acting upon the *res* of the estate, and not upon the persons interested in it. Therefore, it seems to follow that, when an appeal was taken by the executors to the district court, it removed the whole case to the district court, and all parties interested in the distribution were necessarily parties there and entitled to be heard."

It would seem that the position of this court in that case is amply sustained by the authorities and by the reason of the rule. In contemplation of law the Burchills were parties to the proceeding in the county court; but, whether so or not, the appeal was by the proponents, and not by the contestants. The case was dropped by the state in the county court and the state did not again appear; but between the proponents and the contestants there remains the final contention. The proponents took the case to the district court on appeal. Under the decision quoted, if they took it there, they took it there as against all persons whose rights might be affected by admitting the instrument to probate. They took the same there to have the will probated, to have it determined that it was the last will and testament of Bridget Sweeney. When the proponents took the case to the district court for the purpose of having that court probate the will and determine that it was valid, they took it there with the burden upon them to prove its due execution and the capacity of the testatrix to make it at the time of its execution. They failed to establish the testamentary capacity of Bridget Sweeney at the date of the alleged will. Their failure to prove the will and establish it as required by law leaves them without any standing.

A brief review of the facts should be given as they are shown by the evidence. Richard O'Keefe knew the deceased in Cornwall, England, 52 or 53 years before her decease. She was then a woman past the age of 30 years. Her husband, John Sweeney, was a man of middle age at that time. He was a laborer in the tin mines of Cornwall.

Mr. O'Keefe understood that they had come from the county of Cork, Ireland. They never had any children born to them. John Sweeney came to Omaha in September, 1869, and Bridget Sweeney came a couple of years later. For six or seven years prior to the time when they were sent to St. Joseph's Hospital, Mr. O'Keefe had not seen Mrs. Sweeney to speak to her. Peter O'Malley was in the service of the Union Pacific Railroad Company. He became acquainted with John Sweeney in 1870, and Mr. Sweeney worked for him in the Union Pacific Railroad shops. Mrs. O'Malley became acquainted with Mrs. Sweeney in 1876, and the two women visited each other. Mrs. Sweeney worked more or less for Mrs. O'Malley. About 10 years before the Sweeneys were sent to the hospital they lived in a little shack on Mason street in the city of Omaha. Mrs. O'Malley claims to have visited them on Christmas before they were sent to the hospital. Perhaps she did so also upon other occasions. John Sweeney had saved up a considerable sum of money. He had converted his savings into cash. He had ample funds with which he and Mrs. Sweeney might have lived in decent comfort. The evidence shows that they buried their money under the shack, or otherwise concealed it, and that they lived in filth and misery, without sufficient food, and with very insufficient clothing, and almost no shelter and almost no fuel. They seemed to have forgotten how much money they had and where it was, and they were apparently forgotten or lost sight of by their former friends and neighbors.

The Reverend Peter McLaughlin was the pastor of St. Peter's Catholic church in Omaha. He knew John and Bridget Sweeney for about 14 or 15 years. He had a passing acquaintance with them for a longer period of time. When found, they were living in a very dilapidated shanty. It consisted of two rooms. The wind blew through it. It was anything but clean. In the bedroom there was a bed and one chair. In the other room there was a stove, a little table, and another chair. There was no plumbing

in the house, and no running water in the house or on the premises. The kitchen utensils consisted of a couple of cups and some plates. There was a box that looked like a dry-goods box which served for a cupboard. It was one day in June when Father McLaughlin was told that John Sweeney had wandered away from home. In searching for him Father McLaughlin went to the police station. The detectives then looked for the money that Mr. Sweeney was supposed to have about the house. The search resulted in discovering $2,000 in one place, and $8,000 in another. The $8,000 consisted of gold coin. This sum of $8,000 was found in a crock in a hole under the floor. Father McLaughlin took John Sweeney to Mercy Hospital in Council Bluffs, and subsequently brought and placed him in St. Joseph's Hospital in Omaha. Mrs. Sweeney was with her husband in these hospitals. Father McLaughlin testified to the condition of the little shack in which they lived; that their bed was unclean; that Mrs. Sweeney was deaf and said very little, except to talk about her rheumatism; that what she said was generally incoherent; that she was incapable of anything like conversation; that in his opinion Mrs. Sweeney was then of unsound mind. Father McLaughlin had known the mental condition of Mrs. Sweeney for about four years.

W. J. Deverees, a police officer assigned to the detective division of the Omaha police department, testified: That he went to the Sweeney home because informed that John Sweeney had disappeared. He knew nothing about any money being buried about the premises. Mrs. Sweeney did not think that her husband was in the cellar. Mr. Deverees descended into a sort of dugout below the shack. After he had gone down into the dugout and had lit two or three matches there for the purpose of seeing whether Mr. Sweeney was there, he came up and went outside and searched among the weeds, and went down to the railroad, and then came back to the house and found Mrs. Sweeney standing in the cellar, or part of the way down into the cellar. She asked him to give her back the money. She

said that they were a poor old couple and that all they had in the world was this money. Up to that time Deverees had known nothing about any money. On inquiry he was told that the Sweeneys had sold a lot, and that it was believed that they had money in the house. Deverees was then joined by another detective, and they went down into the dugout or cellar. There they found something between the sills on top of the ground and under the floor, and about on a level with the last step. This was a heavy bundle wrapped in paper. They asked Mrs. Sweeney if that was the money, and she said it was. They unwrapped the paper and found a sack tied up inside of it. $2,000 were found in this sack. During this time a search was going on for Mr. Sweeney. He was found down by the river. They took Mr. Sweeney with them to the house, but he was unable to locate the remainder of the money. The officers continued to dig around in the cellar, but neither of the Sweeneys could help them to find the money. They had buried it, but had lost it and did not know where it was. The officers found $225 wrapped up in a little cloth and hidden in an old nail keg with a lot of nails and screws. They found $12 or $15 in bills in the bed, and they found $8,000 in a jar buried in the cellar. The only food in the house was a soup bone in an old kettle and some dry bread in a box. The bed was unclean. The plaster was off the walls. The little house was practically uninhabitable. Mrs. Sweeney was unable to talk intelligently upon any subject.

Mr. John J. O'Connor testified that he was a lawyer of many years' practice; that he resided in Omaha; that he had known the Sweeneys; that he had been consulted by them for many years; that he knew that the $10,000 which they buried was the result of the sale of a lot; that after the Sweeneys were sent to a hospital he represented Mrs. Sweeney in appealing from an order of the probate court placing her under guardianship; that she told him that she remembered Peter O'Malley and Dick O'Keefe, but that she did not know Mrs. O'Malley; that after Mr.

Sweeney's death Mrs. Sweeney became very melancholy; that she failed rapidly both mentally and physically; that while Mrs. Sweeney was at the O'Malleys Mr. O'Connor visited her there; that her conversation was in fragments; that she could not follow a conversation, and that she would answer "yes" or "no" to a question, and then she would wander off and talk of something else; that she could not carry on a continued conversation and did not for months before she went to the O'Malleys.

There is something of a review of the facts and a review of the law in a case bearing some similarity to this one in *In re Estate of Paisley,* 91 Neb. 139. In that case the contestants had the judgment in the county court, which denied probate of the will, and the proponent appealed to the district court. On the trial in the district court the proponent had the verdict and the judgment, and there was an appeal to this court by the contestants. It was contended by the contestants that the verdict was contrary to, and was not sustained by, the evidence. The contestants were collateral heirs of the deceased, and they contested the will on the grounds of the mental incapacity of the testator and undue influence on the part of the widow in procuring its execution. In the body of the opinion it is said: "Undue influence and weakness of body and mind are often closely allied, and it may be difficult to tell exactly which may have been the stronger factor in bringing about the result in any given case where the testator is enfeebled by illness, and has disregarded the natural objects of his bounty and has devised all, or the greater part of his property, to a stranger or to one whose integrity of purpose may well be questioned because of his conduct and his apparent self-interest as the chief beneficiary of the will, and because of his opportunity to exercise undue influence upon the testator."

In 1 Underhill, Law of Wills, sec. 125, it is said: "The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. * * * The will of one whose independ-

ence has been weakened by indulgence in dissipation, or whose stamina, physical or mental, has been broken by illness or old age, may be easily overcome. * * * Every case depends wholly upon its own particular facts and attendant circumstances." Section 137: "The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large benefit under it, is a circumstance raising a suspicion of undue influence."

Upon an examination of the evidence in this case, we are of the opinion that the general verdict of the jury that the will was not the last will and testament of Bridget Sweeney was correct, as was, also, the special finding that she was not of sufficient mental capacity to make a will. Insufficiency of mental capacity to make a will and undue influence may both be found in an examination of the following cases, which seem clearly to sustain the view to which we have come, that the testatrix was without sufficient mental capacity to dispose of her property at the time the will was executed: *Higginbotham v. Higginbotham,* 106 Ala. 314; *Bevelot v. Lestrade,* 153 Ill. 625; *Rivard v. Rivard,* 109 Mich. 98; *Gordon v. Burris,* 141 Mo. 602; *Perret v. Perret,* 184 Pa. St. 131; *Orchardson v. Cofield,* 171 Ill. 14; *Baker v. Baker,* 102 Wis. 226; *Hampson v. Guy,* 64 Law T. Rep. n. s. (Eng.) 778; *Hall v. Hall,* 18 Law T. Rep. n. s. (Eng.) 152; *Carroll v. Hause,* 48 N. J. Eq. 269; *Purdy v. Hall,* 134 Ill. 298; *Brown v. Fisher,* 63 Law T. Rep. n. s. (Eng.) 465. *Hegney v. Head,* 126 Mo. 619; *Sheehan v. Kearney,* 82 Miss. 688; *Whitelaw's Ex'r v. Sims,* 90 Va. 588; *Miller v. Miller,* 187 Pa. St. 572; *In re Estate of Normand,* 88 Neb. 767; *Seebrock v. Fedawa,* 30 Neb. 424.

By section 126, ch. 23, Comp. St. 1911, it is provided: "Every person of full age and *sound mind* may, by his last will and testament, in writing, bequeath and dispose of all his personal estate remaining at his decease, and all his rights thereto and interest therein, and all such estate not disposed of by the will shall be administered as intestate

estate." It will be seen that only persons of sound mind may bequeath and dispose of personal estates.

The judgment is fully sustained by evidence of a most convincing character and by precedent. The judgment of the district court is

AFFIRMED.

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

ANDREW NELSON ET AL., APPELLEES; ALBERT E. PARMELEE, INTERVENER, APPELLANT, V. CITY OF FLORENCE ET AL., APPELLEES.

FILED DECEMBER 24, 1913. No. 17,987.

1. **Judgment:** ADJUDICATION AS PRECEDENT. Where a city of more than 1,000 population and less than 5,000 entered into an agreement with a contractor by which said contractor was to pave a street within the city, and he proceeded with the work until it was completed, and a taxpayer of the city, who had full knowledge of the progress of the work, waited until after its completion and until the city had the use and enjoyment of said street with its improvements, and then sought to enjoin the payment therefor, and the case was determined in the district court against him, and also against him on appeal in the supreme court, in an effort by other plaintiffs in a new case to have the facts re-examined and re-adjudicated, this court will follow the finding and judgment of the supreme court in the former case, not because the judgment in the former case makes the matter under consideration *res judicata*, but because of the rightful force of a just precedent in a legal controversy touching matter of the same kind. *Haddock v. Tucker*, 93 Neb. 510.

2. **Municipal Corporations:** STREET IMPROVEMENTS: INJUNCTION: REVIEW. Where a taxpayer, in an action such as that last described, because of the alleged inferiority of material used in the pavement of a street, and because of alleged defects in workmanship, seeks to enjoin the payment for the construction of the improvement, he will be required to bring his action before the contractor has invested his money and finished his work, and if he waits until the work is completed and the city is in the full enjoyment of the improvement, and the equities of the case have been fairly considered by the trial court, the findings and judgment of

such trial court will not be disturbed because of alleged irregularities in the letting of the contract or slight defects in construction; provided, that the work itself is a substantial compliance with the contract.

3. Appeal: EQUITY: TRIAL DE NOVO. The supreme court is not bound by the findings and judgment of the trial court in an equity case, but it is the duty of this court to try the case *de novo*, and to reach an independent conclusion as to the weight, credibility and effect of the evidence, and to render judgment accordingly. *Colby v. Foxworthy*, 80 Neb. 244. And the conclusion of the trial court, derived from the consideration of the evidence of witnesses in the presence of the court, will not be regarded, unless upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730. And in cases where the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge, and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court. *Cooley v. Rafter*, 80 Neb. 181; *Mensen v. Kelley*, 81 Neb. 206.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Will H. Thompson, for appellant.

Carl E. Herring, John M. Redmond and *R. H. Olmsted, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The pleadings on behalf of the plaintiffs and interveners are of great length. We will content ourselves with a statement of the general purposes of the action, a reference to what is denied or admitted, and a review of the facts as they appear from the evidence. The petition and amended petitions on behalf of the plaintiffs and interveners allege that they are taxpayers and

freeholders of the city of Florence; that they prosecute their action on their own behalf and on behalf of all other taxpayers and freeholders of the city of Florence; that the city is a city of the second class governed by the provisions of chapter 37, Ann. St. 1909. It is then alleged that the city entered into a contract with the defendant M. Ford for the improving of Main street in the city of Florence. While it is claimed that the contract was void for certain alleged errors, it is not denied that the street was improved, yet it is claimed that there are certain defects in parts of the workmanship and inferiority in parts of the material used. The interveners allege the ownership of certain real estate in the city of Florence which they claim to own. From time to time amended petitions of intervention were filed and orders were made pending the final determination of the case. They relate to the granting of a temporary injunction and modifications of the same, and leave to file amended pleadings. The answer of Ford is a denial of the material things set forth in the petitions and petitions of intervention. There is also an answer of the defendant, the city of Florence.

The decree, so far as it is necessary to allege its contents, recites that the case came on to be heard upon the second amended petition of intervention, the answer thereto of M. Ford, and of the city of Florence, the replies, the evidence and the arguments of counsel; that the court finds in favor of the said M. Ford and the said city of Florence and against said interveners; that the order of injunction heretofore granted should be dissolved; that the city of Florence and the said M. Ford had full power and authority to make the agreement for settlement described in said pleadings, and that the same should be and is hereby ratified; that under the terms of said agreement the said M. Ford should have and recover from the said city of Florence the sum of $47,392.02, together with interest thereon from May 31, 1910, which said amount is in payment for work done and performed on Main street in said city of Florence from a point 107 feet south of the

south line of Jackson street to the south line of Briggs street, save and except the paving between the tracks and one foot adjoining and outside of each track of the Omaha & Council Bluffs Street Railway Company; that special assessments to pay for the same were twice attempted to be levied by the council of said city and were twice set aside, the first time by this court and the last time by said council because of jurisdictional defects; that said levies heretofore attempted to be made are void and no valid levy can be made; and the said M. Ford is entitled to judgment against said city of Florence for the amount so found due him, and that of said sum $7,500, as set forth in said pleadings and statement, is available for the purpose of payment on account of the amount herein found due said Ford; that nothing in this decree shall be construed to modify or lessen the liability of said Ford or his bondsmen under the contract between said Ford and said city, or under the bond given for the completion of the work, and for holding said city of Florence harmless from all damages resulting from negligence in the prosecution of said work; that nothing in this decree shall be construed to prevent the city of Florence from retaining out of any moneys herein found due to said Ford a sum not exceeding $3,500 to protect said city of Florence in the enforcement of the provisions of said contract and bond relative to damages resulting from negligence, or accepting in lieu thereof a good and sufficient bond, and that said city of Florence shall have the right to demand as a condition precedent to the enforcement or satisfaction of the judgment from the bondsmen of said Ford satisfactory assurance of their approval hereof and their continued liability as herein provided; that the said city of Florence shall have the right as a condition precedent to the enforcement of said judgment to demand and receive the delivery to city for cancelation all the warrants issued by said city and delivered to said M. Ford. It is considered, adjudged, and decreed that the orders of injunction heretofore entered are hereby dissolved and set aside; that said M. Ford

and said city of Florence have and recover of and from the interveners and each of them their costs of suit herein expended from the date of intervention; that said Ford recover from said city of Florence the sum of $53,796.48, together with interest thereon from May 6, 1912. To this judgment the intervener Parmelee excepted.

We have examined the evidence, which covers more than 800 type-written pages. It shows that there are some defects in the material used and that the workmanship may possibly have been better in part. It is contended by the appellant that the testimony shows that competitors were induced by purchase to refrain from bidding. On the trial a witness was produced who testified that he agreed with Mr. Ford not to bid at Florence "and to give him a clear field up there." He goes into the details, and says that Mr. Madison, the sales agent of the brick company, and himself talked the matter over, that Mr. Ford was with them, and that he said to Ford, that he (the witness) had incurred certain expenses for the promotion of the pavement, and some other expenses. He then comes to the conclusion that Ford "got a special price on the brick" because he (the witness) stayed out and did not bid; that Charles S. Huntington seems to have been in the employ of this witness. He was to receive from the witness five cents a yard for "promoting" the pavement. He seems to have continued working for the pavement until the contract was awarded to Mr. Ford. In appellant's brief it is said: "It is an undisputed fact that Huntington was promoting the pavement, and in the first instance for Fanning. It had been proved and conceded that Fanning did not bid. It is undisputed that he incurred all this obligation, and no one can be brought to say that after going to all this trouble and expense and having the man on the ground to create a favorable sentiment for the brick block, the very kind that Fanning was laying, he neglected to put in a bid except for the reason detailed by him." Huntington testified that Jackson told him that he (Huntington) would be "taken care of." Jackson testi-

fied, and wholly denied this conversation with Huntington. He testified: "I never said anything of the kind." Ford also denied saying what Fanning testified that he said.

From an examination of this conflicting evidence we do not find anything which seems to justify us in the belief that the district judge, who saw the witnesses and heard them testify, was wrong in his conclusion concerning these facts. We are unable to say that the finding and judgment of the district court are unsupported by the evidence. It was for the district court to determine the facts in the first instance, and we are unable to say upon the conflict of the evidence before it that its judgment is wrong, and it seems to be right. A verdict on conflicting evidence will not be disturbed where the evidence is sufficient to sustain a recovery in favor of either party. *Schmidt v. Village of Papillion,* 92 Neb. 511; *Kinney v. Chicago, B. & Q. R. Co.,* 92 Neb., 383. In *O'Chander v. Dakota County,* 90 Neb. 3, it was held: "In an action at law, the judgment of the district court, rendered upon conflicting evidence, will not be set aside by a reviewing court, unless it can be said that it is unsupported by the evidence and is clearly wrong."

The principle recognized in the foregoing decisions may be applied to the findings and judgment of the district court in an equity case, except that on appeal, in such case, the hearing in this court is necessarily a trial *de novo,* because of the statute of 1903 prescribing the mode of reviewing findings of fact. Section 681*a* of the code provides: "That in all appeals from the district court to the supreme court in suits in equity, whether now pending or hereafter to be brought to said court, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the plead-

ings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

In *Grandin v. First Nat. Bank,* 70 Neb. 730, it is is said, in substance, that the conclusion of the trial court derived from the consideration of the evidence of witnesses examined in the presence of the court will not be regarded, unless upon the whole record, in view of the position of the trial court, in weighing such evidence, it appears to be right. And in *Stocker v. Nemaha County,* 72 Neb. 255, it is said that this statute requires the supreme court to go over all the evidence and to reach its own conclusion.

In *Whedon v. Lancaster County,* 80 Neb. 682, it is said, in substance, that the effect of the above act is to require the supreme court to hear *de novo* all appeals from decrees in equity cases and to render such judgment as should have been rendered by the court below.

In *Coad v. Coad,* 87 Neb. 290, it is said that this act requires, in an appeal in equity, the retrial of the case by the supreme court, without reference to the conclusion reached in the lower court.

Notwithstanding the foregoing decisions, the weight of authority would seem to be that, in an equity case appealed to this court, it will be considered that when the evidence in the district court consists of oral testimony which is in sharp irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined upon the degree of competency of the witnesses, their opportunity for knowledge, and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial court will be considered in determining the issues in this court. *Mensen v. Kelley,* 81 Neb. 206; *Cooley v. Rafter,* 80 Neb. 181; *Wetherell v. Adams,* 80 Neb. 584.

In *Coad v. Coad, supra,* it is said, in the body of the opinion: "This being an equity case, this court is required

to retry the cause upon the evidence submitted and preserved in the bill of exceptions and 'reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.' Code, sec. 681*a*." In this connection it is further said: "While in cases where the evidence is conflicting we may (and should) consider the findings of the district court (*Wetherell v. Adams*, 80 Neb. 584), yet the burden is, by appeal, placed upon this court to retry the case."

It is proper to remark that this case is not a stranger to this court. The record in the instant case refers to the former case of *Hadlock v. Tucker*, 93 Neb. 510, 520. The pleadings in that case are included in the bill of exceptions in the instant case. It is contended in that case that there were jurisdictional defects, and that the judge's attention was specifically directed to such defects, and that the lower court decided that it found against the plaintiffs, but refused any relief against them. It is contended that the jurisdictional defects taken in that case were well taken, and that they may still be considered. That case was threshed out in this court and a judgment rendered. Whatever was specifically determined in that case cannot be determined in this one. A brief reference to what was before the court in that case is perhaps proper. We will only attempt to recite part of the facts as they are shown by the record and the report of the case. On or about the 2d day of August, 1909, the city council of the city of Florence passed, and the mayor approved, an ordinance ordering the paving, guttering, and subdraining of Main street. That case included the making of the improvements now under consideration in the instant case. It was urged that the ordinance formed but one paving district, which included all the property within the city, and that the improvement district comprised the whole of the city; that no fund had been provided with which to pay the tax for the improvement, and

that there was no money in any fund of the city which could be appropriated to pay the same; that on the day on which the contract was made there had been contracted debts against the city and against the street and alley fund, and for miscellaneous purposes, a sum in excess of $3,400, and that there were contracted against the city, including the light fund, the water fund, and the salary fund, amounting to more than $5,500, and that there were valid outstanding warrants for the current year and previous years amounting to more than $1,800, for the payment of which no appropriation had been made, and that said warrants were drawing interest at the rate of 7 per cent. per annum, and that for the payment of the warrants no provision had been made and no warrants had been provided; that the whole of said city was within the school district of which it formed a part, and that the school district had voted the limit of taxes that could be raised and was unable to levy any tax on its property within the city to pay for the improvement of Main street, and that all the taxes levied by the school district would be needed for the purpose of maintaining the schools therein; that the mayor and council had no authority to impose a tax for paving the street upon any property not abutting on or adjacent to the street improved, and that they were without authority to order Main street to be paved, or to order the creation of an improvement district for the purpose of paving or causing such improvement; that there were certain defects in the proceedings touching the passage of the ordinance and touching its publication, and that because of these defects there had never been jurisdiction to pass the ordinance, and that it had never become a law; that the cost of paving, curbing, guttering and subdraining the intersections on said street would exceed the sum of $10,000, and that no fund had been appropriated to pay the same; that no vote of the people had been taken on the question of paving the street and no petitions therefor had been filed; that there were no definite plans prepared upon which the contractor could

bid with certainty, and upon which the city could award a contract; that the said M. Ford, mentioned as the contractor in the instant case, was also mentioned as the contractor in that case, and it was sought to restrain him from proceeding with the improvements attempted to be made. Among other things it was urged that the bid of Ford was not the lowest bid for the improvement; that it exceeded the estimates of the city engineer; that the bids were never advertised as required by the terms of the ordinance; that they were not published in a legal newspaper printed in said city; that the said city had no sewer system, and it was urged that one would soon have to be provided for it, in which case the sewers would have to intersect and cross Main street in many places, and in some parts would have to be constructed along and in the street; that it was not provided in the ordinance how the tax should be levied; that it was not provided that there should be a limit for the beginning or completion of the work. It was also alleged that the work had proceeded.

There were amended pleadings and separate answers filed by the city of Florence and by one Tucker, one Craig, one Price, and one Allen, and by Ford and Jackson in their own behalf. It was alleged in these answers that the city of Florence was a municipal corporation having more than 1,000 and less than 5,000 population, and that it was governed by the provisions of chapter 37, Ann. St. 1909; that the plaintiffs in said case were resident freeholders of the city; that the improvement district thereby created included all the real estate within the city; that pursuant to the ordinance the city advertised for bids for doing the work, and that bids were received, opened and considered, and that the contract was awarded to said Ford for doing the work, and that thereafter he began and completed said work; that the school district comprised all the property in the district; that it was the owner of the land where the schoolhouse stood; that the city of Florence was the owner of the real estate within its limits; that ample provision had been made for con-

nection with any sewer system that might be installed in the city without interference with the pavement on Main street. It was further alleged in that case that during all that time the plaintiffs in that case were present in Florence and knew of the progress of the work, and it was urged that they were estopped to deny or question the validity of the contract.

A joint answer was filed by Ford and Jackson, being the same Ford mentioned in the instant case. It was alleged in the said joint answer that the contractor was proceeding with the work, and that the proceedings from the inception thereof to and including the advertisement for bids and the letting of the contract to said Ford were regular and in accordance with the law and the ordinances. It was also alleged that the plaintiffs in said case had knowledge that the city contemplated the improvement of Main street in the manner provided for, and also had knowledge of the passage of the ordinances of August 2, 1909. The details of all the proceedings in the district court were set up, and the several steps taken toward the completion of the work. It was also alleged that the defendant Ford prosecuted the work to full completion in the month of May, 1910; that the plaintiffs took no action in the prosecution of their suit until January, 1910, when they filed in said case another supplemental petition, the only purpose of which was to prevent the city from issuing its bonds. An estoppel was pleaded in said case in said answer against the plaintiffs by reason of their inaction in asserting objections to the improvements within the proper time. The plaintiffs in said action replied to the answer of defendants by a general denial, and trial was had, and there was a general finding in favor of the plaintiffs and against the defendants upon the allegations touching the issue of bonds, and a perpetual injunction was issued restraining the city of Florence, its officers and agents from issuing the bonds of the city in payment for the improvements referred to, and Jackson and Ford were restrained from receiving any bonds of

the city and for the construction of the improvements referred to, and the costs were taxed to the defendants; but, upon the other issues involved in the case, the finding and decree were in favor of the defendants, and the suit was then dismissed at the plaintiffs' costs, in so far as all such issues were concerned.

There was then an appeal to this court by the plaintiffs. This court held in that case that the decree of the district court upon the question of the right of the city to issue its bonds for the purpose of providing funds with which to pay the contractor for paving the street was in favor of the plaintiffs, and that no appeal had been taken by the defendants, and therefore that that part of the decree in that case must be taken as a final adjudication of the question, and that no further reference need be made to it; but it was then further said by Chief Justice REESE, delivering the opinion of this court: "There seems to be no doubt that the paving of the street has been fully completed by the contractor, and the work approved and accepted by the city officers. While it is true the proceedings of the council in letting the contract were irregular, and, in some respects, censurable, yet we find nothing in the evidence showing that the contractor should be deprived of his compensation for doing the work, if there is any method by which provision may be legally made for his payment. * * * It is the opinion of my associates that, as the contractor has paved the portion of the street in question in good faith, and with a large outlay of money, depending upon the faith and credit of the city, he should not be deprived of his compensation for the work performed, and, since he was not restrained by injunction, or other process, from constructing the pavement, and his contract required him to push the work, he should not now be required to lose the money expended under his contract at the suit of these plaintiffs, who took no decisive action, before the full completion of the work, that would justify the contractor in delaying to perform his contract with the city."

It was also held in that case that, where a bid for the paving of a street exceeded the engineer's estimate to the extent of a few dollars, the extra being limited to one item, and the bid, as made, was accepted by the city council, but upon entering into the contract the excess was discovered and eliminated and the contract brought within the estimate, the contract was not thereby void. It was also held in that case that, where the city entered into an agreement with the contractor by which the contractor was to pave a street within the city, and he proceeded with his work under the contract and under the direction of the city officers until the completion thereof, a taxpayer of the city, having full knowledge of the progress of the work, would not be heard to enjoin the payment thereof, after the completion of the work. Of course, we cannot in this case review the proceedings taken in the former case. We cannot review what was done in *Hadlock v. Tucker*, *supra*.

We are unable to say that the judgment of the district court is wrong, and it is therefore

AFFIRMED.

FAWCETT, J.

I concur, on the ground upon which the district court based its findings and judgment.

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Counties and County Officers. See HIGHWAYS, 4-7.

1. Sec. 87, ch. 78, Comp. St. 1909, requires a county to contribute toward the repair of a bridge across the Platte river which extends into such county, though it is located mainly within the adjoining county. *Dawson County v. Phelps County* 112
2. The word "stream," as used in sec. 87, ch. 78, Comp. St. 1909, relating to bridges over streams which divide counties, is used in a general sense, and applies to rivers and smaller courses of running water. *Dawson County v. Phelps County*, 112
3. Counties, in the construction and maintenance of bridges, must provide for such uses as may be fairly anticipated for the proper accommodation of the public where the bridge is situated. *Peitzmeier v. Colfax County*..... 675
4. Evidence, in an action against a county for damages to a threshing outfit caused by the collapse of a bridge, *held* to sustain verdict for plaintiff. *Peitzmeier v. Colfax County*, 675
5. Under sec. 77*a*, art. I, ch. 18, Comp. St. 1911, it is the duty of the register of deeds upon approval of his annual account to turn over to the county treasurer all fees in excess of statutory compensation for official services. *State v. Uerling* 694
6. Mandamus will lie to compel the register of deeds to turn over excess fees to the county treasurer. *State v. Uerling*, 694
7. Under sec. 19, ch. 7, Comp. St. 1907, providing that the salary of county attorneys shall be based on population, without providing how the population shall be determined, the last general federal census does not necessarily control, but the population is to be determined by the best evidence available. *O'Connell v. Sioux County* 826
8. To determine the population of a county to fix the salary of a county attorney, evidence of the number of votes polled is competent in the absence of a census or other direct evidence. *O'Connell v. Sioux County* 826
9. To determine the population of a county to fix the salary of a county attorney, evidence of the government census for a given year and of the number of school children for the same year is competent to show the ratio of population to school children for other years, but is not conclusive, and, if inconsistent with other evidence, will not establish the population in the years in question. *O'Connell v. Sioux County* 826

Courts. See CONSTITUTIONAL LAW, 5, 10. JUDGMENT, 4.

1. The ruling of one judge of the district court upon a gen-

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eral demurrer to a petition is not conclusive upon another judge of the same court who afterwards tries the case. *Follmer v. State* 217

2. Under sec. 2, art. VI, Const. U. S., treaties are the supreme law of the land, and state judges are bound thereby. *Butschkowski v. Brecks* 532

3. In a suit to enjoin payment for street improvements, the supreme court will follow its decision in a prior suit by other parties involving the same questions of fact. *Nelson v. City of Florence* 847

Criminal **Law.** See CONSTITUTIONAL LAW, 3. GAMING. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 10. LARCENY.

1. The sentence for a crime committed before the taking effect of the indeterminate sentence law should conform to the law in force at the time of the commission of the offense. *Stehr v. State* 151

2. Under sec. 448 of the criminal code, requiring arraignment, a conviction of a felony will be reversed where accused entered his objection after verdict, unless the record affirmatively shows that accused was arraigned before trial. *Burroughs v. State* 519

3. In a prosecution for gambling, refusal to permit accused to withdraw his plea of not guilty for the purpose of objecting to a variance between the information and the original complaint *held* not an abuse of discretion. *Goemann v. State*...582

4. Where three parties are jointly charged with gambling, and one demands a separate trial, an instruction that defendant is charged with gambling with one of the parties, without naming the other, *held* not erroneous. *Goemann v. State*.. 582

5. Failure to caution the jury as to the evidence of an accomplice in a misdemeanor case *held* not error, in the absence of a special request so to do. *Goemann v. State*..... 582

6. An instruction in a misdemeanor case that a reasonable doubt is an actual substantial doubt arising either from the evidence or want of evidence is not erroneous. *Goemann v. State* 582

7. It is not an abuse of discretion, in a misdemeanor case, to appoint a former prosecutor, who began the prosecution, to assist in the trial, though he has prosecuted a civil action against the accused for services of another attorney in the case. *Goemann v. State* 582

8. An appellate proceeding, under sec. 515 of the criminal code, to settle a point of law in a prosecution wherein accused was

Criminal Law—*Concluded.*

discharged, may be dismissed for failure of the county attorney to refer in his brief to the volume, page or section where acts of congress, on which the ruling below was based, may be found. *State v. Roy* 690

Damages. See EMINENT DOMAIN. INTOXICATING LIQUORS, 2. LIBEL, 7.

1. Verdict for $15,000 for death *held* not excessive. *Wright v. Chicago, R. I. & P. R. Co.* 317
2. The measure of damages for improper construction of a building is the difference between the value of the building as constructed and its value if constructed according to contract. *Lincoln Stone & Supply Co. v. Ludwig* 722

Deeds. See EVIDENCE, 3.

1. In a suit to cancel a deed, evidence *held* to sustain finding that plaintiff authorized delivery of the deed. *Lamb v. Lamb* 627
2. Evidence *held* to sustain finding that grantor did not make a mistake in the description of the land conveyed. *Lamb v. Lamb* 627

Descent and Distribution.

The first four subdivisions of sec. 2, ch. 23, Comp. St. 1911, relating to distribution of an intestate's estate, are limited by the fifth and sixth subdivisions, and where a father died, leaving a child by a former wife, and also his widow and their child, J., who afterwards died under age and unmarried, the estate which J. took from her father descended to her sister. *In re Estate of Van Orsdol* 98

Divorce.

1. Decree of divorce in which the court found that certain real estate in the wife's name was accumulated by the joint efforts of husband and wife, and adjudged that the wife pay the husband for his interest therein and that the title be quieted in the wife, *held* sustained by the record. *Gleeson v. Gleeson* 13
2. In a suit for divorce, allowance of $6,000 as alimony *held* proper. *Bolton v. Bolton* 343

Drains.

1. A landowner who knew of the placing of tile drains in a highway and assisted in making drains on his own land cannot, several years afterward, enjoin the maintenance of the drains in the highway. *Wachter v. Lange* 290
2. Public authorities may construct drains along the side of highways if necessary to render them passable, and if, in so doing, they divert waters of a pond upon the lands of

Drains—*Concluded.*

one not consenting to the work, they may not ordinarily be enjoined, but they may be liable for damages to persons whose lands or crops are injured. *Wachter v. Lange*..... 290

Ejectment. See ESTOPPEL, 2. EVIDENCE, 7, 8. PLEADING, 2.

1. Evidence that defendant in ejectment purchased an outstanding title while the action was pending cannot be received under a general denial. *Risher v. Madsen*..... 72
2. Evidence in ejectment *held* insufficient to establish an equitable title in defendant. *Tillson v. Holloway*..... 635
3. When the owner of realty, indebted to his son, puts the son in possession of the land until settlement is made between them, and the father dies without a settlement, his devisees and heirs cannot recover the land without payment of the amount due the son. *Tillson v. Holloway*..... 635

Elections. See MUNICIPAL CORPORATIONS, 6, 7, 10, 13-16.

1. Allowance of fees for mileage to an election officer sustained. *Blair v. Sheridan County* 124
2. Police magistrates in cities of the second class being municipal officers, the legislature may provide the time of their election. *State v. Reilly* 232
3. A county is liable for new ballots to be used at a general election, where by mistake of the clerk the ballots first provided were defective. *Wahlquist v. Adams County*..... 682

Electricity. See MUNICIPAL CORPORATIONS, 2-12.

Eminent Domain.

1. The measure of damages in condemnation proceedings to remove a mill-dam is the difference between the value of the mill property before and after the removal. *Maynard v. Nemaha Valley Drainage District* 610
2. In condemnation proceedings to remove a mill-dam, prospective profits from the use of the water-power for the development of electricity are too remote to be elements of damage, where there is no proof of a present purpose to make such development. *Maynard v. Nemaha Valley Drainage District* 610
3. An owner of property who knowingly permits a corporation, having the power of eminent domain, to use or damage his property may be limited to his remedy for damages. *Hall v. Crawford Co.* 460
4. Sec. 46, ch. 78, Comp. St. 1905, accepting the grant of land for highways provided by sec. 2477, Rev. St. U. S., reserves to landowners the right to recover damages for land taken on the opening of such highways. *Rule v. Sioux County*... 736

Equity. See APPEAL AND ERROR, 51-58. CONTRACTS, 5. INSURANCE, 7.

1. To prevent a multiplicity of suits against an irrigation district, a court of equity may acquire jurisdiction to cancel void district bonds in the hands of many different holders. *Paxton Irrigation District v. Conway* 205
2. A suit in equity to enjoin a suit at law and to reform the written contract upon which the suit is based depends on plaintiff's right to such reformation. *Hallgren v. Becker* ... 415

Estoppel. See BOUNDARIES. EXECUTORS AND ADMINISTRATORS, 2, 3. LANDLORD AND TENANT, 1. LIFE ESTATES, 2. MUNICIPAL CORPORATIONS, 25. PARENT AND CHILD, 1. PLEADING, 2. WATERS, 4.

1. To create an estoppel *in pais*, the party against whom it is invoked must have made the declaration or done the act on which the estoppel is based, either with intent to deceive, or with such negligence as to amount to a constructive fraud. *Onn Lumber & Shingle Co. v. Powell Lumber Co* 267
2. Where plaintiff and wife deeded land to A without consideration, and A reconveyed it to the wife, whose deed was not recorded, and thereafter plaintiff exchanged the land for other land and the purchaser took possession under a deed from A executed at plaintiff's request, plaintiff in ejectment *held* estopped to claim the land. *Kime v. Krenek* 395

Evidence. See ATTORNEY AND CLIENT, 4. CONTRACTS, 4. COUNTIES AND COUNTY OFFICERS, 9. EJECTMENT, 1, 2. INTOXICATING LIQUORS, 6. LIBEL, 3, 5, 6. MASTER AND SERVANT, 4-7. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 5, 18, 27, 28. PLEADING, 2, 9. WILLS, 4, 6, 8, 9, 13, 14. WITNESSES.

1. In an action on a note between the original parties thereto, parol evidence is admissible to show want of consideration, and the purpose for which it was given. *Franklin State Bank v. Chaney* 1
2. Exclusion of evidence of contents of letter *held* error, where witness testified that she received the letter by mail, that it was signed by defendant, whose signature she knew, and was lost, in the absence of cross-examination as to her means of knowledge of the signature. *Risher v. Madsen* ... 72
3. The true consideration for a deed of real estate may be shown by parol evidence, though the deed recites a consideration. *Goodman v. Smith* 227
4. A certificate of the filing of an instrument for record under secs. 9603, 9608, Ann. St. 1911, executed by one purporting to be register of deeds or his deputy, is sufficient *prima facie* proof that the document was so filed. *Smith Bros. v. Woodward* 298
5. Ambiguity in a written instrument may be explained by

Evidence—*Concluded.*

parol evidence showing the mutual understanding of the parties. *Myers v. Persson* 467

6. Admission of parol evidence of the contents of a letter *held* proper. *Mack v. Mack* 504
7. A certain letter written by the then owner of the legal title 26 years before, in pencil upon coarse brown paper, in which it appeared that words had been retraced and figures rewritten, *held* of little value as evidence to establish an equitable title to land. *Tillson v. Holloway*..... 635
8. Evidence to establish an equitable title to land as against the legal title must be clear and satisfactory. *Tillson v. Holloway* 635

Exceptions, Bill of. See APPEAL AND ERROR, 21.

Execution.

1. The right to levy an execution upon a stock of goods sold in violation of the bulk sales law is cumulative to prior remedies, and it is not necessary that an execution be first issued and be returned unsatisfied as to other property of the judgment debtor. *Mutz v. Sanderson*..... 293
2. Under the bulk sales law, a sale of a stock of goods in bulk without complying with the statute is void as to creditors, and the goods are subject to execution as though no sale had been made. *Mutz v. Sanderson* 293
3. Where a transcript of a county court judgment was filed with the clerk of the district court of the county and a transcript from said clerk's office was filed in the district clerk's office of the county where execution was issued, a sale of land thereunder *held* not vulnerable to collateral attack because the transcript was not filed directly in the county where execution was issued. *Bresee v. Snyder*..... 384
4. As against a collateral attack, a mere irregularity in the notice of sale of real estate upon execution is cured by confirmation. *Bresee v. Snyder* 384

Executors and Administrators.

1. Where an executor with power of sale under the will takes title to land in satisfaction of a mortgage thereon, he holds it as personalty, and can convey the land without order of court; and the purchaser takes good title unaffected by subsequent proceedings of a county court in another state. *Battey v. Battey* 729
2. Where an executor has settled his accounts with a devisee and the estate, the devisee is estopped to claim any interest in the land received by the executor in satisfaction of a mortgage and sold to a *bona fide* purchaser. *Battey v. Battey* 729

Executors and Administrators—*Concluded.*

3. Where an executor, who is also an heir, sells land received in satisfaction of a mortgage to a *bona fide* purchaser, he is estopped to afterwards claim any interest in the land. *Battey v. Battey* 729

Forcible Entry and Detainer. See JUSTICE OF THE PEACE.

1. In an action of forcible entry and detainer, a judgment for plaintiff, the owner of the legal title, does not extinguish a title in defendant by adverse possession. *Towles v. Hamilton* 588
2. Forcible entry and detainer being merely a possessory action, the question of title cannot be determined therein. *Towles v. Hamilton* 588
3. The rule of the code (sec. 29) that every action must be prosecuted in the name of the real party in interest applies in forcible entry and detainer cases. *Towles v. Hamilton*.. 588
4. Where leased land is sold in a tax foreclosure suit to which the lessor is a party, and the lessee, to avoid eviction, attorns to the purchaser, he may interpose such action as a defense to an action by his lessor for possession. *Bowman v. Goodrich* 696

Fraudulent Conveyances. See EXECUTION, 1, 2.

1. Evidence *held* not to show that dealings between husband and wife were fraudulent as to creditors of the husband. *Conservative Life Ins. Co. v. Boyce*..... 408
2. Where a wife, at her husband's direction, deposited money as indemnity for his release on bail, the rule that transactions between husband and wife by which creditors are prevented from collecting their debts will be scrutinized closely, and proof of their *bona fides* required, will be applied. *Valparaiso State Bank v. Petermichel*..... 606
3. Evidence that a wife deposited money at her husband's request *held* to show *prima facie* his ownership of the money. *Valparaiso State Bank v. Petermichel* 606
4. Where a debtor sells property to hinder or delay his creditors, the purchaser will not be protected as a purchaser in good faith as to the purchase price not paid or placed beyond his control prior to his notice of the intended fraud. *Raapke v. Beacom* 831

Gaming. See BILLS AND NOTES, 2. CONSTITUTIONAL LAW, 3. CRIMINAL LAW, 3-7.

Evidence in a prosecution for gambling *held* to sustain a conviction. *Goemann v. State* 582

Garnishment.

1. Only the interest of the attachment debtor in funds in the

Garnishment—*Concluded.*

hands of the garnishee can be applied on the plaintiff's claim. *Farrington v. Fleming Commission Co*..... 108

2. Where the holder of a check on a bank has in good faith paid the maker in full for it, the deposit to the amount of the check is not subject to garnishment at the suit of another creditor of the maker, notwithstanding sec. 188 of the negotiable instruments act. *Farrington v. Fleming Commission Co.* 108

3. Where a garnishee answers that he has money of the judgment debtor, it is proper to allow a third party to intervene and contest the right of plaintiff to apply the money on his claim. *Farrington v. Fleming Commission Co*..... 108

4. Service on the garnishee impounds the funds in his hands, and he must pay the money to the party having the right thereto as determined by the court. *Farrington v. Fleming Commission Co* 108

Habeas Corpus. See APPEAL AND ERROR, 25.

1. Where the sole parent of an infant surrendered her custody to another, evidence *held* to show that the child's best interest required that she remain in such custody. *State v. Nebraska Children's Home Society* 255

2. Habeas corpus by a parent to recover the possession of his minor child may be brought in the county where the unlawful detention takes place. *State v. Nebraska Children's Home Society* 255

3. A father, the sole parent, by agreement in writing, can surrender the legal custody of his infant child to another, and he cannot regain custody, unless he can show breach of the agreement, abuse of the child, or that the child's best interest requires it. *State v. Nebraska Children's Home Society*, 255

Highways. See APPEAL AND ERROR, 36, 49, 63. CONSTITUTIONAL LAW, 2. DRAINS. EMINENT DOMAIN, 4.

1. One who appears at the hearing on a petition for the establishment of a public road cannot thereafter complain that he had no legal notice of the hearing. *Richardson v. Frontier County* 27

2. It is not essential that a public road be laid out upon the exact line prayed for in the petition. *Richardson v. Frontier County* 27

3. Admission of certain evidence in proceedings for the assessment of damages from the opening of a highway *held* prejudicially erroneous. *Rector v. Red Willow County*..... 167

4. Cities of the second class and villages were road districts within sec. 76 of the road law (Comp. St. 1899, ch. 78) as

Highways—*Concluded.*

it existed prior to the amendment of 1901. *City of Albion v. Boone County* 494

5. Failure of a city to demand from the county payment of its portion of a road fund for a series of years, though with knowledge that the county is using all the fund, *held* not to constitute laches. *City of Albion v. Boone County*..... 494

6. One-half of the road fund collected by a county within the limits of a city belongs to the city, and the city officers cannot compromise the right to such funds. *City of Albion v. Boone County* 494

7. Where a county has collected a road tax levied within the limits of a city, it holds one-half thereof in trust for the city, with the continuing duty to pay it to such city. *City of Albion v. Boone County* 494

8. Section-lines are by sec. 46, ch. 78, Comp. St. 1911, declared to be public roads which may be opened by the county board whenever the public good requires it. *Warner v. Cavey* 778

9. The propriety or necessity of opening and working a section-line road is discretionary with the county board, and is not subject to review. *Warner v. Cavey* 778

10. The only limitation upon the discretion of the county board in opening section-line roads is that of compensation for private property taken or damaged. *Warner v. Cavey*..... 778

11. A county board may open a highway in the form of a *cul-de-sac* on a section line. *Warner v. Cavey*..... 778

Homestead.

1. In a suit to establish homestead rights, failure to prove the acquisition or occupancy of a homestead defeats plaintiff's case. *Cunningham v. Marshall* 302

2. The word "homestead," as used in sec. 4, ch. 36, Comp. St. 1905, the homestead act, means the house and parcel of land where the family reside and have their home. *Anderson v. Schertz* 390

3. Under sec. 4, ch. 36, Comp. St. 1905, any attempted conveyance or incumbrance of the homestead is absolutely void unless executed and acknowledged by both husband and wife. *Anderson v. Schertz* 390

4. A contract in writing to convey a homestead, which has been signed by both husband and wife, but not acknowledged, is void as to the entire homestead, though its value exceeds $2,000. *Anderson v. Schertz* 390

Husband and Wife. See FRAUDULENT CONVEYANCES, 1-3.

Indictment and Information. See INTOXICATING LIQUORS, 10.

1. An information cannot be aided by intendment, nor by recital or inference, but must explicitly state all that is essential to constitute the offense. *Gaweka v. State*..... 53
2. A complaint under sec. 30 of the criminal code for resisting a municipal officer while making an arrest without a warrant, which does not allege that the offense was committed within the municipality, is fatally defective. *Gaweka v. State* 53
3. An information charging accused with violating the pure food law by wilfully overreading a test of cream purchased by him for commercial purposes is not demurrable for failure to charge an intent to defraud the seller; the statute not having made intent an element of the offense. *State v. Thorp* 310

Infants. See CONSTITUTIONAL LAW, 4-7.

Injunction. See DRAINS. EQUITY, 2. MUNICIPAL CORPORATIONS, 5, 29.

Injunction will not lie to obtain possession of real estate, where the ordinary legal remedies are adequate. *Hollinrake v. Neeland* 530

Insurance. See BILLS AND NOTES, 3.

1. In an action on an accident insurance policy providing that, if injury resulted from an intentional act, liability should be one-fifth of the amount otherwise payable, recovery is thus limited, where assured was intentionally struck a slight blow, and fell, striking his head and fatally fracturing his skull. *Ryan v. Continental Casualty Co*..... 35
2. Where an application for insurance of live stock provides that no liability shall attach until the application has been approved by the home office, *held* that ordinarily the company is not liable for loss occurring before such approval. *Johnston v. Indiana & Ohio Live Stock Ins. Co*..... 403
3. An insurance contract is governed by the law in force at the time of the making of the contract. *Johnston v. Indiana & Ohio Live Stock Ins. Co*..... 403
4. Where, in an action on a life insurance policy, the question of the truth or falsity of the answers of assured in his application are submitted to a jury on conflicting evidence, and under proper instructions, a verdict for plaintiff will not be set aside unless clearly wrong. *Jacoby v. Prudential Ins. Co.* 422
5. Instruction as to the use of liquors by assured *held* applicable to the evidence. *Jacoby v. Prudential Ins. Co*..... 422
6. The liability of a member of a mutual insurance company,

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organized under ch. 45, laws 1897, *held* to be similar to that of a stockholder in an ordinary stock corporation. *Randall v. McClain* 487

7. A suit by a receiver of an insolvent mutual insurance company, organized under ch. 45, laws 1897, to recover an assessment to pay liabilities, *held* properly brought in equity, and summons may be issued to any other county. *Randall v. McClain* 487

8. In order to recover an advanced premium for insurance, where plaintiff alleges that he refused to submit to such medical examination as was requested by the company, he must allege and prove rescission of the contract. *Witt v. Old Line Bankers Life Ins. Co.* 748

Interest. See CONSTITUTIONAL LAW, 8.

Intoxicating Liquors. See MANDAMUS.

1. Where, in an action for damages from the sale of intoxicating liquors, defendant testified that he owned a small amount of property, *held* not error to permit plaintiff to show on cross-examination that defendant owned other property. *Colman v. Loeper* 270

2. Verdict for $5,516.70 *held* not excessive. *Colman v. Loeper*, 270

3. An action for loss of support caused by drunkenness may be brought at any time within four years from the date of the last sale of liquors. *Colman v. Loeper*..... 270

4. Where the disability of drunkenness is permanent, the injury is a continuing one, and recovery may be had for the whole period of the disability. *Colman v. Loeper*..... 270

5. That the wife acquiesced in the sale of intoxicating liquors to her husband is no defense to an action by her for loss of support through his disability caused by drink. *Colman v. Loeper* 270

6. In an action by a wife for damages from the sale of liquors to her husband, *held* not error to admit evidence by a station agent that he had delivered bottled goods labeled "mineral water" to defendant that in his opinion were intoxicating liquors. *Colman v. Loeper* 270

7. One who has suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. *Henkel v. Boudreau* 338

8. It is not essential that the signer of a petition for a liquor license shall have resided in the village for the time required to make him a legal voter; residence in good faith being sufficient. *Shackelford v. Zimmerman* 547

Intoxicating Liquors—*Concluded.*

9. The supreme court will on its own motion dismiss an appeal from an order in mandamus requiring reinstatement of a saloon license, where the record shows that the term of the license has expired, and no motion was made to advance the case. *State v. Armstrong* 592

10. Under sec. 8, ch. 50, Comp. St. 1911, each act of selling or giving away of the liquors named to a minor is a crime, and an indictment which charges in the same count the selling and giving to a minor any such liquors is defective for duplicity, and will be quashed on motion. *State v. Freiburghouse* 603

11. Where the electors of a village of an election held under sec. 25, ch. 50, Comp. St. 1911, have voted in favor of no license, the village board cannot issue a license. *Ford v. Thompson* 658

12. The residence of a person, for the purpose of testing his qualifications as a petitioner for a saloon license, is where he has his established home, and is habitually present, and to which, when he departs, he intends to return. *Shaw v. Alexander* 774

Judges.

1. The office of police magistrate being created and the length of the term fixed by the constitution, the incumbent cannot be removed before the expiration of his term. *State v. Reilly* 232

2. The only method of removing a county judge from office is by impeachment, as provided in sec. 14, art. III of the constitution; sec. 1, art. II, ch. 18, Comp. St. 1911, being invalid in so far as it prescribes any other method. *Conroy v. Hallowell* 794

Judgment. See TAXATION, 9.

1. In a proceeding to revive a dormant judgment, where the debtor pleads payment, a presumption of payment arises, which the judgment creditor must rebut; and the rule obtains where the judgment creditor is demanding the payment as a condition precedent to the debtor's right to quiet his title to real estate as against the judgment. *Alberts v. Courtland Wagon Co.* 313

2. Where the name of one plaintiff and the items for which he alone can recover are dropped from an amended petition, the judgment is not a bar to his right to maintain a separate action. *Henkel v. Boudreau* 338

3. Under sec. 18, ch. 20, Comp. St. 1911, a transcript of a judgment of a county court may be filed in the office of the clerk of the district court of any other county without having

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been first filed in the county in which the judgment was rendered. *Bresee v. Snyder* 384

4. Where a special tribunal is empowered by statute to ascertain facts, and there is no provision for a review thereof by the courts, its action is final, in the absence of fraud or mistake. *State v. Houston* 445
5. The right to revive a dormant judgment and to sue thereon are cumulative remdies, and where either is asserted the court in its discretion, under proper evidence, may give judgment for the other. *Young v. City of Broken Bow*..... 470
6. A judgment which is valid and not fully paid may be revived. *Young v. City of Broken Bow*..... 470
7. Under the facts stated, revivor of judgment denied. *Hetzel v. Bennett* 768

Jury.

1. A venireman *held* not guilty of deception as to his relations with opposing counsel, where he admitted the relations and answered all quesions truthfully. *Blakely v. Omaha & C. B. Street R. Co.* 119
2. A juror drawn for three weeks' service in the district court, who serves during said period, can recover for all the days of such term, Sundays excepted, unless finally excused by the court. *Cochran v. Lancaster County* 130

Justice of the Peace.

1. Where title to land is drawn in question in an action of forcible entry and detainer before a justice of the peace, it is his duty to refuse to proceed further. *Bowman v. Goodrich* 693
2. Where a justice of the peace wrongfully enters judgment in an action involving title to land, the district court, on appeal, should dismiss the action. *Bowman v. Goodrich*.... 696

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER, 4. VENDOR AND PURCHASER, 5-8.

1. A landlord who for several months failed to declare a forfeiture of a long-term lease for nonpayment of rent, while the tenant, with the landlord's knowledge and consent, was making permanent improvements under his lease, *held* estopped to declare a forfeiture after the improvements have been completed. *Harte v. Shukert* 210
2. An option in a written lease giving the lessee the right to purchase the land upon definite terms is an enforceable contract. *Dengler v. Fowler* 621
3. A lease may be modified after its execution so as to give the lessee an enforceable option, upon expiration of the lease, to

Landlord and Tenant—*Concluded.*

purchase the land on definite terms; the rentals stipulated in the original lease and a subsequent promise to pay the purchase price being a valid consideration for the new agreement. *Dengler v. Fowler* 621

4. The possession of a tenant is notice, not only of his rights as lessee, but of all other interests of which inquiry would elicit knowledge. *Dengler v. Fowler*..... 621

Larceny.

In a prosecution for cattle stealing under sec. 117*a* of the criminal code, the jury need not declare in their verdict the value of the cattle. *Griffith v. State* 55

Libel.

1. Where the language in a publication would, in the connection in which it is used, be understood by persons of ordinary intelligence to charge the commission of a crime, it is libelous *per se*. *Bigley v. National Fidelity & Casualty Co.*, 813
2. Where the language in a letter, charging a crime, is true, and is published with good motives for justifiable ends, it is not libelous. *Bigley v. National Fidelity & Casualty Co.*. 813
3. It is not competent to prove wide circulation of a libel for the purpose of establishing its falsity or defendant's responsibility. *Bigley v. National Fidelity & Casualty Co*.... 813
4. A person is responsible for such circulation and publicity of a libel as is the natural result of his act, or he might reasonably anticipate, but is not liable for a subsequent publication of a similar libel not induced by him. *Bigley v. National Fidelity & Casualty Co*..... 813
5. In an action for libel, evidence of independent publications of a libel, not induced by defendant, should be excluded. *Bigley v. National Fidelity & Casualty Co*..... 813
6. Where the evidence is conflicting, the question whether defendant is responsible for the publication of a libel is for the jury. *Bigley v. National Fidelity & Casualty Co*..... 813
7. In an action for libel, charging embezzlement, $3,000 damages *held* not excessive. *Bigley v. National Fidelity & Casualty Co.* 813

Life Estates.

1. The conveyance of the life estate conveys all the rights of the life tenant, and the remainderman cannot enforce a forfeiture of the life estate by reason of such conveyance. *Bohrer v. Davis* 367
2. Where a remainderman consented to a sale of a part of the estate by the life tenant and the purchaser has held it for more than 17 years, the remainderman is estopped from recovering the land. *Bohrer v. Davis* 367

Limitation of Actions. See ADVERSE POSSESSION. INTOXICATING LIQUORS, 3. TRUSTS, 2.

1. A mortgagor's right of action to quiet his title, recover possession, and redeem from the lien of the mortgage, accrues when the mortgagee takes possession with claim of ownership, and the ten-year limitation of the statute will then begin to run. *Jackson v. Rohrberg* 85
2. Limitations do not begin to run against a right of action until the right exists. *Bohrer v. Davis*..... 367
3. Limitations will not run against a remainderman's right of possession until the particular estate is terminated. *Rohrer v. Davis* 367
4. That certain plaintiffs in a suit to redeem from a mortgage foreclosure sale are minors, who claim title through descent, does not toll the statute of limitations where it had commenced to run during the lifetime of their ancestors. *McNeill v. Schumaker* 544
5. In an action for damages for personal injuries, an amended petition *held* to state a new cause of action, which was barred by limitations. *Westover v. Hoover*..... 596
6. Where a father, indebted to his son, placed him in possession of land until settlement was made, and the father died without a settlement, in ejectment by the administrator of his estate, *held* that the statute of limitations did not apply either to the right of the devisees and heirs to possession of the land or to the claim of the son to reimbursement for the money loaned to his father. *Tillson v. Holloway*..... 635
7. The statutory right of owners of unoccupied territory within a village for its detachment, under sec. 101, art. I, ch. 74, Comp. St. 1911, is one to which the statute of limitations does not apply. *MacGowan v. Village of Gibbon*..... 772

Malicious Prosecution.

Where, in an action against trustees for malicious prosecution, the evidence failed to show malice or want of probable cause, *held* that a verdict was properly directed for defendants. *Talcott v. Rice* 539

Mandamus. See COUNTIES AND COUNTY OFFICERS, 6. INTOXICATING LIQUORS, 9.

Where an attempted appeal from the granting of a saloon license is without merit, and is not prosecuted in good faith nor with reasonable diligence, and the city council orders the license to issue, mandamus will not lie to compel the council to reconvene and recall it. *State v. Reuling*..... 507

Master and Servant.

1. It is the right and duty of a railroad company to make

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reasonable rules for the protection of its employees. *Wright v. Chicago, R. I. & P. R. Co.* 317

2. Whether a rule of a railroad company for the protection of its employees is adequate is for the jury. *Wright v. Chicago, R. I. & P. R. Co*..... 317
3. Though an extra train run by plaintiff's decedent was required to proceed under full control and protect itself within switch-yard limits, it did not relieve defendant from liability for the negligence of the crew of a switch engine in failing to exercise ordinary care to avoid a collision with the extra. *Wright v. Chicago, R. I. & P. R. Co*..... 317
4. In an action for death, evidence *held* to sustain judgment for plaintiff. *Wright v. Chicago, R. I. & P. R. Co*..... 317
5. The burden is on defendant to establish by a preponderance of evidence the defense of contributory negligence and assumption of risk. *Wright v. Chicago, R. I. & P. R. Co*..... 317
6. Where the evidence showed that defendant company had failed to promulgate any rules regulating the speed of switch engines, *held* that whether such failure constituted negligence was for the jury. *Wright v. Chicago, R. I. & P. R. Co.*, 317
7. Where plaintiff failed to show actionable negligence, *held* that a verdict was properly directed for defendant. *Kelley v. Omaha & C. B. Street R. Co*..... 456

Mechanics' Liens.

1. In a suit to foreclose a mechanic's lien, the owner *held* entitled to a certain credit. *Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co*..... 180
2. Though a mechanic's lien, when filed, attached only to a lease-hold estate, it may be enforced against the fee after the lease-hold has been merged therein by the acts of the landlord. *Harte v. Shukert* 210
3. The statute creating the right to a mechanic's lien does not authorize a lien for premiums paid by a contractor for liability insurance. *Harte v. Shukert*..... 210
4. Where a tenant under his landlord's authority purchased material in June for improvements on the property, and the landlord authorized the purchase of other material in September, *held* that the latter authorization did not extend the time for filing a lien for the material furnished in June to four months from the September purchase. *Carr & Neff Lumber Co. v. Krogh* 537
5. Material furnished *held* to have been furnished under one contract. *Lincoln Savings & Loan Ass'n v. Webber*..... 698
6. Where, in an affidavit for a mechanic's lien, the property

Mechanics' Liens—*Concluded.*
is described so as to enable a party familiar with the locality to identify it, it is sufficient. *Lincoln Savings & Loan Ass'n v. Webber* 698
Way v. Cameron 708
7. A recital in a notice of a mechanic's lien by a subcontractor that the materials were furnished for the owner under a contract will be treated as surplusage. *Way v. Cameron*, 708
8. The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should be liberally construed. *Way v. Cameron*, 708
9. Where a contractor furnishes the plans and specifications for a dwelling-house, a claim that the work was done according to the plans and specifications is not a defense to a counterclaim for damages for defective construction. *Lincoln Stone & Supply Co. v. Ludwig*..... 722
10. In a suit to foreclose a mechanic's lien, evidence *held* to sustain judgment for defendant on a counterclaim for damages for improper construction. *Lincoln Stone & Supply Co. v. Ludwig* 722

Mortgages. See LIMITATION OF ACTIONS, 1, 4. PRINCIPAL AND AGENT, 1, 2.
1. A grantee in possession of realty under a deed given as a mortgage, who seeks to defeat the equity of redemption by showing a parol settlement or an oral election to treat the conveyance as an absolute deed, must establish such parol agreement by a clear preponderance of the evidence. *Sprecher v. Folda* 201
2. A deed given as security for debt conveys the legal title, and the grantor's remaining interest is not subject to the lien of a judgment, and can be reached only by equitable proceedings. *First Nat. Bank v. Spelts* 387
3. Where an agent, authorized to loan money on land, purchased mortgaged land in his own name agreeing to have the mortgage canceled, and thereafter sold the property to defendant, *held*, in a suit by the principal to foreclose the mortgage, that he was entitled to a decree; the mortgage remaining of record. *Walker v. Hokom* 399
4. Where purchasers at a foreclosure sale took actual possession, claiming title, and held adversely for more than ten years after the mortgagor's heirs had attained their majority, the right to redeem was barred. *McNeill v. Schumaker* 544
5. The transfer of one of 70 negotiable bonds secured by the same mortgage transfers the mortgage *pro tanto*. *Herzog v. Union Debenture Co.* 820

Mortgages—*Concluded.*

6. The foreclosure of a mortgage by the owner of one of several bonds secured thereby is not a bar to a subsequent foreclosure by an innocent purchaser of another of the bonds who was not a party to the first foreclosure. *Herzog v. Union Debenture Co.* 820

7. The purchaser at a foreclosure sale takes only the title of the parties to the suit. *Herzog v. Union Debenture Co.*..... 820

Municipal Corporations. See CONSTITUTIONAL LAW, 2. HIGHWAYS, 4-7. LIMITATION OF ACTIONS, 7. STATUTES, 2.

1. Petition in an action to recover the reasonable value of property received and retained by a city under a contract which it has power to make, but which is invalid for failure to comply with statutory requirements, *held* not demurrable. *Nebraska Telephone Co. v. City of Red Cloud*..... 6

2. A city has power, under sec. 8704 *et seq.*, Ann. St. 1911, to construct and operate a municipal electric light system for the use of the city and its inhabitants. *Bell v. City of David City* 157

3. Under our statutes, a city may use the engines and power of its electric light plant to pump water for the use of the city and its inhabitants. *Bell v. City of David City*..... 157

4. A city, in constructing an electric light plant, must not unnecessarily interfere with the rights of owners of an existing plant; and, if it does, it is liable for any injury sustained. *Bell v. City of David City*..... 157

5. The owners of an electric light plant *held* not entitled to enjoin the construction of a municipal plant, where there was no showing of actual or threatened interference by the city with plaintiff's plant. *Bell v. City of David City*... 157

6. Proposition for municipal electric light bonds *held* to provide for bonds payable in 20 years and redeemable at any time after 5 years from date of issue. *Minden-Edison Light & Power Co. v. City of Minden*..... 161

7. A municipal corporation authorized by statute to create an extraordinary debt by the issuance of negotiable bonds has inherent power to levy taxes to pay the principal and interest of the debt at maturity, unless there is a clear legislative intent to the contrary. *Minden-Edison Light & Power Co. v. City of Minden* 161

8. The grant of a certain electric light franchise *held* not to prevent the city from constructing and operating another electric light system. *Minden-Edison Light & Power Co. v. City of Minden* 161

9. A city of the second class may house the machinery neces-

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sary to operate its electric light system in the same building with the machinery of its water plant. *Minden-Edison Light & Power Co. v. City of Minden* 161

10. The fact that, in the discussion of the proposition to vote electric light bonds, certain persons expressed an opinion that surplus revenues from the operation of the plant could be used to pay the principal and interest on the bonds, *held* not to render the election void. *Minden-Edison Light & Power Co. v. City of Minden* 161

11. Compliance with sec. 54, art. III, ch. 13, Comp. St. 1911, is essential to the validity of the issuance of bonds for the construction of a municipal lighting plant in cities of from 5,000 to 25,000 inhabitants. *Brownfield v. City of Kearney*, 419

12. Sec. 54, art. III, ch. 13, Comp. St. 1911, relating to the issuance of municipal lighting bonds, having been re-enacted subsequent to secs. 1 and 2, art. V, ch. 14*a*, Comp. St. 1911, supersedes the latter act in so far as it conflicts therewith. *Brownfield v. City of Kearney* 419

13. The power granted to electors of a city to remove public officers is political in its nature, and is not the exercise of any judicial function. *State v. Houston* 445

14. The provision of the statute that a recall petition shall contain a general statement of the grounds upon which the removal is sought does not require the petition to contain specific charges of misconduct; its purpose being to furnish information upon which a political, and not a legal, issue may be raised at the election. *State v. Houston* 445

15. Under sec. 36, art. III, ch. 14*a*, Comp. St. 1911, the city clerk must determine whether the requisite number of qualified signers have signed a petition for a recall election, and his determination is not subject to review, in the absence of fraud or mistake. *State v. Houston* 445

16. Where, in the absence of fraud or mistake, a petition for a recall election is regular in form and accompanied by the proper certificate of the city clerk, the city council must convene and fix a date for the election. *State v. Houston*.. 445

17. Within constitutional and statutory limits, the mayor and council of the city of Omaha are the sole judges, under sec. 128, ch. 12*a*, Comp. St. 1911, as to when and how railroad companies shall construct viaducts over their tracks where they cross public streets at grade. *State v. Union P. R. Co*.. 556

18. In construing the validity of an ordinance directing railroad companies to construct a viaduct over tracks which cross a public street at a grade, it will be presumed that the

Municipal Corporations—*Continued.*
mayor and council acted with full knowledge of existing conditions. *State v. Union P. R. Co.* 556
19. The city of Omaha, under sec. 128, ch. 12*a*, Comp. St. 1911, can require railroad companies to construct a viaduct over their tracks, without making provision for closing the street where the tracks cross it at grade. *State v. Union P. R. Co.*, 556
20. Under the statute governing the city of Lincoln (Comp. St 1905, ch. 13, art. I, sec. 73), an amended ordinance must be read on three different days, unless such reading has been dispensed with by a two-thirds vote of the council; but, if more than two-thirds of the members vote for the amended ordinance, it is a substantial compliance with the statute. *Miller v. City of Lincoln* 577
21. Under the statute governing the city of Lincoln (Comp. St. 1905, ch. 13, art. I, sec. 4), providing that land contiguous to the city and subdivided may by ordinance be included within the city, a lot adjoining a city boulevard *held* properly included within the city. *Miller v. City of Lincoln*.... 577
22. In an action for injuries from an obstruction on a sidewalk, *held* that whether the city was negligent in failing to restore the sidewalk to a reasonably safe condition for travel and whether plaintiff was guilty of contributory negligence were questions for the jury. *Gielen v. City of Florence*..... 619
23. A city ordinance, which declared that the carcasses of all dead animals within the city, not slain for food, should become the property of the public contractor, *held* void, so far as it attempted to take private property without due process of law. *Whelan v. Daniels* 642
24. A municipal ordinance for the removal of carcasses of animals should permit the owner to remove them within a reasonable time, or to put them to a beneficial use. *Whelan v. Daniels* 642
25. The owner of unoccupied territory in a village does not, by signing a petition to vote municipal bonds, estop himself to assert the right to have such territory detached from the village under sec. 101, art. I, ch. 14, Comp. St. 1911. *MacGowan v. Village of Gibbon* 772
26. The judgment in proceedings under sec. 101, art. I, ch. 14, Comp. St. 1911, to detach unoccupied territory from a village will not be reversed, in the absence of a showing of mistake of fact or of law. *MacGowan v. Village of Gibbon*.. 772
27. The silence of the record of a village board is not conclusive evidence of the non-existence of a fact which should be recorded in enacting an ordinance. *Shaw v. Alexander*.... 774
28. The passage of an ordinance may be proved by common

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law methods, unless otherwise provided by statute. *Shaw v. Alexander* 774

29. Payments for street improvements will not be enjoined in a suit by a taxpayer who had knowledge of the progress of the work, though there were irregularities in the letting of the contract or slight defects in the construction. *Nelson v. City of Florence* 847

Negligence. See APPEAL AND ERROR, 19. CARRIERS. MASTER AND SERVANT. RAILROADS.

1. Where there is no evidence of negligence, the question of contributory negligence does not arise. *Wright v. Chicago, R. I. & P. R. Co.* 317
2. While it is for the court to say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants. *Whitlow v. Missouri P. R. Co.* 649
3. Evidence, in an action for personal injuries, *held* insufficient to show negligence of defendants. *Hurst v. Hayden Bros.*, 704

Newspapers. See TAXATION, 4.

New Trial. See APPEAL AND ERROR, 12, 14, 42, 50.

1. Where defendant was awarded a new trial for newly discovered evidence on condition that he pay the costs of all new witnesses, such condition was void, and, on judgment in his favor, all the costs were properly taxed against plaintiff. *State v. Ball* 39
2. A new trial would not be granted in an action for personal injuries on account of the smallness of the verdict alone, while sec. 315 of the code was in force. *Blakely v. Omaha & C. B. Street R. Co.* 119

Officers. See ATTORNEY GENERAL.

1. An office created by the legislature may, in the absence of any constitutional restrictions, be abolished by that body; the incumbent having no property interest therein. *State v. Houston* 445
2. In the creation of an office the legislature may impose such conditions as to its continuance and termination as it sees fit, and the incumbent takes it subject to such conditions. *State v. Houston* 445

Parent and Child. See CONSTITUTIONAL LAW, 4-7. HABEAS CORPUS.

1. Collateral heirs of deceased adopting parent *held* estopped to deny the validity of the adoption proceedings, and that the adopted child is entitled to inherit. *Milligan v. McLaughlin* 171

Parent and Child—*Concluded.*

2. One not the father of an illegitimate child does not make such child his heir by marrying the child's mother and signing the marriage record which recited that they agreed to take the child as their lawful child. *Van Hove v. Van Hove* 575

3. Where one not the father of an illegitimate child married the child's mother, and sent the child money with which to pay passage from a foreign country, and allowed him to live in the family for a short time, he did not thereby adopt him into the family, within the meaning of sec. 4931, Ann. St. 1911. *Van Hove v. Van Hove*..... 575

4. An agreement to adopt a child, though sufficient to make him an heir, could not prevent a free disposal of the property by deed or will. *Pemberton v. Perrin* 718

Parties. See GARNISHMENT, 3. STATES, 3. WILLS, 10-12.

Partnership.

Evidence *held* insufficient to show a partnership between defendants. *Hurst v. Hayden Bros.* 704

Physicians and Surgeons. See APPEAL AND ERROR, 35.

Pleading. See APPEAL AND ERROR, 13, 24. INSURANCE, 8. LIMITATION OF ACTIONS, 5. MUNICIPAL CORPORATIONS, 1.

1. A demurrer to a pleading admits only such facts as are well pleaded. *Busboom v. Schmidt* 30

2. By sec. 627 of the code, under a general denial in ejectment defendant may prove an estoppel. *Fitch v. Walsh*..... 32

3. A defendant may plead as many defenses as he has, if consistent, and they will be held to be consistent unless one of them cannot be proved without disproving the other. *Ford & Isbell Lumber Co. v. Cady Lumber Co*..... 87

4. In an action for the price of lumber, certain allegation *held* not an admission, and not inconsistent with a general denial. *Ford & Isbell Lumber Co. v. Cady Lumber Co*..... 87

5. The allowance of an amendment to conform to the evidence is usually within the discretion of the trial court. *Blakcslee v. Van der Slice* 153

6. In an action on a note, it is not prejudicial error to strike all of the answer except an admission of its execution, delivery and non-payment, where no defense, counterclaim or set-off is pleaded. *Meyer Bros. Drug Co. v. Hirsching-Morse Co.* 309

7. In an action on a note, a motion for judgment for plaintiff on the pleadings should be sustained, where the answer admits execution, delivery and nonpayment, and no defense,

Pleading—*Concluded.*

counterclaim or set-off is pleaded. *Meyer Bros. Drug Co. v. Hirsching-Morse Co.* 309

8. Where a pleader makes inconsistent allegations, he is bound by those most favorable to his opponent. *Bryant v. Modern Woodmen of America* 380

9. State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence. *Butschkowski v. Brecks*..... 532

Principal and Agent. See MORTGAGES, 3.

1. Evidence *held* to show that an agent had no authority to purchase mortgaged property in his own name and obligate his principal to release the security thereon. *Walker v. Hokom* 399

2. Where one has placed his agent for investments in notes and mortgages in such a situation that persons are justified in regarding him as having full authority to make collections, payment to the agent will be payment to the principal. *Berkley v. Stewart* 550

3. In an action by the principal against an agent for fraud, the agent cannot defend on the ground that his contract of agency was void because not in writing, as required by sec. 74, ch. 73, Comp. St. 1911. *Maul v. Cole*..... 714

4. Where an agent by misrepresentations prevents an exchange of the principal's property to his damage, in an action for fraud, the agent cannot defend on the ground that a tenant's parol agreement to transfer his lease was voidable; though the exchange depended on its transfer. *Maul v Cole*, 714

Process. See INSURANCE, 7. TAXATION, 9, 14, 15.

1. The purpose of an affidavit for publication of notice to a nonresident defendant is to enable the court to determine whether the action is one in which jurisdiction may be acquired by such notice. *Armstrong v. Bates*..... 462

2. A notice to a nonresident defendant in a tax foreclosure suit published in a weekly newspaper for four consecutive weeks, beginning February 8 and ending March 1, *held* sufficient under sec. 79 of the code. *Armstrong v. Bates*.... 462

Quieting Title. See JUDGMENT, 1.

Quo Warranto.

Where a corporation, delinquent in the payment of an occupation fee, as provided in sec. 4260, Ann. St. 1911, pays the fee and penalty demanded by the secretary of state, the fact that the corporation paid a less sum than the required fee will not, in the absence of a demand for the remainder and

Quo Warranto—*Concluded.*

a refusal, authorize ouster of the corporation. *State v. Sperry & Hutchinson Co.* 785

Railroads. See MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 17-19.

1. It is negligence for a railroad company to construct its embankment in such a manner as to obstruct a natural waterway and thereby divert surface waters upon the lands of others. *Iske v. Missouri P. R. Co.* 9
2. A landowner may recover damages against a railroad company for negligently maintaining an insufficient culvert, whereby his lands are flooded, though he may have recovered damages for the location of the road. *Iske v. Missouri P. R. Co.* 9
3. In an action against a railroad company for injury to property at a crossing, *held* that whether the company was negligent was a question for the jury. *Whitlow v. Missouri P. R. Co.* 649
4. Where, in an action for the value of a horse, the evidence is conflicting, the issue of negligence should be submitted to the jury. *Birdsall v. Chicago & N. W. R. Co.* 691

Remainders. See LIFE ESTATES. LIMITATION OF ACTIONS, 3.

Replevin.

1. Mere delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit, *held* not to justify the owner's refusal to accept it when returned. *Wallace v. Cox* 194
2. Where defendant in replevin, after judgment for a return of the property, refuses to accept it on the sole ground that it was damaged while unlawfully detained, his refusal cannot afterward be justified because the return was delayed for three months. *Wallace v. Cox* 194
3. Deterioration in the value of replevied property while unlawfully detained does not justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin; his remedy being an action on the replevin bond. *Wallace v. Cox* 194
4. It is plaintiff's duty in replevin to produce evidence of his title in his case in chief, and the court in its discretion may exclude such evidence on rebuttal. *Mutz v. Sanderson* 293
5. In replevin, the wrongful detention of the property and plaintiff's right to possession constitute the gist of the action. *Crancer Co. v. Combs* 655
6. Where, in replevin, the evidence showed conclusively that a sufficient demand had been made, an instruction that proof

Replevin—*Concluded.*
of a demand was necessary, if error, was not prejudicial. *Crancer Co. v. Combs* 655

Sales. See APPEAL AND ERROR, 64. EXECUTION, 1, 2.
1. Where a manufacturer sells goods to a retail dealer on condition that the buyer may return any goods not entirely satisfactory, the buyer does not waive the condition by retaining the goods for a reasonable time in an effort to dispose of them. *Cohn-Goodman Co. v. Mandelson & Goldstein* 47
2. Where the local agent of a corporation submitted a contract signed by him and a buyer to the general sales manager, and the latter telegraphed the home office to ship a part of the goods, the shipment and the receipt of the goods by the buyer constituted an acceptance of the contract, and the corporation was liable for failure to deliver the remainder of the goods; and the fact that the corporation at the time the goods were shipped had no knowledge that other goods were included in the contract will not relieve it from liability. *Monarch Portland Cement Co. v. Creedon & Sons*... 185
3. Evidence *held* to establish the ratification of a written contract by a sales manager of a corporation. *Monarch Portland Cement Co. v. Creedon & Sons*..... 185
4. A bill of sale which described the property as all the furniture in all the rooms, except room No. 10, and except one carpet and one bed, *held* to reserve all the furniture in room No. 10, and also a carpet and bed. *Damron v. Nobles*..... 527
5. Where a buyer returned the goods as damaged, and telegraphed the seller to "cut the order in two" and fill it with different goods, which direction was complied with, *held* that the buyer could not be required to receive and pay for the goods originally ordered. *Kimball-Mathews Co. v. Tucker* 632

Specific Performance. See VENDOR AND PURCHASER, 8.
A contract for the exchange of a tract of land, including a homestead, which is void as to the homestead, will not be enforced. *Anderson v. Schertz* 390

States. See STATUTES, 1.
1. Employment of an attorney in special cases relating to the duties of the board of educational lands and funds is lodged with the board itself, and not with any member thereof. *Follmer v. State* 217
2. Where the commissioner of public lands and buildings, as a member of the board of educational lands and funds, employed an attorney, who, with the board's knowledge, ren-

States—*Concluded.*

dered valuable services, in a suit against the state for his services, *held* that the fact that he was not formally employed by the board was immaterial. *Follmer v. State*..... 217

3. Action against the state by the commissioner of public lands and buildings for attorney's fees for services rendered the board of educational lands and funds *held* properly brought in the name of the commissioner as assignee of the claim. *Follmer v. State* 217

Statute of Frauds.

There must be a consideration for a modification of a contract required by the statute of frauds to be in writing, or else the new agreement must be in writing. *Lincoln Realty Co. v. Garden City Land & Immigration Co*..... 346

Statutes.

1. The singular number often includes the plural in the constructions of statutes, and "chief officer," as used in sec. 4778, Ann. St. 1911, is so construed. *Follmer v. State*..... 217
2. Sec. 128, ch. 12*a*, Comp. St. 1911, authorizing the city of Omaha to require railroad companies to construct viaducts above their tracks at street crossings, *held* a valid exercise of police power. *State v. Union P. R. Co*..... 556

Street Railways.

A pedestrian should look before crossing parallel street railway tracks, and if there is an obstruction to his view he should use additional care. *Blakely v. Omaha & C. B. Street R. Co.* 119

Taxation. See CONSTITUTIONAL LAW, 2. MUNICIPAL CORPORATIONS, 7. PROCESS. WATERS, 7-9.

1. Where land conveyed by warranty deed was quitclaimed by the grantee to one who had purchased the land at a tax foreclosure sale, *held* that the original grantor was not entitled to redeem from the foreclosure sale on the ground that the original conveyance created a resulting trust. *Farrell v. Dietrich* 136
2. Notice of expiration of time for redemption from tax sale must be served on the person in whose name the land was assessed; and there must be personal service, or a showing that such service cannot be had. *Howell v. Jordan*..... 264
3. Tender by the owner to the county treasurer of an amount sufficient to redeem the land from tax sale, and its refusal, is a sufficient compliance with the statute to enable the owner to sue to redeem. *Howell v. Jordan*..... 264
4. An order of a county board awarding the printing of the scavenger delinquent tax list to a certain newspaper *held*

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not a designation of such newspaper as the one in which subsequent notices in the same suit should be published. *Cronin v. Cronin* 353

5. All delinquent taxes must be included in a sale of land for taxes. *Wight v. McGuigan* 358

6. Real estate cannot be sold for taxes at private sale unless all delinquent taxes thereon have been included in the notice of public sale, and the land has been offered at such public sale and not sold for want of bidders. *Wight v. McGuigan* 358

7. Where a part of a tax levy is void, a sale thereunder is voidable. *Wight v. McGuigan* 358

8. A *bona fide* purchaser of land at private tax sale acquires the lien of the public though the sale is voidable. *Wight v. McGuigan* 358

9. The district court is without jurisdiction to render a default decree foreclosing a tax lien upon service by publication only, where the notice was published only seven times in a semi-weekly newspaper. *Davies v. America Investment & Trust Co.* 427

10. The payment of all delinquent taxes, both before and subsequent to the entry of a void tax foreclosure decree, with interest and penalties, where the land is unimproved, will entitle the owner to redeem. *Davies v. American Investment & Trust Co.* 427

11. Under art. IX, ch. 77, Comp. St. 1903, the district court has power to vacate a decree rendered by default which contains void taxes, and enter a valid decree, at any time before final confirmation of sale. *State v. Several Parcels of Land* 431

12. In order to redeem land sold for taxes under art. IX, ch. 77, Comp. St. 1903, the owner must pay the amount of the decree with interest at the rate provided for in the statute. *State v. Several Parcels of Land* 431

13. A description of two 40-acre tracts as "NW¼ SE¼ and SW¼ NE¼," in a petition against a nonresident to foreclose tax liens, *held* sufficient as against collateral attack, where the state, range, county, township and section were definitely stated. *Armstrong v. Bates* 462

14. In a suit to foreclose a tax lien based on service by publication, there must be strict compliance with the statute; and, if the notice is insufficient, a sale thereunder will be considered void in a suit to redeem. *Armstrong v. Griffith*.... 515

15. Where notice by publication was not addressed to the defendant, and the title of the case and the court were not set

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forth, and it was not stated that a petition had been filed, the service is insufficient. *Armstrong v. Griffith*..... 515

16. Where plaintiff had conveyed part of a tract of land to the city, and an assessment was made against the entire tract, so that it was impossible to ascertain the portion chargeable against plaintiff's land, the assessment was void. *Miller v. City of Lincoln* 577

17. The state may make the ownership of property subject to taxation relate to any day of the year; and the selection of a particular day for returns of assessment does not preclude the making of assessments as of other periods of the year. *Courtright v. Dodge County* 669

18. Sec. 37, art I, ch. 77, Comp. St. 1911, requires the assessor to list for taxation property brought into the state after April 1 and before July 1, and found in the owner's possession; and the owner, in order to escape taxation thereon, must show that the property has been listed elsewhere, or received in exchange for money or property listed for taxation during that year. *Courtright v. Dodge County*..... 669

19. The owner's affidavit that he did not, on April 1, own the property assessed, and did not bring it into the state after that date, is insufficient to authorize striking such property from the assessment roll. *Courtright v. Dodge County*..... 669

20. Where, in a suit to redeem from a tax foreclosure sale, the petition failed to describe a portion of the land, and an amended petition was filed after the time for redemption had expired, *held* that the filing of original petition, the tender of the redemption money, and the answer defending as to the whole tract preserved the right to redeem the entire tract. *Brady v. McGinley*..... 761

21. To redeem from a valid tax foreclosure sale to a person other than the plaintiff, the owner must pay the purchaser the amount of his bid with 12 per cent. interest. *Brady v. McGinley* 761

Trial. See ADVERSE POSSESSION, 3. APPEAL AND ERROR. BILLS AND NOTES, 1. CARRIERS, 3. CRIMINAL LAW. HIGHWAYS, 3. INSURANCE, 5. LIBEL, 6. MASTER AND SERVANT, 2, 6, 7. MUNICIPAL CORPORATIONS, 22. NEGLIGENCE, 2. NEW TRIAL. RAILROADS, 3, 4. REPLEVIN, 4, 6.

1. Where the issue is fairly presented in a proper instruction, the judgment will not be reversed because the same issue was defectively stated in another instruction, unless prejudice is affirmatively shown. *York & Co. v. Boomer*..... 62

2. A verdict for plaintiff, in a suit to annul a contract for fraud, will not be set aside because the trial court with-

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draws a part of his cause of action from the jury, where sufficient remains to justify the verdict. *York & Co. v. Boomer* 62
3. An instruction requiring the party on whom the burden of proof rests to "satisfy" the jury upon an issue of fact by a preponderance of the evidence is not ground for reversal where prejudice is not shown. *Whitney v. Broeder*..... 305
4. Instruction as to amount of recovery approved. *Mack v. Mack* 504
5. Direction of verdict for plaintiff *held* proper, where the evidence sustained plaintiff's cause of action, and was insufficient to sustain the only defense pleaded. *Emerson-Brantingham Co. v. McNair* 553
6. Instructions in an action on account *held* to correctly state the issues, and to be without reversible error. *Kearns v. Blum* 663
7. Motion to dismiss when plaintiff rests does not preclude defendant, after the motion is overruled, from making his defense. *Adams v. Seeley* 243

Trusts. See TAXATION, 1. WILLS, 2.
1. In a suit to recover land on the ground that a conveyance thereof created a resulting trust, evidence *held* to show a ratification of the conveyance by the grantor, and that plaintiff was not entitled to recover the land more than 16 years thereafter. *Farrell v. Dietrich* 136
2. The statute of limitations does not run against a *cestui que trust* after becoming of age until he has notice that the trustee denies his right to the property. *Goodman v. Smith*, 227
3. When property of an infant is sold and the proceeds invested in other property, and the title is taken in the name of another, a resulting trust arises in favor of the infant. *Goodman v. Smith*..... 227

Vendor and Purchaser. See LANDLORD AND TENANT, 2-4.
1. Where a purchaser tenders final payment at the time agreed upon, and the vendor is not able to transfer title, the purchaser may rescind and recover the money paid. *Rushton v. Campbell* 141
2. Where one of three owners makes false representations as to the title and quality of land, whereby plaintiff is induced to purchase it and to make payment thereon, all the owners are jointly liable for the money so paid. *Rushton v. Campbell* 141
3. Where a contract for the sale of land requires payment to be made at a certain time, but does not specify when the title

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shall be transferred, the law implies that the payment and conveyance shall be concurrent acts. *Rushton v. Campbell*, 141

4. A *bona fide* purchaser from the holder of the legal title, without actual notice of any adverse claims, need not take notice of a judgment against a prior holder of the legal title entered after such prior owner had conveyed the land. *First Nat. Bank v. Spelts*..... 387

5. A valid contract for the sale of land may be made by exchange of letters. *Dengler v. Fowler*..... 621

6. A purchaser of land in possession of a tenant *held* bound by all equities enforceable by the tenant against the vendor. *Dengler v. Fowler* 621

7. The notice imparted by a recorded lease does not relieve a purchaser from the necessity to inquiry as to the rights of a tenant in possession of the demised premises and conducting a store in buildings erected thereon at his own expense. *Dengler v. Fowler* 621

8. Purchasers of land, with notice that a lessee in possession has an option to purchase at the expiration of his lease, may be required to perform lessor's agreement to covey to lessee. *Dengler v. Fowler* 621

9. False representations by vendor *held* to justify rescission of a contract by vendee who relied upon them and never saw the land. *Howard v. Duncan*..... 685

10. The purchaser of real estate, with knowledge of his grantor's rights therein, takes only those rights. *Thuresson v. Seifert* 823

Venue.

Where a suit was instituted against three defendants, one of whom resided in the county, a finding that all were jointly liable fixed the jurisdiction over those residing in another county. *Rushton v. Campbell* 141

Waters. See RAILROADS, 1, 2.

1. A landowner may rely on the belief that an adjoining proprietor will not wrongfully divert flood waters upon his premises, and need not anticipate such wrongful action by digging a ditch before a flood comes, or by cleaning out one already constructed. *Iske v. Missouri P. R. Co*..... 9

2. Void bonds of an irrigation district issued to pay for excavating a canal may be canceled without requiring the district to pay the holders of the bonds the reasonable value of services performed, where the contract was in violation of statute, and resulted in no benefit to the district. *Paxton Irrigation District v. Conway*..... 205

Waters—*Continued.*

3. Bonds of an irrigation district, issued in violation of mandatory legislation that they shall be signed by the secretary of the district, sealed, and paid in instalments maturing at different times, and shall be numbered consecutively as issued, bearing date from time of issuance, are void. *Paxton Irrigation District v. Conway* 205
4. An irrigation district, by paying interest on void bonds with taxes levied for that purpose, does not thereby estop itself from assailing them as illegal. *Paxton Irrigation District v. Conway* 205
5. An order in a statutory proceeding confirming the preliminary steps to the issuance of bonds of an irrigation district does not affect a subsequent, unlawful negotiation or transfer of the bonds. *Paxton Irrigation District v. Conway* 205
6. A person who contracts to purchase bonds of an irrigation district and to excavate a canal in exchange therefor must take notice of the statute governing the district and the limitations of its officers. *Paxton Irrigation District v. Conway* 205
7. The county board may levy taxes for costs of organization and payment of bonds of an irrigation district when the district board neglects to do so, but the district board alone can levy a tax for the general purposes of the district. *Wight v. McGuigan* 358
8. Where the provisions of sec. 16, ch. 70, laws 1895, in reference to assessments of irrigation districts, have been substantially complied with and the district board has reviewed the assessment and a levy has been made, it will be presumed, in a suit to cancel the tax, that the district board made the levy. *Wight v. McGuigan* 358
9. Under sec. 49, ch. 70, laws 1895, land incapable of irrigation cannot be included in an irrigation district or taxed for irrigation purposes, but comparatively small knolls or sloughs on a tract of land will not necessarily require its exclusion, and the tract should be assessed as a whole. *Wight v. McGuigan* 358
10. "Appropriation" as used in the irrigation statutes of Nebraska (Comp. St. 1911, ch. 93*a*) defined. *Commonwealth Power Co. v. State Board of Irrigation* 613
11. Where a grant of the use of all the unappropriated water in a stream was in force, a subsequent application for the same water *held* properly denied. *Commonwealth Power Co. v. State Board of Irrigation* 613
12. Under sec. 8*a*, art. II, ch. 93*a*, Comp. St. 1911, it is the im-

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perative duty of the secretary of the state board of irrigation, highways and drainage to pay the fees for filing for water to the state treasurer, and no right can be predicated against the board by reason of the secretary complying with the statute. *Commonwealth Power Co. v. State Board of Irrigation* 613

Wills. See EXECUTORS AND ADMINISTRATORS, 1.

1. A gift by will of the income of certain shares of bank stock to the "First Congregational Church Society" *held* a donation to a public charity. *In re Estate of Douglass*..... 280
2. Officers of a bank, designated in a will as trustees to hold title to stock of the bank bequeathed to a church, are not disqualified to act as such trustees. *In re Estate of Douglass* 280
3. A gift by will of a house and lots to a church society so long as it is used for a parsonage is a donation to a public charity, and vests the society with a base fee to the property. *In re Estate of Douglass*..... 280
4. An allegation that mistake of inserting 9 instead of 10 as the number of the range of land devised was the mistake of the scrivener is sustained by evidence that the wrong number was induced by oversight of the testatrix. *Pemberton v. Perrin* 718
5. A will describing the devisee as "my nephew John Conrod, of Coldwater," sufficiently identifies John Conrod Swart, who resided at Coldwater when the will was made, and was the only nephew of testatrix residing there. *Pemberton v. Perrin* 718
6. Where a will described land devised as in range 9, parol evidence that testatrix owned land in range 10 otherwise answering the description, and no other land, *held* admissible to show that the land was described as in range 9 by mistake. *Pemberton v. Perrin* 718
7. A will devising the use of real estate on which testator holds a mortgage will pass his interest as mortgagee. *Battey v. Battey* 729
8. To authorize probate of a copy of a will 19 years after the original will was executed, the proponent must show what became of the original will, in whose custody it was placed, account for its nonproduction, and produce competent proof of its contents. *In re Estate of Francis*..... 742
9. Evidence *held* not to show that testatrix was unduly influenced in the execution of her will. *In re Estate of Kuhman* 783

Wills—*Concluded.*

10. Every person interested is a party to a probate proceeding to settle distribution of an estate under a will. *In re Estate of Sweeney* 834
11. Where, in a proceeding for distribution, A asks for an order excluding B from participation in the assets, he cannot afterwards object to B's appearance to protect his interest upon appeal in the district court. *In re Estate of Sweeney*, 834
12. An appeal from an order denying probate of a will removes the whole case to the district court, and all parties interested are entitled to be heard in the appellate court. *In re Estate of Sweeney* 834
13. On appeal to the district court from an order denying probate of a will, the burden rests on proponents to prove its due execution and testamentary capacity. *In re Estate of Sweeney* 834
14. Evidence *held* to establish lack of testamentary capacity. *In re Estate of Sweeney*..... 834

Witnesses. See INTOXICATING LIQUORS, 1.

1. The cross-examination of a witness should be restricted to the facts and circumstances in his direct examination. *Easton v. Snyder-Trimble Co*..... 18
2. It is not error to confine cross-examination to matters drawn out on direct examination. *Mutz v. Sanderson*..... 293