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JOHN H. KERSENBROCK, APPELLANT, V. BURDETTE BOYES; BLUE RIVER POWER COMPANY ET AL., APPELLEES.

FILED FEBRUARY 27, 1914. No. 18,114.

1. **Waters:** IRRIGATION: CANCELATION OF WATER APPROPRIATIONS. The irrigation law of 1911, authorizing the state board of irrigation to cancel water appropriations not put to a "beneficial or useful purpose," applies to applications made both before and after the passage of the act. Laws 1911, ch. 153, secs. 17-37.
2. ———: ———: ———: VALIDITY OF STATUTE. Under the irrigation law of 1911, the authority of the state board of irrigation to cancel an application to appropriate public water for irrigation or power may be exercised after notice and an opportunity to be heard, "if it appears that such water appropriation has not been put to a beneficial or useful purpose," and the legislation is not void because it applies to both past and future applications.
3. ———: ———: ACQUISITION OF WATER RIGHTS. A vested right to the use of public water for irrigation or power depends upon the appropriator's compliance with the conditions imposed by statute, and is not acquired by means of a certificate procured by fraud from the state board of irrigation.
4. ———: ———: ———. A feasible plan for applying public water to a beneficial use, undertaken and carried out in good faith by an appropriator, is necessary to the acquiring of a vested right to a statutory appropriation for irrigation or power.
5. ———: ———: ———: LIMITATIONS Under the laws in force before the irrigation act of 1911 was passed, an applicant for an appropriation of water did not, as a matter of right, have more than ten years to comply with statutory conditions for acquiring such an appropriation.
6. ———: STATE BOARD OF IRRIGATION: APPEAL. Upon appeal from an order of the state board of irrigation, the inquiry is ordinarily limited to the questions submitted to that tribunal.
7. ———: ———: POWERS. The state board of irrigation is a tribunal, quasi-judicial in its nature, with authority to perform statutory duties in administering public waters, and is not disqualified to hear a controversy between the state and an appropriator whose right is contested by the state.

APPEAL from the district court for Seward county: EDWARD E. GOOD, JUDGE. *Affirmed.*

B. F. Good, W. N. Hensley and *A. M. Bunting,* for appellant.

Edwin Vail, Norval Bros. and *J. J. Thomas, contra.*

ROSE, J.

The subject of controversy is the right of plaintiff to use for irrigation and power public water of the west fork of the Blue river, where it crosses his land near the center of the southeast quarter of section 32, township 9, range 3 east, in Seward county. Plaintiff asserts that he acquired water rights under two applications made to the state board of irrigation, December 20, 1895, one for an appropriation of 2 1/7 cubic feet of water a second for irrigation, and the other for an appropriation of 105 cubic feet of water a second for the generating of power for a grist-mill and for the pumping of water for irrigation, including the right to construct a dam five feet high at the place described. A certificate evidencing the appropriation for irrigation was issued to plaintiff May 20, 1907; but no certificate showing an appropriation for power was ever issued to him, though he pleads that he complied with statutory conditions; that he performed the necessary work and made the required improvements; that he applied public water to beneficial uses; that he acquired, and still retains, the right sought under both applications; and that his privilege of applying water to beneficial uses still exists. His claims are resisted by the Blue River Power Company and the state of Nebraska, defendants, on the grounds that he never perfected his appropriations by complying with statutory conditions; that he never applied public water to a beneficial use; that his certificate was procured by fraud; that, even if he had used water for irrigation, he abandoned the use in 1896, and thus lost the right; that no certificate of appropriation for power was ever issued to him, or such a right acquired; that for more than ten years no beneficial use of public water has been made under either application. The Blue River Power Company, defendant, filed with the state board, Jan-

uary 3, 1912, an application for an appropriation of 100 cubic feet of water a second for the purpose of operating an electric power plant on the site described in plaintiff's applications, including the right to construct at the same place a dam 15 feet high. Rival applicants having asserted the right to use the same public water at the same site, the state board, February 13, 1912, directed plaintiff to appear and show cause why his applications should not be canceled. Upon a trial of the issues the state board canceled both of the applications of plaintiff June 15, 1912, and he appealed to the district court for Seward county, where the facts were fully pleaded. After the parties on both sides had adduced proofs at great length, the trial court found all of the issues in favor of defendants and upheld the order of the state board. Plaintiff appeals to this court for the relief denied below.

Plaintiff argues that the action of the state board in attempting to cancel his water rights was premature. This proposition is based on the law of 1911, providing that "immediately upon the passage and approval of this act, or as soon as possible, and as often thereafter as shall be necessary, it shall be the duty of the state board to examine into the condition of every water appropriation within this state," and that, after a notice and an appearance, "the said board shall hear evidence, and if it appears that such water appropriation has not been put to a beneficial or useful purpose, or having ceased to be used for such purpose for more than three years, the same shall be declared canceled and anulled." This statute went into effect April 10, 1911. Laws 1911, ch. 153, secs. 17, 37. Plaintiff insists that it operates prospectively only, and permits him to make a beneficial use of water any time within three years from the enactment of the statute, or any time before April 10, 1914; that the board cannot cancel his water rights at an earlier date; that he is a riparian proprietor; that he spent large sums of money in making improvements; and that he acquired vested rights which cannot be taken away without the allowance of a

reasonable time after the passage of the act to apply water to beneficial uses.

It seems clear that the legislature, in passing the act of 1911, conferred upon the state board power to cancel prior applications for appropriations of water without waiting three years. The law was passed with an emergency clause, making it effective upon its approval. The state board was directed to act "immediately," or "as soon as possible," and "as often thereafter as shall be necessary." The power to cancel exists after notice and an opportunity to be heard, "if it appears that such water appropriation has not been put to a beneficial or useful purpose." The terms of the statute, therefore, make it clear that the power to cancel applies to former cases, where "such water appropriation has not been put to a beneficial or useful purpose," within the meaning of the law, and that it may be exercised after reasonable notice and an opportunity to be heard. The power to cancel applications for failure of applicants to comply with statutory conditions applies alike to the past and the future, and on familiar principles the act of the legislature is not for that reason void.

Did the state board in canceling the applications of plaintiff deprive him of vested rights? He was notified by the state board to appear and show cause why his applications should not be canceled. He had an opportunity to make his defense. From an adverse order he appealed to the district court, where formal pleadings were filed by all of the parties and where the cause was tried according to established forms of procedure in courts of justice. Plaintiff insists that the action of the state board, if sustained, will deprive him of his investments, of his site for a dam, and interfere with prospecting for minerals. It is true that he expended large amounts of money in constructing a dam, in installing a pump, in conveying water from the river to his land, and in drilling for minerals. However, a vested right to the use of public water, for irrigation or power, depends upon compliance with the conditions imposed by statute. The certificate of

the state board that plaintiff had acquired an appropriation of water for irrigation did not of itself create or grant such a right. It was, at best, evidence of a water right. Plaintiff made his applications under the act of 1895. Laws, 1895, ch. 69. Beneficial use of water was a condition of his right to a certificate under that statute, as well as under the act of 1911. His own testimony shows that he made false statements to the state board relating to his compliance with conditions on which a water right for irrigation depends. He did not comply with statutory obligations. His certificate was procured by fraud. It granted no rights. While he pumped water out of the river and conveyed it to his land, he provided no practical means of distribution or of application to a "beneficial use," within the meaning of the irrigation law. A feasible scheme of irrigation, as contemplated by statute, was wanting. Though the evidence is uncontradicted that plaintiff has made no attempt at irrigation since 1896, the finding of the trial court that he never applied any water to a beneficial use for that purpose is manifestly correct. It follows that in this respect he neither acquired nor lost a vested right.

Plaintiff's other application contemplated the construction and maintenance of a dam five feet high, the running of a grist-mill, and the pumping of water for irrigation. The conditions of acquiring rights under this application, as indicated on its face, required plaintiff to begin the work of construction by June 1, 1898, to complete it and to apply waters to a beneficial use by September 1, 1899. Proof of compliance with these conditions was never made, and no certificate to that effect was ever issued. It has already been shown that water pumped for irrigation was not applied to a beneficial use. No grist-mill was erected, and only a small quantity of feed was ground with water-power. For a period of more than ten years before plaintiff was cited to appear before the state board, the dam was not in a condition to generate power for the beneficial uses of pumping water for irrigation or for running a grist-mill. The evidence shows clearly that plaintiff did

not comply with statutory conditions or make a beneficial use of public water under either application. A feasible plan, undertaken and carried out in good faith, is necessary to a vested right to a statutory appropriation of water for irrigation or power. Within the meaning of the statute, plaintiff did not apply water to a beneficial use under either application, and consequently he did not acquire a vested right, which the state board could not cancel.

It is suggested that the act of 1895, under which plaintiff's applications were made, did not limit the time to apply water to beneficial uses. That act declares: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases." Laws 1895, ch. 69, sec. 18. Under any construction of the act, plaintiff did not have over ten years to comply with statutory conditions. *Farmers Canal Co. v. Frank,* 72 Neb. 136. Even that period had expired before the act of 1911 was passed, and before any action to cancel his applications had been taken by the state board.

This is an appeal to the district court from an order of the state board, and is confined to the cancelation of the applications made by plaintiff. His rights as a riparian proprietor and an alleged trespass by the Blue River Power Company upon his site for a dam are not involved or considered.

It is further argued that the state is a party to the proceeding, and cannot sit in its own case to cancel rights which it has granted. The position is untenable. The state board is a tribunal, quasi-judicial in its nature, with authority to perform statutory duties in administering the public waters of the state. *Farmers Canal Co. v. Frank,* 72 Neb. 136. The state board is impartial between plaintiff and the state. It is no more disqualified in this case than a court in an action between an individual and the state.

There is no error in the record.

AFFIRMED.

HAMER, J., dissenting.

Appellant is the owner of the southeast quarter of section 32, township 9, range 3 east, in Seward county. He has owned the land, as it is claimed, for more than 20 years. The west fork of the Blue river runs through it. It is claimed there is plenty of water in that stream for power purposes, as also for domestic use. The appellant undertook to make use of the water in the west fork for irrigation and power purposes. A certificate of appropriation seems to have been issued to Kersenbrock by the state board of irrigation May 20, 1907. Proof seems to have been submitted November 20, 1900, and the application had been made on the 16th day of March, 1898. The first application was No. 211. On December 20, 1895, Kersenbrock filed a second application, No. 214. This seems to have been granted by the board, and gave him the right to use 105 cubic feet a second for power purposes, and the right to build a dam five feet above low-water mark upon his land. In September preceding the applications, Kersenbrock built a substantial dam across the west fork of the Blue river at the point designated, and installed a large amount of machinery, pumps and reservoirs, said to have cost him in all about $8,000. He constructed reservoirs, flumes, and pumps and power-house. It is claimed by the appellant that certificate No. 318, of date May 20, 1907, gives an undisputed right to construct the dam and make a beneficial use of the waters for the purposes set forth in the application. It is claimed that the appellant has expended about $9,000 in the improvement mentioned, and it is alleged that he intends to continue the prosecution of his work; that, while the dam is out of repair, he is ready to repair it, and to replace in his power-house machinery designed to aid in the prosecution of his work; that he intends to further develop the work that he has begun.

On the 3d day of January, 1912, the Blue River Power Company filed an application before the state board of irrigation, drainage and highways for the right to use 100

cubic feet of water a second out of the west fork of the Blue river, and upon the same site covered by the above applications of the appellant, Nos. 211 and 214. On February 13, 1912, a notice was served upon the appellant, Kersenbrock, citing him to appear on March 16 and show cause why his rights under the above application should not have been canceled. Kersenbrock appeared. A series of hearings were had. Ultimately the board made an order canceling Kersenbrock's rights. He then appealed to the district court for Seward county. That court rendered a decree against him. He has appealed to this court from the decree of the district court for Seward county. Section 6797 Ann. St. 1911, provided, before its repeal: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases."

On the 4th day of April, 1911, this statute was amended, and its substance so changed as to provide that *immediately* upon the passage and approval of this act, or as soon as possible, and as often thereafter as shall be necessary, it shall be the duty of the state board to examine into the condition of every water appropriation within this state, either by its secretary, assistant secretary, or superintendents, and into the condition of all ditches and canals constructed or partially constructed within the state of Nebraska. There is a further provision that a report shall be made, and that, if it shall appear that any water appropriation has not been used for a beneficial purpose for more than three years, then the state board shall appoint a place and time of hearing, and shall serve notice upon the person, association or corporation owning such water appropriation, or owning such ditch or canal, or other diverting works, to show cause by such time why the water appropriation should not be declared forfeited and annulled; also that such notice shall be served upon the landowners under such appropriation ditch or canal. It is urged that before the enactment of this statute there was no specific statute of limitations fixing the time within

which appropriators of water should make beneficial use for the purpose indicated in their applications. It is contended with much force that the grants heretofore issued cannot be set aside for non-user, or for any other cause until the appropriators are given their day in court. It is said that the legislature fixed a time in the enactment within which appropriators must make a beneficial use of waters under their applications, and a tribunal in which the appropriator has a right to be heard. It is objected that the legislature attempted to enact a statute of limitations, and to make it "effective immediately." I do not think this can be done. Prior to the passage of this act it was possible for the appropriator to make an application for the water and to apply it as best he could. This statute should be construed in the light of the circumstances and all the facts. The irrigators in this state are generally in a new section of the state, and they are not able to do what the appropriator did in this case—spend $9,000 in the development of his plant. If the irrigator indicates his good faith by the construction of a dam and ditch and a pump, or other means of diversion, he ought to have a fair opportunity to complete his plant, and his property should not be summarily taken away from him. I am unable to agree with the majority opinion that the state board of irrigation, drainage and highways has the power to at once cancel the appropriator's right because he has been slow to develop his property, or because he has been unfortunate in having his dam swept away by a flood. In any event there should be a statute of limitations. No such statute has been passed.

There should be a hearing before a *court*. The state board of irrigation is not a court under our constitution, and does not have authority to deprive any man of his property.

In *Whiffin v. Higgenbotham*, 80 Neb. 468, it is said in the syllabus: "Section 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights, vested or otherwise, extended to them by the stat-

ute in force when the purchase was made." The principle declared in that case is certainly applicable to this one. Whatever right the appellant had prior to the passage of this new act he still has until it is taken away from him by a hearing in a court, and after the period provided by a reasonable statute of limitations has expired. While the statute of limitations may be changed, there must be such a statute, and the period fixed must be reasonable. In the body of the opinion in the *Whiffin* case it is said: "We cannot presume that the legislature passed a meaningless statute, and the only force which this section can have is to save to the plaintiff and others in his position every right given him by the old revenue law."

In *Vance v. Vance,* 108 U. S. 514, Mr. Justice Miller, delivering the opinion of the court, said that the time given for the act to be done must be a reasonable time. The right of a water appropriator is, and ought to be, quite as substantial as the right of the owner of the legal title to real estate.

In *Farmers Canal Co. v. Frank,* 72 Neb. 136, it is said in paragraph four of the syllabus: "Non-user must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property, in order to lose the right of appropriation." In paragraph three of the same syllabus it is said: "Under the facts in this case, *held,* that the right of the Farmers Canal Company and its successor, Roberts Walker, to the appropriation of water awarded under the adjudication of the state board of irrigation has not been lost by abandonment." It will be remembered in that case the work covered a long period of time. Under the rule laid down in that case, the appellant in this case, up to the time of the passage of the new act, was in quite as good condition as the successful litigant in the *Frank* case. Shall the courts protect a litigant in such a case as the *Frank* case, while the legislature legislates another litigant out of existence in such a case as the present one? The similarity of the cases as to time is apparent. It is the difference in results

that tends to demonstrate a condition not readily understood.

The new statute seems to add three years' time within which Kersenbrock may make a beneficial use of the water under his rights. I am wholly unable to agree with the majority opinion. It seems to authorize the destruction of substantial property rights without a proper hearing.

THIRZA SHEARON, GUARDIAN, APPELLEE, V. J. ARTHUR GOFF, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,454.

1. **Homestead:** SELECTION: OCCUPANCY. Actual occupancy of lands or town lots, within the limits defined by statute, by a husband and wife at the time of the death of the fee-holding spouse will, in the absence of clear and satisfactory evidence to the contrary, be deemed a selection of the same from the separate property of the decedent spouse as the homestead of the husband and wife.
2. ———: DESCENT. And, under the provisions of section 17, ch. 36, Comp. St. 1911, such homestead, upon the death of the fee-holding spouse, vests, *eo instante*, in the surviving spouse for life, with remainder in the heirs of the fee-holding spouse, regardless of whether or not there are children to be provided for by the survivor.
3. ———: ———. During the life of the owner of the fee of a homestead the exempt character of the property depends upon its occupancy as a homestead; but upon the death of the fee-holding spouse a new title is created which vests, *eo instante*, in the survivor for life, individually and unconditionally, free from the right of the children of either spouse to a division of the income therefrom.
4. **Disaffirmance.** *Guthman v. Guthman*, 18 Neb. 98, examined, and the dictum appearing on page 106, discussed in this opinion, is expressly disaffirmed.

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

95 Neb. 27

Hartigan & Wunder and *C. H. Denney,* for appellant.

Heasty & Barnes, F. L. Rain and *F. N. Prout, contra.*

FAWCETT, J.

Stella M. Goff, while the owner of the west half of the northwest quarter of section 27, township 3, range 2, in Jefferson county, died intestate, leaving her husband, defendant herein, and Bernice Hartman, her daughter by a former marriage, as her only heirs at law. At the time of her death she and the defendant were occupying the 80 acres of land above described as their homestead. It was incumbered by a mortgage of $1,650. Since the death of his wife defendant has been in possession of the property and has been receiving the rents and profits thereof. Plaintiff as guardian of Bernice instituted this suit in the district court for Jefferson county. She alleges, in substance, that Bernice is a minor under the age of 14 years, and is the owner in fee and entitled to the possession of the lands in controversy; that the estate of Stella M. Goff, deceased, has been fully administered and the administrator discharged, and prays that defendant may be required to account for the rents and profits since the death of Mrs. Goff; that the title may be quieted in Bernice, and that she be given possession of the premises. Defendant for answer and cross-petition alleges that the heirs of decedent are Bernice and himself, the former inheriting three-fourths and he one-fourth of the estate, subject to his homestead interest; denies that there is anything due the guardian out of the rents and profits; prays that plaintiff's petition be dismissed, that his homestead interest in the property in the sum of $2,000 be confirmed in him, that the interests of the parties be found as above set out, subject to his homestead interest, that the land be partitioned, if it can be equitably done, and, if not, that it be sold subject to the mortgage, and the present worth of the interest of each of the parties be determined and the money divided according to such interests. Honorable F. N. Prout was appointed guardian *ad litem* of Bernice, and as such filed a

reply and answer to the answer and cross-petition of the defendant, in which he admits that at the time of Mrs. Goff's death she and defendant occupied the land in suit, but denies that the same was occupied as a homestead; admits the mortgage; denies that defendant is entitled to the control of the land by reason of the fact that it is a homestead; alleges that Bernice has no property of any character except the premises in controversy, and that her guardian has supported, maintained and cared for her, that if a homestead right exists the same is for the care, nurture and protection of Bernice, and not for the use and benefit of the defendant; admits the heirship of defendant and Bernice in the proportions above stated; joins in the prayer of plaintiff's petition, and further prays that the court fully protect the rights of Bernice, and that, in the event it should be determined that defendant has a right of homestead, and that the same must be sold under a decree partitioning the same, the full value of the homestead be impounded by the court and ordered invested under its direction, and the income devoted to the care, nurture and maintenance of Bernice, and upon the death of defendant turned over to her or her guardian, that three-fourths of the remainder of the proceeds of the sale be disposed of for the use and benefit of Bernice. The district court found the relationship of Bernice and defendant, and their interests in the fee simple title of the land, as above set out, subject to the mortgage, and subject also to a homestead right therein in favor of defendant, to the amount of $2,000; that defendant by reason of his ownership of an undivided one-fourth interest is entitled to partition; that defendant is not the parent of Bernice, does not contribute to her support, and is not entitled to the sole use and benefit of the homestead interest in the premises, but should share the same equally with Bernice. A referee was appointed, and, he having reported that the premises could not be equitably partitioned, the land was sold, subject to the mortgage, for $2,857. The case came on for hearing on motion of plaintiff to confirm the sale. A rule was entered for all parties to show cause by 4 o'clock the same

day why the sale should not be confirmed. At that hour, no objections having been filed, the court entered an order confirming the sale, and ordering that the proceeds be applied, first, to the payment of the costs, including the fees of the guardian *ad litem* and referee; that out of the residue of the proceeds of the sale the homestead interest in the sum of $2,000 be paid to the clerk of the court, to be by him, under the direction of the court, invested in some safe interest-bearing securities, and the income therefrom equally divided between Bernice and defendant during the lifetime of defendant, and at his death the full sum to be paid to Bernice; that the residue of the proceeds of the sale be divided, one-fourth to defendant and three-fourths to plaintiff as guardian of Bernice. From this judgment defendant has appealed.

As stated by counsel for plaintiff in their brief, but two questions are involved in this case: "First. Did a homestead right exist in favor of defendant at the time of the death of Mrs. Goff? Second. If such homestead right did exist, is Mrs. Goff's child entitled to any part of the income therefrom?" We shall not spend any time considering the first point. The evidence is uncontradicted that at the time of the death of Mrs. Goff she and the defendant were husband and wife and were occupying the land as their homestead. This being a fact, then the further fact that a homestead right exists in favor of defendant is too well settled in this state to require discussion. The nature and extent of that homestead right is involved in the second point.

Section 17, ch. 36, Comp. St. 1911, provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." The contention of plaintiff is that the homestead does not descend to the surviving spouse, individually, for life, but that it descends to the survivor and family; and *Guthman v. Guthman*,

18 Neb. 98, 106, is relied upon to sustain this contention. After considering the case, and at the close of the opinion, it is said: "It may not be out of place in this connection to say, for the guidance of the lower courts, that the homestead set apart and assigned to the petitioner in this proceeding must be held by her as well for the benefit of the respondent, Minnie Ellen Guthman, during her minority, as for herself, as a home, and while the same is rented out during said minority the said Minnie Ellen will be entitled to share equally with the petitioner in the net rental profits thereof." This language would seem to support plaintiff's view; but an examination of the case shows very clearly that the language used is entirely outside of the question litigated and decided. In that case the plaintiff filed her petition in the county court asking that her homestead be set off to her, and that her dower in the residue of the decedent's lands be admeasured and assigned. The county court sustained her contention, over the objection of the heirs, set off to her a quarter section of land as her homestead, and held that she was entitled to dower in the remaining lands of the decedent. On appeal to the district court it was there held that the county court was without jurisdiction to set apart the homestead to the petitioner, and that, the case being one on appeal, the district court was in like manner without jurisdiction. The judgment of the county court was therefore reversed as to the assignment of the homestead, and affirmed on the question of dower. On appeal to this court this judgment was entered: "The judgment of the district court in so far as it affirms the judgment of the county court is affirmed, and in so far as it reverses the judgment of the county court is reversed, and the judgment of the county court is in all things affirmed." This statement of the issues that were tried and determined both in the district court and in this court shows that the language quoted from the opinion was dictum pure and simple. The section of the statute under consideration has been so frequently construed by this court contrary to the dictum in *Guthman v. Guth-*

man, supra, that we will refer to enough of the cases to set that question at rest.

In *Durland v. Seiler*, 27 Neb. 33, our then and present chief justice, in construing this statute, said: "During the life of the owner of the fee the exempt character of the property was made to depend upon its occupation as a homestead. But upon his or her death a new title is created which vests in the survivor for life unconditionally."

In *Nebraska Loan & Trust Co. v. Smassall,* 38 Neb. 516, it is held that under this statute, "if the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, etc. This life estate the survivor may mortgage, and the purchaser under the decree of foreclosure will acquire the life estate." The opinion in that case was by Mr. Chief Justice Maxwell.

In *Brichacek v. Brichacek,* 75 Neb. 417, it is held that under this statute "a homestead which was the separate property of the wife, at her death, vests in her surviving husband for life, and the wife has no power to limit or dispose of the life estate of the survivor by will."

In *In re Estate of Fletcher,* 83 Neb. 156, we held: "A widow need not account to the estate of her husband for the rents and profits of their homestead which have accrued subsequent to his death." The opinion was by Root, J. On page 159 it is said: "It is claimed that the widow should account for rent received by her for the use of a house and two lots in the city of Crete. The court found that said property was the homestead of the deceased, and that finding is sustained by the evidence. The widow, upon her husband's death, became seized of a life estate in said homestead, and she need not account for the use thereof or the rents accruing subsequent to her husband's death."

In *In re Estate of Robertson,* 86 Neb. 490, it is held: "Where a woman, while living with her husband and children upon certain real estate as the family homestead, became insane, and remained in that condition until after

her husband's death, her husband had no power to divest her of her interest in the homestead, by will." The opinion was by Letton, J. It shows that, while Robertson and his wife were living together and occupying the property in controversy as their homestead, Mrs. Robertson became insane and was committed to an asylum. It is apparent from a reading of the opinion that her insanity was incurable. After she was confined in the asylum Robertson lived on the premises with another woman, and by her had three children. He died testate. In his will he devised a certain lot in Lincoln to his wife, and three-fourths (and in a certain contingency all) of his real estate to those three children, all of whom were minors. A guardian *ad litem* for the widow was appointed by the county court. As such guardian *ad litem* he filed an application praying that he might be permitted to elect on behalf of the widow whether to receive the provision of the will or to have assigned to her dower interest in the real estate and the provisions made for her by statute. He was permitted to do so, and elected to renounce the provisions of the will. He also prayed that the court assign to the widow her life estate in the homestead and for the assignment of dower. Appraisers were appointed, who valued the residence property at less than $2,000, and set the same apart as a homestead. The executor appeared and objected to the report, setting out that the homestead was worth more than $2,000, was not occupied as a homestead by the widow at the time of testator's death, and that it left nothing for the minor heirs as contemplated by the will. The county court found for the petitioner, and confirmed the proceedings; ordered that the widow have possession of the homestead during her natural life, and that the three minor heirs of Robertson share with her in the rents, issues and profits of the homestead during their minority. It also adjudged that the minors should receive the sum of $10 a month from the rents, issues and profits of the homestead for their maintenance until further order. An appeal was taken from these orders to the district court, where upon the same issues the objections

of the executor were overruled; the order of the county court confirming the report of appraisers and setting apart the homestead to the widow was affirmed; the order giving to the minor heirs a share in the rents, issues and profits of the homestead was reversed; and it was ordered that the guardian *ad litem* have possession of the property as the homestead of the widow. From this judgment the executor appealed to this court. We affirmed the judgment of the district court in all respects, except as to the order that the guardian *ad litem* have possession of the property as the homestead of the widow, for the reason that the guardian *ad litem* is a special guardian, appointed solely for the purpose of carrying on litigation and preserving the interests of his ward in matters pending before the courts; that he had no right to the possession of the real property of his ward or to the rents and profits therefrom; that he gives no bond, and has only special duties; that, for the purpose of taking care of the estate, a general guardian should be appointed. The cause was remanded, with directions to modify the judgment upon that point only. In the opinion, on page 493, it is said: "In the case at bar, upon Robertson's death the homestead, not exceeding two lots in extent or $2,000 in value, vested at once 'in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will' (citing the statute and several former decisions). He could not take this right away from her by will without her consent. *National Bank of Commerce v. Chamberlain,* 72 Neb. 469. Her insanity could make no difference. *Weatherington v. Smith,* 77 Neb. 363. The minor heirs, either as devisees in the will or as legitimatized children, were not entitled to participate with the widow in the possession of, or in the rents and profits arising from, the homestead. They were not members of her family, and had no possessory interest in the property until her death. The executor has shown no title to or right or interest in the premises, and the widow alone is entitled to possession of the same during her natural life."

We might well stop here, but before doing so we call attention to *Hobson v. Huxtable,* on rehearing, 79 Neb. 340. In the syllabus the rule is again announced that, "if a homestead be selected from the separate property of a married woman in her lifetime, upon her death intestate, a life estate vests in the surviving spouse, and remainder in the heirs of the deceased." In the opinion by Judge Root (then commissioner), on page 342, it is said: "The title in the succession of a homestead is not evidenced by written grant, but arises from seisin, the family relation and residence; and those facts take the place of the written instrument that usually evidences the prior estate and the one in remainder. The nature of the estate devolving upon the heirs at the death of the fee-holding spouse is settled as squarely as the decision of this court can establish any principle of law, and is not open to question." That estate is a vested estate in remainder, with right of possession upon, and not until, the death of the owner of the life estate, the surviving spouse. The estate thus vested in the surviving spouse is a new and independent estate, not dependent upon the general law in relation to homesteads. During the lifetime of both husband and wife, occupancy is an essential element in the right of homestead. True, there may be a temporary absence from even such a homestead, but a permanent cessation of occupancy as a homestead would destroy its homestead character. Not so with the homestead right which vests in a surviving husband or wife. By the operation of the statute under consideration that homestead right is fixed, absolutely, not during subsequent occupancy merely, but during the life of the surviving spouse.

In *Cooley v. Jansen,* 54 Neb. 33, we held that the land of which a man dies seised, which he has not devised, and which during his life and at the time of his death was the homestead of himself and family, "vests in the widow for life, and remainder in the heirs, * * * and this is true whether she, after the death of the husband, occupies the property as a homestead or not."

A careful examination of all of the later cases in this court shows that the dictum in *Guthman v. Guthman, supra,* has never been adopted as a proper construction of the statute, and such dictum is now expressly disaffirmed. Under these decisions a surviving spouse takes a vested life estate in the homestead as such surviving spouse for his or her benefit, to the exclusion of the whole world. This is the plain reading of the statute, and, as stated in *First Nat. Bank v. Reece,* 64 Neb. 292, 297, "the right thus vested in the survivor is not made to depend upon whether any issue resulted from the marriage, but is given regardless of whether there are children to be provided for by the survivor." It follows that the district court erred in depriving the defendant of any portion of his homestead interest in the property in controversy or in attempting to place the same beyond his control.

Under our holding in *Meisner v. Hill,* 92 Neb. 435, this right of homestead in the defendant, as against the heirs of the decedent, was not subject to the $2,000 limitation. Hence, Bernice was not entitled, as an heir, to any portion of the homestead until the death of the defendant. The interests of the respective parties in the land were such that defendant could not have been compelled to submit to a sale of the 80 acres of land, which constituted his homestead, by partition or otherwise. He had a right to hold it during his natural life and to enjoy the use of it or the rents and profits arising therefrom. On the other hand, he could not have compelled the owner of the remainder estate to submit to a sale by partition or otherwise. A remainderman may say to the owner of the life estate: "You have a right to sell your life estate. Over that I have no control. But you cannot sell the entire estate. That is to say, you cannot sell my interest as a remainderman, even though you turn over to me a portion of the proceeds arising from such sale. I prefer to wait until your death and then take the entire estate." If, therefore, either of the parties to this suit had stood upon his or her legal rights, the district court would have had no alternative but to dismiss plaintiff's petition and defendant's

cross-petition. But the parties have seen fit to waive their rights in this respect. It is well settled that a homestead right is a purely personal one, which the owner may at any time waive or renounce. In like manner a remainderman may sell his remainder estate. *Schuyler v. Hanna,* 31 Neb. 307. In this case defendant has fixed the extent of homestead which he chooses to assert, and asks that the balance be distributed among the heirs of the decedent. He has thereby waived his right to assert any greater homestead interest in the estate. The plaintiff has asked that, if her contention that defendant has no homestead interest in the property be decided adversely to her, and the property sold, the proceeds may be distributed among the heirs. The district court held adversely to her on her contention above noted, and ordered the property sold under the ordinary proceedings in partition. It was sold. The money was brought into court for distribution. An order was entered requiring the parties to appear by a certain hour and show cause why the sale should not be confirmed. Neither of the parties interposed any objection, and the sale was duly confirmed, and a deed ordered to the purchaser. Under these circumstances the court is justified in holding the parties to a result which they have jointly produced, and in distributing the proceeds of the sale according to law. In making that distribution, we start out with $2,000 as the value of defendant's homestead interest in the land; that is to say, the value of his life estate. He is not entitled, however, to have this full sum paid to him, as that would be to divest the owner of the remainder of all interest in that portion of her mother's estate represented by this valuation of the life estate. Defendant having consented that the land be sold and the proceeds from its sale divided, the court should ascertain the present cash value of his life estate of $2,000, based upon his age and expectancy of life, and order paid to him such present cash value. The remainder of the proceeds arising from the sale should be divided between the defendant and the plaintiff in the proportion of one-fourth to the defendant and three-fourths to the plaintiff, as guardian.

The judgment of the district court is reversed, with directions to ascertain the present cash value of defendant's life estate of $2,000, and distribute the proceeds of the sale as above indicated.

REVERSED.

ROSE and HAMER, JJ., dissent.

EMMA KRECEK, APPELLEE, V. SUPREME LODGE OF FRATERNAL UNION OF AMERICA, APPELLANT.

FILED FEBRUARY 27, 1914. No. 18,158.

1. **Appeal**: MOTION FOR DIRECTED VERDICT: FINDING. Where, at the close of the trial of a law action, each party moves for a directed verdict, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal.
2. **Insurance**: BENEFICIAL ASSOCIATION: DUES: NOTICE TO AGENT. The secretary of a subordinate lodge of a fraternal beneficiary association, who receives the payment of dues from the members and forwards same to the company, is considered the agent of the company for that purpose, and the company will, ordinarily, be presumed to have knowledge of all facts known to such secretary in regard to the standing of members whose dues he so receives and forwards.
3. ———: ———: ———: ———. But, when the applicant for membership conspires with the secretary and others of the subordinate lodge to deceive the company and to withhold from it knowledge of facts disqualifying the applicant for membership, the presumption of knowledge of such facts on the part of the company is overcome.
4. ———: ———: MEMBERSHIP: PROHIBITED OCCUPATIONS: FRAUD. Where the membership of a fraternal beneficiary association have determined as a mutual organization, and so declared in the constitution of the society, that persons engaged in a particular occupation shall be ineligible to membership, on any terms, the power to admit a person engaged in such prohibited occupation to membership, or to ratify such membership when illegally gained, does not exist in either the supreme officers of the society or in any local lodge thereof.
5. ———: ———: ———: ———: ———: ESTOPPEL. And in such a case the payment by one so admitted, of dues and assessments

to a local lodge of the society, cannot have the effect of validating his membership; nor will it estop the company from denying liability after his death, whether the officers of the local lodge, at the time of receiving such dues and assessments, had or had not knowledge of the fraud practiced by him in gaining and retaining such membership.

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

Edward L. Bradley, Allen & Webster and *H. H. Bowes,* for appellant.

A. H. Murdock, contra.

FAWCETT, J.

Plaintiff was beneficiary in a membership certificate issued by defendant on the life of her husband. After his death she brought this action in the district court for Douglas county, and from a judgment in her favor for the amount of such certificate defendant appeals.

At the close of the trial each party moved for a directed verdict. Under such circumstances the finding of the court takes the place of a verdict of the jury, and should not be set aside unless upon the whole record it appears to be clearly wrong.

The principal contention of the defendant is that decedent was not eligible to membership, and that his membership certificate was procured by fraud and is therefore void. Under the constitution and rules of the order a saloon-keeper or bartender was not eligible to membership. In the application the decedent stated that his occupation was a "can maker." The evidence is clear that this answer was knowingly and wilfully false, and that at the time of giving this answer and signing the application the applicant was a saloon-keeper, or a bartender in a saloon. In stating his occupation, in his medical examination, there is written "sal." These letters were crossed out and the words "can maker" written in. A sister of the decedent was at the time secretary of the local

lodge. She testified that she noticed the change in occupation in the medical examiner's certificate, and shows that she understood why the change was made. She was asked: "Q. You knew when you read that, knowing that he was a bartender, that somebody had started to write 'saloon' and had crossed it out? A. I saw they started to write something; I don't know what, doctor started to do that; I didn't, haven't I been telling you that I knew the business he was in? I didn't notice particularly what they started to write in, saloon or saloon-keeper, I expected the doctor made a mistake, he knew him well, and was going to tell the truth; I expected he started to write something else; I knew it would not do to tell that." She also testified that after her brother's death she had a conversation with Mr. Bradley (one of the attorneys for defendant), "in which he asked me whether or not my brother, the deceased James Krecek, had been engaged as a bartender prior to the time that he joined the defendant order, and in which I told him that he hadn't been a bartender and had never been anything, but was a can maker until after he joined the order. My purpose was to conceal the real facts." In the light of this testimony, showing the part taken by decedent's sister, who was secretary of the local lodge and the one who forwarded the application to the supreme officers, and considering the fact that, as she says, the doctor knew the decedent well, "and was going to tell the truth" until he was stopped either by the decedent or his sister, secretary of the lodge, the fraud attempted to be perpetrated upon the society is most glaring.

It is too evident for serious thought to the contrary that the examining physician started to give decendent's true occupation of saloon-keeper; that after writing the first three letters it either dawned upon him or was suggested by the applicant that if that occupation were given he could not be admitted as a member of the order, and so the change was made. It is claimed that the medical examiner was the agent of the supreme lodge. This contention is not sound. He was not appointed examiner by the supreme lodge, but was selected by the local lodge, of which

applicant's sister was secretary. He was not even a beneficial member of the order, but had been admitted simply as a "social" member, evidently, as stated by counsel for defendant, for the purpose of securing the business of the local lodge. The sister of decedent did not continue in the office of secretary of the local lodge until the time of Krecek's death, and the secretary who succeeded her probably did not know that he was engaged in a prohibited occupation. His assessments were regularly paid into the local lodge for several years thereafter, and forwarded to the supreme lodge. There is no evidence to show that during any of the time that Krecek held his certificate of membership in the society any officer of the supreme lodge had the slightest knowledge or notice of the fact that Krecek was engaged in an occupation prohibited by the constitution of the order. Under the circumstances it would be a travesty upon justice to compel the members of the order generally to be assessed to pay the death claim on a membership gained through such fraud and deceit. The fact that some of the members of the local lodge knew of his occupation does not change the matter. They were not the persons charged with any official duty in relation thereto.

The language of Barnes, J., in *Wilhelm v. Order of Columbian Knights,* 149 Wis. 585, 588, is very appropriate to this case: "We have here a case where the agent of the defendant, and the insured and the beneficiary, his wife, entered into a conspiracy to defraud the defendant by securing a policy of insurance by means of false representations, a policy which they knew could not be obtained if the truth were disclosed. If we were without precedent for our guidance, we would have little inclination to make the court the fourth member of that conspiracy by assisting in the consummation of the fraud, but we are not. This case comes squarely within the decision in *Hanf v. Northwestern Masonic Aid Ass'n,* 76 Wis. 450, and it would be superfluous to say anything more about this branch of it." If we were to substitute the doctor and decedent's sister for the beneficiary in the case at bar, we

would have an exact parallel with the Wisconsin case. The fact that the wife of decedent is not shown to have participated in the fraud by which he obtained his certificate of membership is immaterial. Whether she then participated in the fraud or not, she is now attempting to avail herself of the benefits of that fraud. All of the parties who participated in the fraud were responsible for its results, and certainly neither the insured nor any one claiming under him should be allowed to say that the defendant must be presumed to know the facts which they had succeeded in keeping from the knowledge of its supreme officers, and that defendant has waived the objection to his occupation because of a constructive knowledge of facts which by the very conduct of the conspirators it was prevented from actually acquiring.

But, it is said that for about ten years after the decedent's sister ceased to be secretary of the local lodge Krecek regularly paid his assessments, which were received and forwarded to defendant; that during that time there were various secretaries and other officers of the local lodge who did not participate in the fraud, but who knew of the disqualification of the insured, and who received the money from time to time and forwarded it; and that, under numerous decisions of this court, defendant cannot now assert the fraud practiced upon it in gaining admission to membership as a defense to this action. But none of the authorities cited sustains such a contention. They are all cases where, at the time of becoming a member, the applicant was eligible to membership, but by reason of some act of his after gaining admission his right to remain a member became forfeited; as in *Modern Woodmen of America v. Colman*, 64 Neb. 162, and, on rehearing, 68 Neb. 660; also, *Pringle v. Modern Woodmen of America*, 76 Neb. 384, and, on rehearing, 388. In those cases it is held that a subordinate lodge of a mutual benefit society and its clerk or secretary, who is designated by the supreme lodge to receive and forward dues and assessments, are agents of the supreme lodge, and that the collection of dues and assessments from a member of the order by

the clerk of the subordinate lodge, with full knowledge of any forfeiture of the member's right to continue his membership, amounts to a waiver of the forfeiture. We have no disposition to recede from the rule announced in those cases, but they rest upon a radically different foundation from the case at bar. In the case we are considering, Krecek could not, under the constitution of the society, become a member of the order. The membership of this society having determined as a mutual organization, and so declared in the constitution of the society, that saloon-keepers and bartenders are ineligible to membership, on any terms, the power to admit them to membership, or to ratify their membership when illegally admitted, did not exist in either the supreme officers of the society or in any local lodge thereof. It follows, therefore, that the local lodge could not admit the decedent to membership, nor could the supreme officers of the society ratify its act in so doing, nor could they continue him in membership, for the reason that any attempt to do so was prohibited by the constitution, over which they had no control, and not by any mere by-law which they had enacted. When the constitution of one of these societies provides in unmistakable terms that a person engaged in a certain business *cannot* become a member of the society, and that if, after becoming a member, he enters upon such prohibited occupation, the doing so "shall *ipso facto* forfeit all rights as a member of this order," and that his certificate shall thereby become absolutely null and void without any action on the part of his local or supreme lodge, and that the payment by him of any dues and assessments thereafter shall not have the effect of waiving such forfeiture or reinstating such certificate-holder to any rights, benefits or privileges as a member, the society cannot be made liable by estoppel or waiver, for the reason that he could not be admitted to membership, or permitted to remain a member, by the most solemn affirmative action on the part of either the supreme officers or the local lodge of the society. The rule is well settled that no

one can gain anything by estoppel or waiver that he could not have gained by affirmative action or contract.

The defendant by its answer concedes the right of the plaintiff to recover the amount of the assessments paid into the society by the decedent during his lifetime. These amounts, together with interest, are all that plaintiff is entitled to recover. The judgment of the district court is therefore reversed and the cause remanded, with directions to ascertain the amounts paid in by the decedent in his lifetime as assessments upon his certificate of membership, and to render judgment therefor in favor of plaintiff, together with interest on the sums so paid, from the dates when such payments were made to the time of the original trial of this action in that court, defendant to recover its costs since the filing of its answer in the court below.

REVERSED.

SEDGWICK, J., dissenting.

I cannot concur in the opinion of the majority in this case, because it is not in harmony with the former decisions of this court, and makes the rights of the beneficiaries and policy-holders in these fraternal benevolent associations absolutely uncertain in a most important and vital matter. The majority opinion says: "When the constitution of one of those societies provides in unmistakable terms that a person engaged in a certain business *cannot* become a member of the society, and that if, after becoming a member, he enters upon such prohibited occupation, the doing so 'shall *ipso facto* forfeit all rights as a member of this order,' and that his certificate shall thereby become absolutely null and void without any action on the part of his local or supreme lodge, and that the payment by him of any dues and assessments thereafter shall not have the effect of waiving such forfeiture or reinstating such certificate-holder to any rights, benefits or privileges as a member, the society cannot be made liable by estoppel or waiver, for the reason that he could not be admitted to membership, or permitted to remain a member, by the most solemn affirmative action on the part of either the

supreme officers or the local lodge of the society." The provision of the constitution that "if, after becoming a member, he enters upon such prohibited occupation, the doing so 'shall *ipso facto* forfeit all rights as a member of this order,' and that his certificate shall thereby become absolutely null and void without any action on the part of his local or supreme lodge," is, of course, rightly considered by the majority as effectual to terminate the membership of the insured and cancel his rights as such member, as much so as the "prohibited occupation" would be effectual to prevent his "becoming a member." It makes no difference when he enters upon the prohibited occupation. If he does so before he applies for membership, he cannot become a member. If he does so after becoming a member, his membership *ipso facto* ceases.

In this case, a very few months after Mr. Krecek had been admitted to membership in the local lodge through the fraudulent conduct of the officers of that lodge, those officers who participated in that fraud ceased to hold their official positions, and other members of the lodge who had nothing to do with assisting Krecek to become a member became the officers of the lodge. For the 10 years following, the officers of the lodge were disinterested, and were, so far as this evidence shows, constantly endeavoring to do their duty as such officers. They received the dues from Mr. Krecek regularly and remitted them to the supreme lodge, and so, if we say that the admission of Mr. Krecek into the lodge was in its inception fraudulent, the question is as to the right of the association to receive his dues, recognizing him as a full member of the lodge for 10 successive years, knowing his occupation, and then upon his death refuse further to recognize his beneficiary. During these 10 years he was following the prohibited occupation. Such conduct on his part *ipso facto* forfeited his rights under his contract. The majority opinion says that he could not be "permitted to remain a member, by the most solemn affirmative action on the part of either the supreme officers or the local lodge of the society." This is in direct conflict with the holding in *Pringle v.*

Modern Woodmen of America, 76 Neb. 384, and, upon rehearing, 388. Pringle's certificate of membership contained the provision "that it shall become null and void if, while such a member, he shall become convicted of a felony." This statement in the opinion is a brief summary of the effect of the clause in the constitution and certificate, which were substantially the same as the provision of the constitution and certificate in the case at bar. Mr. Pringle was convicted of a felony. After he was arrested for the offense, and before the trial, "he deposited with the clerk of the local camp a sum of money sufficient to pay his dues and assessments, thereafter to accrue, for the term of four months and directed the clerk so to apply it as such obligations should mature. This direction the clerk obeyed by remitting the required sums monthly to the head camp; such remittances being made all, or nearly all, of them after the conviction and with the knowledge by the clerk of that fact." About six months afterwards Mr. Pringle died in the penitentiary. If anything could forfeit the rights of membership in these associations, it would seem that to commit a felony and suffer conviction and imprisonment for the crime would forfeit such rights, and that his certificate would "thereby become absolutely null and void without any action on the part of his local or supreme lodge." But this court held that the deposit of the dues with the clerk of the subordinate lodge and paying those dues to the supreme lodge by the clerk, while the insured was being prosecuted for felony and was suffering imprisonment therefor, was a waiver of the forfeiture, and the beneficiary was allowed to recover. After Mr. Pringle's death "an officer or agent of the head camp made or attempted to make a tender to the plaintiff of the sums accepted as dues and assessments after the date of conviction," and the court said: "In our view of the matter the fact is not material." The court also quoted from *Modern Woodmen of America v. Colman,* 64 Neb. 162: "It is a settled law of this state that if a beneficiary insurance association, like the plaintiff in error in this action, continues to collect dues and mortuary assessments

from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers." To be convicted and imprisoned for felony cannot be regarded as a less serious ground for forfeiture than to be the keeper of a saloon. At all events, the keeper of a saloon was not so seriously regarded by the lodge of which Mr. Krecek was a member, the members of which were natives of Bohemia, and were familiar with saloons and saloon-keepers, and regarded them quite favorably as the officers of the supreme lodge well knew. Notwithstanding the majority opinion emphatically states that "if, after becoming a member, he enters upon such prohibited occupation, the doing so 'shall *ipso facto* forfeit all rights as a member of this order,' and that his certificate shall thereby become absolutely null and void without any action on the part of his local or supreme lodge," it does not admit that it is overruling *Pringle v. Modern Woodmen of America, supra,* but says, "We have no disposition to recede from the rule announced in those cases," thereby, as it seems to me, making it impossible to foretell what the decision of this court will be in subsequent cases.

The object is to prevent convicts and saloon-keepers from being members, because the risk is supposed to be greater, and the limitation expressly applies alike to those who are trying to get in and to those who are trying to remain in. A saloon-keeper or convict cannot become a member. If a member becomes a convict or saloon-keeper, his membership *"ipso facto"* ceases. Our former decisions are that knowledge on the part of the local officers, who receive and forward dues, that the applicant is, or that the member has become, a saloon-keeper or convict is through such local officers notice to the supreme officers, and through the supreme officers notice to all whom they

represent and for whom they act. And to receive dues implies an agreement on the part of all these to waive the objection or forfeiture, and that if the local officers, the supreme officers and the policy-holders agree to waive the objection or forfeiture, and receive money on that agreement, the waiver is valid and the beneficiary can recover. This holding is now reversed without conceding that the law is changed, but with a solemn statement that we adhere to our former decisions. The attempted distinction that the disqualification of a convict or saloon-keeper to become a member cannot be waived, while the disqualification to remain a member can be waived, is a distinction without a difference, and cannot be relied upon by intelligent business men, and is so clearly without any basis in these contracts of membership that the profession will not be justified in relying upon it as settled law of this state in advising their clients in the adjustment of their claims.

I am not now attempting to discuss the question whether it would be more reasonable and logical to hold that such forfeitures cannot be waived than to hold that they can be so waived. Undoubtedly substantial reasons can be urged for either position. Until the present case, the theory has been that public policy favored the view that they can be waived. The constitutions and by-laws of such associations are generally quite formidable documents, and, together with the certificate of membership, contain a multitude of provisions and requirements that are well understood by the promoters of the association and its supreme officers, but not always fully comprehended by those who accept such insurance and pay the dues. The dues paid by the insured benefit all policy-holders, and the policy-holders select the supreme officers to represent and act for them. It is conceded that the supreme officers are bound by notice to the local officers who receive and forward the money paid by the certificate holder. The majority opinion says that notice to the local officers is notice to the supreme officers who receive the money from them, and there is some reason to conclude that the general policy-holders, who benefit by the receipt

of these dues, should be held responsible for the acts of the supreme officers whom they choose to conduct their business for them. Notice to the local officers who remit this money being notice to the supreme officers who receive it, there is some reason for holding that notice to these supreme officers is notice to the other policy-holders who selected them and for whom they act, and that the waiver of forfeiture by these supreme officers is waiver by their superiors, the general policy-holders.

On the other hand, it may well be suggested that, the association being mutual, and each policy-holder being in a sense a partner with all others, their solemn agreement among themselves that they shall not be liable to contribute to the beneficiary of a convict in the penitentiary or the keeper of a public saloon should be respected, and ought not to be considered waived by receiving and appropriating dues paid by the insured, when their contract expressly provides that the receipt of such dues shall not constitute such waiver.

But there should be certainty in the law, and one position or the other should be adopted and adhered to, so that all parties may know, or be advised, as to their rights. The law, which heretofore was supposed to be definite, is now most unfortunately rendered wholly uncertain.

LETTON, J. I think the opinion inconsistent with cases cited in Judge Sedgwick's dissenting opinion.

BUFFALO COUNTY, APPELLEE, V. KEARNEY COUNTY; JOEL HULL, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,274.

1. **Counties: BRIDGE REPAIRS: LIABILITY: LAW GOVERNING.** The liability of counties, which are separated by a stream, for repairs of a bridge over such stream, when there is no contract between the counties, is fixed by the statute existing at the time the repairs are made. *State v. Kearney County*, 12 Neb. 6.

2. ———: ———: ———: ———. In such case the fact that the bridge was built before the statute which fixes the liability of the counties was enacted is immaterial, as it is within the power of the legislature to change the statute governing the liability of the counties for repairs thereafter made.

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

Joel Hull, M. D. King, J. L. McPheely and *Brown, Baxter & VanDusen,* for appellant.

E. B. McDermott and *H. M. Sinclair, contra.*

SEDGWICK, J.

The county of Buffalo filed a claim with the county board of supervisors of the county of Kearney for one-half of the costs of repairs upon a bridge over the Platte river, which separates the two counties. The claim was allowed by the county board, and Joel Hull, as a citizen and taxpayer of Kearney county, appealed to the district court for that county. Upon trial to the court without a jury, the court found in favor of the plaintiff, Buffalo county, and entered a judgment accordingly, and the said Joel Hull has appealed from that judgment to this court.

The bridge is the same as was involved in *State v. Kearney County,* 12 Neb. 6; *Buffalo County v. Kearney County,* 83 Neb. 550; *Buffalo County v. Hull,* 93 Neb. 586. In the case at bar the repairs were made in 1907 and 1908. So far as we can see, the question which it is now sought to present to this court was determined in each of the two cases last above cited. The appellant, however, continues to insist that, since the bridge was built in 1874, and was built wholly by Buffalo county, when there was no statute fixing the liability of counties separated by a stream for the construction or repairing of bridges over such stream, and because the bridge is used, as he says, more by the people of Buffalo county than by the people of Kearney county, and there have been changes in the settlement of both counties, and various people have pur-

chased and improved property in Kearney county, relying upon the obligation of Buffalo county to maintain this bridge, that for all these and similar reasons some sort of contract has arisen, not very clearly defined in the briefs, by reason of which the legislature of the state has no power to regulate by subsequent legislation the liability of the respective counties in the maintenance of the bridge. In the case last cited the law was stated in the syllabus: "The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred." This statement of law is not discussed in the briefs. The appellant appears to ignore it as not applicable. We are still unable to see why it is not applicable, and why it does not dispose of the matters presented by the appellant in the brief. A county is a political subdivision of the state, created by the legislature; it is wholly the creature of the legislature, and its powers and rights and liabilities are fixed by the statute, and are subject to change by the legislature from time to time. The statute in force when these repairs were made provides that a bridge over a stream which separates two counties, and which was built by one of the counties, must be repaired jointly by the two counties, and no reason is suggested in the brief why this is not valid legislation. *Buffalo County v. Hull, supra,* and cases there cited. No such statute existed when the repairs were made which are considered in *State v. Kearney County*, 12 Neb. 6, and the court there decided that Kearney county was not liable for such repairs. The court, however, in that early case, relating to this same bridge, adopted the principle that the liability of the respective counties depended upon the statutes existing at the time the repairs were made. Laws 1879, p. 142, amendatory of ch. 47, Rev. St. 1866, which fixed the liabilities of adjoining counties under such circumstances, was quoted in the opinion, and the court said: "In 1881, section 88

was amended, limiting its application to bridges which have been built, or may hereafter be built by co-operation of two counties separated by a stream. Its provisions, therefore, do not apply to the bridge in question." The statute does not create a contract between the citizens of respective counties and the rights of respective counties in no sense depend upon a contract, but depend upon the law of the state existing at the time the repairs were made. The matter rests with the legislature, and if the present law is unjust or unfair in any respect, as the appellant insists, the remedy is with the legislature. All of the matters discussed in the brief, so far as we can see, depend upon this question.

The district court appears to have followed our former decisions, and its judgment is

AFFIRMED.

SUSAN INGLEHART, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,397.

1. **Carriers:** INJURY TO PASSENGER: EVIDENCE OF CUSTOM. The evidence was conflicting as to whether the defendant's car had stopped at a certain place before the plaintiff had attempted to alight therefrom. The defendant furnished evidence tending to show that this was not the regular nor proper stopping place, and that the car was not stopped there on this occasion, but plaintiff attempted to alight from the car while it was in motion. *Held*, That evidence that defendant's cars frequently stopped to allow passengers to alight at the place specified was competent as bearing upon the probability of plaintiff's evidence that the car had stopped before she attempted to alight, and that such evidence should be considered by the jury, although it was not sufficient to prove a uniform and established custom.

2. **Appeal:** INSTRUCTIONS: NONPREJUDICIAL ERROR. In such case it would be erroneous to instruct the jury that they must determine the competency of such evidence, but the error would be without prejudice to the defendant. To reject such evidence would be prejudicial to the plaintiff only.

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

John L. Webster and *W. J. Connell,* for appellant.

Brome & Brome and *W. C. Fraser, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment against the defendant in the district court for Douglas county for damages caused, as she alleged, by the negligence of the defendant, whereby she was thrown down and injured in attempting to alight from one of defendant's cars. The plaintiff notified the conductor that she wanted to leave the car at the intersection of Fortieth and Hamilton streets, in the city of Omaha, and she alleged that defendant stopped the car upon the curve at a point where it was customary and usual to stop for the purpose of permitting passengers to alight therefrom, and that while she was in the act of alighting from the car defendant's servants "suddenly started said car forward, throwing plaintiff to the street." The defendant denied that the car had come to a stop, and alleged that plaintiff "stepped from the running-board to the street while the said car was rounding the curve at Fortieth and Hamilton streets, * * * and before said car had reached the regular stopping place at the far side of said intersection."

The defendant presents two assignments of alleged error in the brief: First. "The court erred in receiving evidence tendered by the plaintiff tending to show that the north-bound cars sometimes stopped while rounding the curve on Fortieth and Hamilton streets for the purpose of permitting passengers to alight therefrom." Second. "It was for the court to decide on the defendant's objections to the admissibility of said evidence whether the evidence was competent, material or relevant. It was error for the court to rule that the evidence was competent, relevant and material, and afterwards instruct the jury that it might or might not attach any weight to the evidence, or

that the jury might decide whether the evidence was relevant or material to any point at issue in the case."

We think that the evidence complained of was properly received. The principal question was whether the car was stopped upon the curve. The plaintiff contended that she was attempting to leave the car while the car was stopped, and the defendant answered with the contention that the car was not stopped on the curve, and that plaintiff was attempting to alight while the car was in motion. There was a sharp conflict in the evidence upon this disputed point. While evidence that the car frequently stopped at that point for the purpose of allowing passengers to alight would not of itself prove that it did so upon this occasion, still in view of the defendant's evidence that the car had not yet arrived at its proper stopping place, the evidence complained of had a bearing upon the probability of plaintiff's evidence that the car had stopped at the point when she attempted to alight. See, *Norfolk & A. T. Co. v. Rotolo,* 195 Fed. 231, and cases there cited.

The instruction complained of in the second assignment of error was as follows: "Whether or not the customary place of stopping the cars at Fortieth and Hamilton streets was at the entrance of the curve, at some point on the curve, or beyond the curve on Hamilton street, is not material in this case upon the question whether or not defendant was negligent. * * * But the evidence upon the question of the customary stopping place may be considered by you with the other evidence in determining whether or not the car stopped before plaintiff attempted to get off, if in your judgment it has a bearing upon that question." If we should consider that this instruction submitted to the jury the question of the competency of the evidence, which is by no means clear, still the instruction was without prejudice to the defendant. If the jury rejected the evidence "of the customary stopping place" as having no bearing upon the fact in dispute, this might be prejudicial to plaintiff, but not to defendant. It is suggested that the evidence was not suffi-

cient to prove the custom. It is said that "to establish custom of stopping on the curve the evidence must show that such habit of stopping upon the curve was general and uniform." The rule as thus stated is not applicable to this case. There was evidence from which the jury might find that the defendant's cars were generally stopped upon the curve when passengers along Fortieth street desired to leave the car at Hamilton street, and, if they so found, that fact would tend to corroborate plaintiff's evidence.

There are no errors assigned in the brief which require a reversal, and the judgment of the district court is

AFFIRMED.

FAWCETT, J., dissenting.

I cannot give my approval to instruction No. 8, given by the court, and I think the verdict is so contrary to the great weight of the evidence that the case should be submitted to another jury.

HAMER, J., dissenting.

The plaintiff and appellee, Susan Inglehart, fell and received a severe injury while alighting from a street car at the intersection of Fortieth and Hamilton streets in the city of Omaha. She brought an action to recover damages for the injury so received, and obtained a judgment against the Omaha & Council Bluffs Street Railway Company for $3,000. The negligence charged against the street railway company was the starting of the car while the plaintiff was in the act of alighting. A short review of the evidence may enable us the better to consider the two points which we conceive to be in the case: (1) Whether the testimony tending to establish that the cars stopped on other days before the injury on the curve, or anywhere around the curve, and before the far side was reached, is material touching the alleged negligence of the company. (2) Whether instruction No. 8, given to the jury upon the court's own motion, was prejudicial to the defendant.

The plaintiff testified that she was 57 years old; that she resided at No. 3861 Charles street; that she became a passenger on one of the defendant's cars on Sixteenth and Dodge streets, northwest bound, to get off at Fortieth and Hamilton streets; that before reaching the street intersection she motioned the conductor and told him that she wished to get off at Hamilton street and Fortieth; that when the car came up to Fortieth street it stopped on the curve, and that she got up and walked across the car to the running-board, stepped out on the running-board, "and, as I was making my first step to the ground, they started the car, and I fell." The plaintiff was permitted to testify that the cars stopped as often on the curve as "they did down straight. They had no regular place of stopping when they came down on the line. I have got off just as often on that curve as I have down the other way." She then testified that she had frequently left the cars when they stopped on the curve at the place where she left on the day she was injured. On cross-examination she testified that the usual place for the car to stop was after it got around the curve, but that it stopped just as often on the curve as it did when it got around it. As a result of the fall her left hip bone was broken, and she was put to expense, and was confined to her bed for about twelve weeks, and afterwards was compelled to use crutches.

Price Warren, a witness for the plaintiff, testified that he saw the accident, and that, when the plaintiff stepped out onto the running-board, the car started and threw her off. Three other witnesses for the plaintiff seem to have seen the accident, but they were unable to testify to more than the fact that they saw the car come to a stop and saw the plaintiff lying on the pavement. Dr. David A. Medders testified that he saw the plaintiff get off the car, and that she did not get off until the car came to a stop, but he did not see her fall.

The defendant company produced a number of witnesses who testified to facts more or less material. Mrs. Nelson testified: "We were going very slow, and she steps

off the car and fell." David M. Potter testified that the conductor said to the plaintiff: "Wait until the car stops." Mrs. Curry testified that the conductor "hollored out, 'Wait a minute;' " that the plaintiff halted, and then she made no other attempt, and the car was still moving, and he called out the second time, "Wait a minute;" that "she had made a step off, and down she fell." Charley Haverstroh testified that, when the car was just entering "on them cobble stones, why, she kind of stepped on the running-board, and then she fell kind of backwards;" that the car was moving when she went off, and that it had *not stopped up to that time.* W. A. King, the motorman, testified that he saw her on the running-board just about to step off, and that he saw her step off; that the car was moving at the time, and that it had not stopped up to the time that she stepped off. J. A. Rogers testified that he saw her get off the car; that the conductor said to her, "Wait until the car stops;" that she was then standing on the running-board of the car; that the car had not stopped up to that time, and that it was going very slowly. Stafford J. Flowers, the conductor, testified that he said to the plaintiff, "Wait a minute, please;" that she then stopped, and that in about half a minute "she made another step and stepped right off." Mrs. Eva Wagner testified that the north-bound cars were in the habit of stopping to discharge passengers "on the curve." Mrs. Mabel Lavender testified that the cars stopped *anywhere* around that curve—as often on the curve or south of it as west of it. William G. Davidson testified that the cars were in the habit of stopping "on that curve and over the curve and on this side of the curve." Mrs. Minnie Godenschwager testified that the cars stopped "at the curve and beyond, and sometimes before. I have got off at all three places at different times." Mrs. L. W. Damon testified that she got off "just as often before the car came to the curve as beyond the curve, or on the curve." Mrs. Frederick Godenschwager testified that the car stopped at different places. "I have got off myself at different places,

before the curve, and after the curve, and the regular stopping place, a good many times."

To the testimony of the witnesses concerning the fact that the car frequently stopped on the curve for the purpose of permitting passengers to alight, the defendant objected, on the ground that the testimony was irrelevant, immaterial and incompetent; that said testimony had a tendency to divert the minds of the jury from the real act of negligence, that is, whether the car started while the plaintiff was in the act of alighting from the car. These objections were all overruled.

It is uncontroverted that the car was *going when the woman got off*. If her fall is to be attributed to the fact that the car was going when she got off, then we are brought to consider whether the car had simply *kept on going,* or whether it had *actually stopped* and *then started again.* If it was a custom to stop at the place where the plaintiff got off, and that fact was proved, it would tend to corroborate the plaintiff's testimony that the car did stop just before she got off, because it would make it appear to be probable. If the evidence shows that it *sometimes* stopped there, or in that immediate vicinity, then, on the doctrine of chances, that would make it seem probable that it may have stopped there *this* time, and, owing to the uncertainty of the direct testimony, which is in conflict, this is of some slight probative value. If of such value, it was right to admit it. Unless the car stopped, it could not have started again. So it is most material to show that it did stop. If there is a failure to establish the necessary fact that the car stopped, then the plaintiff cannot recover. It is the stopping of the car and its starting up again, if shown, that together put the defendant on trial for negligence. In *Norfolk & A. T. Co. v. Rotolo,* 195 Fed. 231, it is held that testimony of custom to stop cars and discharge passengers at a *particular point* is admissible, as it tends to prove that the car did stop at that point. It was therefore not error to permit the introduction of evidence that the car had before been allowed to stop on the curve.

The eighth instruction is as follows: "Whether or not the customary place of stopping the cars at Fortieth and Hamilton streets was at the entrance of the curve, at some point on the curve, or beyond the curve on Hamilton street, is not material in this case upon the question whether or not defendant was negligent; the question for your decision is whether the car upon which plaintiff was riding came to a full stop at some point before plaintiff attempted to step to the street (if it did so stop), and whether it started up again while plaintiff was alighting, and she was thereby injured. If you answer all these questions in the affirmative, your verdict should be for the plaintiff; if plaintiff attempted to alight while the car was in motion, she cannot recover, and your verdict should be for the defendant. But the evidence upon the question of the *customary stopping place* may be considered by you with the other evidence in determining whether or not the car stopped before plaintiff attempted to get off, *if in your judgment it has a bearing upon that question.*" Up to the last sentence we do not discover anything wrong with the foregoing instruction; but the last sentence seems to give a wide, rough and uncultivated field of action to the jury. It is in the highest degree stimulating. That sentence seems to minimize the evidence touching where "the customary stopping place" may have been, but it is one of those soft coddling sentences calculated to do an infinite amount of harm. When the jurors are told that they are given permission to exercise their judgment as to whether certain evidence bears upon the case, the learned judge accidently gave to the jury the permission to pass on a *legal question,* and to exercise their knowledge as lawyers or their imagination as men; the knowledge they did not have. Their imagination was probably unlimited, and certainly untrammeled. It was for the learned judge to say whether this evidence concerning the customary stopping place had a bearing upon the case. This was one of the very material things in the case, and to say to the jury that they might determine about it was to abdicate the place of judge and give it to the jury.

It cannot be said that such an error as this may not have prejudiced the rights of the defendant. *Boston & A. R. Co. v. O'Reilly,* 158 U. S. 334. Nor is it necessary to be able to see what the effect of this instruction may have had upon the jury. It was clearly the right of the defendant to have his case go before the jury without being encumbered with illegal or irrelevant matter, and this instruction told the jury that they might consider this matter if they thought it had a bearing in determining whether or not the cars stopped before plaintiff attempted to get off. They were to make *any such use of it as they saw fit.* This was error of a prejudicial character. *Mexia v. Oliver,* 148 U. S. 664.

This instruction, in effect, said to the jury: "This evidence is material. You are authorized to treat it as such, and you will say just how far it shall control your action and what you will do with it." In *Odell v. Story,* 81 Neb. 442, the second paragraph in the syllabus reads: "A judgment will be reversed for the reception of improper evidence where it is probable that such improper evidence influenced the verdict of the jury."

In *National Biscuit Co. v. Nolan,* 138 Fed. 6, it is said in the body of the opinion: "Error presumptively works a prejudice to the party against whom it was committed, and this presumption is only overcome when it appears beyond a doubt that the error challenged did *not* prejudice and *could not* have prejudiced the complaining party." Very many authorities are cited in the opinion in support of this proposition. See, also, *Garthwaite v. Bank of Tulare,* 123 Cal. 132; *Inhabitants of Wayland v. Inhabitants of Ware,* 109 Mass. 248; *Langston v. Southern E. R. Co.,* 147 Mo. 457; *United States v. Honolulu Plantation Co.,* 122 Fed. 581; *Gilmer v. Higley,* 110 U. S. 47.

It is said in the brief of counsel for the defendant: "There is affirmative evidence in the case at bar that said testimony was prejudicial, by reason of the fact that the jury accepted the testimony of the plaintiff and one other witness, coupled with this incompetent and irrelevant testimony, as proof that the car started while plaintiff was

in the act of getting off, as against the testimony of seven witnesses that the plaintiff got off the car before it had come to a stop, and that the car did not start while she was in the act of getting off." No one may say, and perhaps no one may know, whether it was the evidence or instruction that brought about the verdict. Although the evidence seems to be of very slight probative value, so long as it has *any* value there is perhaps no good objection to its introduction. It made the woman's testimony seem probable. It made a different fact happening at a different time evidence of that which is claimed to have happened today. That the car was stopped and then started again was the material fact. Where it stopped was only an incident, but part of a possible truth tending to corroborate the plaintiff's statement. We observe the most objection to the instruction. It said to the jury that they could determine what bearing the evidence had touching the customary place of the car stopping. That was an important factor in the case. Whether the car was *stopped* and *then started again* when the woman attempted to get off was the main question. No one may know what the jury concluded about it. We do know that the jury rendered a verdict against the defendant. Who may say that the jury may not have said to themselves: "Of course, that means that the car stopped before the plaintiff attempted to get off. We are to determine what bearing the evidence touching the question of the customary stopping place has in the case, and we are going to determine that it shows that that car was stopped and then started again, and we are going to do it under this instruction which allows us thus to do what we like." By this instruction the judge seems to have turned the jurors loose to do what they saw fit about the car stopping on the curve at prior times. The judge said, in effect: "You may ignore that evidence if you want to." But at the same time he said, in substance: "If you believe that that evidence has a bearing on the case, you will consider it." When he let the evidence in he, by that act, said to consider it. When

he gave the instruction he said: "Do as you like." His conduct is irreconcilable. It must have confused the jury.

When the court overruled the defendant's objections and held that the jury might consider the evidence relating to the usual stopping place, and so instructed the jurors, then that evidence was before them, in a way, for all purposes, and *especially for the purpose of emphasizing that the car stopped before the plaintiff got off, and therefore that it must have started up again.* When the jury were told that they might consider the evidence touching the stopping of the car before it reached the far side, if they thought it had a bearing on the case, was that in effect telling them that because they so thought, if they did so think, they might find for the plaintiff? Could the jury fail to interpret it in any other way? Was this not equivalent to telling the jury that the defendant was negligent? And therefore, inferentially, did not the court tell the jury that the defendant was liable for the damage sustained? We think it follows that the court erred in the form and substance of the instruction which it gave to the jury. They were licensed by the instruction to give it such a bearing, and as much of a bearing, as they liked. "But in trials by jury it is the province of the presiding judge to determine all questions on the admissibility of the evidence to the jury, as well as to instruct them in the rules of law, by which it is to be weighed. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." 1 Greenleaf, Evidence (16th ed.) sec. 81*e*.

In *Nickey v. Zonker,* 31 Ind. App. 90, the court said: "The question of whether the evidence is material is for the court, and all the evidence which the court decides is material must be considered by the jury with due regard to the credibility of the witnesses. * * * The question of whether evidence is material is a question of law, the determination of which, in a civil action, is solely with the court."

In *Clark v. McAtee,* 227 Mo. 152, 190, an instruction, which read as follows, was declared erroneous: "And if

the jury find from the greater weight of all the *competent evidence* in the cause that said allegations of plaintiff are correct, then their verdict must be for the plaintiff." The court said: "The hornbooks lay down the rule to be that it is the province of the court, and not that of the jury, to determine the competency of evidence offered; and that, when evidence is admitted, it is the duty of the jury to consider and weigh and give to it such credence as they may deem proper; but the jury has no right to decide upon the competency of testimony admitted by the court, as this instruction clearly authorized it to do."

In *Ball v. Skinner,* 134 Ia. 298, 310, an instruction was so phrased as to leave it to the jury to decide whether they would attach any weight to certain evidence which the court had ruled to be material and relevant. The court said: "Without taking time to discuss these propositions, we will say that the materiality of the facts is a matter for the court alone, and the jury is bound to assume that any fact or circumstance allowed in evidence by the trial court is material and entitled to consideration."

In *Slappey v. Sumner,* 136 Ga. 692, the court referred to certain evidence, and said: "If any admissions have been testified to before you as having been made as to any matters material to the issues in this case, I charge you that admissions should be scanned with care and are to be considered, if at all, by you in determining the truth or falsity of the issue to which such admission may or may not relate." It was said the use of the words "if at all" might have had a tendency to mislead the jury into the belief that they might have arbitrarily declined to consider the admission, and it would have been better to omit them.

If the testimony was legally competent, yet nevertheless the defendant was prejudiced by instruction No. 8. To hold otherwise would be equivalent to saying that the court might instruct the jury that they might or might not consider competent or relevant testimony, just as they pleased. Of course, the result of such instructions would be to nullify and render useless the ruling of the court that the evidence was competent and relevant, and it would be

equivalent to saying to the jury: "You are the judges of the law, as well as of the facts." It is unfortunately true that a modest judge is often deferential to the jury and inclined to flatter the jurors touching the responsible position which they hold. He should not be allowed to do this at the expense of the litigant, however tempting the tendency may be to say sweet things to willing listeners.

While the district court was seemingly desirous of minimizing the effect of what it said in the last sentence of instruction No. 8, no one may know the extent to which this sentence influenced the jury. Jurors are often men of character and force in the community, and sometimes they are ready to go a long distance around the judge if they have a little excuse to do so. In this case the sentence in question gives them the excuse. We do not feel like indulging the presumption that the judgment must be right notwithstanding an erroneous and misleading instruction.

In *Borkenstein v. Schrack,* 31 Ind. App. 220, it was said in the body of the opinion "that * * * erroneous instructions are presumed to have had an influence on the jury, *until the contrary* is shown."

In *Royal Neighbors of America v. Wallace,* 66 Neb. 543, the third paragraph in the syllabus reads: "Where, in an action upon a life insurance policy, by the instructions of the court the jury are left at liberty to disregard all representations as immaterial to the risk, it is prejudicial error, requiring the reversal of the case." The assured in the application had answered the question whether he had ever had hemorrhages by saying "No." The court in an instruction submitted to the jury whether this representation was "material to the risk."

The plaintiff and one of her witnesses testified that the car stopped on the curve, and that the plaintiff then undertook to step from the car, which immediately started again and threw her to the ground. Seven witnesses testified for the defendant, that the car did not stop, that it continued to move slowly, and that the plaintiff stepped from the care while it was moving. Other witnesses testi-

fied on behalf of the plaintiff, that on prior occasions they had seen the car stop on the curve, and before it reached the curve, and after it reached the curve, and before it reached the far side, although the far side was the customary stopping place. Of course, the purpose of this last evidence was to corroborate the probability of the truth of plaintiff's statement that the car had stopped on the curve and then started again just as she stepped off. When the evidence touching this matter was admitted by the court, it was, by the mere fact of such admission, declared to be competent; but when the jury were told in instruction No. 8 that the evidence "upon the question of the customary stopping place may be considered by you with the other evidence in determining whether or not the car stopped before the plaintiff attempted to get off, *if in your judgment it has a bearing upon that question,*" the jury were left by the court to declare whether this evidence was competent or incompetent, and they did this at their own election, and therefore this instruction must have confused them; it clearly surrendered to the jury the question of determining the law of the case for themselves and applying it as they saw fit, and it was therefore erroneous and prejudicial.

I am of the opinion that the verdict is against the weight of evidence, and, in any event, the trial court abdicated the place given it by our laws and our method of procedure and gave the jury unbridled license.

STANDARD BRIDGE COMPANY, APPELLEE, V. KEARNEY COUNTY; JOEL HULL, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,613.

1. **Counties: CONTRACTS: RATIFICATION.** County commissioners have power to ratify a contract made in behalf of the county by a member of the board, if it had power to enter into such contract and had power to authorize the member to execute the same in behalf of the county.

2. ———: BRIDGE REPAIRS: ADVERTISEMENT FOR BIDS. When two counties unite in a contract to repair a bridge over a stream which divides the counties, it is not necessary to publish the advertisement for bids in both counties. Publication in one county where the bids are to be opened is sufficient.

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

Joel Hull, J. L. McPheely and *Brown, Baxter & Van Dusen,* for appellant.

E. C. Strode, M. V. Beghtol and *L. C. Paulson, contra.*

SEDGWICK, J.

This action is for repairs to the same bridge involved in *Buffalo County v. Kearney County, ante,* p. 439, and the principal question presented is the same as was presented in that case, which was decided against the appellant for the reasons there given. In this case the two counties entered into a contract with the plaintiff for the repairs of the bridge. The questions presented, not included in the case above referred to, are apparently two.

It is contended that the contract was invalid, because it was not duly authorized by the defendant county, and because the notice of the proposed letting of the contract was not published in both counties. It appears from the record that the county board of the defendant county resolved to enter into a joint contract with the county of Buffalo for these repairs. Mr. Bloodgood, a member of the county board of the defendant county, and one of the bridge committee of that board, attended a meeting of the county board of the county of Buffalo at the opening of the bids, and he testified that the bridge committee, of which he was a member, was authorized to examine the bridge and ascertain whether the repairs were necessary, and that he himself was authorized, after it was found that repairs were necessary, to execute in behalf of the defendant county a joint contract with the county of Buffalo for the repairs of the bridge. This was probably not the best

evidence, as the records of the proceedings of the county board of the defendant county would be conclusive evidence of the action of that board. When the bids were opened, and the plaintiff was found to be the lowest and best bidder, the contract was entered into, and Mr. Bloodgood executed it for the defendant county, and afterwards reported to the county board his action in the premises. The record shows that the county board of the defendant county has taken numerous actions predicated upon the validity of the contract so executed, and it is conceded that the action of the county board would have amounted to a ratification of the contract if the board had power to so ratify it; but it is insisted and numerous cases are cited showing that the county board would have no power to ratify a contract which it was beyond its power to enter into, and it is attempted to apply these authorities to the action of the county board in ratifying the action of the member of its bridge committee. Of course this position is not well taken. The county board of the defendant county had full power under the statute to enter into this contract in the first place. It had also full power to authorize its bridge committee to enter into the contract in its behalf. It therefore, under the authorities cited, had full power to ratify the acts of its agent in executing the contract.

It is conceded that the notice for the reception of bids was published in Buffalo county, and the contention is that it should have been published in the defendant county also. There is, however, no warrant for this contention in the statute. Those sections of the statute providing for the joint action of the counties in repairing bridges contain no provision in regard to the publication of the notice. The section of the statute which provides for the publication of notice is 2964, Rev. St. 1913: "Before any contract shall be let as aforesaid, the county board shall cause to be published for four consecutive weeks, in a newspaper printed and of general circulation in the county, and if there be no newspaper printed in the county, then in a newspaper of general circulation in the county, an

advertisement inviting contractors to compete for such work." We have found no provision in the statute requiring a publication of advertisement for bids in both counties in case of joint contracts of two counties for the repair of a bridge. The trial court correctly instructed the jury to find a verdict for the plaintiff. In such case no other instructions are necessary, and errors in refusing such instructions, if any, are without prejudice.

The judgment of the district court is

AFFIRMED.

N. P. MORTENSON, APPELLANT, V. FRANK WAGNER, APPELLEE.

FILED FEBRUARY 27, 1914. No. 17,620.

Appeal: AFFIRMANCE. Where the evidence is not preserved in a bill of exceptions, and there are no special findings, and the pleadings will support the judgment, it will not be reversed for supposed errors in instructing the jury.

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

R. J. Nightingale and *H. S. Nightingale,* for appellant.

J. S. Pedler, contra.

SEDGWICK, J.

This action was begun in justice court of Sherman county, and was appealed to the district court. It involved less than $200. The petition alleged that the defendant took and carried away some of the hogs of the plaintiff without the plaintiff's consent, and negligently and carelessly confined them in an "alleyway, with high board fences on all sides, which prevented the free circulation of air therein, and the same was wholly without shade and without water," and failed to provide them with water or food or shade for about eight hours or more, and that

because of this one of the hogs died and the others were injured. The plaintiff in the brief complains of errors of the court in refusing request for instructions, and in giving other instructions. There is no bill of exceptions, and there are no errors assigned that we could consider under such circumstances. The plaintiff contends that his petition states two causes of action, one for trespass in taking the hogs, and the other for negligence in not caring for them. The trial court refused to consider that the plaintiff had a separate cause of action for trespass, and submitted the case upon the question of the defendant's negligence in caring for the hogs. Even if two causes of action were alleged, if there was no evidence tending to show any other ground for recovery than the negligence of the defendant, the court was of course right in submitting only that question; and, as we do not have the evidence before us, we cannot say that there was any other issue fairly presented by the evidence than the issue submitted to the jury. Where the evidence is not preserved in a bill of exceptions, and there are no special findings, and the pleadings will support the judgment, it will not be reversed for supposed errors in instructing the jury.

The judgment of the district court is

AFFIRMED.

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

CHARLOTTE S. CUMMINS, APPELLEE, V. SHERIDAN COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 27, 1914. No. 17,630.

1. **Highways: PROCEEDINGS TO OPEN: INJUNCTION.** A public road across the plaintiff's land was duly vacated by the county commissioners upon condition that the plaintiff would pay to the county $25 and grant land for a road on another part of her land. The plaintiff complied with these conditions. Several years afterwards proceedings were begun to reopen the road formerly vacated. *Held*, That such proceedings could not be enjoined on the ground

that the county had not returned the $25 and restored the land granted by plaintiff.

2. ———: ———: DISCRETION OF COUNTY BOARD. Whether the opening of the road will be for the public benefit is within the reasonable discretion of the county commissioners to determine. If their proceedings are regular, and without fraud or oppression, and the landowner's damages are paid, the discretion of the commissioners in opening the road will not be interfered with by the courts.

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

Alden C. Plantz and *R. L. Wilhite,* for appellants.

Albert W. Crites, contra.

SEDGWICK, J.

Proceedings were begun before the county commissioners of the county of Sheridan to open a public road across a half section of the plaintiff's land. Upon contest and hearing the commissioners ordered the road opened. Appraisers were appointed to appraise the plaintiff's damages, and reported, appraising her damages at $600. Four days after this appraisement was returned the plaintiff began this action to enjoin further proceedings in the matter of opening and laying out the road. It appears that there had formerly been a road through the plaintiff's land on precisely the same location, and, upon proceedings duly instituted before the board of commissioners, the road had been vacated several years before these proceedings were begun. As a condition of vacating the road upon the plaintiff's request, the plaintiff was required to pay to the county the sum of $25 and to grant a piece of land 40 feet in width along the side of her tract of land for the purpose of a new road in place of the one so vacated. The county authorities made no offer to return the $25 nor to reconvey to the plaintiff the tract of land which she had granted for the new road. All of these facts appear in the pleadings, and upon motion of the plaintiff a decree was

entered upon the pleadings perpetually enjoining the defendants from proceeding further with the opening of the road.

As we understand the plaintiff, the ground upon which it is contended she is entitled to this injunction is that the $25 is not returned nor offered to be returned, and the tract of land which she has granted was not restored to her. This appears to be the ground upon which the court granted the decree. Of course the county authorities had no right to rescind the compromise upon which the road was formerly vacated. They could not require the plaintiff to receive a return of the grant of land or the money which had been paid by her. It may be that the commissioners considered that there was a public necessity for both roads, and if that is the case it was only necessary that they should properly ascertain and fully pay such damages as the plaintiff suffered by reason of opening the road across her land. This they were proceeding to do, and alleged in their answer that they have not ordered the road opened and have no intention of ordering it open until the plaintiff's damages are fully paid. We think the court was mistaken in enjoining the commissioners under these circumstances. The plaintiff will have full opportunity to be heard in regard to the damages suffered by reason of the opening of the road if the proceedings are persisted in, and also the right of appeal and trial by jury if insufficient damages are allowed her.

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

REVERSED AND DISMISSED.

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

WILLIAM H. BELIEU, APPELLEE, V. LEE CARD, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,650.

1. **Mortgages:** DEED AS MORTGAGE. A deed executed at the same time, to the same party, and upon the same consideration, with a mortgage upon the same real estate will not convey an independent title, but will be treated as additional security.
2. ———: ———: POSSESSION. In such case, if the mortgagee takes peaceable possession of the land without foreclosure, he will be considered as a mortgagee in possession.
3. ———: ———: CANCELATION: DECREE. In such case, a decree at the suit of the mortgagor, determining only that the deed does not convey the legal title and canceling the same, and reserving and not determining the rights of the mortgagee as such, will not be reversed upon appeal, when the pleadings and evidence will not justify a foreclosure of the mortgage, and the issue presented and tried and insisted upon in this court is limited to the question of the validity and effect of the deed as conveying the full legal title.

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

Lee Card, pro se.

A. W. Crites and *E. D. Crites, contra.*

SEDGWICK, J.

Fifteen or twenty years ago this plaintiff and his wife executed a mortgage on the premises in question to one Cutter to secure the payment of a loan made by Cutter to the plaintiff. At the same time of the execution of the mortgage, it seems that the plaintiff and his wife signed a deed, which was in blank as to the grantee, and perhaps in other respects, and left it also with the agent of the mortgagee. Afterwards it appears that the blank was filled by inserting the name of the said Cutter as grantee. After Cutter's decease, the executor of his will executed a deed which purports to convey the interest of

Cutter to the defendant, Lee Card. Mr. Card also procured the said mortgage and the note which it secured, and, the two deeds above mentioned having been placed upon record, he claims that he took peaceable possession of the premises under the papers which he held. This action was brought in the district court for Dawes county to cancel the deeds and quiet the plaintiff's title in the premises. The district court found in favor of the plaintiff, and canceled the deeds and quieted the title as prayed, and the defendant, Card, has appealed.

There is considerable evidence, and controversy in the briefs, as to the execution of the deed to Cutter. There is, however, no evidence as to any other consideration for the deed than the loan of the money for which the mortgage was given as security. The deed must, therefore, if valid for any purpose, be considered as additional security for the loan. The defendant, Card, claimed to be the owner of the land under the deed, and this claim of ownership is the real question that was apparently tried and determined by the court. The trial court expressly refused to consider or pass upon the mortgage, apparently upon the ground that the pleadings and evidence would not justify a determination of that matter. The lien, and possession, if any, of the defendant, Card, under the mortgage and subsequent taxes paid by him, is therefore not affected by this decree. So far as Card's claim of ownership of the land is concerned, by virtue of his deed, that issue seems to have been rightly determined under the evidence, and the judgment of the district court is

AFFIRMED.

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

GERRIT H. TEN BROEK ET AL., APPELLANTS, V. GEORGE W. CALDWELL ET AL., APPELLEES.

FILED FEBRUARY 27, 1914. No. 17,662.

1. **Receivers, Suits by:** JURISDICTION. A court of competent jurisdiction in the state of Missouri appointed a receiver of hotel property in the city of St. Louis, and ordered the receiver to sell the property. These defendants made an offer in writing to purchase the property and pay $9,000 in cash therefor and $10,000 in receiver's certificates which they held. The court approved the offer, and directed the receiver to accept the same, which he did. Thereupon the defendants took the property and gave the receiver the $10,000 in receiver's certificates and $8,000 in cash, but refused to pay the remaining $1,000. The court then ordered the receiver to begin proceedings against the defendants to recover the remainder of the purchase price. *Held*, That the receiver could maintain such action in this state, these defendants being found here.
2. ———: SET-OFF. Also *held* that the defendants should not be allowed to offset in such action receiver's certificates held by them.

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

Brome & Brome and *R. A. Jones*, for appellants.

Hastings & Ireland, contra.

SEDGWICK, J.

A corporation called the Cook Hotel & Excursion Company was created for the purpose of conducting a hotel business at the Louisiana Purchase Exposition, held in the city of St. Louis in 1904. After expending considerable money it was found that the business was unsuccessful, and upon application of a creditor the plaintiff Gerrit H. Ten Broek was appointed a receiver by the circuit court of the city of St. Louis. These defendants were at that time creditors of the corporation, and they advanced to the receiver $35,000 to complete the building and pro-

vide furniture therefor. For this money they received the receiver's certificates. The business was not successful, and the court duly authorized the receiver to sell the property, and bids were called for, and, among others, these defendants submitted to the receiver a proposal in writing to purchase the property. Their proposal was as follows: "We propose to give the sum of $9,000 cash, as follows: $2,500 on acceptance of this bid, and $5,500 within ten days thereafter and before removal of the property, and $1,000 within sixty days of the acceptance of this bid, and $10,000 receiver's certificates, for the Napoleon Bonaparte Hotel, except engine, and all connections and belongings thereto of whatsoever kind; also all furniture and fixtures contained in and about said hotel of whatsoever kind." This offer was submitted to the court, and the court directed that it be accepted and the property sold. The defendants took possession of the property, and made the payments therefor in cash and receiver's certificates, as stated in the offer, except the sum of $1,000. Afterwards the receiver reported these conditions to the court, and the court authorized and directed the receiver to begin proceedings against the defendants to recover the $1,000 remaining unpaid on their purchase. The receiver then began this action in the district court for Douglas county. The defendants answer, admitting substantially the facts above stated, and alleging that there were issued to them $25,000 of receiver's certificates in addition to those turned over by them in payment of the property under their bid, and that these certificates were unpaid, and asked judgment against the receiver for the sum of $35,000, with interest. They also alleged that they had advanced other sums of money for the purchase of materials and supplies, upon which some payments had been made, including the $1,000 remainder of the purchase price sued for, and that there was still a balance due them for materials and supplies, and asked judgment for that also. There was also a plea of the statute of limitations, which is not insisted upon in the briefs. The

district court found in favor of the defendants and entered a judgment in their favor for the costs. The plaintiffs have appealed.

In the brief the defendants say that there are three questions presented: "First. Did the plaintiffs as such receivers appointed by a foreign court have the capacity to sue in the courts of the state of Nebraska, and also have capacity to maintain this action? Second. If they do have the capacity to sue and can maintain an action in the courts of Nebraska, can they place themselves in a better position and place the defendants at a greater disadvantage in this court than in a foreign court of original jurisdiction? Third. Are the claims made by appellees such claims as operate as a set-off or counter-claim, where each would entitle them to relief in a foreign court of equity?" The argument appears to be that if the court which appointed the receiver obtained complete jurisdiction over the rights and interests of these defendants, as well as other parties interested, and still had jurisdiction of all the parties to determine their rights and interests, such jurisdiction is exclusive, and therefore no action could be maintained in the courts of this state. It is said in the brief: "Appellants could have had adjudicated the same issues in the Missouri court. We insist that, if they have the capacity to sue or maintain this action, in this court, this court has all of the authority, power, privileges, rights and prerogatives as the Missouri court would have had, had these same issues been presented to it." If the court which appointed the receiver could have proceeded summarily to hear and determine the liabilities of the defendants upon their contract of purchase of the property, it could also undoubtedly have authorized the receiver to proceed in an action at law against the defendants if the defendants had been citizens of and within the state of Missouri. In such action the defendants would be entitled to trial by jury. The court directed the receiver to bring this action, and there can be no doubt of his right to maintain the same. Receivers appointed by the courts of other states are always allowed, upon principles of comity, to

maintain an action in this state against the citizens thereof upon contracts for the payment of money which such receivers are fully authorized to collect.

These defendants are not in a position to offset the receiver's certificates against this claim of the receiver. Their contract is specific. It is therein specified that they were to pay a proportion of their bid in receiver's certificates and a specified amount in cash. They have turned over the receiver's certificates provided for in the contract, but have failed to pay to the receiver the amount of cash which they agreed to pay as the purchase price of this property. When this property was offered for sale all of the creditors whose claims had been allowed by the court were interested in the property. It was the right of these creditors to have the property disposed of and reduced to cash, and when that was done it was the duty of the court to direct the distribution of the money so received. If these defendants, notwithstanding their specific contract to pay a certain amount of cash for this property, could substitute their receiver's certificates therefor, the effect would be to turn over all of the property available to the creditors for the benefit of one creditor only, contrary to the judgment of the court, and in violation of the rights of the other creditors. Clearly they would not be entitled to offset such certificates in the court having jurisdiction of the receiver, and they cannot be allowed to do so in the courts of this state.

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

REVERSED.

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

STATE, EX REL. BUFFALO COUNTY, APPELLANT, V. PETE OMANA ET AL., APPELLEES.

FILED FEBRUARY 27, 1914. No. 17,783.

Appeal: DISMISSAL: MOOT QUESTION. There being no brief for appellant on file, the cause was submitted by the parties, without motion to affirm for want of briefs, and because of lapse of time the judgment of the district court has no longer any force. The appeal is therefore dismissed.

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

E. B. McDermott and *H. M. Sinclair,* for appellant.

Brown, Baxter & Van Dusen, Charles A. Chappell and *J. L. McPheely, contra.*

SEDGWICK, J.

This is an action in mandamus to compel the members of the county board of the county of Kearney to convene and order a warrant drawn in payment of a judgment which this plaintiff had recovered against the said county of Kearney. This action was begun while certain matters in regard to the judgment on which it is based were pending upon appeal to this court in *Buffalo County v. Hull,* 93 Neb. 586. Since the judgment of the district court was entered in the case at bar, the judgment involved was affirmed by this court in the said case and therefore this case presents only a moot question. The case at bar was submitted upon the brief of Joel Hull, intervener, one of the appellees, in which he presents the same question that was determined in *Buffalo County v. Kearney County, ante,* p. 439.

As there is no brief of appellant on file, and a submission of the case has been taken without a motion to affirm for want of briefs, and the judgment in this case will not affect the collection of the former judgment, the appeal is

DISMISSED.

PHEBE J. PETERSON ET AL., APPELLEES, V. GEORGE E. DAMOUDE ET AL., APPELLANTS.

FILED FEBRUARY 27, 1914. No. 18,088.

1. **Appeal: FINAL ORDER: PARTITION.** When the main purpose of the action in the district court is to obtain partition, and the case is so tried and determined and partition ordered, such order is not appealable as final until partition is effected and confirmed, although questions of title may have been incidentally determined.
2. ———: ———: **TITLE TO REALTY.** When the object of the action in the district court is to determine the title of the parties, or their respective rights in the subject-matter of the action, and no other question is controverted, an order determining those rights is a final order, and a party aggrieved thereby may appeal therefrom before the property is actually partitioned, although such partition is asked for in the petition, and would properly follow the determination of the rights of the parties and is directed in the order.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Motion to dismiss appeal overruled.*

Hainer, Craft & Aylsworth, for appellants.

B. F. Good and *J. H. Grosvenor, contra.*

SEDGWICK, J.

The defendants have appealed from an order of the district court for Hamilton county.

The plaintiffs filed a motion to dismiss the appeal, alleging that the action was in partition, and that there was an order directing the sale of the real estate in partition, and that no sale has been had, and therefore no final order which is appealable. Section 8185, Rev. St. 1913, provides: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record." Section 8176 provides: "An order affecting a substantial right made in a special proceeding

* * * is a 'final order.'" The question to be determined upon the motion is whether the order entered by the district court is a final order, within the meaning of these statutes. The object of the *per curiam* in *Sewall v. Whiton*, 85 Neb. 478, was "to point out the proper method of practice in appeals in partition cases where an issue is raised upon a question of title." Some of the prior decisions of this court were there reviewed, and the rule as applied to that case is stated. The *per curiam* cites *Schimpf v. Rhodewald*, 62 Neb. 105, and states the nature of that action and something of what was decided in it, and uses this language in regard to that case: "When it was disclosed that a question of title was involved, the court properly ordered that the title be first tried as in an action of ejectment. Afterwards, by agreement of parties, a jury was waived and the issues as to title tried to the court, and at the same time the court also tried the right of partition. The proceedings in partition were suspended upon bringing the action here, and, upon the judgment being affirmed, the case was remanded for further partition proceedings." In the *Schimpf* case the following statement is in the opinion: "The trial being to the court alone, it would have been somewhat absurd to require him to traverse substantially the same ground twice, as upon the trial of an action in ejectment, and again to determine the right of partition." In the *Sewall* case it was said: "When a petition has been filed asking for partition, if the plaintiff's title is controverted, the parties have a right to suspend the partition proceedings until the question of title is determined, either by a jury or by the court. A judgment rendered upon the issue of title alone is a final judgment, from which appeal will lie, and which may be reviewed by this court while the partition proceedings are suspended. If, however, the parties unite the issues and litigate the question of title and the right to partition at the same time, and the court determines both questions in the same judgment, such a judgment or order is only one step in the partition proceedings, is interlocutory in its nature, and cannot be re-

viewed until the final decree of partition or until sale and confirmation." It was not necessary in that case, and the court did not attempt, to define under what circumstances and in what manner the parties could "unite the issues and litigate the question of title and the right to partition at the same time." Cases involving partition, and the right of appeal before partition is complete, range themselves in three classes:

(1) Where there is no controversy as to the ownership of the property in common and the right of partition, but the controversy is as to something relating to the partition, as whether the property can be equitably divided or must be sold, one party contending that it can be equitably divided and asking for a distinct portion of the property, and the other party contending that it cannot be equitably divided and asking that the whole property be sold, or some similar controversy in regard to the partition itself. When that is the case, the partition alone is the subject of litigation, and of course is not final until the partition is made.

(2) The second class is where there is the same issue as above indicated as to the method of partition, and at the same time a distinct issue as to the title and ownership of the property. In such cases the parties would have a right to have their title first tried and determined, and, if that was done, the order thereon would be a final order, within the *per curiam* in the *Sewall* case, but if the matter is tried to the court, and the parties do not ask that their title be first determined, and there is no indication that the court proceeded first to determine the title, the parties should be held to have waived their right to appeal before the partition is completed.

(3) The third class is where everything depends upon the title and the nature of the title, and where, when that question is determined, the whole thing is determined. In such case there can be no doubt under the *per curiam* in the *Sewall* case that, when that question is determined, such determination is a final order, within the meaning of the statute, and is appealable.

In the case at bar the petition alleges that the will gives a life estate to the widow, the remainder to the children, and that it also provides: "Providing, however, that said real estate shall not be disposed or divided among my said children prior to the 5th day of October, 1921." The petition also alleges that the decree entered by the county court so construed the will. The petition then alleges that the decree of the county court is "repugnant and contrary to the devise of said lands, and has become nugatory, obsolete and void, and that said provision against division and partition of said premises, and that portion of the decree of the county court of Hamilton county, Nebraska, above set forth, is repugnant to the devise of said premises, and is void as against public policy, and is an unreasonable restriction and restraint upon the owners of said premises, and, unless removed as a cloud upon their title, the same will result in a great loss, damage, delay and hindrance to each and all of the plaintiffs and defendants herein, and will further result in great loss, damage and deterioration of the premises and the buildings, improvements and appurtenances thereto." The prayer is "that the court construe the said last will and testament of the said Joseph Damoude, deceased, with reference to the right of the plaintiffs to have partition and division of said premises, and that the clouds cast upon the title and possession of the plaintiffs and defendants be removed, canceled, set aside, and held for naught." It also asks for confirmation of shares and partition. To this petition a general demurrer was filed and overruled. This, of course, raised the sole question of the construction of the will. Afterwards a general denial was filed, and then an extensive answer alleging facts in answer to the special facts alleged by plaintiff as ground for construing the will as the plaintiff contended it should be construed. The sole matter contested was the construction and effect of the will; there being no contest as to the partition if the will is construed as the plaintiffs contend. This brings the case within the third class above indicated as the law

is announced in *Sewall v. Whiton, supra.* The order construing the will determined the whole controversy.

It follows that the order complained of is final, within the meaning of the statute, and the motion to dismiss the appeal is

OVERRULED.

ROSE, J., did not sit, and took no part in the decision.

GEORGE W. MINIER, JR., ET AL., APPELLANTS, V. BURT COUNTY ET AL., APPELLEES.*

FILED FEBRUARY 27, 1914. No. 18,334.

1. **Statutes:** AMENDMENT: CONSTITUTIONAL PROVISION. An act of the legislature, which is complete in itself, does not violate section 11, art. III of the constitution, which provides: "No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed," although it may by implication repeal or modify some existing statute affecting the general subject of the new act.
2. ———: ———: ———. An act, to be complete in itself within the above rule, must have "one main and general subject," and must not be "in effect simply amendatory." *Van Horn v. State,* 46 Neb. 62.
3. ———: ———: VALIDITY. The subject of the act of 1913 (laws 1913, ch. 101), was to provide a method of raising funds for the erection of county buildings, and the provision it makes is in addition and supplementary to the statutes already existing for that purpose. It does not contain the section or sections so amended, nor repeal such sections. It is therefore a violation of section 11, art. III of the constitution and void.

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

Stout, Rose & Wells, for appellants.

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*Rehearing denied. See opinion, p. 483, *post.*

E. D. Wigton, W. M. Hopewell and *John P. Breen, contra.*

SEDGWICK, J.

In August, 1913, the board of supervisors of Burt county levied a tax of five mills for the purpose of purchasing grounds and erecting a courthouse and jail building for the use of the county. These plaintiffs, as residents, electors and taxpayers of the county, began this action in the district court for Burt county to cancel the levy, and to enjoin the various officers of the county from proceeding further in the matter, and from extending the levy upon the tax lists and collecting the same. The district court sustained a general demurrer to the petition and dismissed the case, and the plaintiffs have appealed.

The proceedings of the county board were in pursuance of chapter 101, laws 1913. It is contended by the plaintiffs that the act of 1913, ch. 101, is unconstitutional and void as violative of section 11, art. III of the constitution, which provides that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." The act of 1913 is entitled "An act to authorize and empower the county board in any county in this state to make a levy upon the taxable property of said county for the purpose of erecting a courthouse or jail upon petition signed by 51 per cent. of the legal voters of said county." The first section of the act is as follows: "That the county board of any county in this state is hereby authorized and empowered to make a levy, not exceeding five (5) mills upon the dollar, on all taxable property in said county, for the purpose of providing a fund for the erection of a courthouse or jail. The proceeds of such levy shall be known as the special courthouse or jail fund, and may be used only in the construction of a courthouse or jail and the tearing down of any existing courthouse or jail and improvements upon said courthouse or jail grounds. The total estimated amount to be raised by such

special levy shall not exceed the sum of one hundred thousand dollars ($100,000), and said levy may be spread over a term of years, not exceeding three years, to produce such estimated sum. Provided, that in no case shall the levy of taxes made by the county board for all purposes, including the taxes levied as herein provided for the erection of a courthouse or jail, exceed in any one year the sum of one and one-half (1½) dollars on the one hundred ($100) dollars of the assessed valuation." The second section provides that the board cannot make such levy except upon the petition of 51 per cent. of the legal voters in the county.

In 1879 a statute was enacted entitled "An act concerning counties and county officers." Laws 1879, p. 353. It was a very comprehensive act containing 153 sections, and was held to be constitutional. *State v. Page,* 12 Neb. 386. Section 22 of the act defined the powers of the counties: Sections 23 and 24 the powers of the county boards. By the first subdivision of section 25, it was made the duty of the county boards "to cause to be annually levied and collected taxes authorized by law for county purposes, not exceeding one dollar and fifty cents on the one hundred dollars valuation, unless authorized by a vote of the people of the county, and in addition thereto sufficient to pay the interest, and create a sinking fund for the payment of the principal, of all indebtedness which existed at the time of the adoption of the constitution, November 1, 1875." The second subdivision made it the duty of the board "to erect or otherwise provide, when necessary, and the finances of the county will justify it, and keep in repair, a suitable courthouse, jail, and other necessary county buildings, and to provide suitable rooms and offices for the accommodation of the several courts of record, the county board, clerk, treasurer, sheriff, and clerk of the district court, and to provide suitable furniture therefor. But no appropriations shall be made for the erection of any county buildings, without first submitting the proposition to a vote of the people of the county at a general election, and the same is ordered by two-thirds of the legal

voters voting thereon." Section 26 provided that "whenever the county board shall deem it necessary to assess taxes, the aggregate of which shall exceed the rate of one dollar and fifty cents per one hundred dollars valuation of the property of the county, except when such excess is to be used for the payment of indebtedness existing at the adoption of the constitution," the question of levying such excess should be submitted to "a vote of the people of the county at the next election for county officers." The following section provided the method of submitting the question to the vote of the people; and section 30 provided that two-thirds of the votes cast must be in favor of the proposition in order to authorize the levy.

By chapter 28, laws 1887, section 26 of the former act was amended so as to allow the vote to be taken at a general or special election called for that purpose; and the second subdivision of section 25 was amended, omitting the words "when * * * the finances of the county will justify it," and modifying the provision that no appropriation should be made for the erection of county buildings without a vote of the people, so that such appropriation, not exceeding $1,500, could be made by the board without such vote. This subdivision was also amended so that the vote of the people, when more than $1,500 was to be appropriated, could be taken at a general election or a special election called for that purpose, and this amendment also authorized the issue of bonds for such purpose upon a vote of the people. In 1889 (laws 1889, ch. 10) this section was amended so as to provide for a majority instead of a three-fifths vote; and, as so amended, the section was re-enacted in chapter 30, laws 1909. Each of those amending statutes contained the sections so amended and repealed the sections as theretofore existing.

These were the provisions of the act of 1879 upon the general subject of providing funds for erecting county buildings. The board of supervisors was authorized to levy the full amount of taxes for county purposes, $1.50 on the valuation of $100 for any one year, but not exceeding that amount, unless authorized by a vote of the

people, and was authorized to appropriate a part of this general levy for the purpose of erecting county buildings. The county board was authorized to levy $1.50 on the $100 valuation for general county purposes, in addition to the levy necessary to pay indebtedness existing at the adoption of the present constitution. The board could appropriate a part of this general levy to erect county buildings, and they might make a larger levy than $1.50 on the $100 valuation for general county purposes, in addition to the levy necessary to pay indebtedness existing at the adoption of the present constitution, if authorized by a vote of the people. Under the statute, as so amended, the county board might also borrow money upon the bonds of the county for the purpose of providing county buildings, but they could not appropriate from the general levy, nor provide by issuing bonds, more than $1,500 for that purpose, unless such action was authorized at a general or special election "by a majority of the legal voters voting thereon."

In 1895 there was further legislation upon the subject of providing funds for the erection of county buildings. Laws 1895, ch. 27. The title of the act was: "An act to levy a tax to create a special fund for the purpose of erecting a courthouse and other public county buildings." This act provided that the county board might submit to the people of the county "a proposition to vote a special annual tax for that purpose of not to exceed five mills on the dollar valuation of the taxable property in said county, for a term not to exceed five years." Section 1. It did not repeal nor purport to amend the former provisions for raising funds for this purpose. On the other hand, it provided in section 8: "This act shall not be construed as to be in conflict with any law now in force authorizing the issuing of bonds for such purposes, but as additional thereto." The language of the first section of the act, in regard to the election at which the matter should be submitted to the voters, was in some respects uncertain, and, apparently to remedy this defect, the following legislature repealed the first section of the act and

enacted another section in its place. This amended section provided that the matter should be submitted to the people "at a special election called by the board of county commissioners for that purpose." Laws 1897, ch. 22. Twelve years later the section was again amended. Laws 1909, ch. 31. The only change made was that it might be submitted "at a general or a special election called by the board of county commissioners for that purpose." This statute originally, and as amended, provided that the county board might submit such a question upon its own motion, and that it must submit it "upon petition of not less than one-fourth of the legal voters of said county." Whether this act was unconstitutional as attempting to amend the former provisions for providing funds for county buildings without repealing those provisions does not appear to have been presented to this court. Under section 25 of the original act of 1879, as amended by the acts of 1887 and 1889 above cited, the county board might make the general levy of $1.50 on the $100 valuation without any vote of the people, and might appropriate a part of that levy for the purpose of providing county buildings, but could not so appropriate for that purpose more than $1,500 without such vote. The only additional power in that regard given to the county board in the act of 1913 is the power to appropriate a larger amount for that purpose, and this power is made to depend upon the petition of 51 per cent. of the legal voters, instead of the vote of the people at an election held for that purpose.

The contention is that this is an independent act complete in itself and cannot be regarded as an amendment of the former provision upon this subject, and is therefore not within the prohibition of section 11, art. III of the constitution. It is evident that the legislature intended that the former provisions for raising funds for this purpose should remain in force, and that the method of raising funds for county buildings provided by this last act should be in addition to all other methods to be used by the county board at their option. The third section of the act of 1913 so provides in these words: "This act is cumu-

lative and is not to be regarded as repealing or modifying any provision of the statutes now in force which provide for submitting to a vote of the people the proposition to raise funds for the erection of a courthouse or jail." Laws 1913, ch. 101. The original act, as amended and still in force, provides that the county board may raise funds for that purpose by the regular 15 mill levy without a vote of the people, provided that they do not require more than $1,500. This statute provides that they may raise the funds in the same manner to the amount of $100,000 if the proper petition is filed.

The title of the act of 1879 was as general and comprehensive as it could well be "concerning counties and county officers." The board of supervisors are county officers, and county buildings are the property of the counties. This title was held to be sufficient to cover all the duties of the board of supervisors, and all the powers and rights of property of counties. It made it the duty of the supervisors to provide county buildings and made provision for the raising of funds for that purpose. By that act no appropriation for public money in excess of $1,500 can be made for public buildings without a vote of the people. By this act of 1913 that amount is increased to $100,000, and that appears to be substantially the purpose and intention of the act. Under our former acts it was the vote of the people that controlled, if the amount to be levied was more than the regular 15 mills, or the amount to be appropriated was more than $1,500. Under this act the same thing is accomplished without the vote of the people, but the petition prescribed is substituted therefor.

The courts will not declare an act of the legislature void as violating the constitution unless such conclusion is unavoidable. But the people have by their constitution placed limitations upon the legislature as well as upon the executive and judicial departments of their government. The duty of enforcing these limitations is placed upon the courts; no other way is provided; and when attempted legislation is plainly and unequivocally prohib-

ited by the constitution the courts must so declare. The constitutional limitation that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed" (Const., art. III, sec. 11) has been very many times construed and applied by this court. In the early history of the state it was decided that an act "complete in itself" did not violate this provision of the constitution, although it might incidentally change the law in some particulars as contained in prior legislation. This principle has been uniformly adhered to, and in such case the question at once arises, Is the act which is being considered complete in itself? This question is not always easy of solution, and there have been many decisions which discuss the question as to when an act is to be considered "complete in itself." This court has been very liberal in construing an act to be complete in itself for the purpose of upholding it.

As an example of this, the case of *Allan v. Kennard*, 81 Neb. 289, may be cited. In that case a statute which created the office of county comptroller was construed to be complete in itself. In the opinion of the court, which was written by Judge Letton, it was said: "Chapter 36 seems to be complete in itself, creating a new office upon sufficient reasons and prescribing the functions and duties and compensation of the incumbent of the office thus created," and the rule which was derived from the facts in that case was stated in the fourth paragraph of the syllabus: "An act which treats of one department of county government, the creation of a county office, and the duties and functions to be performed by the incumbent of such office, is complete in itself, repeals by implication all acts and parts of acts repugnant thereto, and is not required to contain all the sections of former acts which it may amend, or to specifically repeal the same." The opinion, among other cases, cites the case of *Van Horn v. State*, 46 Neb. 62. The opinion in that case, by Mr. Commissioner Irvine, discusses various questions touching the constitutionality of the act there considered,

some of which appear to have been thought to be of more importance and difficulty than the precise question now before us; but the discussion of this question, so far as it goes, is quite satisfactory. In that case the act was to provide for township organization. The title is quite comprehensive, and, among other things, provides for the repealing of some of the then existing statutes. The opinion discusses the distinction between the duties and prerogatives of county officers and the duties of township officers, and says: "Bearing in mind this distinction, we think it will be apparent at once that the act of 1895 has but one main and general subject, to wit, the organization of townships and the government thereof." The opinion finds that the act to provide for township organization had "but one main and general subject," and that it completely covered that subject without assistance from any other act, and the rule of law derived from this discussion is stated in the seventh paragraph of the syllabus, in which it is said that the provision of the constitution above quoted "has no application to acts complete in themselves, and not in their effect simply amendatory."

The question, then, in this case is, What is the subject of the act of 1913? If its subject is the raising of funds for providing county buildings, it is not complete in itself, as that subject was completely covered by the statute of 1879 and its amendments. If that was not the subject of this act which we are construing what then was the subject? Will it do to say that its subject was to provide another method for raising funds for public buildings? Was its subject the substitution of a petition in place of an election to authorize the county board to levy taxes for such funds? Was the substitution of $100,000 as the amount that might be levied for such purposes without a vote of the people in place of the former limitation of $1,500 the subject of legislation in this act? Can any of these supposed subjects be thought to be distinct subjects and complete in themselves? Unquestionably the general subject of this legislation is to provide a method of rais-

ing funds for the erection of public buildings, and the provision it makes is in addition and supplementary to the provisions already existing for that purpose. It therefore enlarges the means for raising such funds, and must be considered as amendatory of the former acts. If such legislation is permissible under the constitutional provision above quoted, it would be difficult to suggest any legislation that would be affected and controlled by that provision. The declaration of the legislature that the act is cumulative and must not be regarded as "modifying any provision of the statute now in force" does not alter the situation nor help the matter. This declaration is an attempt to make the substitution of the petition for the vote of the people in raising funds for this purpose and increasing the amount that can be raised without such vote a distinct subject of legislation, but the subject of legislation is not the petition and the specific amount that can be raised, but the raising of the funds for erecting county buildings, and no declaration of the legislature can change that fact. This act of 1913, then, attempts to amend the law without containing the section or sections so amended and without repealing those sections, and so violates the constitution.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree enjoining the defendants, as prayed in the petition.

REVERSED.

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

LETTON, J., dissenting.

Under the principles announced in *State v. Ure*, 91 Neb. 31; *Stewart v. Barton*, 91 Neb. 96; *Allan v. Kennard*, 81 Neb. 289, and *State v. Hevelone*, 92 Neb. 748, I think the statute does not violate the constitutional provisions, though I admit that, if the earlier cases in this court cited in the opinion were followed, it is a very close question. I prefer the more liberal construction of the late cases and therefore dissent. Moreover, the former statutes all in-

clude "other county buildings," while the present statute applies only to courthouses and jails.

The following opinion on motion for rehearing was filed April 17, 1914. *Rehearing denied:*

PER CURIAM. A motion for rehearing is filed, and it appears that there is an omission in the third paragraph of the syllabus of the opinion, *ante,* p. 473. That paragraph should read: "The subject of the act of 1913 (laws 1913, ch. 101) was to provide a method of raising funds for the erection of county buildings, and the provision it makes is in addition and supplementary to the statutes already existing for that purpose, and materially alters and amends the same. It does not contain the section or sections so amended, nor repeal such sections. It is therefore a violation of section 11, art. III, of the constitution, and void."

Prior to the act of 1913 the original statute provided that "no appropriations shall be made for the erection of any county buildings, without first submitting the proposition to a vote of the people of the county at a general election, and the same is ordered by two-thirds of the legal voters voting thereon." Laws 1879, sec. 25, subd. 2, p. 361. It was found that it is sometimes necessary to expend a small amount of money for furniture and repairing county buildings, and by the act of 1887 (laws 1887, ch. 28) this statute was changed so that no appropriation exceeding $1,500 could be made without a vote of the people. In that condition the statute stood until the act of 1913 was enacted. By the act of 1913 an appropriation of $100,000 can be made without a vote of the people. This is clearly amendatory of the statute existing before that time. Also by the act of 1913 a petition could be substituted for a vote of the people. This was also an amendment of the prior statute, so that there can be no doubt that the prior statutes as they existed were amended by the act of 1913, and were not repealed nor contained in the new act. This seems to be as plain a violation of the constitution as any we will ever have, and we cannot up-

hold the statute without ignoring or virtually repealing this provision of the constitution.

The motion for rehearing is

OVERRULED.

REESE, C. J., and LETTON, J., dissent.

AUGUST D. WITT, APPELLEE, V. GEORGE W. CALDWELL ET AL., APPELLANTS.

FILED MARCH 13, 1914. No. 17,610.

1. **Appeal:** CONFLICTING EVIDENCE. The evidence upon the trial of this case was in direct conflict upon every material controverted point of fact. In such case the verdict of the trial jury upon the conflicting evidence, if there is sufficient to support it, will not be molested.
2. **Negligence:** INSTRUCTIONS. Instructions, the substance of which is stated in the opinion, approved.
3. **Briefs** should be prepared in accordance with the provisions of section 8192, Rev. St. 1913, and the rules of the supreme court.

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

Hastings & Ireland, for appellants.

Guy R. C. Read and *Hugh A. Myers, contra.*

REESE, C. J.

This is an action for damages resulting from a personal injury. It is alleged in the petition that plaintiff was employed by the defendants, who were partners, and who had the contract for the erection of the new courthouse in Douglas county, situated in Omaha; that, while in the discharge of his duties as the employee of defendants, and under the direction and charge of their foreman, a certain wire cable was used in connection with a block and pulley in hoisting building material to the dome of said courthouse; that, while the said work was being prose

cuted, the said wire cable became twisted, and defendants' foreman directed plaintiff to take the twist out of the cable, and which plaintiff, in obedience to said order and command, undertook to do; that in untwisting said cable it became necessary for plaintiff to take hold of the cable with his hands at or near the block through which it passed; that the hoisting apparatus, with which the loads were carried to their destination, was propelled by a steam engine, which was under the direction of the foreman, who controlled the same by signals to the engineer in charge of the engine, the signals being given by the use of a whistle blown by the foreman; that, while plaintiff was endeavoring to take the twist out of the cable with his hand in a place of danger, known to said foreman, the foreman negligently and carelessly gave the signal to hoist, without the knowledge of plaintiff, whereupon the machinery and wire were suddenly started, and plaintiff's hand was caught and drawn into the pulley by the wire cable, and he received the injury complained of, to his damage in the sum of $2,000.

Defendants answered admitting their partnership relation, their contract for the erection of the Douglas county courthouse, that plaintiff was in the employ of defendants at the time alleged in the petition, and that, while so employed, he received a slight injury; but allege that whatever injury plaintiff received was by his own contributory negligence; that the signal to hoist was not given until plaintiff gave notice to the foreman that the load was ready to hoist, and when the machinery was started plaintiff carelessly and negligently placed his hand in a place of danger, and by reason of his own carelessness the slight injury was inflicted. The assumption of risk and the act of plaintiff's fellow servant were also pleaded, as was a denial of all negligence on the part of defendants. Plaintiff replied in general denial. A jury trial was had, which resulted in a verdict in favor of plaintiff for the sum of $1,500, on which a judgment was rendered. Defendants appeal.

It is shown by the evidence that plaintiff was directed to untwist a wire cable which had become twisted very near the block or pulley through which it had to pass in hoisting the load of material to its destination in the dome of the building then being constructed; that plaintiff was directed by the foreman to untwist the cable, and, while doing so, the machinery was suddenly started up, and his hand was caught by the wire, drawn into the block, and so injured as to require the amputation of the thumb, which, according to his testimony, rendered him unable to follow the vocation of horseshoer, which appears to have been his trade. The evidence of what occurred at the time of the accident was in direct conflict. On the part of the plaintiff, it was to the effect that he was directed to untwist the cable, and which he was doing, when the foreman, without warning or notice to him, gave the signal to the engineer for a quick hoist; that plaintiff did not hear the signal; that the machinery was suddenly started, jerking or drawing his hand into the block and seriously injuring it. It must be conceded that, if that testimony was correct, the action of the foreman was without the exercise of due or proper care, and defendants would be liable for any injury plaintiff may have received, if he were free from negligence himself. A different theory was presented by the defense, to the effect that the danger was open and apparent, and by the exercise of reasonable care on the part of plaintiff all accident would have been avoided; that the foreman did not give the signal to hoist until informed by plaintiff and his fellow servant that the defect in the cable had been corrected, and that the hoist could be made; that, when so informed, and not until then, the foreman gave the signal to the engineer to hoist; that plaintiff negligently and carelessly retained his hold upon the cable and allowed his hand to be drawn into the block. This presented a question peculiarly for solution by the jury. They were the judges of the convincing force of the testimony of the witnesses, and the court could not then, nor can we, take the questions of fact from the jury and

hold that the verdict was not sustained by sufficient evidence. This must dispose of the assigned errors of the district court in refusing to direct a verdict in favor of defendants at the close of plaintiff's evidence, and also after the close of the whole evidence.

It is contended that the district court erred in giving instructions numbered 5, 8, 10 and 14 upon its own motion. The giving of these instructions was severally assigned for error in the motion for a new trial, but we are unable to find any specific discussion of them in appellants' brief. The fifth is, in substance, that the burden of proof is upon plaintiff to establish negligence on the part of defendants by a preponderance of the evidence, and that to recover he must prove, first, that he was injured at the time and place substantially as alleged in the petition; second, that defendants were negligent in giving the signal to the engineer to start the hoisting apparatus while plaintiff was in the act of untwisting the wire cable ropes attached to the block; and, third, that defendants' negligence was the proximate cause of plaintiff's injury. The eighth instruction is that negligence is not presumed, but must be proved, not necessarily by direct evidence, but facts must be established from which a reasonable inference of negligence arises; if not, negligence is not proved. The above is amplified in a later part of the instruction, but we can perceive no infraction of any rule of law therein. The tenth is that, if plaintiff gave the signal to the foreman for the movement of the engine, which resulted in plaintiff's injury, he could not recover, and the verdict should be for defendants. The fourteenth is simply a direction for the jury to select a foreman and sign the verdict which conforms to their finding. We are unable to detect any reversible error in these instructions. It is also assigned that the jury failed to follow instructions numbered 6, 7, 9 and 11. These instructions are general ones usually given upon the subjects involved in the case, and properly directed the minds of the jury to the issues presented, leaving it to the jury to apply the law to such facts as they might find proved. Our attention is

not directed to any error requiring a reversal of the judgment.

We desire, again, to call attention to section 8192, Rev. St. 1913, and to the rules of this court governing the matter of the preparation of briefs. While appellants' brief in this case shows much labor and care in its preparation, it is more of a general classification of subjects, with citations of authorities, than a brief upon the particular questions involved in the case.

The judgment of the district court is

AFFIRMED.

EDWARD A. SMITH, ADMINISTRATOR, APPELLANT, V. ESTATE OF GEORGE M. BAYER, APPELLEE.

FILED MARCH 13, 1914. No. 17,669.

1. **Courts:** COUNTY COURTS: PROBATE JURISDICTION. The county court has exclusive original jurisdiction over the administration and settlement of the estates of deceased persons.
2. **Executors and Administrators:** ALLOWANCE TO WIDOW: WAIVER. Where a husband dies possessed of personal property, but of no wearing apparel, ornaments, nor household furniture, and it does not appear that he possessed any property specifically exempt to him from seizure under execution or attachment process, and the wife makes no demand for an allowance to her of exempt property, nor for the delivery to her of personal property, "to be selected by her," of the value of $200, during her life, but dies subsequent to the decease of her husband without making such request or demand, the provisions of section 1267, Rev. St. 1913, being for her sustenance and support, the rights conferred upon her by the section are waived, and do not, upon her death, descend to nor vest in the administrator of her estate.

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

McKenzie & Cox, for appellant.

Weaver & Giller, contra.

REESE, C. J.

Plaintiff filed his petition in the district court for Douglas county alleging, in substance, that George M. Bayer died intestate on the 5th day of May, 1910, leaving an estate of personal property of the value of $10,000; that he left surviving him Allie M. Bayer, his widow; that the estate of George M. Bayer was being administered upon, the administration thereof not having been closed; that Allie M. Bayer died on the 2d day of July, 1911; and that on the 5th day of July, 1911, plaintiff was appointed administrator of her estate. It will thus be seen that George M. Bayer died more than a year prior to the decease of Allie M. Bayer. There is no averment that Allie M. Bayer ever claimed or demanded any part of the estate of George M. Bayer, nor that there were any children born to them. It is alleged that after her death and the appointment of plaintiff as the administrator of her estate, he filed a petition in the county court asking for an order directing the administrator of the estate of George M. Bayer to turn over to plaintiff, as the administrator of the estate of Allie M. Bayer, the sum of $500 as exempt to the said Allie M. Bayer, and also personal property not exceeding in value the sum of $200, making a total of $700, as due to her estate under the provisions of sections 1267, Rev. St. 1913; that the county court refused to make the order as demanded; but just how the case got into the district court, whether by appeal or original action, does not appear. If by an original action, it is clear that the district court was without jurisdiction to make the order prayed for, and the order of the county court would be final; that court having exclusive original jurisdiction in the matter of the administration of estates.

It is alleged that, "as shown by the inventory of the administrator of the estate of the said George M. Bayer on file herein, the said George M. Bayer, at the time of his decease, had no wearing apparel, ornaments or household furniture of any kind or nature;" that he "did not own any lands, lots or real estate, or any interest in real es-

tate of any kind or nature whatsoever." The prayer is "for an order directing the administrator of the estate of George M. Bayer, deceased, to deliver over to your petitioner as the administrator of the estate of Allie M. Bayer, deceased, the sum of $500 as exempt to the said Allie M. Bayer out of the estate of the said George M. Bayer, deceased, and other personal property not exceeding $200 in value, or the sum of $200 in cash." Defendant demurred to the petition on the ground that the facts stated in the petition were not sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff having elected to stand upon his petition without amendment, the suit was dismissed. Plaintiff appeals.

It is said in defendant's brief that the decedent Allie M. Bayer claimed to be the common-law wife of George M. Bayer, but, as the demurrer admitted the averments of the petition, no notice can be taken of matters aside from what is there alleged, and we must assume that Allie M. Bayer was the legal wife of George M. Bayer. Questions of fact not shown in the petition must be raised by answer, if at all. As we have seen, there is nothing in the petition or record before us showing that this is other than a suit instituted originally in the district court. We are furnished no record, except the petition, the demurrer, and ruling of the court. While it is recited in the petition that plaintiffs' claim was rejected by the county court, there is no suggestion of any appeal therefrom. It is provided in section 1206, Rev. St. 1913: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons," etc. It necessarily follows that the only jurisdiction which the district court could acquire would be by appellate proceedings. Rev. St. 1913, sec. 1526. Upon this ground alone the demurrer was properly sustained.

But, passing this, it is claimed that plaintiff is entitled to the sum demanded under the provisions of section 1267, Rev. St. 1913, which declares that the surviving husband or wife shall be entitled to the "wearing apparel and ornaments and household furniture of the deceased, and all

the property and articles that was or were exempt to the deceased, at the time of his or her death, from levy or sale upon execution or attachment, and other personal property, to be selected by her, him or them, not exceeding two hundred dollars in value," etc. It is shown in the petition that, at the time of his death, George M. Bayer had neither wearing apparel, ornaments nor household furniture, and it is not alleged that he possessed any "property and articles" that was specifically exempt from levy or sale upon execution or attachment. These provisions are for the support and protection of the surviving members of the family of the deceased. In this case, assuming as we must, that there was a lawful marriage between the parties, there are no children, and the alleged wife refrained from making any demand for the allowance during her lifetime. Nor did she make any request for the transfer to her of personal property, "to be selected by her," to the extent and value of $200. No steps of that kind were taken by her during her life. Her claim under the statute was therefore waived. After her decease, she, of course, had no necessities to meet, and whatever rights she may have had personally could not descend nor vest in the administrator of her estate.

It follows that, viewing the case from any angle, the district court did not err in sustaining the demurrer. The judgment is therefore

AFFIRMED.

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

H. W. HORTON, APPELLEE, V. TABITHA HOME ET AL., APPELLANTS.

FILED MARCH 13, 1914. No. 17,438.

1. **Mechanics' Liens: CHARITABLE INSTITUTIONS.** A trust for the benefit of the public attaches to property secured by a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and a home for indigent orphans

to be given a common school education to fit them to become nurses and attendants on orphan homes, and similar institutions, and property so secured and used is not subject to mechanics' liens without an order of the district court of the proper county authorizing the same, nor can the property of such a corporation be sold on execution where such sale would defeat the trust and destroy the public purpose for which the property was donated or secured.

2. ———: ———: CONTRACTS BY TRUSTEES. The trustees elected to manage the affairs of such a corporation cannot enter into a valid contract by which its property may become subject to mechanics' liens without first having obtained an order of the district court for that purpose.

3. **Charities:** TRUSTEES: NOTICE. All persons dealing with the trustees of such a corporation must, at their peril, take notice of the powers granted by its articles of incorporation.

4. **Mechanics' Liens:** CHARITABLE INSTITUTIONS. The failure of the trustees to object to the use of material furnished, at the order of other persons, in remodeling the building situated upon such property will not have the effect of creating a mechanic's lien thereon.

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

F. A. Boehmer & Son and *H. C. Bittenbender,* for appellants.

Jesse L. Root, E. C. Strode, Field, Ricketts & Ricketts, M. V. Beghtol, C. S. Polk, Talbot & Allen, C. S. Allen and *Mockett & Peterson, contra.*

BARNES, J.

This action was commenced by H. W. Horton in the district court for Lancaster county, for the foreclosure of a mechanic's lien against an incorporated charitable institution known as "Tabitha Home," situated near the city of Lincoln. The petition was in the usual form for materials furnished Tabitha Home under an alleged contract. Certain other persons claiming mechanics', judgment and mortgage liens were made parties defendant, and filed answers and cross-petitions setting up their

claims, aggregating $22,280.32, exclusive of interest and costs. To the petition and cross-petitions the Home answered, admitting that it is a corporation, that it is the owner of the property in controversy, and denying the unadmitted allegations of the petition and cross-petitions. The minor children, inmates of the orphans' department of the home, applied for and were given leave to file an answer and cross-petition, which consisted of a general denial of the averments of the petition and all cross-petitions. The names of said minors and orphans, some 13 in number, are given, with the averment that they are minors and orphans, inmates of and confined in said Tabitha Home, a charitable institution, and have an interest therein; "that the Home is a corporation under the laws of this state, existing as a charitable institution, the object and purpose of which is to maintain a home for orphans and aged people; that it became incorporated many years ago, and ever since said date has been and is now maintained as an orphans' home; * * * that its property and funds are controlled and handled by a board of trustees whose duty it is to use said funds and property for the purposes and objects for which the Home was incorporated, and that such board of trustees has no other interest or rights in the property of this Home; that the title to the property is held in trust by the corporation and its officers for the use and benefit of the inmates in furtherance of the object for which the home was created; that these answering minors have been inmates of the Home and were inmates thereof at the time when the alleged improvements were made, and that they are still inmates of this Home and being cared for in said institution; that no part of the material or labor described in these petitions and answers of the lienholders was necessary for the completion, maintenance or furtherance of the trust for which the Home was incorporated, but if said material was in reality furnished it was for a different purpose; that these orphans have a right to and lien on all the funds and property of said institution until they arrive of age. And that the board of trustees could not

use the funds or property of the Home for any other purpose. The minors pray that their interest may be protected and the property preserved for the original trust for which it was intended."

By leave of court an answer and cross-petition was also filed by the aged inmates of the Home, in which it is alleged: "That Tabitha Home is a charitable institution duly incorporated, as appears from a copy of the articles attached to this cross-petition as exhibit A; that the Home was organized and is maintained as a charitable institution, and not for profit; that the corporation has no capital and has no funds or income outside of a few contributions, and that it has no property except that in controversy; that all of these answering inmates who had any funds made a contract with said Home for their support, board and lodging for the remainder of their lives, and that they paid their money to said Home for that purpose; * * * and before any of the alleged material was furnished or labor done, they entered said institution, in pursuance of their contract and payment of their money, and that they were in said Home long before and at the time when it is claimed that these materials were furnished and this labor was done; that the alleged material was not furnished at the request of these inmates, nor for their use and benefit, nor was it necessary to maintain the institution for its original charitable purpose." Then follows a list of the aged inmates, 19 in number, with the dates of their several entries, extending from November 21, 1887, to June 25, 1913, with the allegation "that they have each contributed all they had to the Home for their support, and that said sums of money so paid were accepted and are being retained by the Home under said contract for maintenance of these inmates; that they paid their money in good faith, and relied upon the charitable purposes of said Home and the articles of incorporation, believing the same to be true; that the Home was incorporated so that no one person might hold, own or control its property or funds, and that the board of trustees and the officers have no right or interest in this prop-

erty or funds as individuals, and have no authority to use the funds for other purposes than to support the inmates, and that they have no right or interest as individuals in the property of this institution; that the corporation has elected these officers in order that some one might transact its business in a proper manner, and for no other purpose; that neither the officers nor trustees receive any compensation, and that the corporation has no capital, and is dependent for its support upon free contributions, and that it has no real estate except that in controversy; that the material described in the petition and cross-petition herein was not furnished * * * under the direction or request of the board of trustees of said Home, nor was it necessary for the continuance of the trust for which the Home was incorporated and continued; that these inmates, by reason of these facts, have a lien upon the property of the Home for the fulfilment of their said contract, and that the board of trustees or officers could not make any contract to divest these inmates of their said right." The answer concluded with a "prayer for protection of their rights, preservation of the property, and, in the event that the real estate be sold, the money paid in by these inmates may be refunded to them." The articles of incorporation of Tabitha Home were attached to the cross-petition, and show that they were filed for record April 4, 1890, and duly recorded in the proper records of Lancaster county; that the objects and business of the corporation are: "First. To erect and maintain an orphans' home for the benefit of the orphans of our land. Second. To erect and maintain a place where the sick and needy and feeble may be cared for. Third. To educate and train parties for the purpose of becoming deaconesses, nurses and attendants on hospitals, orphan homes or similar institutions. Fourth. The transaction of the business of the corporation shall be vested in five trustees to be elected by the members of the corporation, and who shall hold their office during the term of their natural life, except they may be removed for cause, or by resignation. Fifth. The indebtedness

of the corporation shall at no time exceed one-half of the value of such property as may at the time be owned by it."

The answer of J. H. Humpe, trustee, and a mortgagee, consists of a general denial of the averments of the answers and cross-petitions of the alleged mechanics' lienholders, admits that the defendant Tabitha Home is and for many years has been duly incorporated as a charitable institution under the laws of this state; that it is the owner of the land described in the petition and cross-petitions. It is alleged that for the purpose of securing the payment of certain described notes, amounting in all to the sum of $10,250, issued by the corporation of Tabitha Home, said notes drawing interest as therein provided, and in pursuance of a resolution therefor duly adopted directing the trustees so to do, they, on the 22d day of September, 1908, duly executed and delivered to said Humpe a trust deed upon the said real estate; that the notes are outstanding and unpaid, though some are not yet due, but that the said trustee has a lien on said property for the security of said notes, which he asks to have protected by the decree of the court.

The Woodmen Accident Association filed an answer and cross-petition, setting up the execution of two promissory notes, amounting to $8,000, with 6 per cent. annual interest, secured by mortgages on the premises involved, which were duly executed by leave of the district court, and the mortgages, duly recorded, constitute prior liens; that the debt was not yet due, and there was no default in the payment of interest. The decree found the mortgages to be the first and prior liens, but not subject to foreclosure. No objections having been made thereto, the mortgages need not be further noticed. Replies were filed to all the cross-petitions, and the issues fully formed.

A trial was had, which resulted in findings and a decree in favor of plaintiff and all the cross-petitioners claiming mechanics' liens, and ordering a foreclosure thereof; that the liens of the several mechanics' lien-holders constitute a second lien; that J. H. Humpe, trustee,

has a third lien, and is not entitled to a foreclosure thereof; that H. Herpolsheimer Company has a fourth lien. A sale was ordered, and Tabitha Home, the aged inmates, and one Martin, as next friend in behalf of the orphan inmates, have appealed.

At the beginning of the trial it was stipulated that the material and labor furnished by the parties claiming the liens were as stated in the accounts attached to plaintiff's petition and the several cross-petitions of the lien-holders, and that the statements were filed and recorded as alleged, and the materials were furnished and used on the premises described, but that such stipulation would not be construed to mean that they were furnished by order of Tabitha Home or any of its officers. The stipulation is of considerable length, referring to each cross-petition, and "that the balance due on the above amounts and items is the amount specified in the petition and in the answers and cross-petitions of the respective parties, subject to the defenses tendered here by the Tabitha Home, as to the legal rights of the parties incurring these expenses to obligate the Tabitha Home to pay for them."

The fact that the material and labor was furnished to remodel one of the buildings is not disputed; but it is contended that it was not furnished for the Home, nor under any contract with the corporation therefor. We find no cross-appeal as against the Woodmen Accident Association, nor in favor of J. H. Humpe, trustee. This leaves for our consideration the contention against the mechanics' liens claims, and the Herpolsheimer Company judgment.

It is shown by the record that Tabitha Home is a charitable institution; that the title is in the corporation, with a board of trustees to manage its affairs, who are not vested with the title; that it has no fixed income, and is instituted, supported and maintained alone by voluntary contributions and donations by the charitably inclined, and by contributions made by the church organization of the denomination in whose interest the Home

was created, and by which it is managed, assisted by contributions from others, and is in no sense an organization created and maintained for profit. It has no capital stock, and it is shown that in carrying out the corporate design over 2,000 orphans and inmates have been taken care of since its organization; that the aged and infirm have contributed large sums of money under a stipulation that they should be provided with care and a home during the remainder of their lives; their contributions ranging from $50 to $1,000, according to their ability to pay. It is clear that those inmates, should the decree of the district court be affirmed, will be deprived of the care and support toward which they have contributed, and will be thrown upon the charity of the public for their maintenance and support. There seems to be little, if any, doubt that, should the liens be enforced, the total indebtedness would swallow up the property, and the object of its creation and maintenance would be completely destroyed. On the other hand, should the decree be reversed and the existence of the liens be denied, plaintiff and cross-petitioners would probably lose what they have furnished for the improvement of the property. The importance of the case will therefore be well understood and appreciated.

It appears that Tabitha Home is an institution of charity. The real estate and funds provided for the building were contributed by generous people for the good of human beings who were not able to take care of themselves. It is a general charity. Its benefits are not limited to any class of people, and it appears that its doors are open to all alike.

It further appears that certain doctors practicing their profession in the city of Lincoln thought it would be a good thing to have a hospital at this institution; that it would help them in their business, and would be of benefit generally. They proposed to the trustees of Tabitha Home to make a hospital there. The trustees of the Home appear to have been cautious and discreet persons, and made a plain arrangment with the doctors that, if the

hospital was established there, it should be done without expense to the Home. The doctors had an estimate made, and claimed that the improvement could be completed for $6,000. The trustees then authorized them to go ahead and establish a hospital at their own expense and without charge to the Home. Thereupon, the doctors went ahead in a careless sort of way and incurred an expense of over $20,000, and now these claims are asserted as liens upon the property of the Home. The board of trustees of the Home, and especially the many old people who have put all of their worldly goods and money into the Home on the understanding that they were to have a place of refuge as long as they lived, and the many orphan children who are kept there, some of whom are being kept for a consideration paid by their friends, are all perfectly innocent in this matter; and, if the liens in question are established, the inmates will lose everything they have in connection with the Home.

The first question presented and discussed is, whether the contractors and materialmen have placed themselves in a position to have a lien upon this property, even if it is ordinary property and is not protected by the statute. It is by all parties considered that they did not make their contracts with the owners of the property; and, if they are held to have had a contract with the owners or trustees, it must be one implied from the conditions and circumstances under which they acted. The title of the property was in the Tabitha Home. The trustees of the Home had made their record plainly show that the property was not to be chargeable with these expenses. On a former occasion, when the trustees desired to charge the property with an indebtedness, they applied to the courts for permission to do so, and this was a matter of public record. That this was a charitable institution was also a matter of public record and notoriety. This court has many times held that "a person furnishing material for an improvement on real estate must take notice of the interest and title in the premises of the person with whom he contracted as shown by the public record, as

his lien for labor and material, aside from the improvement itself, attaches only to such interest." *Waterman v. Stout,* 38 Neb. 396. The question, then, is whether the parties who furnished the materials, if they intended to charge the accounts against the Tabitha Home and establish a lien thereon, should not have taken notice from the public records showing that the title was in the Home, which was controlled by a board of trustees, and that the trustees, when they made certain improvements on the Home, had themselves applied to the courts for permission to do so. The records of the corporation showed as explicitly as it could be shown that the Tabitha Home was not undertaking to make this improvement, and was not chargeable with the bills. Therefore it cannot be said that the parties had the right to go ahead and assume that the property of this charity was to become chargeable with the bills for material and labor, without making more inquiry than the evidence shows they made. The trustees as a body, or individually, took no action in ordering the material which was used in making the improvement; and no separate or independent action of any one or more of the trustees could create an indebtedness which would eventually ripen into a lien upon the property held in trust by them. Trustees have no power beyond that created by the trust, and any person dealing with them in matters beyond their power does so at his peril. *Stark v. Olsen,* 44 Neb. 646, 659; *Livermore v. Maxwell,* 87 Ia. 705; *Byron Reed Co. v. Klabunde,* 76 Neb. 801; *French v. Trustees of Griswold College,* 60 Ia. 482.

In *Fordyce v. Woman's Christian Nat. Library Ass'n,* 79 Ark. 550, 7 L. R. A. n. s. 490, it was said: "The immunity of the property of a charity from sale under execution rests on special grounds. The property of a corporation organized solely for charitable purposes is exclusively dedicated to public uses, as much so as the streets and alleys of a town or city; for this purpose the corporation is a mere trustee. *Benton v. Boston City Hospital,* 140 Mass. 13. It is of primary importance to the public that the trust shall be perpetuated. The trus-

tees of the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physician and the attendants in a hospital. If the doctrine of *respondeat superior* is applied to them, it follows that, along with their other powers, they possess an implied power to destroy, by a wilful violation of their duties, by collusion, or by negligence, the public interests that they are selected to preserve." Further it was said: "'A valid vested estate in trust (for charitable purposes) can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right as well as the duty of the sovereign, by its courts and public officers, as also by the legislature (if needed), to have the charities properly administered.' *Girard v. Philadelphia,* 7 Wall. (U. S.) 1, 15. 'With regard to the liability of charitable corporations or their trustees for the negligence of their agents or employees, there is some difference of opinion, but the decided weight of authority denies such liability; this on two grounds: First, that, if this liability were admitted, the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that, since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees.'"

It follows that in this case the board of trustees could not do by indirection what they could not do directly. *Avery v. Baker,* 27 Neb. 388; *Grissom v. Hill,* 17 Ark. 483; *Fordyce v. Woman's Christian Nat. Library Ass'n, supra; Zion Church v. Parker,* 114 Ia. 1.

Another question of importance is whether the property of the Home could be incumbered with a mortgage or otherwise, except under the direction of the court, pro-

viding what the money realized on the incumbrance should be used for. At the common law no lien was allowed upon church property. The revenue of a religious corporation and any profits realized from this property could be appropriated by the creditors, but not the property itself. Phillips, Mechanics' Liens (3d ed.) sec. 185, after reciting this condition of the common law, says: "It is well worthy of consideration whether all who deal with it do not contract upon the credit of these resources (the revenues and profits derived therefrom) alone." It appears that many cases have arisen in this country in which in the absence of any statute on the subject, the courts have been divided upon the proposition as to whether any mechanics' lien could be established upon church property.

The property in question in the case at bar was owned by the Tabitha Home, a corporation organized for the purpose of holding the title thereof. This corporation is not a religious society. A religious society, however, concluded to build a home. They solicited funds from the charitably inclined with which to construct it, and of course the religious society itself contributed towards the construction of the building. If we look to the form of the matter only, this was not the property of a religious society; if we look to the substance however, it was the property of such society. If it can be held to be the property of a religious society, it comes directly within section 651, Rev. St. 1913, and if it does, then, in case it is desired to sell or exchange the property or incumber it by a mortgage or otherwise, the district court, upon petition and good cause shown, might authorize it to be done; and, if that authority was granted, there would be included in the order a direction as to how the proceeds of the incumbrance should be appropriated or invested. Such order would require that the proceeds be appropriated and invested in accordance with the original terms upon which the real estate became invested or entrusted to such religious society. The lienholders, however, have cited some sections of the statute, which is a general one, and in-

tended to cover other cases of organized societies besides religious societies, and which of course would not have any application to the case at bar. Their attempted application of those sections of the statute do not appear to be warranted by the Revised Statutes of 1913, where the various sections of the statute are arranged. Section 651, Rev. St. 1913, provides: "When any real estate shall have been or may hereafter be bequeathed, aliened, donated, or otherwise entrusted to any religious society in this state, or to any of the trustees or officers of any such society, and such society shall be desirous to sell, exchange, or incumber, by mortgage or otherwise, any such real estate, it shall be lawful for the district court of the proper county, upon good cause shown upon petition of any such society, or some person authorized by them, to make an order authorizing the sale or incumbrance of any such real estate, and said court may include in such order directions how the proceeds of such sale or incumbrance shall be appropriated or invested: Provided, such order shall in no case be inconsistent with the original terms upon which such real estate became invested in or entrusted to such religious society." It appears beyond all question that the organization was for charitable purposes, and was under the jurisdiction and control of the Evangelical Lutheran Church, and it is our view that it was within the provisions of the statute above quoted. If this be true, no action was had of any kind, as directed by the statute, conferring authority upon the board of trustees which could result in the creation of a lien or an incumbrance upon the property, and, as we view the record, no liens were created, for it was beyond the power of the board to do by indirection what they could not do directly.

While there is some conflict in the authorities, the great weight of the adjudicated cases favor the conclusions above expressed. It is to be regretted that the claimants, seeking to establish their liens are denied that remedy; but, on the other hand, a decree establishing such liens and an order of foreclosure would divert the property

from the charitable purposes to which it has been dedicated, and would completely destroy its object, with the result that the orphans and the aged and infirm inmates of the Home would be left without any means of support, and would be thrown upon the general public for suitable care and maintenance. As we view the authorities, this should not be done.

The judgment of the district court establishing the claimants' liens, and ordering a foreclosure and sale to satisfy the same, is reversed, and the cause is remanded to the district court for such other and further proceedings in harmony with this opinion as may be desired.

REVERSED.

LETTON, J. I am unable to agree with the conclusions of fact announced in the opinion, and also with the legal principles stated as applying to the facts in evidence in the case. I therefore dissent.

ROSE, J., dissents upon the same ground.

HAMER, J., concurring.

The corporation seems to have been organized as a charitable institution to maintain a home for orphans and aged people—persons who are unable to provide for themselves. The purpose of the existence of the institution is not for profit. It has no property except that in controversy. The aged persons, for the benefit of whom the Home in part exists, appeared to have contributed all their means to establish and maintain it. This was done under a contract so that the inmates should have a home that would shield them in their old age, infirmity, and feebleness.

It is provided in its articles of incorporation that the transaction of the business of the Home "shall be vested in five trustees to be elected by the members of the corporation." These trustees have no authority to bind the corporation and create a debt against it, unless they act within the purposes of the corporation as set forth in its

articles. The thing proposed to be built and for which it is claimed the indebtedness on mechanics' liens was incurred was a hospital. I am unable to see how these people needed a hospital. Suppose that the trustees had undertaken to construct a flour-mill, would they have had authority to do it? Could they engage in any sort of commercial venture? Could they do anything outside of that which the articles of incorporation would naturally include? The character of the occupation of the trustees was such that it demanded of the one who would do business with them a critical inspection of their powers. The hospital was to be built without expense to the Home. The doctors who were going to build it so represented to the trustees. Therefore the mechanics' lien people can only look to the doctors. They certainly cannot look to the trustees, who never intended to incur an obligation against this charitable institution. If there is to be a loss, let those whose vigilance in getting business made the loss possible suffer for it. The helpless orphans and the feeble old people should not be turned out of their refuge because the doctors overestimated what they could do, or because they conceived the idea of building a hospital for a charitable institution which did not need it, and whose articles of incorporation did not contemplate it.

Section 153, ch. 16, Comp. St. 1911, contains a provision that all funds received by any such corporation (charity society) shall be used in the first instance, or shall be vested, and the income thereof used (after paying the necessary expenses) "for the exclusive purpose set forth in the articles of association, and no portion thereof shall be used for any such purpose except within this state, and no portion of the funds of any such corporation shall be used or contributed toward the erection, completion, or furnishing of any building not owned or used by such corporation."

Section 154c of the same chapter provides that "the books, records and files pertaining to any such Home shall be subject to the inspection of the auditor of public accounts of this state or any deputy or clerk authorized by

him to inspect the same." It is further provided in the same section that, "in case of any diversion of the funds or other property acquired by any organization under this act from the object and purposes of such Home or Homes, or funds therefor, the attorney general is hereby authorized to bring suit in any court having general jurisdiction in equity matters in the state, to restrain and prevent any diversion of such funds or property, and to adjust any and all wrongs concerning the same."

It will be seen that the spirit of this legislation tends to prevent any diversion of the property from the charitable purpose intended. It seems to the writer that, if the trustees undertook to endanger the safety of the property by engaging in a contract which might incumber it with mechanics' liens in carrying out a purpose not contemplated by the articles of incorporation, such effort of the trustees would be beyond their jursdiction, and forbidden by the general spirit of our laws towards charitable institutions.

WILLIAM ALBERS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 13, 1914. No. 17,592.

1. **Waters:** DAMAGES: RAILROAD EMBANKMENTS: DIRECTING VERDICT. Action to recover damages alleged to have been sustained by the negligent construction of defendant's railroad yards and grades, which, it is claimed, held back the flood waters of Salt creek, and threw them over plaintiff's premises and into his store building. It appears from plaintiff's evidence that, when the water reached its maximum height, the defendant's tracks and grades were entirely submerged; that the water formed a lake in the salt basin of such depth as to stand three feet deep in plaintiff's store for several hours. *Held*, That defendant's motion to direct a verdict in its favor should have been sustained.

2. **New Trial:** FINDINGS: EVIDENCE. Special findings of the jury are ordinarily entitled to great weight, and will not be lightly set aside, but where there is no evidence to sustain them they are not controlling, and a new trial should be awarded.

3. **Venue:** MOTION FOR CHANGE: REVIEW. Where the evidence submitted in support of a motion for a change of venue fairly shows that the party seeking such change cannot have a fair and impartial trial in the county where the action is pending, it is reversible error to overrule the motion.

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

Jesse L. Root, Byron Clark, E. C. Strode, Max V. Beghtol and *Barton L. Green,* for appellant.

Wilmer B. Comstock, contra.

BARNES, J.

This was an action to recover damages sustained by plaintiff by the partial destruction of his stock of groceries contained in his store building at the corner of Fifth and D streets, on lots 11 and 12, in block 194, of the city of Lincoln, together with damages to the lot and building, caused by the flood waters of July 6, 1908, which, it was alleged, had been thrown upon plaintiff's premises by the negligent construction of the new yards, tracks and grades of the defendant railroad.

The answer admitted the construction of the grades, embankments, bridges and culverts over and across what is known as the Salt basin, west of the city of Lincoln, in Lancaster county, north of the place where the channels of Salt and Middle creeks enter said basin; and alleged that the lots and personal property described in plaintiff's petition were located in low ground which was subject to inundations and overflow, and known to be subject thereto from the earliest known history of the basin, and at a point where the surface and channel waters of the surrounding country were precipitated down steep grades into said basin; that when said basin was filled the waters thereof would spread out, overflow, extend to and include the lands of which plaintiff's lots formed a part; that on the 6th day of July, 1908, the waters accumulated from the drainage area into said valleys and basin and stood back upon plaintiff's lots, as, by the nat-

ural topography of the valleys in said basin, it was compelled to do; that said waters were the result of an excessive rainfall, theretofore unknown and unequaled in quantity in the same period of time in said valleys and basin, the drainage area thereof and the tributaries thereto, and one which the defendant could not, nor was it required by law to, provide for; that defendant's grades, embankments, culverts and bridges were built in a skilful manner for drainage and railroad purposes, and included in such construction the plans, bridges, culverts and waterways equal to that which nature provided for known, natural, usual and ordinary drainage purposes; that said rainfall was of such unusual volume that it submerged defendant's embankments and railroad tracks, and the depth of water complained of was the result of natural conditions; that any damages of which plaintiff complains and which accrued therefrom were not contributed to by any act of the defendant, nor influenced by defendant's grades, embankments, tracks, bridges or culverts. Defendant denied each and every other allegation contained in plaintiff's petition. Plaintiff's reply was a general denial of the allegations of the answer.

Upon the issues thus joined, there was a trial to a jury, and a verdict was returned for the plaintiff for the sum of $1,000. Two special findings were also submitted to the jury, which, with the answers thereto, read as follows: "First. Would the plaintiff's real estate described in his petition have been damaged to any extent by the flood waters of July 6, 1908, had the defendant's embankments not have been constructed in the Salt creek valley? Answer: No. Second. Would any part of the plaintiff's personal property described in his petition have been damaged by the flood waters of July 6, 1908, had the defendant's embankments not have been constructed in the Salt creek valley? Answer: No."

A motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant has brought the case to this court by an appeal.

Defendant, among other assignments of error, contends that the verdict is not sustained by the evidence. It appears from the record that plaintiff gave evidence of the extent and value of the stock of groceries damaged and destroyed by the flood, and the depreciation in the value of his land and buildings caused thereby. He testified that the flood waters began to flow over his premises about 6 o'clock on the morning of the 6th of July, 1908, and that the water increased in height and depth until about 8 or 9 o'clock, when it was three feet deep on the floor of his store, and was running over the counters.

Mart Overton testified for plaintiff that the water was about three feet higher than it ever was before for 20 years; that he had noticed that, when the water "comes" over the Burlington grade, it begins to go down at "our" place; has been that way for 20 years. Other witnesses for the plaintiff testified that there was a deep, wide basin on the west side of the Burlington grade; that a pretty fair current was running from the southwest to the north of east, and that the water always broke over the grade in flood times.

Henry Wurster testified that, at about half past 8 o'clock on the morning of July 6, the water commenced to run over the J street grade; that before that time it was from three to four feet lower on the north side of the grade than it was on the south side, and that in about 15 minutes after it broke over the grade it was the same height on both sides. To the same effect was the testimony of Helzer, Lendtke, and Schmall. One Siebert testified that the water came over the J street grade between 8 and 9 o'clock. In fact, the plaintiff clearly proved by a number of witnesses that the water coming down Salt creek from the south was held back for a short time by what is called the Denver grade, and did not break over the grade until between 8 and 9 o'clock in the morning. The testimony of surveyor Scott fixes the elevations along the J street grade, and for a short distance north and south thereof; the elevations of the grades and the openings or waterways constructed therein, together with the

highway bridges across Salt creek, and the railroad bridge on or near J street. The size of the openings of the waterways thereunder were described by him, and it may be said that his evidence corresponds with the grades and elevations as fixed by the defendant's engineers.

The evidence introduced on the part of the defendant shows that the city of Lincoln is constructed on the east side of Salt creek valley, but a portion of it lies within the Salt creek basin. The source of Salt creek is near the southwest corner of Lancaster county, about 23 miles from Lincoln, at an elevation of 1,500 feet above sea level. This stream flows in a northerly direction through Lancaster county, and, as it enters the corporate limits of the city of Lincoln, it passes through the basin that receives the flood waters from a drainage area of approximately 680 square miles. This drainage area is fan-shaped in form, and converges into Salt creek basin at the western edge of the city of Lincoln. The Burlington railroad built its first line into and through the city in 1870. Subsequently other lines were purchased or constructed, so that in 1908 the defendant owned a number of railway lines converging into the city of Lincoln, with the terminals essential for its use. The main line of the Burlington from Chicago to Denver, extending southwestward from the passenger station through and beyond the city of Lincoln, crosses Salt creek at a point where B street would intersect the railway if it were extended westward. This line of railway is referred to in the record generally as the Denver line. The plaintiff's property is located at Fifth and D streets, about five blocks east of the Denver line. In 1908 the defendant company had about completed its Middle creek yards, and railway lines connecting those yards with the Denver line, and the switch tracks to the west thereof. The yards are about 3½ miles long, and from 200 to 1,000 feet wide. The railways connecting these yards with the main lines are laid upon an elevation of earth approximately eight feet in height. Salt creek is spanned by a bridge 250 feet in length, divided into waterways by piers constructed to carry the rail-

ways from the main line into the yards. This improvement is referred to in the evidence of both plaintiff and the defendant as the new construction, the J street embankment, and the J street grade. A map was introduced in evidence by the plaintiff, from which may be ascertained the high water plane by a dotted irregular line in the form of letters H W to indicate the elevation the water attained at each particular point. The Denver embankment is from four to five feet in height, but the elevation of the ground upon which this track is laid makes the top of the ties on this line as high as the top of the ties on the J street embankment. The plaintiff's property is situated a trifle over half a mile south and up stream from the J street grade, and the Denver line intervenes between plaintiff's property and the J street embankment.

On July 5, and the morning of July 6, 1908, the drainage area of upper Salt creek, of Oak creek, Middle creek, Antelope creek, Little Salt creek and Stevens creek was deluged by a heavy rain, which, as we view the testimony, was unprecedented in volume and extent; 5.13 inches of rain fell during that night upon the campus of the University of Nebraska near the Salt creek basin. Approximately the same amount of rain fell over the entire drainage district above mentioned. The conditions existing in the valleys of the watercourses flowing into Salt creek basin are described by numerous witnesses. Haines branch, which empties into Salt creek near Lincoln Park, some distance south of the plaintiff's premises, was out of its banks at 6 o'clock on the morning of July 6, and the water was from 2 to 6 feet deep on the bottoms, which were about 80 rods wide.

Frank Denton, Thomes Littler, and Martin Gilbert testified that no other flood of such magnitude was known to have existed since 1866. Antelope creek, which flows east through Lincoln, and from thence into Salt creek near the fair grounds, was out of its banks by midnight of July 5. The water was the highest at about 3 o'clock in the morning of the 6th of July, and remained at flood tide until 4 o'clock. The water in the Antelope valley

flowed 3½ feet deep down the Rock Island tracks and across O street in the city of Lincoln. North of O street the stream was 200 feet wide, and in some places from 10 to 12 feet deep. In the upper Salt creek valley, at Roca, which is several miles south of Lincoln, the water was 2 feet higher than it had been known to be in the preceding 40 years. Stevens creek, which empties into Salt creek about 7 miles northeast of Lincoln, and not far from Havelock, was out of its banks at 5 o'clock in the morning, and was higher than it had been known to be for 40 years. The water in Salt creek attained such a height that it held back the waters in Stevens creek, which at its maximum height was some 2 miles wide. In some places the water was 6 feet deep, and it destroyed three-fourths of a mile of the Burlington grade near Havelock, and did not commence to recede until 4 o'clock in the afternoon. Little Salt creek, which empties into main Salt creek below the mouth of Antelope creek, but above the confluence of Stevens creek and Salt creek, was also out of its banks and covered the bottoms, which were about a mile and a half wide. The water from Salt creek backed up the water in Little Salt creek, and it was three days before it receded within its banks. The water was from 10 to 12 feet deep on the bottoms, and came up so suddenly that a boy driving cattle was marooned upon a knoll, and was rescued by means of a raft. In Oak creek valley the water was 1 mile wide and 3 feet deep, with a current so swift that it destroyed about 80 or 90 yards of the Union Pacific railroad grade. Between Havelock and Waverly the water in the Salt creek valley was 6 feet deep in the bottoms, and from 2½ to 3 miles wide. At 4 o'clock in the morning the water was backing upstream from Little Salt creek in the neighborhood of the mouth of Antelope creek, and by 11 o'clock in the forenoon there was 5 feet of water in the pasture just below the mouth of the Antelope. By 10 o'clock in the forenoon of July 6, all of the railway embankments in the Salt creek valley in Lincoln and vicinity were entirely submerged. At 8 o'clock in the forenoon of July 6, 1908, at the corner of Second and

L streets nearly three blocks north of the J street grade, and about three-fourths of a mile down the stream from the plaintiff's premises, the water was flowing up stream. Horses were drowned in the vicinity of the gas works, just north of J street, and, according to the testimony of plaintiff's witness Wurm, the water attained its greatest elevation between 1 and 2 o'clock in the afternoon, and continued at that elevation for three hours thereafter. According to the testimony of plaintiff's witness Reif, the water did not commence to recede until 12 o'clock P. M. of July 6. Plaintiff's witness Phillips says the water remained at its maximum height for three hours, and that the water flowed over the J street bridge from 4 o'clock P. M. until dark. It appears that for three hours the water was without much current and was like a pond. Plaintiff's witness Scott established the elevation of the flood plain at three points north of and down the stream from all of the defendant's alleged negligently constructed improvements, and from an examination of those elevations every principle of hydraulics would be violated by saying that the defendant's embankments increased the elevation of the water south of those points. The plaintiff's property is more than 3,500 feet northward from the northwest corner of block 79, and the water at that point below the defendant's embankment was within 2.27 feet of the top of the counter in plaintiff's store. Plaintiff's witness Scott testified that there is 3.3 feet fall in the natural surface of the ground between defendant's J street grade and the Denver line bridge over Salt creek. The distance between those structures is less than the distance between the northwest corner of block 79 and the plaintiff's store. Allowing for the natural fall of the surface of the ground, the hydraulic or flood grade between the plaintiff's property and the northwest corner of block 79, at the time the water attained its maximum height, was less than the natural grade of the ground. In fact, it is clearly established by all of the testimony, and that fact is disputed by none, that the water

flowed into Salt creek basin from the various streams tributary thereto until it filled that basin and submerged all of the defendant's railway tracks, grades and construction several feet in depth, and there was a lake or pond in the valley sufficiently high to create a head which forced its way down the stream and through the constricted outlet in the vicinity of Havelock; that for three or four hours this solid body of water overflowed the whole bottom, and remained in the plaintiff's store as high as the top of his counters.

It thus clearly appears that plaintiff's real estate and personal property would have been damaged to the same extent by the flood waters of July 6, 1908, if the defendant's embankments had not been constructed in the Salt creek valley. It is true that, for a short time on the morning of July 6, the water coming from the south down the Salt creek valley was held back to some extent by the Denver grade, and flooded the plaintiff's store. But, as soon as the volume of water from the other tributaries poured into the basin, it became filled up, and a great lake was formed in the area between Havelock and A street, and the water continued to rise until a sufficient head was created to carry it north down the Salt creek valley; that during that period the flood in the plaintiff's store reached its maximum height, and there remained for several hours at the same height as the flood plane throughout the whole basin.

Plaintiff, by his petition, failed to allege special damages for that part of the time in which his premises were flooded before the water broke over the defendant's grade. No proof was introduced on that point, and the cause was not tried on that theory. Therefore, it was the plain duty of the trial court to sustain defendant's motion and direct a verdict in its favor, and it was reversible error to overrule that motion.

It is also contended that the court erred in overruling defendant's motion for a change of venue. That motion was supported by the affidavits of 113 persons. Among them appears the affidavit of Gottfreid Herzog, who testi-

fied that he was well acquainted with the locality where the flood claims against the defendant originated; that 400 property owners in the Salt creek basin, in a territory covering 60 blocks in the city of Lincoln, were claimants against the railroad company for damages; that meetings were regularly held on the last Tuesday of each month attended by many of those claimants; that in those meetings the question of the defendant's liability was discussed, and the property owners agreed to testify for each other. A written memoranda was made as to what each claimant would testify to; that the meetings were regularly organized, with a presiding chairman, and the claimants would laugh, and say they would enforce their claims and secure settlements, although they did not believe the company was liable; that the attorneys and agents for the claimants were urging litigation, and advancing the arguments that juries in Lancaster county would find for the claimants, that the railroad company could not win, that the claimants and property owners had many friends and relatives residing in different parts of Lancaster county, and that defendant could not obtain a fair and impartial trial in said county. Many other affidavits of the same nature were produced, together with the affidavits of other persons long residents of Lancaster county, residing in different precincts, villages and cities, and from practically every walk of life, stating that defendant could not obtain a fair and impartial trial in the county. In opposition to the motion, the plaintiff produced the affidavits of about 250 persons who testified that, in their judgment, the defendant could have a fair and impartial trial in Lancaster county. Out of this number, 60 of the affiants resided in University Place, where one of the leading counsel for plaintiffs in the flood cases resided. Practically every lawyer in Lancaster county who held a claim of the character referred to in Mr. Herzog's affidavit made an affidavit to the effect that defendant could have a fair and impartial trial in the county.

After a careful reading of the affidavits, and an examination of the record, we are satisfied that the district

court erred in not granting the defendant a change of venue; and our conclusion is confirmed by the special verdicts of the jury in which they found that plaintiff's real estate described in his petition would not have been damaged to any extent by the flood waters of July 6, 1908, had the defendant's embankment not been constructed in the Salt creek valley, and that the personal property described in plaintiff's petition would not have been damaged to any extent by the flood waters of July 6, 1908, had the defendant's embankment not have been constructed in Salt creek valley.

As we view the record, those findings were in direct opposition to the evidence, and, in fact, there was no evidence to sustain them. While the special findings of a jury under ordinary circumstances are entitled to great weight and careful consideration, and will not be lightly set aside, still where they are opposed to all of the evidence they are entitled to no consideration whatever. Those findings should have been set aside and a new trial awarded.

The defendant has assigned many other errors as grounds for a reversal of the judgment, among which it is claimed that it was error for the court to receive the plaintiff's evidence relating to the drowning of persons in the flood in question; also, that it was error for the district court to receive evidence relating to the destruction of the domestic animals found at or near the J street bridge. It seems clear that it was error to receive this evidence; but it is unnecessary, as we view the record, to discuss those assignments, for it is clear that the evidence does not sustain the verdict, and the court erred in not granting the defendant a change of venue.

For the reasons above mentioned, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

REESE, C. J., dissents.

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

CHARLES O. WHEDON, APPELLANT, V. HARRY E. WELLS, COUNTY CLERK, ET AL., APPELLEES.

FILED MARCH 13, 1914. No. 17,626.

1. **Appeal:** ISSUES: HARMLESS ERROR. To allow the answer of a mere volunteer to remain on the files, and the overruling of a demurrer to such an answer, if erroneous, is error without prejudice, where only the issues raised by the answer of the real defendant are litigated on the trial of the action.

2. **Constitutional Law:** GENERAL AND SPECIAL STATUTES: SANITARY DISTRICTS. Chapter 36, laws 1891, entitled "An act to provide for the organization of sanitary districts, and to define their powers," does not violate that section of the constitution which provides that "no corporation shall be created by special law, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created." Const., art. XI*b*, sec. 1.

3. ———: ———: ———. The act in question is general in its nature, is cocplete in itself, and applies to all municipal corporations similarly situated. It neither amends nor purports to amend any other legislative act.

4. **Sanitary Districts:** OFFICERS: POWERS: TAX LEVY: INJUNCTION. The law does not require the officers of a sanitary district to give notice of the levying of a tax which is within their power to levy. If they exceed their power they may be enjoined. They have nothing to do with valuing property for assessment. Errors of assessment are to be corrected by the board of equalization.

5. ———: CREATION: ESTOPPEL. The vote of the electors creating a sanitary district concludes the taxpayers residing therein as to the necessity for the creation of the district, and the benefits to be derived from the construction of the improvements for which it was organized.

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

C. Petrus Peterson, for appellant.

Frank J. Kelly and *Field, Ricketts & Ricketts, contra.*

BARNES, J.

In August, 1911, Charles O. Whedon, who in his lifetime owned certain taxable real estate and personal property situated in the city of Lincoln, commenced this action on his own behalf, and for all others similarly situated, against Harry E. Wells, clerk, and William McLaughlin, treasurer, of Lancaster county, Nebraska, Sanitary District No. 1 of the city of Lincoln, and Kent D. Cunningham, W. J. Blystone and S. B. Hohman, the trustees of said sanitary district, to enjoin the clerk from extending a levy of three mills on the dollar of the valuation of the plaintiff's taxable property on the tax lists of said county, to enjoin the treasurer and his successors in office from collecting said tax, and the sanitary district and its trustees from expending any of said three-mill levy, and for general equitable relief.

To his petition the trustees of the sanitary district and the defendants Wells and McLaughlin filed an answer putting in issue the allegations thereof. There was filed an answer of one Clell D. Campbell, who had a contract with the sanitary district for the excavation of a new channel for Oak creek. There was also filed an answer of Abel & Roberts, a copartnership, doing business at Lincoln, Nebraska, and who had a contract with the sanitary district to construct certain drains and conduits for the purpose of carrying off the stagnant waters of Antelope creek.

The plaintiff filed a motion to strike the answers of the contractors from the files, for the reason that they had no right to appear in the case, except by petitions of intervention. The motions were overruled, and thereupon plaintiff demurred to those answers. His demurrers were overruled, and the plaintiff excepted. Without waiving his objections, plaintiff filed a reply, and a reply to the answer of defendants Wells and McLaughlin, the Sanitary District and its trustees, was also filed. On the issues thus formed there was a trial to the district court for Lancaster county, which resulted in a finding for the defendants, a judgment dismissing plaintiff's action was rendered, and thereupon the case was brought to this court

by appeal. After the appeal was perfected, plaintiff died, and the action was revived in favor of the representatives of his estate.

It is contended by appellant that the district court erred in refusing to strike the answers of the contractors from the files, and in overruling his demurrer to said answers. This assignment of error is argued at considerable length in the appellant's brief. But, as we view this question, the rulings of the district court, if erroneous, constituted error without prejudice.

The issues litigated were presented by the answer of defendants Wells, McLaughlin, and the Sanitary District and its trustees, and the cause was tried upon those issues. The fact that the answers of the contractors remained on file, and the plaintiff's demurrers to those answers were overruled, did not affect the trial, or the findings or the judgment of the district court upon the merits of the controversy.

The appellant also contends that the act under which the sanitary district in question was created is unconstitutional because section 1, art. XI*b* of the constitution of 1875, provides that: "no corporation shall be created by special law, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created."

The act in question provides that, upon the petition of 100 legal voters, freeholders, resident within the proposed limits of the sanitary district, containing a definite description of the territory intended to be embraced in such district, the county commissioners shall give notice for 20 days prior to the time and place where the petition shall be heard, at which time the board shall meet, and all persons in such proposed sanitary district shall have opportunity to be heard touching the location and boundary of the proposed district, and thereupon the board shall by an order determine the boundaries of such district, whether described in the petition or otherwise. It further provides that after the determination by the county board, or a majority of them, they shall call a special elec-

tion and submit to the legal voters of the proposed sanitary district the question of the organization of such district, and notice shall be given of the election 20 days prior thereto; that at such election each legal voter resident within the proposed sanitary district shall have the right to cast a ballot with the words thereon, "For Sanitary District," or, "Against Sanitary District," and, if a majority of the votes cast be in favor of the proposed district, such district shall be deemed an organized sanitary district.

It is further provided that an election shall be called for the election of three trustees, and that, after such trustees shall be chosen, "such district shall be a body corporate and politic by name of sanitary district of ——, with power to sue, be sued, contract, acquire and hold property and adopt a common seal."

Provision is also made for the election of a member of the board of trustees as president of that body, and a clerk who may receive not to exceed $300 a year for his services, and power is given the board to "pass all necessary ordinances, orders, rules and regulations for the necessary conduct of their business, and for carrying into effect the objects for which such sanitary district is formed."

It is apparent from these provisions that the legislature did not, by special law, create the corporation. On the contrary, the corporation is created by the action of the voters under the provisions of the act, which is general in its nature, and applies to all municipal corporations of the state similarly situated.

In *Neal v. Vansickle*, 72 Neb. 105, it was held that the legislature may provide for the creation of drainage or reclamation of large swamp, or overflowed, or submerged lands by the creation of local administrative organizations or political corporations. To the same effect is *Campbell v. Youngson*, 80 Neb. 322, *State v. Hanson*, 80 Neb. 724. We think, therefore, that this contention of appellant must fail.

It is further contended that the act in question is also unconstitutional because it is amendatory of the act of February 28, 1881 (laws 1881, ch. 51) entitled "An act to provide for draining marsh or swamp lands in the state of Nebraska, and to repeal an act entitled 'An act to drain marsh or swamp lands,' passed March 3, 1873, which took effect June 1, 1873;" and is now article I, ch. 89, Comp. St. 1909.

The act here in question was passed by the legislature of 1891, as chapter 36 of the laws of that session, under the following title: "An act to provide for the organization of sanitary districts, and to define their powers." Laws 1891, ch. 36. The act is complete in itself. It relates to a different subject from the one providing for drainage and drainage districts, and authorizes the organization of sanitary districts alone. The trustees of the sanitary district are given power to provide for the construction of channels, drains or ditches for carrying off and discharging the sewage of the district. The purpose of the act is to improve sanitary conditions, and the construction of drains and ditches is only incidental to the main purpose. The act neither amends nor purports to amend any existing law, and therefore this contention cannot be sustained.

Appellant further contends that the act in question is unconstitutional in this, that when the trustees have determined the rate of taxation no method is provided by which the taxpayer can contest the tax; that the act provides for no appeal from the decision of the trustees; and therefore it takes the property of the taxpayer without due process of law. It must be observed that the act provides that the valuation fixed by the county board of equalization shall be taken as the valuation on which the tax levy shall be based. It therefore follows that the taxpayer can appear before that board and contest the question of the valuation of his property for the purpose of taxation, and an appeal from the order of the board of equalization, for which the law provides, is all the law requires. We find no authority for a taxpayer to con-

test the levy as fixed by the power which determines that question. In case the levy is unreasonable and exceeds the rate fixed by the statutes or the constitution, the person desiring to object thereto is required in most cases to resort to a suit in equity for relief.

Finally, it is contended that appellant's property is so situated that it is not benefited by the improvement, and therefore ought not to be taxed for that purpose. On that question the record discloses that the sanitary district was properly created, and includes within its boundaries the property of appellant. It is true that the appellant's lots are situated upon high ground between Antelope creek and Salt creek, within the city limits, and the purpose of the organization of the sanitary district was to provide for the better disposal of the sewage of the city. It was also the purpose for which the district was formed to straighten the channels of the several streams that empty into Salt creek in the western part of the city of Lincoln, and provide for a better fall in said streams, thus preventing the accumulation of stagnant water, which might endanger the health of the inhabitants of the city.

It appears that Antelope creek, which is situated east of appellant's property, was a sluggish stream, except in times of high water, containing many pools that were stagnant, and into which much of the garbage of the city was thrown; and the purpose of the trustees was also to straighten the channel of that stream, and construct conduits which would cause a rapid flow of its waters into Salt creek, and thus cleanse the stream and render its condition more sanitary.

It appears from the record that the work for which the district was formed has been nearly completed, at a great expense, and has materially improved the sanitary conditions of the city. It must be remembered that the sanitary district was formed by the voters of which the appellant was one, and the determination of the necessity for the creation of the district and the improvements since carried out was settled by the vote of the district, and the appellant was concluded thereby.

A careful examination of the record satisfies us that the act in question is constitutional; that no substantial rights of the appellant have been invaded, and a court of equity can afford him no relief. The judgment of the district court is therefore

AFFIRMED.

CHARLES G. NELSON ET AL., APPELLEES, V. FRED NELSON, APPELLANT.

FILED MARCH 13, 1914. No. 17,663.

1. **Brokers:** AGENCY CONTRACT: PURPOSE OF STATUTE. A contract by which one employs an agent to assist him in making an exchange of properties is not governed by the provisions of section 2628, Rev. St. 1913. The purpose of that section was to protect landowners from fictitious claims of real estate dealers.
2. **Trial:** DIRECTING VERDICT. Where the evidence bearing upon the vital issue presented by the pleadings in a case is of such a nature that reasonable minds cannot disagree as to its effect, it is proper for the court to require the jury to return a directed verdict.

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

Brome & Brome, for appellant.

J. L. Kaley, contra.

BARNES, J.

Charles G. Nelson and Charles W. Kaley recovered a judgment against the appellant in the district court for Douglas county for the sum of $478.40, and this appeal is prosecuted for the purpose of reversing that judgment.

The suit was commenced in the county court, and by stipulation of the parties was tried in the district court on the pleadings filed in the county court, which are too long to be copied in the opinion. It is sufficient to say that defendant entered into a contract with the plaintiffs

as follows: "Omaha, Nebraska. Real Estate Agent's Contract. I hereby agree to employ Charles W. Kaley and Charles G. Nelson, as my agents to sell, trade and convey my town property or farm property or any property that I might put in on a deal on a farm of 1,160 acres in Miller Co., Mo., now owned by a man at Plattsmouth, Neb. And for and in consideration for services in making this deal, I agree to pay to said agents a cash commission of $500 when a contract has been drawn conveying these properties, or as soon thereafter as the contracting parties here agree to. Signed in duplicate this 3d of May, at Omaha, Neb., 1910. Fred Nelson, Chas. W. Kaley, Chas. G. Nelson."

It was alleged that according to the terms of the contract plaintiffs procured the exchange of property to be made, and caused the 1,160-acre farm in Miller county, Missouri, to be conveyed by good and sufficient deed to the defendant; that defendant had paid them $64.75 on the contract, and that there was a balance due from the defendant to plaintiffs amounting to $435.25 with interest, for which they prayed judgment.

The answer of the defendant was a general denial of the allegations of the petition not specifically admitted, and an allegation that plaintiffs ought not to recover against him, for that plaintiffs were the agents employed by one J. P. Falter to procure the exchange of the Miller county, Missouri, farm for the defendant's town property in the city of Omaha; that at the time he entered into the contract defendant was not aware of that fact; and that, by means of certain false representations made by plaintiffs, defendant was induced to exchange his Omaha property for said farm. There followed a description of the false representations alleged to have been made by plaintiffs, and a statement of certain rents collected and retained by the plaintiffs, amounting to $72, for which, with interest, the defendant prayed judgment against the plaintiffs. The reply put the allegations of defendant's answer in issue.

A trial was had to the court and a jury, and after the evidence was introduced the defendant requested the court to direct the jury to return a verdict in his favor. His request was denied, and the court on its own motion directed the jury to return a verdict for the plaintiffs for the sum of $478.40, as above stated. The verdict was returned, judgment was rendered thereon, and the defendant has appealed.

Counsel for defendant contends that the judgment of the district court should be reversed, because the contract does not contain a description of the property which he proposed to exchange for the Miller county farm. We think this contention is without merit, for, as we view the contract, it was an agreement on defendant's part to pay plaintiffs the sum of $500 to assist him in purchasing the farm in question, and the evidence found in the bill of exceptions fully confirms our view of the contract. In fact, the plaintiffs were employed by the defendant to purchase for him the Missouri farm by paying for it with such properties as he had, and it appears that they performed their part of the contract.

In *Howell v. North,* 93 Neb. 505, it was said: "The purpose of the statute was to protect landowners from fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants; but it was never the intention of the legislature to protect the real estate owner against legitimate claims for services which he authorized in writing and which were honestly rendered."

It is apparent that the real question which the trial court was required to determine was whether the defendant had knowledge of the fact that plaintiffs were representing Falter, the owner of the Missouri farm, during the negotiations which led up to the exchange of the properties. On that question the bill of exceptions discloses that, when defendant first went to plaintiffs' office, he was told by Nelson that Mr. Kaley had gone to Missouri with a man from Nance county to try to sell him the farm in question, which he was also told belonged to a man in

Plattsmouth. He immediately became interested in the matter, and wanted to be told when Kaley returned, for the reason that, as he stated, if Kaley did not sell the farm to the Nance county man, there might be a chance for him to secure it. When Kaley returned, defendant was informed of that fact, and was told that no deal had been made. The next day he went to the plaintiffs' office, and there the matter was discussed. Plaintiffs told him the transaction was a large one, and that he might not be able to swing it; but defendant thought he could do so, and explained to plaintiffs the nature and amount of the property he could exchange for the farm, and at his request plaintiffs asked Falter to come to Omaha and talk the matter over with him. Falter came to Omaha, and they went over the matter together, and Mr. Kaley agreed to go with the defendant to Miller county, Missouri, and show him the farm. The defendant and Mr. Kaley started immediately for Missouri without Mr. Falter, who agreed to pay Kaley's necessary expenses for showing the defendant the farm. Kaley and the defendant arrived in Missouri the next evening, stayed at Tuscumbia all night, and the next day they took a couple of saddle horses and rode all over the farm, examined the buildings and improvements, returning to Tuscumbia that night. Defendant expressed himself well satisfied with the deal, and signed a telegram, which was sent to Kaley's partner (Mr. Nelson), asking him to close the deal and exchange the contracts, which had been drawn before Kaley and the defendant started on their journey to view the farm.

There appears to have been some trouble about defendant's abstract, and he procured the plaintiffs to induce Falter to give him 30 days in which to close the deal and exchange conveyances. Falter agreed to this, and when everything was ready defendant and the plaintiffs went to Plattsmouth, and the conveyances were exchanged and the deal was closed. Mr. Falter offered at that time to pay plaintiffs their commission, and the next day sent them a check for the same. The defendant then placed some rent accounts in the plaintiffs' hands for collection,

and promised to pay the $500 mentioned in his contract in about a week.

In view of these facts, reasonable minds could not find that defendant had no knowledge of the fact that plaintiffs were the agents of Mr. Falter for the purpose of selling or trading his Missouri farm for other property, and the trial court did not err in directing the jury to return a verdict for the plaintiffs.

Defendant made numerous offers of proof as to subsequent transactions relating to the trade, none of which constituted any defense to the plaintiffs' cause of action, and were properly excluded.

As we view the record, the judgment of the district court was right, and is

AFFIRMED.

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

STATE, EX REL. JOHN W. GILBERT ET AL., APPELLANTS, V. CHARLES DILLEY ET AL., APPELLEES.

FILED MARCH 13, 1914. No. 17,664.

1. **Constitutional Law:** SCHOOLHOUSES: USE FOR RELIGIOUS PURPOSES. Holding Sunday school or religious meetings in a country schoolhouse so infrequently as not to exceed four times a year, and which do not interfere with the school work, does not constitute the schoolhouse a place of worship, within the meaning of section 4, art. I, of the constitution.
2. **Mandamus:** SCHOOLHOUSES: USE FOR RELIGIOUS PURPOSES. The courts will not compel the school district board, by mandamus, to close the schoolhouse for the purpose of excluding such meetings, at the instance of a taxpayer who is not required to contribute anything whatever to the support of such meetings or the repair of the schoolhouse in which they are held.

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

George H. Hastings and *James E. Addie,* for appellants.

Aldrich & Fuller and *R. M. Proudfit, contra.*

BARNES, J.

On the 18th day of August, 1911, John W. Gilbert and John M. Simmons filed their petition in the district court for Saline county, praying for a writ of mandamus to compel the school district board of district No. 13, of that county, composed of Charles Dilley, director, John Barney, moderator, and August Barney, treasurer, to keep the schoolhouse in that district closed to the public as a place of worship on the first day of the week, commonly called Sunday, and on other days. Relators moved the court to grant them an alternative writ of mandamus, as prayed for in their petition. The grounds on which the writ was sought were that the respondents had converted the schoolhouse into a place of worship, and had compelled the relators to support a place of worship against their consent, and contrary to the provisions of section 4, art. I of the constitution, which provides: "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted."

An alternative writ was allowed, and respondents by their return admitted that on infrequent occasions they had permitted the public to use the schoolhouse for religious meetings, and that relators had demanded that they discontinue such use. Respondents alleged that John W. Gilbert was not a resident of said school district, but was only a taxpayer therein; that when the schoolhouse was built it was agreed that it might be occasionally used for holding religious meetings; they also alleged that during the past five years not more than five meetings of that kind had been held in the schoolhouse in any one year; that no meetings of that kind had been held in said schoolhouse at night, or on any days except Sundays, during

the incumbency of the present board. Respondents denied that such infrequent meetings have resulted in any damage to the schoolhouse; and alleged that the expense of whatsoever meetings have been held has been borne by those participating in such meetings, and that the schoolhouse has been kept in better repair by reason thereof than it otherwise would have been kept. Respondents also denied that by the holding of such infrequent meetings they had converted the schoolhouse into a place of worship, within the meaning of the constitution. They denied that the meetings were of a sectarian nature, and especially denied that the relators had been compelled to contribute, or had ever contributed, anything of value whatsoever to the purpose of maintaining the schoolhouse as a place of worship. Respondents prayed that the alternative writ be quashed; that a peremptory writ be denied; and that the petition be dismissed at the relator's costs. Upon the issues thus presented, the cause was tried to the court, without a jury; the findings and judgment were for the respondents; and the relators have appealed.

The first question presented for our determination is: Have the respondents, by their acts, converted or permitted the schoolhouse to be converted into a place of worship? The evidence discloses that for the five years last past there have been held in the schoolhouse, in said district, Sunday school and religious meetings not more than four times each year; that such meetings have been held only on Sundays, and have in no way interfered with the scholars in the school work in said district; that relators have not attended nor been compelled to attend those meetings. And respondents contend that the meetings have not interfered with the rights of the relators, and were not of sufficient frequency to make the schoolhouse a place of worship.

Section 3, art. I of the constitution of the state of Iowa, provides: "The general assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled

to pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry." *Davis v. Boget,* 50 Ia. 11, was a case where it was sought by mandamus to compel the respondents to permit the use of the schoolhouse occasionally for religious worship. It was there said: "We may further say that the use for the purposes named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the schoolhouse into a building for worship, within the meaning of the constitution." In *Townsend v. Hagan,* 35 Ia. 194, it was sought to restrain the directors of the school district by injunction from permitting the use of the schoolhouse for occasional religious meetings. It appeared in that case, as it does in this one, that the voters had settled the question at a regular school district meeting, and it was there said: "We have seen that the statute confers the power on the electors of the district when legally assembled to make such disposition of the schoolhouses as they may deem right and proper. They may permit any reasonable and proper use of them which, in their discretion, may be determined upon. That the use in the present case is reasonable clearly appears from the facts agreed upon, and that it is proper, ought not to be questioned in a Christian state. Whether a court of equity will enjoin an abuse of the discretion vested in the people of a school district, we do not, as we need not, determine. In this case we hold that there has been no abuse of discretion whatever."

In *Nichols v. School Directors,* 34 Am. Rep. 160 (93 Ill. 61), it was said: "A statute authorizing school directors to grant the temporary use of public schoolhouses, when not occupied by schools, for religious, literary and other meetings, and for evening and Sunday schools, is not unconstitutional." To the same effect is *Scofield v. Eighth School District,* 27 Conn. *499.

As we view the record, relators have failed to show that the respondents have converted or permitted the schoolhouse in question to be converted into a place of worship,

within the meaning of the constitutional provisions above quoted.

The next question for our determination is whether the relators have been compelled to attend, erect or support any place of worship against their consent. On that question the relator Gilbert testified that he did not live in the district, but paid about one-sixth of the taxes collected therein; that he could not tell how much additional tax he had been compelled to pay by reason of the religious meetings in question; that he had never figured it up; and he was unable to testify as to any items of expense due to those meetings; and he could not designate any particular item of expense occasioned thereby. The testimony of the relator John Simmons was to the same effect. In fact, the relators failed to show that they had been compelled to pay any sum whatever for the support of the meetings in question, or for the repair of the schoolhouse occasioned by such meetings. In fact, they failed to bring themselves within the inhibition of the constitutional provisions above quoted. If the relators had shown that the schoolhouse had been used for religious meetings to such an extent as to make it a place of worship, or that they had been compelled to pay anything for the erection, the support, or the repairs of the building for that purpose, we might hold that they were entitled to the relief prayed for. But, failing to make such proof, it seems clear that the judgment of the district court was right, and is

AFFIRMED.

HAMER, J., concurring.

It must be conceded that any use of the schoolhouse which prevents it from being used for school purposes is clearly objectionable. In this case religious meetings were had occasionally, but whether to such an extent as to establish the character of the building as a place of worship may well be doubted. I do not think so. If the school officers should see fit to use the building for the purpose of hearing a lecture on geography, illustrated by maps and charts, there probably could be no good objec-

tion. If the lecture should be upon astronomy or any kindred educational subject there could not well be any serious objection. So of science and philosophy, law and literature. It is the opinion of the writer that to impart knowledge concerning religion and religious subjects is educational to the extent that our civilization covers and includes those subjects. I am unable to see that religion is so far removed from the general purposes of a school as not to be tolerated in a moderate degree. Religion is a part of our civilization. It is therefore, of necessity, part of our education. An intelligent discussion of religion and its kindred subjects approximates as nearly to the ordinary use of a schoolhouse as its use for the purpose of receiving a lecture on geography, philosophy, history, or agriculture. Chaplains at the legislature or at the penitentiary do not interfere with legislation or reform. The discussion of religion and its relation to our civilization ought to be educational and beneficial. The occasional use of the schoolhouse for such a purpose ought not to be denied.

EDWARD A. SMITH, ADMINISTRATOR, APPELLANT, V. ESTATE OF GEORGE M. BAYER, APPELLEE.

FILED MARCH 13, 1914. No. 17,668.

Executors and Administrators: ALLOWANCE TO WIDOW: WAIVER. A widow made no claim against the estate of her deceased husband for an allowance of a year's support until about a year after his death. Her claim was disallowed by the probate court, and before taking an appeal from the order of disallowance the widow died. *Held*, That she had waived her right to such an allowance, and the administrator of her estate succeeded to no right which he could enforce.

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

McKenzie & Cox, for appellant.

Weaver & Giller, contra.

BARNES, J.

George M. Bayer, late of Douglas county, died intestate on the 5th day of May, 1910, possessed of about $10,000 worth of personal property. Thereafter, on May 12, 1910, a petition for the appointment of an administrator of his estate was filed in the county court of said county, and proceedings were commenced to probate his estate. On April 17, 1911, and one year after his death, Allie M. Bayer filed her petition in the county court of Douglas county, alleging that she was the wife of the deceased, and praying for an allowance of $50 a month for her support and maintenance as his widow. It was alleged in her petition that she was afflicted with a disease known as cancer of the spine, which rendered her a helpless invalid; that she was not possessed of any property in her own right, and was dependent for her support upon such amounts as she might receive from her deceased husband's estate; that she was compelled to employ medical aid and assistance, and it would require for her support and maintenance not less than $50 a month; that the estate of George M. Bayer had not been settled, and that she was entitled to receive therefrom a reasonable amount for her support and maintenance during the administration of said estate.

On June 5, 1911, an order was entered denying the prayer of her petition. On the 2d day of July, 1911, Allie M. Bayer died, and the plaintiff in this action was appointed administrator of her estate. He thereupon prosecuted an appeal to the district court from the order disallowing her claim. His petition set forth, in substance, the foregoing facts. The administrator of the estate of George M. Bayer demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action against the estate of his decedent. The district court for Douglas county sustained the demurrer. The plaintiff stood upon his petition, and the action was dismissed. Plaintiff thereupon brought the case to this

court by an appeal, and contends that the court erred in sustaining the demurrer to his petition.

It appears in the case at bar that George M. Bayer, when he died, left certain personal property, but no wearing apparel, ornaments, or household furniture, or other property to which the wife was entitled as a matter of law. She made no demand for the delivery to her of any such property, and although it is claimed she was an invalid, and was in need of an allowance for her year's support, she made no application for such an allowance until about the expiration of one year after the death of her husband; that her application was denied by the probate court, and the appellant died before she took any steps to appeal from the order. It therefore seems clear that she waived her right to the year's support, and the administrator of her estate succeeded to no right which could be enforced by him against the estate of her deceased husband.

The supreme court of North Carolina, in a case where the facts were similar to those in the one at bar, passed squarely upon the question now under consideration. In that case application for a year's allowance had been made by the widow, and appraisers were appointed to set apart the year's support. Before that duty had been performed, and while the appraisers were in the act of taking the necessary steps incident thereto, the widow died. The court held that, the allotment not being complete, no title to the year's support had become vested in the right of her representative to make any claim therefor; that, before such right would accrue to her representative, the report of the commissioners would have to be returned and confirmed. *Ex parte Dunn,* 63 N. Car. 137.

As we view the question presented in this case, the widow had waived her right to prosecute the claim, and her representative could recover nothing from the estate of her deceased husband.

The judgment of the district court was right, and is

AFFIRMED.

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

ROBERT J. DUNLAP, APPELLEES, V. RICHARD MARNELL, APPELLANT.

FILED MARCH 13, 1914. No. 17,578.

1. **Deeds**: DEPOSIT FOR RECORD ON DEATH OF GRANTOR: EFFECT. If a grantor deposit a deed with a third person, without power of revocation or recall by the grantor, and with directions that it be held until the grantor's death and then put upon record by the holder, this is a sufficient delivery and will be effectual to pass the title to the grantee, even though he had no knowledge of the execution of the deed.

2. ———: ———: ———. Where a husband and wife each executed deeds of their respective lands in favor of the other spouse, with directions to a scrivener, in whose hands the deeds were deposited, not to deliver either deed to either grantor except upon the written order of both, and upon the death of either to place upon record the deed to the survivor, no present title passes by the execution of either deed.

3. ———: ———: ———. A mutual agreement that the survivor shall take the property of the other spouse was made between husband and wife, and was carried out as far as possible by the execution of deeds each to the other of the separate property of the grantor. The deeds were delivered to and held by a depositary under an agreement that they were not revocable by either, and that the deed to the survivor should be placed upon record upon the death of either, and upon the death of the wife the deed to the husband was recorded by the depositary. *Held*, That in an action to set aside the deed and quiet the title, brought by an heir of the wife, a court of equity may uphold and enforce the mutual agreement to convey and quiet and confirm the title of the grantee in the premises.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Reversed with directions.*

Charles W. Haller, M. O. Cunningham and *D. W. Merrow*, for appellant.

I. J. Dunn and *G. W. Shields & Sons, contra.*

LETTON, J.

This is an action to set aside a deed to certain real estate and to quiet the title to the premises in the plain-

tiff. The district court found for the plaintiff, subject to the homestead right of defendant in one tract, and to his share as widower, but without prejudice to defendant's right to present an instrument in the form of a warranty deed, under which defendant claims title, to the county court upon the question of whether it may constitute the last will and testament of his deceased wife. Defendant appeals.

Prior to June, 1905, the defendant, Richard Marnell, and Mary A Marnell, his wife, now deceased, each separately owned certain real estate in Douglas county; the wife's property consisting of three lots and a residence in the city of Omaha and 160 acres of land, the husband's consisting of 160 acres of land. In June, 1905, they executed a joint warranty deed, without consideration, to James Perkins, an unmarried man, of all the property. This deed was never delivered, and Perkins was not aware of its existence when he was requested to reconvey. On April 17, 1907, Perkins, also without consideration, executed to Richard Marnell a warranty deed to the same property. These two deeds were not recorded, and were ineffective as conveyances, hence they will not be noticed further. On April 20, 1908, John A. Frenzer, a notary public with whom they had been long acquainted, was called to the Marnell home. He was requested to prepare two conveyances; one describing the real estate of Mary A. Marnell and conveying the same by warranty deed to her husband, Richard Marnell, and the other in like manner conveying the real estate of Richard Marnell to his wife, Mary A. Marnell. Each of these deeds was executed by the grantor and duly acknowledged before Mr. Frenzer as notary public. Mr. Frenzer testifies that in the conversation when the deeds were executed the understanding was that Frenzer would keep the deeds in his safe, and if Mrs. Marnell should die first he was to record the deed from her to Marnell, and if Mr. Marnell died first he was to record the deed from Mr. Marnell to his wife; that he stated he would not deliver either deed to either of them without a written order signed by both, to which both

agreed; that after their execution he took the deeds to his office. After the death of Mrs. Marnell he recorded the deed to her husband, and brought into court the deed from Marnell to his wife, which he states has never been out of his possession until produced at the trial. On cross-examination he testifies that he was told by Mr. Marnell, who called him up on the telephone, that "if Mrs. Marnell dies first then Mr. Marnell was to have all the property; if Mr. Marnell died first she was to have all the property." Marnell testifies that, when Frenzer said to them during the transaction that he would not give up either deed unless upon the written order of both, Mrs. Marnell "said not to give them to anybody until death had been the judge." Mrs. Marnell died on June 21, 1909, more than a year after the deeds were executed. On May 13, 1909, Frenzer was again called to the Marnell home. At that time Mrs. Marnell refused to sign an order to record the deed from her to Marnell. When she signed the deed on the 20th of April, 1908, she was in bed, but Frenzer is unable to remember whether she was up or in bed on May 13, 1909. The deeds were witnessed by a Mrs. Smith, and by Mrs. Rich, who testifies that she is the daughter of Mr. and Mrs. Marnell; that she was present when Mrs. Smith signed the papers, and signed them at the same time as a witness at the request of her father and Mr. Frenzer.

The appellant insists that the delivery to Frenzer under the direction to hold and record after the grantor's death, and with no power to revoke, constituted a delivery to the grantee, and that the title passed thereby, but that, even if the court should hold it was not a grant *in præsenti,* the mutual agreement will be held good and enforced by a court of equity.

It has been many times decided that if a grantor deposits a deed in the hands of a third person to be held until after the grantor's death and then delivered to the grantee, or with directions that it shall be recorded by the holder after the grantor's death, a delivery to the grantee or the recording of the deed after the death will

be a sufficient delivery and effectual to pass title to the grantee. *Brown v. Westerfield,* 47 Neb. 399; *Haas v. Wellner,* 90 Neb. 160; *White v. Watts,* 118 Ia. 549; *Dickson v. Miller,* 145 N. W. (Minn.) 112; *Foreman v. Archer,* 130 Ia. 49; *Lippold v. Lippold,* 112 Ia. 134; *Nolan v. Otney,* 75 Kan. 311; *Emmons v. Harding,* 162 Ind. 154, 1 Ann. Cas. 864, and note, p. 869; *Loomis v. Loomis,* 144 N. W. (Mich.) 552. See, also, note to *Renehan v. McAvoy,* 38 L. R. A. n. s. 941 (116 Md. 356). In Iowa it has been held that, even though the right to recall remains in the grantor, this will not defeat the conveyance, but this question is not involved and is not decided, though our impression is to the contrary.

We have held that a deed which was executed and delivered to the scrivener by whom it was written, with instructions to forward to the register of deeds for record, the grantee being present and assenting thereto, constituted a delivery to and acceptance of the deed by the grantee, that title thereby passed, and that, even though the grantor without the consent of the grantee obtained the return of the deed and destroyed it before it was recorded, it had no effect upon the title. *Svanda v. Svanda,* 86 Neb. 203.

The appellee, who claims as one of the heirs of Mrs. Marnell, insists that the true rule is that whether title passed upon the delivery of a deed to a third party for the grantee is to be determined from the intent of the parties at the time of the delivery; that it was the intention of Mrs. Marnell that her deed might never go into effect; that for that reason it was not a conveyance but a mere provision in the nature of a will, and conveyed no title; that if Marnell had died then the deed to her would have been recorded, and her deed would have remained unrecorded and inoperative; that, this being the case, as to both deeds there could be no present conveyance of the title to either Marnell or his wife; and that the condition attached to the delivery prevented the deed from becoming a conveyance. There is much force in this reasoning. If the deed from Mrs. Marnell had been the only

one executed at this time, under the authority of the cases heretofore cited, there was a present intention that the title should pass subject to a life interest or estate in the grantor; but since there were two deeds executed, with the agreement on the part of each grantor and grantee that the survivor alone should take, and the other deed become inoperative, no title passed at the time of the conveyance. In a California case, *Kenney v. Parks,* 125 Cal. 146, the agreement of the parties was almost identical with the one made by the Marnells. The court held that the act of delivering must be accompanied with the intent that the deed shall become operative as such; that, since both parties understood that the deed could have no effect until recorded, there was no intent that it should become operative immediately, and that under such an agreement no title passed; that "the title to the property vested presently when the deeds were delivered, or did not vest at all;" and that on account of the condition the surviving grantee took nothing by the deed. This reasoning seems to be sound. It was not the intention of either of the Marnells that a present estate in the property should pass at the time of the delivery of the deeds to Frenzer, and it cannot be said that there was a present intention to convey a remainder to the grantee, reserving a life estate in the grantor, which is a reason assigned by several courts for upholding transactions of this nature. Either deed might become void upon the happening of a future event, and was made subject to such condition. We think, therefore, that the legal title did not pass by the conveyance from Mrs. Marnell.

There is another consideration, however, which seems to us to be controlling in this case. Mr. and Mrs. Marnell entered into a contract with each other that, upon the death of either, the survivor should become owner of all the real estate described in the respective deeds. They attempted to effectuate this contract by the written instruments which were executed and delivered to Frenzer. Each of these attempted conveyances was a consideration for the execution of the other, and under the equitable rule

announced in *Brown v. Webster,* 90 Neb. 591, the contract then made may be enforced by a court of equity after the decease of either contracting party who had adhered to the contract. In the case cited the husband and wife each executed a will devising all the testator's property to the other spouse, the intention being that the survivor should take all the property of both upon the death of either testator. One of the parties broke the contract and made a later will making a different disposition of his property. It was held that the oral agreement and the execution of the wills constituted a single transaction which did not rest entirely in parol; that the wills may not be revoked by either party as long as the other continued to perform the contract; and that specific performance would be decreed. *Mueller v. Batcheler,* 131 Ia. 650.

In our opinion the oral contract entered into by Mr. and Mrs. Marnell, and attempted to be carried out by the execution of the respective conveyances and their delivery to Frenzer, irrevocable, save by consent of both parties, constituted a valid contract in favor of the survivor capable of specific enforcement. In such an action as this, brought in a court of equity to set aside the deed and quiet title in Mrs. Marnell's heirs, the court has the right, and it is its duty, to do complete equity between the parties. This can only be done by holding that the contract is valid and enforceable, and that, since the intention of the grantor was to vest the full legal title in the grantee at her death, the recording of the deed by Frenzer after her decease operated to carry out and perfect that intention. Taking this view, the title of the grantee therein should be made effectual by the decree. By reason of some peculiar circumstances in this case which are unnecessary to set forth in this opinion, it is with great reluctance that we reach this conclusion, but we find no escape from so doing. It has been made to appear that defendant Marnell has died since this action was begun, and the cause has been revived in the name of the heirs, devisees and legal representatives of the deceased.

The judgment of the district court is therefore reversed, with directions to quiet title to the premises in the heirs, devisee and legal representatives of Richard Marnell, deceased.

REVERSED.

PHILIP J. NOTEWARE, APPELLANT, V. JOHN B. COLTON ET AL., APPELLEES.

FILED MARCH 13, 1914. No. 17,588.

Descent and Distribution: STATUTE: CONSTRUCTION: "CHILDREN." The word "children" does not include grandchildren, where it appears in the following language of the statute of descent: "If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by the right of representation." Comp. St. 1911, ch. 23, sec. 2.

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

McGilton, Gaines & Smith, J. J. Tunnicliff and *G. Tunnicliff*, for appellant.

L. S. Hastings, E. A. Coufal and *Williams, Lawrence, Welch & Green, contra.*

ROSE, J.

This is a suit to partition 480 acres of land of which Sarah M. Colton died seized, leaving no will. Plaintiff pleads that the estate descended to intestate's sole heirs at law as follows: To plaintiff, who is the grandson of a deceased sister of intestate, an undivided one-sixth interest; to each of John B. Colton and Francis Colton, defendants, who are the brothers of intestate, an undivided one-third interest; to Maud Hamilton, defendant, the daughter of a deceased sister of intestate, an undivided one-sixth interest. From a dismissal of the action plaintiff has appealed.

The appeal presents the single question: Is plaintiff, as an heir of intestate, entitled to a one-sixth interest in the land? The controlling statutory provision follows: "If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by the right of representation." Comp. St. 1911, ch. 23, sec. 2.

Intestate survived plaintiff's parent, to whom a share of the estate would have descended, if living. The statutory descent extends to "brothers and sisters, and to the children of any deceased brother or sister, by the right of representation." Within the meaning of such a provision the word "children" does not include grandchildren of a deceased brother or sister. *In re Estate of Chapoton,* 104 Mich. 11; *Quinby v. Higgins,* 14 Me. 309. This is the general rule, except where the context requires a different interpretation. The construction adopted is in harmony with analogous rulings of this court. *Douglas v. Cameron,* 47 Neb. 358; *Clary v. Watkins,* 64 Neb. 386. The judgment of the district court conforms to the view expressed.

AFFIRMED.

HENRY M. POWELL ET AL., APPELLANTS, V. ANDREW N. VENTIS, APPELLEE.

FILED MARCH 13, 1914. No. 17,682.

Descent and Distribution: EJECTMENT: EVIDENCE. Plaintiffs who fail to show any title or right of possession are not entitled to a recovery in ejectment.

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

Charles W. Meeker and *David G. Hines,* for appellants.

Ritchie & Wolff, contra.

ROSE, J.

This is a suit in ejectment for a number of lots in the village of Haigler. In the petition it is alleged that the property described is real estate of which Henry M. Powell died siesed, and that plaintiffs are his sole heirs. The answer was a general denial. From a judgment in favor of defendant plaintiffs appeal.

Plaintiffs are brothers and sisters of decedent, who left no will. At the time of his death he was a married man. There is no proof that his widow is dead or that he left no issue. Without such proof plaintiffs did not, under the statute of descent, make a case of ejectment. The dismissal is therefore without error.

AFFIRMED.

J. S. HATCHER & COMPANY, APPELLEE, v. GOSPER COUNTY, APPELLANT.

FILED MARCH 13, 1914. No. 18,276.

1. **Taxation:** COUNTY ASSESSOR: ABOLITION OF OFFICE. Where the voters of a county, in the manner provided in section 19, art. I, ch. 77, Comp. St. 1911, elect to abolish the office of county assessor, the then incumbent of the office continues in his office until the expiration of the term for which he had previously been elected, unless he shall die, resign or otherwise vacate such office prior to the expiration of such term, in which event the county clerk of the county, *eo instante*, becomes *ex officio* the county assessor.
2. ———: ———: ———: COUNTY BOARD OF EQUALIZATION. And the fact that such office is so abolished does not oust the county board and county clerk of their powers and jurisdiction as the county board of equalization.
3. ———: ASSESSMENT: APPEAL: PRESUMPTION. Where a taxpayer appeals from the action of the county board of equalization in fixing the value of his property for taxation, the presumption obtains that the board faithfully performed its official duties, and that in making the assessment it acted upon sufficient competent evidence to justify its action; and the burden is upon the appellant to plead and prove that the action of the board is erroneous.

4. ———: ———: DUTY OF TAXPAYER. It is the duty of a taxpayer, when so requested by the assessor, or county board of equalization, to honestly and promptly furnish information as to the character and amount of personal property owned by him, and the true value of the same.

5. ———: ———: DISMISSAL OF APPEAL. And when, on appeal to the district court from the action of the county board of equalization in fixing the value of his property for taxation, it appears that, before action taken by the board in fixing such value, the appellant refused to produce his books, papers and records, or to give any information which would aid the board in arriving at the true value of his property, and whether or not it had been assessed elsewhere, his appeal should be dismissed.

APPEAL from the district court for Gosper county: ERNEST B. PERRY, JUDGE. *Reversed with directions.*

Grant G. Martin, Attorney General, George W. Ayres, Frank E. Edgerton and *O. E. Bozarth,* for appellant.

W. S. Morlan and *John L. Rice, contra.*

FAWCETT, J.

Plaintiff is a corporation with its principal office and place of business in the village of Elwood, in Gosper county. The nature of the business to be transacted by the corporation is: "Dealing in lumber, building material, hardware, coal, either as wholesale or retail merchants or both, grain, live stock, real estate, general merchandise, contracting, and any other business that may be desirable to connect therewith." Its capital stock is $100,000, fully paid. At the time the controversy arose, plaintiff had seven lumber yards, one of which was at Elwood. It kept its bank account in the city of McCook, but none of its branch yards was located in that city. At the general election in November, 1911, the question of abolishing the office of county assessor, under the provisions of section 19, art. I, ch. 77, Comp. St. 1911, was submitted to the voters of the county, and by an overwhelming vote the office was abolished. About two months later the incumbent of the office tendered his resignation in writing, and the same was accepted. The county commissioners went

through the form of appointing W. L. Reynolds, who was the then duly elected and acting county clerk of the county, as the successor to the county assessor who had just resigned. Thereafter Reynolds entered upon the performance of his duties as *ex officio* county assessor. In that capacity he met with the precinct assessors from time to time, instructed them in their duties, and made up all of the records pertaining to the office of county assessor. In relation to the assessment of plaintiff, Reynolds instructed the precinct assessor to assess it as a corporation. When the precinct assessor called upon plaintiff to assess it in accordance with the instructions from Reynolds, plaintiff refused to be assessed as a corporation, but made a return on the form provided for individuals, which appears in the record as exhibit A, and on which it was assessed $10,000. The precinct assessor took this schedule to Reynolds, and informed him that plaintiff refused to make any other or further schedule. Thereupon Reynolds notified Mr. Hatcher, manager of plaintiff, that he would not accept such schedule, and made an appointment to meet him the same evening and talk the matter over. They met as per appointment, and, being unable to agree as to how the assessment should be made, they agreed to leave the matter to the state board of equalization and abide by their instructions. The matter was submitted to the state board in a letter written by Mr. Reynolds, and an answer received favorable to the view taken by him. Reynolds submitted the letter to Mr. Hatcher, but the latter still refused to permit the corporation to be assessed as such. Thereupon Reynolds demanded that he be permitted to inspect the records, books and everything pertaining to the corporation, which was refused. The seven lumber yards were assessed separately in their several counties and precincts, the assessments, including the $10,000 assessed under exhibit A, aggregating $65,865. This amount deducted from plaintiff's paid up capital left an apparent valuation, not assessed anywhere, of $34,135. This sum Reynolds added to the $10,000, making the amount as-

sessed by him against plaintiff $44,135. To this he added, as a penalty for the refusal of plaintiff to furnish the information called for as to the true value of its property, 50 per cent. of the $34,135. Plaintiff appealed to the county board of equalization.

Its complaint lodged with the board alleged that it had made out a schedule and listed, in the form and manner required by law, all of its personal property "in Elwood precinct, in said county," subject to taxation; that the assessor had assessed the same at $10,000; that afterwards the county clerk without authority and without notice, pretending to act as county assessor, rejected the schedule so made, and pretended to make a new and different assessment, in which he assessed the property of the company at $44,135, and added thereto a penalty of $17,065 for a claimed refusal on the part of the company to list its property; that "the said valuation of said property of said company, as assessed by said precinct assessor, was at its full value for assessment and taxation, and was in fact more than the real value as compared with the valuation and assessment of other property in said precinct for taxation. The said claimed assessment, so made by said county clerk, is inequitable, excessive and unjust, and is many times greater than the actual value of the property of said company in said precinct, and is and was without authority of law, and void. There was no failure or refusal on the part of said company to list and return all its taxable property in said precinct for taxation and assessment for said year, and the said claimed penalty was wrongfully, unjustly and illegally added by said county clerk, claiming to act as county assessor, or otherwise. The said J. S. Hatcher & Company, deeming itself aggrieved by said claimed assessment so made by said county clerk, so claiming and pretending to act as county assessor of said county, prays that said unjust, excessive and illegal assessment of said property may be equalized and reduced, and that its property in said precinct be assessed at its just and reasonable value; that said claimed penalty may be canceled and removed,

and for such other and further relief as equity and justice may require."

This is the case attempted to be made by plaintiff on its appeal to the board of equalization. It shows just what the county assessor was attempting to do, viz., to assess plaintiff's unassessed property, wherever situated, according to its actual reasonable value. It also shows that plaintiff was standing upon its theory that it was only required to list such of its property as was actually located "in Elwood precinct." The question of taxing the capital stock of plaintiff was in no manner raised by the county assessor, nor by plaintiff in its appeal to the board of equalization. On the hearing before the board plaintiff objected to the board's proceeding with the hearing, for the reason that the board was "not made up of the required members and persons as required by law; W. L. Reynolds, sitting on said board both as county assessor and county clerk of said county." The objection was overruled, and the hearing proceeded. The county assessor then offered in evidence the correspondence which had taken place between himself and the state board of equalization under his agreement with Mr. Hatcher, as above stated. With this correspondence before it to guide it in its deliberations, the board then called upon plaintiff to produce its books, papers and records, or to state the value of the capital stock, the amount of the capital stock over the tangible property in the several yards, the surplus, if any, belonging to the company, the value, if any, of real estate or tangible property over the assessed value, the real estate or other tangible property that plaintiff might own which had not been listed and deducted from the capital stock. The proceedings of the board show that plaintiff refused to produce its books and records, "and in every way refused to give aid or information concerning said corporation which would aid them (the members of the board of equalization) in arriving at the value of said capital stock, and, admitting that some of their capital stock was in the general treasury at McCook and loaned to the other yards, still refused to state the amount,

if more or less than $34,135 claimed by the county assessor." Thereupon the board set aside the 50 per cent. penalty added by Reynolds, and affirmed his action in otherwise increasing the assessment. From this action of the board plaintiff, appealed to the district court. On the hearing of the appeal, the district court reversed the action of the county board of equalization and reduced plaintiff's assessment to the amount shown in exhibit A. From this judgment, defendant appeals.

The grounds upon which plaintiff tries to justify the judgment of the district court, or, to speak more accurately, the grounds upon which it seeks to be relieved from the assessment made by the county clerk, acting *ex officio* as county assessor, and ratified by the county board of equalization, urged by counsel in his brief are three in number, which we will consider in the order in which they appear in the brief.

1. "The county clerk was without authority to make the claimed assessment." The argument in support of this point is that, notwithstanding the fact that the county at a general election in 1911 voted to abolish the office of county assessor, that office continued to exist until January 1913. Section 19, art. I, ch. 77, *supra,* provides that the county board of any county, upon presentation of a petition signed by at least ten per cent. of the electors of the county, secured in not less than two-fifths of the townships or precincts of the county, shall submit to the electors at the next general election the question of electing a county assessor, designates the form of the ballot, and further provides: "And if a majority of the votes cast shall be against the election of county assessors in said county, the office shall cease therein with the expiration of the time of the incumbent, and the duties of county assessor shall thereafter in said county devolve upon the county clerk, who shall receive from the county board such allowance for the additional duties as shall seem reasonable, until otherwise ordered by the voters at a new election held under the same requirements as herein provided." It is argued that the expression, "the office shall

cease therein with the expiration of the time of the incumbent," means at the expiration of the term for which the incumbent was elected. We do not so construe the act. What the act was clearly designed to obviate was the ousting of a county assessor from his office before the expiration of the term for which he was elected. That the legislative intent was to continue the office during his incumbency, and not during the term for which he had been elected, if he did not continue to be the incumbent until the expiration of that term, is too apparent for serious disagreement. If the legislature had meant to continue the office until the expiration of the term, instead of during the incumbency of the then incumbent, it would have been easy to have done so in apt language. We therefore hold that, upon the resignation of the county assessor on January 3 following the election at which the electors decided to discontinue the office, the county clerk, *eo instante,* became *ex officio* the county assessor. The action of the county board, therefore, in going through the form of electing him as successor to the county assessor who had resigned, was a meaningless form, as the board could not have elected any other person as such successor, had it desired so to do.

2. "Without the five members provided for by statute, there was no board of equalization capable of legal action." In his argument on this point counsel states: "The statute requires the board of equalization to be composed of five members." In this counsel is in error. Section 120, art. I, ch. 77, Comp. St. 1911 provides: "The county board, the county assessor and county clerk shall constitute the county board of equalization, and the county clerk shall be the clerk of said board." This does not constitute a requirement that the board of equalization shall consist of five members. It simply provides that certain officials shall constitute the board. Suppose the statute were to be amended so as to provide for five commissioners. Then in counties having both a county clerk and a county assessor the board of equalization would consist of seven members. The mere statement of the illus-

tration shows the fallacy of counsel's argument. The office of county assessor having been abolished, the board, in defendant county, would thereafter consist of but four members—the three commissioners and the county clerk. The fact that the county clerk was also *ex officio* county assessor would not give him two votes on the board, so that the only change made was that there was one less offcial on the board. We therefore hold that the county board of equalization was lawfully constituted and had full power to act in the premises. The rule announced in the authorities cited by counsel that, "if only two of a board of three qualify and act, there is no board and the action is void," does not apply.

3. "The capital stock of an ordinary mercantile corporation is not assessable against the company." It is strenuously contended by counsel in his brief that the capital stock of plaintiff could not be assessed to it as a corporation, for the reason that such action is not authorized by statute. We think this contention is entirely "beside the mark." While there is some language in the proceedings of the board which, standing alone, might indicate that the board assessed the capital stock of plaintiff, as such, an examination of the entire proceedings shows that what the board actually did was to decide the appeal taken by plaintiff from the action of the county assessor, and determine the complaint of the plaintiff that the county assessor had taxed its property at an unjust, inequitable and excessive valuation.

Section 10927, Ann. St. 1911, provides that the personal property of corporations shall be listed by the president or proper agent or officer thereof. Except as otherwise provided, such property is required to be listed and taxed in the county, precinct, township, city or village, and school district where the principal office or place of business of such corporation is located within this state. Section 10949 provides: "The schedule shall be in such form as the state board of equalization and assessment shall from time to time provide." A schedule in this form was delivered to plaintiff, by direction of the *ex*

officio county assessor, with the request that plaintiff make its return thereon. This plaintiff refused to do. It also refused to give the assessor access to its books and papers, or to furnish any information which would aid him in determining what property of plaintiff had not been assessed anywhere and the true value of the same, so that assessment could be made as required by law. It also refused to furnish this information to the county board of equalization, to which it appealed. It in like manner failed to make proof thereof on the trial in the district court. It will be seen from this that its appeals from the assessor to the board of equalization and from the board of equalization to the district court were both without merit. The taxing authorities were not seeking to assess plaintiff upon the basis of the nominal or face value of its capital stock, as contended by counsel. They were simply seeking, honestly and as faithful officials, to ascertain the true value of plaintiff's property, in order that it might be assessed. The government must live. It cannot live without its revenue. In collecting its taxes it is entitled to fair and frank treatment by every citizen. To permit a taxpayer to take advantage of our liberal laws in relation to appeals, to unfairly and vexatiously hinder and delay it in obtaining its revenue, is a serious detriment to the government, and contrary to every sound principle of public policy. It is, therefore, the duty of a taxpayer, when so requested by the assessor, or county board of equalization, to honestly and promptly furnish information as to the character and amount of his personal property and the true value of the same. He cannot refuse to furnish such information to the lawfully constituted taxing board, and then, after months of delay, occasioned by his probably unnecessary appeal to the court, challenge the correctness of the valuation fixed by the board, except, at most, on a clear showing of fraud practiced by the board. If the assessment made by the county assessor was excessive, as alleged, it was the result of plaintiff's own failure to aid the assessor in arriving at the true value. If the assessor had, while act-

ing, as he says in his return, according to the best information in his possession, placed too high a valuation upon the property of the plaintiff, the burden was upon the plaintiff to establish that fact before the board of equalization. This it failed to do. If it could have and had done so, the presumption is that the board would promptly have corrected the assessment. That is precisely what boards of equalization are for. The presumption obtains that a board of equalization faithfully performs its official duties, and that in making an assessment it acts upon sufficient competent evidence to justify its action; and, where a taxpayer appeals from the action of the board in fixing the value of his property for taxation, the burden is upon him to show that the action of the board is erroneous. *Western Union Telegraph Co. v. Dodge County*, 80 Neb. 23.

For the reasons above stated, the judgment of the district court is reversed and the cause remanded, with directions to dismiss plaintiff's appeal.

REVERSED.

ROSE, J., not sitting.

LIDA BUSH, APPELLANT, V. EBENEZER E. MOCKETT ET AL., APPELLEES.

FILED MARCH 13, 1914. No. 17,569.

1. **Injunction:** USE OF PROPERTY. Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another.
2. ———: ERECTION OF FENCE. A landowner will be enjoined from erecting a fence on his land to the great damage of his neighbor, and without any useful purpose on his part, but for the sole purpose to annoy and punish the party injured.
3. ———: ———: EVIDENCE. The evidence in this case, which is indicated in the opinion, is *held* to justify such injunction.

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

Burr, Greene & Greene, for appellant.

Mockett & Peterson, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Lancaster county to enjoin the defendants from interfering with the plaintiff in the erection, repairing and rebuilding of a fence which the plaintiff and her husband desired to maintain on or near the line between the residence lot of the plaintiff and that of the defendants. The defendants answered by way of cross-petition, alleging that while the defendants were away from home the plaintiff erected a rough, unsightly board fence between the lot occupied by the residence of the defendants and the lot so occupied by the plaintiff; that the fence was "about six feet high from the front sidewalk for fifteen feet back, and for the rest of its extent * * * was seven feet high; that the fence ran within about seven and one-half feet of the full west side of defendants' house; that the fence shut out the light, air, and view from the defendants' windows, and that defendants were unable to see the street or street cars or to have any view whatever from the windows on the west side of their house; and that the view was cut off from their front porch and front yard to the west and northwest," with other allegations as to the injury that the fence caused to the defendants, and then alleged "that the fence was not only high, but was made out of as rough material as possible, and was made for the express purpose of annoying and disturbing defendants and the members of their family, and was erected for no useful purpose." It was further alleged that the fence "was placed on, over and along said lot line, immediately on the west of defendants' house, maliciously and out of spite, and for the express purpose of harassing defendants and their family, and for the purpose of annoying them and disturbing their peace of mind, and for the

purpose of decreasing the value of their said property, and for the purpose of compelling them to sell their property for a less amount than it was really worth." The defendants asked that the plaintiff be enjoined from maintaining the fence. The reply denied the allegations of the cross-petition. The trial court enjoined the plaintiff from maintaining a specified portion of the fence, and enjoined the defendants from interfering with the remainder thereof. The plaintiff has appealed.

The defendants alleged that that part of the fence which the plaintiff is enjoined from maintaining extended in some points on to defendants' land, and that their placing and maintaining it there constituted a trespass. Several witnesses testified that some of the fence posts, and especially the cement in which the posts were set, extended on to the defendants' land about two inches. The county surveyor, who was called upon to make exact measurements for the purpose of determining this point, testified that he found one or two of the posts that were set a fraction of an inch on the defendants' land, and that no part of any of the fence extended more than two inches over the defendants' land. This variation is so slight that it does not appear to be considered as a material matter in the controversy. There are then but two questions, one of law and one of fact, involved in the case: First. Can a landowner erect any structure that he sees fit, without any useful purpose on his part, but for the sole purpose to annoy and punish his neighbor, when his neighbor is severely damaged thereby? Second. If this question of law is answered in the negative, was this fence built without any useful purpose on the part of the plaintiff, and for the sole purpose of annoying and punishing the defendants?

1. The common law of England strenuously adhered to the doctrine that the owner of real estate might use it as he pleased, without regard to the convenience or even the interests of his neighbors. Some exceptions were made as to "ancient lights," and perhaps other such considerations. This rule of the common law was not quite in har-

mony with the theory of the civil law as expressed in the maxim, *"Sic utere tuo ut alienum non lædas."* The earlier decisons in this country are inclined to the English view; but in recent years there have been some very notable departures from the strict rule of those courts. In 1909 the supreme court of North Carolina said that the maxim above quoted "is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' * * * No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion." *Barger v. Barringer,* 151 N. Car. 433. The opinion cites several Michigan cases and others, and is the subject of a somewhat extensive note, 25 L. R. A. n. s. 831.

Many of the states have by statute adopted the rule so announced. In 1888 the supreme court of Michigan, in the absence of any statute on the subject, declared the law of that state to be: "A fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance." *Burke v. Smith,* 37 N. W. 838 (69 Mich. 380). The opinion by Mr. Justice Morse reviewed some of the earlier decisions upon both sides of the question, and stated at some length the reasons for the conclusions reached by the court. Chief Justice Campbell dissented. He discussed the common law doctrine of "ancient lights," and says that the right to have one's prospect into defendant's property left unobstructed "is an easement in the strictest sense of the term. * * * No man can create an easement for himself. If he has no such right, then he cannot complain that it is interfered with, either at law or in equity." He concludes that, where no such right has been acquired by prescription, "there is nothing to prevent the erection of any fence or barrier" to obstruct it. The doctrine of

"ancient lights" has not been recognized in this state, and the reasoning of the great chief justice does not seem to have application here. Mr. Justice Champlin concurred in the dissenting opinion; but he based his opinion upon the earlier decisions of that and other courts, and said that it should be left to the legislature to declare the remedy, and that he thought "that legislation of the character contained in the statutes above cited is required and would meet my hearty approval." In *Flaherty v. Moran,* 81 Mich. 52, the rule established in *Burke v. Smith, supra,* was affirmed and followed, and Justice Champlin, then being chief justice, concurred in the opinion. These decisions are followed in *Kirkwood v. Finegan,* 95 Mich. 543, and *Peek v. Roe,* 110 Mich. 52.

No doubt every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another. His neighbors have no legal cause to complain although it may interfere with some privileges formerly enjoyed. Courts of equity would fail in the service that history shows they were intended to render to society if they are unable to protect those common rights which more clearly appear, and become more valuable, as civilization advances and the relations of social life become more intricate and more enjoyable. As was said by Mr. Justice Hoke in his dissenting opinion in *Barger v. Barringer, supra,* we cannot "allow causes of action to be based upon motive alone. For here we enter upon the domain of taste and temperament, involving questions entirely too complex, varied, and at times fanciful for satisfactory inquiry and determination by municipal courts." But when it appears that, not only was the motive wholly malicious, but the intention and result were to seriously injure another, without benefit to any one, courts of equity are not so impotent in these modern times that they are unable to prevent such a wrong. That the defendants would be seriously injured by this act of plaintiff is shown without contradiction. Several disinterested witnesses testified that the value of

the defendants' property would be affected to the amount of at least $500, and without benefit, but rather injury, to the plaintiff herself.

2. The question, then, remains whether the evidence in this record proves that this plaintiff erected and sought to maintain this fence, not for any useful purpose on her part, but for the sole purpose of maliciously injuring and annoying the defendants. The plaintiff was the owner of lot 9 and the defendants were the owners of the adjoining lot 8, fronting to the north on South street in the city of Lincoln. It is strictly a residence locality, several blocks distant from any business section of the city. It appears that the defendants were required to lay a cement walk in front of their lot, the grade of which was fixed by the city authorities. This grade so fixed was about 4 inches higher than the cement walk which connected with it, and which had been laid by the plaintiff in the front of her lot, so that the plaintiff would be required to raise her walk to meet the walk of the defendants. The plaintiff seriously objected to this, and insisted that the defendants' walk should be laid to the grade of her walk. When the defendants were not allowed to do this, the plaintiff declared that, if she was compelled to raise the grade of her walk, she would erect a fence between the lots. Mr. Bowery, the paving inspector for the city, testified that the plaintiff and her husband seemed very indignant because they were required to bring the sidewalk up to the level; that he had instructions to require them to raise it, and told the plaintiff and her husband so, and that the plaintiff's husband said: "That when they brought the sidewalk up then up would go a high board fence." Another witness testified that he was working under a contract with the city in raising the plaintiff's walk, and, while so employed, the plaintiff told him that "she was going to put up a fence on the east side of her place," and that she "was going to put the names of Mr. Bates, I believe his name was, the assistant city engineer, and Mr. Bowery and all who had anything to do with the raising of that sidewalk, * * * on the

fence." This and other evidence of the same character is not contradicted. Soon after that the fence in question was built. It was a tight board fence about 6 feet high from the street north of the house to the line of the front of the defendants' house, about 15 feet, and from that point it was about 7 feet high between the houses. It was built by nailing stringers on round cedar posts and nailing inch boards to these stringers; the posts and stringers being on the side toward the defendants' house. The stringers and posts were dressed lumber, and were painted a dark green color. The fence is placed about 7 feet from the defendants' house, and reached about the middle of the windows of their living rooms. Before this fence was built the defendants had placed a wire fence on this line. This fence was built of iron rods and wires, about 3½ or 4 feet high. The plaintiff's husband, while on the witness-stand, was several times asked what their purpose was in building this fence, and whether it was intended to serve any useful purpose. Upon objection of plaintiff's counsel, he was not required to answer, and there was no attempt to show any useful purpose or any other object in building the fence than to punish the defendants and others for causing the plaintiff to raise their walk, unless it can be inferred from the evidence that the plaintiff once stated that she had the fence built for privacy and to avoid the taunts of the defendants.

There was already a fence on the line between these lots which is not complained of, and which was apparently suitable. The evidence shows beyond any question that the plaintiff's fence was not built for any useful purpose to promote their own convenience or welfare in any way, but for the sole purpose of annoying and punishing the defendants. Soon after the fence was constructed the defendants forcibly removed it, breaking some of the boards in doing so. The plaintiff rebuilt it, and it was again torn down. This action on the part of the defendants is seriously complained of in the briefs, and we have no inclination to approve of this conduct. This is not the form of action usually employed to redress such grievances,

and no relief is asked for in the nature of damages for injury to plaintiff's property. As that part of the fence will not be rebuilt, there is no occasion for any further action on the part of the court in this case. The trial court enjoined the plaintiff from reconstructing or maintaining that part of the fence extending north of the front line of the defendants' house, and enjoined the defendants from interfering with the remainder of the fence. The defendants have not appealed, and, as we have seen, the plaintiff was rightly enjoined.

The judgment of the district court is

AFFIRMED.

REESE, C. J., dissenting.

I agree that, if plaintiff placed any part of her fence over the lot line on defendants' property, defendants had the right to remove it where it thus encroached, or by injunction restrain the trespass. To that part of the opinion of the majority which holds that, if an adjoining lot owner, prompted alone by spite and a desire to annoy the adjacent lot owner, and for no useful purpose, should erect or should construct an unreasonably high fence, whether upon the lot line or his side of the line exclusively, equity could in a proper case protect the rights of the adjoining lot owner from what would be, in effect, a trespass. But I am fully persuaded that, so long as one keeps upon his own property, he has the right to the free use thereof, within reason, and to some exercise of his own judgment and preference as to the exercise of such use. If the use is lawful and within his rights, it is not for the courts to inquire as to his motive.

It does not strike me that the fence was so unsightly as to shock the sensibilities of any one, however refined they might be. The fence was 6 feet high, constructed of material planed and dressed upon both sides, and painted a dark green color, which is not an objectionable color. The decree of the district court, and indeed of this court, orders no interference with plaintiff's fence opposite the windows of defendants' house. That ques-

tion is not before this court, for defendants have not appealed from that part of the decree. It therefore has no place in this case. The decree only prevents the maintenance of *any* fence from a point opposite the front of defendants' porch to the front lot line, which is a distance of some 15 feet. Such a fence could not seriously interfere with the free circulation of the atmosphere, and the only possible interference with defendants would be to prevent them from observing everything existing or taking place in plaintiff's front yard, and probably a view along the surface of the earth in the street, neither of which is of so valuable a right as to enable defendants to dictate to plaintiff as to how she shall use or enjoy her own home and property. It is apparent that every right of which defendants are deprived (that of inspecting plaintiff's front yard, and looking along the street) is equally destroyed, so far as plaintiff is concerned, for she cannot oversee and inspect defendants' front yard, nor observe what is doing along the street, but in the opposite direction. The inconvenience of defendants is no greater than that of plaintiff. By this decree all semblance of privacy in front of plaintiff's house upon her own property is destroyed. If desired by plaintiff, I do not believe the court has any possible authority to enjoin the construction of the fence upon her own property, for her own benefit and convenience. To my mind the case is too trivial to warrant any such interference as is here proposed.

LETTON, J., dissenting.

While I agree with the modern doctrine, I think the motive is not material, unless the structure is offensive, unsightly, or is built for no useful or proper purpose. If the fence was lawful, proper, and not unsightly, the courts should not interfere.

JOHN STENBERG, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1914. No. 17,623.

1. **Carriers: LIABILITY: ASSAULT ON TRESPASSER.** Evidence that a brakeman on a freight train demanded money of a trespasser in one of the cars of the train, and immediately struck him, with some deadly weapon, such a blow as to crush his skull and render him unconscious for several weeks, will not justify a finding that such act was done in the employment of the company, and render the company liable in damages.

2. ———: ———: ———: EVIDENCE. The evidence indicated in the opinion is *held* insufficient to support a judgment against the defendant.

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

Edgar M. Morsman, Jr., and *J. A. C. Kennedy*, for appellant.

W. W. Slabaugh, John W. Battin and *Charles E. Foster, contra.*

SEDGWICK, J.

In the spring of 1911 the plaintiff was employed in a stone quarry near Nehawka. He went to Omaha for the purpose, he says, of having a rest and enjoying himself. He had $40 in his pocket, and, after staying around the city at various places for five or six days, he went on the 9th day of June to a saloon and drank some beer (one glass he says), and borrowed $2 from the saloon-keeper with which to go home, and then between 2 and 3 o'clock in the afternoon started for the Webster street railroad station, about 10 blocks distant. The defendant's passenger train which he desired to take left that station at 3:50, and the plaintiff arrived there too late to take that train. He says he stopped and talked with an acquaintance on the way. He then took a street car to South

Omaha, and he testified that between 5 and 6 o'clock he went to the track of the defendant, and found a freight train there, and told a man, whom he said was the conductor, where he wanted to go, and was asked if he had any money, and said he would give him 50 cents to let him ride. He then got into an empty box car and sat down in the corner of the car. The car left in about 20 minutes, and after it had passed Plattsmouth a man entered the window at the end of the car and approached the plaintiff, and asked him if he had any money. The plaintiff told him that he had paid 50 cents for his ride, and the man then struck him on the top of the head with some instrument, which the plaintiff thinks he carried in his pocket, and from that time the plaintiff was unconscious for something more than 30 days. He alleges that the man who struck him was a brakeman and employed by the defendant company. He brought this action in the district court for Douglas county to recover damages caused by this injury. The trial resulted in a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

The principal contentions of the defendant are that the verdict and judgment are not supported by the evidence, and that the plaintiff's own evidence shows that the man who assaulted him was not in the line of his duty as an employee of the defendant company at the time, and the defendant was not responsible for his act.

1. The plaintiff is fully corroborated as to the extent of his injury. The evidence of the physician who attended him was that the blow was such a severe one as to break the plaintiff's skull and cause him to be unconscious for several weeks. "The skull was fractured in such a way that a portion of the bone was driven in, and there was brain tissue at that time escaping through the opening." The plaintiff suffered other injuries. The plaintiff is also corroborated as to his having been to the saloon, and that he borrowed $2 of the saloon-keeper with which to go home at about the time that he testified he did. It also appears from the evidence that the crew of one of defendant's

freight trains found the plaintiff lying in an unconscious condition on the railroad track of the defendant south of Plattsmouth, and between the stations of Murray and Union, at about 5:50 o'clock of the morning of June 10. They "smelled liquor on him" when they moved him. We have not found that the plaintiff's story is corroborated in any other particular. The evidence was without contradiction that there was no freight train of the defendant that left South Omaha going south later than 2 o'clock in the afternoon until 8:20 in the evening. As the plaintiff could not have arrived in South Omaha before 2 o'clock, if he rode on any train of the defendant it must have been the train that left South Omaha at 8:20 P. M. It appears that the freight trains of the defendant run from the Webster street station in Omaha over the belt line to the junction with the Union Pacific and stock-yards tracks, and from that point over the Union Pacific track through South Omaha and to California Junction, and the trains of the Burlington also run over the same line. The freight train of the defendant which left South Omaha at 8:20 on that day was a through train. Its crew consisted of a conductor and two brakemen, all of whom were witnesses on the trial. The conductor testified positively that he was required to and did make a record of the cars in his train on that day, and that there were no empty cars in the train, and that he never saw the plaintiff before the trial, and the plaintiff did not ride upon the train that day. Both of the brakemen positively denied that they had ever seen the plaintiff before the trial, or that on the day named they went into any empty car on that train, or that there was any person on the train other than the employees, or that either of them assaulted any person on that train. The theory of the plaintiff is that when he was assaulted on the train he was afterwards thrown from the car by the person who assaulted him. When he was found on the track in an unconscious condition several hours after the train on which he says he was riding had passed, he was lying between the rails of the track, and there is of

course no explanation as to how he could have fallen in such a situation. The train dispatcher of the company was also a witness, and corroborated the conductor as to there being no empty cars upon the train in question. There are other circumstances shown in the testimony that tend to show the impossibility of the plaintiff's story. If he had not been drinking in Omaha more than he says he had, and was in any condition to take care of himself or know what he was really doing, and if he is not mistaken in regard to having taken one of the defendant's trains, instead of another of the various trains that might be in the same locality in the South Omaha yards, still his evidence is so indefinite and improbable in itself that it fails to support a judgment against the defendant, contradicted as it is by the evidence of so many apparently reliable witnesses and so many well-established circumstances.

2. The evidence wholly fails to show that the defendant was assaulted and injured by an employee of the defendant company in the course of his employment. According to the plaintiff's testimony, the purpose of his assailant was robbery, and the robber, without anything further than to ask him how much money he had, dealt him such a blow on the top of his head as to crush his skull to such extent that the substance of the brain was exposed. If he received his injury in such a manner, the object of his assailant must have been murder and robbery, and he at once threw from the train what he supposed was the corpse of his victim. The trial court instructed the jury that under the evidence the plaintiff, if he was in the car of the defendant, was a trespasser. This is in accordance with the evidence, and, that being the case, the defendant as a common carrier was not an insurer against robbery and murder.

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

REVERSED.

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

MYRL A. WARRICK, APPELLEE, V. WILLIAM I. FARLEY, APPELLANT.

FILED MARCH 13, 1914. No. 17,523.

1. **Animals: PERSONAL INJURIES: RIGHT OF RECOVERY.** One who voluntarily exposes himself to danger by attempting to separate two fighting dogs, then engaged in a combat, cannot recover damages from the owner of the dog by which he is bitten, because he has himself helped to create the condition and the danger.
2. ———: ———: ———. Where a dog is allowed to run at large, and bites the owner of another dog with which he is in a fight, and the owner is bitten while negligently attempting to separate the fighting dogs, there is no liability for damages because of the injury, unless the evidence shows that the owner of the dog which committed the injury knew that his dog was accustomed to bite persons, and then the injury must not be carelessly brought about or contributed to by the plaintiff, and, if it is, the plaintiff cannot recover.

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

Hainer, Craft & Aylsworth and *John A. Whitmore,* for appellant.

J. H. Grosvenor and *W. A. Prince, contra.*

HAMER, J.

The plaintiff, Myrl A. Warrick, recovered a judgment against the defendant, William I. Farley, in the district court for Hamilton county, for damages by reason of an injury sustained through the bite of defendant's dog. The defendant appeals.

The defendant objects that the verdict is not sustained by sufficient evidence. This involves a consideration of the disposition of the dog, whether to bite mankind, and whether the defendant knew or had reason to believe that his dog had such a disposition. We have read the evidence. It appears that the defendant owned a bulldog. The plaintiff owned a coach dog. The plaintiff seems to

have been standing on the sidewalk in front of a drug store in the city of Aurora, and was talking with a gentleman named Elmore. He had with him his coach dog. The daughter of the defendant came along, and the defendant's bulldog was with her. The defendant's dog seems to have attacked the plaintiff's dog, and the plaintiff separated the dogs and put his dog in the drug store. Shortly afterwards the defendant's daughter returned, and she was accompanied by the defendant's dog. Immediately there was a resumption of hostilities between the two dogs. In trying to separate the dogs the plaintiff was severely bitten by the defendant's dog. The defendant set up the defense that his dog was gentle, and that he himself had no knowledge of the fact that he was inclined to bite any person. He also claimed that the dog was accustomed to play with his own children and the children of the neighborhood; that he was of a gentle disposition; and there is much testimony tending to show that fact, although it is not claimed that he did not fight other dogs. He would perhaps have been an unnatural bulldog if he had not had some fights with other dogs. It is also claimed that the plaintiff was negligent in the manner in which he handled the dogs when he undertook to separate them, and that his injury occurred because of such negligence in handling and attempting to separate two infuriated, fighting dogs then in a fight.

It is to be considered (1) whether the defendant's dog had a propensity to bite mankind; and (2) whether the defendant had notice of such propensity.

John Powell, chief of police, knew the defendant's dog, and had seen him on the streets with the Farley children, Alice and John. He gave his opinion that he did not think that the dog was a very bad dog. Robert Mitchel, the night watch, testified that he had not noticed anything wrong with the dog in its conduct toward persons. Mrs. Steenburg testified that she saw the dog every day; that the dog played with the Farley children, with Blanche McKey, Thomas Peterson, with the Williamson children, the Haughey girls, Arthur Ronin, and her own boys. She

saw the boys pick the dog up by his feet and handle him in a very rough manner, and he did not get angry at this. He seems to have been willing to endure almost any amount of rough treatment at the hands of these children. Mrs. Haughey, the wife of Dr. Haughey, testified that she knew the Farley dog; she saw him; and that her children played with the dog, especially the youngest girl, who was about 12 years old; she also saw the Williamson children, Thomas Peterson, and Dr. Steenburg's boys playing with the dog. They would run and hide, and the dog would hunt them. Mrs. Williamson testified as to the gentleness of the dog and its daily companionship with the children. Her children were seven, nine and eleven years old. She knew that the dog was always gentle with these children. Walter Boyd testified that the dog was with his brother-in-law's little boy, a little fellow three years of age, and that the dog and the child would play in the house. Mr. Ronin testified that the dog was the companion of his little grandson and other neighborhood little children. He had seen the dog on his porch and in his yard playing with his little grandson and other little children. The grandson was seven years old. George Verbeck testified that he had observed the Farley children and other children playing with this dog; that he had seen him a great many times with other children than the Farley children. The children and the dog would chase each other about the place. He never saw the dog show his teeth, growl, or show any tendency to bite anybody. He appears to have been the pet and companion of the children of the neighborhood.

The defendant's daughter testified that she had seen many children, ranging in age from four to twelve years, play with the dog; that they would tie a rope on his collar, and the dog would pull them on roller skates in front of the house; sometimes they would roll over him; at other times they would tie a handkerchief around his nose and watch him get it off with his paw. They also fed him candy. The defendant's wife testified to the same facts. The defendant's testimony is along the same line. He had seen

the children tie his feet together with a handkerchief or a string. He had seen them tie a handkerchief about the dog's nose. Mr. Serf testified that he frequently saw the dog, and that when he went by the house the dog would come out in a friendly way. He frequently went by the Farley home and often in the nighttime. The dog was always friendly. He would come out and walk a little ways with the witness. Lewis G. Bald testified that the dog was unusually friendly. He testified to meeting the dog and petting him, and that the dog went with him. He often saw the dog play with the children. R. Y. Barnes, who had formerly been the city marshal, testified that for two years he had passed the Farley residence as often as at least twice a day, and sometimes four times a day, and that he always found the dog playful and friendly. He described the dog as a very pretty dog, and clean and nice, and he would speak to him and pet him. He had never seen any tendency on the part of the dog to attack any person.

The evidence shows conclusively that the dog was generally of an amiable disposition, and that he played with the children in the neighborhood. The evidence would seem to indicate that there was no reason to apprehend danger from this dog under ordinary circumstances. That he would fight dogs was, perhaps, natural for a bulldog—perhaps for most breeds of dogs.

W. J. Elmore, a witness for the plaintiff, testified that Mr. Warrick separated the dogs when the defendant's dog first came by, and put his coach dog in the drug store; that the defendant's dog went on down the street; that there was a little girl with the dog. Presently the little girl came back. By that time the coach dog was out of the drug store, and the bulldog came by. "Q. You say the bulldog rushed in and grabbed the coach dog. What, if anything, did Mr. Warrick do—describe what he did? A. He grabbed these dogs and tried to part them, and he had them by the collar, and this dog reached around and grabbed him. * * * Q. As soon as they commenced to fight that time (the second time) Mr. Warrick grabbed

both of them by the collar? A. Yes, sir. Q. And lifted them off their front feet? A. Well, he lifted them off their front feet, but they was still on their back. Q. And he was holding the dogs apart? A. Yes. Q. And they were both trying to get together? A. Well, Mr. Warrick's dog didn't attempt to get to the other one; the bulldog was doing all the lunging. Q. The other dog did not try to fight at all? A. He tried, but he was not vicious like the other dog."

Glenn Mason, witness on the part of the defendant, testified: "A. Well, I was in front of McKee & Hartquest's drug store, and with a bunch of men there after we got back from a trip in the automobile, and I heard somebody say, 'Here he comes,' and about the same time they said that the dogs were close together, and Mr. Warrick *grabbed them by the collar and picked them up.* * * * He lifted them *clear up,* and they were too heavy to hold that way, and they would strike the ground again, and then he *would pull them back up;* and it seemed he couldn't lift them the second time as high as he did the first time—(continuing). Well, they came back down to the ground, and the dogs—I don't know whether it was the *second* or *third* time—one of the dogs, Mr. Farley's dog, got hold of Mr. Warrick's dog on the side and just pulled the skin right out on the dog and let loose, he got loose from him again."

Luther French, a witness for the plaintiff, testified: "Mr. Warrick stepped out of the way, and Mr. Farley's dog had hold of Mr. Warrick's dog about the shoulders or neck; and Mr. Warrick grabbed his dog by the collar, and also Mr. Farley's dog, and he was pulling on Mr. Warrick's dog to get him off I believe—they was trying to get the dogs parted there anyway—and the first thing I knew the bulldog had bit Mr. Warrick."

It is, seemingly, the undisputed evidence that the plaintiff took *each dog* by the collar and *lifted them both clear of the ground.* Holding them in that manner, they would be sure to snap at each other. From the circumstances as detailed no one may be certain that the bite which the

plaintiff received was not intended for the coach dog. We are of the opinion that the plaintiff was guilty of negligence, and that he himself, by his negligence, made the injury possible. If he had taken either dog by the collar and attempted to drag him away from the other, he would, in all probability, not have been injured. We do not think that the evidence sustains the verdict.

It appears that the plaintiff was bitten because he caught these dogs by their respective collars and held them up so that they could snap at each other. As well expect two cats suspended together by their tails and facing each other not to fight as to expect peace between these dogs when they were held up fronting each other and with their heads near enough together so that they could snap at and reach each other. Elmore testified that the dogs were about the same size. A coach dog will fight, probably not so well as a bulldog; but, if this coach dog understood that his *master was helping* him by holding the other dog, he would try to do his whole duty, from a dog's standpoint, because of the spirit of loyalty to his master. A bulldog held up that way would probably delight in the mad revelry of the battle; and, no doubt, almost any dog would fight under the same circumstances. Ordinary prudence demands more careful conduct of the plaintiff and greater regard for his own safety. The injury of the plaintiff was clearly due to his own neglect.

The owner of a dog is not liable for injury caused by it, unless it is vicious, and notice of the fact that it is vicious is brought home to him. *Trumble v. Happy,* 114 Ia. 624.

The owner of ordinary domestic animals is not liable for injury which they do to another, unless the animal was accustomed to injuring persons, or had an inclination to do so to the knowledge of the owner. *Smith v. Causey,* 22 Ala. 568; *Le Forest v. Tolman,* 117 Mass. 109.

Where, in an action to recover for personal injury, caused by a domestic animal, it does not appear that the animal ever injured any one before or since, or that any one ever had any difficulty with it other than on which

plaintiff founds his suit, nonsuit should be granted, since there is no evidence that defendant had knowledge of the vicious character of the animal. 2 Cyc. 390.

Under a declaration that the defendant kept a dog that he knew was accustomed to bite mankind, it is not enough for the plaintiff to prove that the dog had a savage and ferocious disposition, and that defendant knew it; but he is bound to prove the allegation that the dog was accustomed to attack and bite mankind, and that defendant knew that.

There is no doubt that, in case of animals not inclined to do mischief, a previous mischievous propensity must be shown, and, the scienter clearly established, the gist of the action is not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not. *Mann v. Weiand,* 81 (pt. 2) Pa. St. 243; In *Beck v. Dyson,* 4 Camp. (Eng.) 198, Lord Ellenborough directed a nonsuit because the evidence was not sufficient to warrant the jury in inferring that the defendant knew that the dog was accustomed to bite. In a like case Lord Abinger nonsuited because it did not appear that the owner had knowledge of the vicious propensity of his dog. *Hogan v. Sharpe,* 7 Car. & P. (Eng.) *755. In *Martinez v. Bernhard,* 106 La. 368, 55 L. R. A. 671, it is said by the court: "The owner of a gentle animal, which has always been of a kind temper, and has never attempted to bite any one, and has never given occasion to suspect that it would bite, is not liable in damages by the mere fact that the animal has bitten some one."

Where a dog has been around the premises for four years and had never shown symptons of viciousness, and he bit the plaintiff, and it was shown that he had just been stepped on, and that boys had been throwing dirt at him, held, that the vicious character of the dog was not shown so as to warrant a verdict against the owner. *Cuney v. Campbell,* 76 Minn. 59.

The plaintiff's contributory negligence in teasing defendant's dog, but for which the injury would not have

occurred, is a defense to the action, it matters not when or where the injury was inflicted. *Bush v. Wathen,* 104 Ky. 548, 47 S. W. 599.

In *Hathaway v. Tinkham,* 148 Mass. 85, it was said by Mr. Justice Allen: "It is, however, essential to a plaintiff's right to recover that he should have been in the exercise of ordinary care himself." Where the plaintiff interferes with a dog and is bitten, due care should be shown. The same should be true where he interferes with two dogs that are fighting. *Raymond v. Hodgson,* 161 Mass. 184. In the case cited, "the plaintiff testified that his dog was making great outcries; that he rushed up to the dogs, looked for a collar on the defendant's dog, and seeing none, seized the defendant's dog by the tail, and pulled it away from his dog; and that, as the dogs became separated, the defendant's dog bit his hand, which had hold of the tail." The plaintiff requested the judge to rule that he was not obliged to satisfy the jury that he exercised due care, under the undisputed circumstances of the case. The judge refused so to rule. The jury returned a verdict for the defendants, "on the ground of want of due care on the part of the plaintiff; and the case comes before us on the plaintiff's exceptions to the refusal to rule as requested." The supreme court of Massachusetts, by Judge Lathrop, delivering its opinion, cited several Massachusetts cases, and then said, referring to these cases: "We have no doubt that where the plaintiff incites or interferes with a dog, and is bitten, his due care must be shown; and that the same is true where he interferes with two dogs that are fighting. * * * In the case at bar, the plaintiff voluntarily submitted himself to danger, and we have no doubt that the ruling of the court below was right."

The logic of the Massachusetts case seems to be conclusive. Applying that logic to the instant case, it is clear that the plaintiff voluntarily submitted himself to danger and did not exercise due care. He held these dogs, that were then engaged in fighting, up in front of him. They were standing on their hind legs and snapping at each

other, and he was supporting them by holding them up. By his conduct he voluntarily incurred the danger. He failed to exercise reasonable discretion. He was guilty of contributory negligence. While the purpose of the plaintiff was a proper one—he was trying to stop the fight—he took no consideration of his own danger. He unnecessarily exposed himself.

The judgment of the district court is

REVERSED.

ROSE and SEDGWICK, JJ., not sitting.

FAWCETT, J., concurring.

I concur in the the judgment of reversal on the ground of the insufficiency of the evidence to show any previous disposition of defendant's dog to bite mankind; and on the further ground that plaintiff was guilty of negligence in voluntarily exposing himself to a danger that was clearly apparent.

STATE, EX REL. JOHN HABERLAN, APPELLEE, V. DON L. LOVE, MAYOR, ET AL., APPELLANTS.

FILED MARCH 13, 1914. No. 17,892.

Municipal Corporations: FIREMEN'S PENSION: PERIOD OF SERVICE: EVIDENCE. The relator, John Haberlan, began a mandamus proceeding in the district court for Lancaster county against Don L. Love, mayor of the city of Lincoln, and others, to be placed upon the retired list of firemen under section 1, ch. 39, laws 1895. It is contended by the respondents that the relator must have served 21 years' continuous service in the department; second, that the service must be in a paid fire department; third, that the relator must have elected to retire from active service; fourth, that he must have retired with an honorable discharge. *Held*: (a) That the section does not require continuous service, and that the period of 21 years may include the full time which the applicant has served the city; (b) that under the facts shown the service of the applicant was in a paid fire department of the city for more than 22 years; (c) that the evidence shows that

the applicant elected to retire from active service; (d) that when he retired he was entitled to an honorable discharge, and that his name should be placed upon the retired list of firemen on a pension.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed, except as to money award.*

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

W. C. Frampton and *Price & Abbott, contra.*

HAMER, J.

This is an appeal in a mandamus proceeding brought in the district court for Lancaster county by John Haberlan against Don L. Love, mayor of the city of Lincoln, and others, to be placed upon the retired list of firemen on a pension. He bases his claim upon section 11, ch. 30, Comp. St. 1901, which reads: "That all metropolitan cities and cities of the first class having a paid fire department, shall pension all firemen of the paid fire department, whenever such fireman shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firemen upon the active list are paid, and such pension shall be twenty-five per cent. of the amount of salary such retiring fireman shall be receiving at the time that he goes upon such pension list." Judgment was rendered for the relator. The appellants contend that Haberlan must have served 21 years *continuous* service in the department; second, that the service must be in a *paid* fire department; third, that he must have *elected* to retire from active service; fourth, that he must have retired with an *honorable* discharge, and not under a cloud for misconduct.

It seems to be admitted by the appellants that the relator served 19 years, 3 months and 18 days. It is stated in a summary of the evidence that he *began work* April 29, 1876, and that he resigned December 29, 1881, making 5 years and 8 months employment at that time; that August

13, 1888, he began his first employment for the city in a *paid* fire department, and that he resigned February 15, 1890, making the time of his *first* employment in the *paid fire department* 1 year, 6 months and 2 days; that he again commenced work in the paid fire department February 15, 1892, that he was discharged from said department March 31, 1904, making the time of his second employment in the paid fire department 12 years, 1 month and 16 days. The brief of appellants contends that the legislature intended that the service should be a *continuous* period, and not several periods of service totaled together. The construction contended for seems artificial and unreasonable. The language is not 21 years of "continuous" service. The section merely provided that the service should be in the "fire department for the period of twenty-one years." The period is not described as uninterrupted or continuous. It may have been intended to mean duration of time only. We are not aware of any gain to the public by making the period of service continuous. If the legislature had intended to make the service continuous, it could easily have used the word "continuous" or some other word of like import to convey its meaning.

In *People v. French,* 46 Hun (N. Y.) 232, it was held under a police pension statute that service could not be continuous, but was based upon a statute which permitted terms of service to be added together, and the court in construing that statute held that it did not intend 21 years continuous service. The statute contained the following provision: "In determining the terms of service of any member of the police force, service in the late municipal and metropolitan force, and subsequently in the police force of the city of New York shall be counted and held to be service in the police force of the city of New York, for all purposes of this chapter." In that case the court held that that part of the statute above quoted disclosed the intention of the law to be that, where a portion of the service had been rendered as a member of the metropolitan force, *continuous* service for 20 years was not required, but that

the use of the words "terms of service" meant that the time could be made up by adding the terms together.

In *Continental Hose Co. v. City of Fargo,* 17 N. Dak. 5, six members of the fire department were given sole charge of the fire apparatus used by the city; the other members of the department were required to repair to the fire and aid in extinguishing it, and were to be paid so much per hour in the daytime and so much more per hour in the nighttime. Held, That such fire department "was a paid department." It was the effort of the defense in that case to show that the firemen were "volunteer" firemen. This is an instructive case, because it quotes liberally from encyclopedias and dictionaries, contains considerable research, and discriminates and distinguishes in a clear and logical way.

In *In re Becker,* 80 N. Y. Supp. 1115, the "testator gave to each employee who at the time of his decease had been employed 'as long as two years and less than five years' $500, and to each one who had been employed 'for less than two years' $100, held, that one who, before the testator's death, had been employed continuously for only 16 months, but who had, counting his various terms of service, been employed for four years in all, was entitled to $500." In that case it was said in the body of the opinion: "While there is little from which the intent of the testator can be drawn upon this subject, yet it is evident that the desire of the testator was to recognize the persons who were in his employ at the time of his death, and to make the recognition depend upon the length of their services. That being the case, it seems to me that it is immaterial whether it was continuous or not, as, if the testator had had in mind an intention to restrict its provisions to persons who had been in his employ continuously no doubt he would have indicated it by the use of the word 'continuous.'"

It is contended by the respondents that the Nebraska statute does not permit totaling terms of service. To this it may be said that the Nebraska statute does not provide for "continuous" service. That seems enough to dispose

of this question, without reference to the authorities cited, which are clearly in favor of the relator.

It is said by respondents that the statute requires the appellee to serve for 21 years "in a paid fire department, and not in a volunteer organization." It is then said that the city of Lincoln did not have a paid fire department until in January, 1886. There seems to be some dispute on the part of the respondents as to whether Haberlan served the city on the fire department during the years 1885, 1886 and 1887, and up to August 13, 1888, and from February 15, 1890, to February 15, 1892. Haberlan testified that he was away three years, beginning on the 29th of December, 1881; that he came back from Minnesota and was at Holdrege six months, making three years and six months from December 29, 1881, ending in June, 1885. Haberlan testified that he then went upon the Lincoln fire department in June, 1885. It is the contention that he did not go to work for the city until August 13, 1888, making three years in dispute. Haberlan contends that he was in the employ of the city as engineer on the fire department during 1885, 1886, 1887 and 1888. In corroboration of his testimony, Mr. Byers testified that Burr was mayor during 1885 and 1886, and that he (Byers) was street commissioner under Burr's administration, and that he wrote to Haberlan at the request of Mr. Burr, the mayor, to come back and take charge of the engine, and that Haberlan did come back and take charge of the engine, during Burr's administration. As to 1887 and 1888, A. J. Sawyer was the mayor. Haberlan testified that he was with the fire department as engineer during Sawyer's administration. His testimony is corroborated by the testimony of Mr. Sawyer, and Byers testified to substantially the same facts. Haberlan testified that he was in the fire department until March 31, 1904, excepting from December 29, 1881, to June, 1885.

Robert Malone's testimony shows that, when the hook and ladder company was taken from the volunteers and put in the paid fire department in 1886, they organized themselves and made rules governing the hook and ladder com-

pany, and that at that time there seems to have been no record kept by the hook and ladder department; that there was nobody to relieve him when he went to his meals or was absent from the house; that the records kept were very uncertain; that no effort was made to keep track of who was on the fire department or when anybody was appointed or discharged.

M. B. Reese, the present chief justice of the Nebraska supreme court, testified on behalf of the relator that during the time he was practicing law he had searched the records of the city of Lincoln as to whether the records showed that Mr. Haberlan was a member of the fire department for a certain length of time. He testified: "I found that Mr. Haberlan was, for a time, a member of the fire department, as shown by the records. I went into the records for a number of days and searched among them, and searched everything that seemed to me to throw any light upon the subject. Then, for I don't know how many years, apparently there was a complete blank of any record, and absence of any record on the subject of the fire department, except that at certain periods some person who had apparently bought up the claims would present a bill and it would be allowed to him as assignee of claims against certain departments, but there was nothing showing who was the assignor, or who had rendered the service, or anything of that kind. That is my recollection. For a number of years, I don't remember how many, that was the case." Judge Reese was asked if he examined any records in the office of the fire department, and testified that he did; that "the fire chief gave me what records he had, and I took them with me to the clerk's office, and went into the old papers and files covered with dust and looked them all through just as thoroughly as I could. I might state, if I am allowed, that I presented this claim as attorney for Mr. Haberlan, and for a long time failed to get the committee to act upon the claim. * * * Finally, I saw some of the members of the committee individually, and they requested me to investigate the subject and report, and to that extent I was acting, not only for my client, but for the city, and that

caused me to go through the records as I did, with the results as I have already stated." He was asked if in examining the records he could find any place that showed that John Haberlan had served 21 years for the city. "A. Yes, sir; at the commencement, and later on; but during three years there was not any record as to who had been members of the fire department, the only record being that there was an assignee of claims against the department presented. I think Mr. Brock." He was then asked if Mr. Brock used to buy them up, and answered: "Yes, sir; so I came to the conclusion that those claims had been bought up and allowed to him as assignee of the claims without stating who the persons were who rendered the service. With that exception the record was a complete blank." Further along Judge Reese testified: "I can remember what I did not find. I found the record to be in the condition which I have stated. Mr. Haberlan had been a member; and I think I found where he had been appointed, and claims allowed as salary—allowed for a length of time—and then I found the record was a complete blank, except as I have stated. I cannot remember just what the records in the chief's office showed." Judge Reese made a report to the mayor and city council. His report is included in the bill of exceptions and is referred to in his testimony. In the report he says, in substance, that the records have been very poorly kept; that many have been lost or destroyed; that it is impossible to say who the firemen were at all times or how they were paid; that he examined the warrant register from May 5, 1890, to December 1, 1891; that it is shown that during that time warrants were issued on the fire fund for salaries to firemen to the amount of nearly $30,000; that nearly all were issued to N. C. Brock for "claims assigned" without further indication as to who were the original owners of such claims; that the investigation shows that Mr. Haberlan was a member of the force during those years; that he was appointed on the 29th day of April, 1876, at a salary of $75 a month; that this was 28 years before the disabling of his engine in 1904; that from the date of his appointment he served continuously until

March, 1890, with the exception of three years; that the printed report of Fire Chief Newbury, issued in 1888, shows, at page 13, that Mr. Haberlan was the engineer of engine No. 4; that the printed report of Fire Chief Malone, issued in 1884, shows, at page 52, that Haberlan was then on the force, having been appointed September 1, 1888; that he resigned April 15, 1890; that he was reappointed February 15, 1892; that in Mr. Reese's report it was said to be certified by Fire Chief Clement that Mr. Haberlan was on the force continuously from the 5th day of February, 1892, until April 1, 1904, making the time nearly 25 years of service; that about two years of this time he was not in actual paid service, but always responded to calls when needed; that, deducting this time from the 25 years, it leaves about 23 years of actual paid service. Judge Reese's report closes: "I have aimed in this to be on the safe side, and think there is no doubt at all but that he has served more than 21 years in the regular paid fire department of the city. This entitles him to be retired under the provisions of section 11 of chapter 30 of the Compiled Statutes and pensioned at the rate of $20 per month, which would be equal to one fourth or 25 per cent. of the salary he was drawing at the time his engine failed." The witness was cross-examined by Mr. Foster for the respondent.

While the evidence is not very clear because proper records were not kept, the best evidence of which the subject is capable tends to establish the fact that Mr. Haberlan was a member of the *paid fire department* of the city of Lincoln for something more than 21 years. In any event the relator seems to have faithfully served the city *for more than 24 years.* If the two years about which there is a dispute, being the time elapsing between the 15th day of November, 1890, and the 15th day of November, 1892, shall be deducted, the time left is 22 years he was in a paid fire department in any event.

In *United States v. Belew,* 24 Fed. Cas. 1079, the question submitted was whether a carrier of mail was "a person employed in any of the departments of the general post-office." The court said: "The business belonging to the

post office, is in a department of the post office; a person employed in that business, is a person employed in a department of the post office. If, then, the carrying of the mail be a part of the business of the post office, it would seem that the person who carries it, is a person employed in a department of the general post office." It is further said: "He (counsel for the prisoner) insists that he must be an officer. But this is not the object of the law; the terms of the enactment do not require an officer; they are satisfied with an agent, or any person employed in any of the departments, or, in other words, in the business allotted to the general post office." The conviction was sustained. The cases of *People v. French, supra,* and *In re Becker, supra,* are both applicable to this part of the case.

Did Haberlan retire? Haberlan resigned. His resignation was an *election to retire,* and the Standard Dictionary defines "retire" "to withdraw from active service, * * * as an officer of the army or navy. * * * To separate or withdraw." In *State v. Mayor and City Council,* 4 Neb. 260, this court say: "In the absence of some statutory provision, we know of no rule which requires such resignation to be accepted by the municipal authorities, to make it effective. Their refusal, even, to accept it, would not have the effect to compel him to retain the office against his will." In *United States v. Wright,* 1 *McLean* (U. S.) 509, it is said: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office." Haberlan testified that, except during the time he had been off duty, which he explained, he had been in the service of the city as a paid fireman "ever since 1872. I never volunteered a day. * * * I have been in the service for the city 24 years and 6 months." At the end of that time, he says, "I just quit." There is no evidence tending to show a dishonorable discharge or anything that reflected on his conduct. He is entitled to the reward which the law provides for a faithful servant.

It is proper that those who risk their health and their lives to protect the property of their neighbors should be

rewarded in old age by a pension, which possibly may save them from actual want or serious distress. We see no objection to the granting of a pension in such a case as that presented by the facts considered. We are unable to see that the judgment of the district court is wrong. We find much in this case to sustain it. The judgment of the district court properly granted a peremptory writ of mandamus, but improperly awarded a money judgment.

The judgment granting the writ is affirmed, but the money judgment is set aside; appellants to pay all costs.

JUDGMENT ACCORDINGLY.

FAWCETT and SEDGWICK, JJ., concur in conclusion.

REESE, C. J., not sitting.

HENRY NAYSMITH ET AL., APPELLEES, V. CITY OF AUBURN, APPELLANT.

FILED APRIL 3, 1914. No. 17,433.

1. **Municipal Corporations: DRAINAGE: LIABILITY.** A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property, and negligently fails to provide a sufficient outlet for the escape of the water thus brought upon or against such property, it will be liable to the owner thereof for any damage that may result from such negligence.

2. ———: ———: APPEAL: FINDINGS: EVIDENCE. Where it is alleged and evidence is introduced tending to prove a negligent or unskilful drainage of the streets by and within a municipal corporation, resulting in an overflow and damage to the property of the plaintiff, and the jury hearing the case had, by order of the court, inspected the property and the character of the alleged defective drainage of the accumulated surface water, the finding of the jury will not be disturbed unless shown to be clearly wrong.

3. **Instructions** examined, and no prejudicial error found.

4. **Depositions: CORRECTION: QUESTION FOR COURT.** Where a deposition of a witness is taken, and it is claimed that a mistake has been

made by the stenographer in copying his notes, the proper time for the correction of the alleged mistake is by an application to the court, before the deposition is read, for permission to make such correction. The issue as to the mistake should not be submitted to the jury, thus multiplying the questions to be decided by them.

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

Lambert & McCarty, for appellant.

Quackenbush & Neal and *Fred G. Hawxby, contra.*

REESE, C. J.

This is an action against the city of Auburn by plaintiffs, the owners of residence property in said city, for damages to real estate by the overflow of surface water, alleged to have been caused by a change of the sidewalk grade, and the imperfect and negligent drainage of the streets adjacent to the property, to the extent of overflowing of the lots upon which the residence is located, and thus impairing their value and their use as residence property. The action is based upon two allegations of the petition; one, that the dwelling-house was originally constructed with reference to and corresponding with the street as it then existed, and that by a subsequent elevation of the sidewalk in front of the premises the house and lots were caused to be at a lower level from the sidewalk, the danger from overflow increased, and the value of the property thereby reduced and impaired; the other, that the city wrongfully, negligently and unlawfully constructed a ditch or waterway along and near the lot line and a drain or ditch across the street in front of the premises by which an increased flow of water was turned upon and against said lots, but without adequate drainage for the increasd flow, and by reason whereof a large volume of surface water was thrown against and over the sidewalk space and onto the lots, to the injury of plaintiffs and damage to the property, which was used as a residence. The answer consists of a denial of unadmitted facts, and alleges, in substance, that the house was orig-

inally constructed upon low ground, below the street and sidewalk level, the top of the foundation being below the level of the street and sidewalk space; that long before the improvements of the street and sidewalk were made the property was frequently overflowed, the surface water running and collecting about the house and into the cellar thereunder; that no damage was caused to the property by anything done by the city in the way or by the means of the improvements of the street or the surface drainage; that the change of the elevation of the sidewalk was very limited in extent, and the improvements of both street and sidewalk, together with the excavation of gutters and ditches, were necessary for the benefit of the public in the use of the street as a public thoroughfare; that the same were reasonably and carefully made, and in strict accordance with the rights and duty of the city, and without damage to plaintiffs' property; that, if plaintiffs have suffered any damage by reason of the overflow of the property or the deposit of earth or debris thereon, the same has been caused by the negligence on the part of the plaintiffs by reason of the house having been built on ground lower than the grade of the street, in the natural depression thereof, without any protection or effort to prevent the natural action of the surface waters; that by the improvements of the street, as stated, the property of plaintiffs had been increased in value, and not in any way injured or the value decreased. Reply, a general denial. A jury trial was had, which resulted in a verdict in favor of plaintiffs, finding the damage to the property to be $180.75, upon which, after the motion for a new trial was overruled, a judgment was rendered. Defendant appeals.

The cause was tried on the part of each side with a high degree of care and skill, and, apparently, every proper phase of the case was presented to the jury. The same commendable care has been observed in the presentation of the cause on this appeal. However, it will not be deemed necessary to follow the discussions as contained in the briefs and oral argument, as the case may be disposed of to our

satisfaction by its examination, limiting our investigation to a few plain principles which are applicable thereto.

As we view the record, the principal lines of contention were submitted to the jury on sharply conflicting testimony. Aside from the inconvenience of access to the property by the elevation of the sidewalk space in front of the lots, the already high surface as compared with the level of the property, we are scarcely persuaded that the subject merits very much attention. The surface of the lots was below the level of the street grade established by long user. The elevation of the sidewalk, the extent of which was sharply in dispute by the witnesses, was probably, in part at least, for the protection of the property in the prevention of the overflow of the surface water onto the lots from the street, but mainly for the improvement of the street and sidewalk. In the estimation of some of the witnesses this change had an injurious effect upon the value of the property, while other witnesses were of the opinion that the two lots owned by plaintiffs were benefited thereby. On this subject the conclusion to be drawn was for the jury. In addition to the oral testimony, the jury were, by order of the court, sent to view the premises, which it is presumed they did, and by that means the actual view furnished to the jurors a line of evidence not presented to the trial court, nor to this court. While not attaching so much importance to this feature of the case, we are reminded that it may have been, and probably was, considered by the jury as a partial basis for their verdict.

As we view the case, the principal element of damage as found by the jury arose from the effort of the city to take care of surface water by a system of drainage, as to which it was claimed, and the evidence introduced tended to show, that the volume of water carried in the drains was largely increased in time of rains and melting snows, and that to such an extent as to damage plaintiffs' property. The lots are situated in the south end of the west half of the block, the west ends fronting to the west upon Sixth street, while Twelfth avenue is along the south line. There is evidence that in the construction of the drainage system

of that part of the city quite a large watershed was so ditched and drained as to carry an increased flow of surface water to the south along the west side of Sixth street until it came to a point opposite the southwest corner of plaintiffs' property, where the drain was carried across the street in a ditch under a crosswalk, where the flow of water came in contact with the drain running to the south along the east side of the street, the outlet being from there to the east along the south line of the south lot of plaintiffs' property; that this last named drain was not of sufficient capacity to meet the requirements of the two ditches, and at the point where the two came together the water accumulated in a body, and was forced over the embankment of the ditch onto plaintiffs' lots. One witness testified that "the water sometimes seemed to come with greater force from the west, evidently from the greater drainage that came across the street. It came with great force. The water also from the north backed up, and the water from the west seemed to hold that from the north, and backed it up until it came over the corner of the walk; that at the lower part or corner of the walk, the water rushed around the corner, and made an abrupt turn; that all came along the gutter so that it came around that easily, and that coming from the corner seemed to come with a rush, and as it came it swelled toward the house. Q. Would it reach the building and porch? A. It did; we could see it. Q. Tell the jury how it ran. A. It came over in a great volume, over the corner of the walk, also over the crossing, just like a little torrent, and ran over toward the house." This evidence was supported, in substance, by other witnesses, and there was evidence which tended to prove the increased drainage from the north, and the inadequacy of the ditch to the east to carry off the water, produced by the union of the two ditches from the north along the east and west side of Sixth street, where that from the west side was carried across the street and united with that coming down the east side at the corner of plaintiffs' property. True, much of this testimony was in effect contradicted by the witnesses on the part of the defense, but the solution of

the question was for the jury. Here again, the examination of the place in question by the jury, with their opportunity to observe the drainage both above and below the point of union of the two drains, places the matter beyond reach of this court, as well as of the learned judge who presided at the trial. We are unable, therefore, to say that the verdict was not sustained by sufficient evidence.

We take it that it is a well-settled principle of law that neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. *Elliott v. Oil City,* 129 Pa. St. 570; *Byrnes v. City of Cohoes,* 67 N. Y. 204; 30 Am. & Eng. Ency. Law (2d ed.) 339; *Lincoln & B. H. R. Co. v. Sutherland,* 44 Neb. 526. In 10 Am. & Eng. Ency. Law (2d ed.) 243, it is said: "It is well settled according to all the authorities that, were the effect of the sewer, whatever its plan, is to cause a direct invasion of private property by collecting and throwing upon it in new channels or in increased quantities water that would not otherwise have found its way there, the corporation is liable." We can conceive no reason why the same rule should not be applied to surface drainage or surface sewers. Therefore, assuming the verdict of the jury to be sustained by sufficient evidence, which we must, we cannot say that it is contrary to law.

The deposition of a witness was taken and read in evidence by the transcript of his testimony furnished by a stenographer. It was offered to prove by the stenographer's shorthand notes that the witness had testified that at a time before the improvements were made the water had accumulated in the cellar of plaintiffs' property to the depth of three or four feet, but by the transcribed testimony the witness had used the word "inches" instead of "feet." The stenographer was called as a witness, and asked to produce his shorthand notes and testify that the notes were correct, but that in transcribing them he had inadvertently changed the word "feet" to "inches." Objection was made to the offered testimony, and the ob-

jection sustained, to which defendant excepted, and now assigns the ruling of the court as error. The proper time to have sought a correction of the deposition, if a mistake had been made in transcribing it, would have been before the trial, and we are unable to see that it would have been proper practice to present the additional issue to be tried by the jury, for the question had it been sustained, would have been for decision by them. But, in any event, we are unable to see that, had the practice proposed been correct, the error of the court, if such there were, could have worked any prejudice to defendant.

Objection is made to certain instructions given to the jury by the court, among which is the sixth, which is as follows: "You are instructed that the city is liable under the constitution of this state to lot owners for such damages as they may sustain by filling in the street in front of their lots above the level of the same, when the buildings were erected on the lot before the grade was established." While we may not be able to fully comprehend the necessity for giving this instruction, yet there is no doubt of its correctness as an abstract proposition. It has often been said that the statement of abstract propositions of law in instructions to juries is not always to be commended. The instruction is substantially a copy of the syllabus in *Harmon v. City of Omaha*, 17 Neb. 548. It is insisted that, while the doctrine is correct in a proper case, it can have no application to the one now under consideration. It is shown by the evidence that after the construction of plaintiffs' residence the sidewalk in front thereof was raised to an uncertain extent, according to the estimates of the witnesses, ranging from a very few inches to a greater height, and to that extent the instruction might be applied. It may be that at that time the street grade had been established by user, but, if so, that grade was changed in so far as the sidewalk space was concerned. We see no reversible error in giving the instruction.

The giving of instruction number 21 is assigned for error. It is as follows: "You are instructed that, if you find from all the evidence in this case that the plaintiffs

are entitled to recover, then the measure of plaintiffs' damages is the depreciation in the value of the property in controversy, which you find from the evidence in this case has been caused or occasioned by the change of the grade of said street and sidewalk, or from the change of the grade of the sidewalk alone, or by the accumulation and diversion of surface water." We are unable to see any ground for complaint in this instruction. The rule for the measurement of damages is correct and covers all the issues in the case as to what, under the issues and evidence, could have worked an injury to the property.

Objection is made to the action of the trial court in refusing to give certain instructions requested by defendant, and in giving instructions requested by plaintiff. As to those refused, we need only say that their substance is sufficiently included in those given. We are unable to detect any prejudicial or reversible error in those given. In view of their length, we must refrain from copying them here.

Finding no error which calls for a reversal of the judgment, it is

AFFIRMED.

EMMA ROEPKE ET AL., APPELLANTS, V. JAMES NUTZMANN ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,496.

1. **Deeds:** NECESSITY FOR DELIVERY. "The delivery of a deed is essential to render the conveyance operative." *Brown v. Westerfield*, 47 Neb. 399.
2. ———: DELIVERY. "Delivery is purely a question of intent to be determined by the facts and circumstances of each particular case." *Brown v. Westerfield*, 47 Neb. 399.
3. ———: ———. "It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument." *Brown v. Westerfield*, 47 Neb. 399.

4. ———: DELIVERY ON DEATH OF GRANTOR. A father signed and acknowledged two deeds, before a notary public, conveying a portion of his real estate to two of his children, and delivered the deeds to the notary, before whom they were acknowledged, for the use and benefit of the grantees, without any reservation or control, with the intention and understanding that the notary should retain the custody of the instruments until the grantor's death, when he was to record them. No information of the making of the deeds was given to the grantees until after the death of the grantor, but the grantor, during his lifetime, expressed to a disinterested person his satisfaction of what he had done, and never modified nor countermanded his instructions to the notary. *Held*, That the delivery to the notary was sufficient to pass the title to the property to the grantees at the date of such delivery, subject to their acceptance of the same when informed of the conveyance. Following *Brown v. Westerfield*, 47 Neb. 399.

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

Lambe & Butler and *O. E. Bozarth*, for appellants.

W. S. Morlan and *E. T. Grunden, contra.*

REESE, C. J.

This is an action to cancel the records of the two certain deeds made by Christian Nutzmann on the 6th day of January, 1909, one to the defendant James Nutzmann for the northwest quarter and the west half of the southwest quarter, and the other to Elbert Nutzmann for the southeast quarter and the east half of the southwest quarter, all in section 23, township 7 north, of range 21 west, in Gosper county. The facts as disclosed by the pleadings and evidence may be said to be that Christian Nutzmann was the father of the two defendants above named, as well as of some of the plaintiffs, and was possessed of quite a large quantity of land; that having previously lost his wife, the mother of parties to this suit, he on or about the 7th day of January, 1909, entered into the marriage relation with defendant Anna Nutzmann, and on the day preceding such marriage, to wit, on the 6th day of January, 1909, procured the deeds to be written, signed, witnessed, and acknowledged by him, and left them in the possession of the notary,

who had prepared the deeds and taken the acknowledgments, with instructions to cause them to be recorded in case of his decease. So far as is disclosed by the record, neither of the grantees knew anything of the making of the deeds, either at the time they were made or at any time thereafter, until after the death of their father, when the deeds appeared of record. The deeds were therefore never delivered to them, personally, during the lifetime of the grantor, but were kept in possession of the notary, as custodian, until after the death of the grantor, which occurred about the 13th or 14th of January, 1911. This was in accordance with the instructions of the grantor, which appears to have been definitely given, viz., that the deeds were to be held by the notary until the death of the grantor and then placed upon record. Nothing appears to have been said about deliveries to the grantees. When the notary had caused them to be placed upon the county records, he appears to have discharged his whole duty with reference to them. While the consideration of $10,000 mentioned in the deeds was suggested by the grantor at the time they were made, it sufficiently appears that no money consideration was ever paid. The testimony of the notary is: "When I was drawing up the deeds, when he came to the point of the consideration, I asked him what consideration he wanted to put in the deeds. Well, he said he didn't know. He hesitated a moment, then he said he wanted to make these deeds because the boys had helped him work at home and helped earn the property. Then I spoke up, and I says, 'You can make the deeds one dollar or most any other consideration you want to.' He stood there a moment thinking, then he says, 'Well, make it $10,000.' That is my recollection of it, and I think that was the amount put in the deeds." It was shown that the grantor leased the land described in the deeds to defendants and others after the deeds were made and up to the time of his death. The notary was the local banker at Bertrand, and he placed the deeds in the bank safe, where they remained until taken out and filed for record. The trial of the cause resulted in

a finding and decree in favor of defendants and a dismissal of the suit. Plaintiffs appeal.

While a number of questions involved in the rulings of the court upon the admission and rejection of evidence are presented, it is quite clear that the controlling and ruling question in the case is as to the delivery of the deeds. Upon that question there is no conflict. There is no showing or intimation that at the time the deeds were written, nor at any other time during the lifetime of the grantor, there was any impairment of his mental faculties, nor did he ever change his instructions to the notary. Was the delivery of the deeds to the notary, in the absence of defendants, and without any knowledge on their part of their execution prior to the death of the grantor, with the instructions given, a sufficient delivery to render the conveyances valid? As said in *Brown v. Westerfield,* 47 Neb. 399, "the delivery of a deed is indispensable to its validity," which is a well-recognized and established rule of law. The question in this case is: Did the delivery of the deeds to the notary, with positive instructions to place them upon record upon the happening of the grantor's death, and which instructions were never modified nor countermanded, amount in law to a delivery of the deeds to or for the benefit of the grantees? It is not for the court to say that the conveyances were inequitable as a division of the grantor's land among his children, for he had the right, had he so desired, to convey his whole property to any one or more of his children, and the court could not for that reason alone interfere. It is quite apparent that at the time of making the deeds it was the grantor's purpose to make a present transfer of the title for the benefit of the defendants upon the occasion of his decease. It seems to us that, whatever might be our views upon the question involved, *Brown v. Westerfield, supra,* is so nearly like the case at bar as to settle the question in favor of the grantees. It is not the province of the court to inquire as to the justice of the reasons assigned by which he justified his act. It is true that the grantees knew nothing of the conveyances until after the death of their father and the deeds were on record; but,

for the reasons assigned by him, it was his desire that the transfers should be kept secret and thus avoid the expression of dissatisfaction of his other children during his life. It is therefore not unreasonable that he should retain possession of the land, receiving the rent from defendants and others, or that one of the defendants, as administrator, with another, of the father's estate, should account for rent to the estate. Following the holding in *Brown v. Westerfield, supra,* we feel bound to hold that the delivery was sufficient. See, also, *Dickson v. Miller,* 145 N. W. (Minn.) 112; *Loomis v. Loomis,* 144 N. W. (Mich.) 552.

Upon reading the briefs and record, we have been impressed with the belief that the trial court held too strictly against plaintiffs in the exclusion of evidence, and, had anything been offered which could throw light upon the question of delivery, it should have been received. But, upon a close inspection of the record, we are persuaded that, under the law as applied to the facts, a new trial could not avail the plaintiffs, and that the judgment should be affirmed, which is done.

AFFIRMED.

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

HOME SAVINGS BANK, APPELLANT, V. A. C. SHALLENBERGER, APPELLEE.

FILED APRIL 3, 1914. No. 17,585.

1. **Guaranty:** NOTE. A guaranty in the following form: "I hereby waive protest and guarantee payment of a note of $830.05 of date Dec. 16, '02, due June 14, 1903, signed by W. P. Summers in favor of Shelly-Rogers Co. Signed this 30th day of Dec., 1902. A. C. Shallenberger." *Held* to be an absolute contract that the money expressed in the note should be paid at the maturity thereof at all events. *Bloom & Co. v. Warder, Mitchell & Co.,* 13 Neb. 476.

2. ———: CONSIDERATION. "The extension of time of payment to a principal debtor is a sufficient consideration to support a new

contract of guaranty made after the date of the renewal of such obligation, especially when the guarantor at the time of making such guaranty is still liable as guarantor for the payment of the debt renewed." *Home Savings Bank v. Shallenberger*, 82 Neb. 507.

3. ———: NOTE: RIGHT OF ACTION. Where, in such case, the promissory note, the payment of which was thus guaranteed, was conditionally transferred to plaintiff, the condition being that the defendant should renew the guaranty upon such note, and the new guaranty was executed and transmitted to the payee of the note, who, upon its receipt, delivered it to plaintiff, the purchaser of the note, the plaintiff would be entitled to maintain an action thereon the same as if the guarantor had personally delivered the guaranty to him.

4. **Appeal:** VARIANCE. Where, at the time of the commencement of the action upon the guaranty, the promissory note, the payment of which was guaranteed, and the guaranty were in the possession of defendant, and the plaintiff in his petition so alleged and set out an incorrect copy of the guaranty, alleging that it was substantially a correct one, and the defendant in his answer set out and attached thereto the original guaranty, and the cause was thereafter tried upon the corrected guaranty, no objection that the allegation of the petition and proof did not agree can be considered on appeal.

5. **Guaranty:** NOTE: ASSIGNMENT: NOTICE OF DEFAULT. Where an absolute, unconditional, general guaranty of the payment of a promissory note is executed upon sufficient consideration, such guaranty goes with the note without assignment to any one to whom such note may be transferred, and notice of default in the payment thereof by the maker is not essential to hold the guarantor, nor is the holder bound to protect the security—such as a chattel mortgage—for the benefit of the guarantor.

6. **Guaranty:** APPEAL: REFUSAL OF INSTRUCTION. An instruction to the jury, copied in the opinion, requested by plaintiff, the giving of which was refused by the court, *held* to state the law applicable to the case on trial, and that the refusal to give it was reversible error.

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

W. S. Morlan, for appellant.

J. G. Thompson and *John Everson, contra.*

REESE, C. J.

This case is before this court the second time. Upon the former trial judgment went in favor of defendant, from which plaintiff appealed. The judgment was reversed and the cause remanded. The opinion was written by the late Commissioner Calkins, and is reported in 82 Neb. 507. Upon a retrial of the cause, the verdict and judgment were again in favor of defendant, and plaintiff has again appealed.

In addition to the facts set out in the former opinion, it appears that the inception of this indebtedness was a promissory note and mortgage made by W. P. Summers to defendant for the purchase price of a number of cattle sold by defendant and a Mr. Snyder to Summers; the cattle having been purchased from the Shelly-Rogers Company, a commission firm in South Omaha. The note was indorsed by defendant and transferred to Shelly-Rogers Company. There seems to be no question but that defendant was liable upon his indorsement of the note. Shelly-Rogers Company held the note until its maturity, when it was renewed; the indorsement being perpetuated by defendant during a number of renewals. The renewals were made to the Shelly-Rogers Company, and the chattel mortgage was renewed at each renewal of the note. The last renewal note was sold and transferred to plaintiff, but apparently upon the condition that defendant would guarantee the payment thereof, as he had done on previous occasions with the notes of which the one in suit is a renewal. After the sale and delivery of the note in suit to plaintiff, Shelly-Rogers Company wrote defendant, who was then in Washington city as a member of congress, saying, in substance, that Summers desired an extension of time upon his note, giving him a list of the property secured by the mortgage, and inclosing a guaranty of the payment of the note, which defendant signed and returned to Shelly-Rogers Company, who delivered it to plaintiff and was by the latter attached to the note. After the maturity of the note, and upon the expiration of 30 days thereafter, whereby under the law of Colorado where the cattle were situated the mortgage

lien was lost, a creditor of Summers caused a writ of attachment to be levied upon the mortgaged property, and the security was then defeated. The guaranty was executed December 30, 1902, as follows: "I hereby waive protest and guarantee payment of a note of $830.05 of date Dec. 16, '02, due June 14, 1903, signed by W. P. Summers in favor of Shelly-Rogers Co. Signed this 30th day of Dec., 1902. A. C. Shallenberger." On the 9th of June, 1903, plaintiff wrote defendant as follows: "We hold note and mortgage for $873.17, due June 14th, given by William P. Summers, of Lamar, Neb., and guaranteed by you. Mr. Summers wants an extension of time until fall, and we want to clean up the deal when due. If you will send us draft for the amount when due will send you all the papers in this case. * * * F. McGiverin, Prest." On the 12th of the same month defendant wrote plaintiff acknowledging the receipt of the foregoing letter, and saying: "I feel the same as you do about this. I want it paid and have so written Summers. I have a brother in Imperial, same county as Lamar, cashier of Farmers & Merchants Bank of Imperial, and have written him to go after the matter and either collect the money and remit to you or see that the cattle are shipped to market and the proceeds paid to you. I prefer to have the collection come from you. I have stood behind this for some time and unless you will carry it I don't want to take it up personally until we have realized on the security. As soon as I can hear from O. P. Shallenberger of Imperial I will write you just what Summers will do. * * * A. C. Shallenberger." On the 26th of the same month plaintiff wrote defendant; "I have heard nothing from Wm. P. Summers, of Lamar, Neb., since I wrote you. There was due on this note, June 14th, $873.17, with int. at ten per cent. after maturity. I think you better take up this paper now. Mr. Summers had June 7th, 26 cows, 8 2-year-old heifers, 20 calves. Enough to pay most of this. His cattle are over in Colorado, where a mortgage is only good 30 days after due. If you will send me a check for the amount due I will send you the note and mortgage. * * * F. McGiverin, Prest." On July 13

McGiverin again wrote defendant: "Yours of July 1st duly received. Up to this date I have not heard from Mr. Summers. Please stir this matter up and oblige. * * * F. McGiverin, Prest." (The letter of July 1 is not found in the record.) On July 18 defendant wrote plaintiff: "I inclose draft for $559.75 to pay note of Jos. Porter in like amount due May Bros., at their request. Also draft $881.47 to pay note of Wm. Summers due June 14, '03 and int. to date. Please send both of these notes to me uncanceled, together with mortgages. * * * A. C. Shallenberger." On July 20 defendant wrote plaintiff acknowleging the receipt of the Summers note and mortgage for $830 and interest, saying they were not assigned to him, that the indorsement of Shelly-Rogers Company was erased, and that he held them subject to plaintiff's order; that since mailing the letter containing the draft he had learned that the cattle described in the mortgage had been seized under attachment proceedings; that "although W. P. Summers immediately notified you of the fact you made no move to protect me, nor did you notify me so I could protect myself, and that you allowed the 30 days to expire after the maturity of your mortgage without attempting to protect me against McPherin, although you knew under the Colorado law this would invalidate the mortgage as against the claims of a third party, and you have allowed the security to be lost under this mortgage, although you had full time and notice to protect me and did not do so;" that he had notified his correspondent bank to refuse payment of the draft. (We have referred to this correspondence as between plaintiff and defendant, but, as a matter of fact, it was between defendant and the Commercial National Bank of Fremont holding the note for collection, but of which McGiverin was president as well as of plaintiff bank.) The note, defendant's guaranty, and the mortgage, were not returned to the bank, but remained in the possession of defendant.

In the petition the guaranty is quoted: "I hereby waive protest and guarantee the payment of a note of $873.17 of date December 16, 1902. due June 14, 1903, signed by Wm.

P. Summers, in favor of Shelly-Rogers Co. Signed this 16th day of December, 1902." It is alleged in the petition that "said original written guaranty is now in the possession of the defendant, who obtained the same as hereinafter stated, and the foregoing copy may vary slightly, in immaterial form, from the literal wording thereof, but is in all material respects, substances and effect the same;" thus evidently referring to the guaranty upon a note of which the one in suit is a renewal. Defendant answered the petition, setting out the guaranty showing that it was dated December 30, 1902, and described the note as dated December 16, 1902, and for the true amount of $830.05. From that time on the guaranty was treated as for $830.05, the true amount. *Home Savings Bank v. Shallenberger,* 82 Neb. 507. Plaintiff might properly have amended its petition correcting the error, but this was not done. It is now insisted that the well-known rule, that "the allegations and the proof * * * must agree," should be applied, and a number of authorities are cited sustaining the doctrine. The rule is not here questioned, but its application to the case in hand may be seriously doubted. The whole record abounds with proof that the contest was based upon the guaranty attached to defendant's answer, and whatever prejudice might otherwise have resulted from the error in the tentative copy set out in the petition was obviated, and the case was tried upon its true merits in so far as the copy of the guaranty was concerned.

The first answer filed by defendant consisted solely of a general denial. The second, or amended, answer also contained a general denial of unadmitted averments, with the admission of the execution of the promissory note for $830.05, the execution of guaranty for the same amount, the correction of dates and the exhibit of the true copy, as above stated; alleges that the guaranty was not attached to the note, but was on a separate paper not accompanied by the note; that the guaranty was nonnegotiable; that at the time of its execution the Shelly-Rogers Company was not the owner nor holder of the note; that the note was secured by a chattel mortgage held by the Shelly-

Rogers Company, as defendant supposed; that the company had agreed with defendant to keep the note well secured by a chattel mortgage, upon which defendant relied, but failed to keep its agreement; that the guaranty was without consideration; that, before the execution and delivery of the guaranty to Shelly-Rogers Company, that company had sold and transferred the note to plaintiff, which was unknown to defendant, and, had it been known to defendant, he would not have signed the guaranty, and that at the time of the commencement of this suit the note and guaranty were in the possession of plaintiff's attorney, but was later returned to defendant's counsel.

A second amended answer was filed pleading the facts contained in the previous pleading more in detail, alleging fraud and breach of contract on the part of Shelly-Rogers Company, who in obtaining the guaranty was acting as the agent of plaintiff; that plaintiff failed and neglected to comply with the argeement by the Shelly-Rogers Company, and by its laches and carelessness the chattel security was lost by the appropriation thereof by others after the expiration of the mortgage lien; that subsequent to the 16th day of December, 1902, there was no liability on the part of defendant, and therefore there was no consideration for the guaranty; that immediately after the appropriation of the mortgaged property by the attachment plaintiff, in a suit brought against Summers, plaintiff was notified of the fact by Summers, but no steps were taken to protect its rights or the rights of defendant, and by plaintiff's negligence the mortgage lien was lost.

The reply contained a general denial of the averments of this answer, as well as some affirmative allegations which it is not deemed necessary to notice here. There was a jury trial, resulting in a verdict in favor of defendant, upon which judgment of dismissal of the action was entered.

At the outset, it might be well to notice the holding of this court upon the former appeal of this case, and in which some of the principal facts are stated. It is held that, as defendant was liable on his former guaranty at the time

the guaranty sued on was signed and delivered, the question of want of consideration cannot arise; that, as between plaintiff and the Shelly-Rogers Company, the plaintiff would have had the right to cancel the transaction (of the purchase of the note) in case the latter had failed to procure defendant's guaranty; and that the fact of the cancelation of the indorsement of the Shelly-Rogers Company before the note was returned to defendant could not be urged by him as a defense to this action, he being primarily liable.

An examination of the terms of the guaranty shows that it is an absolute unconditional, general guaranty of the payment of the note. It is described by a recital of the correct amount, its date, by whom signed, and in whose favor drawn. The question of its negotiability is not important nor material. It is not made in favor of any person. It therefore follows and goes with the note wherever it may go, or to whom it may be transferred. 20 Cyc. 1432. In an absolute guaranty of payment, notice of default is not necessary. *Bloom & Co. v. Warder, Mitchell & Co.*, 13 Neb. 476.

"Guaranties of performance and payment are absolute and not collateral. Unlike the contract of an indorser, there is no condition as to demand and notice of default annexed to a contract of guaranty of payment or of performance. Such a guaranty is an absolute promise that the principal will perform in accordance with the provisions of his contract. It is the business of the guarantor to inform himself as to the conduct of the principal. There is some conflict as to this doctrine, but it is the true rule, because the guarantor makes an absolute promise that a particular thing shall be done, and thereby assumes an active, absolute duty to see that it is done, and must, at his peril, perform the promise. And while the guarantee, from his situation, possesses better means of knowing of the default of the principal than the guarantor, yet the latter has ample means of knowing the facts, and must inform himself and not rely upon the guarantee, who owes no duty to the guarantor except to act in the utmost good faith,

and not be guilty of laches to the guarantor's injury." Pingrey, Suretyship and Guaranty (2d ed.) sec. 348.

"A general guaranty is assignable with the obligation secured thereby, and it goes with the principal obligation, and is enforceable by the same persons who can enforce the obligation. The rule is, as to general guaranty, that the transfer of a note carries with it all security, even if there is no formal assignment or delivery, or mention of the guaranty. This rule is so because a general guaranty is one open for acceptance by the whole world." Pingrey, Suretyship and Guaranty (2d ed.) sec. 357. See, also, Spencer, Suretyship, secs. 105, 106.

It cannot be doubted that at the time of the execution of this guaranty defendant was liable on a former guaranty of a note of which this one and the guaranty are renewals. The evidence shows that the former note and guaranty were not surrendered and relinquished to Summers, if at all, until after the receipt of the new guaranty by plaintiff. The note to which the guaranty referred matured on the 14th day of June, 1903. By the law of Colorado, a chattel mortgage lien holds good only until the expiration of 30 days after the maturity of the note, which would be July 14, 1903. On the 26th day of June, 1903, the Commercial National Bank of Fremont (then holding the note and guaranty for collection) notified defendant by the letter, hereinabove set out, of this provision of the Colorado law, saying "a mortgage is only good 30 days after due," thus giving defendant some 14 days' time in which to take care of the security. Even if it had been plaintiff's duty to give any notice to defendant in order that he might protect himself, the notice was given. It therefore seems evident that defendant was mistaken in his letter of July 20, 1903, in saying, "nor did you notify me so I could protect myself," etc. The time for action in preserving the mortgage lien was before the expiration of the 30 days. After that time there was nothing to "protect." The lien was lost. The charge of fraud committed by the Shelly-Rogers Company was not sustained, and it is unnecessary to inquire what effect proof of fraud on its part would have

upon the rights of plaintiff. As we view the law as applicable to this case, we are persuaded that none of the affirmative allegations of the answer present a defense to plaintiff's demand.

On the trial plaintiff requested the court to give instruction numbered 6 of instructions so requested, but which the court refused to give, and to the refusal plaintiff duly excepted, and now assigns the action of the court as error. The instruction is as follows: "The court instructs the jury, under the terms of guaranty set out in plaintiff's petition, the plaintiff was not required by law to first endeavor to collect the note guaranteed by the defendant when due from W. P. Summers, the maker thereof, and the plaintiff was not required by law to endeavor to collect the amount of said note from the chattel property mortgaged to secure the same. The said guaranty is what is known in law as an absolute guaranty, and any failure on the part of the plaintiff to attempt to collect the note so guaranteed from said Summers, or any negligence or failure on the part of the plaintiff to follow up and take the property mortgaged to secure the same, is no defense in this action, and in arriving at your verdict in this case you will entirely disregard any evidence tending to show a failure on the part of the plaintiff to attempt to collect said note from said Summers or out of said mortgaged property." As we have heretofore seen, this instruction states the law, and it should have been given. No instruction given is of similar import, and the refusal to give it constitutes reversible error.

The action of the court in giving instructions on its own motion, as well as the refusal to give other of plaintiff's instructions refused, is presented for review, but it is not deemed necessary to notice them further.

For the error in refusing to give the instruction above quoted, the judgment of the district court is reversed and the cause is remanded to that court for further proceedings.

REVERSED.

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

ERNEST ISKE, APPELLEE, V. HENRY ISKE, APPELLANT.

FILED APRIL 3, 1914. No. 17,618.

1. **Statute of Frauds:** CONTRACT FOR SALE OF LAND. "The statute of frauds only requires the vendor to sign the contract or memorandum thereof, for the sale of lands." *Ballou v. Sherwood*, 32 Neb. 666.
2. **Specific Performance:** CONTRACT FOR SALE OF LAND: SUFFICIENCY. A written agreement for the sale of real estate, in which the land is correctly described, the price stated, with promise to convey upon the receipt of the purchase price, no specific time being fixed, and delivered to the vendee, will, in the absence of fraud or mistake, entitle the purchaser to a specific performance of the contract, if its terms are performed by him within a reasonable time.

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

I. J. Dunn, for appellant.

William R. Patrick, contra.

REESE, C. J.

This is an action for the specific performance of a written contract for the sale of real estate. The contract is as follows: "In consideration of the sum of $50 I hereby agree to sell to Ernest Iske a strip of land 16½ feet in width across the west side of the southeast quarter of the southeast quarter of section 30, township 13, range 13 east of the 6th P. M., in Sarpy county, Nebraska, to the Platte river, said strip to be measured east of the fence as it now stands, and I agree to deliver to said Ernest Iske a good and sufficient warranty deed to said land upon the payment to me of said sum of $50. Dated this 17th day of April, 1911. Henry Iske." The petition is in the usual form, alleging performance on the part of plaintiff, the tender of the purchase price, and demand for conveyance, with the refusal of defendant to execute and deliver the same. Defendant answered, admitting his signature to the paper,

set out in the petition, but denying that it is a contract for the sale of the land referred to for the consideration named; admitting his refusal to convey the property; alleging that the contract is not mutual and binding upon defendant and plaintiff alike; that no part of the consideration was paid at the time the alleged contract was signed; that there is no provision specifying the exact time the payment was to be made; that the contract is not fair nor reasonable and does not express the real market value of the land; that, if enforced, defendant would be required to tear down and rebuild his fence now standing upon the line of his land; that there is now, and for a number of years has been, a drainage ditch along practically the entire length of the strip described in the petition to protect defendant's land from being overflowed in case of heavy rainfall or high water, and the opening of a road upon the land described would cause the filling up of said ditch and require defendant to dig another of similar size and capacity, or, should he not do so, he will suffer injury and damage by reason of the overflow upon his land. It is alleged, in substance, that plaintiff and defendant are brothers, and, for the purpose of avoiding unpleasant relations between them, growing out of the location of a road along another line, the agreement in question was made, and, as no consideration was paid at the time, defendant believed that he would not be required to carry out the agreement, if it would prove injurious to him to do so; that defendant would have an opportunity to determine this question before being obligated to convey the land; that plaintiff has no need for a road over the strip of land, as he has no property or interest along or at the end of the road, if opened, his only object being to have an outlet to the Platte river, which the road would not give him. It is also alleged that the petition does not state facts sufficient to constitute a cause of action. Plaintiff replied by a general denial of the unadmitted averments of the answer; admitting the existence of the drainage ditch referred to; alleging that it was "constructed for the specific purpose" of draining land owned by plaintiff situated immediately north of defend-

ant's land; that defendant has permitted vegetation to grow and dirt and trash to accumulate therein, has plowed dirt into the same, lessening its capacity and impairing its utility and usefulness to plaintiff; that its existence is of imperative necessity to plaintiff, and he has no intention of interfering with it in any way. There is an extended portion of the reply giving a history of conditions leading up to the establishing of a road on another line, and the execution of the contract sued upon, but which we do not deem essential to the disposition of this case, and it will receive no further notice. The reason for the purchase of the strip by plaintiff is alleged to be to procure an outlet to water for his stock. The case was tried to the court, which resulted in a finding in favor of plaintiff and decree for specific performance of the contract. Defendant appeals.

As we view the case, the pleadings and evidence took a wider range than is justified by the facts. The contract appears to be legal and enforceable. There is no ambiguity in it. There is no charge of fraud or mistake of fact in its inception, nor any violation of its terms by plaintiff. It is contended by defendant that the agreement is "a mere option given to the plaintiff to buy the land for $50 at some future time, to perform which he did not bind himself and could not have been compelled to perform." Section 5, ch. 32, Comp. St. 1911, provides: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." It has been held by this court in a number of cases that such a contract is valid and binding upon both parties, and that it is not necessary that the vendee sign it. If he accepts it he is bound by it. *Gardels v. Kloke,* 36 Neb. 493; *Gartrell v. Stafford,* 12 Neb. 545; *Ballou v. Sherwood,* 32 Neb. 666; *Rank v. Garvey,* 66 Neb. 767.

It will be observed that the contract is, by its terms, an agreement to sell the property described for a stipulated price. The acceptance thereof by plaintiff is an agreement

to buy the identical property for the price named, and he bound himself thereby. There is therefore no want of mutuality. It is alleged in the petition and shown by the evidence that plaintiff performed all the conditions upon his part to be performed, including the tender of the price within a reasonable time after the execution of the written agreement, and that he has kept the tender good. We can see no good reason why the specific performance should have been refused. It can serve no good purpose to discuss the facts which led up to the signing of the agreement, as there is no intimation of deception, fraud, or mistake.

It is shown by the evidence that the land in question is situated in the valley of the Platte river, that water from heavy rains is liable to accumulate upon the lands of both parties, as well as the lands of others, and that a ditch, of the depth of from 3 to 4 feet and some 8 feet wide at the surface of the ground, has been constructed along the strip in question, by which a considerable quantity of the lands of others more remote from the river, and including the lands of both plaintiff and defendant, have long been drained through that ditch, which was constructed in about the year 1885, so that by its long, continual use it has become permanent. By the testimony of defendant, it appears that he fears that plaintiff will close the ditch and allow the lands to be again flooded. Plaintiff declared upon the witness-stand that he had no such purpose, and would not do so. It must be conceded that the ditch, from its permanent character, its long continued use, and the interest in it of both plaintiff and defendant, whose lands have been drained for such a length of time, renders it a permanent improvement of their lands, and plaintiff would have no right to destroy it, and, should he undertake to do so, he would be subject to the process of injunction at the suit of defendant, and to a suit for damages. However, we find nothing in the record indicating such purpose on the part of plaintiff, and no preventive remedy will now be applied.

The decree of the district court is

AFFIRMED.

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

JULIA SARAH SIMMONS, APPELLEE, V. WILLIAM ALFRED SIMMONS, APPELLANT.

FILED APRIL 3, 1914. No. 17,646.

1. **Pleading:** PETITION: SUFFICIENCY. The petition of plaintiff, the substance of which is set out in the opinion, examined, and *held* to state a cause of action.
2. **Statute of Frauds:** ORAL CONTRACTS: TIME OF PERFORMANCE. "A verbal contract, to be void under the first clause of section 8 of our statute of frauds, must be one that, by its terms, is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time." *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339.
3. **Objections** to depositions are found not to be sustained by the record.

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

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

Albert W. Crites, contra.

REESE, C. J.

This is an appeal from the district court for Dawes county. Plaintiff is a resident of the city of London, England. Defendant, formerly a resident of England, and a brother of plaintiff, resides in Dawes county, this state. It is alleged in the petition that on or about the 22d day of October, 1908, at the city of London, England, by an oral contract, defendant borrowed and received of plaintiff the sum of £800 sterling, of the value of $3,888, which sum he agreed to pay to plaintiff on demand, with interest thereon from said date until paid at the rate of 5 per cent. per annum, interest payable annually, and for which he acknowledged receipt by the following writing: "11 Portland Place, London, W. 10-22, 1908. Rec'd of Julia Simmons the sum of (£800) eight hundred pounds with interest at (5) per cent. until paid. W. A. Simmons;" that

the receipt was duly stamped with a sufficient number of tax stamps affixed and canceled; that on or about the 4th day of February 1910, plaintiff demanded payment, whereby the amount of principal and interest to said date became due; that, defendant having failed to pay the debt, the full sum of $3,888 principal, and interest thereon at 5 per cent. per annum from the 22d day of October, 1908, is due and payable, and for which judgment was demanded. Defendant answered, denying "that he assumed or agreed to pay in any manner and form set out in said petition;" and alleging that the instrument described was not sufficiently stamped as required by the law of England. The alleged provisions of the law of that country providing for the affixing of revenue stamps to written instruments are set out in some detail, but at too great length to be here copied. It is claimed that, by the failure to attach the necessary stamps to the instrument described in the petition, it is ineffective and void. No other defense is pleaded. The reply is a general denial. A jury trial was had, resulting in a verdict in favor of plaintiff for the sum of $4,498.17. A motion for a new trial was filed, overruled, and judgment rendered on the verdict. Defendant appeals.

The assignments of errors contained in appellant's brief are: "The petition does not state a cause of action. The proof does not sustain the allegations of the petition. The court erred in refusing to quash plaintiff's depositions and in receiving them in evidence over objection. The paper pleaded is not a sufficient memorandum of an agreement not to be performed within one year. There was error in the exclusion of testimony and evidence offered by defendant, and in the reception over objection of testimony on behalf of plaintiff, particularly the testimony of the witness Herbert as to the stamp act statute of England, and the rejection of the official published volume containing the same offered by defendant. The verdict is contrary to law."

As to the contention that the petition is not sufficient to state a cause of action, we do not think that the appellant's

objection is sound. The action is not founded upon the written instrument copied in the petition. It is for money alleged to have been loaned to defendant under an oral contract to repay the same on demand. True, the memorandum is, unnecessarily perhaps, copied into the petition, but under the allegations its office could only be used as corroborative evidence in support of the charge as to the loan.

As bearing on the question of the sufficiency of the petition, we may anticipate a later assignment to the effect that the contract was not to be performed within one year. We are not advised of any provision in the statute of frauds, either in this state or in England, which requires a contract to pay, or the payment of, a debt due upon demand to be performed within one year after contracting the debt. It is well understood that the statute does not include cases of that kind. There is nothing in the pleadings nor evidence showing that the alleged oral contract was not to be performed within one year, nor is any suggestion of the kind contained in the written memorandum receipt. This being true, the statute of frauds cannot be applied. *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339; *Reynolds v. First Nat. Bank,* 62 Neb. 747, and other cases cited in 2 Neb. Syn. Dig. p. 1378.

"The proof does not sustain the allegations of the petition." As to this assignment, it need only be said that the evidence was conflicting, and the verdict of the jury settled the question in favor of plaintiff; there being sufficient evidence on the part of plaintiff, if believed by them, to sustain their decision. It was conceded that defendant received the £800 sterling from plaintiff on the date named, and that he signed the memorandum receipt set out in the petition; the only grounds of contention being, by plaintiff, that the money was a loan to be repaid, and, by defendant, that it was an advancement out of the estate of the mother of the parties; she being then living. The evidence preponderated in favor of plaintiff's contention. However, there is nothing in the answer presenting this issue, and it need not be discussed.

Plaintiff being a resident of the city of London, England, it became necessary to take the depositions of herself and a witness in her behalf. Due notice was given and accepted by defendant's attorney, and a number of cross-interrogatories were submitted to plaintiff's attorney, who forwarded them for answer. The depositions were taken and returned to the proper office. Before the trial, defendant moved to suppress those depositions; the motion was overruled, to which defendant excepted, and the ruling is now assigned for error. The motion contains six grounds of objection, one of which is want of proper notice; the contention being that the depositions were not taken at the place named therein. The certificate of the notary shows that the depositions were so taken, and we are unable to find any competent evidence contradicting his return. The depositions were taken on the questions submitted, and, had they not been taken at the time and place suggested, it could have worked no prejudice to defendant.

The objection that "the deposition was not taken before either of the notaries" named in the notice is also without merit. The notice designates "the office of Messrs. H. de Pinna and John Venn, notaries public," as the place of taking the depositions, but does not name the officer before whom the same were to be taken. However, it appears that the notary who did take the testimony was John D. Venn.

Other objections were made in the motion but they do not require further notice. An inspection of the depositions and certificate show a compliance with the law.

It is urged that the revenue stamp required by the law of England was not affixed to the receipt in sufficient value to meet the demands of that law, a complete copy of which was offered in evidence. It is shown that adhesive stamps, aggregating one penny, were affixed to the receipt, which seems to be all that was required.

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

AFFIRMED.

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

JOHN H. AFFLERBACH, APPELLEE, V. YORK COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 17,659.

1. **Counties and County Officers: SHERIFFS: JAILERS.** The law "recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff." See *Dunkel v. Hall County*, 89 Neb. 585.
2. ———: ———: ———: COMPENSATION. "And if the sheriff in such a county performs the duties of jailer, in addition to his duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer." *Dunkel v. Hall County*, 89 Neb. 585.
3. ———: ———: ———: ———. The duties of a janitor of the courthouse and grounds, or of the person employed to provide food for prisoners, under a contract with the county board which does not require the person employed to act as jailer, can have no bearing on the right of the sheriff to compensation for acting as such jailer. The law makes it the duty of the sheriff to discharge the duties of jailer, unless he decides not to do so and a deputy is appointed upon whom the duty is devolved.

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

M. M. Wildman, for appellant.

Power & Meeker, contra.

REESE, C. J.

This is an action against the county of York by a former sheriff of the county for the recovery of jailer's fees alleged to be due for services rendered from April 5, 1907, to and including January 5, 1910. Omitting the formal parts of the petition, it is alleged, in substance, that in 1905 plaintiff was elected to the office of sheriff, and on January 4 following he entered upon the discharge of his official duties; that he served throughout the term, and was re-

elected at the election in 1907, and continued to hold the office until January 5, 1910, or during the years 1908 and 1909; that throughout all of his service as sheriff he was the jailer of the county; that he collected fees due him from the beginning of his service to the 5th day of April, 1907, from which time he had not received compensation as such jailer. An itemized statement of the days when persons were confined in the jail is attached to the petition. The county answered, admitting the corporate existence of the county and the official character of plaintiff for the time alleged, but denying all other averments. A jury trial was waived, and the cause was tried to the court; the finding being in favor of plaintiff. Judgment was rendered against the county for the sum of $498 and costs. The county appeals.

It was shown by the evidence that plaintiff, by a re-election, held the office of sheriff for four years, beginning January 4, 1906, and ending January 5, 1910; that from the beginning of his service until April 5, 1907, he filed his claims for and was allowed his fees as jailer, but at a later date the sheriff's compensation was changed from the payment of fees collected to that of a definite salary, when, being advised by those with whom he conferred that the section of the statute granting jailer's fees was thereby repealed, he filed no further claims during his term of office. As we have held in *Dunkel v. Hall County,* 89 Neb. 585, that the statute allowing jailer's fees was not changed by the act making the sheriff's office a salaried one, we need not give the contention of defendant in that regard further consideration. In that case it is said in the third clause of the syllabus: "Section 13, ch. 46, Comp. St. 1907, recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff"—leaving it optional with the sheriff whether he will discharge the duties of jailer himself or by a deputy. It was held in that case that, if the sheriff "performs the duties of jailer, in addition to his

duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer." To that extent, at least, the *Dunkel* case is decisive of this.

It appears that neither the sheriff nor his deputies resided in the jail building, which is the courthouse. Whether the arrangement of the building is such as to provide a residence for the jailer is not shown. It is shown that the county board employed a janitor, whose business it was to care for the whole building, occupying a part as a residence, cleaning and caring for the offices and halls, mowing the lawn, removing snow from the walks and sidewalks, as provided in the written contract between the county and the janitor. Considerable time was occupied on the trial showing that the janitor complied with his contract, and occasionally assisted in cleaning up the jail under the direction of plaintiff. We cannot see that this line of evidence throws any light upon the issues in the case. Neither the sheriff nor the jailer was under any obligation to do the work of the janitor. The same can be said as to the matter of furnishing food to the persons confined within the jail. The law specially provides for this service and it is no part of the specific duties of the jailer. True, he may perform the service, if agreeable to the county board, and receive pay for it as provided by law, but it does not necessarily fall within his duties as jailer. The time spent upon the subject as to "who fed the prisoners" was time lost.

The statute (Rev. St. 1913, sec. 3541; Comp. St. 1911, ch. 46, sec. 13) provides: "The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office," etc. This leaves it optional with the sheriff as to whether he will discharge the duties of jailer himself, or place the burden upon a deputy. The word "elect," as used in the statute, means no more than the words "decide" or "choose" would mean, had either been used. No formality

of informing the county board of what he had decided to do is required. Time and labor have been unnecessarily spent upon the subject of "election" by plaintiff. The sheriff may act as jailer, or he may appoint a deputy to do so. If the former, he is entitled to the compensation. If the latter, the deputy is entitled to it. *Dunkel v. Hall County, supra.*

The most serious question involved is whether, under the law, plaintiff has shown that he performed the duties of jailer, or permitted others to do so without much of an effort on his part. He testified that, during the time for which the claim is made, he had general charge of the jail, kept the records, and had a general oversight of its management and of the prisoners confined therein; that he required the inmates to do the sweeping and other lines of manual labor about the jail, which was allowable, and would not of itself deprive plaintiff of the jailer's compensation. But it is shown that much of the control and management of the jail, the receipt and discharge of prisoners, was by the deputy sheriff, who had keys to the jail and often performed all the duties of a jailer. To the writer the evidence of plaintiff's right to recover is not entirely satisfactory, but we are reminded that the case was heard by a judge who resides within the county and city of York, and who for a number of years presided over the courts of that county, is familiar with the services rendered by plaintiff in his capacity of sheriff and jailer, is well acquainted with plaintiff and all the witnesses who testified, seems to have carefully examined the claim and disallowed those parts thereof to which plaintiff is clearly not entitled. The case is an action at law, and the decision upon questions of fact must be sustained unless clearly wrong.

The judgment is therefore

AFFIRMED.

JAMES WALLACE, APPELLANT, V. PHILIP KRUZER, APPELLEE.

FILED APRIL 3, 1914. No. 17,671.

1. **Action**: ENFORCEMENT OF RIGHTS. The law affords a legal remedy for the protection of every right and the redress of every wrong. The enforcement of a legal right should be sought through the application to legal and peaceable procedure, and not by physical force or stealth.
2. **Injunction**: PROTECTION OF PROPERTY RIGHTS. E. sold a small tract of land to W. In the deed of conveyance it was stipulated that a certain fence, situated upon the land of the grantor, a short distance outside of the boundary of the land conveyed, should "stand at present where it now is, until otherwise provided for." W.'s deed was duly recorded. Some years later E. sold and conveyed the remainder of his land to K., the deed referring to the book and page of the county records where W.'s deed was recorded. *Held*, First, that, under the contract with E., W. had the right to maintain the fence where it then stood until the right was terminated by lawful means, and that, until such time, he was not a trespasser; second, that, until the termination of W.'s rights, K. had neither right nor authority to destroy the fence located and established by the contract between E. and W., and that W. was entitled to an injunction restraining such destruction so long as his rights were not terminated by legal and peaceful methods.

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

H. M. Sinclair, for appellant.

F. E. Beeman, contra.

REESE, C. J.

This is an action for an injunction to restrain defendant from cutting down and destroying a certain fence, in part inclosing plaintiff's property used as a hog lot. Plaintiff owns the land adjoining the land of one Evey on the west. Running through Evey's land and close to the east line of plaintiff's land is a drain, or what is termed by some a "dry creek," with a well-defined channel, and which, during the dry season, contains little, if any, water, but at

other seasons carries water, and during the rainy season, or from heavy rains, becomes quite a torrent, as said by one witness, deep enough to swim a horse. Some time in the year 1903 plaintiff purchased one-half acre from Evey, consisting of a narrow strip of land, including within its boundaries the bed of the stream referred to, from the north line of plaintiff's land to a point on the south line of Evey's land, the strip purchased being apparently about 336 feet in length, the southern extremity thereof being on the north line of another tract owned by plaintiff. Between the time of the purchase and the execution of the deed to plaintiff by Evey and wife, which was January 23, 1904, by agreement between the parties, plaintiff constructed a fence around the north and east sides of the land, thus separating it from the remaining land belonging to Evey, but, owing to the topography at the north end of the strip, the fence was built on the land of Evey. It was also agreed that plaintiff might construct what is termed a "floodgate" across the stream bed, which served as a part of the fence, and which was suspended in the creek in such a way that, when there was a strong flow of water in the stream, the gate would open from the bottom, thus allowing the water and any floating debris to pass under the gate. This also was constructed outside the land purchased by plaintiff. After the purchase by plaintiff, he took possession of the land, including the fenced part, and including the floodgate, and has been in possession ever since. The deed from Evey to plaintiff describes the land by metes and bounds, and contains this provision: "And to have the right of way to put in and maintain floodgate on the north to the best of all concerned, and the fence to stand at present where it now is until otherwise provided for." On the 9th day of January, 1908, Evey sold and conveyed the remainder of his land to defendant, the land formerly conveyed to plaintiff being excluded from the terms of the deed, but no mention made of the reference to the floodgate and fence contained therein. The deed, however, refers to the book and page of the county deed records, wherein plaintiff's deed, containing the reference to

the floodgate and fence, is recorded. The facts above stated are, in the main, set out in the petition, and it is alleged that defendant "on October 7, 1911, wrongfully, wilfully, and unlawfully cut the wires, and was then and there attempting to destroy and demolish the fence around the said tract, deeded plaintiff from Evey, together with said floodgate, that is next to the defendant's land that Evey deeded him as aforesaid; that defendant would not desist when forbidden to do so, and was only prevented from destroying and demolishing all of said fence and floodgate by means of physical force;" that he threatens to destroy and demolish said fence and floodgate as often as the same are erected and repaired, and will do so unless prevented by the process of the court. An injunction was prayed for. A restraining order was granted. The defendant answered by general denial of unadmitted facts, setting up his ownership of his real estate, alleging that plaintiff has unlawfully kept him out of possession of that portion not belonging to plaintiff, but within his inclosure, and retains the same, and the rents and profits thereof, to defendant's damage; prayer that plaintiff's action be dismissed, and for judgment of ouster against plaintiff, and for damages. Plaintiff replied in general denial. The cause was tried to the court, which resulted in a finding that the clause, referring to the fence and floodgate, "is a license merely, and not an easement;" that defendant is the owner of the land under the fence and not within the bounds of the plaintiff's deed, and entitled to the possession of the same. A decree was accordingly entered. Plaintiff appeals.

The quantity of land involved in this litigation is so very small we find it impossible to estimate the same. As compared with the half acre owned by plaintiff, it can amount to but few rods, if that much. The fence is situated upon the brow of the bluff or bank, which is from 20 to 30 feet high, and with practically a perpendicular face down to the creek, so that it is said to be impractical to construct a fence on the line without great expense, if at all, and it is claimed that the location of the floodgate is the only natural one that is at all suitable for its use. These rea-

sons are assigned for the permission to construct and maintain the fence and floodgate. It is clear to us that, in view of the contract between Evey and plaintiff, plaintiff was not a trespasser. When defendant purchased his land from Evey, he was charged with full notice of the contract between Evey and plaintiff, as recited in plaintiff's deed of record and referred to in defendant's deed. By this defendant was given full notice of the agreement at the time of his purchase, and he succeeded to no higher or greater rights than Evey would have had, had he retained his land. He bought with that contract in full force, and took his deed subject to it. So long as that contract remained in effect, plaintiff was entitled to the use and occupation of the soil upon which the fence stood, which was said to be, in most places, within six inches of the brow of the bluff. It is claimed that the recitals in the deed show affirmatively that the right to occupy the land upon which the fence and floodgate rested was only a temporary one, which might be terminated at any time. The right to terminate at a reasonable time and upon seasonable notice may be conceded, but that would not have authorized Evey, nor defendant, to destroy the improvements by force without reference to either. It is claimed by defendant, and so held by the trial court, that the right to occupy the ground in question is a mere license, terminable at any time by the licensor. Suppose this should be conceded, would it justify defendant in destroying the improvements without taking any steps to terminate the right? Is it to be the established law of this state that, if a fence or other improvement is supposed to encroach upon some right of the adjoining landowner, he may take the law into his own hands and destroy what may have been rightfully erected? We cannot give our consent to any such rule. If plaintiff's fence was subject to removal, the law would have furnished ample remedy. If not subject to removal by defendant, there is no excuse nor justification for a resort to force. But it is claimed by plaintiff that he has an easement in the land on which the fence stands, growing out of the recitals in his deed and his user of the right. This

may be true, perhaps is; at least we do not hold that he has no easement. But it must also be conceded that the permanent and perpetual right is not given. By the terms of the grant the right is limited to the pleasure of the parties. There seems to be no limitation as to time upon the right to maintain the floodgate. The only limitation is "to the best of all concerned," which was settled by the parties to the contract at the time of its construction; but, as to the fence the limtation is: "To stand at present where it now is until otherwise provided for." This clearly implies a temporary right, not perpetual, and subject to termination, but not to destruction. If defendant has the right to terminate plaintiff's occupation of the land, the law furnishes him a complete and adequate remedy by reasonable and seasonable notice and procedure.

The decree of the district court is reversed and the cause remanded to that court, with directions to enter a decree enjoining defendant from destroying plaintiff's fence until such time as defendant may by peaceable and lawful means terminate the rights of the plaintiff.

REVERSED.

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

DORA KOEPKE, APPELLEE, V. HANS DELFS, APPELLANT.

FILED APRIL 3, 1914. No. 17,673.

1. **Appeal:** BILL OF EXCEPTIONS: AFFIDAVITS. Affidavits used in support of a motion for a new trial must be attached to and made a part of the bill of exceptions in order to have them considered by the supreme court.

2. **Bastardy:** EVIDENCE: SUFFICIENCY. In a prosecution for bastardy, a preponderance of the evidence is sufficient to justify a conviction.

3. ———: ———: COMPETENCY: OFFER OF COMPROMISE. Evidence of an offer of a sum of money made by the defendant to a third person if he would marry the complainant, which was not com-

municated to her, is not incompetent as being an offer of settlement or compromise.

4. ———: ———: ADMISSIBILITY. Testimony that the complainant had sexual intercourse with other men than the defendant, outside of the period of gestation, is inadmissible in evidence.

5. ———: ———: ———. "Evidence of the unchastity of complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues presented for trial." *Davison v. Cruse*, 47 Neb. 829.

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

H. E. Siman, for appellant.

Berry & Berry, contra.

BARNES, J.

Dora Koepke, an unmarried woman about 20 years of age, and a resident of Wayne county, filed a complaint with the county judge of that county charging Hans Delfs with being the father of her illegitimate child. The defendant was recognized to appear and answer to the charge in the district court for Wayne county. At the November, 1911, term of said court the cause was tried, and the jury returned a verdict of guilty as charged in the complaint. Defendant's motion for a new trial was overruled, and the court rendered a judgment on the verdict requiring him to pay plaintiff $600 in instalments for the support of the child. Defendant thereupon brought the case to this court by a petition in error. The proceeding will be treated as an appeal, and the errors of which the defendant complains will be thus reviewed.

Defendant's first contention is that the plaintiff's father and one of the jurymen were guilty of such misconduct as to entitle him to a new trial. The misconduct complained of was set forth in certain of the affidavits. The affidavits, however, were not incorporated in, and were not made a part of, the bill of exceptions, and we have often decided that in such cases the affidavit cannot be considered.

Therefore this assignment of error must fail. *Gray v. Godfrey,* 43 Neb. 672; *Newtson v. Walker,* 1 Neb. (Unof.) 118.

It is next contended that the evidence was insufficient to sustain the verdict. The plaintiff testified to a state of facts which, if believed by the jury, were amply sufficient to sustain the verdict. Her testimony was consistent with the fact that her child was born on the 11th day of February, 1911, or 284 days after the last act of sexual intercourse took place between plaintiff and the defendant, as testified to by her. William Delfs, a cousin of the defendant, testified that shortly before the plaintiff's child was born he had a conversation with the defendant, in which the defendant offered to give him $150 if he would marry the plaintiff; and this offer was made in a conversation in which the defendant told the witness of the plaintiff's condition. Plaintiff testified that she told defendant of her condition in June, 1910, when they were on their way home from church, and defendant wanted her to lay her trouble to some one else, and said he would give her $100 to do so. In October, 1910, on an occasion when she was helping the defendant's mother, plaintiff talked with him again about her condition, and defendant told her to go to Omaha and get a doctor, and he would pay her expenses. He said that she was not to let any one know about it, but should keep it to herself. Plaintiff testified positively to having five acts of intercourse with defendant between April 21, 1910, and the 4th day of May following, and that she had never had sexual intercourse with any other man. It is true that on the trial defendant denied that he ever had sexual intercourse with the plaintiff at any time; but, in view of all the testimony, it cannot be said that the verdict was not sustained by the evidence.

It appears that defendant produced one Louie Rasmussen as a witness, and attempted to show by him that at some time during the month of June, 1910, he had intercourse with the plaintiff at defendant's home. The plaintiff objected to this testimony because the witness did not offer to testify that the intercourse took place within the period of gestation. The objection was sustained, the tes-

timony was excluded, and this ruling is assigned as error. The court will take judicial notice of the fact that the period of gestation ordinarily is about 280 days. By the testimony offered, the defendant attempted to show an act of intercourse which took place 252 days, or thereabouts, before the plaintiff's child was born. This testimony was properly excluded. There was no evidence showing, or tending to show, that the child was prematurely born, and, in order to make this testimony at all competent, that fact must have been shown. In *Olson v. Peterson,* 33 Neb. 358, and *Sang v. Beers,* 20 Neb. 365, it was held that testimony that the complainant had sexual intercourse with men, other than the defendant, outside of the period of gestation is inadmissible in evidence.

It is contended by counsel for the defendant that the testimony was admissible for the purpose of impeaching the plaintiff and to discredit her testimony. In support of his contention, he cites 2 Ency. of Evi. 248. In the notes to the text it is there said, in substance, that such testimony is not admissible unless it has a bearing upon the question of the paternity of the child. It is also said: "It is competent for the defendant to introduce evidence to show that the complainant had sexual intercourse with other men about the time she became pregnant; but such evidence must be limited to a period of time within which, in the course of nature, the child could have been begotten."

The defendant's mother was called as a witness, and counsel inquired of her whether at one time, in the month of June, 1910, the plaintiff had sat up part of a night with one Louie Rasmussen at her house. This testimony was supposed to show that plaintiff might have had intercourse with Rasmussen; but it will be observed that the time fixed by the witness was outside of the period of probable conception. Therefore error cannot be predicated on the refusal of the district court to permit the witness to answer the question.

Defendant further attempted to show by the testimony of his mother that plaintiff's general reputation for chas-

tity was bad. No attempt was made to bring the evidence of such reputation or character within the time of the period of gestation. In *Davison v. Cruse,* 47 Neb. 829, it was held: "Evidence of the unchastity of complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues presented for trial."

Defendant assigns error for the refusal of the court to allow his mother to testify to the fact that she had discharged the plaintiff on May 4, 1910, because of her improper conduct. This testimony was properly excluded, because it had no bearing whatever upon the question of the parentage of plaintiff's child.

Defendant also alleges that the court erred in receiving the testimony of William Delfs to the effect that the defendant offered to give him $150 to marry the plaintiff. The grounds of this assignment are that it was an offer of compromise, and an offer of that kind cannot be received in evidence. As we view the testimony it was not an offer to compromise. No offer was made by the defendant to the plaintiff, or to any one representing her. The defendant's offer was to pay a third person a sum of money to marry the plaintiff. The conversation seems to have been brought about as a result of the defendant's desire to save himself from being charged with being the father of the plaintiff's child. We think this testimony is not within the rule relating to an offer to compromise.

There are other assignments of error for the refusal of the court to permit other witnesses to testify that they had intercourse with the plaintiff at a time entirely outside of the period of gestation. This testimony was properly excluded, as it had no bearing upon the issue as to whether the defendant was the father of the plaintiff's child.

In conclusion, it may be said that the undisputed testimony shows that the defendant was much in plaintiff's company at about the time the acts of intercourse took place; that he accompanied her to dances, parties, and church; that she was a domestic in his mother's home,

where he had every opportunity to win her affections and accomplish her ruin. Their last act of intercourse took place on May 3, 1910, at the defendant's home, and the child was born on February 11, 1911, which was 284 days after that date. Plaintiff's testimony is reasonable and convincing. She was subjected to a severe cross-examination, which availed nothing for the defendant. It is true Charles Bargstadt testified that he had intercourse with the plaintiff on or about the 1st of May, 1910, but Bargstadt appears to have been a boy only 16 years of age, a personal friend of the defendant; and that defendant went to Pierce county and brought him to Wayne to testify in his behalf. It is apparent that the jury disbelieved his evidence.

Finally, it is contended that the judgment of the district court is void and of no effect, because it recites that the defendant is the reputed father of the plaintiff's child. This expression seems to have been used in other cases of a like nature, and this contention is without merit.

It appears that the defendant had a fair trial; and, no substantial reason having been shown for granting him a new trial, the judgment of the district court is in all things

AFFIRMED.

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

GEORGE E. DOVEY ET AL., APPELLANTS, V. OLIVER C. DOVEY ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,694.

1. **Partnership:** SETTLEMENT: SUIT TO RESCIND: BURDEN OF PROOF. In an action to rescind a settlement of the affairs of a partnership and recover the consideration paid to a retiring partner on account of duress and fraud, the burden of proof is on the plaintiff to show, not only duress and fraud in obtaining the settlement, but that the consideration paid to the retiring partner is inequitable, excessive and unjust.

2. ———: ———. In the absence of any special agreement between the partners upon the subject, the rule of law is that the partners are to share equally in both profits and losses; and the mere fact that the partners have put an unequal amount of capital into the common stock, or that one has put in all the capital and the others only their skill and industry, will make no difference in the rule.

3. ———: DEATH OF PARTNER: RIGHTS OF REPRESENTATIVES. "As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election to demand either interest on the capital used or the profits earned by its use, the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities." *Robinson v. Simmons*, 146 Mass. 167.

4. ———: SETTLEMENT: RIGHT TO RESCISSION. Where plaintiffs have failed to rescind or seek a rescission of a partnership settlement, and have neglected and refused to surrender or offer to surrender any part of the consideration which they have received for the settlement, they cannot require a court of equity to set aside the settlement of which they complain.

5. **Appeal:** AFFIRMANCE: EQUITY. Where the supreme court, after a careful examination of the record in a suit of equity, and a consideration of the same without regard to the judgment of the district court, is unable to say that the judgment of that court is wrong, it will ordinarily be affirmed.

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

John L. Webster, for appellants.

John J. Sullivan and *Francis A. Brogan, contra.*

BARNES, J.

This is an action to recover $7,500 in money paid to the defendant Oliver C. Dovey, and for the return and cancelation of certain notes, and a mortgage given to secure the same, delivered to him, on the ground that they were obtained by duress. The issues were made up, and a trial to the district court for Douglas county resulted in a judg-

ment for the defendant, and the plaintiffs have brought the case to this court by an appeal.

The evidence discloses that George E. Dovey and his father, E. G. Dovey, as equal partners, entered into a copartnership in 1876, under the firm name of E. G. Dovey & Son, at Plattsmouth, Nebraska, and the partnership continued until the death of E. G. Dovey on February 1, 1881. It is conceded that at that time the net value of the partnership assets was $52,092.42, one-half of which belonged to the plaintiff, George E. Dovey, to wit, $26,046.21. In 1881 E. G. Dovey died intestate, leaving three sons, George E., Horatio N., and Oliver C. Dovey, and his widow, Mrs. C. Dovey. Each of the sons and the widow then became the owner of an undivided one-fourth in the one-half interest in the business which had belonged to E. G. Dovey, amounting to $6,511.55 each; George owning the other half interest in addition thereto. These facts are undisputed. It was alleged in the petition that after the death of E. G. Dovey the business was carried on under the same name as before, until September 22, 1909, when Oliver withdrew from the firm, and that at that time the total net assets amounted to $142,796.56; that during this whole period none of the parties placed any additional money or property in the business, and that no division of profits nor dividends were declared. The amount withdrawn by each was then set forth. It was then alleged that, when Oliver desired to withdraw, the parties were unable to agree; that Oliver employed counsel, and insisted upon the employment of an accountant to examine the books. On recommendation of Oliver and his attorney, an accountant was selected, who acted under the advice of Oliver and his attorney, and presented different statements, which were all inaccurate, unjust and erroneous, and were so indefinite and uncertain that the plaintiffs did not understand the same, and were imposed upon and deceived thereby; that Oliver demanded that plaintiffs should pay him $50,000 for his partnership interest in the business, which demand was accompanied by a threat that, if the same was not paid, immediate application would be made to the

court for the appointment of a receiver; that as a part of the assets of the business the firm owned and held a majority of the stock of the First National Bank of Plattsmouth, and that plaintiffs believed that if a receiver was appointed for the business it would produce a run upon the bank, which would ruin both the banking and the mercantile business, and bring disaster to the depositors; that plaintiffs were placed in great mental distress and agony by the threat, were deprived of their free will and judgment, and in order to prevent the appointment of a receiver they, solely by reason of the duress, paid Oliver $7,500 in cash, and gave him their notes and other assets, amounting in all to $50,000.

The answer alleged that after the death of E. G. Dovey the assets were taken over by a new firm composed of Oliver, George and Horatio as equal partners; that, in addition to one-half interest in the firm, E. G. Dovey left about $50,000 worth of other property which was taken over by the partnership and treated as personal property. Positive denial is made that the selection of the accountant was made by Oliver or his attorney; that he was partial or unfair; or that any threats were made or duress suffered. It was also alleged that Oliver's interest which he offered to sell for $50,000 was conceded to be worth $52,276.76, when taking good-will into account, and that this offer was a fair compromise of the firm affairs; that Oliver had determined, on failure of an amicable adjustment, to bring suit for dissolution and receivership, and so told plaintiffs, but this was not intended or understood as a threat, but as a matter of prudence and good judgment, and that the settlement was reached by the plaintiffs after a thorough investigation and conference with their attorneys; that plaintiffs took possession of the business on December 22, 1909, and have been in control thereof ever since; that defendant has incurred other obligations and liabilities on the assumption that the notes would be paid, and that plaintiffs have been guilty of laches, and are now estopped from disputing the validity of the settlement.

On the trial, after both parties had rested, the court rendered a tentative or interlocutory opinion, finding that the evidence showed that an agreement was made about July 22, 1885, between the parties that they should become equal partners in the business; that Mrs. Dovey was at no time regarded as a partner in the firm, but that the money and property which went into the business belonged to her as an interest-bearing loan; that the peculiar situation with respect to the bank placed plaintiffs' minds in such a condition that the threatened appointment of a receiver amounted to duress, in order to be relieved from which they executed the settlement. Having found that the partnership was actually formed in 1885, and not in 1881 as alleged, the court gave the parties leave to amend their pleadings to correspond with the facts. Plaintiffs asked, and were given, leave to file an amended reply setting forth the assets as they claimed them to be on July 22, 1885. Additional evidence was taken with respect to the condition of the books and the assets, and at the conclusion of the testimony the district court handed down a further opinion, in which he held substantially that it was the duty of plaintiffs to put the bank and the depositors out of the reach of danger which might arise from the affairs of E. G. Dovey & Son, and that a rescission would have the effect to place defendant as he was before the transaction took place, and the plaintiffs would find themselves in the same predicament as to the bank, with the same right on the part of Oliver to proceed. Plaintiffs were also held to be estopped from opening up the transaction, and the action was dismissed for want of equity.

While the pleadings are based upon the idea that the firm was dissolved upon the death of E. G. Dovey, the evidence is clear that what actually took place was that the business was carried on in the same manner as before until July, 1885. At the time that E. G. Dovey died, Oliver was about 20 years old, and had been working in the store several years, and Horatio was about 17 years of age. He had been attending school at Nebraska City, had come home, and a short time afterwards in 1881, or early in 1882, he

went into the First National Bank as a clerk. At that time the firm had only a few shares in the bank, which was practically owned and controlled by other parties. Horatio continued to work in the bank as a clerk until about the time he became of age, which seems to have been early in 1885. According to the testimony of Oliver and Horatio, in July, 1885, Horatio was dissatisfied and was about to go away, and it was then agreed between the three brothers that, if Horatio would not leave, but would take part in the business, the three brothers should become equal partners. Oliver surrendered or gave up his claim to the portion of his salary as a clerk, not withdrawn by him, which at that time would, as he testified, amount to about $3,200. This agreement is denied by George, but the circumstances surrounding the transaction seem to establish the story told by Oliver and Horatio.

It appears that from the date of E. G. Dovey's death until 1885 the business was conducted by George and Oliver, and, as far as the evidence shows, it was carried on identically as before, except for the lack of the father's services. Plaintiffs contend that George's five-eighths interest in the business became profit-sharing *pro rata* on the death of E. G. Dovey, and we are of the same opinion. They also contend that this continued until the settlement of 1909, while we take the view that, under the contract or agreement of 1885, the profits were thereafter to be equally divided by the three brothers; that, while George owned an excess of capital, Oliver and Horatio contributed the services of two men against his; and that the withdrawal of one-fourth of the capital then in the business, and the payment of one-half of the amount due upon the stock account which these brothers would be entitled to demand and receive had they insisted on withdrawing their capital, would probably have dealt such a blow to the business that George would have been left seriously crippled. Can it therefore be said that his offer to divide the profits equally was not dictated by sound business judgment? The half interest of George, then, was profit-sharing, so also was the half interest belonging to the estate. Oliver testified

that he was receiving a salary of $50 a month (George says $40 or $50) before his father's death. When the new arrangement was made it would seem his salary ceased, and no charge was made for his services thereafter. The testimony shows that Mrs. Dovey's capital was treated as an interest-bearing investment from that time on, and, since no one is objecting, it will be so considered. A peculiar feature of the firm's transactions was that before the death of E. G. Dovey the proceeds of the sale of real and personal property which he owned, aside from his interest in the business, was paid into the firm and used by it in its business. It further appears that an account was kept, called the "stock account," in which all such sums were credited. At the time of Mr. Dovey's death, in 1881, there was a credit of $27,979.19 in that account. In one part of his testimony George claimed that about $10,000 of this account belonged to him. But he afterwards testified that the whole stock account belonged to the firm and was so credited, one-fourth to each of the heirs of his father's estate. This $27,979.19 was therefore a debt owing by the partnership to the estate of which George was the administrator. But it is not shown that he ever accounted for any property received by him as administrator from the time of his father's death. Property of the estate, both real and personal, continued to be sold, and the proceeds placed in the stock account. It appears that two expert accountants have attempted to ascertain what the books of the firm show, and they have submitted six different statements, which are utterly confusing and irreconcilable; and in the estimates following exact accuracy is not sought for, but the figures are taken from data made by George, or under his direction, before any controversy arose between the members of the firm.

It appears that in 1885, when the new arrangement was made, the assets of the firm, were $241,667.02, with liabilities amounting to $89,728.63. This left a net balance of $151,938.39, which was the amount of capital then invested in the concern, and of this capital the estate had a credit of $61,042.48; while the remainder of the capital, less the

original amount contributed by Oliver, belonged to George. From 1885 to the time of the settlement in 1909 the firm was very prosperous. It made large profits, and from those profits George had withdrawn $119,271.35, Horatio had withdrawn $76,859.88, while Oliver had only withdrawn $63,419.96. Each of the brothers had invested in a home and paid for the same out of the proceeds of the business. George had so invested $10,463.14, Horatio $6,076, and Oliver had invested $7,471.64. These amounts, added to the other withdrawals of the members of the firm, left the withdrawal account as follows: George $129,734.49, Horatio $82,935.88, and Oliver $70,891.60. It thus appears that George had benefited by withdrawals of all kinds, including the payment for his house, to the amount of $58,842.89 more than his brother Oliver; and the only way in which George ever accounted to his brothers for the assets, of all kinds that came into his hands, of the estate of their deceased father was to turn them over to the partnership for the use in the business from 1881 to 1909, without allowing any interest on the amounts or any share in the profits at the end of the period. By his own act, without the request or agreement of his brother, George assumed to dispose of all of that interest by crediting his mother and brothers each a one-fourth interest of that accumulation. If the business grew from 1881 to 1885, and from 1885 to 1909, a large part of its growth was due to the fact that its assets were augmented by the proceeds of the estate of E. G. Dovey. It will not do to say that the three brothers and their mother were making withdrawals from the partnership, and that those withdrawals in time exceeded the amount of the assets in the hands of the firm belonging to the estate. It is George's claim that if he be allowed interest at 7 per cent. on the amount of his investment for 24 years, or if it is to be treated as profit-sharing to the extent of his entire five-eighths interest, in either case he has absorbed the entire business, leaving nothing to Oliver. He does not explain in these statements that his method of accounting would produce the same fatal result as to his brother Horatio, would like-

wise extinguish his interest, and make George the exclusive and sole owner of all of the assets as they existed on September 22, 1909.

We think it fairly appears that on the death of E. G. Dovey in July, 1881, the firm of E. G. Dovey & Son was thereby dissolved; that the control of the assets of the firm passed into the hands of the surviving partner, whose sole duty would have been to wind up the business and pay over to a representative of the estate, for distribution among the distributees, the share belonging to E. G. Dovey in his lifetime. It appears, however, that this winding up process did not take place, but the business was in fact conducted for 37 years thereafter by the surviving partner and two of the heirs of the estate. The business must have been so conducted under a new partnership agreement made after the death of the former partner, either express between the parties, or implied by their actions. It follows that the three partners were to share equally in the profits and losses, and that neither the excess contribution of capital by the one, nor the greater contribution of skill or services by another, would justify any change in the rule of equal participation in profits and losses. The rule thus announced is supported by the following authorities: 30 Cyc. 451, note 63; Collier, Partnership, secs. 308-313; Lindley, Partnership, p. 857; *Paul v. Cullum,* 132 U. S. 539; *Jacobson v. McCullough,* 113 Minn. 332. Partners are not entitled to interest on their respective capital unless there is some agreement to that effect. Such an agreement may be inferred if they have been in the habit of charging such interest in their accounts; but, in the absence of any evidence on that question, they are not entitled to interest. Even when one partner has brought in his stipulated capital, and the other has not, the former will not be entitled to interest on the winding up of the partnership, if it has not been previously allowed and charged in the accounts of the firm; and, where a person has been paid for services by a share of the profits, interest on capital cannot be charged against him unless there is some agreement to that effect. Lindley, Partnership, p.

423. The same rule is laid down in 2 Bates, Partnership, sec. 781, and in the following cases: *Griggs v. Clark,* 23 Cal. 427; *Taylor v. Coffing,* 18 Ill. 422; *Whitcomb v. Converse,* 119 Mass. 38; *Caldwell v. Leiber,* 7 Paige Ch. (N. Y.) 483; *Ratzer v. Ratzer,* 28 N. J. Eq. 136. In the case last cited, it was said: "In the absence of any agreement as to the interests of the partners, a partnership is presumed to have been carried on for the joint interest of the partners, and each is entitled to an equal share of the profits with the others." In *Miller v. Hale,* 96 Mo. App. 427, it was said: "The law is that as between themselves, the contract of partnership being silent, partners are entitled to share equally in the compensation for their labor. The courts decline to look into the question of which performed the more onerous duties, and whether one was more skilful or more industrious than the other. An adjustment of that nature is not demanded by the nature of the contractual association and would often prove to be impractical." In *Robinson v. Simmons,* 146 Mass. 167, the following rule was announced: "As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election to demand either interest on the capital used or the profits earned by its use, the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities."

As we view the evidence, Oliver C. Dovey, at the time when the dissolution took place in 1909, had an interest in the firm amounting to at least $45,000, and, taking into consideration the good-will of the business which had been successfully conducted for more than 30 years, the consideration of $50,000 for his withdrawal from the firm cannot be said to be unjust or unreasonable.

Again, the plaintiffs have wholly failed to rescind or seek a rescission of the settlement of September 22, 1909, and have neglected and refused, and still neglect and refuse, to surrender or offer to surrender any part of the consider-

ation which they have received for the cash and notes given by them to Oliver in the settlement. Under such circumstances it is evident that the lower court found no serious difficulty in applying to this case the well-known rule of law that before a party dissatisfied with a transaction on account of alleged fraud or duress can institute a proceeding to rescind his contract, he must promptly disclaim the benefits of the transaction whenever he discovers the fraud, or when duress has been withdrawn. He must abide by that attitude throughout, and refuse to take any benefit from the consideration moving to him, and a failure to do so bars him from the equitable remedy of rescission.

The evidence in this case shows that, at the time the plaintiff Horatio Dovey signed the notes, he believed Oliver to be a one-third partner in the business, and he knew that Oliver's interests must be the same as his own, except as they might have differed in their withdrawals, and Horatio's withdrawals were the greater. In the negotiations relating to the settlement, he made no claim of any different status. As a result of the settlement Horatio became the owner of four-tenths of the assets of the partnership, and he admitted frankly on the witness-stand that if he does not pay the notes in question he will be getting that four-tenths for nothing. George Dovey claims that Oliver had no interest in the business at the time of the settlement; that he never had more than one-eighth of an interest in the business, and never had acquired any more, and never was a third partner in the profits. The evidence also shows that at the moment George Dovey signed the notes in question he intended to repudiate them, and also intended to keep the profits of the transaction. It is well settled that in case of fraud the plaintiff, on the discovery of it, must move promptly, and any unreasonable delay in declaring a rescission, any equivocal attitude, any use or enjoyment of the fruits of the contract, settlement or deed which he challenges, would bar his right of action. *Gallagher v. O'Neill,* 78 Neb. 671; *American Building & Loan Ass'n v.*

Rainbolt, 48 Neb. 434; *Building & Loan Ass'n v. Cameron,* 48 Neb. 124; *Hawley v. Von Lanken,* 75 Neb. 597.

In the case at bar we have seen that the plaintiffs received from Oliver Dovey the formal conveyance of a legal title of real estate, which legal title unquestionably rested in him by the statute of descent, and could only be taken from him without his consent by a formal suit for a dissolution of the firm, by a decree therein finding that upon a full settlement of the accounts of the partnership he was entitled to no interest therein, and that he was bound in equity to convey the property. Moreover, plaintiffs received a bill of sale transferring to them all the interest of Oliver Dovey in the partnership other than the real estate, consisting of a stock of merchandise and a large list of book accounts, and necessarily including an interest in the good-will of a profitable business firm which had been in existence in Plattsmouth for more than a third of a century. The plaintiffs retained these things, and not only do they retain and enjoy the property which they got for the notes in question but they also retain an equally valuable right which they never offered to restore to the defendant, to wit, his agreement for a dissolution of the partnership and a surrender of all interest therein, including his right to bring an action for a dissolution and an accounting. All these matters were taken into account by the trial court and considered by him when he rendered his decree dismissing the plaintiffs' action.

After a careful examination of the record, we are not convinced that the finding and judgment of the district court was wrong, and it is therefore

AFFIRMED.

REESE, C. J., not sitting.

SEDGWICK, J., dissenting.

When E. G. Dovey died intestate in 1881, he and his son George Dovey had been equal partners in business for something over five years. He left surviving him three sons, George, Horatio and Oliver Dovey, and his widow. After

his death his three sons continued the business until in the year 1909, when, a difference having arisen between them, Oliver claimed a one-third interest in the business. After some negotiations and consultations with attorneys, George and Horatio agreed with Oliver to give him $50,000 for his interest in the business, and executed their notes and securities in that amount accordingly. Afterwards George and Horatio brought this action in the district court for Douglas county to set aside the said agreement and cancel the notes and securities, on the ground that they were obtained by duress and fraud. Oliver had transferred these notes to other parties, and these other parties were also made defendants. Afterwards Oliver brought the notes and securities into court to abide the result of the litigation, and no further consideration was given to the assignees of these securities. There is therefore virtually one defendant, Oliver. The district court entered a decree in favor of the defendant and dismissed the plaintiffs' case, and the plaintiffs have appealed.

The record is a large one; the briefs are extensive, and present a variety of questions for solution. It is conceded that at the time of their father's decease the net value of the business was $52,092.42, and that George Dovey had been an equal partner of his father, and was at that time the owner of an undivided one-half interest in the business, of the value of $26,046.21. George was appointed and acted as administrator of his father's estate, and used the money that came to his hands as such administrator in the prosecution of the business, and no agreement was made between the three brothers nor any questions raised or suggested as to the rights of each in the business, or their relation thereto, or their liability arising therefrom, until some time during the year 1885 about four years after their father's death. It is also conceded that at the time these plaintiffs agreed to give the defendant $50,000 for his interest in the business the net value of the business was $142,796.56, and that in the meantime the three sons and their mother had withdrawn from the business $201,353.33.

The most important points in dispute between these parties now are: First. Were the notes and mortgages in question procured by duress so that a court of equity should now disregard them as a just settlement between the parties? Second. Should George be allowed a share of the net profits in proportion to his share in the property after his father's death? Third. Were the three sons equal partners in the business so that each should be entitled to one-third of the net profits? Fourth. If they were equal partners and should share equally in the profits of the business, should George be allowed interest on his excess capital? Fifth. If George is allowed interest on his excess capital, should the partners each be charged with interest on their respective withdrawals? Some of these essential disputes are mentioned in the majority opinion.

1. As to whether the notes and securities were obtained by duress, so that a court of equity will disregard it as a just settlement between the parties, we should consider that a part of the assets of the business at the time of the agreement of settlement consisted in a majority of the capital stock in a bank in Plattsmouth, which was doing a prosperous business, and had over $350,000 deposits of more than 1,000 depositors, and these plaintiffs were the principal officers of the bank. The plaintiff had attempted to exclude the defendant from the business, and the defendant demanded an immediate settlement and payment of the interest which he claimed in the business. He, and his attorney for him, insisted upon a settlement without delay, and threatened an action for a dissolution of the partnership and division of the assets. So far there is no doubt that the defendant was strictly within his rights, but although the business was in a prosperous condition, and the net assets seem to have been ample to guarantee the defendant whatever amount a court of equity might decree to be due him, he insisted, not only upon his right of action for a dissolution of the partnership and a decree in his favor of the amount due him, but also insisted upon placing the assets and business in the hands of a receiver unless his demands were immediately complied with. It appears

that such action might, and probably would, have occasioned a loss to the business greater than the amount claimed by the defendant. The cash in the bank was $60,000; deposits about $360,000. A run on the bank would be ruin to the business, and at least delay and loss to the depositors. For these reasons, and under the circumstances disclosed by the record, it seems certain that a court of equity should not regard this settlement as a voluntary and free act of the parties, dictated by their united best judgment of their respective rights.

The defendant contends that, by a delay of about one year after the settlement, the plaintiffs being in full control of the business, the plaintiffs have been guilty of laches, and are estopped to question the validity of the settlement, and by their conduct have affirmed the settlement; that plaintiffs have not rescinded the sale nor offered restitution, but have acquiesced in and affirmed the sale. Many authorities are cited by the parties, upon this and other questions involved in the settlement of the affairs of this partnership. It is not to be expected that an authority could be found presenting an exact parallel with the case at bar in all its details. I have not seen such an authority. Each case must be determined upon its own conditions. In this case the plaintiffs desired to exclude the defendant from the business, and he desired and had determined to withdraw. The only question between them was as to the amount, if anything, the defendant was entitled to receive, and they all agreed that the amount was to be determined upon the basis of the value of the actual tangible assets of the business. The defendant was out of the business by the agreement of all parties interested, and an offer to receive him back into the business would have been idle and impracticable. The conveyances which the defendant had made were of small importance as compared with the main controversy, and the rights of all parties, as affected by such conveyances, could be fully protected by the final adjudication of the principal controversies, which would include all matters incidental thereto. No interest of the defendant could suffer or be in any way affected by the

delay in beginning the proceedings, and that delay does not appear to be unreasonable under the circumstances disclosed by the evidence. I think the court should, upon view of the whole transaction, adjust the equities of the parties to the end that the final decree may, so far as possible, do exact justice.

2. Plaintiffs contend that the excess capital of George E. Dovey, $26,046.22, and Mrs. Dovey's capital, should be profit-sharing, thus entitling George to five-eights of the profits of the business. The profits, however, were produced by the capital and the personal services which the partners contributed to the business. It is impossible to ascertain what proportion of the profits arose from the use of the capital, unless we can ascertain the relative value of the services of the respective partners. This it is impossible to determine from this record, and therefore there is no basis upon which the profits arising from the capital can be determined. I have no doubt that these three brothers, under the circumstances in this case, should be regarded as equal partners in the profits and losses of this business from the time of the decease of their father. It is a fundamental principle of the law of partnership that, unless otherwise expressly agreed, the partners shall share equally in profits and losses, and when these brothers undertook to conduct this business together, each having a financial interest therein after their father's death, and each giving his personal attention to the business without any agreements as to profits and losses, the law will undoubtedly regard them as equal in that respect. Mrs. E. G. Dovey has apparently taken no part in the business, except that she has allowed the use of her capital, $6,511.55, and her one-fourth share of the various amounts derived from her husband's estate and used in this business, upon which she is entitled to simple interest at 7 per cent. per annum, deducting of course as partial payments such sums as she has received from the business. Amounts received by her from time to time should be applied, first, in payment of accrued interest due her, and the remainder, if any, applied to reduce the principal. If the credits to her

account and debits for withdrawals are so numerous and irregular as to make computation, as partial payments are usually made, so difficult as to be impracticable, the computation should be made for each business year as shown by the books, so that she is not charged with interest on the withdrawals unless and when those withdrawals exceed the interest due her on her capital used in the business.

3. Should George be allowed interest on the excess of his investment? This presents a question of more difficulty, and, in connection with the question of interest on the withdrawals from the business, contsitutes the principal difficulty in this case. There is no doubt that when men agree to form a partnership, and that each shall give his attention to the business, and that each shall furnish capital in specified unequal amounts, and their agreement contains no provision for interest on the capital so furnished it will be presumed that they have incorporated into their contract all of the points upon which they agreed, and from this presumption the law will imply that the services of the parties and other conditions which they had in mind were by their agreement offset against the use of the capital so furnished by each. In this case it cannot be found from this record that these parties made a contract of partnership in which the law would imply that they had inserted all of their agreements. For four years after the father's death the business was conducted by the three brothers without any agreement between them, or any suggestion of any necessity for an agreement, and then there was an informal talk, in which one of the brothers desired to withdraw from the business, and George requested him to remain, and, according to the preponderance of the evidence, it was stated by George that they would be partners in the business, and perhaps it was stated that the partnership should be an equal one. There was no attempt to formulate or agree upon any details of a partnership agreement, and no suggestions that George was under any obligations to continue his excess capital in the business. This conversation between the brothers amounted to nothing

more than a confirmation of the pre-existing conditions, and there was of course no contract implying that George should allow his excess capital to remain for any length of time in the business. If George had agreed that while the partnership continued he would contribute $26,000 more than either of the other partners, and had not in that agreement stipulated for interest on this excess capital, the law would imply that no interest was to be paid, but under the circumstances in this case there is no ground for such an implication.

4. It is a universal rule of equity that when partners, who are equal as to profits and losses, withdraw from the business an unequal amount of the profits without any special agreement or objection on the part of any one, they will in final settlement be charged with the profits so withdrawn, but without interest thereon. I think, therefore, that the three brothers were equal partners in the profits and losses; that George Dovey should be allowed from the assets his excess contribution of the capital, $26,046.22, with simple interest thereon at 7 per cent. per annum from the death of his father to the 22d day of September, 1909. The share of Mrs. E. G. Dovey should, of course, be deducted from the net assets before the division between the three partners, and also the excess capital of George as above stated. The defendant Oliver was on that date entitled to one-third of the remaining assets, and was also entitled to one-third of the profits withdrawn by the three brothers. The total profits withdrawn by the three brothers, admitted in the pleadings, amounted to $197,319.03, of which Oliver withdrew $41,665.71. He was therefore entitled to $24,107.30, in addition to his one-third of the net assets at the time of the agreed dissolution of the partnership.

The third paragraph of the syllabus of the majority opinion seems to have no application to this case. All of the heirs continued the business together after their father's decease, and consented to the use in that business of all the money derived from the estate, and had equal advantage of such use.

The majority opinion says that "George's five-eighths interest in the business became profit-sharing pro rata on the death of E. G. Dovey." If that is so, it seems impossible to reach the conclusion that Oliver, "at the time when the dissolution took place in 1909, had an interest in the firm amounting to at least $45,000," as is also stated in that opinion.

The majority opinion inquires, "Can it therefore be said that his (George's) offer to divide the profits equally was not dictated by sound business judgment?" George's "offer" was nothing more than a statement that they were equal partners from the time of their father's death, as above shown.

It is said in the opinion that "Partners are not entitled to interest on their respective capital unless there is some agreement to that effect." Several cases are cited, some of which hold that where a partner agrees to contribute excess capital, and does not stipulate for interest thereon, no interest will be allowed. But no case is cited holding that when there is no agreement to contribute excess capital, but merely an understanding that an equitable adjustment of the whole matter shall be made, and the business and capital are principally the property of one of the partners, no account shall be taken of such condition in adjusting the equities between them. As I have already stated, it is the agreement to furnish capital (presumably against the more valuable services of the other partners), without specifying in the agreement that interest shall be allowed on the capital so furnished, from which the law implies an agreement to furnish it without interest. George was familiar with the business, and had been active in the management thereof for several years before his father's death. It is conceded, and it might well be conceded, that George's services were worth much more to the business than Oliver's services were.

Upon the above computation it would be found that Oliver has received $15,000 or $20,000 more than he was entitled to, and a court of equity should adjust the whole matter accordingly.

LAIN MCKENNAN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1914. No. 17,698.

1. **Street Railways:** PERSONAL INJURIES: NEGLIGENCE: QUESTION FOR JURY. In an action to recover for personal injuries alleged to have been caused by defendant's negligence, where there is a conflict of evidence, that question should be submitted to the jury.

2. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is conflicting as to the nature and extent of plaintiff's injuries, the verdict of the jury on that question will not be set aside.

3. **Street Railways:** USE OF TRACK: INSTRUCTIONS. Where the accident which caused plaintiff's injuries occurred by reason of his having driven on and along the track of a street railway at a point between street intersections or crossings, it was error to instruct the jury that "Defendant had the legal right to operate its cars over and upon its tracks at the time and place in question, and that teamsters have the legal right to cross the street at any point thereon, and their rights in this respect are equal and reciprocal, that is, each has the right to the use of the streets in the ordinary and usual manner, and in doing so it is necessary for each to take into consideration the rights of the other."

4. **Trial:** REFUSAL OF INSTRUCTIONS. It is error for the trial court to refuse to give a requested instruction which fairly states the defendant's theory as to the cause of the accident, where there is evidence which would sustain such theory.

5. ———: ———. It was error for the trial court to refuse an instruction, tendered by defendant as soon as it was ascertained that the court would not give a like instruction on his own motion; the tender having been made within a reasonable time before the instructions were read to the jury.

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

John L. Webster and *W. J. Connell,* for appellant.

John A. Moore, H. S. Daniel and *Dunham & Aye, contra.*

BARNES, J.

Plaintiff brought this action to recover for injuries alleged to have been sustained by him by a collision between one of the defendant's street cars and the plaintiff's wagon. The accident occurred on Twenty-fourth street in the city of Omaha about the 20th day of January, 1911. The cause was tried in the district court for Douglas county, plaintiff had the verdict, judgment was rendered thereon for $3,900, and the defendant has appealed.

It was alleged in plaintiff's petition that the defendant's motorman negligently failed to have his car under control, and negligently failed to stop the car before striking the plaintiff's wagon, when, by the exercise of ordinary care, he could have stopped his car in time to have avoided the collision; that the motorman failed to keep a lookout, and observe the dangerous situation in which plaintiff was placed immediately before the accident occurred.

By its answer defendant denied that the plaintiff's wagon was struck when he was in the act of driving from the track; and averred that there was ample room between its tracks and the curb for plaintiff to have driven his team in safety; that plaintiff knew of the frequent passage of cars upon defendant's parallel tracks on Twenty-fourth street and knew that a car was south-bound on the west track, and nevertheless the plaintiff, at the time when the south-bound car was in the act of passing plaintiff's wagon, turned his horses toward and partially onto the said track, so that the front end of the car came in contact with the singletree or whiffletree, and that thereupon the said car was immediately brought to a stop, so that no damage was inflicted upon either the horses or the wagon, and that the plaintiff, without any real occasion therefor, and without any impending danger, jumped from said wagon to the street, and that his injuries, if any, were the result of his own misconduct and negligence. The answer also denied that defendant was guilty of any negligence whatsoever, and all of the other averments of the petition were denied. The reply was a general denial of the averments of the answer.

It appears that when the accident occurred plaintiff was driving along Twenty-fourth street with a wagon drawn by a team of mules, and on that street the defendant had a double street car track. The north-bound cars ran on the east track, and the cars south-bound ran on the west track. Plaintiff was driving in the clear space between the west track and the curb, and was going south between Nicholas street and Cuming street. According to plaintiff's testimony he looked back about the distance of a block, or a block and a half, and saw no car coming. He claimed that he turned out onto the west track to pass a wagon which was going south ahead of him, and drove on the track 50 or 60 feet; that he thought about the car, and looked back, and saw it coming about 40 or 50 feet away at the rate of 10 or 12 miles an hour; that he then turned his mules west, but before he succeeded in getting entirely off from the track the car overtook him and struck the rear end of his wagon. It appears that the car was so nearly stopped that it did not injure or mar the wagon, but the jar of the impact caused plaintiff to fall off the wagon seat, and in falling he struck the pavement or curb, and thus sustained the injuries of which he complained.

There was a conflict in the evidence on the question of the presence of another team and wagon on the west side of the street where the accident occurred. All of the plaintiff's witnesses but one testified that they saw no other team or wagon at or near the place where the plaintiff's wagon was struck by the car. So it is somewhat doubtful if the plaintiff was justified in driving upon the street car track at all, but we think that question was properly left to the determination of the jury.

Plaintiff's witnesses testified, in substance, that, when they first noticed the wagon and car, they were probably 10 or 15 feet apart; that they did not see the plaintiff go upon the track to pass around another wagon in front of him that after the accident occurred the wagon was right in front or near the engine house on Twenty-fourth street; that they first saw the car and the wagon at about the same time, when they were about 10 feet apart, and that

the car was going from 8 to 12 miles an hour when they first saw it. They also testified that they heard a noise greater than would be produced by the natural speed of a car; that it seemed as if the brakes were being applied, and that noise attracted their attention; that they saw the wagon just turning off the track, and the mules were on the trot; that at the moment the wagon was struck McKennan lunged sidewise off from the wagon; that, when they got to where McKennan was, he was standing against a telephone pole; that he was dizzy, and complained of his back and ankle. Some of the witnesses, however, testified that plaintiff said he was "all right." They all testified that he got onto the wagon with the help of one of the bystanders, and drove away. Dean Berlin testified that he was standing at the northeast corner of Twenty-fourth and Cuming streets, near the drug store, and at the time when the car struck the wagon, the wagon was going off the track; that the first thing that he noticed or observed out of the usual was hearing the motorman apply his brakes. The brakes were being applied at the time he turned, that is why he noticed it. He said: "I turned at the same time I heard the motorman apply the brakes." To the question, "So far as your observation went, the motorman was doing what he could to stop the car?" He answered, "I presume that he was." The witness further testified that he heard a scraping, jarring sound or noise of brakes applied in stopping the car. When McKennan got onto his seat on the wagon after the accident, he picked up his lines and drove away.

The evidence was conflicting on the question of the nature and extent of the plaintiff's injuries, and the finding of the jury on that question ought not to be set aside. On the trial counsel for the plaintiff caused him to exhibit his person to the jury. To this the defendant strenuously objected. It appears that plaintiff had been operated upon some considerable time before the accident for appendicitis; that some time after the accident occurred he was again operated upon for what is termed a floating kidney, and later on the doctors performed what they called an

"exploratory" operation upon the plaintiff, in order, as they claimed, to ascertain the cause of the pain from which plaintiff alleged he was suffering as a result of the accident. While in ordinary cases it would not be error for the plaintiff to exhibit his wounds to the jury, still in the instant case it would seem that he ought not to have been permitted to expose the several scars above mentioned to the inspection of the jury; and it is quite probable that an examination of those scars, some of which were in no manner attributable to the injury of which he complained, may have influenced the jury to some extent.

A more serious question, however, arises on the instructions given by the court to the jury. By paragraph 7 of those instructions the court said: "You are instructed that defendant had the legal right to operate its cars over and upon its tracks at the time and place in question, and that teamsters have the legal right to cross the street at any point thereon, and their rights in this respect are equal and reciprocal, that is, each has the right to the use of the streets in the ordinary and usual manner, and in doing so it is necessary for each to take into consideration the rights of the other." We think this is an incorrect statement of the law. The accident occurred near the middle of the block between street intersections; and, while the instruction is correct as to the rights of the street car company and the plaintiff at intersections or cross streets, it fails to properly distinguish between the rights of the company and the plaintiff at other places on the street.

The point involved in this action was the right of McKennan to drive upon and along the track, and it is apparent that the language used by the court was applicable only to crossing a street car track at street intersections. Again, this is not a case where McKennan was attempting to cross the street at all. This is a case where he was driving upon and along the track in front of an on-coming car; and, as applied to that situation, it is a statement that plaintiff, as a matter of law, had a right equal to the street car company to drive upon and along its tracks. It was equivalent to saying that plaintiff had such right, and the

street car must slow down, and remain behind his wagon until it suited his convenience to get out of its way; that the motorman was bound to look out for McKennan, and not permit the car to come in contact with his wagon; that plaintiff, being upon the track, had an equal right to be there, and was not required to look out for a car coming up behind him, nor was he required to get off the track to let the car go by him.

In *Harris* v. *Lincoln Traction Co.*, 78 Neb. 681, it was held: "One who negligently attempts to cross a street railway track in front of an approaching car cannot recover for injuries sustained by being thrown from his wagon by impact with the car, unless those in charge thereof wilfully or wantonly produce the collision." In the opinion in that case it was said: "The plaintiff was negligent in attempting to cross defendant's tracks without looking or listening for an approaching car, and this is especially true where, as in this case, he crossed the tracks in the middle of a block. Having contributed to the accident by his own negligence, there is no principle of law which will allow him to recover, unless he shows that he was wilfully and wantonly run down by those in charge of defendant's car." If we apply the principle thus announced to the case at bar, it does not justify the instruction complained of.

Some of the reasons why the street car company has, and must have, a preferential right to occupy its tracks, especially at points other than street intersections, are as follows: The franchise right granted to a street car company to occupy a portion of the streets and operate its cars thereon is authorized by the laws and the constitution of the state and by a vote of the people. McKennan, as well as other teamsters, constitute a part of the public which made the grant. To so occupy the street is to conserve a public utility, to wit, the rapid transportation of vast multitudes of people. It is unfair and unjust to the public to say that one may drive his team upon and along a track under an assertion that he has an equal right to be there, and thus hinder and delay a car load or train load of other people, who are anxious to get to their point of destination.

Again, by the city ordinance introduced in evidence, the street car company had the right to operate its car at the point where the accident occurred at a speed of 15 miles an hour. It is a matter of which the courts should take notice that, if teamsters can assert an equal right with the street car company to occupy the track at any point, and thus drive in front of a heavy and rapidly moving car, it means destruction of property and human life. The plaintiff had no right to say, and the court should not have said, that he had an equal right with the defendant company to drive with his wagon upon defendant's track at that particular time and place, in front of the moving car.

Again, paragraph No. 10 of the court's instructions would seem to be in conflict with that part of instruction No. 7 above quoted. Instruction 10 reads as follows: "You are instructed that the defendant, the Street Railway Company, had the right to run and operate its cars along and upon the tracks on Twenty-fourth street, at and near where the accident to plaintiff happened, and in the exercise of said right was entitled to operate its said cars at a reasonable rate of speed within the limits of the city ordinance, taking into account all surrounding and existing conditions at the time, and in doing so, to avoid injury to others, or to the team or wagon of plaintiff coming or being upon its track, was required to exercise only such ordinary care as would naturally be exercised by an ordinarily prudent person." It is difficult to see how the two instructions can be harmonized, and therefore the jury must have been, to some extent, confused and misled thereby.

The defendant requested certain instructions to the jury which were refused. Among them was paragraph 15, which reads as follows: "You are instructed that, if it is shown by the evidence in this case that plaintiff, McKennan, suddenly turned his team from the clear space on the west side of Twenty-fourth street upon the south-bound track without looking for a car back of him, at a time and place when, if he had looked, the approaching car toward the south would have been seen by him, and that, after he

did so, the motorman in the exercise of ordinary care did not have time to stop his car before colliding with his wagon, no recovery can be had in this action, and your verdict should be for the defendant." This instruction seems to be a correct statement of the law as applied to the facts shown by the evidence in this case. Many of plaintiff's witnesses testified that what called their attention to the accident was the fact that the motorman applied the brakes to the car for the purpose of stopping it. They testified to hearing the grinding sound made by the application of the brakes while the car was distant from 8 to 12 feet from the plaintiff's wagon. Defendant's motorman testified, and his testimony was not disputed by any one, that he did everything in his power to stop the car as soon as he discovered the fact that plaintiff was not liable to get off the track. Under the circumstances it was error for the trial court to refuse to give the instruction above quoted.

It also appears that defendant requested the court to give request No. 16 to the jury, which reads as follows: "You are instructed, in making an 'emergency stop' for the purpose of avoiding coming in collision with plaintiff's wagon, that if from the evidence it appears that the motorman was confronted with a situation of danger requiring immediate and prompt action on his part, and that there were two methods of stopping the car, either of which would be usual and proper, he would have the right under such conditions to use whatever method in the exercise of his judgment and experience as a motorman would be most effectual for stopping the car and avoiding a collision with the plaintiff's wagon; and, if in this regard he exercised in good faith his best judgment, no liability would be attached to the defendant by reason of using and adopting the method he did adopt, and this will be true, even if you might conclude that some other method which he did not follow would have been, under the conditions and circumstance, the most effective for stopping the car." It appears that this instruction was refused because the defendant did not tender it to the court within a suitable time before the instructions were given. By the affidavits in this case, it

appears that the other instructions were tendered the evening before the cause was submitted to the jury; that, when counsel for the defendant ascertained that the court's instructions did not cover that point, he prepared the request, and presented it to the court more than an hour before the instructions were read to the jury, and the reason the court gave for refusing it was that it had not been tendered at a time within his rule. We think the reason for refusing the instruction was not adequate; that when the request was tendered, and the court was informed that counsel had failed to discover the omisson of such an instruction within the time fixed by the rule, the court should have considered the showing sufficient, and the instruction should have been given. We are not disposed to interfere with the ordinary and reasonable rules of the trial court as to the time when instructions should be tendered, but under the circumstances it would seem that an instruction on this point should have been given.

It is not our purpose to comment upon the nature and extent of defendant's injuries as shown by the evidence, nor do we believe that we should invade the province of the jury by holding that the evidence was insufficient to entitle the plaintiff to recover. It is not necessary to discuss any of defendant's other assignments. For the errors in giving and refusing instructions, we are of opinion that the defendant is entitled to a new trial. The judgment of the district court is therefore reversed, and the cause is remanded for further proceedings.

REVERSED.

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

GEORGE P. SHIDLER, APPELLEE, V. YORK COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 17,699.

Counties: LIABILITY: HEALTH OFFICERS. A duly licensed physician, acting under the order of the state board of health in quarantining and suppressing a highly contagious disease, may recover of the county, where such disease was prevalent, the actual expenses incurred by him and the reasonable value of his services.

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

M. M. Wildman, for appellant.

George M. Spurlock and *W. L. Kirkpatrick, contra.*

BARNES, J.

In the summer and fall of 1909 there was a large number of cases of what is commonly called "infantile paralysis" in York county, Nebraska. Doctor George P. Shidler, a duly licensed physician, was at that time a member of the board of health in that county, but he was not the county physician, and was under no contract with, and received no salary from, the county, as a member of its board of health, or otherwise. The disease in question was of a most serious nature, and was fatal in many cases. The pathology of the disease was not then very well understood, but, by reason of its prevalence and character, many of the communities in the stricken territory were thrown into a condition approaching panic. Trade suffered, public schools remained closed after the usual time for them to begin the fall term, dates of chautauquas and other public assemblies were canceled, and notably among those communities was the city of York in that county. Mr. John L. Dorsey, the then chairman of the county board of health, expressed himself as opposed to a quarantine, and failed and refused to call a meeting of the county board of health, or to take any other measures relative to the disease, or to

the investigation or control of it; and no meeting was had by said board of health, and no action whatever was taken by it at any time during the entire year that Doctor Shidler was a member. On July 20, 1909, the state board of health, acting under its power, on information of the condition of affairs in York county, and by reason of the authority contained in section 2738, Rev. St. 1913, met and made an order that said disease be quarantined in York county, and by its order instructed the state health inspector to communicate its order to Doctor Shidler, and to require him to establish and maintain a rigid quarantine of said disease throughout that county. The order was communicated to Doctor Shidler, and in obedience to it, and to the command of the inspector to "get busy," he proceeded to quarantine said disease wherever he could find it in his county, and was occupied with his duties in that behalf from about July 20 to October 1 of the year 1909. It appears that the doctor came in contact personally with about 250 cases of the disease, and devoted his time to those cases to the partial exclusion of his other practice; that in the performance of those duties the doctor incurred and paid necessary expenses in the sum of $225; that for his own services in the premises he charged the county supervisors the sum of $267.50. From this latter sum there was deducted four or five items for the quarantine cases within the proper limits of certain towns and villages. The doctor presented his claim to the county board, and asked for its approval and allowance. The board of supervisors rejected the claim, and the doctor appealed from its order to the district court for York county. On March 13, 1911, both parties in open court waived a jury trial. After the evidence was introduced the court took the case under advisement, and on January 9, 1912, rendered a judgment in favor of the plaintiff and against the defendant county for the sum of $508.60, and costs taxed at $14.75, to which finding and judgment the defendant excepted, and has prosecuted an appeal to this court.

The main question presented by this appeal is: Was the plaintiff entitled to recover on the claims filed against the

county? It is the defendant's first contention that the plaintiff was a member of the county board of health, and therefore he could not employ himself, or take part in his own employment, to perform the services in question, and thus bind the county to pay for the same. In support of this contention the defendant cites many authorities holding that one cannot recover on a contract made with a board of which he was a member. Those authorities are based on public policy, but they are by no means wholly in accord on the question as applied to the services of the kind performed by the plaintiff in this case. It appears, however, that plaintiff did not rely on any contract made with the board of health of York county, for his action was based on a *quantum meruit* for services performed by order of the state board of health, under the provisions of section 2738, Rev. St. 1913, which reads in part as follows: "In addition to such general and standing rules and regulations, in cases of emergency wherein the health of the people of the entire state or any locality therein shall be menaced by or exposed to any such contagious, infectious or epidemic disease or diseases arising from unsanitary conditions, or when a local board of health having jurisdiction of a particular locality shall fail or refuse to act with sufficient promptitude and efficiency in any such emergency, or in localities wherein no local board of health shall have been established, as provided by law, it shall be the duty of the board to adopt and enforce such special quarantine and sanitary regulations as the occasion and the proper protection of the public health may require; and all necessary expenses incurred in the enforcement of such rules and regulations shall be paid by the city, village or county for and within which the same shall have been incurred."

It appears that plaintiff, acting under the order and by the authority of the state board of health, as provided in the part of the section above quoted, performed the professional services and incurred the expenses certified to in his claim; that such services were necessary, and were actually required in order to check the spread of the highly contagious disease above mentioned, and protect, as far as pos-

sible, its stricken victims and others. It appears that the expenses in question were actually incurred and paid by Doctor Shidler, and that the charge for his services was reasonable as to its amount. In such a case we are of opinion that plaintiff was entitled to recover. *Spearman v. Texarkana,* 58 Ark. 348, 22 L. R. A. 855; *Board of Commissioners v. Mitchell,* 131 Ind. 370, 15 L. R. A. 520; *Mayor of Niles v. Muzzy,* 33 Mich. 61; *McBride v. City of Grand Rapids,* 47 Mich. 236; *Boggs v. Caldwell County,* 28 Mo. 586; *Garrett v. Board of Commissioners,* 92 Ind. 518; *Town of Knightstown v. Homer,* 36 Ind. App. 139; *Aull v. City of Lexington,* 18 Mo. 401; *Hawthorne v. Board of County Commissioners,* 79 Kan. 295.

As we view the record in this case, the defendant was liable to Doctor Shidler for the reasonable value of his services, and the expenses necessarily incurred by him in rendering them. The judgment of the district court was right, and is AFFIRMED

SEDGWICK, J., not sitting.

JAMES NORRIS PLUMB, APPELLEE, v. YORK COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 17,700.

Counties: LIABILITY: SERVICES OF PHYSICIAN. A regularly licensed physician, who is paid a salary of $5 a month for his professional services in treating the inmates of the county poor farm and the county jail, may recover from the county the actual expenses incurred by him in quarantining, fumigating and suppressing an epidemic of smallpox within his county, together with a reasonable compensation for his services.

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

M. M. Wildman, for appellant.

W. L. Kirkpatrick and *George M. Spurlock, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for York county in favor of the plaintiff, Doctor James Norris Plumb, who for more than 20 years has been a duly licensed physician practicing his profession in York county.

It appears that the plaintiff, during the years 1907, 1908, and part of the year 1909, was under contract with York county to give medical attendance to the inmates of the poor farm and the prisoners in the county jail of said county, for which he was to receive the sum of $5 a month. By reason of that employment he was called the county physician. During a portion of that time and subsequent thereto, one Stephen was chairman of the county board of supervisors and of the county board of health. While plaintiff was treating the inmates of the poor farm and county jail, the disease of smallpox became prevalent in said county to such an extent that it soon became epidemic, and the plaintiff was directed by the chairman of the county board and board of health to quarantine all those afflicted with that disease in said county, to fumigate their homes, and take all necessary measures to provide for its suppression. He commenced his services in compliance with that order in the fall of 1908, and continued his work to some time in the summer of 1909. It appears that he was called upon by the county to attend, quarantine and fumigate 132 cases of smallpox. His actual expenses in connection with this service were $260, and he charged the county $726 for his professional services in that behalf. The county board disallowed the plaintiff's claim, and he prosecuted an appeal to the district court. The cause was tried wthout a jury, and the court awarded the plaintiff a judgment for $790.35. The county excepted, and has brought the case to this court by appeal.

The county sought to defeat the plaintiff's claim by contending that Doctor Plumb was a member of the board of health, and therefore he could not have a return of the money expended by him in the suppression of the disease

of smallpox, and neither could he have compensation for his services rendered in that behalf.

It appears that there was no contract entered into between the county and the plaintiff for the services in question, and there was a rule that required members of the board of health to serve without compensation. If the contention of the county is to prevail, then the public is helpless to protect itself against contagious and epidemic diseases. It is easy to understand why the members of the board of public health should receive no compensation for serving thereon, but it would be difficult to understand why a physician should be called upon to serve the county in suppressing an epidemic and contagious disease without compensation. Many cases are cited by appellant to support the contention that an officer must perform all the duties of the office for the compensation provided by law; however, those cases are not decisive of this controversy. The better rule is announced in *Spearman v. Texarkana*, 22 L. R. A. 855 (58 Ark. 348), where it is said: "A physician who is a member of a board of health may recover reasonable compensation for purely professional services which any other physician might render, rendered by him under direction of the board of health without any express agreement for compensation."

In the appeal of *Chairman of Board of Health v. Board of County Commissioners*, 89 Minn. 402, it was said: "A town or village board of health, formed under the provision of the general statutes, one of whose members is a practicing physician and surgeon, may employ such physician to act for the board in all matters requiring such services."

In *Village of St. Johns v. Board of Supervisors*, 70 N. W. 131 (111 Mich. 609), it was held: "The fact that the health officer of a village is a member of the board of health does not preclude such board from fixing his compensation by agreement for services performed by him in preventing the spread of smallpox, and the village may recover the

amount so paid him from the county, where such amount is reasonable."

In *City of Mankato v. County of Blue Earth,* 87 Minn. 425, it was said: "The county is liable, under laws 1902 (Ex. Sess.) ch. 29, for the necessary additional salary paid the local health inspector for extra services in locating and combating contagious diseases."

In *Labrie v. Manchester,* 47 Am. Rep. 179 (59 N. H. 120), it was held: "Where health officers of a city are empowered to remove persons infected with smallpox and helpless to a pest-house, they have implied authority to employ nurses for them at the expense of the city."

Without multiplying the authorities, it may be said that the plaintiff was entitled to recover the expenses actually incurred and paid by him in the suppression of the smallpox epidemic in question, together with a reasonable compensation for his professional services.

The judgment of the district court was right, and it is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

ANDREW P. MORAN, APPELLEE, V. OTOE COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 17,708.

Attorney and Client: COMPENSATION OF ATTORNEY FOR INDIGENT DEFENDANT: ALLOWANCE BY COURT. The judge of the district court has the power to allow and certify a claim for the services of an attorney to an indigent prisoner in the supreme court, under an appointment to defend such criminal made by him, but the amount allowed must not exceed the sum named in section 9081, Rev. St. 1913.

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

W. F. Moran, for appellant.

Paul Jessen, contra.

BARNES, J.

This was an action to recover of the defendant the sum of $50 alleged to be due plaintiff for services in the supreme court in the case of *Goff v. State,* 89 Neb. 287.

It appears that Goff, an indigent defendant, was charged in the district court for Otoe county with a felony. When the cause came on for trial the proper affidavit was filed, and the court assigned the plaintiff as counsel to defend him. A trial resulted in Goff's conviction, and, after his motion for a new trial had been overruled, he was sentenced to a term in the state penitentiary. The plaintiff then made application to the judge who tried the case for the allowance of an attorney's fee for defending Goff. The court allowed him the sum of $50, and the same was paid by the county. The plaintiff then took the case to the supreme court on a petition in error. After said cause was heard and the sentence had been affirmed by the supreme court, the plaintiff made an application to the district court for the allowance of an attorney's fee for his services rendered in the supreme court. The court allowed the plaintiff the sum of $50, which sum was certified by the clerk to the board of county commissioners, and was by the commissioners rejected. The plaintiff appealed, and the cause was tried by the district court on a stipulation of facts. Judgment was rendered in favor of the plaintiff for the sum of $50, and the defendant county has appealed.

The only question presented by this appeal is whether the county of Otoe is required to pay the attorney's fee allowed by the judge of the district court for services in the supreme court in defending an indigent criminal who has been convicted and sentenced to the penitentiary. Plaintiff is compelled to rely for a recovery upon the provisions of section 9081, Rev. St. 1913, which reads as follows: "The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceed-

ing two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours; and it shall not be lawful for the county clerk or county board of any county in this state to audit or allow an account, bill, or claim hereafter presented by an attorney or counselor at law for services performed under the provisons of this section, until said account, bill, or claim shall have been examined and allowed by the court before whom said trial is had, and the amount so allowed for such services certified to by said court: Provided, no such account, bill, or claim shall in any case, except in cases of homicide, exceed $100." It will be observed that this statute makes no direct provision for an allowance for services by an attorney in the supreme court. The statute provides that the court before whom an indigent criminal is indicted and tried may allow and certify a bill for services of counsel in behalf of the criminal to the county board.

In *Boone County v. Armstrong,* 23 Neb. 764, it was held that the allowance for defending an indigent criminal was not conclusive on the board as to the amount of the allowance.

In *Edmonds v. State,* 43 Neb. 742, it was held that the supreme court is without authority to examine and allow an account for services under this section. The opinion in that case, however, contains this statement: "The bill for such services should be presented for examination and approval to the trial court." This would seem to authorize such an allowance. In capital cases and often in other cases where the accused is too poor to provide counsel for himself the court has the power, which it ought and usually does exercise, to assign him counsel. In such case the attorney, being an officer of the court, is required to defend the criminal and accept such compensation, within the limits of the statute, as the court may allow. It has always been the custom of the district courts of this state to appoint counsel, and allow him a reasonable compensation for defending an indigent prisoner, and, while the allowance made by the trial judge is not conclusive on the county

board as to the amount thereof, still it has been the custom to audit and pay such claims when certified and allowed by the trial judge. It must be said, however, that the trial court should exercise a reasonable discretion in the allowance of such claims, and if he should find, on a conviction of the defendant in the district court, the case is one which should be taken to the supreme court, he should make an allowance to the attorney, within the limit fixed by the statute, for that purpose.

In the case at bar the amount allowed by the district court is within the amount provided by the statute, and therefore the judgment of the district court is

AFFIRMED.

O. G. LEIDIGH, APPELLEE, V. OTOE COUNTY, APPELLANT.

FILED APRIL 3, 1914. NO. 17,709.

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

W. F. Moran, for appellant.

Paul Jessen and *Paul S. Topping, contra.*

BARNES, J.

The facts of this case are the same as those in the case of *Moran v. Otoe County, ante,* p. 658, and the questions of law are identical.

Following the judgment in that case, the judgment of the district court is

AFFIRMED.

HENRY MOELLER, APPELLEE, V. FRANKLIN COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 17,715.

Appeal: CONFLICTING EVIDENCE. In an action to recover the damages sustained by a landowner for establishing and opening a county road over and across his land, if the evidence as to the amount of plaintiff's damages is conflicting, the verdict of the jury will not be set aside unless it clearly appears to be wrong.

APPEAL from the district court for Franklin county: ERNEST B. PERRY, JUDGE. *Affirmed.*

George Losey, for appellant.

H. W. Short and *W. H. Miller, contra.*

BARNES, J.

This cause was tried in the district court for Franklin county on an appeal from an order of the county board allowing the plaintiff $30 as his damages for establishing and opening a county road over and across the plaintiff's land. The cause was tried to a jury, and a verdict was returned in favor of the plaintiff for $150. Judgment was rendered on the verdict, and the defendant has brought the case to this court by an appeal.

The only error assigned in defendant's brief is that the verdict was excessive, and that is the only question argued by the appellant. The evidence as to the amount of plaintiff's damages was conflicting. The testimony of the witnesses for the plaintiff fixed the value of the plaintiff's land actually taken for the road at from $30 to $150; while some of the witnesses for the county testified that the plaintiff's land was actually benefited by the establishment of the road. It appears that on the line of the highway was a private bridge constructed by plaintiff, and that bridge was taken and appropriated by the county for the public use. The testimony showed that it would cost about $200 to construct a bridge over the stream crossed by the highway.

The value of the bridge, whatever it was, should have been awarded to plaintiff and included in his damages. Therefore we are unable to say that the verdict was so excessive as to entitle the defendant to a new trial. As has often been decided by this court, when the evidence is conflicting a verdict of the jury will not be set aside unless it is shown to be clearly wrong.

The judgment of the district court should be, and is,

AFFIRMED.

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

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLANT, V. THOMAS B. STOCKER, APPELLEE.

FILED APRIL 3, 1914. No. 18,262.

1. Costs: REVIEW: BILL OF EXCEPTIONS. On appeal from a judgment of the district court on a motion to retax costs on account of the inclusion of unnecessary matter in the bill of exceptions, record examined, and judgment of the district court sustained.
2. ———: INTEREST. In such a case interest should not be computed on the amount paid for the bill of exceptions before the entry of the final judgment on the mandate.

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

Kelligar & Ferneau, for appellant.

T. R. P. Stocker, contra.

BARNES, J.

This is an appeal from an order of the district court for Nemaha county, retaxing the costs in the case of *Nemaha Valley Drainage District v. Stocker,* 90 Neb. 507.

When the mandate was received by the district court, the former judgment having been reversed, the costs were

taxed to the drainage district, the appellee. A dispute having arisen over the amount which should be taxed for the bill of exceptions, the appellant, Stocker, filed a motion to retax that item of costs. The motion was resisted by the drainage district. On the hearing Stocker produced his affidavit, which showed that in order to perfect his appeal to this court he was required to pay, and did in fact pay, the court reporter the sum of $175 for the bill of exceptions. His affidavit was received in evidence, and thereupon Stocker claimed that he was entitled to have refunded to him the $175 which he paid for the bill on February 1, 1910, with interest at 7 per cent. from that date. The drainage district produced the affidavit filed by Stocker in the original drainage proceeding, the original bill of exceptions on which the cause was heard in this court, and the oral testimony of the court reporter who took the evidence in the district court, and who furnished the bill of exceptions. By the evidence it was shown that the cases of Thomas B. Stocker, George F. Marconit, Benjamin F. Skeen and H. F. Higgins, all separate cases against the drainage district, were tried together in the district court, and it was agreed that if either of the parties desired a bill of exceptions the original exhibit 12 and the transcript exhibit 2 might be used as a part of the bill without recopying the original exhibits. It was further shown that it would cost $18 to reproduce the other evidence which was not required to be duplicated. Thereupon both parties rested, and the court, on consideration of the evidence and facts relating to the appeal, ordered that the costs be retaxed, and that Stocker recover of the drainage district the $175 he was required to pay for the bill of exceptions in order to perfect his appeal, with interest thereon from November 22, 1912, the date of the entry of the final judgment in said cause.

It is contended by the drainage district that it had furnished certain of the exhibits used in evidence on the trial in the district court, and it should not be required to pay for furnishing the copies thereof which the reporter pre-

pared in order to complete the bill of exceptions. It was not disputed, however, that Stocker had been required to pay for the same in order to procure the bill, and it is not clear from the evidence that it was unnecessary to include the exhibits therein. Therefore, we are of opinion that Stocker was entitled to have the amount paid for the bill refunded to him, with interest, as provided by the order of the district court.

On the cross-appeal it was contended that Stocker was entitled to interest from the time when he paid for the bill of exceptions. Answering this contention, it is sufficient to say that it would be impossible to determine which party would be required to pay the cost of the bill of exceptions before the cause was finally decided by this court, and until that time the money would not be due and payable to the successful party to the litigation. It follows that interest on that item of the costs should be computed from the entry of the final judgment in the district court.

As we view the record, the judgment of the district court is right, and is

AFFIRMED.

FAWCETT, J., not sitting.

STATE BANK OF NEBRASKA, APPELLEE, V. SEWARD COUNTY, APPELLANT.

FILED APRIL 3, 1914. No. 18,448.

1. **Taxation: EQUALIZATION: APPEAL: ISSUES.** On appeal from an order of a board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405.

2. ———: ———: ———: ———. In making up the issue for the trial of such an appeal, the district court, on motion, should strike from the pleadings all new matters not put in issue before the board of equalization.

3. ———: ASSESSMENT: CAPITAL STOCK OF BANKS. The law requires the assessor to determine and settle the true value of the capital stock of every bank or banking association, loan and trust or investment company. For that purpose he should require a complete statement of the proper officer under oath, showing the number of shares of the capital stock and the value of such shares. He should also examine the last report made to the authorities by such institution pursuant to law. If he has reason to believe that these statements and reports fail in any respect to show the actual value of the assets, he should examine the officers of the bank, association, or company, under oath, in determining and fixing the true value of such stock. If the stock has a market value, he must consider that, and he must also consider the surplus and undivided profits. But he is not concluded by his consideration of the foregoing items, for he must find the true value of all the assets for himself.

4. ———: ———: ———. All property and assets and everything of value are included in the true value of the stock, and as against such true value the *bona fide* mortgages on real estate on which the mortgagors have paid or agreed to pay the taxes must be deducted, and the remainder assessed as capital stock. *First Trust Co. v. Lancaster County*, 93 Neb. 795.

5. ———: ———: POWER TO CHANGE. A board of county commissioners sitting as a board of equalization, without notice to the taxpayer, and without complaint that his property was assessed too low, is without jurisdiction to change the assessment as returned by the county assessor.

APPEAL from the district court for Seward county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Edwin Vail, Grant G. Martin, Attorney General, George W. Ayres and *Frank E. Edgerton*, for appellant.

Norval Bros., J. J. Thomas and *H. D. Landis, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Seward county in the matter of the assessment of the property of the State Bank of Seward, Nebraska, for taxation for the year 1913. It appears that in May of that year the bank, by its cashier, made the following return of its property to the county assessor for taxation:

"Name. The State Bank of Nebraska.
Location. Seward, Nebraska.

Capital stock	$35,000.00
Number of shares ($100 each)	350
Surplus	8,000.00
Undivided profits	3,201.85
Total book value	46,201.85

or $132.00 per share.
Market value per share, $——.

I, Harry D. Landis, cashier of said bank, do solemnly swear that the foregoing statement, with list of stockholders attached thereto, is true and correct this 1st day of April, 1913.

HARRY D. LANDIS, Cashier.

Subscribed in my presence and sworn to before me this —— day of ——, 191—."

Attached to the schedule was the following entry in substance made by the county assessor:

Actual value $46,200, assessed value $9,240, penalties $——; board of equalization $——. Attached to and made a part of the schedule of the bank is exhibit A, which is a statement of the deduction claimed by the bank in the form of mortgages on real estate, with the affidavit of the cashier as follows: "Each mortgage was given, executed, and filed after the 1st day of July, 1911, and before the 1st day of April, 1913, as aforesaid; that each of said mortgages is upon Seward county real estate, and the value of each and every piece of real estate covered by said mortgages considerably exceeds the value of said bank's mortgage thereon, and that each and every mortgage aforesaid provided that the mortgagor should pay the taxes levied thereon, and contained the following provision, 'and shall pay all taxes and assessments levied upon said real estate, including all taxes and assessments levied upon this mortgage, or the debt secured by this mortgage;' that each and every mortgagor giving and executing said mortgages aforesaid has paid or caused to be paid the taxes on said mortgage according to said agreement in said mortgage contained; that each of said mortgages represent *bona fide* loans

made by the bank. Affiant further says that, according to the laws of the state of Nebraska, said bank is justly entitled to have said mortgages amounting in the aggregate to the sum of $34,026, considered as an interest in real estate for the purposes of assessment and taxation, and deducted as real estate and tangible property otherwise taxed from the said capital stock of said bank as listed in said return for said bank hereto attached for the year 1913."

There was a copy of the last report made by the bank attached to the schedule, as requested and required by law. It appears that the assessor found the actual value of the bank stock to be $46,200, which was $1.85 less than the book value thereon returned to the assessor, and fixed the assessed value at $9,240, without making any allowance or deductions whatever on account of the $34,026 of the capital stock of the bank invested in real estate mortgages as listed in said exhibit A.

The bank, on June 11, 1913, filed a written complaint and protest duly verified against the assessment with the county board of equalization, claiming a reduction of the $34,000 loaned on real estate mortgages, as set forth in exhibit A attached to its schedule. On June 12, 1913, the county board of equalization considered the complaint and protest of the bank, and caused to be made the following record: "The protest and complaint of the State Bank of Nebraska of Seward, Nebraska, was read, asking for a deduction from the assessment as made by the county assessor. Moved and carried that the assessment as made by the county assessor on the State Bank of Nebraska remain as it is." Thereupon the bank duly prosecuted an appeal to the district court, where it filed its petition asking the court to reverse the order of the county board of equalization, and allow the exemption claimed in exhibit A attached to its schedule. The county filed a motion to require the bank to make its petition more definite and certain, and a motion to dismiss the appeal, both of which were overruled by the court, and the county excepted. Thereupon the county filed an answer, in substance, as

follows: Comes now the appellee and, for answer to the petition of the appellant herein filed, denies each and every allegation therein contained not hereinafter admitted, controverted, or modified; admits that appellant made a return to the county assessor, and alleges that said return is truly set out in the transcript in this case; admits that plaintiff filed a complaint with the county board of equalization at the time and in the manner and form set out in the transcript; and that on the 12th day of June, 1913, the board entered an order, as set out in the transcript, which is the order above referred to.

Appellant admits the allegation of paragraph 6 of the petition. Then followed certain allegations to the effect that the amount fixed by the county board of equalization and assessment as the aggregate value of the bank stock for the purposes of taxation for the year 1913 is no larger or greater sum than the actual real or true value of said stock after deducting said actual real and true value of the aggregate amount of said mortgages. Other allegations were contained in the answer touching the real value of the property of the bank, and it was alleged that the appellant was not entitled to have its assessments as fixed by the board at the sum of $46,200 reduced by the deductions therefrom of the amount of said mortgages for the reason that without such deduction the value of the stock for the purposes of taxation for the year 1913 was no more or greater than the fair, reasonable and just value of said property for the purposes of taxation and assessment.

The bank filed a motion to strike from the answer all the remaining portion thereof following the admission of the allegations of paragraph 6, because the same was redundant, irrelevant and immaterial, and tendered an issue not raised before the board of equalization. The motion was sustained, and the county excepted to the ruling. Thereupon a trial was had to the court upon the pleadings. The testimony of T. C. Beck, the county assessor, was taken, and he testified that he had made the assessment of the bank, and in so doing made no deduction whatever on account of real estate mortgages owned and held by the bank.

This was all the evidence that was introduced, and thereupon the court found the issues in favor of the bank; that it was entitled to have deducted from $46,200 the value of its capital stock for the purposes of assessment for the year 1913 the sum of $34,026, the aggregate amount of real estate mortgages owned and held by the bank. From this judgment the county has brought the case here by appeal.

It is contended by the appellant that the court erred in overruling the motion to require the bank to make its petition more definite and certain by setting out the true value of the shares of its capital stock, the market value thereof, the average amount of its loans and discounts during the fiscal year, also other resources of earnings, and the net amount of its actual earnings during the last fiscal year. This was an attempt to require the district court to revalue and reassess the property of the bank for taxation. The court had no authority to do this. The proper place to procure a revaluation and reassessment of the property was before the board of equalization. The county authorities having neglected to require such a statement when the matter was being considered by the board, there was no authority to require such a statement on the appeal to the district court.

It is further contended that the court erred in refusing to dismiss the appeal for want of jurisdiction. The complaint filed before the board gave that tribunal jurisdiction to determine the matter of the deduction of the amount of the mortgages owned by the bank from the value of its capital stock. The board took jurisdiction of the complaint, and made its order, from which the bank appealed. This gave the district court jurisdiction, and the motion to dismiss the appeal was properly overruled.

It is also contended that the court erred in sustaining the motion of the bank to strike from the answer the allegations relating to matters not in issue before the board of equalization and assessment. Section 6440, Rev. St. 1913, which provides for appeals to the district court from the action of the county board of equalization, reads as

follows: "The court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof." This section was considered by this court in *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405, where it was held: "On appeal from an order of a board of equalization in the matter of the assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal." To the same effect are *First Nat. Bank v. Webster,* 77 Neb. 813, and *Reimers v. Merrick County,* 82 Neb. 639.

In the case at bar the assessor had returned the schedule of the bank to the county board, with his valuation and assessment fixed thereon. By his return he had refused to deduct the mortgages owned by the bank as returned by its affidavit attached to the schedule. The bank thereupon filed its complaint asking the county board of equalization and assessment to make the proper deduction. That was the only matter presented to the board for determination. According to the record, that was the only matter passed upon by the board when it made its order refusing to grant the request made by the bank, and, under the rule announced in the foregoing cases, that was the only matter that could be considered by the district court. It follows that the motion to strike the allegations from the answer was properly sustained.

This brings us to the consideration of the main question presented by this appeal. Under section 6351, Rev. St. 1913, mortgages on real estate for the purpose of taxation should be deducted from the capital stock of banks and trust companies, and the remainder assessed as capital stock. *First Trust Co. v. Lancaster County,* 93 Neb. 795. The facts are practically the same in both cases, and the opinion in that case clearly settles the question involved on this appeal in favor of the bank. It may be possible that the bank is, to some extent, escaping taxation; but the court, under the circumstances, cannot grant the county any relief. If it was believed by the assessor, or the county au-

thorities, that the assessment was inequitable and unjust, the board of equalization should have given the bank notice of the fact that it would proceed to reassess its property. This was not done, and without such notice the board could not raise the assessment, but was bound by the schedule returned by the assessor. When the assessment was returned, the case of the *First Trust Co. v. Lancaster County, supra,* had not been decided, and it is quite apparent that the taxing authorities of Seward county assumed that the real estate mortgages of the bank could not be deducted from the amount of its capital stock, and hence no effort was made to reassess the property of the bank.

As we view the record, there was nothing for the court to do but to render a judgment in favor of the bank, deducting the amount of its real estate mortgages from the value of its capital stock, and the judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

DAVID E. MOSES, ADMINISTRATOR, APPELLEE, V. ALEXANDER L. MATHEWS, APPELLANT.

FILED APRIL 3, 1914. No. 17,595.

1. **Master and Servant:** NEGLIGENCE OF SERVANT: LIABILITY OF MASTER. A master is liable for the consequences of the negligent conduct of his servant, committed within the apparent scope of his employment, although the particular act complained of was unauthorized by the master, and was done in disobedience to his command.
2. **Pleading:** OBJECTIONS. Objection that a petition is not sufficiently specific comes too late after trial and verdict, where the general allegations are sufficient to support the relief prayed for.
3. **Death:** EVIDENCE: TABLES OF EXPECTANCY. The law does not require the production of tables of expectancy in order to prove the probable duration of human life. Such evidence, if tendered, is not conclusive, but may be received and considered with other evi-

dence in the case bearing upon the question of the probable continuance of life of the injured person.

4. **Appeal:** DEATH: DAMAGES. In an action to recover for the loss to a husband of the services of a wife, it is not essential that the exact money value per day, week or month, of her services be proved with mathematical certainty. If the wife is able to perform ordinary household duties, the lack of such services constitutes an element of damages. Ordinarily, the matter must be left to the good judgment and ordinary common sense of the jurors, considering the circumstances of each case, and, unless the verdict is manifestly unjust and excessive, it will not be disturbed on appeal.

5. **Death:** SALE OF POISON BY MISTAKE: LIABILITY: INSTRUCTION. Where an agent, who was sent to purchase a simple remedy, was given by mistake a poison, from the taking of which his principal died, an instruction which states in substance that, unless the agent disclosed to the seller that he was purchasing it for his principal, an action for the death of the principal could not be maintained, was properly refused.

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

Sullivan & Squires, for appellant.

Silas A. Holcomb and *W. F. Critchfield, contra.*

LETTON, J.

Action for death by wrongful act. Plaintiff recovered a verdict and judgment for $1,500, and defendant appeals. The plaintiff is the administrator of the estate of his deceased wife, Etta L. Moses. He sues for the benefit of himself, and the mother of deceased, as next of kin. The action was originally brought against Dr. Mathews, Mrs. Mathews and Barber. It was voluntarily dismissed as to Mrs. Mathews. The court by a peremptory instruction directed the jury to return a verdict in favor of Barber, on the ground that he was a minor when the transaction occurred.

The petition charges negligence in selling tartar emetic as cream of tartar, and in negligently failing to label the substance sold as poison. The answer denies the authority of Christopherson to sell drugs, and pleads facts as to the

death of the deceased which would go to the mitigation of damages.

The defendant, who is a practicing physician, in September, 1910, was in partnership with one Barber in the drug business in Callaway. Dr. Mathews' time was principally devoted to the practice of his profession, and Barber looked after the drug store. The firm employed one Christopherson, a young man about 18 years of age, as a clerk in the store. He was not a registered pharmacist. On September 17, 1910, Mrs. Moses, with her brother, Samuel Sterner, drove in front of the drug store, and at her request Sterner went into the store and asked Christopherson, who was the only person in the store at the time, for ten cents worth of cream of tartar, which Mrs. Moses used occasionally for stomach trouble. Christopherson by mistake delivered to him tartar emetic, wrapping the same up in an ordinary paper package without a label. Sterner gave the package to Mrs. Moses, who put it in her handbag. That evening, just before retiring, she dissolved a spoonful in water and drank it. Shortly afterwards she was taken violently ill, and after severe suffering died the next day. The medical testimony indicated that the cause of her death was poisoning with tartar emetic.

The first point sought to be made by defendant is that, since the evidence shows that Christopherson was forbidden to sell drugs, his act was outside the scope of his authority, and that therefore his principal is not liable. He admits that there is an exception where the servant commits an injury while acting within the apparent scope of his authority, and that this apparent scope must be determined by the facts in evidence. The evidence shows that at the time the purchase was made Christopherson was in sole charge of the store. There is no proof that Mr. Sterner knew, or had any reason to surmise, that there was any limitation upon his authority. If one enters a store and finds a person apparently in charge, in the absence of notice to the contrary, he has a right to presume that such person is authorized to sell any ordinary article of merchandise kept for the purpose of sale, and to rely upon him

procuring and furnishing the article asked for. It is a matter of common knowledge that there is a class of chemical preparations, such as bicarbonate of soda, chloride of lime, copperas, and cream of tartar, which, while in one sense drugs are in such general use for domestic and other purposes as often to be sold in general stores in the smaller towns, and which require no special skill or knowledge to sell. It may be doubted under the evidence whether the clerk was exceeding his actual, and he was not exceeding his ostensible, authority. Even though the clerk disobeyed his instructions, it is a settled principle that a master is liable for the consequences of the negligent conduct of his servant, committed in the course of his employment, although the particular act complained of was unauthorized by the master, and was done in disobedience to his commands. *Wickham v. Walcott,* 1 Neb. (Unof.) 160; *Weber v. Lockman,* 66 Neb. 469; *Barrett v. Minneapolis, St. P. & S. S. M. R. Co.,* 106 Minn. 51, 18 L. R. A. n. s. 416, and collection of cases upon this point found in the note to the latter case.

The next point argued is that there is no proof presented to show that Mrs. Moses' mother depended upon her for support or was injured by her death. This is true; but by the instructions the amount of plaintiff's recovery was limited to compensation to the husband for the loss of his wife's services.

It is next objected that the petition does not state a cause of action in favor of the husband; the position taken being that it is not sufficiently specific as to the wife's capacity to work, the value of her services, and the expectancy of the parties. This objection comes too late after trial and verdict. The general allegations are sufficient. If the defendant desired a more specific statement, he should have moved for it before the trial.

It is next argued that the evidence does not support the verdict in several respects—that there was no proof of the expectancy of the husband; that plaintiff did not prove the value of the wife's counsel, or her labor and assistance, and the probable cost of maintaining her; that there was no

proof of the wife's business capacity, or any other fact upon which the jury could predicate a money damage; and no proof that the substance taken by Mrs. Moses was that purchased from Christopherson.

As to the proof of the husband's expectancy, the law does not require the production of tables of expectancy in order to prove the probable duration of human life. They are permitted to be used as tending to throw some light upon the question, but it would be imputing gross stupidity to a jury if a court should hold that it was incapable of forming a reasonable estimate as to the age of a party to a suit who testifies before them upon the witness-stand, and as to the average duration of human life. Even with the aid of tables of expectancy, such an estimate is largely conjectural but it is acted upon by each of us in daily life.

We are satisfied that the circumstantial evidence that her death resulted from taking the tartar emetic given Sterner is sufficiently strong to convince any reasonable mind.

It is complained that it was error to admit in evidence the Carlisle table as to the expectancy of the deceased, for the reason that she suffered from a serious heart trouble at the time of her death. We will consider this complaint in connection with the assignment that there is no proof of any facts upon which the jury could predicate money damages to the husband. It is shown that Mrs. Moses was nearly 43 years old, and that though she was not in robust health she had been able for several years to assist her husband upon a farm in Oklahoma, and after the family moved to Nebraska to do light housework and to aid in caring for the home in Broken Bow. There was evidence derived from a post mortem examination that the deceased was suffering with valvular heart trouble, and medical testimony that with over exertion by one suffering with such a condition it might terminate fatally at any time, but that with proper care such a person might live for years. There was testimony also that deceased had symptoms indicating the existence of chronic Bright's disease, and that of medical experts, to whom the symptoms were described, that in all

probability she could only live a few months. The jury were properly instructed that the evidence furnished by the table was not conclusive, but might be received and considered with other evidence in the case, and that "its statement as to expected duration of life might be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party."

The ascertainment of pecuniary damages in suits of this nature is often exceedingly difficult, and depends upon future contingencies, such as attend the existence of human life. The exact pecuniary loss to plaintiff is impossible of ascertainment. It is obvious that, if the wife was able to perform the ordinary household duties, the lack of such services would constitute an element of damages. Mere proof of the value of services of a housemaid or housekeeper might not be sufficient, and in ordinary cases the matter must be left to the good judgment and ordinary common sense of the jurors, considering all the circumstances of each case. If the testimony of Dr. Mullins and that of the other experts based thereon is true, the verdict is excessive, since one year would be the limit of the probable duration of life of deceased according to their testimony; while, on the other hand, if the testimony of other witnesses as to her condition is believed, she might have lived for years by being careful. This is the point in the case upon which we have had most hesitation, but we are not prepared to say upon the whole testimony that the verdict was excessive, and to substitute our judgment for that of the jury in this regard. *Denver & R. G. R. Co. v. Gunning,* 33 Colo. 280, 80 Pac. 727; Tiffany, Death by Wrongful Act. (2d ed.) sec. 163, and cases cited.

The complaint that it was error to dismiss Barber out of the case on the ground of his being a minor is untenable. If the partnership was liable at all Barber and Mathews were joint tortfeasors.

Complaint is made of the refusal to give instruction No. 7 requested by the defendant. We find no instruction bearing this number in the record. Probably instruction

No. 1 is meant, which stated substantially that, unless the deceased's brother disclosed to the drug clerk that he was purchasing it for her, or any other person than himself, the deceased could not recover, and therefore that her husband could not recover. This instruction was properly refused. The brother was acting as agent for Mrs. Moses, and both Sterner and she had a right to believe that the article sold was that which was asked for. The fact that the principal was undisclosed does not change the liability.

We find no prejudicial error in the supplemental points presented. Taking the whole record together, the case seems to have been fairly tried, and the judgment of the district court is

AFFIRMED.

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

WALLACE M. BOON, APPELLANT, V. HERBERT E. GOOCH ET AL., APPELLEES.

HENRY CAMPBELL, APPELLANT, V. HERBERT E. GOOCH ET AL., APPELLEES.

FILED APRIL 3, 1914. NOS. 17,597, 17,598.

Gaming: GRAIN OPTIONS: RECOVERY OF LOSSES. The courts of this state, prior to the enactment of a statute upon the subject, held that a contract to operate in grain options, to be adjusted according to advances in market value, and without the intention of either party that any grain should actually be bought or sold or delivered, is a contract for gaming transaction, against good morals and public policy, and have consistently refused to lend their aid to either party to such a transaction. In 1907 an act was passed making the keeping of a bucket-shop unlawful, and imposing a penalty upon any person keeping or operating one. *Held*, That the enactment of this statute did not affect the previous doctrine of this court, and that an action to recover the amount paid to a bucket-shop keeper as margins cannot be maintained.

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

J. J. Thomas, for appellant.

Charles S. Roe, contra.

LETTON, J.

This was an action to recover money alleged to have been paid as margins in a bucket-shop. A general demurrer was filed to the petition, which was sustained by the trial court, and the action dismissed. Plaintiff appeals. The petition in substance sets forth that the defendants kept a bucket-shop for the pretended buying and selling of shares of stocks, bonds, and of certain commodities on margins. Its language follows that of section 226*a*, criminal code (1907), which was in force at the time the transaction occurred. By this section in substance it is made unlawful to carry on a bucket-shop, office, or store where the pretended buying or selling of shares of stocks or bonds of petroleum, grain, provisions, or other products, on margins or otherwise, is without any intention of receiving and paying for the property so bought, or of delivering the property so sold. The keeping of all such places is prohibited. Persons or corporations guilty of violating the section are upon conviction punishable by fine or imprisonment, or both. It is alleged that plaintiff paid the defendants certain sums of money at different dates as margins, which were merely wagers on the future price of commodities, and were so understood by both parties, and that defendants took and kept the same.

The plaintiff insists that the prohibitions and penalties of this act are all against the bucket-shop keeper. That it does not penalize the patron of the bucket-shop, nor make the transaction on his part unlawful; that consequently the parties are not *in pari delicto,* and under the rule of *Becker v. Wilcox,* 81 Neb. 476, he may recover the money lost. He admits that, where parties are *in pari delicto,* the courts have usually refused relief to either, but insists that the rule is illogical and operates to the benefit of the guilty party by permitting him to retain the benefits of his wrongdoing, and thus rewards the party guilty of the greater moral turpitude.

The defendants take the position that the parties to the contract are *in pari delicto;* that such a contract is against public policy and public morals; and that no court will lend its aid to a cause of action which is based upon an immoral and illegal transaction of the nature pleaded by the plaintiff.

The question as to the nature of transactions of this kind first came before this court in *Rudolf v. Winters,* 7 Neb. 125, which was an action to recover upon a due bill given for margins. It was said in the opinion: "The test in such cases is whether the party requires the aid of the illegal transaction to establish his claim; and, if he cannot proceed without showing that he has broken the law, the court cannot assist him, whatever may be his demand." Part of the syllabus is as follows: "A contract to operate in grain options to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is *contra bonos mores,* and against public policy. Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain." This doctrine has been strictly followed ever since. *Sprague v. Warren,* 26 Neb. 326, 335; *Watte v. Wickersham,* 27 Neb. 457; *Morrissey v. Broomal,* 37 Neb. 766, 784; *Rogers & Bro. v. Marriott,* 59 Neb. 759; *Mendel v. Boyd,* 3 Neb. (Unof.) 473. The rule is practically a part of the American common law. Note on p. 758, 1 Am. St. Rep., to *Crawford v. Spencer,* 92 Mo. 498.

It will be seen that this view has prevailed for more than 35 years, and that the courts of this state have consistently refused to lend their aid to either party in such transactions. The enactment of the statute of 1907 imposing a penalty upon the bucket-shop keeper in nowise operated to change the nature of the contract or the relations of the parties. The fact that a penalty was attached to the keeping of a bucket-shop by the later statute, it seems to us, is immaterial in this connection. The transaction was illegal wherever conducted. In order to take the position of plain-

tiff, we would be compelled to say that, while before the passage of this statute both parties to the transaction were equally guilty, by its passage the individual whose cupidity and love of gain led him to risk his money upon such a venture became purged of his offense, and an innocent party favored by law, while his partner in wrongdoing remained guilty. We cannot so hold.

Becker v. Wilcox, 81 Neb. 476, upon which plaintiff relies, is not a parallel case. The principle that parties *in pari delicto* cannot be aided by the court is specifically adhered to in the opinion. It was held that, since the sale of lottery tickets was not prohibited at common law, and since the statute made the sale illegal, but not the purchase, it was the intent of the law to protect the buyer against the seller, and hence they were not equally criminal. This reasoning is not applicable in this case, since the premises on which the conclusion rests are not identical. It may be questioned whether the attention of the court was directed, or whether sufficient force was given, in this case, to the provisions of section 224 of the criminal code, which made the existence of a lottery illegal. The cases of *Farmers' Cooperative Shipping Ass'n v. Adams Grain Co.,* 84 Neb. 752, and *Ives v. Boyce,* 85 Neb. 324, both involving the question in this case, have been decided since *Becker v. Wilcox, supra.* The identical point is decided in the *Ives* case. This was an action to recover money paid to defendant, who was operating a bucket-shop. Plaintiff based her right to recover upon two grounds: First, that she was entitled to recover under the common law; and, second, that she had a good cause of action under section 214 of the criminal code; but the court held against her on both contentions.

We think it needless to review the cases from other states cited in the interesting brief of plaintiff.

The judgment of the district court is

AFFIRMED.

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

MAGGIE E. WARNER, APPELLEE, V. CITY OF WAYNE, APPELLANT.

FILED APRIL 3, 1914. No. 17,604.

1. **Appeal:** BILL OF EXCEPTIONS. The court will not review alleged error in the exclusion by the trial court of certain drawings when the tendered exhibits are not made a part of the bill of exceptions.
2. ———: CONFLICTING EVIDENCE. A verdict on conflicting evidence, approved by the trial court, will not ordinarily be disturbed in the appellate court.
3. **Trial:** REFUSAL OF INSTRUCTIONS. It is not error to refuse an instruction where the legal principle embodied therein has been fully stated to the jury in another instruction.
4. **Municipal Corporations:** DEFECTIVE SIDEWALK: CONSTRUCTIVE NOTICE. Where a walk, about 150 feet long, was old, and was dilapidated over such a portion of its length that its defective condition was clearly visible, and had so remained for a long time, the city was chargeable with constructive notice that the whole walk was unsafe. The fact that a portion of it at one end, upon which the plaintiff fell, seemed to a casual observer to be in good condition upon the surface did not relieve the city from using reasonable diligence to keep such portion in reasonable repair.

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

C. H. Hendrickson and *A. R. Davis,* for appellant.

F. S. Berry, contra.

LETTON, J.

This is an action for damages for personal injuries sustained by reason of plaintiff's fall upon a defective sidewalk in the city of Wayne. Plaintiff recovered a judgment for $500, and the city appeals.

The petition is in the usual form, except that it alleges that at the time she fell the plaintiff was pregnant, and she suffered a miscarriage as a result of the fall. The answer is a general denial, with a plea of contributory negligence.

A former street commissioner of the city testified that he made an examination of the walk upon the block where the plaintiff fell in the spring of 1910; that it was a board walk nailed upon stringers, and that the stringers were rotten in places and some of the boards were gone; that there were some of the places upon the walk that were better; and that he made a written report of its condition to the city clerk; and that before this time he had told the chairman of the street and alley committee of its defective condition. The plaintiff, who is a married woman 38 years of age, testified that she had five children, the youngest of whom was 2½ years old; that up to the time of her fall she had been in good health and able to perform all of her housework, and had never suffered a miscarriage or abortion; that on the 19th of August, 1910, she was returning home about noon, walking with another woman, side by side, and that as they walked a board flew up, which tripped her, causing her to fall; that her knee was bruised, and she suffered a pain in her side and abdomen; that she told her husband about it when she reached home, but went back to her work in the afternoon; that she was then pregnant; that a few days afterwards she began to flow; that a physician was called, but she flowed more or less all the time until November 10, when she was taken to the hospital in Sioux City, where she suffered a miscarriage; and that since she fell her health has been poor, and she is still unable to do her usual work. On cross-examination she testified that she had been passing over this walk several times a day; that she knew that there were rotten stringers in it and some boards missing, but that the condition of the walk at the place where she fell looked all right; that any one passing over that part would not observe any defects in it. While the plaintiff's evidence as to the defective condition of the walk was disputed, we think it was sufficient to justify the jury in finding in her favor upon that issue.

The defendant insists that, because about 30 feet of the walk at the point where plaintiff fell appeared upon the surface to be in good order, it was not charged with notice

of the defective condition at that point, and that it was not its duty to search for defects, under the rule announced in *City of Omaha v. Kochem* 74 Neb. 718, that a city will not be charged with notice of a latent defect in a sidewalk. This principle was applicable to the facts in that case where the fall resulted from stepping upon the cover of a scuttle-hole which appeared to be safely in place, but it is not applicable here. The old walk was 150 feet long, a portion of the boards were gone, and the fact that it was old and out of repair was clearly visible. The portion upon which the plaintiff walked seemed sound to an ordinary observer. If the city had used proper and reasonable care, it must have ascertained that the portion which seemed safe upon the surface was also defective. We think the age and general condition of the walk was sufficient to charge the city with notice of defects over its whole length. *Anderson v. City of Albion,* 64 Neb. 280.

Complaint is made as to instructions given as to the measure of damages. The court instructed the jury very fully with regard to the respective rights and duties of both plaintiff and defendant and as to the measure of damages. We find no error in these instructions.

Several doctors testified that they believed that the cause of the miscarriage was marginal placenta prævia, while Dr. Blair, the plaintiff's family physician, testified that in his opinion the fall was the direct cause of the miscarriage. There is a direct conflict in the evidence of Mrs. Warner and some of the other witnesses as to whether she had suffered from hemorrhages and pain in the region of the uterus before the time that she fell. If the testimony of these witnesses was credited by the jury, it would support the view of the physicians who testified that in their opinion Mrs. Warner had a uterine disorder which caused the miscarriage. This subject was fully gone into at the trial, and we must abide by the finding of the jury upon the disputed facts.

Complaint is made that the court refused to give instruction No. 7, requested by defendant. The requested in-

struction described at length an ailment or disease known as "placenta prævia," and instructed the jury that, if they found that this condition was the cause of the miscarriage, they should find for defendant. The jury, however, were instructed in substance, that the fact that plaintiff had a miscarriage does not of itself prove that the alleged fall was the proximate cause of the premature birth, that there must be evidence to establish that the fall was the direct cause of plaintiff's injuries, and that unless they so found they should find for defendant. This thought was expressed in more than one instruction. The general includes the particular. Since the court had already instructed the jury that, if they believed the miscarriage resulted from another cause than the fall, they should find for defendant, there was no error in refusing instruction No. 7. The court also instructed the jury in favor of the city that the defendant had sustained no permanent injury or impairment of health.

It also assigned as error that the court refused to admit in evidence two drawings of the uterus and adjacent organs showing a marginal placenta prævia. The tendered exhibits do not appear to be attached to the bill of exceptions. The question before the jury was not what conditions are known in the medical profession as placenta prævia, but whether such conditions existed before the plaintiff fell, and were the proximate cause of the miscarriage. We are unable to see how this evidence could have aided in the determination of that question, and think there was no error in its exclusion.

It may be proper to say here that none of the instructions tendered by the defendant relating to this subject were strictly accurate statements of the law, since if the jury found in plaintiff's favor upon the issues as to negligence, she was entitled to recover for such injuries as she actually suffered, even if slight in degree, and though the miscarriage was not caused by the fall.

The real controversy in this case is upon questions of fact which were determined by the jury.

The rights of the city seem to have been carefully guarded by the trial judge. We find no error in the record, and the judgment of the district court is

AFFIRMED.

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

EUGENIA I. COOKINGHAM, ADMINISTRATRIX, APPELLEE, V. GUSTAV TESKE, APPELLANT.

FILED APRIL 3, 1914. No. 17,681.

Appeal: AFFIRMANCE. Having reached the same conclusion upon the evidence as did the district court in this an equity case tried *de novo*, its judgment will not be disturbed.

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

M. D. Tyler and *M. S. McDuffee,* for appellant.

Reeder & Lightner, contra.

LETTON, J.

This was an action for an accounting to determine that the amount due upon a mortgage had been paid and declare it satisfied. The court allowed sufficient credit to reduce the mortgage debt to $600, and rendered a decree of foreclosure. Defendant, mortgagee, appeals.

Freeman M. Cookingham was an attorney at law residing in the village of Humphrey. For many years he had acted as the legal adviser of the defendant Gustav Teske. In 1902 he borrowed from Teske the sum of $700 upon a promissory note maturing in five years, and, in order to secure the same, gave Teske a mortgage upon his dwelling and lot in the village. Teske is a farmer of considerable wealth, who for years loaned money on real estate and personal security, and has been in a good deal of litigation. He is not a man of education, and the evidence fairly indicates

that he consulted Mr. Cookingham in many business transactions aside from strictly legal matters. Cookingham died December 4, 1909. The plaintiff is his widow and administratrix. She alleges that Teske was indebted to her husband in the sum of $2,000 at the time of his death; that this was the reasonable value of his services, for which nothing had been paid; and that the defendant refuses to enter into an accounting or make any settlement. An account is attached to the petition as an exhibit, setting forth the amounts claimed to be due for 33 specific items of service extending from 1904 to 1909, but it also alleged that deceased performed many other services for defendant. The defendant pleads a general denial, the statute of limitations as to items prior to June 1, 1907, payment in full of all services rendered by Mr. Cookingham, and by cross-petition asks for the foreclosure of the mortgage. The court found there was $600 still due upon the mortgage after allowing credit for unpaid services.

The deceased apparently kept no books of account, and we find no evidence as to the majority of the items charged. As to a number of others the defendant produced receipts in full signed by Mr. Cookingham, as to the validity of which there is no dispute. There are other items charged for services, which the proof shows were rendered, amounting in all to about $80. Defendant testifies that these matters have all been settled. He introduced in evidence a receipt dated September 17, 1909, acknowledging "payment in full of all demands as attorney fees to date," and signed by the deceased. There is a sharp controversy as to whether the date of this paper has been changed by erasure and alteration. Two experts testify a change has been made in the date of the year, and there is corroborative testimony aside from the appearance of the paper itself. Teske swears no change has been made, and the dirty and roughened appearance of the paper is accounted for by the fact, as he and his wife swear, that he carried it in his vest pocket for a long time. This is a very close question in our minds, and all the circumstances in evidence must be considered.

The testimony is clear that Teske was a constant visitor at the office of Mr. Cookingham for years. An adopted daughter and another lady, who had each acted during a portion of this period as office assistant, testified that he was in the office from one to four times a week, holding consultation with the deceased, and that Mr. Cookingham frequently drew mortgages and other papers for him; that they never saw Teske pay any money, but that he usually told the deceased to charge the services. It is somewhat peculiar that no payment of interest has ever been made upon the note so far as any indorsement shows, and that, though Mr. Cookingham was almost continually employed, the receipts show very few payments to have been made. The testimony of one of the witnesses is that defendant told him that he paid the deceased or settled with him by treating him to brandy. We think that the proof of payment for the major portion of the services rendered in 1908 and 1909 is not sufficient. This being the case, the testimony of prominent members of the local bar as to the value of the services rendered seems relevant and competent. Considering all the testimony the deduction of $545 made by the trial court seems to be a fair and just estimate of the value of the unpaid services. The matter is by no means free from doubt, on account of the careless business methods of the deceased, and it is difficult to make an exact estimate, but, on the whole record, we have reached practically the same conclusion as the district court.

Its judgment is therefore

AFFIRMED.

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

TOLEDO COMPUTING SCALE COMPANY, APPELLANT, V. JOHN FREDERICKSEN, APPELLEE.

FILED APRIL 3, 1914. No. 17,683.

1. **Sales:** IMPLIED WARRANTY. Ordinarily where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, for a particular purpose, of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the article supplied shall be reasonably fit for the purpose for which it is sold.
2. ———: RIGHT OF RESCISSION. If, upon the prompt inspection of such an article, it proves to be defective and unfit for the purpose for which it was purchased, the buyer may refuse to accept it and rescind the contract.

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

Muldoon & Gibbs, for appellant.

Wilcox & Halligan, contra.

LETTON, J.

This action was brought to recover the balance due plaintiff upon a contract for the sale of a computing scale. Plaintiff failed in the action, and appeals to this court.

Defendant bought the scale on September 5, 1910, under a printed and written contract, which in substance provided that the scale will be used in the grocery business, that the price should be $150, $50 of which was paid in cash when the contract was signed, and $100 was to be paid in 30 days. The contract also provided: "It is expressly agreed that this contract shall not be countermanded, and in the event of a refusal to accept said scale when tendered, the full purchase price, less any previous payments, shall at once become due and payable as liquidated damages, not as a penalty. The signing and delivering of instalment note shall not be deemed nor considered a payment or

waiver of any term, provision or condition of this contract." The further clauses of the contract are not material, except that there, appeared upon its face the words, "NOTICE—No scale placed on trial." Defendant purposed opening a grocery store on October 1. The scale arrived at Brady on September 29, and, as was the local custom, was at once delivered by a drayman at defendant's place of business. The scale was unpacked on September 30, set up on the counter, and tested. Defendant testified that it did not weigh correctly, and that he was unable to adjust it so that it would do so. His testimony in this respect is corroborated by other witnesses. Defendant then repacked and returned it to the railway station, without receipting for it or paying the freight. On cross-examination it developed that the agent for another scale was in his store after the time he tested plaintiff's scale, and that he purchased a scale from him that day. He testifies that he did this for the reason that he had provided for only one pair of scales, and that it was necessary to have a scale for use next day, when his store was to open. About a week afterwards he notified the plaintiff that the scale was out of order, and that he refused to accept it. The scale remained at the station until removed by the plaintiff's agent. It was produced by plaintiff at the trial, and tested before the jury. At that time the indicator on one side showed the correct weight when tested by one of plaintiff's witnesses with a six-pound weight which he produced and testified was a correct weight, while upon the other side the indicator showed one ounce short of that weight; with a one-pound weight there was a difference of one-half ounce; and he further testified that with a greater weight there would be a proportional difference. Plaintiff's agent, Harris, who sold the scale also tested the scale in the presence of the jury. On cross-examination, when the scale was tested with the six-pound weight, he admitted that it was short upon one side, and in answer to the question, "If these weights weigh what Mr. Rush testified, the scale is not weighing correctly?" he answered, "No, it is not correct if these weights are correct. Q. If these weights are

correct, your scale is not correct? A. No, sir." At the close of the testimony each party moved for a directed verdict. The court sustained the motion of defendant and directed the jury accordingly.

Defendant asks that the case be affirmed because plaintiff's brief is not prepared in accordance with the rules of this court. We would probably be justified in so doing if the record was large and the points sought to be made were not clear, but with a short record and an orderly, logical and concise arrangement in the brief, we do not now feel warranted in taking such summary action. In view of the unnecessary labor heretofore imposed upon the court by carelessly prepared and defective briefs, new rules, more specific and definite, have been adopted to aid the bar in the preparation of briefs and the court in the disposition of cases. Briefs prepared after such rules are in effect will be more strictly scrutinized, and if not in accordance with the instructions given in the rules may receive scant consideration.

Plaintiff, while admitting that a party to an executory contract may rescind it at any time before receipt of the goods, and that under certain circumstances a buyer may examine the goods before acceptance, and if not found as represented may refuse to receive the same, insists that the right of inspection by the purchaser was taken away under the terms of the contract, and, further, that by receiving it in his place of business and unpacking it, defendant received and accepted the scale and that the transaction became an executed and complete sale and delivery, and defendant's only recourse was under the terms of the warranty in the contract. Defendant maintains that he had a right to examine and inspect the scale before acceptance, and to rescind and return it if defective and not according to contract, that he did no more than this, and that the scale was defective and unfit for use when tested. We find no restrictive provisions in this contract which take the transaction out of the ordinary rule with respect to the right of inspection before acceptance. The quoted provision with respect to countermand is not applicable to the

facts in this case, and the provision that, "in the event of a refusal to accept said scale when tendered," the full purchase price shall become due and payable, does not apply to the tender of a defective scale.

We think there was an implied warranty that the scale purchased should be fit "for use in the grocery business." *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. Rep. 537; *Gilchrest Lumber Co. v. Wilson*, 84 Neb. 583; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68. We are also of opinion that the reasonable right of inspection remained in the defendant, nothing to the contrary being contained in the written contract. The condition of the scale justified its rejection. The provision "no scale placed on trial" evidently means that the buyer shall not have the privilege of receiving, retaining and using the scale in his business for the purpose of trial, and does not affect the right of inspection before acceptance.

Under the evidence the defendant was justified in refusing to accept the scale, and the judgment of the district court was right, and is

AFFIRMED.

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

ANTON THOMPSON, APPELLANT, V. ELIHU C. PIERCE ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,685.

1. **Corpse: RIGHT TO CONTROL.** The right to control the disposition of the remains of a deceased husband lies primarily in the widow or next of kin, in such order.

2. **———: MUTILATION: RIGHT OF ACTION.** The right to maintain an action for damages for mutilation of the corpse in such a case does not pass to the next of kin until it is made to appear that the widow has lost or abandoned her right to do so, or has waived the same.

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

John Lothrop, for appellant.

W. C. Walton, Clark O'Hanlon and *George A. Doll, contra.*

LETTON, J.

This is an action at law by the brother of a deceased person to recover damages for mental suffering on account of the mutilation of the corpse. A general demurrer to the petition was sustained and the action dismissed. Plaintiff appeals.

In substance the petition alleges that the plaintiff is about 12 years younger than the deceased, who was 50 years of age at the time of his death; that they had always lived in the same home or near each other, and there was a strong affection between them; that the deceased was married, but that a partial separation had taken place between him and his wife, who survives him; that the body was in plaintiff's care; and that defendants maliciously removed the stomach and refused to return it, and the body was buried without it, thereby trespassing upon plaintiff's rights and greatly injuring his feelings, to his damage in the sum of $1,000.

The courts of the United States generally recognize the right of the surviving spouse or next of kin of a deceased person to the care, custody and control of the remains for the purpose of sepulture. The point in dispute here is whether the surviving wife or the brother of the deceased is entitled to maintain an action for the wanton mutilation of the corpse. As between the wife and other relatives, the great weight of authority is that the care and custody of the body and the right to provide a place of burial rests in the first place with the surviving spouse. The right of the surviving husband or wife, or, *if there be none,* of the next of kin, to have the custody of the body of the deceased person and decide upon the place of its final burial is supported by the better reasoning and by the almost unanimous voice

of the authorities. There are, of course, exceptions, as there are to nearly all general rules, but they arise for the most part out of such circumstances as would deprive a natural guardian of the custody of a living child. *McEntee v. Bonacum,* 66 Neb. 651; *Larson v. Chase,* 47 Minn. 307, 14 L. R. A. 85. This is a leading case upon the subject. It has been followed and approved many times. Note to *Larson v. Chase, supra,* 2 L. R. A. Ex. Ann. 1117; *Koerber v. Patek,* 123 Wis. 453; *Foley v. Phelps* 1 App. Div. (N. Y.) 551; *Pettigrew v. Pettigrew,* 207 Pa. St. 313; 64 L. R. A. 179; *Medical College of Georgia v. Rushing,* 1 Ga. App. 468; *Kyles v. Southern R. Co.,* 147 N. Car. 394, 16 L. R. A. n. s. 405.

The crucial question is whether upon the facts alleged in the petition the surviving spouse has lost her right to maintain such an action and the plaintiff has shown the right to do so.

The statement of facts in the petition is exceedingly meager, and, of course, its allegations must be taken most strongly against the pleader. It is alleged: "That deceased was married to Amanda C. Sheets on November 24, 1909, who survives deceased; that soon after said marriage there were disagreements and trouble between them; that, for want of affection one toward the other, they lived separate and apart from each other a large portion of the time after said marriage on Nov. 24, 1909, and before the death of the deceased on Oct. 12, 1910; that said wife had no love or affection for deceased at the time of his death; that soon after the death of the deceased, and while his body was under the care of this plaintiff, and while there was preparation being made for funeral," defendants wantonly mutilated the body.

We are of opinion that this language does not plead facts sufficient to establish the loss of the right of the surviving spouse to the body of her deceased husband. The plea as to the time of separation does not negative that they lived together at the time of the death. The further plea that the mutilation occurred "while his body was under the care of this plaintiff" does not aid the plaintiff's

case, because the body may have been placed under the care of plaintiff with the consent of the wife, and without any intention upon her part of yielding her right of control and disposition of the remains. Until this fact or the fact of a total estrangement and separation sufficiently appears no right of action lies in any other person.

We are of opinion that the demurrer was rightfully sustained, and the judgment of the district court is therefore

AFFIRMED.

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

JOHN F. AMMON ET AL., APPELLANTS, V. JAMES F. KEILL, APPELLEE.

FILED APRIL 3, 1914. No. 17,696.

Contracts: RESTRAINT OF TRADE: INJUNCTION. A. & Co., plaintiffs, who were engaged in the plumbing, tinwork and heating business, bought of B and C, who were engaged in business of the same nature, their stock of plumbing goods, supplies, tools and fixtures. A part of the contract of sale provided that the defendant, who is one of the vendors, "will not go into, or conduct, directly or indirectly, a plumbing, tinwork or heating business, within the county of Butler," for a period of ten years. Defendant afterwards, working by the day installed heating apparatus for the owner of a building, put up a metal ceiling, being paid for this work by the square, and took other contracts in the same manner as the partnership did before it made the sale, except that defendant carried no goods or material in stock and did not furnish the same; he also worked for competitors of plaintiffs in the same business by the day or week. *Held*, That this was a violation of the agreement, and that the plaintiffs are entitled to an injunction to restrain the further continuance of such business.

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

Roper & Fuller, for appellants.

L. S. Hastings, contra.

LETTON, J.

Action to restrain the defendant from performing acts in breach of a contract to refrain from entering into business. From a judgment refusing an injunction, plaintiffs appeal.

The petition alleges that the plaintiffs, in 1911, entered into a written agreement with the defendant, James F. Keill, and Henry E. Keill, his brother, doing business in David City, under the name of J. F. and H. E. Keill, by which the Keills sold to plaintiffs their stock of plumbing goods, supplies, tools and fixtures. Part of the contract was as follows: "It is further agreed by and between the parties hereto, and as part of the consideration herein, that the said James F. Keill will not go into, or conduct, directly or indirectly, a plumbing, tinwork, or heating business, within the county of Butler, and state of Nebraska, for a period of ten years from this date, and it is further agreed, and as part of the consideration herein, that the said Henry E. Keill will not engage in or conduct, directly or indirectly, a plumbing, tinwork, or heating business, within the city of David City, Nebraska, for a period of ten years from this date." It is also alleged that the defendant is engaged in the plumbing, tinwork and heating business, has taken several jobs, and is doing work for other parties, both in his own name and in the name of others; that he has undertaken to install a heating plant for one Bunting in a building in David City and is now engaged in the work. The prayer is for an injunction to prevent further breaches of the contract.

The answer admits the agreement, but pleads that both parties have construed it to mean that he might perform work of this kind by the day, or for daily or monthly hire; admits that defendant worked for Mr. Bunting in installing a heating plant; but alleges that such work was done by the hour, and that he did the work with the consent of plaintiffs.

The defendant testifies that he thought he had a right to work by the day under the contract, and that this is the only manner in which he has worked; that the plaintiffs

furnished the steel for a ceiling which the defendant put up, and did not object to his doing the work; that he also worked for rival plumbing concerns by the day, after he made the agreement. On cross-examination it was shown that, while the firm of J. F. and H. E. Keill was in business, it did work by the hour or by the day, as well as taking jobs by contract; that defendant went to Lincoln with Mr. Bunting and helped him to select the furnace which he purchased, and which he afterwards installed for Bunting; that while the firm was in business it was not unusual for them to help their customers select the heating apparatus which they afterwards erected by the day, hour, or job; that he was paid for putting up the steel ceiling referred to by the square; that when he made the contract he was intending to go upon a farm, and had no intention of doing any work in the plumbing or heating line.

Contracts of this nature are not unlawful. The question as to their validity has been settled in this state by the cases of *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304; *Downing v. Lewis*, 59 Neb. 38; *Wittenberg v. Mollyneaux*, 60 Neb. 583; *Engles v. Morgenstern*, 85 Neb. 51. The real inquiry in this case is whether a contract that provides that the seller "will not go into, or conduct, directly or indirectly, a plumbing, tinwork or heating business, within the county," is broken by the vendee taking employment as a skilled workman by the plaintiff's competitors, and by his entering into contracts to install heating apparatus and other work to be paid for by the hour, day, or piece. The object of the contract was to prevent defendant from using his skill, experience and acquaintance with customers to the detriment of the vendee. Some of the acts of business in which defendant engaged were the same, as to the nature of the work and the manner of payment, as it had been the custom of the partnership to do while it was in business. It seems to us that the words "go into, or conduct, directly or indirectly," such a business clearly include such transactions within their terms. The mere fact that defendant did not carry a stock of materials on hand is of little consequence. The firm had not carried material for

ceiling in stock when in business, and had never carried a large line of furnaces. Defendant may have been guilty of a lack of forethought in entering into such an agreement, but this cannot operate to justify a breach of its conditions. We think he has broken both the letter and spirit of the contract.

In *Boutelle v. Smith,* 116 Mass. 111, where a firm of bakers in selling out a bakery agreed that they would not enter into that business "in the town of F, and will not, directly or indirectly, engage in any business or do any act that shall interfere with the business thus purchased," the driving of a bread cart, though acting as the hired servant of a baker in another town, was held to violate the contract. See, also, *Thompson v. Andrus,* 73 Mich. 551; *Finger v. Hahn,* 42 N. J. Eq. 606; *Babcock v. Clear,* 17 N. Y. Supp. 664; *Sander v. Hoffman,* 64 N. Y. 248; *Siegel v. Marcus,* 18 N. Dak. 214, 20 L. R. A. n. s. 769.

We do not wish to be understood as saying that it is an invariable rule that the vendor in such a case may always be prevented from entering the services of a competitor as a workman. It can easily be seen that, where the workman is practically merely a cog in a machine and his personality and business-getting ability is submerged in his work, the effect of such employment upon the business of the vendee would in all probability be nil, and there would be no reason for a court of equity to interfere. The nature of the business which is sold, the character of the transactions in which the vendor is or may be engaged and which are claimed to be in violation of the contract, and the probable and reasonable effect of such transactions upon the business which has been sold, must all be considered. It is only when an injurious effect can be reasonably made apparent that an injunction will be allowed. *Wilson v. Delaney,* 137 Ia. 636; *Nelson v. Johnson,* 38 Minn. 255.

We think the district court erred in refusing the injunction, and its judgment is therefore reversed, with the direction to grant the relief prayed.

REVERSED.

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

FELIX J. MCSHANE, JR., APPELLEE, V. DOUGLAS COUNTY, APPELLANT.*

FILED APRIL 3, 1914. No. 18,260.

Statutes: CONSTRUCTION: COMPENSATION OF SHERIFFS. The question presented here was argued and decided in *McShane v. State*, 93 Neb. 54. The legislature has been in session since the decision, and, having made no change in or amendment to the statute, the construction given therein is adhered to.

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

Charles Haffke and *Myron L. Learned*, for appellant.

Arthur F. Mullen, contra.

Albert W. Jeffries, amicus curiae.

LETTON, J.

The plaintiff is the sheriff of Douglas county. He filed with the county clerk a claim against the county for feeding prisoners confined within the county jail from February 6, 1913, to February 28, 1913—3,045 days, at 50 cents a day, making a total of $1,522.50, upon which he credited for gas and water $42.43, leaving a net claim of $1,480.07. The claim was rejected by the board of county commissioners. Shortly afterwards he filed a petition in the district court based upon the same claim and for the same amount. The defendant answered, pleading that chapter 53, laws 1907, purporting to amend section 5, ch. 28, Comp. St. 1905, was void; that it violated section 11, art. III of the constitution; that a portion of said chapter 53 had been declared unconstitutional by the supreme court, and that said portion was a material inducement to the adoption of the remainder, and that the legislature would not have passed the law had the part rejected not been included therein; that the sheriff's fees are fixed by section 5, ch. 28, Comp. St. 1905; that the meals furnished by the sheriff were not

*On rehearing, judgment of district court reversed. See opinion, 96 Neb. —.

worth to exceed 7½ cents a meal; that defendant has equipped a new jail with all the modern conveniences, and that the only expense incurred and service rendered by the plaintiff had been in the supplying, preparing and serving food to the prisoners, using the rooms and equipment of the defendant. After a trial, the district court found in favor of the plaintiff for the whole amount claimed, less a small deduction for the use of defendant's kitchen and appliances. Defendant appeals and assigns as error, first, that the court erred in holding that section 1, ch. 53, laws 1907, fixed the fees for feeding prisoners in Douglas county; second, that the plaintiff's petition did not state a cause of action; third, that the court erred in excluding evidence of the nature, quality, quantity and cost of the meals furnished, and in rendering judgment in the absence of such evidence.

Previous to April, 1907, the statute governing the compensation of sheriffs for feeding prisoners was as follows: "For boarding prisoners per day, not exceeding seventy-five cents per day, nor more than $3.50 per week when the prisoners are confined more than six days." Section 5, ch. 28, Comp. St. 1905. The legislature of 1907 passed an act amending the foregoing section so as to read as follows: "Section 5. (Sheriff.) Serving capias with commitment or bail bond and return, one dollar. * * * For boarding prisoners, fifty cents per day; provided, that in counties having by the last preceding national or state census a population in excess of one hundred thousand (100,000) the sheriff shall receive for boarding prisoners, including jail supplies, thirty-nine cents per prisoner per day until January 1, 1908, and it shall be the duty of the board of county commissioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail." The validity of the provisions authorizing the board of county commissioners to contract with the lowest bidder

for feeding prisoners in the county jail was assailed in the case of *State v. McShane,* 93 Neb. 46, for the reason that such a provision was not within the title either of the original or the amendatory act, and was not germane to the subject of either. This view was taken by the court, and it was said in the opinion: "A careful reading of the amendatory act satisfies us that, after eliminating the unconstitutional portion of it, the remainder of the act is complete in itself, and capable of enforcement." In *McShane v. State,* 93 Neb. 54, which was argued and submitted with *State v. McShane,* 93 Neb. 46, it appeared that the sheriff filed a claim with the state auditor for the board of a state prisoner for four days, at 50 cents a day. The state auditor allowed the claim to the extent of 19 cents a day which was the amount fixed in a contract between the county board of Douglas county and the firm which then held the contract for feeding the prisoners. The district court also held that this amount was all that plaintiff was entitled to, but its judgment was reversed by this court, which held that the question in the case was identical with the one determined in *McShane v. State,* 93 Neb. 46, and that the sheriff "was clearly entitled to the compensation mentioned in that part of chapter 53 remaining in force, by which it is declared that the sheriff shall receive the sum of 50 cents a day for furnishing meals to such prisoners." The correctness of our decision in the latter case is now directly challenged.

A stipulation was filed in *McShane v. State,* 93 Neb. 54, that the question in the two cases was identical, and the opinions came down at the same time. Appellant now argues that, on account of this stipulation, the opinion in the latter case must have been rendered under a misapprehension of the question involved, and that, since Douglas county was not a party to the suit, it is not bound by the decision. Of course, the county, not being a party to the suit, is not bound by the judgment, but it is equally bound with all other persons by the principles of law announced. But, in the brief of the county of Douglas in the former case, it was argued that "That clause is: 'For boarding

prisoners 50 cents per day.' * * * And the provision for competitive bids are complete only when taken together, and must stand or fall together, as the provision for competitive bids in counties to which it applies was the efficient and moving cause for the enactment of the amendment, and particularly that portion which fixed the amount for smaller counties." The fact that the legislature of 1907 at the same session enacted chapter 54, laws 1907, which provides salaries for sheriffs in full compensation for their services, in lieu of the fees previously received, was also set forth as a reason for the legislation, and it was said that it was not intended that sheriffs would make a profit by the feeding of prisoners; that it was rumored that in Douglas county the sheriff was making a large profit under the price of 35 cents a day, which had been fixed by the county commissioners under the former statute, and that the object of both of these statutes was to place the office of sheriff upon a definite salary basis, and to provide that the amount paid him for feeding the prisoners should be as nearly as possible the actual cost thereof. It is said also: "The amount would not have been fixed at 50 cents unless the first proviso was also enacted, because the prisoners were then being fed in the counties the proviso applied to for 39 cents a day;" and that the first clause and the first proviso was each an inducement for enacting the other, and both must stand or fall together. Speaking of Mr. McShane, it is said: "He does not want the law to stand as it was prior to the amendment of 1907, under which the amount to be paid to the sheriff for feeding prisoners was determined by the county commissioners. He only wants that part of the amendment which provides that the amount to be paid for feeding prisoners shall be determined by the county commissioners, by competitive bids submitted to it, declared void."

These excerpts from the brief clearly show that the questions raised in this case were expressly raised and decided in the former case, and that, if any relief is to come, it must come through the legislature. The legislature has been in

session since the decision in the former cases, and has taken no steps to change the rule of the decisions.

We are not inclined to interfere with their prerogative. For these reasons, the judgment of the district court is

AFFIRMED.

FAWCETT, J., dissents.

HAMER, J., dissenting.

I am not quite able to agree with the majority opinion. It is said in the syllabus of that opinion that the identical questions presented were presented and argued in *McShane v. State,* 93 Neb. 54, and that this case is controlled by the decision in that one. On referring to that case I find it stated in the syllabus that "The question decided therein was identical with the one determined in *State v. McShane, ante,* p. 46." On turning to that case, I find the statement in the syllabus that "So much of chapter 53, laws 1907, as authorizes the county board of counties having more than 100,000 inhabitants to contract with the lowest and best bidder for feeding prisoners in the county jail is violative of the provisions of section 11, art. III of the constitution." It may be well to run over these cases, with a view to ascertaining what has been decided.

In the first case (*State v. McShane* 93 Neb. 46) it is said that the relator brought the action in the district court for Douglas county for a writ of mandamus to compel the respondent as sheriff of that county, to allow the relator and the firm of Garnipee & Flanagan admission to the jail of Douglas county in order to furnish meals to the prisoners confined therein for and during the year 1912, under a contract entered into for that purpose between the county commissioners and said firm under the provisions of section 5, ch. 28, Comp. St. 1905, as amended by chapter 53, laws, 1907. The respondent filed an answer to the alternative writ, which the district court held stated no defense, and the writ of mandamus was allowed as prayed, and the respondent appealed. The appellant in that case contended that so much of the amendatory act of 1907 as provided that "it shall be the duty of the board of county com-

missioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail," is unconstitutional and void. It was the contention in that case that the part referred to was unconstitutional because it was in violation of section 11, art. III of the constitution, providing: "'No bill shall contain more than one subject and the same shall be clearly expressed in its title.' Second. The amendatory act is broader than its title. Third. The act, both directly and by implication, amends several sections of the general laws of the state relating to the powers and duties * * * of the sheriff, without expressly repealing such sections and re-enacting them. Fourth. That the act is local and special legislation, and is violative of section 15, art. III of the constitution, which provides: 'The legislature shall not pass local or special laws. * * * Where a general law can be made applicable, no special law shall be enacted.' On the first proposition it may be said that the act in question purports to amend section 5, ch. 28, Comp. St. 1905, entitled 'Fees,' and, in so far as it treats of that subject, it might be said to be germane to the section amended. It appears, however, that the act provides that for boarding prisoners the sheriff shall receive 50 cents per day; 'provided, that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, 39 cents per prisoner per day until January 1, 1908, and it shall be the duty of the board of county commissioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail; provided, further, that the sheriff shall, on the first Tuesday in January, April, July and October of

each year, make a report to the board of county commissioners or supervisors under oath, showing the items of fees, except mileage, collected or earned, from whom, at what time, and for what service, and the total amount of fees collected or earned by such officer since the last report, and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer.' It must be said that section 5, ch. 28, Comp. St. 1905, dealt exclusively with the subject of sheriff's fees, and fixed the amount of fees he was to receive for official acts performed by him, that that part of the proposed amendment which is claimed to be unconstitutional does not deal with the subject of fees but deals with matters entirely foreign to the subject matter of the original section, and refers specifically to the powers and duties of the county board. It attempts to take the control of feeding prisoners away from the sheriff and place it with the county board, which is a matter regulated by a distinct section of the statute. The subjects are not closely related, and are not germane to each other." Many cases are then cited, with a view to showing the correctness of the contention made. We quote from the opinion. "It may be fairly said that the part of the section above quoted was not within the title to either the original or amendatory acts, and was not germane to the subject of either of those acts. We are, therefore, of opinion that so much of the amendatory act as refers to the powers and duties of the board of county commissioners is unconstitutional and void. * * * A careful reading of the amendatory act satisfies us that, after eliminating the unconstitutional portion of it, the remainder of the act is complete in itself, and capable of enforcement. It has been repeatedly held that, if the unconstitutional and constitutional provisions of an act can be separated and leave the remainder of it capable of enforcement, the unconstitutional provisions will be stricken out, and the constitutional provisions will be preserved." Here follow citations. It is then said: "From the foregoing, it follows that the contract upon which the

relator bases its right to the writ of mandamus was not authorized by law, and the district court erred in overruling and disregarding the respondent's answer and awarding the writ as prayed." There is then a provision in the opinion for an order that the judgment of the district court be reversed and the action dismissed.

The second McShane case being *McShane v. State,* 93 Neb. 54, is a second reversal of the judgment of the district court, and is said to cover the same question, except that the item under consideration was: "Board of prisoners from date of conviction, August 27, 1912, to August 30, 1912, 4 days, at 50 cents a day, $2." Time seems to be the main difference. The county is always Douglas county, except that in the last case (*McShane v. State,* 93 Neb. 54), there was a trial in the district court for Lancaster county, but it was the consideration of an appeal from a judgment of the district court sustaining the action of the auditor of public accounts in disallowing a portion of a claim presented by the plaintiff in that case to the auditor for allowance against the state. It was for "board of prisoners from date of conviction, August 27, 1912, to August 30, 1912, 4 days, at 50 cents a day, $2." This particular claim was allowed "at only 19 cents a day." In that case it was stipulated that the question presented for determination was identical with the one decided "in *State v. McShane,* 93 Neb. 46, and the two cases have been consolidated and argued as one." In that case it was said that "the provision contained in chapter 53, laws 1907, by which the legislature attempted to authorize the county commissioners in counties having more than 100,000 inhabitants to let contracts for feeding prisoners in the county jail to the lowest and best bidder, is unconstitutional and void." It was said, therefore, that, as the plaintiff had "furnished the meals in question to a state's prisoner, * * * he was clearly entitled to the compensation mentioned in that part of chapter 53 remaining in force, by which it is declared that the sheriff shall receive the sum of 50 cents a day for furnishing meals to such a prisoner." It will be seen that the legislature adopted the sum of 19 cents a day,

and that the court, by declaring the act of the legislature unconstitutional, has made 50 cents a day possible, something that the legislature did not contemplate when it reduced the price to 19 cents a day. Unless we have to do so, I do not wish to substitute the will of this court in lieu of the intention of the legislature. It is the legislature which has power to fix the compensation. I do not want to fix it. It is true that the result is the effect of a ruling. The ruling knocks out and nullifies the intention of the legislature, and revives the fee fixed at a former and different time. The instant case proposes to follow the cases cited and make the sum 50 cents a day. That may not be exorbitant, but it is not the will of the legislature that such a sum shall be paid, and I do not want the supreme court of our state to be encumbered with legislative duties and responsibilities, which it will be unless it is very careful how it handles this case.

In the instant case it is said that the claim is 3,045 days at 50 cents a day. There was a small credit for gas and water of $42.43. The claim in the majority opinion is alleged to be "a net claim of $1,480.07." "The defendant answered, pleading that chapter 53, laws, 1907, purporting to amend section 5, ch. 28, Comp. St. 1905, was void; that it violated section 11, article III of the constitution; that a portion of said chapter 53 had been declared unconstitutional by the supreme court, and that the said portion was a material inducement to the adoption of the remainder, and that the legislature would not have passed the law had the part rejected not been included therein; that the sheriff's fees are fixed by section 5, ch. 28, Comp. St. 1905; that the meals furnished by the sheriff were not worth to exceed 7½ cents a meal; that defendant has equipped a new jail with all the modern conveniences, and that the only expense incurred and service rendered by the plaintiff had been in the supplying, preparing and serving food to the prisoners, using the rooms and equipment of the defendant." The majority opinion in the instant case recites the fact that "previous to April, 1907, the statute governing the compensation of sheriffs for feeding prisoners was

as follows: 'For boarding prisoners per day, not exceeding seventy-five cents per day, nor more than $3.50 per week when the prisoners are confined more than six days.' Section 5, ch. 28, Comp. St. 1905." It is alleged in the majority opinion that the legislature of 1907 passed an act amending the foregoing section so as to read: "Section 5. (Sheriff.) Serving capias with commitment or bail bond and return one dollar. * * * For boarding prisoners, fifty cents per day; provided, that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, thirty-nine cents per prisoner per day until January 1, 1908, and it shall be the duty of the board of county commissioners to advertise on or before December, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail." It is said: "The validity of the provisions authorizing the board of county commissioners to contract with the lowest bidder for feeding prisoners in the county jail was assailed in the case of *State v. McShane* 93 Neb. 46, for the reason that the provision was not within the title either of the original or the amendatory act, and was not germane to the subject of either. This view was taken by the court and it was said in the opinion: * * * 'After eliminating the unconstitutional portion of it, the remainder of the act is complete in itself, and capable of enforcement.' "

It may be said with a good deal of force that, if this court sees fit to do so, it may say that part of an act is unconstitutional, and that the part of the act which is unconstitutional is no inducement to the passage of that part of the act which is constitutional, and it may further say that the part remaining is complete in itself, and capable of being enforced. It is the opinion of the writer that we are on very dangerous ground whenever a court condemns part of an act as unconstitutional, and then proceds to say that

that part was no inducement to the passage of the other part, and that the part remaining is to be considered complete and capable of enforcement by itself. The danger is that, if the court does not like what is declared unconstitutional, it will have no trouble in rejecting it, but, if it likes what is left, it will want to keep it, and there is no rule by which it can be told with certainty what the opinion of the court will be. It may like what is left and, if so, it will retain it. If the court desires to defeat the whole act, it is so easy for it to say that the unconstitutional part was an inducement to the passage of the other part. If it wants to keep the other part, it will say that the unconstitutional part was no inducement. The whole matter is pure speculation. It will dislike what it declares unconstitutional, and, if so, it will put it out. This doctrine is objectionable, no difference how many times this court in the past has said that it could be resorted to. The fact is one of personal preference of the judge or judges which determines their action. The attempted rule is as fleeting and intangible as the end of a rainbow. This sort of rule makes the court a lawmaker. It gives it legislative powers. Whenever it concludes to go in and nullify part of an act upon the ground that it is unconstitutional, it can keep the remainder, or put it out, just as it pleases. If it puts the whole act out, the effect is to revive a discarded law, like the 50 cents a day in this indentical case. Here is a case where the legislature contemplated one thing and attempted to do it. It declared for the lowest bidder. The supreme court declares for a law that the legislature had pronounced repealed. It may be argued upon humanitarian grounds that it is a bad thing to let the contract to the lowest bidder. It may be said that he would fill the prisoners with diluted and dangerous food. But that is a matter which might be met in some other way; perhaps by the employment of an intelligent and humane inspector.

Of course, it can be further said that it might be made the duty of the sheriff to run a boarding house of this size in a clean, capable and efficient manner, so that the prisoners would get good food. The sheriff should be pro-

vided for; if not by fees, then by a liberal salary; but our court should not be required to render any decision likely to be misunderstood as a juggling or sleight of hand performance. Any one capable of analyzing the cases referred to might come to that conclusion. There is no way to avoid this sort of thing as long as the whim of the individual may become the law of the court.

LOUIS BLOOM V. STATE OF NEBRASKA.

FILED APRIL 3, 1914. No. 18,296.

1. **Criminal Law**: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted in a criminal case on the ground of newly discovered evidence, unless it is made to appear that the newly discovered evidence is material, is not doubtful in character, and that the defendant could not by the exercise of reasonable diligence have discovered and produced it at the trial.
2. ———: WITNESSES: NECESSITY OF CALLING. It is not required that all the witnesses whose names are indorsed upon an information must be called at the trial.
3. ———: RECEIVING STOLEN GOODS: EXISTENCE OF CORPORATION: PROOF. In a prosecution for knowingly receiving goods which had been stolen from the freight cars of a railroad corporation while being transported, strict proof as to the existence of the corporation is unnecessary. It is sufficient to show that the company named in the information was, at the time charged, operating the railroad, and that the goods sold were stolen from freight cars upon its tracks. This establishes its *de facto* existence, which is sufficient.
4. ———: REFUSAL OF INSTRUCTION. It is not error to refuse an instruction, where another one is given by the court upon its own motion covering the ground.
5. ———: INSTRUCTIONS: FAILURE TO REQUEST. It is not reversible error for the court to fail to instruct as to the defense of alibi, where the defendant makes no request for such instruction.

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

James E. Leyda, Edwin Falloon and *T. J. Doyle,* for plaintiff in error.

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

LETTON, J.

Plaintiff in error was convicted upon the charge of buying stolen property, knowing that the property was stolen. He brings the case here for review.

The first contention made is that there is not sufficient evidence to sustain the verdict. It is impossible, within the proper limits of this opinion to set forth all the evidence. Plaintiff in error, hereafter called the defendant, had a small shop or store in Falls City for the sale of clothing, notions, etc.

The testimony in behalf of the state is to the effect that the goods, consisting of a large number of overalls, a number of boxes of cigars and some tobacco, were stolen from freight cars of the Chicago, Burlington & Quincy Railroad Company standing in the railroad yards at Falls City, and that the thieves, Norman and Merle Bonner, sold them to the defendant on or about Sunday, July 21, 1912; that Norman Bonner told him at the time that the property was stolen; that the marks or tags were afterwards removed from a number of the overalls and were intermingled by Bloom with other overalls on the shelves; and that, when the officers asked for the goods he got from the Bonners, Bloom showed them where the overalls were, and went into a back room and brought them a valise filled with the stolen cigars.

The testimony for the defense is that the goods were left in the store by Norman Bonner to be called for; that Bloom was in the country when they were left, Mrs. Bloom being in charge of the store and giving him permission to leave them; that the goods were not intermingled, but the bundle of overalls brought by Bonner was placed on a shelf by itself, covered with a black cloth; that none of them were sold by the Blooms, and no money was ever paid for them.

Several witnesses testify Bloom was at a farm five miles from Falls City on Sunday, July 21, 1912. Part of the testimony of the Blooms is so strongly impeached by other credible witnesses that it tends to weaken their whole story, and this probably had its effect with the jury.

While there is a direct conflict in the testimony, we think it was ample to support the verdict, if the jury believed the witnesses for the state.

It is next assigned that the sheriff was disqualified to select talesmen on account of his bias and prejudice against the defendant. It is shown that all that the sheriff had to do with the selection of the jury was to call five talesmen to fill the panel at the beginning of the term of court at which the trial was had. There is no showing that any of these talesmen were jurors, and no showing of any misconduct on the part of the officer.

Misconduct of counsel is next complained of. One Whitaker, a witness for defendant, was called to testify to the reputation and character of defendant. After testifying that he considered his reputation good for honesty and morality, he was asked by counsel for the state: "Don't you know the city wouldn't let him run a pawnshop down there?" This was objected to, and the objection sustained. He was also asked whether he had heard of the trouble that Bloom had had with a machinist about a ring. This was also objected to, and the objection sustained. The nature of the questions themselves was not out of the ordinary; no attempt was made to carry on this line of questioning after the court sustained the objections; and we find no prejudice to defendant in this matter.

The fourth assignment is that the court erred in not granting plaintiff a new trial on the ground of newly discovered evidence. The affidavit of one V. D. Kelso is to the effect that on a Sunday in July, 1912, when he went to deliver ice to Mrs. Bloom, he met Norman Bonner in Bloom's store; that at that time there were one or two bundles lying on the floor in the room; and that Bloom was not there. At the trial Norman Bonner testified that Kelso was an iceman and lived in Falls City, and that he was in the room

at one time when Bloom paid him money for the goods. We see no reason why a subpœna could not have been issued for Kelso at any time after Bonner testified. A party cannot, with knowledge of the existence of a witness within reach of a subpœna, refrain from calling him, and then, after a trial has been had resulting in an adverse verdict, procure a new trial on the ground of newly discovered evidence. The affidavit of one Foster is also filed to the effect that one day in July he picked up a pair of overalls from a bunch on the shelf, and that he asked Mr. Bloom the price; that defendant replied they were not his overalls, at the same time calling Foster's attention to overalls on another shelf, which he stated were his, and which he would sell, and saying, referring to this pile of overalls and a grip, that they had been "left there by a fellow last Sunday," and the "fellow hadn't come after them yet." This affidavit is inconsistent with the testimony of both Mr. and Mrs. Bloom, since, according to their testimony, the stolen overalls were covered with a black cloth as soon as placed upon the shelf and during the time they were in the store. Furthermore, this conversation is said to have occurred several months before the trial. Bloom says he had forgotten the man with whom he spoke; but there is no showing that he made any effort to find this man before the trial. Foster was a resident of Falls City, and it would seem that soon after the trial was had his affidavit was obtained. We think due diligence in the endeavor to procure the testimony of these witnesses before the trial has not been shown, and doubt that, if received, it would affect the result.

It is next complained that, because the name of Merle Bonner was upon the information, he should have been called to the stand by the state, and that failure to do so is reversible error. There is no statutory requirement in this state that makes it incumbent upon the state to call witnesses whose names are indorsed upon an information. Furthermore the record discloses that Merle Bonner is deficient in mentality, and that, if he had been called by the prosecution the defense might have had a good reason

to complain of the action of the state in attempting to use the testimony of such a witness in order to convict the defendant. He was called as a witness by the defendant, but his testimony is so incoherent and inconsistent with itself in several respects as to demonstrate the inadvisability of his being called as a witness, either by the state or the defendant.

What is said in this connection applies to the complaint that, since Merle Bonner was a hostile witness, the court erred in refusing to permit the defendant to impeach him by showing that he had made statements at the preliminary trial inconsistent with his present testimony. Moreover, the witness was permitted to testify to several statements he had made at the preliminary, and questions asked, to which objections were sustained, did not tend to impeach.

Complaint is made of instructions Nos. 1 and 2 that they omitted to state the issue as to whether the Chicago, Burlington & Quincy Railroad Company was a corporation, and the issue of an alibi. Instruction No. 1 merely states the allegations of the information. Instruction No. 2 informs the jury of defendant's plea of not guilty, and gives the law as to the presumption of innocence and the duty of the state to prove guilt beyond a reasonable doubt. There is no error in this instruction.

Instruction No. 2 is also complained of for the same reasons. This instruction restates the material allegations of the information, and directs the jury to acquit the defendant if these are not established beyond a reasonable doubt. There is no error in this instruction. With respect to the claim that neither the instructions of the court nor the evidence cover the allegations in the information that the property was stolen from a corporation it may be said that the information charged that the Chicago, Burlington & Quincy Railroad Company was a corporation, and the proof established that a company known by the name given in the information was as a matter of fact carrying on the business of transportation under such name. This is sufficient evidence of the identity of the owners of the property. In *Braithwaite v. State,* 28 Neb. 832, this court cited with

approval and followed the case of *Burke v. State,* 34 Ohio St. 79. In that case the accused was charged with breaking into a railroad car of the Pittsburg, Cincinnati & St. Louis Railroad Company. There was no allegation in the indictment that the company was a corporation. The court held that "it is sufficient to prove by reputation that there was, at the time when the crime is alleged to have been committed, a corporation known by that name, operating such road, and carrying goods, stock, and passengers for hire in its cars running along said company's road. A *de facto* existence of the corporation is only necessary to be shown." In this case the information alleged the corporate character of the railroad company, and the proof established its *de facto* existence. That is all that was required.

It is assigned that the court erred in refusing to give instruction No. 5, to the effect that, although the wife may have known the goods were stolen, this would not be sufficient to justify the jury in returning a verdict of guilty, although the defendant may have passively consented to what his wife had done without taking any part in the transaction. There was no evidence in the case to which such an instruction was applicable. No claim is made, and no one testified, that Mrs. Bloom ever purchased any goods. Instructions should have reference to the evidence in the case, and there was no error in this refusal.

Complaint is also made that the court failed to instruct the jury as to the defense of an alibi. No request was made to instruct upon this issue, and under such circumstances the failure to do so was not reversible error. *Heidelbaugh v. State,* 79 Neb. 499; *Ferguson v. State,* 52 Neb. 432.

The assignment that the court erred in permitting proof as to the shipping of a trunk containing a part of the stolen goods to Beatrice by Bonner is also untenable. The evidence was corroborative, and, while collateral in its nature and somewhat remote, it was within the discretion of the trial court to admit the same. Unless an abuse of discretion is shown which results in prejudice to the rights of the accused, a reviewing court will not interfere with the judgment on this account.

Complaint is made of the refusal to instruct, at defendant's request, that "the witnesses Merle Bonner and Norman Bonner are accomplices," and to caution the jury that for that reason their testimony should be acted upon with great care and caution. The testimony of both the Bonners showed that they were convicted criminals. Their answers to questions and the nature of their testimony clearly demonstrated to any man of ordinary intelligence that their testimony was of such a nature that it should be closely scrutinized. No sensible man would accord their testimony unless corroborated by circumstances or by credible testimony a tithe of the weight which would be accorded to that of an ordinary witness. We think that, while the court might with propriety have instructed the jury to use caution in considering their testimony, it would be an insult to their intelligence to hold that the refusal to give such an instruction was prejudicial, and that a new trial should be granted for such reason. Moreover, it may be doubted whether the tendered instruction is an accurate statement of the law where, as in this state, the crime charged is a substantive offense. 24 Am. & Eng. Ency. Law (2d ed.) note 1, p. 51.

In the reply brief it is complained that a lawyer aided in the prosecution who had not been appointed by the court for that purpose. This point should have been made in the main brief, and we are not bound to consider it. At the trial defendant was represented by two able and experienced counsel who made no objection. After a trial and conviction has been had, it is too late to interpose such an objection, and the right to object to other counsel participating has been waived.

Under section 9050, Rev. St. 1913, it is provided that "no indictment shall be deemed invalid nor shall the trial, judgment or other proceedings be stayed, arrested, or in any manner affected," for any "defect or imperfection which does not tend to the prejudice of the substantial rights of defendant upon the merits." Under section 9065, Rev. St. 1913, the provisions of the code in relation to indictments shall, as near as may be, "apply to informations, and all

prosecutions and proceedings thereon." None of the matters complained of have operated "to the prejudice of the substantial rights of the defendant upon the merits."

The judgment of the district court is therefore

AFFIRMED.

HAMER, J., dissenting.

The principal witness in this case, Norman Bonner, swore that he was an inmate of the Iowa penitentiary, and before that that he was in the Missouri penitentiary. He claims to have been convicted of felonies three times. He seems to have been permitted to go to Joplin, Missouri, to the deathbed of his mother. There he escaped from the guards and took his 18-year old brother to Kansas City with him, and then to Falls City, Nebraska, where he broke into the freight cars of the Chicago, Burlington & Quincy Railroad Company and proceeded to steal. He is shown to be a professional thief. He claims that he sold the stolen goods to the defendant Bloom. Bloom was keeping a little store at Falls City. The charge is that he (Bloom) purchased personal property belonging to the Chicago, Burlington & Quincy Railroad Company, knowing that the same had been stolen, and with the intent to defraud the owner. I do not like to send anybody to the penitentiary on the testimony of such a witness as Bonner, and especially if he is contradicted and also contradicts himself. Both is done in this case. His story is in many respects unreasonable and improbable. While the facts should be found by the jury, the reviewing court cannot be expected to shut its eyes to the incongruous things pictured by the witness, nor is it expected to be deaf when the witness with particularity relates what is improbable, and his testimony is controverted as far as it goes. One of the improbable things in his statement is that he made *seven trips* to the store on this particular Sunday. He claimed to be *carrying up the goods*. It is unlikely that any man of intelligence would go seven times into a store with grips on Sunday. He would be almost sure to attract the attention of the public. He also claimed that part of the time he went

in where there was a board off in the *back fence, and came out at the front.* That would be equally likely to attract attention. He claimed to have got acquainted with Bloom when Bloom was at Lincoln. He claimed the acquaintance orignated through Bloom's *crooked work,* but on further examination it seems that he had never seen Bloom while he lived at Lincoln. Later on he did not know whether Bloom had ever lived at Lincoln or not. He testified that he never bought any goods of Bloom while he lived at Wymore; that he never sold him any while Bloom was living at Wymore. When closely pressed as to how he came to get acquainted with Bloom he said: "If I would tell you I would incriminate some of my partners." A little later on he claimed that he stole these particular goods *because Bloom asked him to.* The evidence shows that he came direct to Falls City, and therefore *he had no opportunity to see Bloom.* He testified that he broke into the cars *before* he got to Falls City; that he broke into the cars *on the way* to Falls City. He seems to have lost no opportunity to avoid telling the truth. He cheerfully testified that after he got to be 18 or 20 years old he was in the penitentiary most of the time. He testified that he was making the trips to Bloom's store on Sunday all day. The other brother said the defendant only made three trips. Norman Bonner testified that there were other people in the front room that day; that Bloom and himself would go in the back room, and then come out into the *front room to settle up;* that would be before people. It is not a very likely story that they would settle there in the presence of a crowd of people, but, of course, if Bloom was guilty, they may have done so. He testified that Bloom paid him about $80, and that it was mostly paid in silver. He testified that he gave the money to his brother. His brother testified that Norman *never gave him any money,* neither that day, nor the next day, nor at any time. Norman seems to have kept all of it, if there was any. Norman testified that he carried up two grips each trip on that Sunday. Sadie Halbert testified that the defendant, Louis Bloom, was out to their house on that day; that he came

out about half past 10 or 11 o'clock, and that he left at 4 or 5 in the afternoon. William Honea testified that he was at Louis Halbert's house on Sunday, the 21st of July, when Bloom came there about half past 10 or 11; that Bloom ate his dinner there, and left between 4 and 5 o'clock that afternoon. W. H. Guilliams testified that he knew Bloom, and saw him at Halbert's on that Sunday; that he ate dinner with him. Jesse Smith testified that he worked for Louis Halbert, and saw Bloom there at Halbert's house that Sunday, July 21, 1912; that Bloom came down to the sawmill where he was at work. Mrs. Bloom's statement that the goods were brought there in a big bundle is not unreasonable. The cigars were in a grip. She denies that Bonner came into the store the back way. The defendant testified to making the trip out to Halbert's place, and that he was there on the 21st day of July, 1912; that he did not see at his store either Merle Bonner or Norman Bonner until the officers came after the goods; that he never bought any goods of either one of the boys; that he never sold any goods in the store that did not belong to him; that he never sold any cigars out of the valise; that he never opened the valise. He also testified that there was no fence between the back part of the building and the alley; that it had always been open. This was a fact or it was not a fact. If it was not a fact, it was easy to show it. Amos E. Gantt thinks the fence may have been there, but is uncertain. John Wilson testified that he did not recollect ever seeing a fence at the rear of Bloom's premises; that there might have been a fence at one time, but there had not been one there for the *last several years.*

This is very rickety testimony upon which to send a man to the penitentiary, even if he is described as a Jew by the young man who voluntarily confesses that he is himself a burglar and a thief, and who tries by his testimony to bring Bloom down to a level with himself. This young man Bonner not only makes an assault upon this particular Jew, but he makes an assault against a large number of Jews, when he testifies that they are in the habit of buying stolen goods. He was probably testifying in that way for

the purpose of securing the conviction of Bloom. As he had not seen Bloom before for many months, nor recently until after the goods were stolen, that was a subject upon which he probably had a good deal of anxiety. He seems to have indicated this anxiety. He characterized the Jews as being in the habit of buying stolen goods, and then spoke of Bloom as a Jew. In addition to that, he tried to create the impression, without any apparent foundation for doing so, that he and Bloom had been guilty of crooked transactions together in Lincoln.

It is in evidence that the defendant Bloom has the reputation of being a law-abiding citizen. That is all the reputation he could have, even if he had belonged to another race and had a different religion. "Though good reputation of accused does not prove innocence, it carries weight where the proof is doubtful and circumstantial." *Gerke v. State,* 139 N. W. 404 (151 Wis. 495).

It would seem that the trial court was not quite fair to him. Counsel for the defendant requested the following instruction: No. 10: "The jury are instructed that the witnesses Merle Bonner and Norman Bonner admit that they stole the goods which they testified were sold to Bloom. By their own testimony they are accomplices and their testimony should, for that reason, be acted upon with great care and caution, and if, after a careful examination of their testimony, the jury are not satisfied that it is true, and do not believe that they can safely rely upon it, then the jury should return a verdict of not guilty." These witnesses must have been of the most unsatisfactory character. It was the duty of the court to caution the jury against them. This the court did not do. The fact that it did not do so does not seem to be fair. The jury had the testimony of these witnesses before them. It went to them under the sanction of the court. The mere fact that the court let it in compelled the jurors to consider it. It is easy to say that these witnesses were unworthy of belief, but how does the jury know that so long as no one tells them? When the court let this sort of evidence go before the jury, it

stood sponser for the fact that it was to be considered. The jurors are not lawyers; they are simply jurymen.

The defendant requested the giving of the following instruction: No. 5: "The jury are further instructed that, although the wife may have known or thought the goods at the time she bought them were stolen, this would not be sufficient to justify you in returning a verdict of guilty, though the defendant may have passively consented to what his wife had done without taking any active part in the matter." This instruction, or one similar to it, should have been given. This is a case where there should be a *discrimination between the defendant and his wife.* Under the testimony for the defense, only the wife was there at the time the goods were brought into the store. Whatever she said and whatever she did was not binding upon her husband. The jury should have been told that fact. It should be remembered that the jury were composed of men who are not lawyers. They were likely to receive the impression that the husband's act acquiescing in the purchase made by his wife bound him, and, if it did, he would be criminally liable, although he was not present and had nothing to do with the transaction.

It is a familiar rule that the defendant is entitled to have his theory of the case go before the jury.

Merle Bonner is weak-minded. It is stated by counsel in some of the objections made that he had been in the Institution for Feeble-Minded. He swore that he was eighteen years old the 18th of October; that his parents were both dead; that he had not gone to school very much; that he could read a little, "not to amount to anything;" that he understood that the clerk wanted him "to swear against the Jew." Undoubtedly there was an atmosphere there about the court that was unfriendly to the Jew, and, although this witness was only half-witted, he felt the pressure. He testified that they (his brother and himself) changed from a passenger car to a freight car as they were coming up to Falls City and before they got there, and that they *did it to get these goods;* that his brother suggested

getting the goods. It will be remembered in this connection that Norman Bonner testified that Bloom *told him to steal the goods.* Of course, if Norman suggested stealing the goods before they arrived at Falls City, Norman swearing that Bloom *told him to steal the goods is all a fiction.* When they got to Falls City, he testified, the goods were thrown out along the side of the track down by the stockyards. He says this was at 4 or 5 o'clock in the morning.

Eaton testified that he went to Bloom's store; that Aldrich said, "Bloom, get those goods you got from these boys;" that then Bloom started around and commenced getting the overalls, and that his wife stepped up and said, "I'll get them; you wasn't here." Eaton testified that the overalls were not covered up. "Q. Isn't it a fact there was some kind of clothing, I don't know what it was, over these overalls at the time and they were all taken out from that covering? A. No, sir; they wasn't."

L. L. Aldrich, the chief of police, testified that he went to the store along with Eaton, Johnson, and Merle Bonner; that "we were back there helping him, and Mrs. Bloom told him (her husband) to get out of the way when he went to get them." She said that she put the goods there, and that he was not there when the goods were left at the store.

Mrs. Bloom testified that the overalls were brought to the store on Sunday, the 21st of July; that her husband was out of town that day; that he had gone out to the country about half past 8 or 9 o'clock in the morning, and he did not return until 7 or 8 that evening; that one of these boys asked her if they could leave the bundle, and she said, "yes;" that this bundle was tied with a rope, and that one could see that it was overalls. She says that she untied the rope and put the overalls on the shelf, and that she put the suitcase that had the cigars in it under the lower shelf; that she did not know how many pairs of overalls there were; that she never sold any of them; that to her knowledge her husband never sold any of them. She describes the overalls *as a great big bundle;* she says the overalls were all in one pile; she says she cut the rope that was around the bundle; she testifies that she *untied the pack*

and put the overalls up on the shelf because they *were in her way; she put the cover on the overalls;* that her husband had nothing to do with it. She testified that she got the suitcase when the men came in and asked for it. It will be seen from her testimony that *she* assumed the management of delivering the goods to the chief of police; that she was inclined to crowd her husband to one side on the theory that *she knew* where the goods were, and that the *package* had been *left* with her.

The defendant testified that he first learned from his wife about the overalls and the suitcase being there; that he did not know about it until the Monday morning after they were brought there.

If the court had liberty to refuse this instruction, then it was at liberty to deny the defendant the privilege of being heard. I cannot sufficiently emphasize the fact that the jury are not composed of lawyers, and that jurors are taught that it is their *duty* to receive from the judge what he characterizes as the law. When he lets the evidence come before them, the jury feel *bound* to consider it. If he does not give them some sort of cautionary instruction, they are almost sure to accept the evidence as true.

It is said in the majority opinion that "It is assigned that the court erred in refusing to give instruction No. 5 (requested), to the effect that, although the wife may have known the goods were stolen, this would not be sufficient to justify the jury in returning a verdict of guilty, although the defendant may have passively consented to what his wife had done without taking any part in the transaction. There was no evidence in the case to which such an instruction was applicable. No claim is made, and no one testified, that Mrs. Bloom ever purchased any goods. Instructions should have reference to the evidence in the case, and there was no error in this refusal."

It is true that there was no *direct* testimony to the effect that Mrs. Bloom purchased the goods, but the goods *were there in the store;* because of the fact that *they were there,* it would be easy for the jury to jump to the conclusion that whether Bloom was there or not when the goods were

brought into the store would make but little difference. The jury were likely to say: "Suppose Bloom's wife took these goods in, but Bloom let them stay there does not that make him guilty?" The trouble with that sort of reasoning would be that they would be holding Bloom liable for an assumed criminal act of his wife. The majority opinion refuses or neglects to consider Bloom's danger. As lawyers, the other members of this court know that one person should not be held liable for the wrong of another except in special cases and under special circumstances, which do not apply in this case. But they know *that* because they *are* lawyers, and because they have been trained by *years of experience* to know that; but the gentlemen who sat as jurors did not have those years of experience, and they would be wholly unable to determine what the law was unless directed. The district court did not direct them. It left them in the dark and where they could jump onto Bloom as responsible for the act that his wife had not done, but which they *might assume that she did.*

A's wife, in A's absence, receives stolen potatoes, knowing them to be stolen. The jury find that A afterwards adopted his wife's receipt. This finding is not sufficient to sustain a verdict of guilty, as it is consistent with A's having passively consented to what his wife had done without taking any active part in the matter. *Regina v. Dring,* 1 Dears. & B. C. C. (Eng.) 329. Chief Justice Cockburn said: "The word 'adopted' may mean that the husband passively consented to what his wife had done, without taking any active part in the matter. In that case we think it would not be right to say that he was guilty of receiving. True it may mean that he did take such active part, but we cannot put this rigid construction upon the word 'adopted;' and it would be going too far to say, upon this finding of the jury, that the conviction can be supported." The opinion was unanimous.

No instruction given by the court contained the idea set forth in this request. We should remember that the defendant is found guilty upon the theory of the prosecution that he *knew* that the goods had been stolen. The danger

is that the jury came to its conclusion that the property was stolen because the jurors thought that Mrs. Bloom may have believed that it was stolen. They may have further thought that it was the *duty* of the defendant Bloom to make some sort of objection to it, although they may have considered that he was not present when the goods were brought into the store. The jury were likely to conclude that the act of the wife was the act of the husband, and, though performed in his absence, that it made no difference. In the consideration of this peculiar case, it was the duty of the trial judge to protect the defendant from the effect of any act of his wife. As I understand it, the majority opinion declines to look into the details of the case. The English case cited *looks in and acts.* Unless the testimony of the Bonners is accepted as true, there is no testimony against Bloom except that the goods were found in his store. I am unable to find any testimony that corroborates the testimony of Norman and Merle Bonner, and they dispute each other *all the time as* to *what* happened and *how* it happened. The testimony of the Bonners tends to show that they brought the goods to the store on the 21st of July. That seems to be their testimony, and that is the testimony of Mrs. Bloom. The defendant Bloom says that he was not there, and that he did not purchase the goods nor receive them, and four witnesses swear that on that Sunday he was out in the country all day. No one disputes the fact that he was out in the country all day on that Sunday except the Bonners.

The writer of the majority opinion may not believe in the Bonners generally, and this jury may have had the same impression; but if left at liberty to think the husband *adopted* the act of the wife, and so *was willing* to keep the goods, they may have thought they had the right to find the husband guilty, and that he properly was guilty. For this reason, there should have been an instruction as requested. In any event, there should be a new trial for this reason alone.

The questions asked the character witness on cross-examination were prejudicial. *People v. Huff*, 173 Mich. 620; *Elliott v. State*, 34 Neb. 48.

REESE, C. J., dissenting separately.

There was some evidence that, at the time the stolen goods were delivered at the store of defendant, he was not present and had no knowledge that they had been placed there until his return in the evening, when his wife informed him that she had given permission to have them left there temporarily by the person who had brought them and made the request that they be so left. With the weight of this evidence we have nothing to do. It is well settled by this and all other courts in this country that a litigant, whether in a civil or criminal case, has the right to have the jury instructed upon the issues and theories of each party, leaving the jury to decide the questions of fact. Upon the trial the defendant asked the court to instruct the jury: "Although the wife may have known or thought the goods, at the time she bought them, were stolen, this would not be sufficient to justify you in returning a verdict of guilty, though the defendant may have passively consented to what his wife had done without taking any active part in the matter." The instruction was refused, and no instruction given covering the proposition sought to be presented. We cannot say much in favor of the whole instruction as asked, but it is very clear that it presented to the court the well and long-established rule that the husband is not liable criminally for the acts of the wife in which he did not participate. I think the instruction should have been given (modified, if thought necessary), and to fail to do so was prejudicial and reversible error.

CATHERINE M. O'CONNOR ET AL., APPELLEES, V. ADA M. L. PETTY ET AL.; LEARY P. HALL ET AL., APPELLANTS.

FILED APRIL 3, 1914. No. 17,427.

1. **States: BOUNDARIES: RIVERS.** The boundary between Iowa and Nebraska follows gradual and imperceptible changes in the main channel of the Missouri river.
2. ———: ———: ———. A change by avulsion in the main channel of the Missouri river does not change the boundary line between Iowa and Nebraska.
3. **Quieting Title: JURISDICTION.** In a court of Nebraska, an action to quiet title should be dismissed, when it is found that the land in controversy is in Iowa.

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

R. E. Evans and *Edwin J. Stason,* for appellants.

A. M. Morrissey and *A. Van Wagenen, contra,*

ROSE, J.

This is a suit to quiet in plaintiffs title to lands between an abandoned channel of the Missouri river and its present channel. Plaintiffs claim to be riparian owners of definitely described, separate tracts in Dakota county, Nebraska. Defendants allege that the land in controversy is in Woodbury county, Iowa. The rival parties claim the territory in controversy as accretions to their riparian lands. From a decree in favor of plaintiffs, defendants have appealed.

One of the defenses pleaded is that the land in controversy is in Iowa, and that therefore the Nebraska courts are without jurisdiction to determine the issues. This defense seems to be established. Referring to the boundary line between the states as running north and south, the present channel is in places two miles east of the abandoned channel, and the river was formerly still farther east. For many years prior to 1893 the river gradually

changed from its extreme eastern channel westward beyond the present channel to the abandoned channel along the Nebraska bank. In the brief of plaintiffs it is conceded that the river in working westward moved gradually. This is shown by the evidence. Under well-settled principles of law, therefore, the boundary line between the states followed the center of the main channel to its western extremity. *Rober v. Michelsen,* 82 Neb. 48. The course of the river, the velocity of the current where it washed the Nebraska bank, maps, and convincing proof of witnesses lead inevitably to the conclusion that the center of the main channel, or the boundary between the states, was, in 1893, west of the land claimed by defendants. During that year, and for some years prior thereto, what is called in the record a "chute" marked the course of the present channel. The testimony indicates that, during floods, water poured through this chute, that in ordinary stages of the river there was little or no current there, and that in dry periods the water disappeared or stood in pools. The parties do not agree as to how or when this chute was formed. Plaintiffs contend that it was never land as distinguished from riverbed, and that it was the natural result of continuous action of the waters of the stream. The position of defendants seems to be that the chute was made in dry sand by the action of the wind after the river had passed its location in gradually working westward. Whatever the proper explanation may be, it is clear that the chute, before it was appropriated by the river as the present channel, which it now is, was not the main channel forming the boundary line between the states. From all of the evidence it seems clear that the change from the western channel to the chute occurred during a flood in 1894. It is certain that the old channel was abandoned. It is equally clear that the chute was an inviting course for a sudden change during a flood. While river waters occupied the western or abandoned channel during the years 1895 and 1896, and perhaps longer, the main channel suddenly changed from the old to the new, within the meaning of the law of avulsion, without changing the boundary between the states. *Nebraska*

v. Iowa, 143 U. S. 359; *Missouri v. Nebraska,* 196 U. S. 23. The land in controversy being between the abandoned channel and the present one, plaintiffs argue that, prior to the change, the disputed territory was riverbed as distinguished from land, that the river shifted its course about sand bars and that therefore the state boundary followed such changes in the channels. In discussing this phase of the case, however, plaintiffs do not question proof that, out of a tract consisting of more than 1,200 acres, at least a body of 100 acres was not swept away by the flood of 1894, though the river shifted its course two miles in places. The conclusion is that the land claimed by defendants is in Iowa, and that the district court was without jurisdiction. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

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

ROMA LOVE, APPELLANT, V. HOWARD C. PARK ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,556.

Equity: SUIT TO RECOVER PLEDGE: RELIEF. In an independent suit in equity for affirmative relief, restoring to plaintiff corporate stock legally pledged as security for a debt, and quieting his title to the pledged property, on the ground that the lien of the pledge has been extinguished by a rejected tender of the amount due pledgee, payment of the debt may be made a condition of granting the relief sought by plaintiff.

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

Courtright & Sidner, for appellant.

George L. Loomis and *H. C. Maynard, contra.*

ROSE, J.

This is a suit in equity to restore to plaintiff, free from the lien of a pledge, 63 shares of corporate stock, of the par value of $100 each, issued in a single certificate by the Fremont Milling Company, defendant, a Nebraska corporation. When plaintiff was the owner of the stock, it was pledged to secure a note for $2,500, executed May 2, 1910, and payable to Howard C. Park, defendant, at the Central National Bank of Columbus, Ohio. The makers of the note are Fred C. Kingsbury and Para Love Kingsbury his wife. The latter is plaintiff's sister, and all three live together at Columbus, Ohio. Fred C. Kingsbury previously owed the Central National Bank $8,850, which he was unable to pay. In that situation he procured from Park, individually, an additional loan, for which the note described was given. Plaintiff did not sign it or personally obligate herself to pay the debt, but she indorsed her stock certificate in blank and delivered it to Kingsbury, who pledged it to Park. Plaintiff bases her right to restoration of her stock, free from incumbrance, on a rejected tender to Park of the amount due him individually. That plaintiff tendered to him $2,500 and accrued interest is not disputed. She relies for a recovery on the principle that the lien of a pledge is extinguished by a rejected tender of the amount due pledgee on the debt secured. Pledgee interposed the defenses that plaintiff's stock was pledged to secure the indebtedness due from Kingsbury to the bank, as well as that to Park; that the latter had no right to accept the tender or to perform any other act obligating him to surrender the pledged certificate of stock without protecting the lien of the bank, and that plaintiff is not entitled to affirmative equitable relief without paying the debt secured by the pledge. During the conference in regard to the tender, the lien of the bank was discussed. On the issue of a pledge to the bank, the evidence is conflicting. Plaintiff said she never authorized Kingsbury to pledge her stock to the bank, and he testified that he never did so. On the other hand, plaintiff indorsed her certificate in blank and committed it to Kingsbury for delivery to Park.

In testifying to the conditions under which Kingsbury procured the loan of $2,500, Park said: "I refused to loan him the money as cashier of the bank. He then asked if I couldn't secure it for him personally. This I attempted to do, but was unable to do so. He then stated that Miss Love had some stock of the Fremont Milling Company which she would permit him to use as collateral. I stated to him that the only way I could secure the loan would be to put up collateral of my own and make a personal matter of it. He stated that, if I would do that and secure the money for him, the excess of the Love stock as collateral should be retained by the bank as collateral to their loans, for which he had been demanding payment. By their loans I mean the loans of Mr. Kingsbury and his wife from the Central National Bank, which then approximated $8,850. I secured information regarding the value of the stock, which was given as worth from $125 to $140 per share. I then loaned Mr. Kingsbury the $2,500, taking a note made payable to myself and signed by himself and wife, with the certificate of stock in the Fremont Milling Company as collateral, in keeping with our previous conversation, as just stated."

The trial court found that Kingsbury had no authority to pledge the stock for any purpose except to secure his debt of $2,500 to Park, and that plaintiff was the owner of the certificate, subject to pledgee's lien for that amount and interest. By the decree restoration of the stock to plaintiff and the quieting of title in her were made conditional upon payment of Kingsbury's indebtedness to Park. Plaintiff has appealed.

In reply to the plea that the lien of the pledge was extinguished by the rejected tender, Park's rejoinder is: The decree in equity is justified by the maxim, "He who seeks equity must do equity." In determining this question, the reasons given by the trial court for the conclusion reached below are immaterial. By the pleadings, the proofs and the tender, plaintiff established the validity of the pledge to Park to secure Kingsbury's note for $2,500, when it was made. The tender has not been kept good. The secured

debt has not been paid. There is now no offer to pay into court or to Park the amount tendered. It is undisputed that the loan to Kingsbury could not have been procured without the pledge. Since plaintiff, in a suit instituted by herself, is in a court of equity affirmatively seeking the quieting of her title to the pledged stock, under the technical rule of law that the lien of a pledge is extinguished by a rejected tender, may the conscience of the chancellor, under the circumstances narrated, respond to the promptings of equity? In discussing the maxim that "he who seeks equity must do equity," an eminent text-writer says: "It may be applied, in fact, in every kind of litigation and to every species of remedy." 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 385. This maxim has been applied in a suit to quiet title to land by removing the cloud of an expired mortgage lien, such affirmative, equitable relief having been granted only upon payment of the outlawed debt. *Kerr v. McCreary*, 84 Neb. 315; *Bank of Alma v. Hamilton*, 85 Neb. 441; *Bell v. Dingwell*, 91 Neb. 699. The doctrine has also been applied to a pledge of corporate stock. *Assignee of Savings Bank of Louisville v. Grand Lodge*, 5 Ky. Law Rep. 328.

The conclusion is that the decree, in requiring payment of the indebtedness to Park as a condition of granting to plaintiff affirmative relief, responds to the demands of equity. For that reason, it is

AFFIRMED.

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

JUST C. GRASBORG, APPELLEE, V. H. F. HAHN & COMPANY, APPELLANT.

FILED APRIL 3, 1914. No. 17,577.

Conversion: PLEADING AND PROOF. In a suit to recover damages for the conversion of a stock of merchandise alleged to have been converted by defendant, it is error on the part of the trial court to admit proof of, and by instructions to allow a recovery for,

the conversion of store fixtures not alleged in the petition to have been converted.

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

Burkett, Wilson & Brown and *Baldrige, Keller & Keller,* for appellant.

Byron G. Burbank and *Mockett & Peterson, contra.*

ROSE, J.

Plaintiff sued to recover damages for conversion. The jury returned a verdict in his favor for $3,988.08. To prevent the granting of a new trial, plaintiff filed a remittitur for $1,000 in conformity with a ruling of the district court. From a judgment for $2,988.08, defendant has appealed.

When plaintiff was running a retail jewelry store in South Omaha, February 19, 1906, he was indebted to defendant, a wholesale jewelry company of Chicago, in the sum of $772.06. On that date, for the expressed consideration of $800, plaintiff executed a bill of sale, absolute in form, transferring to John E. Friedland, for defendant, the stock of merchandise in plaintiff's store. The bill of sale also included "one iron safe and six showcases and four wall cases with connecting mirrors, and all other furniture." In the petition, which was not filed until August 24, 1909, plaintiff pleaded an oral agreement obligating defendant to sell at public auction enough of the merchandise to pay its claim and expenses, and to turn back to plaintiff the unsold property. At plaintiff's store defendant conducted auction sales of goods daily from February 21, 1906, until March 7, 1906, the proceeds of the last day's sale being $11.75, and the total, including some goods furnished by defendant for the purpose of the auction, being $860.55. Promptly after the closing of the auction, defendant packed and shipped to Chicago practically all of the remaining stock, and sold the safe and store furniture or fixtures. By pleadings and proofs plaintiff attempted to show that defendant had a lien only for the amount of its

claim; that it agreed to turn back the stock, after paying the debt from the net proceeds of auction sales; that it converted to its own use defendant's property of the value of $3,522.67; and that it was liable for that sum with interest from March 7, 1906. Defendant asserts in its answer and proofs that there was no oral condition attached to the bill of sale, and that the net proceeds of the property transferred did not exceed plaintiff's indebtedness.

The principal argument of defendant on the appeal is directed to these propositions: There was error in admitting testimony that the market value of the safe and the fixtures in plaintiff's store was between $1,500 and $2,000; there was error in an instruction that the fair market value of the fixtures was a material allegation of the petition; there was error in an instruction requiring the jury, when determining the amount of plaintiff's recovery, to ascertain the fair market value of the safe and the fixtures remaining unsold at the close of the auction sale. The basis of these assigned errors is the failure of plaintiff to allege in his petition facts constituting a plea that defendant converted to its own use the safe and the fixtures in plaintiff's store. The question is a serious one. As an element in plaintiff's recovery for conversion, testimony, over defendant's objection, was admitted to show that the fair market value of the safe and the fixtures was between $1,500 and $2,000. Did defendant, a wholesale jeweler, convert to its own use property of that value, under the pretext of securing and collecting a debt of $772.06, after having sold a large part of the retail stock at auction, and after having shipped the remainder to Chicago? The duly executed bill of sale, absolute in form, purported to transfer the safe and the fixtures to defendant. In that instrument the stock of merchandise and the safe and the fixtures were separately described. The conversion of the merchandise not sold at public auction is formally charged in the petition with unnecessary particularity. Most of the allegations relating to the retail stock make no reference whatever to the safe and the fixtures. Plaintiff asked leave during the trial to amend the petition by inserting a definite plea that defend-

ant converted the safe and the fixtures to its own use, but permission was refused. If defendant is answerable in this action for the conversion of the safe and the fixtures, the protection of its rights required plaintiff to insert in his petition a proper allegation of the facts, thus giving it an opportunity to ascertain and prove the market value of the converted property four years earlier. The statutory requirement is that the petition must contain "a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition." Rev. St. 1913, sec. 7664. Such a statement charging the conversion of the safe and the fixtures is not to be found in the petition. Nearly all of the formal allegations which plaintiff employed in stating his cause of action for conversion of the merchandise are not only omitted from the matter relating to the safe and the fixtures, but the petition contains the following language: "Defendant disposed of certain of the fixtures, part of said stock of goods, wares and merchandise, for the sum of $900 cash, and then falsely and fraudulently represented to said plaintiff that said defendant had disposed of said fixtures for the sum of $450." If plaintiff did not intend to charge conversion of the proceeds of the safe and the fixtures, as distinguished from the fixtures themselves, why did the petition contain this allegation? Conversion of proceeds alleged to be $900 and conversion of property shown by testimony to be of the market value of $1,500 or $2,000 are not the same. On the measure of plaintiff's recovery different evidence is required in making defenses. Defendant was entitled to a definite statement of the cause of action involving the safe and the fixtures. It was not made, unless a conversion of the proceeds was charged. Under the petition proof of the market value of the safe and the fixtures was erroneously admitted in evidence, and for the same reasons the instructions on that subject were erroneous. That the errors prevented a fair trial is manifest. While the trial court required a remittitur for $1,000, there is nothing to show that this requirement was attributable to the errors pointed out or that they were thus cured.

For the reasons stated, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

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

RALPH E. WALTZ, APPELLEE, V. CHARLES G. ELMORE, APPELLANT.

FILED APRIL 3, 1914. No. 17,582.

Appeal: AFFIRMANCE. Error in instructions which are not prejudicial to appellant is not a ground for reversing a judgment against him.

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

Fisher & Rooney and *Dunham & Aye,* for appellant.

Albert W. Crites and *Edwin D. Crites, contra.*

ROSE, J.

This is an action to recover damages for personal injuries to plaintiff. When he was riding a bicycle westward on Second street near the west line of its intersection with Bordeaux avenue in Chadron, he collided with defendant's automobile. The collision occurred at or near the Second street crosswalk on the west side of the intersection of Bordeaux avenue, south of the Blaine hotel, a few feet south of the north curbline of Second street. In the petition it is alleged that defendant approached from the west at an excessive rate of speed, negligently turning to his left upon meeting plaintiff and running into him, thus causing the injuries of which complaint is made. Defendant denies negligence on his part, and alleges that he is a physician; that he had stopped in front of the Blaine hotel to make a professional call; and that, while his automobile was standing there, plaintiff ran into it on his bicycle. Defendant fur-

ther pleaded that plaintiff's injuries were caused by his own negligence. The evidence adduced by the parties is as conflicting as the allegations of their pleadings and would support a finding either way. Plaintiff recovered a verdict for $575, and from a judgment in his favor for that sum defendant has appealed.

The following instruction is challenged as erroneous: "If you believe from the evidence that at the time of the collision the defendant was not answering a professional call at the Blaine Hotel, and that in driving along said street his purpose was to go elsewhere than at the said hotel, then it was his duty to keep to the right-hand side of the street, and if he did not do so, and a collision occurred as a result of his not keeping on the right-hand side of the street, then he would be liable for all damages which resulted from said collision."

The objections to this instruction are that it directed the jury that defendant had no right to drive on the left-hand side of the street, except for the purpose of making a professional call at the Blaine Hotel, and that if he did not keep on the right-hand side of the street, and a collision resulted, he would be liable for damages, regardless of negligence. While the instruction should not have been given in the form quoted, the criticisms do not show reversible error for the following reasons: The instruction challenged should be considered as a part of the entire charge of the court. Another instruction contained the direct statement that plaintiff could not recover, if the collision occurred after defendant had stopped his automobile. A part of the charge not challenged in this court by an assignment of error contains the following language: "The burden of proof is upon the plaintiff; and, before he can recover a verdict against the defendant, he must prove by a preponderance of the evidence that on or about the 7th day of September, 1911, he was traveling west on Second street in Chadron, as alleged in the petition, and was met on said street by defendant with his automobile, and that in passing on said street the defendant carelessly and neg-

ligently and unlawfully failed and omitted to turn his said automobile to the right or south side of the center of said street to permit this plaintiff to pass on his position in the road to the left or north side of the center thereof, but did carelessly and negligently drive his said automobile on the left-hand side or north side of the center of said road, and did negligently and carelessly drive his said automobile against the plaintiff and the bicycle upon which he was riding upon said highway, and thereby then and there the plaintiff, wholly without fault on his part, was thrown by the defendant with great force and violence off from said bicycle upon the automobile of the defendant."

As a whole, therefore, the instructions do not charge that the act of defendant, in driving on the wrong side of the street, was of itself negligence for which plaintiff is entitled to recover. Evidence of negligence on part of defendant in failing to turn to the right upon meeting plaintiff is required as a condition of recovery. The objections of defendant, when the entire charge is considered, do not seem to disclose prejudicial error in the instruction criticised. For the same reasons, similar objections to another instruction are overruled.

The following instruction is also criticised as erroneous: "You are instructed that the defendant had no right to operate his automobile on a public highway within the city of Chadron at a speed greater than 12 miles per hour, or at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said Second street, at the time or the condition of Second street, or at a rate of speed such as to endanger the life or limb of the plaintiff; and, when approaching the intersection of said Second and Bordeaux streets, it was the duty of the defendant not to drive his automobile exceeding six miles per hour, unless you find that he was a physician answering an emergency call demanding excessive speed, and if you find from the evidence that the defendant at the time was not answering an emergency call demanding excessive speed, and

that by reason of his traveling at such excessive speed he occasioned the injuries and damage sustained by the plaintiff, you should return your verdict for the plaintiff in the amount of the damage thus caused to him."

This instruction is erroneous and should not have been given. It limits defendant to a speed of six miles an hour when approaching a street intersection, while the statute forbids a speed exceeding six miles an hour only when a motor vehicle is crossing a street intersection. Comp. St. 1911, ch. 78, sec. 146. The question is: Should the judgment be reversed for this error? Under the code an error which does not affect the substantial rights of appellant must be disregarded. Code, sec. 145. Defendant pleaded and testified that his automobile was standing in the street when struck by plaintiff. If the jury found in favor of defendant on this issue, they were instructed by the court that there could be no verdict against him. On an important phase of his defense he was disbelieved. There was a direct and positive instruction that plaintiff was not entitled to recover without proving by a preponderance of the evidence that his injuries resulted from the negligence of defendant in failing to turn to the right upon meeting plaintiff. On the principal issue in plaintiff's case the jury necessarily found in his favor. These and other considerations arising from an analysis of the entire record indicate that the jury believed plaintiff and his witnesses; that belief in their veracity controlled the issues of fact; and that the verdict would not have been different had the error in the instruction been eliminated. On the whole case, the conclusion is that the error was not prejudicial.

The concluding argument of defendant is directed to the proposition that plaintiff is not entitled to recover because the undisputed evidence shows that he was guilty of contributory negligence as a matter of law. The parties do not agree on the facts proved nor on the evidence adduced. Each has filed an abstract. In this situation the bill of exceptions has been examined to learn the truth in so far as it is disclosed by the record. From this ex-

amination it is perfectly clear that the position assumed by defendant is not well taken.

There being no prejudicial error in the record the judgment is

AFFIRMED.

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

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

FILED APRIL 3, 1914. No. 18,272.

1. Counties: ANNEXATION OF UNORGANIZED TERRITORY. The statute, providing that unorganized territory may be attached to an adjoining organized county, does not authorize the annexation of an unorganized county to an adjoining organized county. Comp. St. 1891, ch. 18, art. I, sec. 9.
2. ———: ———: DE JURE ORGANIZATION. McPherson county, since its organization, has been a *de jure* organization, and as such it properly exercised jurisdiction over Arthur county for revenue, election, and judicial purposes, until the organization of the latter under the act of 1913. Laws 1913, ch. 262.
3. ———: ———: RATIFICATION. Ratification of the annexation of Arthur county to McPherson county *held* not established by the evidence.

Original action in *quo warranto* by the state to determine the right of respondents to be county officers of Arthur county. *Dismissed.*

Grant G. Martin, Attorney General, and *Hoagland & Hoagland,* for relator.

Wilcox & Halligan and *P. R. Halligan, contra.*

ROSE, J.

This is a proceeding in the nature of *quo warranto.* The information was filed in this court by the attorney general, relator, on behalf of the state. Respondents claim to be

public officers of Arthur county and the purpose of the suit is to oust them on the ground that Arthur county has no existence and no officers. Relator pleads that the territory which respondents assume to control as Arthur county is four townships north and south and five townships east and west; that it is the western part of McPherson county, and that it was attached thereto January 1, 1892, by an order of the county board of the latter county, pursuant to a majority vote for annexation at the general election November 3, 1891, and that it has never been detached. In 1887 the boundary of McPherson county was fixed by legislative enactment. Laws 1887, ch. 23. At the same time and in the same manner, the territory over which respondents assume jurisdiction, being 20 townships directly west of McPherson county, was included within the statutory boundaries of Arthur county. Laws 1887, ch. 21. McPherson county was promptly organized, but Arthur county was not. In 1913 the legislature made provision for the organization of Arthur county. This was done by a bill entitled: "An act to provide for the organization of the county of Arthur and for the location of its county seat and to attach such county until organized to McPherson county for election, judicial and revenue purposes, and to repeal all acts and parts of acts in conflict herewith and declare an emergency." Laws 1913, ch. 262. Relator asserts that this act of 1913, authorizing the organization of Arthur county, is void.

Respondents take the position that the order of consolidation was void; that the counties were never attached; that Arthur county, prior to the act of 1913, with its boundaries described by the legislature of 1887, was annexed to McPherson county for election, revenue and judicial purposes only; that it was legally organized pursuant to the act of 1913; and that the defendants are its duly-elected, qualified and acting officers.

The first question presented is the validity of the annexation order made by the county board of McPherson county. This order was based on the vote on county annexation November 3, 1891. An election submitting a

proposition to transfer the territory of Arthur county to McPherson county and an order of annexation could only have been authorized by statute. Respondents deny there was any such authority, and assert that the election and order of annexation were void. Relator relies on the following enactment, which was in force when annexation was attempted: "When any unorganized territory lies adjoining to and is not embraced within the boundaries of any county, and a majority of the inhabitants of said territory petition the commissioners of said adjoining county to be attached to the same, the county board of said county shall within sixty days order an election as provided for in sections 4, 5 and 6 of this act, and said territory shall become attached to and be a part of said county by a majority vote of the same, and be subject in all other respects to the provisions of this act." Comp. St. 1891, ch. 18, art. I, sec. 9.

Organized counties, unorganized counties, and unorganized territory were all subjects of legislation when that statute was passed. Each had a distinctive character. In 1887 Arthur county was named and its boundaries fixed. "Unorganized territory," as that term is used in the statute, is what may be attached to an adjoining, organized county. Reference is made to territory "not embraced within the boundaries of any county." At the time of the election the territory now in controversy was within the boundaries of Arthur county as previously described by the legislature. The words "any county," in the sense used in the statute quoted, comprehended both organized and unorganized counties. *State v. St. John,* 21 Kan. 591. Arthur county, therefore, was not "unorganized territory" which could be transferred to the organized county of McPherson. No statute authorizing the annexation has been pointed out, and none has been found. It follows that the election and the order of the county board were void.

It is argued by relator that McPherson county, with the territory of Arthur county attached, became a *de facto* county organization when the order of annexation was

made, and that the people in the territory of both counties have since exercised the powers and realized the benefits of annexation. Defendants should not be ousted on this ground. In all of the territory over which McPherson county exercised jurisdiction, it is a *de jure* organization. Its capacity as such has not been questioned. It was regularly organized before any effort was made to attach Arthur county to it. Within the boundaries fixed by the act of 1887, its authority as a county has not been questioned since its organization. Its jurisdiction over Arthur county for election, revenue, and judicial purposes, while that county remained unorganized, is fully established. Comp. St. 1891, ch. 18, art. I, sec. 146; *Robinson v. State,* 71 Neb. 142. For the purposes of this case, therefore, the official acts of McPherson county should be attributed to a *de jure* organization.

Relator argues further that both Arthur county and the state ratified the annexation, and *Robinson v. State,* 71 Neb. 142, is cited to sustain the argument. In the district court for McPherson county Robinson had been charged with the commission of a felony in territory comprising Arthur county as described by the legislature of 1887. Jurisdiction of that court to punish accused was the question decided. In the opinion, jurisdiction was shown under the statute attaching Arthur county to McPherson county for judicial purposes. Comp. St. 1891, ch. 18, art. I, secs. 146, 147. What is said in regard to annexation by the county board of McPherson county was not necessary to a decision of the jurisdictional question. The decision in that case does not control the issue here. Under the circumstances of the present case, the acts relied upon to establish a ratification should be treated as a recognition of McPherson county's lawful jurisdiction over Arthur county for election, judicial, and revenue purposes, and not a ratification of the order which the county board of McPherson county had no power to make. In this view of the law, the act of 1913, making provision for the organization of Arthur county is not unconstitutional, as alleged by relator.

On the issues joined, the findings are in favor of respondents. The proceeding is therefore dismissed at the costs of the state.

DISMISSED.

STANDARD BRIDGE COMPANY, APPELLEE, V. KEARNEY COUNTY; JOEL HULL, APPELLANT.

FILED APRIL 3, 1914. No. 17,275.

1. **Counties: BRIDGE REPAIRS.** The principal question controverted in this case was determined in *Buffalo County v. Kearney County, ante*, p. 439, for the reasons there given.
2. **Appeal: STIPULATION OF FACTS.** When the parties agree and stipulate a material fact for the purpose of trial in the district court, they will not be allowed in this court on appeal to dispute the fact so stipulated.
3. ———: **ISSUES.** A case on appeal rests upon the issues tendered and finally determined in the district court.

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

Joel Hull, J. L. McPheely and *Brown, Baxter & Van Dusen*, for appellant.

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

FAWCETT, J.

In this case the question which is determined in *Buffalo County v. Kearney County, ante*, p. 439, is principally discussed by the appellant, and is there determined adversely to his contention.

The repairs upon the bridge in this case were made by plaintiff under a contract between Buffalo county and Kearney county jointly, on the one part, and plaintiff, on the other. A further contention of the appellant is that the contract was void because the contract was let without advertising for bidders. The case was tried upon a

stipulation of facts, in which it is stipulated "that an emergency existed for the immediate repairing of said bridge as was provided by the terms of said joint contract, and the board of supervisors of the respective counties, parties to said contract, so declared, found and determined that the interests of the respective counties required immediate action on the part of said counties for the repairing of said bridge."

The appellant contends that the evidence shows that no emergency existed, and the evidence recited in the brief might make the question a serious one if it were open to investigation in this case. The county board of the county of Kearney allowed the claims, and this appellant alone removed the case to the district court by appeal. He was the sole defendant contesting the matter in the district court, and is alone contesting it here. After stipulating the fact as above, it was unnecessary for the plaintiff to produce evidence upon that trial in that court as to the existence of an emergency, and none was offered upon the plaintiff's part. It must be heard in this court on appeal as it was in the district court, and the stipulation of facts is the only evidence that we can consider. We must therefore assume that an emergency existed within the meaning of the statute when the counties entered into the contract with the plaintiff for the repairs of the bridge.

The allegation in appellant Hull's answer is that the resolutions of the two county boards that an emergency existed "did not create an emergency, and that, unless an emergency existed in fact, no contract could be binding upon Kearney county unless it first advertised for bidders." The stipulation in the record, above set out, admits "that an emergency existed for the immediate repairing of said bridge." Such being the fact, the boards were not required to advertise for bidders. Ann. St. 1909, sec. 6144.

In the brief filed by appellant, the point is attempted to be made that, by section 3, ch. 55, laws 1905, when the boards declared that an emergency existed, they should have given notice of their intention to make repairs by at

least one publication in some newspaper of general circulation in the county. No such question is raised by the pleadings or in the motion for new trial. A case on appeal rests upon the issues tendered and finally determined in the district court.

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

AFFIRMED.

AMOS W. HUNT ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 3, 1914. No. 17,544.

1. **Appeal**: MODIFICATION OF REQUESTED INSTRUCTION: EXCEPTION. While the district court is prohibited by section 4764, Ann. St. 1911, from modifying a requested instruction "by interlineation or erasure," a modification so made will not ordinarily constitute reversible error, unless it affirmatively appears from the record that at the time the instruction was given an exception was noted, not to the fact of such modification merely, but to the manner of making the same.
2. **Carriers**: INJURY TO SHIPMENT: CONTRIBUTORY NEGLIGENCE. The rule that, if negligence on the part of a person injured contributed to the injury, he is not entitled to recover therefor applies as well where the injury is to plaintiff's property as to where it is to his person, and in cases of contract as well as those of tort.
3. ———: ———: PLEADING. To enable a common carrier to avail itself of the general rule applicable where a shipment of live stock is accompanied by a caretaker, selected by the shipper, it is incumbent upon it to specially plead and prove such fact.
4. **Appeal**: THEORY OF CASE. Where the record on appeal to this court clearly shows that the case was tried and determined in the court below upon a certain theory, it will ordinarily be considered and decided in this court upon the same theory, even though such theory may be somewhat at variance with the pleadings.
5. **Carriers**: INJURY TO SHIPMENT: MEASURE OF DAMAGES. The proper measure of damages for injury to a shipment of horses is the difference in their reasonable market value at the time and in

the condition in which they were delivered at their agreed destination and their reasonable market value when and in the condition in which they should have been delivered.

6. ———: ———: ———. In an action against a common carrier for damages under a contract for the shipment of live stock, the damages which the plaintiff is entitled to recover are such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

7. ———: ———: PETITION. The allegations in the petition, set out in the opinion, *held* not sufficient to support a recovery upon plaintiffs' second cause of action.

8. Trial: SEPARATE CAUSES OF ACTION: VERDICT. Where the petition counts upon two causes of action, the first of which is sustained by sufficient allegations in the petition, and the second not, and the verdict of the jury is a single verdict, and is for a sum in excess of the first cause of action, thus showing an allowance by the jury upon both causes of action, but not showing how much was allowed upon either separately, the entire verdict must fall.

9. Appeal: CONFLICTING EVIDENCE. Where the evidence submitted to a jury is sufficient to sustain a verdict either way, the verdict of the jury thereon will ordinarily control.

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

Byron Clark, W. S. Morlan and *E. E. Whitted*, for appellant.

Lambe & Butler, contra.

FAWCETT, J.

From a judgment of the district court for Furnas county in favor of plaintiffs for damages to a shipment of horses over defendant's railroad, defendant appeals.

The petition alleges that on March 14, 1911, plaintiff delivered 25 horses in good condition to defendant at Wilsonville, Nebraska, for shipment to Bristolville, Ohio, the shipment to be over defendant's road from Wilsonville to Chicago; that in conveying the horses defendant operated

its train in such a careless and negligent manner that the horses were jammed, thrown about, etc., in such a manner that they were rendered unmarketable, to plaintiffs' damage in the sum of $320. A second cause of action for $168 is then set out, which will be considered under defendant's seventh assignment of error. The answer admits the corporate capacity of defendant; that it is a common carrier between Wilsonville, Nebraska, and Chicago, Illinois; denies every allegation in the petition not specifically admitted, and alleges that, if a shipment of horses was made over the defendant's road by plaintiffs, all delays, if any, suffered en route were due to the negligence and carelessness of plaintiffs and made at their request, and not due to any carelessness on the part of defendant; that all loss and damage sustained by plaintiffs, if any, were due to the carelessness and negligence of plaintiffs, directly contributory thereto, and in no manner due to any carelessness or negligence on the part of defendant. The reply is a general denial.

Defendant's first contention is that any injury received by the horses was largely due to the overcrowding of the car by plaintiffs; that such overcrowding will cause horses to become restless, and in the event of a horse "getting down" it is impossible to get him up again without unloading the whole car. When the car reached Wymore, one mare was down and being trampled by the other horses. At the request of an employee of plaintiffs, who was accompanying the shipment, the horses were unloaded and kept at Wymore about 24 hours, when they were again all loaded into the car. Before the train was ready to leave Wymore, the same animal was down again, and at the request of paintiffs' employee the horses were again unloaded and held in defendant's yards at Wymore another 24 hours, during which time the employee communicated with plaintiffs, and by their direction left this animal at Wymore and reloaded the other 24 horses. From that time until the end of the run there is no evidence of any further unusual delay. From this defendant argues that any delay in delivering the horses at their final destination was by

reason of the 48 hours' delay at Wymore, which was at plaintiffs' request, and which request, it is argued, was made necessary by plaintiffs' negligence in crowding so many horses into the car. Plaintiffs' contention is that they were not responsible for this delay, for the reason that it was necessitated by the negligence of the defendant in operating its train between Wilsonville and Wymore in such a negligent and careless manner as to cause the condition existing when the train reached Wymore.

On this branch of the case defendant tendered its instruction No. 13, as follows: "The court instructs the jury, if you find from the evidence that the plaintiffs shipped a car-load of horses over the defendant's railroad from Wilsonville, Nebraska, to Chicago, Illinois, and that, in loading said horses into defendant's car at Wilsonville, the plaintiffs negligently loaded more horses into said car than could be safely and properly transported therein between said places, and such overloading and crowding of said horses into said car contributed in causing the injury to said horses complained of in plaintiffs' petition, then the plaintiffs were guilty of contributory negligence, and they cannot recover in this action, and your verdict should be for the defendant." On this instruction appears the following notation by the court: "Modified by interlineation." As a matter of fact the court modified the instruction by both erasure and interlineation. Section 4764, Ann. St. 1911, provides: "If the court refuse a written instruction, as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." The court modified the instruction by erasing the words "contributed in causing," and by interlining the word "caused." It is argued that this act constitutes reversible error. It is a matter of surprise that the court should thus modify an instruction in the face of such a statute; yet we would be reluctant to reverse a case on that ground, and would not do so un-

less it appeared that at the time the instruction was given an exception was noted, not to the fact of modification merely, but to the manner of making such modification. In this case the exception was: "To the refusal of the court to give this instruction as requested the defendant excepts, and to the giving of this instruction as modified by the court the defendant excepts." This is not an exception to the manner in which the modification was made, but to the substance of such modification, and in that respect alone the exception should be treated. As requested by defendant, the instruction submitted the defense of contributory negligence, and told the jury that, if the negligence of plaintiffs "contributed in causing the injury," plaintiffs were guilty of contributory negligence. The evidence being conflicting both upon the question as to whether the car was negligently overloaded and upon the question as to whether there had been rough handling by the defendant, we think the defendant was entitled to have the question of contributory negligence submitted to the jury as requested. 29 Cyc. 507, and cases there cited. By the modification, the court, instead of telling the jury that plaintiffs would be guilty of contributory negligence if their overloading and crowding the horses into the car contributed in causing the injury, by substituting the word "caused" told the jury, in effect, that the plaintiffs would not be guilty of contributory negligence unless the overloading and crowding of the horses into the car *caused* the injury; in other words, that it was the sole cause of the injury. We think the instruction as modified was clearly prejudicial, and, being upon an important issue in the case, constituted reversible error. The most that the court should have done, if it decided to modify the instruction, would have been to have told the jury that, if "such overloading and crowding of the horses into the car was the proximate cause of the injury," plaintiffs would be guilty of contributory negligence.

In the second assignment it is urged that the horses were accompanied by a caretaker, and the general rule in such

cases is attempted to be invoked by defendant, but no such issue is tendered in the pleadings.

In the third assignment it is contended that a common carrier is not an insurer against delay in the transportation of live stock, and *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57, is relied upon. We think this assignment is practically covered by what we have said as to the first assignment.

By assignment No. 4 it is contended that the court, by instructions 8 and 9, introduced an issue not presented by the pleadings. By this instruction the jury were told that a common carrier of freight in this state cannot, by a contract with the shipper, limit its liability. This issue was not raised by the pleadings, but counsel for plaintiffs contend that defendant forced it into the case by offering certain documentary evidence. As the case must be reversed on other points, it is unnecessary to decide this question, as it will not arise again on another trial for the reason that, as to interstate shipments, the supreme court of the United States, in *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, has settled the law upon that point.

The fifth assignment is that the court erred in giving inconsistent and contradictory instructions. The record hardly justifies this contention.

The sixth assignment is: "In an action against a carrier for injury and delay in transportation of live stock, evidence of the market value of such stock at places other than the point of delivery is inadmissible." The case seems to have been tried in the court below upon the theory that the contract of the defendant was to transport plaintiffs' horses from Wilsonville, Nebraska, to Chicago, Illinois. While the petition alleges that plaintiffs delivered the horses to defendant at Wilsonville, Nebraska, for shipment to Bristolville, Ohio, said shipment to be over defendant's road from Wilsonville to Chicago, there is no evidence in the record that defendant made any contract with plaintiffs beyond the line of its own railroad. The contract introduced in evidence makes no reference to Bristolville, but gives the initial and terminal points at Wil-

sonville, Nebraska, and Chicago, Illinois. That plaintiffs tried the case upon that theory is shown by their requested instruction No. 7, as follows: "The court further instructs the jury that, if you find for the plaintiffs you will assess their damages in such sum or amount as they have proved by a preponderance of the evidence that they have sustained as a result of the negligence and carelessness of the defendant company, and no more, not exceeding the amount claimed in their petition. The rule for the measure of damages in such a case is the difference between the reasonable market value of the horses in the condition in which they were turned over to the connecting carrier and the condition in which the same would have arrived had the company used usual, ordinary care and diligence in transporting and delivering said shipment to the connecting carrier, together with the necessary expenses incurred in caring for said horses as a direct and natural consequence of the misconduct of the defendant or its agents." Chicago was the point where the horses "were turned over to the connecting carrier," and the jury were told that the measure of damages is the difference between the reasonable market value of the horses "in the condition in which they were turned over to the connecting carrier" and the condition in which they would have arrived had the company used usual, ordinary care in transporting and delivering them "to the connecting carrier." This clearly shows that plaintiffs were treating Chicago as defendant's terminal point. Upon the question as to the reasonable market value of the horses, in either of the conditions named, at Chicago, or when they were delivered to the connecting carrier, the record is barren of proof. No attempt was made to show the value of the horses in either of the conditions named at that time and place. It was admitted by one of the plaintiffs upon the witness-stand that they had filed a claim with the connecting carrier, the Pennsylvania Railroad Company, for damages to the horses in that shipment. There is no attempt to prove how much of the damage, if any, was sustained while the horses were being transported by the defendant, and how much

after they were turned over to and transported for 300 miles by the Pennsylvania Railroad Company. As the parties have themselves tried the case upon the theory that there were two separate shipments, one from Wilsonville to Chicago, for which it is attempted to hold the defendant liable, and the other from Chicago to Bristolville, Ohio, for which plaintiffs are demanding damages from the Pennsylvania Railroad Company, it must be disposed of here upon the same theory. The only evidence offered by plaintiffs was as to the condition and value of the horses when they were loaded at Wilsonville, their value at St. Joseph, Missouri, when they passed through that city en route, and their condition and value when they reached Bristolville, Ohio. This cannot be held to be competent evidence of the value of the horses in either of the conditions named at their point of destination in Chicago. *Atchison, T. & S. F. R. Co. v. Lawler,* 40 Neb. 356; *Chicago & N. W. R. Co. v. Dickinson,* 74 Ill. 249, reaffirmed in *Plaff v. Pacific Express Co.,* 251 Ill. 243; *Scott v. Texas C. R. Co.,* 127 S. W. (Tex. Civ. App.) 849.

The seventh assignment is that, in an action for damages caused by delay, only such losses can be recovered as were reasonably contemplated by both parties at the time the contract of carriage was made as likely to arise from a breach, and not losses arising out of circumstances then wholly unknown to the carrier. Under this assignment defendant contends that plaintiffs could not recover anything upon the second cause of action, set out in their petition, viz., for damages by reason of having to readvertise a sale of the horses at Bristolville, Ohio, necessitated, as plaintiffs argue, by reason of the fact that through defendant's negligence the horses did not reach that point in time for a sale which had already been advertised, and for which the horses would have been received in time had it not been for the negligent delay of defendant. There is nothing in the contract, or in the evidence, to show that defendant was notified at any time at or prior to its shipment of the horses that plaintiffs were shipping the horses to Bristolville for the purpose of disposing of them at a

prearranged sale, and hence there could be no recovery upon plaintiffs' second cause of action. *Hadley v. Baxendale,* 9 Exch. (Eng.) *341; *Karbach v. Fogel,* 63 Neb. 601. Plaintiffs meet this contention with the argument that the damages claimed for injuries under their second cause of action are not special damages, and hence do not come within the rule contended for by defendant. With this contention we cannot agree. The trouble with plaintiffs' second cause of action is that their petition does not state facts sufficient to constitute a cause of action. Their allegation is: "That the defendants (plaintiffs), relying on the defendant company conveying said horses to the destination safely and promptly, advertised a public sale of said horses for on or about the 21st day of March, 1911, which was long after said horses should have reached their destination had the defendant company used usual or ordinary diligence and delivered said horses at their destination within the ordinary and usual time for making delivery of such shipments; that, by reason of said delay and the emaciated condition of said horses, plaintiffs were compelled to and did expend large sums of money (which they would not otherwise have done) for readvertising the sale of said horses, and for additional feed and for caring for said horses during said time, all of which was due to the defendant's negligence and carelessness, which sums of money so expended aggregated the sum of $168." It will be seen that these allegations not only do not show that the defendant was advised of this proposed sale, with which they were trying to connect, but they fail to state when the horses did in fact arrive at Bristolville, or to state any fact, other than a negative conclusion, that it was necessary for them to readvertise their sale. We think that plaintiffs were not entitled to recover on this cause of action for both reasons, viz.: First, that the petition did not state a cause of action; and, second, that if it had stated a cause of action there is an entire absence of proof of notice to or knowledge by the defendant of plaintiffs' purpose in shipping the horses to Bristolville. The amount claimed in the first cause of action was $320, and in the

second $168. The verdict was for $342.14, together with interest from March 22, 1911, total, $355, showing an allowance by the jury upon both causes of action, but not showing how much was allowed upon either separately. Under these conditions the entire verdict must fall.

The eighth assignment is misconduct of counsel for plaintiffs in his closing argument to the jury. We deem it unnecessary to consider this point, for the reason that counsel who represented plaintiffs, having been elevated to the district bench, will not have an opportunity to exercise his forensic powers upon the next trial of the case. Moreover, from what counsel for plaintiffs say in their brief upon this point, the language used in the closing argument was provoked by similar misconduct of counsel for defendant in his address to the jury.

The final assignment is that the verdict is not sustained by the evidence. In the particulars hereinbefore referred to, this is true. As applied to the claim that defendant operated its cars in such a negligent and careless manner as to injure the horses in transit, the evidence is quite conflicting. Such being the fact, the verdict of the jury would have to control upon that question.

For the errors above pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

The majority opinion holds that the only method of proving the damage of the plaintiff by reason of the injuries complained of was to prove the market value of the horses at Chicago, at the time and in the condition in which they reached that place, and "their reasonable market value when and in the condition in which they should have been delivered." The destination of the shipment was Bristolville, Ohio. The opinion assumes that the shipment was billed over the defendant's road to Chicago only. The bill of lading does not appear in the abstract, and I think that it is immaterial whether the defendant billed

the shipment through to its destination, or only to the point where it was to be delivered to a connecting carrier. In either case the rule announced in the opinion is incorrect and wholly unsupported by the authorities. Such a rule would generally prevent any recovery in a case of this kind. The market value of a mixed lot of horses at a place which they passed through without stopping a sufficient length of time to allow witnesses who were familiar with the market at that place to inspect them and become familiar with their class and description could not ordinarily be readily proved. It would be peculiar hardship to apply such a rule to this class of shipment, and it is not the rule under the authorities applied to any shipments. This case was tried upon the theory that the defendant would only be liable for such damages as were caused by injury upon the defendant's line, and, in order to so limit it, the instruction quoted in the majority opinion required the jury to consider the condition of the horses when they were delivered by the defendant to the connecting carrier, and under the theory which the case was tried this was proper. The instruction, however, did not contemplate that the proof in regard to the value before and after the injury should be limited to any place between the place of shipment and the destination of the shipment. Proof, then, of the value of the horses when they arrived at their destination at Bristolville, Ohio, in the condition that they were when turned over to the connecting carrier by the defendant, and their value as they would have been if the defendant had performed its duty and delivered them, without negligence, to the connecting carrier, was competent proof of the damage caused by the defendant's negligence. "In an action against a railroad company to recover damages for an alleged unreasonable delay in the transportation of cattle, it is not error to take as the basis for computation of damages the difference in the market price of the cattle in the market to which they were being shipped, where their destination was known to the defendant, although its contract covered their transportation only over its own line, and their

delivery to a connecting carrier for the remainder of the shipment." *Missouri, K. & T. R. Co. v. Truskett,* 104 Fed. 728; 13 Ency. of Evi. 570 *et seq.* Even where the bill of lading provides that the value at the place of shipment shall govern, the evidence of the value at the destination is admissible, in the absence of better evidence. *Harris v. Panama R. Co.,* 58 N. Y. 660. In this case the ultimate object of the proof is to show the damage to the property. In ordinary cases this can be done most readily by proving the value before and the value after the injury. This difference in value in the case of a mixed lot of horses would not be much different in one place from what it would be in another. If this value at the destination of the property can be proved, it is generally conceded to be the most satisfactory. Where this proof is not obtainable, other evidence may be received. When the property is wholly lost or destroyed, its value is the ultimate object of proof, and in such case the rule adopted in this state, and in some others, is that the value at the destination of the shipment must be proved. *Atchison, T. & S. F. R. Co. v. Lawler,* 40 Neb. 356; *Chicago & N. W. R. Co. v. Dickinson,* 74 Ill. 249. These cases are mistakenly cited in the majority opinion as holding the doctrine which that opinion announces. In those cases the shipment was entirely lost, and it was held that the value at the place of the destination was the measure of damages.

LUCIE BODIE, APPELLANT, V. EDWARD BATES, APPELLEE.

FILED APRIL 3, 1914. No. 17,601.

1. **Courts: EQUITY JURISDICTION.** "The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Cochran v. Cochran,* 42 Neb. 612.

2. ———: ———. Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied.

3. ———: ———: CONSENT AS BAR. Where consent to the exercise of judicial power, in a manner not authorized by statute, is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent. Such consent and the action of the court based thereon should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state.

4. Divorce: ALIMONY: ESTOPPEL: FOREIGN DECREE. Where it clearly appears that in a suit for divorce in a sister state, under the statutes of which the court did not have jurisdiction to take cognizance of real estate then owned by the husband in this state, nor, without consent of the parties, to consider the same in fixing the amount of alimony, and no such consent is affirmatively shown to have been given, and it also clearly appears that the court in allowing alimony to the wife did not take cognizance of or consider such real estate in fixing the amount of such allowance, but allowed the wife a reasonable sum only, based upon the property owned by the husband situated within the jurisdiction of that court, the judgment so rendered is not a bar to an independent suit in this state by the wife, after divorce, to recover a reasonable amount of alimony out of the real estate of the husband situated in this state; nor will the fact that she accepted and has retained the allowance made to her by the judgment of the other court, out of the property of her husband situated within the jurisdiction of that court, estop her from prosecuting such suit.

5. ———: ———: ———: ———. *Eldred v. Eldred*, 62 Neb. 613, and *Cochran v. Cochran*, 42 Neb. 612, examined, and *held* to be at variance with each other; and, upon due consideration, and for the reasons stated in the opinion, *Cochran v. Cochran* is adhered to, and *Eldred v. Eldred*, in so far, but in so far only, as it is in conflict therewith, is overruled.

APPEAL from the district court for York county: EDWARD E. GOOD, JUDGE. *Reversed.*

Gilbert Brothers and *S. P. Davidson*, for appellant.

Field, Ricketts & Ricketts and *W. L. Kirkpatrick*, *contra.*

FAWCETT, J.

From a judgment of the district court for York county, sustaining a general demurrer to her petition and dismissing her suit, plaintiff appeals.

The petition alleges that the parties were married in January, 1889, while they were residents of York county, in this state; that soon after their marriage defendant became addicted to drinking intoxicating liquors to excess, and was guilty of continued drunkenness and cruelty until about March 1, 1911, when defendant commenced a suit for divorce from plaintiff in the chancery court of Benton county, Arkansas, to which county the parties had removed, the alleged grounds of divorce being "indignity, cruelty and infidelity;" that, on being served with summons, plaintiff here, defendant in that cause, filed her answer and cross-complaint, in which she denied the allegations in plaintiff's bill, and alleged as grounds for a divorce and alimony plaintiff's drunkenness and cruel treatment, and set out in general terms the amount and value of plaintiff's property, including lands situated in York county, in this state. On the trial of the cause the Benton county court found the issues against the plaintiff on his bill and dismissed the same, found for the defendant (plaintiff here), and entered a decree granting her a divorce and restoring to her her maiden name of Lucie Bodie. The petition further alleges that the Arkansas court found that defendant was indebted to plaintiff in the sum of $2,500 for borrowed money; that defendant's personal property "was of the value of about $4,000, and that said court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that, in consequence of that fact, in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into the account the above mentioned property situated in York county, Nebraska;" that the laws of Arkansas then in force, after stating the grounds for divorce, further provide: "Where the divorce is granted to the wife each party is restored to all property not disposed

of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." The petition alleges that the section of the statute just quoted "is the only provision for allowance of alimony to the wife in case of divorce." It is further alleged that when the case was tried in the Arkansas court during the first days of March, 1911, and when the same was determined, as a part of the finding and decree entered therein, it was ordered and decreed that defendant in that suit should recover from plaintiff the $2,500 borrowed money, one-third in value of plaintiff's personal property, and the then present value of her life interest in one-third of the value of a house and lot then owned by plaintiff, and that these items aggregated the sum of $5,111, which sum was allotted and decreed to her, together with certain articles of furniture which originally belonged to her; that this was the only allotment made to or for defendant in that suit; that that court was limited and prohibited in taking into account, in determining the amount of the allowance to the defendant there (plaintiff here), the lands lying in York county, Nebraska, or their value, and that the only amount of alimony allowed plaintiff was the sum of $2,611, being the balance of the sum of $5,111, after deducting the $2,500 borrowed money. The petition then sets out the value of the York county land at $48,000, and alleges that the amount of alimony allotted by the Arkansas court is inadequate and insufficient for the support of plaintiff, and is not such fair proportion of the property of defendant, owned by him at the date of the Arkansas decree, as plaintiff then was and still is entitled to, in view of the circumstances surrounding the case, "and the services and hardships endured and performed by this plaintiff for this defendant." The

prayer is that the court take cognizance of the whole matter, and that on a full and final hearing it decree to plaintiff a reasonable sum out of the value of defendant's property in York county, "as and for alimony to which she is entitled in addition to the said amount so allowed in and by said court of chancery of Benton county, Arkansas," also for attorney's fees and costs, and for an injunction restraining defendant from disposing of his York county land until the allowance made by the court is paid. Plaintiff attached to her petition and made a part thereof the decree entered by the Arkansas court.

In the decree it is recited that the court, "being well advised in the premises, doth dismiss plaintiff's bill for want of equity, and doth grant a divorce on the cross-bill of the defendant herein. It is ordered, adjudged and decreed by the court that defendant, Lucie Bates, have and recover of and from the plaintiff, Edward Bates, the sum of $5,111, in full of alimony and all other demands set forth in the cross-bill, which judgment is rendered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." It then assigns to Mrs. Bates certain specific articles of silverware and household furniture. The decree then provides that, to secure payment of the judgment, a lien be declared on lot 9, block 8, Beauchamp's addition to the city of Siloam Springs, Benton county, Arkansas, and that as additional security the defendant place with the clerk of the court four notes of $280 each, one note for $89.60, one for $112, "the same having been given by one Shockey to Edward Bates, one note for $500 and two notes for $40 given by Ida and W. S. Tibbs to Edward Bates, one note for $400, given by Richard O. Forman to Edward Bates, one note for $500, given by Norris and Yonkers, being a total of $2,801.60, which are by the said Edward Bates, in open court, deposited with the said clerk, all of which notes are secured by mortgages." It was then provided in the decree that Bates might sell and dispose of any or all of the property, including real estate and notes, but in making sale he should deposit the proceeds with the

clerk until he had paid the full sum of $5,111, with interest at 6 per cent. It further provided that Mrs. Bates have restored to her her maiden name of Lucie Bodie.

The grounds upon which defendant based his demurrer in the court below, and seeks to defend the judgment of the court in sustaining the same are: (1) That the Arkansas judgment is a complete bar to a recovery of further alimony. (2) That plaintiff, having accepted and retained the fruits of the Arkansas decree for alimony, is estopped to repudiate that decree. We will consider these two points in the order named.

An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to real estate, the provision is that she shall be entitled to "one-third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form." It will not, of course, be contended by any one that under that statute the Arkansas court could have vested in Mrs. Bates, for life, one-third of the lands of which her husband was then seised located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court. While the decree is not as specific in its findings as set out in plaintiff's petition in this suit, we think it does sufficiently appear from the decree itself that a portion only of the $5,111 allowed the defendant was for alimony, and that the balance of the sum allowed was for borrowed money, as alleged by plaintiff in her petition here. The wording of the decree is that Mrs. Bates should recover the sum of $5,111 "in full of alimony and all other demands set forth in the cross-bill." The term, "and all other demands set forth in the cross-bill," should, in the light of the allegations of plaintiff's petition, as against a general demurrer, be construed as an admission that $2,500 of the amount allowed by the court was for borrowed

money, as alleged. This would leave only $2,611 allowed as alimony. This fact, in the light of the further fact that Bates at that time owned the Arkansas real estate referred to, and notes secured by mortgages aggregating over $2,800, which the court required him to deposit as security for the payment of its judgment, makes it appear to our entire satisfaction that the amount actually allowed by the court for alimony was not more than a fair amount to allow Mrs. Bates out of the property which her husband then owned in Arkansas. In the light of the evidence as to what Bates then owned in Arkansas, it would be idle to claim that that court, in making its allowance, took into account or gave any consideration to the valuable lands then owned by Bates in this state. It is clear, therefore, that, as to the Nebraska land, the rights of the parties were not adjudicated in that action.

It is argued by defendant here that, while the Arkansas court may not have been authorized by statute to enter a money judgment for alimony, it could do so by consent of parties, and that the parties gave such consent. The wording of the decree upon which this argument is based is: "Which judgment is rendered by the consent of the plaintiff, on condition that no appeal will be taken by defendant from the judgment or decree herein rendered." In support of his contention defendant cites *Wood v. Wood,* 59 Ark. 441. In that case a judgment by way of alimony was allowed in the sum of $33,000. On appeal the supreme court of Arkansas said (p. 448): "In allowing alimony in a gross sum, the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors, who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record done by them, but she must abide by them, and hold her solicitors responsible, if they were derelict in their duties, or unfaithful to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court." In the light of that decision, it is argued that the court gave Mrs.

Bates a money judgment by consent, and that in such case the remedy would be, ordinarily, by appeal; but it is also said she could not have appealed that case because the court entered judgment, by consent of plaintiff, on condition that she would not appeal. This contention, so far as it goes, is very plausible. If Mrs. Bates had attempted to appeal from that judgment, it is very doubtful if her appeal would have been sustained; but we do not see the application of the case cited, for the reason that there was nothing in that judgment from which Mrs. Bates needed to appeal. The court had adjudicated everything within its jurisdiction, and, apparently, had awarded her a fair allowance out of Bates' property within the jurisdiction of the court.

It sometimes happens that technical rules of construction stand out, on one side against plain, undeniable justice on the other. In such a case, what is the duty of the court? In our judgment the question admits of but one answer: Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied. So, therefore, where consent to the exercise of judicial power, in a manner not authorized by statute, is relied upon as a bar to equitable relief demanded in another state, it should be made to clearly appear that the *res* of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted upon their consent. Such consent and the action of the court based thereon should not be extended, by construction, so as to defeat a clear equity of either of the consenting parties in the courts of the other state. We are, therefore, unwilling to extend, by construction, either the scope of the consent upon which the Arkansas court acted, or the scope of the jurisdiction of that court in acting thereon.

The learned district court undoubtedly felt bound by the opinion of this court in *Eldred v. Eldred*, 62 Neb. 613. In that case the parties were married in Iowa, from which state they removed to Illinois. Subsequently the husband came to this state, leaving his wife and children in Illinois.

The wife applied to the circuit court in that state for a divorce and alimony. Service was had by publication. The husband did not appear. The wife was granted a decree of divorce, and the Illinois residence was awarded to her as alimony. Later on she instituted suit in this state for alimony and for the support of two minor children. A decree was entered dismissing the cause, but without prejudice to a future suit for the support of the children. She appealed. In the opinion it is said (p. 614): "The validity of the Illinois decree is not questioned. The court had jurisdiction of the cause, and the decree granting Mrs. Eldred a divorce, being valid there, is likewise valid here. If there had been personal service upon the defendant in the cause, the decree awarding alimony would be conclusive upon the parties, and a new suit for alimony by Mrs. Eldred could not be maintained. But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no validity, save as to the property within the jurisdiction of the court pronouncing it. This suit, then, is not for an allowance out of the property of the defendant for her maintenance, as incidental to some other proceeding or relief. No divorce is sought herein. If the decided weight of authority in this country should be followed, alimony could not be recovered in an independent suit. But this court is committed to the doctrine that courts of equity have jurisdiction to allow alimony to a wife as an independent right where no divorce or legal separation is sought. *Earle v. Earle,* 27 Neb. 277. This decision would be decisive of the present case had plaintiff not been legally divorced from the defendant, since in the case cited the plaintiff was at the time the legal wife of the defendant, no divorce having been previously granted, nor was one sought in the proceeding for alimony. The marriage relation that existed between the present plaintiff and defendant has been dissolved by a court of plaintiff's own selection. They are no longer husband and wife. The duty and obligation that once existed to sup-

port and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony." If this decision stood alone in our court, or had been subsequently followed, or if we had never sustained a different theory, we might hesitate to announce a rule at variance with the one so plainly stated by the learned chief justice who wrote that opinion. In that opinion *Cochran v. Cochran*, 42 Neb. 612, is attempted to be distinguished, but the case is not overruled, nor is the soundness of its holding at all questioned.

As we read *Cochran v. Cochran*, it is at variance with *Eldred v. Eldred;* and as we consider the two, and compare one with the other, we find the variance so decided that we must now determine which we will follow and establish as the rule in this state. We have no hesitancy in deciding this question in favor of *Cochran v. Cochran.* The opinion concedes that in *Earle v. Earle* we have departed from the rule that the allowance of alimony is a mere incident to a suit for divorce, and have awarded alimony in a suit where no divorce was asked. We have held the same in a number of cases. If, therefore, alimony may be allowed in a suit against the husband where no divorce is asked, then alimony is not necessarily an incident to a divorce suit. If it is not an incident to a divorce suit and inseparable therefrom, then in reason it matters not whether the parties are still husband and wife, or whether that relation has been severed by a decree of divorce. The right to alimony does not depend alone upon the duty of the husband to support his wife. It is not based upon her necessities alone. It is an allowance to her, when her husband has proved recreant, of a just proportion of his (or, more accurately stated, their) estate. Hence, it is a right not solely incident to a divorce suit, but a right which this and many other courts have held is enforceable in a separate and independent suit. *Rhoades v. Rhoades,* 78 Neb. 495, and cases cited on page 497, where it is also said: "And it is clear that the dis-

trict courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Graves v. Graves,* 36 Ia. 310; *Daniels v. Daniels,* 9 Colo. 133; *Galland v. Galland,* 38 Cal. 265, where it is held: "The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority. And in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife, in an action which has no reference to a divorce or separation." *Woods v. Waddle,* 44 Ohio St. 449, where it is held: "A and P. were married in West Virginia at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *a vinculo* from A., but, as there was no personal service upon A., her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A., in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. *Held,* P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A." The fact that her application for alimony was dismissed by the Tennessee court without prejudice and to enable her to sue for it elsewhere, is immaterial. If *Eldred v. Eldred* is sound, that fact could not aid her in this state, because of the other fact that at the time of applying for alimony in this state she would not be the wife of her former husband.

Let us now see what we held in *Cochran v. Cochran, supra.* In that case it appears that Cochran left his wife and family in Wisconsin and came to Nebraska, as his wife thought, on a temporary mission and with the intention of returning to his family. Whether he was actuated by that thought or not, it appears that after coming to Nebraska he decided not to return to his family, but

brought a suit for divorce on the ground of desertion, obtained service by publication, complying with all the requirements of law, and obtained a divorce from his wife. About two years later she instituted suit to recover alimony. In her petition she set out the acts of Cochran in deserting his family, and alleged that she had no knowledge of his application for the divorce until after it had been granted. She did not ask to have the decree which her husband had obtained set aside, nor was it set aside. Yet we held, as appears from the syllabus:

"1. A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault.

"2. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute.

"3. A husband deserted his wife and minor children in the state of Wisconsin, where they resided, took up his abode in this state and became a citizen thereof, and procured a divorce from his wife on the grounds of desertion, obtaining service on her by publication. The wife had no knowledge of the divorce proceedings until after the date of the decree. Two years after the date of the divorce the wife brought suit in equity against the husband for alimony. *Held,* (1) That the action was not brought under, nor governed by, section 46, chapter 25, Compiled Statutes of 1893, nor by section 602 of the code of civil procedure, but was a separate and independent action based on the legal obligation of the husband to support his wife and children; (2) that the petition stated a cause of action for alimony, although it contained no allegation that the wife and children were in destitute circumstances or in actual need of support.

"4. Our divorce laws are liberal and should be liberally construed; but they are not designed for, and should not be used to enable designing husbands, without cause, to legally discard their wives, whether domiciled in this or

other states, or to escape the performance of their marriage contracts."

The venerated Judge WAKELEY, who heard the case, rendered a decree in favor of Mrs. Cochran for alimony in the sum of $2,000, in instalments of $500 each, and awarded her a further sum of $250 a year during life. From this decree all parties appealed. The opinion first considers the appeal of the plaintiff's former husband. In that consideration *Cox v. Cox,* 19 Ohio St. 502, *Graves v. Graves, supra, Earle v. Earle, supra,* and *Smithson v. Smithson,* 37 Neb. 535, are all approved. In his appeal Cochran urged four grounds for reversal: First. That an action for alimony or maintenance cannot be maintained in this state except as an incident to divorce proceedings, and that as Mrs. Cochran in her petition did not pray for a divorce the court had no jurisdiction of the subject matter of the suit. Second. The statute of limitation, viz., that under section 46, ch. 25, Comp. St. 1893, no proceedings for reversing, vacating or modifying any decree of divorce could be prosecuted after the expiration of six months. Third, That the court was wrong in awarding any alimony whatever to Mrs. Cochran, for the reason that the petition did not show that she or her children were in need of support. Fourth, That the amount awarded Mrs. Cochran was excessive. His appeal was dismissed. The court then took up the appeal of Mrs. Cochran, and said (p. 629): "Her sole ground of complaint is that the amount of alimony awarded her by the district court is too small." It then proceeded to a consideration in detail of the property owned by Cochran, as shown by the evidence, and, after making certain deductions from his real estate, by reason of the fact that some of it was in litigation, found the clear net value of the remainder of his property to be $23,633. The court then added that it did not think alimony should be awarded in instalments during the life of a party, but held that Mrs. Cochran's appeal should be sustained, but that that portion of the decree of the district court allowing $250 a year during Mrs. Cochran's life should be set aside, and computed the amount which

should be allowed, in the gross sum of $6,000, payable in three equal annual instalments, and entered judgment modifying the decree of the district court as follows (p. 631): "The decree of the district court as to the amount of alimony awarded Mrs. Cochran is set aside, and a decree will be entered in this court in favor of Mrs. Cochran against Warren Cochran for the sum of $6,000 alimony, as hereinbefore stated. In all other respects the decree of the district court is affirmed." It will be seen from the above that this court in the *Cochran* case sustained a suit by the woman, commenced two years after her husband had obtained from her a divorce in strict compliance with the laws of this state, and in which suit she did not ask that the divorce theretofore granted to her husband should be set aside, and which divorce this court did not set aside; and under the general equity jurisdiction, existing in the courts of this state, which it said are not limited in the exercise of such jurisdiction by statute, it awarded Mrs. Cochran the sum of $6,000 *as alimony*. We think our holding in *Cochran v. Cochran* is sound and should be followed; and, in so far as it conflicts therewith, *Eldred v. Eldred* is overruled.

The answer to defendant's second point, viz., that, having accepted and retained the fruits of the Arkansas decree, plaintiff is estopped to repudiate that decree now, is that she is not attempting to repudiate that decree. As in the case of *Cochran v. Cochran*, she is not assailing the legality of the divorce, nor is she questioning the adequacy of the allowance made to her out of the property within the jurisdiction of that court. We therefore hold that the decision of the Arkansas court is not *res judicata* here, and that the acceptance and retention by Mrs. Bates of the allowance made her in that case does not estop her from maintaining the present suit.

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

REVERSED.

LETTON, J., concurs in the conclusion.

MARY E. SIMMONDS, APPELLANT, V. WILLIAM T. FENTON, APPELLEE.

FILED APRIL 3, 1914. No. 17,589.

1. Divorce: AWARD OF PROPERTY: ATTACHMENT. A wife has an interest in the family property by virtue of the marriage relation, and when the court gives her a divorce and decrees to her a part of the personal estate of the husband, such property becomes hers absolutely, and is not subject to attachment in a subsequent action for debt against her husband.
2. Attachment: HUSBAND AND WIFE. If the wife has assumed and agreed to pay debts of the husband, such agreement on her part will not make her property subject to attachment in an action for such debt brought against the husband alone.

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

Edwin Falloon, for appellant.

Reavis & Reavis, contra.

SEDGWICK, J.

In an action for divorce, which this plaintiff was prosecuting in the district court for Richardson county against her husband, William E. Simmonds, the parties entered into a stipulation, agreeing upon and settling their property rights, subject to the approval of the court, and conditioned upon the granting of a decree of divorce. Afterwards the court granted the divorce to this plaintiff, and approved of the stipulation, making it a part of his findings, and entered a decree in accordance with the stipulation. A few days afterwards a copartnership, known as C. H. Lupold & Company, began an action against the said William E. Simmonds, and caused a writ of attachment to be issued therein, which was delivered to this defendant as the sheriff of said county, and was levied upon certain cattle as the property of William E. Simmonds. The plaintiff then began this action in replevin

in the district court for Richardson county against the sheriff to recover possession of the cattle, claiming to be the owner thereof and entitled to the possession. She failed to give bond in replevin and the action proceeded under the statute as an action for damages. Upon the trial there was a verdict and judgment for the defendant, and the plaintiff has appealed.

The principal question in the case is as to the construction and effect of the stipulation and decree in the divorce action. In the petition for divorce it was alleged that the defendant is the joint owner of "140 acres of land of the value of $2,500, and subject to a mortgage of $1,100." The stipulation provided: "The plaintiff is to pay the defendant the sum of $800 by next Saturday, and, in addition thereto, is to pay all mortgage indebtedness upon the land described in said petition, including interest and taxes, and, in addition thereto, is to pay all store bills, paint bills, blacksmith bills, and all bills that may have been incurred in the support of the family of the parties to this action, including the bills of the plaintiff; but the total amount herein agreed to be paid shall not exceed the sum of $2,159. It is further stipulated and agreed that the defendant shall, upon the rendition of said decree, make a quitclaim deed of the land described in the petition, and shall by this decree agree that all personal property and household goods of every description, as well as all personal property that he may own, shall be and vest in the plaintiff. * * * It is further agreed that, upon the payment into court of the said $800 on next Saturday, then the clerk is to deliver to plaintiff the quitclaim deed to the premises described in the petition, which upon rendition of the decree is to be made by defendant and deposited with the clerk." The court, among other things, decreed as follows: "It is further adjudged and decreed that all the property named in said stipulation is, as provided in said stipulation, awarded to the plaintiff, and the stipulation is in all respects approved and confirmed." This appears to be a judicial construction of the stipulation in that regard. The property is awarded to the plain-

tiff, and the decree says it is so provided in the stipulation. When the plaintiff began her action for divorce she had an interest in the family property by virtue of the marriage relation. If a divorce was granted to her she was entitled to have a "just and reasonable" part of the personal estate of her husband. Rev. St. 1913, sec. 1584. When the decree awarded her this personal property it became hers absolutely. The plaintiff agreed to pay all of the family bills, not exceeding $2,159, and also agreed to pay to the defendant in that action the sum of $800 upon the delivery to her of the deed of the land; but there is nothing in the stipulation that makes her title in the personal property awarded to her depend upon or await the payment of these bills or of the $800. She became personally liable therefor, and her property could be reached by legal process in the ordinary way.

It is insisted in the defendant's brief that the title to the personal property would not pass to the plaintiff until she paid the $800; but we do not see that this construction of the contract and decree would assist the defendant in this case. This plaintiff was not a party to his suit in attachment. She had no opportunity to test the validity of that claim. The attachment against Mr. Simmonds' property would give the sheriff a lien only upon Mr. Simmonds' interest, and would be subject to Mrs. Simmonds' rights under the decree. Even under the defendant's construction of the decree she had an interest in the property which was not subject to attachment in a suit against her husband alone, an interest that would become a complete title upon payment of the $800.

The suggestion that the claim upon which this attachment was issued was one of the bills assumed by Mrs. Simmonds will not help the defendant. This is an action at law. Both parties are standing upon their legal rights. There is no allegation in the answer of any equitable interest in the property or equitable claim against Mrs. Simmonds, and no attempt to apply the $800 upon the claim against Mr. Simmonds. The court instructed the jury that, unless Mrs. Simmonds had paid the $800 before the

levy of the attachment, they must find for the defendant. This instruction in the condition of this record was erroneous.

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

REVERSED.

FAWCETT, J., not sitting.

FRED C. WILLSON, APPELLEE, V. GERMAN AMERICAN INSURANCE COMPANY, APPELLANT.

FILED APRIL 3, 1914. No. 17,640.

1. **Insurance: PLEADING AND PROOF: VARIANCE.** In an action against an insurance company to recover for loss by fire, the petition alleged that the contract was that the insurance should be in full force from noon of a certain day. The evidence was that it was agreed that the insurance should be in force from the time of the agreement, which was between 8 and 9 o'clock of the forenoon of the said day. The loss by fire was several days later. *Held*, That the supposed variance between the allegations and proof was immaterial.

2. ———: **RENEWAL: ORAL AGREEMENT: EVIDENCE: AUTHORITY OF AGENT.** The parties to a contract of fire insurance may agree orally to renew such contract on the same terms for another year. The evidence in this case, stated in the opinion, is *held* to support the finding of the jury that the defendant agent so contracted with the plaintiff, and that the agent acted within his ostensible authority in making such contract.

3. ———: ———: **AUTHORITY OF AGENT: ESTOPPEL.** If the local agent of a fire insurance company has by agreement renewed a policy of insurance from year to year, and such agreement has been acted upon by the company, the fact that the insured knew that the agent had no authority to waive the written conditions of the policy will not estop him to assert that the agent was authorized to so renew the policy.

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

Burr, Greene & Greene, for appellant.

Sullivan & Squires, contra.

SEDGWICK, J.

The plaintiff was the owner of a stock of general merchandise in the town of Anselmo, Custer county, which was destroyed by fire on the 22d day of April, 1911. He claimed that the defendant insurance company had insured the property against loss by fire in the sum of $4,000, and brought this action in the district court for Custer county to recover that insurance. The cause was tried to the court without a jury, and general findings for the plaintiff and judgment entered thereon for $4,000, and interest and costs. The defendant has appealed.

The allegation of the petition was that one, J. C. Moore, was the agent of the defendant company, and was duly authorized in that regard, and that on the 18th day of April, 1911, the plaintiff applied to the said Moore, as such agent, for insurance on the said property; that the "said defendant by its said agent, in consideration of the sum of $80, orally agreed to become an insurer of said stock of merchandise for the sum of $4,000 for the period of one year, beginning on the 18th day of April, 1911, and ending on the 18th day of April, 1912, at noon, and orally agreed to make and deliver to plaintiff a policy of insurance for the sum of $4,000 in the usual form of policies issued by the defendant." It was also alleged that the plaintiff offered to pay the defendant the specified premium, and that the said agent of the defendant informed him "that he might have 30 days from the date of said contract in which to pay said premium; and plaintiff alleges that it is the custom and habit of said company to allow 30 days in which the insured may pay premiums for contracts of insurance entered into with it; that within 30 days after April 18, 1911, and before the loss hereinafter mentioned occurred, plaintiff tendered defendant the full amount of said premium, but defendant wrongfully refused the same, and still refuses the same, claiming that it is not obligated by said contract;" that within the agreed time the plaintiff tendered the defendant the full amount of the said

premium, but the defendant refused to receive the same. The defendant admits that Moore was then the agent for the company, but alleges that he was merely a soliciting agent, and had no authority to make contracts of insurance, and especially had no authority to make oral agreements binding the defendant to insure property, and also insists that Moore made no such contracts or agreements with the plaintiff.

This being an action at law, the findings of the trial court are entitled to the same consideration in this court as would be given the verdict of a jury, and such finding will not be set aside where the evidence is substantially conflicting, unless upon the whole record it appears it is clearly wrong.

1. It is objected that there is a variance between the allegations of the petition and the evidence, and that the judgment does not follow either. The petition alleges that the policy was to be in force from noon of the 18th, and the witness testified that the contract was made on the morning of the 18th, between 8 and 9 o'clock, and the policy was to be in force from that time. The judgment is that the policy was in force from the 18th, without stating the hour. The fire took place on the 22d, and these supposed variances are not material.

2. Moore had been acting as agent of the defendant company at Anselmo for five or six years, and as such agent had acted for the company in insuring the stock in which this plaintiff was interested in this store from year to year. The policy insuring this property expired at noon on the 18th day of April, 1911, and on the 16th day of that month Moore inquired of the plaintiff whether he desired to continue the insurance, and the plaintiff informed him that he did. Thereupon, Moore left an application with the plaintiff, and again on the morning of the 18th Moore called at the plaintiff's place of business, and the appplication, having been partially filled by the plaintiff, was completed and taken by Mr. Moore and forwarded to the company. When Mr. Moore called on the morning of the 18th, the plaintiff informed him that he wanted to continue the

insurance, and he wanted to know to a certainty that the insurance would not be interrupted, and that the renewal policy would be in full force and effect from that time. He was assured by Mr. Moore that the insurance would be written upon his application, and that it would be in effect from the time of the expiration of the former policy. The plaintiff then offered to pay Mr. Moore the agreed premium, $80, but Mr. Moore told him that he was in a hurry at that time, and that he usually made his remittances within 30 days, and that the plaintiff might have the 30 days in which to make payment. Two days later, as we have already stated, the fire occurred. In the meantime the policy had not been delivered to the plaintiff. It appears from the evidence that on former occasions the agreement for the renewal of insurance had been made on or about the day that the former policy expired, but the policy had not been delivered until several days, sometimes more than a week, later; but these renewal policies had uniformly been written so as to be in force and effect from the time of the expiration of the policy. Mr. Moore was a witness upon the trial, and the testimony of the plaintiff was not denied by him.

On the 19th day of April, Mr. Sage, the manager of the defendant company, wrote a letter to Mr. Moore calling the agent's attention to the expiration of plaintiff's policy on the 18th, and saying: "Thinking possibly you may have overlooked it, we thus remind you in order that assured may not unwittingly go without insurance." He also stated: "Rate is now $4.90 as per rate book of Nov. 12, 1910." Mr. Moore answered that the risk was a good one, and the rate agreed upon was the same as it had been. Again, on the 22d, Mr. Sage wrote Moore that the rate was too low, saying: "We consider the former rate of 2 per cent. entirely inadequate and prefer to accept no liability unless a rate of 3½ per cent. can be secured, and we are holding the application in this office awaiting your early advices along this line." Mr. Moore wrote several letters describing and strongly recommending the risk at the rate agreed upon by him, and it does not appear that the con-

tract was repudiated and the plaintiff notified until after the goods were destroyed by fire.

3. It appears from the evidence that the defendant company applied to the auditor of state for a license authorizing Mr. Moore to act as agent for the defendant in the town of Anselmo, and in that application stated that Mr. Moore "is hereby duly appointed agent of the German American Insurance Company of New York, to whom please issue certificate of authority," and the license issued by the auditor recited that "the above named agent is hereby authorized to transact the business of insurance as agent of the said company in this state." There was no suggestion, either in the application or in the license, that Mr. Moore was merely a soliciting agent, and, as we have seen, in former years he had taken the application and procured the policy, and, although the same was not delivered to the assured until some time after the former policy had expired, the new policy was uniformly made to be in force from the expiration of the former one. This was, of course, done with the knowledge and approval of the defendant company, and the defendant ought not now to be allowed to object that this plaintiff was not justified in relying upon the representations and promises of the agent Moore in regard to the continuance of his insurance without interruption.

4. The answer alleged that the former policies of this company in which the plaintiff was interested contained the provision that the agent had no power "to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto." It is urged in the brief that the plaintiff knew of this provision in defendant's policies, and is therefore estopped to allege that the agent Moore had authority to agree to a renewal of the policy. But an agreement to renew the policy for another year upon the same terms was not a waiver of any of the terms of the written policies of defendant, and there seems to be no ground for this objection.

We think, therefore, that the findings of the trial court that the defendant is now bound by the contract of the agent Moore, and that the contract with the plaintiff was made substantially as alleged, is not so unsupported by the evidence as to require this court to reverse those findings.

The judgment of the district court is

AFFIRMED.

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

WILLIAM SULLIVAN, APPELLANT, V. HENRY HANSEN, APPELLEE.

FILED APRIL 3, 1914. No. 17,704.

1. **Replevin:** DIRECTING VERDICT: IDENTIFICATION OF PROPERTY. The affidavit and writ of replevin should identify the property replevied. If they fail to do so, and there is no evidence identifying the property taken under the writ as the property claimed by the plaintiff, the court should direct a verdict for defendant, although no objection is made to the affidavit and writ in that regard.

2. ———: TITLE: EVIDENCE. Evidence that the defendant agreed to give plaintiff 1,600 bushels of corn in settlement, and that they agreed that plaintiff should take the corn then in a certain crib, and if, upon measurement, it should prove to contain more than 1,600 bushels, the plaintiff should pay the defendant for the excess "whatever you get in Jackson, and, if less, you pay me," tends to prove an agreement on the part of defendant to make good the deficiency, if any, by the payment of money, but does not tend to prove any title or lien in favor of plaintiff in defendant's corn not contained in the specified crib.

3. ———: JUDGMENT: HARMLESS ERROR. In replevin, if the property has been delivered to the plaintiff, and the jury find for the defendant, the judgment must be "for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Rev. St. 1913, sec. 7833. If there is no alternative judgment for the value, and the property cannot be returned, such a judgment is very favorable to the plaintiff, and he cannot complain of the error. *Jameson v. Kent.* 42 Neb. 412.

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

Sullivan & Griffin and *Alfred Pizey,* for appellant.

J. J. McAllister, contra.

SEDGWICK, J.

The plaintiff began this action before a justice of the peace in Dakota county, and, after trial and verdict against him, appealed to the district court for that county. After trial before that court and jury, the court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed. After the appeal to this court, the defendant, Henry Hansen, died, and the action was revived against Simon C. Peterson, as administrator.

The affidavit in replevin and also the petition filed in the district court described the property as "182 bushels of corn." The petition stated the value to be $70. There was no attempt in either the affidavit or the petition to identify the property replevied. The original writ of replevin does not appear in the record, but the justice recited in his docket that he issued one. He also recited the sheriff's return, which says that he has replevied "the goods and chattels within described."

Mr. E. P. Riley testified that a certain farm cultivated by the defendant in 1910 "stands in the name of William Sullivan," and that the witness, in behalf of the parties entitled to the rent, made an agreement of settlement with Hansen as to the amount of corn that the landlord should have. He testified that the defendant offered to give him 1,600 bushels of corn in settlement of the rent, and that he told the defendant to give him the corn in a certain crib, and that if it turned out, upon measurement, that there were more than 1,600 bushels in the crib, "I will pay you whatever you get in Jackson, and, if less, you pay me." This was their agreement. This witness afterwards testified, upon cross-examination, that, if the corn was less than 1,600 bushels, "he was to deliver to me in Jackson," but this seems to be his conclusion as to the construction of

their agreement, since he does not attempt to change his testimony upon his direct examination, in which he gave the exact words of their agreement. This was an agreement to pay him the difference in money, and not in corn. It does not appear that the corn which the sheriff took under the writ was raised upon the premises referred to in the evidence. In fact, the contrary would appear, as this witness testified that Hansen "hauled the corn away" in February. The plaintiff failed to show that Hansen ever agreed to give him any corn, or that he had any claim whatever upon the corn that the sheriff took under the replevin writ.

There is no finding as to the value of the corn, nor as to defendant's damages, and no alternative judgment in case that a return of the corn to the defendant cannot be had, but the defendant does not complain of this. He seems to be satisfied that, although the corn must now be as old as the 1910 crop, he can still obtain a return thereof upon his judgment. It may be that by agreement some disposition of the corn has been made so that this judgment can be enforced.

As there was no error in the case except as against the defendant, and he is not complaining, the judgment of the district court is

AFFIRMED.

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

CHARLES F. WARD, APPELLEE, V. ED L. ADAMS ET AL.; ASA L. RANSOM, APPELLANT.

FILED APRIL 3, 1914. No. 17,714.

1. **Sheriffs: APPREHENSION OF CRIMINALS: REWARDS.** It is a part of the duty of a sheriff to apprehend a person charged with crime. If a public reward is offered for the arrest and conviction of a criminal, the sheriff of the county cannot become entitled to such reward on account of services rendered in finding and arresting the person so charged.

2. **Money Received: REWARD: EVIDENCE.** The verdict of the jury that the defendant failed to prove that he was entitled to retain money that came into his hands for plaintiff is found not so clearly wrong as to require a reversal under the evidence indicated in the opinion.

APPEAL from the district court for Kearney county: ERNEST B. PERRY, JUDGE. *Affirmed.*

M. D. King, for appellant.

W. S. Morlan and *Lewis C. Paulson, contra.*

SEDGWICK, J.

When Bert M. Taylor was charged with the crime of murder in Kearney county, he absconded, and some time afterwards gave himself up to some of the officers of California, and through the instrumentality of the plaintiff, Ward, he was held in custody until the defendant Ransom, who was then sheriff of Kearney county, took Taylor into his custody and returned him to Kearney county for trial. The crime with which Taylor was charged was considered very aggravated, and the county offered a reward for his capture and return of $1,500, and some of the citizens of Kearney county added to this the further sum of $140. Afterwards the plaintiff, Ward, filed his claim with the county board of Kearney county for the amount of the reward. It was finally adjusted so that the plaintiff should be allowed one-half of the reward. When the defendant Ransom was in California, he undertook, with the plaintiff, to look after his interest in obtaining the reward. The defendant Ransom employed the defendants Adams & Adams, attorneys at law, one member of which firm was a brother-in-law of his, for the plaintiff, to obtain the reward from the county. When the adjustment was made, a county warrant was issued in the name of the plaintiff for $750, his one-half of the reward offered. This warrant was receipted for by the defendants Adams & Adams, and the money obtained from the county, also the reward offered by private parties, amounting in all to $826.75, one-half of which they retained for their services,

and paid over the other half, $413.35, to the defendant Ransom. Afterwards the plaintiff brought this action in the county court of Kearney county against Ransom and Adams & Adams to recover the money which they had obtained for him. Afterwards, upon appeal to the district court and trial, the plaintiff recovered a verdict and judgment against the defendant Ransom for the amount so received by him and costs of suit, and the defendants Adams & Adams obtained a verdict in their favor. From this judgment the defendant Ransom has appealed to this court.

The defendant thinks he ought to recover a judgment for at least one-half of the amount turned over to him by Adams & Adams. The reward was first divided between the plaintiff and another claimant, and afterwards, the plaintiff's half was divided by Adams & Adams, and now the remaining one-fourth of the reward it is claimed should be divided between the plaintiff and Ransom. When he was asked as a witness in the case why he claimed this money or a part of it, he said that he had "been to quite a bit of expense," and that he claimed part of the reward for the capture of Taylor; that the expense he had been to was before Taylor was captured; and the court correctly instructed the jury that as sheriff he was not entitled to any reward for the capture of Taylor. The defendant Ransom does not specify any other services which he rendered for the plaintiff in the matter of the reward, except the employment of the attorneys, in which he agreed that they should have one-half of any amount recovered. He failed for several months to inform the plaintiff that he had received the money, and finally, after the plaintiff had written him numerous letters in regard to the matter, he wrote to the plaintiff that "Adams took half of what you and I were to get, and left me to settle the other half with you, which would be $185. Now, if you think I am entitled to some for my time and expense, let me know so I can settle with you at once, because I want you to be satisfied whether I get anything or not." He had in fact received $413.35. He testified on the trial of the case at bar that the reason he stated in his letter to plaintiff that

the money turned over to him by Adams & Adams with which to "settle with" plaintiff was $185 was because "that is what I wanted to give him." The plaintiff alleged that Ransom was not authorized to contract to give the attorneys one-half of the amount of the reward, and that he did so because of their relationship and for the purpose of absorbing all of the plaintiff's claim. His letters indicate that there was no agreement to pay him anything for employing these attorneys, and that no compensation was expected until he had this money in his hands. Clearly, under the circumstances, he had no valid, legal claim against the plaintiff, and the verdict of the jury was supported by the evidence.

The judgment of the district court is

AFFIRMED.

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

HENRY DAMKROEGER ET AL., APPELLANTS, V. J. W. JAMES, ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,722.

1. **Specific Performance: PAROL CONTRACT: PART PERFORMANCE.** "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it." *Kofka v. Rosicky*, 41 Neb. 328.
2. ———: ———: EVIDENCE. The evidence in this case, indicated in the opinion, is *held* to be sufficient to establish such a contract.

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

J. A. Gardiner, Steiner & Boslaugh and *John C. Stevens*, for appellants.

John M. Ragan, Karl D. Beghtol and *J. E. Addie, contra.*

SEDGWICK, J.

August Damkroeger died intestate in Adams county, and left some property, real and personal. Afterwards the plaintiffs, who are husband and wife, brought this action in the district court for that county to obtain a specific performance of an alleged contract of the said decedent to convey the said property to these plaintiffs. They alleged that the deceased, who had no family of his own, had lived with them as a member of their family for about 12 years, and that some 15 or 20 years ago, while he was so living with them, the deceased promised and agreed that, if they would allow him to so continue to live with them, and would board and care for him, they should have his property at his decease. He died suddenly after two or three days illness, at the age of 72 years, and without having made any will or conveyance in their favor. They fully performed the contract on their part, and had received no compensation therefor. The defendant James is administrator of the estate of the deceased, and the other defendants are heirs and next of kin. The defendants admitted the formal parts of the petition, and denied the material allegations. The trial court found the issues in favor of the defendants, and entered a decree accordingly, and the plaintiffs have appealed.

That "specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it," has been well established as the law of this state. *Kofka v. Rosicky,* 41 Neb. 328; *Hespin v. Wendeln,* 85 Neb. 172; *O'Connor v. Waters,* 88 Neb. 224; *Peterson v. Baur,* 83 Neb. 405.

Henry Damkroeger and his wife and family came to this country from Germany in 1882, and his brother August came with them. They located in Jefferson county, and August resided with the family there for about six years. Afterwards he had a farm of his own, and the witnesses testified that he spent some of the time in his own house "batching it," but had no other home than with the family

of the plaintiffs. During the last six years of his life he lived wholly with the plaintiffs' family. He had a room by himself, and, being in poor health, required and received special care. So far as this evidence shows, he never paid the plaintiffs anything for his board and the care which they took of him. Charlotta Damkroeger testified to conversations that she heard between her husband and August while they were residing in Jefferson county, in which her husband suggested to August that there should be some arrangements made in regard to his living with them, and August, who was a very careful man financially, replied that they (these plaintiffs) should have all of his property when he died, and that that would be ample pay for taking care of him. Her evidence was objected to, but was admitted subject to the subsequent conclusion of the court, and the defendants in their brief say that the evidence of Charlotta Damkroeger was stricken out by the court as incompetent because it appears that she participated in the conversation with the decedent to which she testifies. The brief does not refer to the part of the record which shows that ruling. After the evidence was closed, the record recites that the motion to strike out this evidence was renewed, and that there was "no ruling at this time." This witness was not familiar with the English language. She testified through an interpreter. On cross-examination she was asked, and answered: "Q. Now, in these conversations August was talking to you and your husband both, and you were both talking to him? A. Yes. Q. You took as much part in the conversation as Henry, did you not? A. No. Q. August talked to both of you, did he not? A. He talked to Henry." From the whole evidence of this witness it is clear that she meant to testify that she overheard the conversations between her husband and his brother, and took no part therein herself. Several witnesses testified to different conversations with August during the many years that he was living with these plaintiffs, in which August more or less definitely stated that these plaintiffs were to have his property at his death. Henry Roeder, who was a

carpenter and painter in Hastings, testified that he had known August Damkroeger for about a year prior to his death; that he saw him quite often; that August was in the habit of coming down to the witness' house and to his shop to visit with him in the German language; and, referring to a conversation about a month before August's death, the witness testified: "He told me about his property, of the different wealth he had, and, of course, I knew he was not a married man and had not been married. I knew he was getting old and might not live long. I asked him who would fall heir to his wealth. He said that Henry Damkroeger would, because he had kept him the biggest part of his life and he had treated him right; had cared for him nicely and had treated him the best he knew how." This witness appears to be competent and disinterested. Mr. Charles W. Juhl testified that he knew August Damkroeger for about two years before his death, and that just before his death August was at the witness' house, and, in the course of their conversation, "said he wanted to look around and see what we had. We went out with him and showed him what we had—our cows, hogs, chickens and things—and he said we were getting along good, and if we kept on we would be rich. We were out by the barn looking northeast, and he said he was getting old and did not think he would last long, and when he died that Henry would get all of his property." Mr. Juhl's wife was present and heard this conversation, and she testified to substantially the same thing.

If the former decisions of this court above cited are to be followed, this evidence is sufficient to establish the case of the plaintiffs. It is said in the brief that equity will not compel a specific performance of an oral contract to convey real estate, "if the services rendered have a money value." The brief continues: "The circumstances under which services can be considered part performance to remove such a case from the action of the statute of frauds are very special and extraordinary, such as the love of a child or daughter, or great service rendered in a long sickness, where utter mental and physical incapacity

exists, or where constant and unwearied attention attest the devotion of a life or for years." Many courts have adhered to such a rule in all its strictness. It has been urged by counsel in several of the cases heretofore determined by this court: *Peterson v. Estate of Bauer,* 83 Neb. 405; *Harrison v. Harrison,* 80 Neb. 103; and other cases. It has not been followed as the defendants in this case would construe and apply it. Each case must depend upon its own circumstances and conditions. The proof must be clear and unequivocal. When it is clearly established that the alleged contract was not an unreasonable one under the circumstances, and has been fully and faithfully performed on the one part relying upon its performance by the other party, and there is no such disproportion of values shown as would render the alleged contract unconscionable and improbable, this court has uniformly held that such contract will be specifically enforced. This seems to us to be the only way that equal justice can be done. There is nothing in this evidence to indicate that these plaintiffs would have been willing to do as they did relying upon an implied agreement to pay them, at some time then in the indefinite future, such amount of money as a court or jury might estimate as equivalent. If the agreement was fair and reasonable, and they have done their part, they are entitled to the agreed compensation. Such contracts, when fully performed on one part, are enforced between the living. And, if the proof can be made clear and satisfactory, there is no greater reason for refusing relief in cases such as this.

The decree of the district court is reversed and the cause remanded, with directions to enter a decree in favor of plaintiffs as prayed in their petition.

REVERSED.

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

PLATT & FREES COMPANY ET AL., APPELLANTS, V. WILLIAM J. SCRIVNER ET AL., APPELLEES.

FILED APRIL 3, 1914. No. 17,343.

1. **Mechanics' Liens: EVIDENCE.** Platt traded lots to Moritz for a farm, agreeing to give Moritz a credit of $3,400 with the Platt & Frees Company. Moritz was to build five cottages on the lots, was to buy all his material of Platt & Frees Company, the same to be paid for out of his said credit, if the same should be found sufficient. The plaintiffs brought an action to foreclose an alleged mechanic's lien for so much of the material as went into one of the houses, the Scrivner house. Scrivner and his wife and Moritz were made defendants. The material furnished for the five houses amounted to $3,851.50. The Scrivner house was the fourth house constructed. The evidence shows that, when the contract for this was made and the material furnished, Moritz was still entitled to a credit of more than the cost of material. *Held*, That no lien attached to the property of Scrivner, but that the plaintiffs are entitled to a judgment against Moritz for the price of the material furnished for the five houses in excess of the credit of $3,400.
2. **Compromise and Settlement: EVIDENCE.** Evidence upon the issue between Moritz and Scrivner as to the amount due Scrivner examined, and *held* that a valid settlement was entered into between such parties, and that nothing is due Scrivner thereupon.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed in part and reversed in part.*

L. H. Blackledge, for appellants.

Bernard McNeny and *E. U. Overman, contra.*

HAMER, J.

The pleadings in this case cover about 13 pages, and an effort will be made to state the matter in controversy without the recital of the pleadings in detail. The pleadings and evidence show that an exchange of real estate was made by the defendant Moritz with Charles J. Platt, one of the plaintiffs. Moritz conveyed to Platt certain farm land in Webster county, Nebraska, in exchange for six

groups of lots, of four in each group. The lots are in Platt's First addition to Red Cloud, Nebraska. Between the value of the farm as agreed upon and the value of the lots there was a difference of $3,400 which was coming to Moritz. On one of the groups of lots there was a dwelling-house, and Moritz, under the agreement with Platt, was to build a dwelling-house on each of the other groups of lots. Platt was to put in all of the cement work, including sidewalk, at the price at which Moritz might be able to obtain the same at Red Cloud. Moritz also agreed to buy all of his material from the Platt & Frees Company, one of the plaintiffs, the same to be furnished to said Moritz by said Platt & Frees Company, at a price 10 per cent. above cost, including handling, except as to cement work. Moritz agreed to take sufficient material from the Platt & Frees Company for the erection of five cottages to be built by him on the five groups of lots, the cost of such material to be applied on the $3,400 which was due Moritz from said Platt on the trade, and on completion any amount due for such material in excess of $3,400 was to be paid by said Moritz in cash, and, if any amount of the $3,400 should not be used, then the same was to be paid in cash by said Platt to said Moritz. After the first three houses were built, for which material only was to be furnished, said Platt was to furnish all lumber and material and was to build the fourth and fifth houses, provided that the material previously furnished did not cost $3,400. It was agreed that when Platt had bought and furnished material, or material and labor, in the total aggregate sum of $3,400, his obligation under the contract was to be considered complied with. Moritz was to build two of the cottages in 1909, two in 1910, and one in 1911. The contract was signed by C. J. Platt and R. D. Moritz, and also by Platt & Frees Company, the latter signing under the clause, "we agree to furnish the material as specified in the foregoing contract."

Platt & Frees Company commenced their action against William J. Scrivner, Emma L. Scrivner and Richard D. Moritz. Their petition alleged that they had commenced

their action to foreclose a mechanic's lien; that the Platt & Frees Company, had furnished the defendant William J. Scrivner, material for the construction of a dwelling-house on one of said lots pursuant to an oral agreement; that the value of the material furnished was $841.95; that the steps to secure a mechanic's lien had been taken, reciting the steps; that Emma L. Scrivner was the wife of said William J. Scrivner; that there was due to the plaintiffs, as a balance on the contract, $841.95, together with interest from the 18th of January, 1910; that the defendant Richard D. Moritz claimed to have an interest in the property by virtue of a mortgage thereon which had been executed by the defendants William J. Scrivner and Emma L. Scrivner to said Moritz in the sum of $1,500; that the interest of said defendants was subject and inferior to the plaintiffs' claim, which was a first and valid lien on the premises. The prayer was that the rights of the parties should be determined, and that the plaintiffs recover judgment against the defendant William J. Scrivner for the sum of $841.95, with interest, and that the same be declared a first lien on the premises, and that the premises be sold and the proceeds applied to the payment of the amount due the plaintiff, with interest and costs, and for such other and further relief as might be just and equitable.

To this petition William J. Scrivner filed his answer, admitting that he bought of the plaintiffs Platt & Frees Company, the lumber and material specified in the petition, and that he used the same in the erection of a dwelling-house on lots 17, 18, 19, and 20, in block 4 of Platt's First addition to Red Cloud, Webster county, Nebraska; that at the time he bought the same he (the defendant) was the owner and in possession of said lots, holding the same under a contract of sale from the defendant Richard D. Moritz; that afterwards Moritz and his wife conveyed the premises to the defendant William J. Scrivner by warranty deed duly recorded in Webster county; that thereupon the defendant William J. Scrivner and his wife, Emma L. Scrivner, executed to said Moritz their note in

the sum of $1,500, bearing 6 per cent. interest, and securing the same by a mortgage on said premises; that the consideration for which said mortgage and note were given was a balance of the purchase price on said lots then due to said Moritz; that said Moritz should pay or furnish to the defendant William J. Scrivner the money to pay the plaintiffs the amount of plaintiffs' said lien, being the sum of $885, which was included in said mortgage, and for which the defendant William J. Scrivner had received no other or further consideration; that the defendant Richard D. Moritz had not paid either to the plaintiffs Platt & Frees Company, or to the defendant William J. Scrivner, the said sum of $885, or any part thereof; that since the commencement of the suit said Moritz had assigned or transferred the mortgage; that, on account of the failure of said Moritz to pay the said sum of $885, said lien of the plaintiffs had been filed, and that the defendant had been greatly damaged thereby; that the defendant had been unable to sell the property, which he desired to do, and could have done but for the filing of the said lien; that soon after the filing of the said lien the defendant William J. Scrivner had served a notice on said Moritz demanding that he pay the said sum of money to him (the defendant) or to the plaintiffs Platt & Frees Company, and that he cause the said lien to be released; William J. Scrivner prayed for an accounting between himself and said Moritz, and that said Moritz be required to pay into court so much of the said sum of $885, with interest, as might be necessary to procure the cancelation of said lien; that said mortgage and note might be canceled and reduced by the amount of $885; that the defendant William J. Scrivner recover of said Moritz, in addition, the sum of $500 damages, with costs; that he also have such further relief as might be just and equitable.

The defendant Richard D. Moritz filed an answer to the petition of the plaintiffs Platt & Frees Company, (1) denying each and every allegation in the petition contained; (2) alleging that the Platt & Frees Company, was no longer a corporation, that it had been dissolved in September,

1909, and that it was not in existence January 29, 1910, when the mechanic's lien mentioned in the plaintiffs' petition was filed in the office of the county clerk of said county; (3) that said Platt & Frees Company is not the owner of the account sued on, but that said company had sold the same to Charles J. Platt and Benjamin F. Frees, a partnership known as the Platt & Frees Company; (4) that the defendant Richard D. Moritz denies that the defendant William J. Scrivner and the Platt & Frees Company ever entered into a contract for the purchase of the lumber and material mentioned in plaintiffs' petition; alleges that the defendant Richard D. Moritz purchased of the said Platt & Frees Company all of the lumber used in the erection of the said dwelling on lots 17, 18 and 19, in block 4, Platt's First addition to the city of Red Cloud, and under and by virtue of a certain contract entered into between the defendant Richard D. Moritz and Charles J. Platt and the Platt & Frees Company, which said contract is set out in the exhibit attached to the answer of said Richard D. Moritz; alleges that before purchasing said lumber and building material the defendant Richard D. Moritz entered into a written contract with the defendant Scrivner for the sale of the lots mentioned in plaintiffs' petition, and the lumber to be used in the dwelling erected thereon, and, in pursuance of said contract, purchased of the said Platt & Frees Company all of the lumber and materials mentioned in plaintiffs' petition (a copy of the contract between the defendant Moritz and the defendant William J. Scrivner is attached to the answer of said Moritz and marked exhibit B); alleging that at the time said Moritz purchased the lumber and material mentioned in plaintiffs' petition said Platt & Frees Company was indebted to him, the said Moritz, in a sum in excess of $841.95, and that the said sum of $841.95 was paid by the defendant Richard D. Moritz to the said Platt & Frees Company, and that it was agreed by the said Platt & Frees Company and the defendant Richard D. Moritz and the defendant Scrivner that the lumber so furnished by this defendant to said Scrivner was to be charged against the

balance which this defendant then had deposited with the said Platt & Frees Company, and that the said Platt & Frees Company had been paid in full for said lumber and material; alleging that under the terms of the contract between the said Platt & Frees Company, Charles J. Platt, and the defendant Richard D. Moritz, the defendant Moritz erected five houses, and received under its contract from the said Charles J. Platt and Platt & Frees Company building material amounting to about $3,700, and no more; that the prices charged in the account mentioned in plaintiffs' petition and the prices charged for the building material used by the defendant Richard D. Moritz in erecting the other houses mentioned in the contract were greatly in excess of 10 per cent. above the cost price; alleging that the defendant Richard D. Moritz has at all times been ready and willing to settle or pay to the said Platt & Frees Company all he might owe it under said contract, but that the said Platt & Frees Company refused to accept the cost price of said lumber and material plus 10 per cent. profit thereon; alleging that the said Platt & Frees Company is not entitled to a lien on the premises described in plaintiffs' petition, and that the lumber and material used in the erection of said dwelling on said lots was purchased by the defendant Richard D. Moritz, from the said Platt & Frees Company, and was paid for by the defendant Richard D. Moritz by the said Platt & Frees Company deducting said bill from the balance which the said Platt & Frees Company then owed to this defendant Richard D. Moritz. There was a prayer to this answer of Richard D. Moritz that the plaintiffs and the defendant William J. Scrivner take nothing.

The plaintiffs replied to the answer of the defendant Moritz, admitting that a contract was made between said Moritz and Charles J. Platt substantially as set forth in exhibit A, attached to said answer of said Moritz, and alleging that the same was the individual agreement of said parties, and not the contract of the plaintiffs; alleging that the plaintiffs did not have knowledge of the contract set out as exhibit B, and attached to said answer; also

denying each and every other allegation of fact contained in said answer.

Subsequently the plaintiffs and Charles J. Platt moved that Charles J. Platt be made a party plaintiff with the plaintiff, Platt & Frees Company, and the same was done.

Upon the trial the district court found that the plaintiffs furnished and delivered to the defendant Richard D. Moritz, under the written contract between the parties set forth in the answer of the defendant Moritz, certain lumber and building material and cement work to the amount and value of $3,851.50, and that said material included the material set forth in plaintiffs' petition, and which entered into the construction of the dwelling-house described therein, and that lots 17, 18, 19 and 20, in block 4, Platt's First addition to Red Cloud, Webster county, Nebraska, against which property the plaintiffs claim a lien; that the said dwelling-house is known as the "Scrivner house;" that the whole amount of material referred to and computed by the court and chargeable under the terms of the contract amounts to $3,851.50, and that said material entered into the construction of the said "Scrivner house," and also four other dwelling-houses contemplated by said contract, and known and referred to as the "Pope-Jones house," the "McFarland house," the "Yost house," and the "Barta house;" that, as between the plaintiff and the defendant Richard D. Moritz, the said defendant Richard D. Moritz is entitled to a credit under said contract of $3,400 against the said sum of $3,851.50. It was also found that, as between the plaintiff and the defendant Richard D. Moritz, the defendant Moritz is entitled under the contract to a credit of $3,400 against the said sum of $3,851.50; that, as between the said defendant Moritz and the defendant William J. Scrivner, the note and mortgage given by the said Scrivner to said Moritz upon said described real estate was above the true amount, and that there was due to the defendant Scrivner from the defendant Moritz $219.70; that the sale and furnishing of said materials by the plaintiffs was to the defendant Moritz, under the said contract, and that the claim of the lien filed by the

plaintiffs and the record thereof should be canceled, because not constituting a lien against said property. It was considered that the plaintiffs recover from the defendant Moritz the sum of $451.50; that the defendant William J. Scrivner recover of the defendant Moritz the sum of $219.70; that the lien of the plaintiff, Platt & Frees Company, filed against said real estate and the record thereof be canceled and set aside as not constituting a lien on said property.

The first question raised is whether the plaintiff, the Platt & Frees Company, is entitled to a lien for the amount of material furnished by it, or for any part of it. It seems to be conceded that the value of materials furnished by the plaintiff and entering into the construction of the five houses exceeds $3,400, the amount of the Moritz credit, which is confined to $3,400. The dwelling-house involved in the controversy is the fourth one to be erected by the defendant Moritz under his agreement. It was found by the court that the materials entering into its construction were furnished to Moritz under his contract. There is evidence to sustain this finding, and we do not feel at liberty to disturb it. It is contended by the plaintiffs that, notwithstanding this, the lien should have been allowed because another house, called in the record the "Barta house," was under construction at the same time, and that the amount due for all materials furnished, including that for the Barta house, exceeded the Moritz credit, and for that reason that plaintiff is entitled to a lien for at least the amount of the excess. The fault with this position lies in the fact that the contract for the materials for the Scrivner house was reached and the material furnished for that house *before anything was furnished for the Barta house,* and before any agreement or understanding touching the amount of material to be furnished for the Barta house was reached. In other words, at the time the amount of materials for the Scrivner house was agreed upon and the material furnished, Moritz still had a credit on his contract. All the material for the Scrivner house being furnished, Moritz still had a credit of about

$100. No lien could arise against this property until there was a debt existing because of materials furnished for its improvement. Until Moritz had exhausted his credit under the contract he was not indebted to the plaintiffs. We are unable to say that the decree of the district court is wrong in so far as it cancels the lien claimed by the plaintiffs. We think it is right, and it is therefore affirmed.

This brings us to the consideration of that part of the decree which finds the price charged by Moritz to Scrivner for the house to be excessive and awarding Scrivner a judgment for the excess. By agreement between Moritz and Scrivner, Scrivner was to be charged the actual cost to Moritz of the materials going into his home. On making a settlement between themselves, a statement of the cost was obtained from Platt. It was adopted by Scrivner and Moritz as representing the cost of the material, and Scrivner executed the mortgage upon the basis of Platt's statement. No fraud or misrepresentation seems to have been practiced by either. They had an equal opportunity for knowledge of the cost. Scrivner is himself shown to be a contractor and builder. Their settlement was voluntarily entered into, and, in the absence of fraud, it ought not to be set aside. The decree, in so far as it gives judgment in favor of Scrivner and against Moritz, is reversed.

The decree of the district court is affirmed so far as it cancels the lien claimed by the plaintiffs, and reversed so far as it awards judgment in favor of the defendant William J. Scrivner, and against the defendant, Richard D. Moritz, and the cause is remanded to the district court for such other and further proceedings as are necessary according to law and in harmony with this opinion.

JUDGMENT ACCORDINGLY.

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

CLARENCE H. JONES, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1914. No. 17,396.

1. **Carriers:** ACTION FOR DAMAGES: DIRECTING VERDICT. The plaintiff entered a street car in South Omaha, July 24, 1909, intending to go north through Omaha to Courtland Beach. He paid his fare. At Thirteenth and Dodge streets, Omaha, he left the car, walked south on Thirteenth street to Douglas street, west on Douglas street to Fourteenth street, where he entered a store, and, after making a small purchase, walked north along Fourteenth street across Douglas and Dodge streets, and at the intersection of Fourteenth and Dodge streets he entered a car going north on Fourteenth street, and presented to the conductor in payment of his fare a transfer slip on the Sherman avenue line punched "south" of the day before, and asked for a Cuming transfer at Seventeenth and Cuming streets, and also said he wanted a transfer on Locust street to the Beach. On refusing to pay his fare and refusing to leave the car, he was ejected from it, and brings suit for damages. *Held*, That the evidence disclosed by the record fails to sustain a verdict for the plaintiff, and that, a request being made therefor, the jury should have been directed to find a verdict for the defendant.
2. ———: TRANSFERS. A street car company has the right to collect and receive fares and fix such reasonable rules concerning the issuance and use of transfer slips as to prevent it from being defrauded.
3. ———: ———. As between the conductor and the passenger, the transfer produced must be regarded as conclusive as to the rights of the latter.

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

John L. Webster and *William J. Connell*, for appellant.

E. T. Farnsworth, contra.

HAMER, J.

The plaintiff sues to recover damages because, as he alleges, he was wrongfully ejected from one of the defendant's cars. He got aboard one of its cars on the evening

of July 24, 1909, at Twenty-fourth and L streets in South Omaha. He testified that he intended going north to Courtland Beach. His route lay through Omaha. At Thirteenth and Dodge streets, Omaha, he left the car and walked south on Thirteenth street to Douglas street, and then walked west on Douglas street to Fourteenth street, where he entered the Palace Clothing Store, and made a small purchase. He then walked north along Fourteenth street across Douglas and Dodge streets, where at the intersection of Fourteenth and Dodge streets he boarded the car from which he was subsequently ejected. That car was going north on Fourteenth street. When he got aboard the Fourteenth street car at Dodge street, he presented the transfer which had been given him before he left the first car. When he presented his transfer, the conductor refused to accept it in payment of fare, and told the plaintiff that his transfer was not good, and demanded payment of the fare. When the car was standing still at Chicago street, the conductor informed the plaintiff he must leave the car or pay his fare. The plaintiff refused to pay, and refused to go. It is said not to have been the custom of the defendant company to issue transfer slips which give a privilege to the passenger to leave the car at any intermediate point on the line for the purpose of transacting his private business and then going as a foot passenger to some other street car line, there to present his transfer slip in payment of his fare on the other line. That is what the plaintiff seems to have done in this case. The plaintiff had received a transfer for the transfer point at Seventeenth and Cuming streets. It will be remembered that he left the car at Thirteenth and Dodge streets, a point about 12 blocks south from the transfer point named by the plaintiff. If the plaintiff received a transfer on a north-bound Thirteenth street car entitling him to transfer from that line at Cuming street and Seventeenth street, then he had no right to attempt a transfer at either Thirteenth or Fourteenth street car lines at the intersection with Dodge street. The plaintiff's conduct in leaving a car on the Thirteenth street line to do personal shop-

ping, and thereafter undertaking to use a transfer upon another car at a point which was *not* a transfer point, tends to indicate that the plaintiff was not acting in good faith.

The evidence tends to establish the custom in these matters, and apparently it is not the custom to leave a car on a street car line and to walk about, transacting business in the meantime, and then go to *another* line presenting a transfer which does not purport to be issued for use on that line. The plaintiff testified that he told the conductor that he wanted to go to Courtland Beach; that the conductor gave him a transfer on Seventeenth street, a Cuming street transfer; that he rode north on the Thirteenth street car to Dodge street; that he would go across to Fourteenth street, that it would not be crowded so much. He claimed to have done that at other times. He testified that he got off the car at Dodge street, and that he walked west to Fourteenth street, and then got on a closed car and *asked the conductor for a transfer on Locust street to Courtland Beach.* The plaintiff said he wanted a transfer on Locust street to the Beach, and the conductor said he would not give it to him. The plaintiff told the conductor, he testified, to give him a transfer, and the conductor said: "You will have to pay another nickel if you get a transfer." When the parties reached this sort of a controversy, the plaintiff says that he and the conductor called each other names. The plaintiff testified, "I told him to give me my transfer and I would get off and walk back, and he would not give it, so he grabbed me and jerked me around, and the motorman came out, and he said, "We can't hold that car here; and then the conductor put his knee against my back and gave me a shove out, and I went through the door." This brings us to the question as to which was right in the controversy.

As a part of this same matter it is proper to inquire what sort of a transfer the plaintiff presented when he boarded the Fourteenth street car. B. Van Horn was the conductor to whom the transfer was presented. He testified: "He got on at Fourteenth and Dodge, and I went

to get his fare, and he tendered me a Sherman avenue transfer punched 'south' on the day before, and I asked him if he didn't have another transfer, and he said, 'No,' that was his fare, that was all he had, and I told him that he would have to pay his fare if he didn't have another transfer, I went on and collected the rest of the fares, and went back and asked him again, and he said that he wouldn't pay, swore at me, and I stopped the car at Seventeenth and Webster streets and put him off with the help of the passengers." The conductor identified exhibit No. 1 as the transfer which was presented to him. He said of it that it was of the same color as "all on the Sherman avenue line, yes, sir;" that he turned it in the same evening; that he attached to it a "trouble" blank; that it was dated the day before he got it, "and that was the 23d, and I got it on the 24th;" that the plaintiff asked "for a transfer to Courtland Beach," and that he "refused to give it to him;" that the plaintiff refused to pay his fare. The witness explained to the court and jury the meaning of the punch marks at considerable length. Among other things, he said: "Q. Tell the jury what the originating line was. A. Sherman avenue, South Omaha, *going south.* Q. What line were you on that day? A. Sherman avenue line. Q. Going what direction? A. *North.* Q. Then, what is the fact as to whether, under the rules and custom of the company, a transfer to go *south* would authorize or permit a passenger to ride *north?* A. *It would not.* Q. What has been the rule and custom as to whether or not transfers issued from the cars of the same identical line, for instance, going north or south on your line, would a transfer be issued on that same line enabling a party to get off and do shopping, and then get back on the same car? A. No, sir. Q. On to another car on the same particular street and line? A. No, sir. Q. Were these the reasons why you declined to accept this transfer? A. *Yes, sir.* Q. And, under the custom that prevailed and your knowledge of the rules of the company, could you accept this transfer? A. *No, sir.* Q. Did you make that known to this man Jones? A. Yes, sir. Q. And

when you made that known, and refused to accept this transfer for passage, and demanded fare, what did he say? A. Said he didn't have another transfer, and said that was his transfer, and he wanted a Courtland Beach, and I told him I could not take the transfer for fare, that it was no good." The plaintiff resisted being ejected from the car, and, according to the testimony on both sides, there was more or less swearing, which it is unnecessary to repeat. Further along the witness testified: "Q. Under the rules of the company, is there any custom that would authorize or permit a party to get off a north-bound car on the Thirteenth street line and go back south on the south side of Douglas street and do shopping, making a purchase, and then walk from that point, namely, the southeast corner of Fourteenth and Douglas, to Fourteenth and Dodge, and board and ride on a car on a transfer on a Thirteenth street line going north? A. No, sir. Q. Is there any custom under which a party would have a right to use a transfer that gave him the right to make a transfer on a car line going south to use that same transfer to go north? A. No, sir." On cross-examination this witness testified: "Q. How far, then, had the car gone before you met him again? A. Seventeenth and Cass. Q. That is after you had gone up by the north side of Jefferson Square and got up to Seventeenth and Cass? A. Between Sixteenth and Seventeenth and Cass. Q. Then, you asked him for the fare again? A. Yes, sir. Q. Now, what did he say? A. Said he would give me his fare, and he gave me his transfer again. Q. What did he say? A. Said he would pay me, and he handed me the transfer again; he took the transfer back once and gave it back to me again, and I told him it was no good, and he wanted a transfer to East Locust, and I told him I could not give him one on that transfer, to pay his fare, and I would give him one; he said that he wouldn't pay no fare." The witness testified that, when he went to put the plaintiff off the car, the plaintiff had hold of him, "had a hold of my necktie, and nearly tore it off." There does not seem to have been any very serious injury as the result of the struggle

to put him off the car, so that we will not spend much time on that.

B. W. Bennett, a conductor, was sworn as a witness on behalf of the defendant, and was shown the transfer, exhibit No. 1, and, from an examination of it, testified that it was issued "on the Sherman avenue line *going south;*" that it permitted the passenger to ride *south;* that, under the custom or rules of the company, the conductor would not be authorized to receive or accept that transfer for fare from a passenger *going north;* that it was not the custom to receive a transfer of that kind on the Fourteenth street line *going north.* He further testified: "Q. Would you accept a transfer where the party was going the opposite direction than that allowed or indicated by the transfer? A. *No, sir.* Q. Where a party got off the Thirteenth street line at Dodge and walked back to Douglas and did shopping, and then walked north on Fourteenth street to Fourteenth and Dodge, and had a transfer punched for Seventeenth and Cuming, would that transfer be good on the Fourteenth street line going north, according to the custom or rule of the company? A. *No, sir.*" The transfer slip itself shows that it was a *south bound* transfer slip issued on the 23d of July, and not on the 24th.

W. L. Musgrave testified that he was superintendent of transportation of the defendant street railway company; that he had been connected with it 23 years; that, by reason of his experience in connection with the company and duties required to be performed, he was familiar with the operation of cars on the different lines, and knew the custom that existed with reference to the issuance and receiving of transfers for fares; that he was not on the car from which the plaintiff was ejected, and that he did not know what had happened there; that he had heard the testimony of the witnesses Van Horn and Bennett. "Q. I will show you the transfer that has been offered in evidence in this case, which the reporter has marked exhibit No. 1, and will ask if you have examined that before, so as to know what it relates to? A. Yes, sir; it came into my hands the next morning. * * * Q. What is the fact

as to whether or not that transfer which you now hold in your hand, marked exhibit No. 1, under the rules of the company, or according to the custom, would be good going *north?* A. *No, it would not be good.* Q. Under the rules of the company, would a conductor be permitted or authorized by those rules or custom to accept or receive that transfer for passage on a *north bound car?* A. *No, sir.*"

The plaintiff was called and testified by way of rebuttal that the passengers did not help pull him off the car. He did not deny the testimony concerning the alleged fact that the transfer which he held would not entitle him to go north. He had testified at his examination in chief that he paid his fare and asked for a transfer to Courtland Beach; that the conductor gave him a transfer on the Seventeenth street line, a Cuming transfer; that he asked for a transfer at Seventeenth and Locust; that the conductor did not object to the transfer offered until he asked for the transfer at Seventeenth and Locust; that at that time he had ridden two blocks on the car; that he said to the conductor: "I wanted a transfer on Locust street to the Beach, and he said he could not give it to me; he said that was a Dodge transfer. I told him it was not, because I just got off at Thirteenth and walked from there." He then describes what happened between him and the conductor; that the conductor wanted him to pay another nickel; that he told the conductor he was not going to get off unless the conductor gave him his transfer. The plaintiff testified that he had before ridden on a Fourteenth street car immediately north from Dodge street on a transfer like the one he was then riding on, and before the day in question; that he had been doing that, and did not know that it was against the rules; that he had been doing that two or three months. His excuse for doing it seems to have been to avoid the Sherman avenue crowded car.

The plaintiff has neglected to brief his case. We are not very clear as to what his theory may be, but we are unable to justify a disregard of the rules of the company by its conductors. We see no excuse for disregarding the

rule that transfers north go north, and transfers south go south, and a transfer to go south on the 23d of July is not a transfer to go north on the 24th of July.

If it is suggested that it was for the jury to find whether excessive force was used by the conductor in putting the plaintiff off the car, it may be answered that the plaintiff testified that he resisted being put off, and that he held on to the seat, and afterwards held on to the handrail on the platform; and it is fully shown that he made a most stubborn resistance; that one of the things which he did was to get hold of the necktie of the conductor and hang on to it; and he does not say or attempt to prove that more force was used than was necessary to overcome his resistance and eject him. For the reason that the evidence is insufficient to sustain a verdict for the plaintiff, the district court should have directed the jury to render a verdict for the defendant.

It is in evidence that the plaintiff asked for and supposed that he had received a transfer slip entitling him to transfer at Seventeenth and Cuming streets. That is certainly conclusive against his right to attempt to transfer and use a transfer slip at either Thirteenth or Fourteenth and Dodge streets, and defeats his cause of action. *Keen v. Detroit Electric Railway,* 123 Mich. 247.

As disclosed by the plaintiff's own testimony that he attempted to use a transfer slip at a point which was not a transfer point, and upon a street car line to which it was not issued, the conductor was justified in ejecting him. *Shortsleeves v. Capital Traction Co.,* 35 Wash. Law Rep. 4.

When the conductor refused to receive the transfer slip presented on the Fourteenth street line, it was the duty of the plaintiff to either unconditionally pay his fare in cash or to leave the car. *Norton v. Consolidated R. Co.,* 79 Conn. 109, 4 Am. Street R. Rep. 114, 118, and cases there cited.

While the amount of the judgment is for only $80, the principle involved in the case is important, because it includes a consideration of the right of a street railway company to collect and receive fares, and to fix reasonable

rules concerning the issuance of transfer slips and the use of the same in such manner as to prevent it from being defrauded. As between the conductor and the passenger, the transfer produced must be regarded as conclusive as to the rights of the latter. This principle receives support in *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342. "As between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive, and the right to ride upon it on that train is, for the time being, to be determined accordingly." Baldwin, American Railroad Law, p. 292, *Mosher v. St. Louis, I. M. & S. R. Co.*, 127 U. S. 390. A rule requiring an expulsion from a car of a passenger who refuses to either pay his fare or produce a ticket showing his right to ride on such car is a reasonable one. *Norton v. Consolidated R. Co.*, 79 Conn. 109, 4 Am. Street R. Rep. 114; *Downs v. New York & N. H. R. Co.*, 36 Conn. 287.

In the instant case, there seems to have been no abuse of which the plaintiff had a right to complain. The judgment of the district court is reversed and the cause is remanded, with instructions to render a judgment for the defendant.

REVERSED.

LETTON and ROSE, JJ., not sitting. SEDGWICK, J., concurs in conclusion.

STATE, EX REL. SAMUEL R. MCKELVIE, APPELLANT, V. ADDISON WAIT, SECRETARY OF STATE, APPELLEE.

FILED APRIL 17, 1914. No. 18,479.

States: EXECUTIVE OFFICERS: ELIGIBILITY. The constitutional provision that "none of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected," makes the lieutenant governor, during the term for which he was elected, ineligible to be elected to the office of governor for the succeeding term. Const., art. V, sec. 2.

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

W. T. Thompson, for appellant.

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

PER CURIAM.

Relator is the present lieutenant governor of the state. Desiring to become the republican party's candidate for governor at the next general election, he requested the secretary of state to place his name on the official ballot for the primary election to be held August 18, 1914. This the secretary of state declined to do, on the sole ground that relator, being the present lieutenant governor, is ineligible to be elected governor for the two-year term beginning in January, 1915. The course taken by the secretary of state is based on his interpretation of the following constitutional provision: "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected." Const., art. V, sec. 2. The secretary of state defines the word "eligible" as "capable of being elected," and argues that, since relator was elected lieutenant governor for the two-year term ending in January, 1915, he cannot, during that term, be elected governor, another state office, at the general election in November, 1914. This is an application to the district court for a writ of mandamus commanding the secretary of state to comply with relator's request for a place on the official primary ballot. A demurrer to the application was sustained and the action dismissed. Relator has appealed.

Relator was elected lieutenant governor for the term of two years "from the first Thursday after the first Tuesday in January," 1913. Const., art. V, sec. 1. Is he eligible to the office of governor for the term of two years "from the first Thursday after the first Tuesday in January," 1915? The answer depends upon the meaning of the constitutional provision that "none of the officers of

the executive department shall be eligible to any other state office during the period for which they shall have been elected." In constitutions and statutes, the use of the word "eligible" in connection with an office has often been discussed by the courts. Authority is divided. To what the courts have already said on the subject, little new matter can be added.

There is abundant authority for the rule that ineligibility to office extends to the capacity to be elected. *State v. Clarke,* 3 Nev. 566; *Roane v. Matthews,* 75 Miss. 94, 21 So. 665; *Taylor v. Sullivan,* 45 Minn. 309; *Finklea v. Parish,* 160 Ala. 230, 49 So. 366; *State v. Howell,* 70 Wash. 467, 41 L. R. A. n. s. 1119. This court is committed to the doctrine announced in the cases last cited. *State v. Moores,* 52 Neb. 770, 801; *State v. Boyd,* 31 Neb. 682; *State v. McMillen,* 23 Neb. 385. The interpretation was: "The word 'eligible' relates to the capacity to be elected or chosen to office, as well as to hold office." In the dissenting opinion it was also said: "We think the greater number of the adjudicated cases, as well as the decided weight of authority, sustain the proposition that the word 'eligible' means both competent or capable of being elected to office, and competent or capable of holding office. * * * Not one of the cases reviewed above is authority for the contention made here that the word 'eligible' found in our constitution refers solely to legal qualification to hold office. Nor, after a somewhat protracted examination, have I been able to find any case where the word 'eligible' was given such a construction when used in a law or constitution like ours." *State v. Moores,* 52 Neb. 770, 801. Without departing from this rule, it cannot be held that relator is eligible, or that he is entitled to a place on the primary ballot. There being reason and authority on both sides of the question presented, no sufficient ground has been suggested for changing the rule to which this court is committed. It follows there is no error in the proceedings below, and the judgment is

AFFIRMED.

REESE, C. J., not sitting.

HAMER, J., (Concurring in conclusion only).

I concur in the conclusion because the opinion is based upon the former decisions of this court. If the question were a new one I should be in favor of a different determination of the case, and I am inclined to the belief that the former opinions, in the interest of public policy and a fair construction of the language used, should be overruled. I have glanced into the opinions of some of the other courts and find that they rest upon different constitutional provisions than those contained in our constitution. The meaning to be given to the word "eligible" depends upon the connection in which it is used. If it is used in connection with *holding an office,* then it means eligible to *hold an office* and it does not mean something else. The language "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected" would seem to mean ineligible to hold the office *during such period,* but not to forbid an election of the proposed officer for *another* and *different period* for which he was *not* elected. The power of the voter to nominate and elect his choice should not be restricted beyond the clear import of the language used.

HARRY B. ZIMMAN, ADMINISTRATOR, APPELLANT, V. MILLER HOTEL COMPANY, APPELLEE.

FILED APRIL 17, 1914. No. 17,706.

1. **Carriers: ACTION FOR DEATH: REFUSAL OF INSTRUCTION.** Plaintiff alleged that the death of his decedent was caused by the incompetency of defendant's elevator conductor, but failed to introduce any competent evidence of that fact. *Held,* That the trial court properly refused to submit that question to the jury.

2. **Witnesses: EVIDENCE OF PARTY'S WITNESS.** A party is ordinarily bound by the testimony of his own witness on the question of

negligence, unless the circumstances or the evidence of other witnesses would warrant the jury in disregarding the evidence of such witness.

3. **Appeal:** INSTRUCTIONS: LAST CLEAR CHANCE. Where the plaintiff sought to recover under the rule of the last clear chance, and that question was submitted to the jury under proper instructions, the verdict of the jury will not be set aside unless it is clearly wrong.

4. **New Trial:** DESIGNATION OF INSTRUCTIONS. Where the trial court, by mistake, marked one of his instructions "refused," which was in fact given, and it was considered by the jury as having been given, the fact that it was marked "refused" not having been discovered by any one until after the verdict was returned, such mistake is not a ground for granting a new trial.

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

Weaver & Giller, for appellant.

John C. Wharton and *Edgar M. Morsman, Jr., contra.*

BARNES, J.

Plaintiff, as administrator of the estate of W. S. Kenneth, brought this action against the Miller Hotel Company, to recover damages sustained by the widow and next of kin by reason of the death of his decedent, which plaintiff alleged was caused by the defendant's negligence. A trial in the district court for Douglas county resulted in a verdict for the defendant. A motion for a new trial was overruled, judgment was rendered on the verdict, and the plaintiff has appealed.

It appears that on or about the 27th day of August, 1909, W. S. Kenneth, traveling for a Duluth house, came to Omaha and registered as a guest at the Rome Hotel, which was conducted by the defendant, the Miller Hotel Company. He was assigned to a room on floor B of the hotel, where he remained as a guest until the morning of August 28, 1909, at which time the accident occurred which caused his death. It appears that the hotel contained an elevator for the use and convenience of its

guests, which ran in what is called an elevator shaft extending from the basement to floor E, or the top floor of the hotel. On each floor there was a slide-door opening from the hall or corridor into the elevator shaft. The doors were each fitted with a catch, which was operated from the inside of the elevator cage, which was supplied with a register, electrically connected with a push button on each floor, by which the elevator conductor could be notified by any one desiring the use of the elevator on his floor. The elevator was in charge of a conductor named John D. Fisher. On the morning in question, shortly before 9 o'clock, while the elevator was at the bottom of the shaft, the conductor received a call from floor E, or the top floor of the hotel, and in response thereto he started the elevator cage up the shaft for that floor. In passing floor B, while the elevator was going at full speed, or nearly so, Kenneth attempted to get into the elevator cage, and was caught between the floor of the cage and the top of the elevator shaft door. The conductor stopped the elevator, thus releasing Kenneth, who fell to the bottom of the shaft, and was almost instantly killed. The plaintiff alleged, among other things, that defendant's elevator conductor was incompetent, and his incompetency was the cause of the accident. The trial court, by his instructions, took that question from the consideration of the jury, and the plaintiff alleges error therefor.

As we view the record, there was no evidence introduced showing the incompetency of the conductor, and there is no evidence in the record showing, or tending to show, that incompetency on his part was the cause of the accident. It is a fact that the plaintiff introduced a section of an ordinance of the city of Omaha requiring elevator conductors to obtain a license, but evidence was also produced which showed that Fisher obtained such a license on the second day after the accident, and this evidence, if competent for any purpose, showed that Fisher was competent to run an elevator. It can hardly be said that, if he was competent on Tuesday after the accident, he was incompetent two days before to engage in the busi-

ness of running an elevator. We therefore conclude that the trial court did not err in his instructions to the jury on that question.

Plaintiff also alleged in his petition that the defendant's elevator conductor was negligent in failing to close the door of the shaft to the elevator on floor B, and that was the cause of Kenneth's injury and death. This brings us to the consideration of the evidence on that question. The plaintiff called John D. Fisher, the elevator conductor, as his witness, and his testimony was the only evidence which was produced on that question. Fisher testified that he had made several trips with his elevator to the top floor of the hotel on the morning before the accident occurred; that when he came down the last time before Kenneth was injured the elevator door on floor B was closed; that when he passed floor B on his way up to floor E, the door on floor B was open, and Kenneth attempted to get into the elevator cage as it was passing; that the elevator was going at full speed, and Kenneth had to step up in making his attempt to enter the cage; that as soon as he saw Kenneth he stopped the elevator, but before he could bring it to a full stop Kenneth was caught and was doubled up between the floor of the cage and the top of the elevator shaft door, and when the elevator stopped Kenneth was released and fell down the shaft. No other evidence was produced showing, or tending to show, how the accident occurred. Fisher's testimony was apparently delivered in a straightforward manner, and without equivocation or any attempt at concealment. His evidence was fair and consistent. He was the plaintiff's own witness, and under those circumstances plaintiff was bound by his testimony. It follows that there was a failure of proof showing, or tending to show, that the elevator conductor was negligent in failing to close the door on floor B. It is true that, if there had been any other evidence from which the plaintiff could claim that the conductor was negligent in that respect, that question might have been submitted to the jury. But such was not the case, and, if that question had been submitted to the jury, they would have been obliged

to indulge in speculation and conjecture, which would not have been permissible. It follows, therefore, that the district court properly refused to submit that question to the jury.

It was further alleged that the elevator conductor negligently failed to stop the car and close the door on floor B before proceeding to floor E. It must be remembered that when the elevator came down the shaft in passing floor B the door was apparently closed. So there was no occasion for the conductor to assume, when he started to answer the call on floor E, that the door on floor B would be open, or that any one would attempt to get into the elevator on that floor. The testimony shows that when the elevator conductor answered that call he started from the office floor at full speed, and when he reached floor B, he was suddenly confronted with a situation that required him to stop his car as soon as possible in order to avoid injury to Kenneth. This he attempted to do, but, owing to the speed at which he was going, he failed to accomplish that purpose, and that allegation of negligence was unsupported by the evidence. The allegation that the hall on floor B was dark needs no consideration, other than to say that no evidence was offered to support it.

Plaintiff also alleges error because the court instructed the jury that it was negligence *per se* for the plaintiff's decedent to attempt to get onto a moving elevator. We think this instruction was correct, and it was not error to give it when submitting the question of the last clear chance to the jury.

Finally, it is alleged that the elevator conductor negligently failed to stop his car after he saw Kenneth in a position of peril, although he had time to do so, and therefore defendant was liable for Kenneth's injury and death. This raises the question known as the doctrine of the last clear chance. As we view this case, that was the crucial question, and that question was submitted to the jury under proper instructions. A verdict was returned for the defendant, and we can see no reasonable grounds on which we can set it aside.

It appears that the court, by mistake, marked the instruction by which that question was submitted to the jury "refused," instead of "given," and that was assigned as error in plaintiff's motion for a new trial. The motion was supported by the affidavit of one of the jurymen, who stated that he was misled by the instruction which was marked "refused," but he failed to state that the cause of his being misled was that the instruction was so marked, instead of being marked "given." The evidence, however, is overwhelming that no one discovered the mistake in marking the instruction until long after the verdict was returned. The instruction in question was in fact given. It was handled and read by the attorneys on both sides during the arguments, and no one discovered the mistake. It was sent out with the jury, and they read it and commented on it, and none of them discovered the fact that it was marked "refused." In fact, it was treated by every one as "given." On this evidence the court refused to grant a new trial, and we are of opinion that the ruling on that question was right, and a new trial was properly refused.

This seems to be one of those cases where the plaintiff was unable to produce sufficient evidence to render the defendant liable for the death of his decedent, and therefore the judgment of the district court is

AFFIRMED.

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

SAMUEL A. COEN, ADMINISTRATOR, APPELLEE, V. CENTRAL TELEPHONE COMPANY, APPELLANT.

FILED APRIL 17, 1914. No. 17,744.

1. **Telephones: CONTRACT: CONSTRUCTION OF LINE.** Where a telephone company has obtained permission to build its line across the pasture of a landowner, under an agreement to maintain its telephone wire at a sufficient height to avoid the danger of injury

to persons and stock, it is the duty of the company and its grantor to comply with such agreement.

2. ———: CONSTRUCTION OF LINE. As a matter of law, a telephone company is required to maintain its line where it crosses the pasture of another at a sufficient height, and in such a condition as to prevent injury to persons and domestic animals.

3. ———: INJURY: EVIDENCE. The death of a person may be shown to have been caused by negligence on the part of a telephone company to properly construct and maintain its wires, by circumstantial evidence.

4. Instructions examined, and *held* not inconsistent, and to have been properly given.

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

J. R. Dean and *Edgar M. Morsman, Jr.*, for appellant.

Sullivan & Squires, contra.

BARNES, J.

The plaintiff, as administrator of the estate of his deceased minor son, brought this action to recover for the death of his decedent alleged to have been caused by the negligence of the defendant in not properly maintaining its telephone wire where it crossed the plaintiff's pasture, about 20 miles from the city of Broken Bow, in Custer county, Nebraska. A trial to a jury in the district court for that county resulted in a verdict for the plaintiff for the sum of $1,750. Defendant's motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant has appealed.

The record discloses that plaintiff was the lessee of the farm where the accident occurred; that in the year 1903 the defendant's grantor had constructed the telephone line in question across the pasture with the consent of the owner of the farm, without compensation, under an agreement with the owner that it would place its wires on poles sufficiently high to render it safe, and keep and maintain the line in that condition; that on or about the 31st day of August, 1911, the plaintiff's decedent, Willie F. Coen,

who was then about nine years of age, mounted the family horse and started, about sundown, to the pasture to bring in the cows; that in about 20 minutes thereafter plaintiff's daughter saw the horse standing in the corral without the bridle. Fearing that Willie had been hurt, she went to the pasture and found him in a draw about the center of the canyon, where he was lying on the ground on his right side, dead. Where he was found there was a great deal of blood on the ground. She testified that a short time before Willie started for the cattle she had talked with a neighbor by the name of Marsh over the telephone; that after she returned to the house with Willie's body she tried to use the line, but could not get any one. On cross-examination she testified that the horse rode by Willie was the old family horse; that it had been used for that purpose for more than eight years; that the horse was a quiet animal; that she never knew it to cut up in any way; that it could be driven both double and single; that it was used for farm work, and was the farm horse; that it had the saddle on when Willie left the corral; that when she found Willie he had his cap on, and the whip was lying by his side.

Mrs. Marsh was called as a witness for the plaintiff, and testified that she was at home all day the day that Willie Coen was killed; that she was talking with Minnie Coen and Mrs. Coen that afternoon; that she last talked to Minnie about sundown; that she was within hearing of her telephone all of the evening, and no one had called over the telephone after she talked with Minnie until the line was repaired.

Murl Coen, a witness for plaintiff, testified that he was 18 years old; that he was at Eddyville on the 31st day of August, 1911; that it was getting dark when he got home; that he saw his mother sitting on the porch holding his brother Willie on her lap; that in a few minutes he went to the point where the wire was broken, probably 15 or 20 minutes after he got home; that he found the wire broken in two, close to the southwest pole, about 200 yards from the house; the wire ran southwest and northeast,

and the poles were about 80 steps apart where the wire was broken; that he searched the ground and could not find the wire, so he went to the northeast pole, and found the pole torn down, or torn from the cedar post, and lying on the ground; that in order to find the wire he took hold of it where it was attached to the post and ran it back, pulling it to the end; that he finally discovered the end and pulled it back as he came up; that it seemed sort of down the hill, and the other end was wrapped around the pole or post; that the ground under the wire where it was stretched between the posts was generally level; from the point where the wire was broken down to the canyon was about 50 steps; that the posts were formed by what are called bed slats, which were boards nailed to cedar posts; that at the broken post both boards were on the ground; that he repaired the break in the wire, and raised the post; after he got back he could use the telephone; that they kept work horses and milch cows in the pasture; that the horses were not out the night Willie was killed, and there were no other horses in the pasture at that time.

Oscar Blevins was called for the plaintiff, and testified that on the night the boy was killed he was at the place where the accident occurred; that he examined the horse's tracks from the point where the boy was killed back to where the wire had been broken. The tracks got heavier as they went down the canyon. When they struck the ground they would cut the grass and throw up the dirt. The tracks were fresh, and were plainly discernible down the hill from where the wire was broken; that he followed the track in the morning from the deep edge of the canyon to the point where the mare came out, and up to where the boy was found on the side hill. The ground was cut up by what is called small cat steps. From the canyon to where the boy was found is about 35 yards; the total distance from where the horse passed through the wire to where the boy was found is about 300 yards. There was evidence that the mare had fallen; that she had struck the ground and made a saddle mark; that she scooted, and seemed to sort of struggle, or wheel; that he saw the bridle

near where the boy was found, about 10 feet from the body; that the tracks showed that the horse had jumped in places about 18 feet.

Herman Campbell testified that he lived about a mile from Coen's, and was called to Coen's place on the evening of the 31st day of August, 1911, and found Mrs. Coen and her oldest daughter there. Mrs. Coen was on the front porch, holding the boy Willie, when he rode up to the house. When he went up to her she was talking about the boy; she was afraid he was killed; she said she could not wake him up, but she did not believe he was killed, if she could get a doctor. The girl took the horse and went across the river to Mrs. Woodruff's, and telephoned to Eddyville; that the boy was dead. Witness said he was there when the doctor made the examination; that the boy's face was badly bruised; that he examined the fracture of the skull, which was a little above and behind the ear; that the fracture seemed to be pretty well defined; that he went to the point where the boy was found, the next morning, with Mr. Blevins and two other men; that they walked along the telephone line; that he left the place where the boy had fallen, and went to the telephone line and followed the line to where it was broken; that there they struck a horse's track, and followed it from there back to where the boy lay; the ground under the telephone wire was fairly smooth and even; that they struck the track at or near the wire, and it angled off across the flat and down the bank to the bottom of the canyon, and followed the course of the canyon to where the old trail crossed between the corral and the point where the body was found. The tracks were well defined and showed that the horse had been running; they showed the horse had been awfully excited, and went without any regard whatever to the lay of the ground. The witness said: "I remember seeing places where the horse's feet had struck the edge of the cat steps, it would be caved off and the dirt pushed off or torn up." The horse "was in violent action; you could discern that." He said he had been along the wire before the accident occurred; that the wire was low;

in the spring he had crossed the hills in the pasture just west of the point where the wire was broken; that the wire was low enough to catch a man on horseback—was between five and seven feet from the ground; that he had had a good deal of experience in going about wire in the condition in which this one was; that it was extremely difficult to tell where the wire was with regard to the distance from you, or even see it; that one could very easily run into wire the right distance from the ground without seeing it, and a person was liable to do this in going about his work.

Several other witnesses were called who described the conditions substantially as testified to by the witnesses above named. The defendant produced no witnesses.

The first point made by the defendant in its brief is that there was no evidence from which the jury could infer that the telephone wire was the proximate cause of the accident, and there was no evidence upon which the jury could reasonably conclude that the horse was ridden into the wire, and thereby became unmanageable and ran away, or that the horse was running when it fell and threw the boy.

In answer to this contention, it may be said that 5 minutes before the boy went into the pasture, and within 15 minutes before he was killed, the wire was not broken, because it was being used to telephone from plaintiff's house to the neighbors, and as soon as the boy was found it was impossible to use it for telephone purposes. This fact is clearly shown by the testimony of Miss Coen and Mrs. Marsh. It also appears that the horse was cut in the flank; that the wound was such a one as the end of the wire would make. Her tracks showed rapid speed, and when she fell she slipped along the ground and pulled the bridle from her head. Therefore it was reasonable to infer that the mare was ridden into the wire; that it broke, and probably wrapped around her limbs and lacerated her body; she thereupon ran away with the boy down over the steep embankment until she fell and killed him. So it

cannot be said that there was no evidence to support the conclusion reached by the jury.

Appellant's second contention is that it was under no obligation to keep the telephone wire at any specified height above the ground. It was the duty of defendant to keep the wire through the pasture in a safe condition. This duty resulted, first, from the agreement between its grantor and Cavenee, the owner of the pasture. The testimony is undisputed that Cavenee gave oral license to the builder of the line through the pasture in consideration of a promise and agreement to keep the wire in safe condition, and by virtue of this agreement it was the duty of the defendant to keep and maintain the wire in such a condition that it would not be dangerous, and, allowing it to sag in the manner shown by the testimony, was a violation of the direct agreement of its grantor. Second, the law imposed upon the company the duty of so using its wire as not to injure others. Appellant was using the plaintiff's land without pay, and should therefore be held to the highest degree of care in the use of its property. The company was therefore bound to use more than ordinary care in the maintenance of its wire over and across the lands leased by the plaintiff.

In 29 Cyc. 424, under the title of "Negligence," it is said:

"The duty, violation of which constitutes negligence, may arise in several ways. It may be created by statute or ordinance, by contract, or from the relation of the parties, as in case of master and servant, bailor and bailee, carrier and passenger or consignee. This duty is usually implied by law, the rule being that the law imposes on a person engaged in the prosecution of any work an obligation to perform it in such a manner as not to endanger the lives or persons of others, and the law imposes on every person in the enjoyment of his property the duty of so using his own as not to injure his neighbor. This duty may also arise out of circumstances; and this is especially true where a person is using or dealing with a highly dangerous thing which, unless managed with the greatest

care, is calculated to cause injury to bystanders, where an owner has reason to apprehend danger owing to the peculiar situation of his property and its openness to accident, or where it was apparent that if a person did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to another."

It may therefore be said that by reason of its contract it was defendant's duty to maintain the wire in a safe condition. The law also imposes upon the company the duty of so using and maintaining its telephone wire as not to injure others.

Appellant's third contention is, that the accident could not have been foreseen or anticipated. It is within common knowledge of every one that persons handling stock are bound to go anywhere in the pasture where it is kept, and the agents and employees of the defendant must have known that parties using the pasture were likely to ride through it on horseback; that they were likely to go through the pasture in the nighttime as well as in the daytime. As said by the witness Campbell, it is difficult to tell the condition of a wire when riding up to it. The defendant's manager and agents must have been familiar with the character and habits of horses. We are therefore of opinion that this contention is without merit.

The fourth point made by appellant is that the instructions of the court were inconsistent and erroneous. In support of this contention it is said that by instructions 9 and 10 the jury were permitted to return a verdict based on circumstantial evidence; that by instruction No. 4, plaintiff was required to establish his cause by a preponderance of the evidence; and the instructions are erroneous because any fact cannot be established by a preponderance where the evidence is circumstantial. It requires no citations to refute this contention. The books are full of cases where judgments inflicting a death penalty have been sustained which were based alone on circumstantial evidence.

It is further contended that the court erred in giving instruction No. 5. By this instruction the jury were told, in substance, that the plaintiff must satisfy them by a preponderance of the evidence that he was the duly appointed and qualified administrator of the estate of William F. Coen, deceased; that William F. Coen, without fault on his part, or that of his parents, came to his death on account of his horse becoming entangled in the telephone wires of defendant, as alleged in the petition; and that the manner in which the defendant maintained its wire at the time was negligent; that such negligence was the direct and proximate cause of the death of said William F. Coen; and they should find those facts from the evidence, and further find that the parents sustained some damages because of William F. Coen's death, then they should find for the plaintiff.

Appellant criticises this instruction because it did not embody the idea that appellant should have had knowledge of the dangerous condition of the wire. It may be said that it was the duty of defendant to know the condition of its wire, and not to allow it to become sagged and in such a condition as would likely cause the injury complained of.

Again, it is apparent from the evidence that the wire in question had been in a dangerous condition for a long time before the accident occurred. The posts supporting the wire had been placed there in 1903, eight years before the accident. They were simply two boards one inch thick and four inches in width nailed onto short cedar posts, and on these bed slats (so-called) the wires were suspended. Therefore the defendant company was bound to know that the wires were likely to get out of position and become dangerous by reason of sagging.

Witness Campbell testified that he had been over the pasture early in the spring; that the wire was then low enough to catch a man on horseback. Again, about four weeks before the accident, plaintiff took defendant's agent, whose special duty it was to keep the line in repair, and pointed out to him the particular defect in the wire which

caused the accident in question, and insisted that a new post should be put in to hold up the wire. So the defective condition of the wire was known to the defendant for something like three or four weeks before the accident occurred.

Concerning the point made by appellant that negligence can never be said to be established by a preponderance of the testimony where the evidence is circumstantial, it may be said that the law does not require direct and positive evidence of negligence. That fact may be inferred from circumstances adduced in evidence, and, if the testimony is sufficient to satisfy reasonable minds of the fact of negligence, that is all that is required.

As we view the record, it contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

CHARLES D. TRAPHAGEN, APPELLEE, v. HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT, ET AL., APPELLANTS.

FILED APRIL 17, 1914. No. 18,522.

1. **Bureau of Printing:** DUTIES. By chapter 85, laws 1911, establishing a bureau of printing, all of the bookbinding and the printing of all stationery and supplies for the use of the state officers and the heads of the several departments of the state government are to be let by the commissioner of printing on contracts secured by competitive bidding, except in case of emergency, as provided by section 10 of that act.

2. ———: ———: SUPREME COURT REPORTS. Section 1146, Rev. St. 1913, is not in conflict with the provisions of the act establishing a bureau of printing. That section should be construed with the provisions of the act of 1911, and the supreme court reporter should cooperate with the commissioner of printing in letting the contract for publishing the supreme court reports.

3. **Commerce:** FOREIGN CORPORATIONS: STATUTORY PROVISIONS: CONTRACT FOR STATE PRINTING. A contract with a corporation doing

business in another state for publishing the supreme court reports of this state partakes of the nature of interstate commerce, and such foreign corporation may make a contract with the commissioner of printing in this state without complying with the provisions of section 725, Rev. St. 1913.

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

Grant G. Martin, Attorney General, George W. Ayres and *Frank E. Edgerton,* for appellants.

Hall & Bishop, contra.

BARNES, J.

Appeal from a judgment of the district court for Lancaster county, awarding the plaintiff an injunction enjoining Harry C. Lindsay, reporter of the supreme court, from delivering any of the manuscript opinions of the supreme court to the E. W. Stephens Publishing Company, of Columbia, Missouri, to be printed and bound, and William B. Howard, auditor of public accounts, from drawing or issuing any warrants for the publication of the reports of the supreme court, and Walter A. George, state treasurer, from paying any of said warrants. The defendants, and each of them, were also enjoined from performing a certain contract with the publishing company for the publication of ten certain volumes of the supreme court reports.

The record discloses that on the 11th day of February, 1914, one Charles D. Traphagen, filed his amended petition in the district court for Lancaster county, in which he alleged, in substance, that he was a resident and taxpayer of the city of Lincoln, county of Lancaster, and state of Nebraska, and has been such resident and taxpayer for more than 30 years last past; that on the 27th day of August, 1913, the state of Nebraska, through John H. Morehead, Governor, as commissioner of the printing bureau, entered into a contract with the E. W. Stephens Publishing Company, of Columbia, Missouri, at Lincoln, Nebraska, for printing, stereotyping, binding, and deliv-

ering ten volumes of the Nebraska supreme court reports, numbered 95 to 104, both inclusive. A copy of the contract was marked exhibit A and made a part of the petition.

It was alleged that the contract was illegal, null, and void, for the following reasons, to wit:

(1) That the E. W. Stephens Publishing Company is a corporation organized and existing under and by virtue of the laws of the state of Missouri, with its office and principal place of business in Columbia, Missouri; that it has no office or place of business in the state of Nebraska, and was not engaged in business in this state at the time of making said contract, nor at this time; that the business of the company is the printing, binding, and publishing of books; that said corporation has not complied with the requirements of section 725, Rev. St. 1913, in that said corporation has not appointed a resident agent in this state upon whom service of process could be made, and has not filed a certificate signed by its president or secretary in the office of the secretary of state or register of deeds designating its principal place of business in this state, and has taken no steps giving it the right to do business in the state of Nebraska.

(2) It was also alleged that under the provisions of chapter 65, Rev. St. 1913, the public printing in this state is required to be done by a competent printer doing business in this state; that the said E. W. Stephens Printing Company was not a competent printer doing business in this state, and had no right or authority to bid on the printing of the Nebraska supreme court reports, and the commissioner of printing had no right, power or authority to enter into a contract with the said E. W. Stephens Printing Company, of Columbia, Missouri, for the reason that it was a foreign corporation and a nonresident corporation, not doing business in this state; that the commissioner of printing had no right, power, or authority, under the statutes of this state, to deliver to the E. W. Stephens Printing Company the schedule or specifications for printing said Nebraska reports, for the reason that it was not a competent printer doing business in the state

of Nebraska, and said company could not bid upon said contract for the printing of said reports without a schedule or plans and specifications therefor; that the statutes of this state make it the duty of the reporter of the supreme court to prepare the opinions of said court for publication as fast as they are delivered to him, and, when sufficient material has accumulated to form a volume of not less than 900 pages, he shall cause the same to be printed, stereotyped and bound in a good and substantial manner; that said Harry C. Lindsay, as reporter of the supreme court, has now in his hands the manuscript opinions of said court for at least volume 95 of the Nebraska supreme court reports, which said manuscript will be delivered to said E. W. Stephens Publishing Company to be printed and bound in accordance with the terms of said contract; that the said E. W. Stephens Printing Company will begin the printing, binding and publishing of volume 95 of said Nebraska supreme court reports at Columbia, Missouri, unless enjoined from so doing by an order of this court, notwithstanding said contract is illegal and void; that no part of said contract has yet been performed.

(3) It was further alleged that William B. Howard, the auditor of public accounts, will draw warrants for the payment of said volumes as they are delivered to the state, under said contract, from time to time, unless enjoined from so doing by an order of the court; and the said Walter A. George, state treasurer, will pay said warrants when presented, unless enjoined and restrained from so doing; that the printing of said ten volumes of the Nebraska supreme court reports, and the payment for the same under said contract, would be illegal and void and in violation of law; that said contract will be performed and completed, unless defendants are enjoined from the performance of that part of said contract obligatory upon them; that the plaintiff is remediless in the premises, and has no adequate remedy at law.

The petition concluded with a prayer for a permanent injunction. To this petition the defendants demurred sep-

arately, on the ground that the petition did not state facts sufficient to constitute a cause of action against the said defendants, or any of them. The district court overruled the demurrers, the defendants each severally excepted, elected to stand upon their demurrers, and the court thereupon rendered its judgment awarding the injunction as above set forth. This appeal is prosecuted for the purpose of reversing that judgment.

The crucial question presented by this appeal is the right or power of the governor, as commissioner of the printing bureau, to enter into the contract in question, and that point will receive our first consideration.

The legislature, by chapter 85, laws 1911, created what is called a "State Printing Bureau," and provided that the governor should be the commissioner thereof. The commissioner was authorized to appoint a deputy, who, the act provides, "shall be a thorough, practical journeyman printer, and who shall attend to the preparing of all schedules and contracts, examine all bids and furnishing, and perform any detail work relating to stationery supplies and printing as the commissioner may direct," and, when acting for or instead of the commissioner, shall have and may exercise equal power and authority, subject to the approval of the commissioner.

Section 2 of the act provides: "On or before the 10th day of January, April, July and October of each year the commissioner of printing shall receive from the officers of each department of the government and state institutions an estimate of the probable amount and kind of stationery, blanks, blank books, circulars, folders, catalogues, pamphlets, reports and all other stationery or printed matter required by law or that may hereafter be required by law to be contracted for for said state offices and state institutions."

The act further provides that, within 20 days thereafter, the work shall be bid on separately, and the contract awarded to the lowest and best bidder; the commissioner reserving the right to reject any or all bids. The act also provides for the publication of a notice for five consecu-

tive times in three different daily newspapers in different parts of the state, asking for bids, and fixing the day and hour for closing the time when they shall be received.

Section 4 of the act provides for the preparation of a blank schedule, upon which all bids shall be made, specifying the size, weight and quality of paper to be used, the size and style of type, the quality and style of binding, etc. It is also provided that, when required so to do, the commissioner shall furnish any competent printer doing business in the state a copy of the blank schedule.

Section 5 of the act provides, in substance, that the successful bidder shall receive notice of the acceptance of his bid, and he is required, within five days thereafter, to enter into a contract with the state to furnish the same in accordance with the schedule and specifications.

Section 6 provides that the attorney general shall draw all contracts let under the provisions of the act; that each contract shall be signed by the commissioner and by the party to whom the contract has been awarded; and the contract thereafter shall be filed in the office of the commissioner.

By section 10 it is provided: "All stationery supplies and printing of every kind for any state officer, institution or organization not herein enumerated shall pass through the hands of and shall be purchased by the commissioner in the same manner as herein provided. Except, however, when an emergency arises for the immediate furnishing of any stationery supplies or printing, the cost of which shall not exceed the sum of twenty-five (25) dollars, the commissioner shall have the power, if, in his judgment, the same cannot be deferred, to furnish said stationery supplies or printing at the lowest and best competitive price, at any time between the date fixed in section 2 of this act, for the letting of contracts."

The act concludes with a repealing clause, which reads as follows: "All laws and sections in conflict herewith are hereby repealed."

By the provisions of the act above mentioned it is apparent that it was the purpose and intention of the legis-

lature to require the printing bureau to furnish all necessary printing, bookbinding, and the printing of all stationery and supplies for the use of the state officers and the heads of the several departments of the state government by contract, based on competitive bidding, and we are of opinion that by the terms of the act, when properly construed, that purpose was accomplished.

It is contended, however, that the act is in conflict with section 1146, Rev. St. 1913, by which it is provided: "It shall be the duty of the reporter of the supreme court to prepare the opinions of said court for publication as fast as they are delivered to him, and, when sufficient material is accumulated to form a volume of not less than nine hundred pages, he shall cause the same to be printed, stereotyped, and bound in a good and substantial manner."

It is argued that by the section above quoted the supreme court reporter is unlimited in his power to discharge that duty, and that it is nowhere provided that he is compelled to let the contract therefor to the lowest bidder, or to advertise for printing and binding the reports, and that he has full power to let the contract for so doing to any person or corporation he may see fit. We think this contention is unsound. It is our opinion that this section ought to be construed with the provisions of the act establishing the bureau of printing, and that, when so construed, it is the duty of the reporter of the supreme court to notify the commissioner when he has a sufficient amount of manuscript to make a volume of the supreme court reports, and cooperate with him in letting the contract for the printing, stereotyping and binding of the report or reports, as the case may be, on a competitive bid, to the person or corporation making the lowest and best bid for that purpose. We therefore hold that the contract in question comes within the jurisdiction of the printing board, and, unless the E. W. Stephens Printing Company was incapable of contracting with the commissioner, the contract was properly awarded to that company.

It is plaintiff's contention, however, that the E. W. Stephens Printing Company could not make a valid contract with the commissioner of the printing bureau, because, being a nonresident corporation, neither the commissioner nor his deputy was required to furnish it with a schedule on which it could bid for printing the supreme court reports. That contention is based on the provision that the commissioner or deputy shall furnish a blank schedule to "any competent printer doing business in the state." The expression "doing business in the state," as we view it, means that any person or corporation having a place of business in another state who comes into this state and solicits business by which it is to furnish any article of commerce or any manufactured article which is made in whole or in part at its place of business in another state, and which is to be furnished, sold or delivered to the purchaser in this state, is, in a comprehensive sense, doing business in this state. There is nothing in the statute prohibiting the commissioner or his deputy from furnishing such firm, person or corporation the blank or schedule on which to bid for doing the work in question herein, and we think that this contention is without merit.

It is finally contended that the E. W. Stephens Printing Company, having failed to comply with the provisions of section 725, Rev. St. 1913, by filing with the secretary of state a certificate setting forth the name of some resident agent on whom service of summons could be made, and also designating its principal place of business in this state, was unable, as a matter of law, to enter into the contract with the commissioner of the printing bureau. By the contract, the governor, as commissioner of the bureau of printing, was to furnish the copy for printing ten volumes of the supreme court reports from time to time to the E. W. Stephens Printing Company, and the company was required to furnish the paper, the binding, and do the work necessary to publish the reports in question, at its place of business in Columbia, Missouri, and as fast as the work was completed was to deliver the reports (the finished product), together with the stereotyped plates of each volume,

at the vault in the basement of the capitol building at Lincoln, Nebraska, there to be stored under the direction of the reporter of the supreme court. That this was interstate commerce seems clear, and therefore the section of the statute above referred to could not affect the contract in any manner whatsoever. An act of the legislature of a state which imposes limitations upon the power of a corporation, created under the laws of another state, to make contracts within the state for carrying on commerce between the states, violates that clause of the constitution of the United States which confers upon congress the exclusive right to regulate interstate commerce. *Cooper Mfg. Co. v. Ferguson,* 113 U. S. 727; 7 Cyc. 445, 446; *Hargraves Mills v. Harden,* 56 N. Y. Supp. 937; *Coit & Co. v. Sutton,* 102 Mich. 324; *International Trust Co. v. Leschen & Sons Rope Co.,* 41 Colo. 299; *State v. American Book Co.,* 69 Kan. 1, 1 L. R. A. n. s. 1041.

As we view the facts stated in plaintiff's petition, he was not entitled to an injunction, for the various reasons set forth in this opinion. The judgment of the district court is therefore reversed, and the plaintiff's action is dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

I am unable to concur in the opinion. Section 4, ch. 85, laws 1911, provides: "The commissioner shall prepare a blank schedule, upon which all bids shall be made, enumerating the probable number, kind, form, style, size and quality of each article; the size, form, weight and quality of paper to be used. The size and style of type, the quality and style of binding design or monogram, and all other details entering into and forming a part of the goods to be furnished, and, when requested so to do, shall furnish any competent printer doing business in the state a copy of said blank schedule. Each bid shall be made in accordance with the schedule and specifications, and shall be accompanied by a bond, with two or more sureties to be approved

by the board, equal in amount to the aggregate sum of his bid, that in the case of the party proposing for any such supplies or work shall be awarded the contract it shall be holden for his faithful performance of the same." As I construe this section, it clearly shows that the legislature had in mind the letting of contracts for public printing to parties actually doing the business of printing in the state. If the intention was that "any competent printer" should, upon request, be furnished a schedule, it would have been easy to have said so; but the legislature saw fit to add to the words, "any competent printer," the words, "doing business in the state." We cannot assume that these words were simply "thrown in." The legislature must be presumed to have intended that the words used should be given effect. What does "doing business in the state" mean? Does it mean that a corporation actually doing business in another state—that is to say, doing all of its printing and binding and furnishing of material in that state, and transacting no business in this state except to enter into a contract, deliver its work, and collect its pay—is doing businss in this state? I do not think such was the legislative thought, nor that such is the meaning of the language which the legislature used. I do not think the question of the right of the E. W. Stephens Printing Company to enter into the contract by reason of its having failed to comply with the provisions of section 725, Rev. St. 1913, cuts any figure in this case. The question here is not whether that company had a right to make a contract of this kind, or whether the business contemplated by the contract is or is not interstate commerce. The question here is: Had the commissioner of printing of this state a right to enter into this contract? If not, then the injunction issued by the district court is proper, and the judgment of that court should be affirmed. The reasons why the legislature never intended that contracts of this kind should be made with nonresidents are many. State pride may have been one reason. The legislative thought may have been that the state ought to patronize some of the many strong and competent printing establishments within

its own borders; or the thought may have been in the minds of the legislature that it would be humiliating to the state, in the event that one with whom a contract of this kind might be made should fail to comply with his contract by supplying the printed volumes within the time contracted for, and the state should desire to compel it to do so by mandamus or otherwise, it would be compelled to institute such proceedings in the courts of a foreign state. Other illustrations could be given, but the two are sufficient for my purpose.

Without further discussion, it seems to me very clear that the commissioner of printing had no authority under the law to let the contract in controversy.

KIRBY MACKEY, APPELLEE, V. JAMES COX ET AL., APPELLANTS.

FILED APRIL 17, 1914. No. 17,737.

Mortgages: FORECLOSURE: RECEIVER: HOMESTEAD. Under the principles announced in *Sanford v. Anderson*, 69 Neb. 249, the judgment of the district court is affirmed.

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

W. J. Moss, for appellants.

John C. Hartigan and *E. A. Wunder, contra.*

LETTON, J.

Defendant owned 160 acres of land which he occupied as his family homestead. The land was incumbered by three mortgages. The prior incumbrance amounted to $3,465, the second was for $1,600 and interest, and the third for $5,200 with interest. This action was brought to foreclose the third mortgage. A decree was rendered foreclosing the second and third mortgage, leaving the first as

an existing lien. An application was then made by plaintiff for the appointment of a receiver for 120 acres of the tract, alleging that the defendant was insolvent, and that the remaining 40 acres of the tract constituted the homestead of defendant. The court set apart 40 acres containing the family home and other buildings and improvements as the defendant's homestead, and appointed a receiver for the other 120 acres. From this order defendant appeals. The value of the whole tract is about $7,000 and the 40-acre tract set apart as the homestead is worth $2,000.

Ordinarily a receiver will not be appointed to collect the rents and profits of a homestead for the benefit of a mortgage creditor. *Chadron Loan & Building Ass'n. v. Smith,* 58 Neb. 469; *Laune v. Hauser,* 58 Neb. 663. A general creditor cannot procure to be set apart any portion of a homestead in order to subject it to sale on execution, unless the value of the homestead, exclusive of incumbrance, exceeds $2,000. *Hoy v. Anderson,* 39 Neb. 386; *Prugh v. Portsmouth Savings Bank,* 48 Neb. 414. Relying upon these decisions, defendant argues that, since after the deduction of the mortgage debts from the value of his entire 160 acres there is not $2,000 in value left, the court had no authority to appoint a receiver, and he is entitled to retain possession of the whole 160 acres as his homestead. We cannot take this view. A like contention was made in the case of *Sanford v. Anderson,* 3 Neb. (Unof.) 561, and on rehearing, 69 Neb. 249. At the first hearing it was held that, the mortgagor's interest in the whole tract being less than $2,000, he was entitled to hold the same as a homestead, and that the court erred in appointing a receiver; but upon rehearing the whole question is carefully examined and a contrary conclusion reached. It was pointed out "to hold that the amount of plaintiff's lien in the present case must be deducted from the value of these premises, and that the homestead interest would only attach to the remainder, would be to apply the existence of this lien as a protection against its own provisional enforcement," and that the effect would be to allow more than a $2,000 exemption, if it was so held. Defendant in

this case has had the full amount of his homestead exemption set apart to him by the decree of the district court. This is all he is entitled to.

The judgment of the district court is therefore

AFFIRMED.

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

JOHN MINSHULL, APPELLANT, V. SHERMAN COUNTY, APPELLEE.

FILED APRIL 17, 1914. No. 17,619.

Counties: CLAIMS: APPEAL BY TAXPAYER: ATTORNEY'S FEES. A taxpayer, though permitted by law to appeal from the allowance of a claim against the county, cannot, in absence of statutory authority, collect from the county fees paid by him to his attorney for prosecuting such an appeal. Rev. St. 1913, sec. 966.

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

R. J. Nightingale and *H. S. Nightingale,* for appellant.

J. S. Pedler, contra.

ROSE, J.

Plaintiff alleged in his petition that, as a taxpayer, he appealed from the allowance of two claims against Sherman county, and that he paid his attorney $50 for professional services in successfully prosecuting the appeals. For this sum he demanded judgment against the county. A demurrer to his petition was sustained, and from the dismissal of his action he appealed.

The ruling on the demurrer is right. A statute permits an appeal by a taxpayer from the allowances of a claim against the county, but there is no statute making the county liable for the fees of his attorney in prosecuting such an appeal. Rev. St. 1913, sec. 966. A taxpayer,

though permitted by law to appeal from the allowance of a claim against the county, cannot, in absence of statutory authority, collect from the county fees paid by him to his attorney for prosecuting such an appeal.

AFFIRMED.

HENRY W. ABTS COMPANY, APPELLEE, V. THOMAS J. CUNNINGHAM, APPELLEE; PATRICK W. CUNNINGHAM, APPELLANT.

FILED APRIL 17, 1914. No. 17,703.

1. **Contracts: FALSE REPRESENTATIONS.** "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Foley v. Holtry*, 43 Neb. 133, *Brucker v. Kairn*, 89 Neb. 274.
2. ———: ———. Where a party negotiating for a contract has knowledge of material facts, and the other party is ignorant thereof and does not have the means of knowledge at hand, the latter may rely upon positive statements of the former.
3. ———: ———: FAILURE TO INVESTIGATE. A party who procures a contract by active fraud in making false representations of material facts cannot urge the negligence of the defrauded party in failing to make an investigation which would have resulted in the discovery of the truth.
4. **Appeal: REVERSAL: INSTRUCTION.** The giving of a prejudicial, erroneous instruction on a vital issue is a sufficient ground for the reversal of a judgment.

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

Frank D. Williams and *Albert & Wagner*, for appellant.

Garlow & Long and *A. E. Garten, contra.*

ROSE, J.

This is an action on a promissory note for $2,455.82, dated October 26, 1910, payable with interest in monthly

instalments of $100 each, beginning December 1, 1910. Plaintiff is payee. Defendants, Thomas J. Cunningham and Patrick W. Cunningham, are makers. The former made default, and the latter answered, admitting the execution and delivery of the note, and pleading as a defense that his signature was procured by false representations of plaintiff in regard to the solvency, assets and liabilities of his codefendant, for whom he was merely a surety. On the issue of fraud, which was denied by a reply, the jury rendered a verdict in favor of plaintiff. From a judgment in its favor for $2,613.40, the answering defendant has appealed.

The principal error assigned is the giving of the following instruction: "You are instructed that where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth, and the matter is open for inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of falsehoods of the other party." This would probably be a correct statement of the law, if applicable to the facts; but there is no evidence that the answering defendant had at hand reasonably available means for ascertaining the truth. On the contrary, there is proof that an investigation would not have disclosed the facts.

There was direct and positive testimony tending to prove the following facts: Plaintiff was a wholesale grocer at Columbus. The defaulting defendant, a customer of plaintiff, had been a retail merchant at Spalding. He owed plaintiff the amount for which the note was given, and was insolvent at the time. He owed other creditors about $4,500. His stock of merchandise was worth about $600, and he owned collectable, outstanding accounts amounting to $300. The answering defendant is his uncle, who lives in the country nine miles from Spalding. Plaintiff's president went to the retail store, procured the defaulting defendant's signature to the note, and afterward went to the home of the answering defendant and told him that the

stock owned by the nephew was of the value of about $4,000 or $5,000, that the nephew owned good accounts amounting to $800, and that his other debts were about $400 or $500. The answering defendant did not know the value of his nephew's stock or the extent of his assets or liabilities. He did not know that his nephew was insolvent. He could not have estimated the value of the merchandise, had he made an investigation. He believed and relied upon the false representations made by plaintiff's president, and was thus induced to sign the note in controversy.

Some of the facts of which there is proof are thus narrated for the sole purpose of testing the instruction quoted. All evidence of fraud is emphatically contradicted by plaintiff, and in what is here said there is no purpose to express an opinion on any issue of fact. It has been shown that plaintiff was a wholesale merchant. Its president visited the store at Spalding, and promptly went from there to the home of the answering defendant. The business of plaintiff's president would naturally acquaint him with the value of a stock of merchandise. The answering defendant testified he had no such knowledge. According to his testimony, the parties did not have equal means of knowledge. If he told the truth, plaintiff's president made material statements of fact under circumstances justifying reliance thereon by the answering defendant, who stated he would not have signed the note, had the representations not been made. On the issue of fraud, he should have had the protection of the following rule: "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Foley v. Holtry*, 43 Neb. 133. *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 37 L. R. A. 593, note VIII.

The instruction quoted deprived the answering defendant of the rule stated. It also deprived him of the benefit of the principle that where one party has knowledge of material facts, and the other is ignorant thereof and does not have the means of knowledge at hand, the latter may

rely upon positive statements of the former. *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 37 L. R. A. 593, note VIII*a*.

The instruction assailed also released plaintiff from the rule that a party guilty of active fraud in making false representations of material facts cannot urge the negligence of the defrauded party in failing to make an investigation which would have resulted in the discovery of the truth. *Hoock v. Bowman*, 42 Neb. 80; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. Dak. 219, 37 L. R. A. 593, note II.

For the giving of an erroneous instruction on a vital issue, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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

JET HARDESTY V. STATE OF NEBRASKA.

FILED APRIL 17, 1914. No. 18,312.

1. **Criminal Law**: MISCONDUCT OF PROSECUTOR. On the trial of accused under a criminal charge, misconduct of the county attorney in stating to the jury that "defendant had an opportunity to go upon the witness-stand himself and deny this charge, but he didn't do it," does not require a reversal of his conviction on a record showing that no other error was committed; that the trial court disapproved the misconduct by sustaining an objection to the improper remark; that the county attorney thereupon stated he should not have made it; and that accused was not prejudiced thereby.

2. ———: REFUSAL OF SPECIAL INSTRUCTION: CONFESSION. In a criminal prosecution, it is not error to refuse a special instruction on the law relating to a confession by defendant, where the record shows that it was properly admitted on evidence showing without contradiction that it was voluntarily made; that it was consistent with the state's proofs; and that a general instruction relating to the credibility of witnesses and to the weight of evidence fairly stated the law and fully protected the rights of defendant.

3. ———: RECALLING JURY: DISCRETION OF COURT. "The recalling of juries for instructions is so far within the discretion of the trial court as not of itself to present a subject for review." *McClary v. Stull*, 44 Neb. 175.

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

M. H. Leamy, for plaintiff in error.

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

ROSE, J.

In the district court for Pierce county, Jet Hardesty, defendant, was convicted of statutory rape upon a child under 15 years of age, and for that offense was sentenced to serve a term of three years in the penitentiary. As plaintiff in error, defendant now presents for review the record of his conviction.

The first assignment of error is directed to the misconduct of the county attorney in making the following statement to the jury in the course of his argument: "The defendant had an opportunity to go upon the witness-stand himself and deny this charge, but he didn't do it." This statement, though true, was improper, and the county attorney in making it disregarded a provision of statute. Criminal code, sec. 473. The question is: Should the judgment be reversed for the error mentioned? The conduct of the county attorney was disapproved at the time by the sustaining of an objection to his remark, and thereupon he immediately said, in presence of the jury, "that he should not have made such statement." The trial court instructed the jury that their verdict should be based on the evidence under the instructions of the court, and that their finding should be the result of their soundest and best judgment upon the evidence. Without disregarding the charge to base the verdict on the evidence under the instructions, the jury could not have allowed themselves to be influenced by the retracted statement of the county attorney. While the truth of the accusation against defend-

ant was a question for the jury, the reviewing court can affirmatively say that his guilt was established by evidence so clear and conclusive that he could not have been harmed by the county attorney's misconduct. It was not necessary for the state to prove force on the part of defendant or nonconsent on the part of prosecutrix. That she was under the age of consent, that he was old enough to commit the felony, and that the forbidden act was consummated are facts clearly and conclusively established by the evidence. In overruling the motion for a new trial, the trial judge, who saw and heard what took place, held, when the motion for a new trial was overruled, that defendant was not prejudiced by the improper remark of the county attorney. Under such circumstances the reviewing court is not compelled to hold that there was a mistrial or that the error requires a reversal of the conviction. What is here said is not to be understood as indicating a purpose to depart from the line of decisions upholding the spirit and purpose of the statute. It is apparent that defendant was not prejudiced by the misconduct of which he complains. For the harmless error assigned, the conviction will not be set aside.

The next assignment of error challenges the rejection of a requested special instruction on the law applicable to proof of a confession by defendant that he had committed the offense charged. The confession was properly admitted in evidence. Proof that it was voluntarily made is uncontradicted. It was consistent with direct evidence adduced by the state. A general instruction relating to the credibility of witnesses and to the weight of evidence fairly stated the law and fully protected the rights of defendant. The assignment of error is therefore overruled.

The final assignment of error relates to the recalling of the jury after they had been deliberating some time and the giving of an additional instruction. In *McClary v. Stull*, 44 Neb. 175, the following rule was announced: "The recalling of juries for instructions is so far within the discretion of the trial court as not of itself to present a subject for review."

The additional instruction is a correct statement of the law applicable to the evidence, and there was no error in giving it under the circumstances disclosed by the record.

AFFIRMED.

FAWCETT, J., not sitting.

LYMAN B. CORNELL, APPELLANT, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED MAY 29, 1914. Nos. 17,480, 17,481, 17,482.

Taxation: SUIT TO REDEEM: PAYMENT OF TAXES. It is not essential to the commencement of a suit to set aside a tax deed and redeem property from tax sale that all taxes due on the property be first paid. It will be sufficient if all taxes are paid at or before the trial and entry of the decree. The "showing" of the payment of taxes is made by the evidence, and not by the pleadings alone.

OPINION on motion for rehearing of case reported *ante*, p. 9. *Rehearing denied.*

REESE, C. J.

There seems to be some misapprehension as to the holding in the opinion in this case, and that we failed to meet the full contention of appellees as to the right to redeem under section 6549, Rev. St. 1913, which provides: "No person shall be permitted to question the title acquired by a treasurer's deed without first showing * * * that all taxes due upon the property had been paid by such person," etc.—and complaint is made that this provision of the statute was not referred to in the opinion. The clause is not referred to because it was the opinion of the writer that it was wholly unimportant so far as this case is concerned. The contention was that plaintiff should have paid the taxes, which he offered later to pay, before bringing suit. We sought to show that there were no unpaid taxes "due" at the time the suit was commenced, and therefore the clause referred to was not believed to have any place in

the case. It is said by some of my associates that the holding of the opinion may be construed to be that no suit could be commenced if all taxes *due* were not paid. Such is not the holding, nor do we think that question arises in this case; but, lest there be a misconception of the rule to be applied, we are of the opinion that it makes no difference whether at the time of the commencement of the suit the taxes due are paid or not. The *"showing"* of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough. The "showing" is made by the evidence, and not by the pleadings alone.

REHEARING DENIED.

INDEX.

Abatement.

Under sec. 455 of the code, a pending action for personal injuries does not abate by the death of the plaintiff. *Murray v. Omaha Transfer Co.* 175

Action.

1. Where plaintiff dies from injuries for which he brought suit, the action may be revived by his administrator for the benefit of his estate. *Murray v. Omaha Transfer Co.* 175

2. As the law affords a remedy for the protection of every right and the redress of every wrong, the enforcement of a legal right should be sought through legal procedure, and not by physical force or stealth. *Wallace v. Kruzer*..... 615

Affidavits.

An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void. *Cornell v. Maverick Loan & Trust Co.* 9

Animals.

1. One who voluntarily attempted to separate two fighting dogs cannot recover damages from the owner of one of the dogs by which he was bitten, where the injury was the result of his negligence. *Warrick v. Farley* 565

2. The owner of a dog is not liable for injury inflicted by it, unless it is vicious and the owner has knowledge of its viciousness. *Warrick v. Farley* 565

Appeal and Error. See BAILMENT, 3. BASTARDY. CRIMINAL LAW. EVIDENCE. MUNICIPAL CORPORATIONS, 3, 5. REPLEVIN, 1. TAXATION, 1, 6, 9, 10. TRIAL. TROVER. WATERS, 1.

1. In an action on an appeal bond, attorney's fees, unless provided for by statute, or the usual course of the law, will not ordinarily be allowed for resisting an unsuccessful appeal. *Higgins v. Case Threshing Machine Co.* 3

2. On appeal, in a matter of public concern, the pleadings, briefs, and arguments will be liberally construed. *Brooks v. MacLean* 16

3. Error cannot be predicated on the overruling of a motion to suppress a deposition, where there was no objection thereto when offered in evidence. *Murray v. Omaha Transfer Co.* 175

Appeal and Error—*Continued.*

4. In the absence of a motion for a new trial, the only question on appeal is the sufficiency of the pleadings to sustain the judgment. *Shoff v. Ash* 255
5. Where a case is tried as though the answer contained only a general denial, admissions in the answer will be disregarded on appeal. *McFadden v. Cedar County* 318
6. Where appellant's brief does not set out particularly each error assigned, as required by sec. 675c of the code, nor comply with the court's rules relating to assignments of error, and the record does not disclose a plain error such as need not be specified under sec. 675c of the code, the judgment will be affirmed. *Wielinga v. Beatrice Creamery Co.* 406
7. Where no brief for appellant is on file and the cause is submitted without motion to affirm for want of briefs, and, pending an appeal, the issues are determined in another suit, the appeal will be dismissed. *State v. Omana*..... 468
8. Briefs should be prepared as required by sec. 8192, Rev. St. 1913, and the rules of the supreme court. *Witt v. Caldwell* 484
9. Where the main purpose of a suit is to obtain partition, an order for partition is not appealable until partition is effected and confirmed, though the question of title may have been incidentally determined. *Peterson v. Damoude*.. 469
10. Where the object of a suit is to determine title to land, an order determining the title is final and appealable, though partition is asked for in the petition and directed in the order. *Peterson v. Damoude* 469
11. A verdict not manifestly excessive will not be disturbed on appeal. *Moses v. Mathews* 672
12. Overruling of demurrer to an answer by a volunteer is not prejudicial error, where only the issues raised by the answer of the real defendant were litigated. *Whedon v. Wells* 517
13. Where petition set out an incorrect copy of the guaranty sued on, and the answer set out the original guaranty, on which the cause was tried, the question of variance will not be considered on appeal. *Home Savings Bank v. Shallenberger* 593
14. Affidavits in support of motion for new trial will not be considered unless made a part of the bill of exceptions. *Koepke v. Delfs* 619

Appeal and Error—*Continued.*

15. The supreme court will not review alleged error in the exclusion of drawings when the tendered exhibits are not made a part of the bill of exceptions. *Warner v. City of Wayne* 682

16. Parties on appeal cannot dispute a material fact stipulated for the purpose of trial. *Standard Bridge Co. v. Kearney County* 744

17. A case on appeal rests upon the issues tendered and finally determined in the district court. *Standard Bridge Co. v. Kearney County* 744

18. A case tried below on a certain theory will ordinarily be decided on appeal on the same theory, though such theory be at variance with the pleadings. *Hunt v. Chicago, B. & Q. R. Co.* 746

19. A verdict for defendant, in an action for death, will not be set aside, where the conclusion as to how decedent lost his life is conjectural. *Lyons v. Greeley County* 104

20. A question not necessary to a decision on appeal may be disregarded, though argued by both parties. *Murray v. Omaha Transfer Co.* 175

21. Where the questions of fraud in obtaining a note and mental capacity are properly submitted, a verdict for defendant will not be set aside unless clearly wrong. *Burgedorff v. Hamer.* 113

22. The finding of the court in an action at law is entitled to the same consideration as the verdict of a jury, and will not be set aside unless clearly wrong. *Whisker v. Vera Cruz Coffee Co.* 119

23. In an action for death, admission of evidence as to earning capacity of decedent *held* not prejudicial. *Bethel v. Pawnee County* 203

24. Where, on appeal in equity, a doubt as to the equities between the parties depends solely on the credibility of witnesses who testified orally, it will ordinarily be resolved in favor of the decree. *Langmann v. Guernsey* 221

25. A verdict so clearly wrong as to induce the belief that it was found through passion, mistake, or some means not apparent in the record will be set aside. *Hoffman v. McKeen Motor Car Co.* 238

26. Where the evidence of negligence and contributory negligence, in an action for personal injuries, is conflicting, the verdict will not be set aside unless clearly wrong. *Svetkovic v. Union P. R. Co.* 369

Appeal and Error—*Continued.*

27. Where the evidence is conflicting, the verdict will not be set aside, if there is sufficient competent evidence to support it. *Witt v. Caldwell* 484

28. Where the evidence is conflicting as to the extent of plaintiff's injuries, the verdict will not be set aside. *McKennan v. Omaha & C. B. Street R. Co.* 643

29. Where, in an action to recover damages for opening a county road, the evidence as to plaintiff's damages is conflicting, the verdict will not be set aside unless clearly wrong. *Moeller v. Franklin County* 662

30. A verdict on conflicting evidence will not ordinarily be disturbed. *Warner v. City of Wayne* 682

31. Where the evidence is sufficient to sustain a verdict either way, the verdict will not ordinarily be set aside. *Hunt v. Chicago, B. & Q. R. Co.* 746

32. Where the supreme court, after careful examination of the record in an equity suit, is unable to say that the decree is wrong, it will be affirmed. *Dovey v. Dovey* 624

33. Where the supreme court, in the trial *de novo* of an equity suit, reaches the same conclusion on the evidence as did the district court, the judgment will not be disturbed. *Cookingham v. Teske* 686

34. Instructions will not be reviewed where no exceptions to them were taken at the trial. *Acme Harvesting Machine Co. v. Brigham* 62

35. Harmless error in an instruction is not ground for reversal. *Murray v. Omaha Transfer Co.* 175

36. In an action by a vendor for purchase money, an instruction that plaintiff need not receive money paid into a bank by defendant to plaintiff's credit, in the absence of an express agreement that the money might be so paid, *held* not prejudicial to plaintiff. *Beranek v. Beranek* 311

37. Where each party moves for a directed verdict, the finding of the court will be regarded on appeal as the verdict of a jury. *Krecek v. Supreme Lodge, F. U. A.* 428

38. Error in submitting to the jury the competency of evidence *held* not prejudicial to defendant, where its rejection would have been prejudicial to plaintiff only. *Inglehart v. Omaha & C. B. Street R. Co.* 442

39. Where the evidence is not preserved in a bill of exceptions and there are no special findings, the judgment, if sup-

Appeal and Error—*Concluded.*

ported by the pleadings, will not be reversed for alleged errors in the instructions. *Mortenson v. Wagner* 458

40. Error in instructions which are not prejudicial to appellant is not ground for reversal. *Waltz v. Elmore* 736

41. Modification of a requested instruction by interlineation or erasure, in disregard of sec. 4764, Ann. St. 1911, will not ordinarily constitute reversible error, unless an exception was taken, not to the fact of such modification merely, but to the manner of making same. *Hunt v. Chicago, B. & Q. R. Co.* 746

42. Where plaintiff seeks to recover under the rule of the last clear chance, and that question is submitted under proper instructions, a verdict for defendant will not be set aside unless clearly wrong. *Zimman v. Miller Hotel Co.* 809

43. The giving of a prejudicially erroneous instruction on a vital issue is ground for reversal. *Abts Co. v. Cunningham.*. 836

Attachment. See DIVORCE, 3.

A wife's property is not subject to attachment in an action for debt brought against the husband alone, though she assumed the debt. *Simmonds v. Fenton* 771

Attorney and Client. See APPEAL AND ERROR, 1. COUNTIES AND COUNTY OFFICERS 17.

1. The judge of the district court has power to allow a claim for services of an attorney in defending an indigent prisoner in the supreme court, under an appointment made by him, but the sum must not exceed that named in sec. 9081, Rev. St. 1913. *Moran v. Otoe County* 658

2. Where the county board ordered a road opened and that the damages be paid, and ten years thereafter the premises were conveyed, *held* that an attorney's lien filed when the proceedings were begun did not constitute a lien on the fund brought into court and accepted by the grantee in payment of damages. *Clay County v. Howard* 389

Bailment.

1. While an involuntary bailee of goods may conserve the same and recover therefor what the service is reasonably worth, a voluntary, gratuitous bailee is not entitled to compensation. *Crance Co. v. Combs* 403

2. To change a voluntary, gratuitous bailment to one for which compensation may be recovered, the bailee must notify the bailor to take the property or compensation will be exacted. *Crancer Co. v. Combs* 403

Bailment—*Concluded.*

3. Verdict in an action for storage charges for a piano *held* not sustained by the evidence. *Crancer Co. v. Combs* 403

Banks and Banking. See TAXATION, 11, 12.

1. Where the nature of a bank deposit is not shown, the law will presume that it is a general one. *Citizens State Bank v. Worden* 53
2. A general deposit creates between the bank and the depositor the relation of debtor and creditor. *Citizens State Bank v. Worden* 53
3. Under a general deposit the title to the identical money deposited passes to the bank. *Citizens State Bank v. Worden* 53
4. A bank need not return identical funds deposited subject to check, but only the equivalent upon demand. *Citizens State Bank v. Worden* 53
5. A solvent bank is not in default of payment, or guilty of conversion, of a general deposit until a demand for the deposit has been made, or waived, or shown to be unnecessary. *Citizens State Bank v. Worden* 53
6. A general allegation, in an answer pleading a set-off for bank deposits, that the bank converted the deposits to its own use must yield to specific allegations showing that a demand was necessary, but not made. *Citizens State Bank v. Worden* 53
7. In an action by a bank against a depositor on a note, an answer pleading a set-off for general deposits, which does not allege that, at the time the suit was commenced, a demand for the deposits had been made, or waived, or shown to be unnecessary, is demurrable. *Farmers & Merchants Nat. Bank v. Worden* 58
   Farmers Nat. Bank v. Worden 59
8. Where a deed is sent to a bank for delivery on payment of a definite sum, and the bank delivers it for a less sum, it is liable for the full amount. *Porter v. Packers Nat. Bank* 223

Bastardy.

1. Where the evidence is conflicting, a verdict of guilty in a prosecution for bastardy will not be set aside unless clearly wrong. *Cowan v. Ertel* 380
2. A judgment in a bastardy case will not be reversed because of striking out evidence which was incompetent and did not materially support the defense. *Cowan v. Ertel*..... 380

Bastardy—*Concluded.*

3. A judgment in a bastardy case will not be reversed for misconduct of an attorney in making unwarranted statements in his argument, where the court immediately rebuked the attorney and directed the jury to disregard the statements. *Cowan v. Ertel* 380

4. Statement of counsel in a bastardy case that "I think I can substantiate it from the evidence that this defense has been fixed up" *held* legitimate argument. *Cowan v. Ertel* 380

5. A preponderance of evidence is sufficient to sustain a conviction of bastardy. *Koepke v. Delfs* 619

6. Evidence of an offer of money by defendant to a third person if he would marry complainant, not communicated to her, *held* not incompetent as being an offer of settlement or compromise. *Koepke v. Delfs* 619

7. In a prosecution for bastardy, evidence that complainant had sexual intercourse with another than defendant, outside the period of gestation, *held* inadmissible. *Koepke v. Delfs* 619

8. In a prosecution for bastardy, evidence of the complainant's unchastity outside the period of gestation, whether as proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues. *Koepke v. Delfs* 619

Bills and Notes. See APPEAL AND ERROR, 21. EVIDENCE, 1. GUARANTY. PAYMENT, 1. PLEADING, 1, 2.

1. A note, executed by a person under guardianship and mentally incompetent to transact business, is void in the hands of the payee, or those holding it as collateral security. *Burgedorff v. Hamer* 113

2. In an action by an assignee on notes procured by fraud, the burden is on plaintiff to prove that he took them in good faith in the usual course of business and paid value. *Ostenberg v. Kavka* 314

3. The question of good faith of the holder of a note is for the jury, where men might draw different inferences from the evidence. *Ostenberg v. Kavka* 314

Bonds. See COUNTIES AND COUNTY OFFICERS, 1-4. PRINCIPAL AND SURETY.

Bribery.

1. A county attorney is a public officer within sec. 176 of the criminal code, making it a crime to attempt to bribe a public officer. *McMartin v. State* 292

Bribery—*Concluded.*

2. Evidence *held* to sustain conviction of attempting to bribe a public officer. *McMartin v. State* 292

Brokers.

1. The written contract required by sec. 2628, Rev. St. 1913, may be evidenced by letters passing between the parties. *Pottratz v. Piper* 145
2. By sec. 7909, Rev. St. 1913, where the terms of an agreement have been intended in different senses by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. *Pottratz v. Piper* 145
3. Broker's contract effected by letters construed. *Pottratz v. Piper* 145
4. The use of the words "sale," "sell," or "to sell" in a broker's contract of sale of land does not necessarily authorize him to execute a contract of sale for and in the name of his principal. *Whitehouse v. Gerdis* 228
5. The burden of proving the authority of a broker to execute a contract of sale of land rests on the party alleging it. *Whitehouse v. Gerdis* 228
6. Evidence *held* to show that a broker was authorized to make a written contract of sale of land for his principal. *Whitehouse v. Gerdis* 228
7. Petition, in an action for damages for breach of contract of sale of land executed by a broker, *held* not demurrable. *Whitehouse v. Gerdis* 228
8. Petition, in an action for commission, *held* to sustain judgment for plaintiff. *Shoff v. Ash* 255
9. A broker's contract for the sale of land may be created by letters between the parties, though the same papers were not signed by both parties. *Shoff v. Ash* 255
10. A contract with an agent to assist in making an exchange of properties is not governed by sec. 2628, Rev. St. 1913, providing the requirements of brokers' contracts. *Nelson v. Nelson* 523

Carriers.

1. In an action against a carrier for injuries, evidence that cars frequently stopped where plaintiff was injured *held* admissible as bearing upon the probability of plaintiff's evidence that the car had stopped before she attempted to alight. *Inglehart v. Omaha & C. B. Street R. Co.* 442

Carriers—*Concluded.*

2. A carrier is not an insurer of a trespasser against assault and robbery. *Stenberg v. Missouri P. R. Co.* 561

3. A shipper cannot recover for injury to horses in transit, where his own negligence contributed to the injury. *Hunt v. Chicago, B. & Q. R. Co.* 746

4. To enable a carrier to avail itself of the rule applicable where a shipment of live stock is accompanied by a caretaker selected by the shipper, it must specially plead and prove such fact. *Hunt v. Chicago, B. & Q. R. Co.* 746

5. The measure of damages for injury to a shipment of horses is the difference between their reasonable market value when delivered at their destination and their reasonable market value when and in the condition in which they should have been delivered. *Hunt v. Chicago, B. & Q. R. Co.* 746

6. In an action for injury to a shipment of horses, the damages recoverable are such as may fairly and reasonably be considered as arising naturally, or such as may reasonably be supposed to have been in contemplation when the contract for shipment was made. *Hunt v. Chicago, B. & Q. R. Co...* 746

7. Allegations in an action for damages for delay in shipment of horses *held* insufficient to state cause of action. *Hunt v. Chicago, B. & Q. R. Co.* 746

8. A person ejected from a street car for refusing to pay fare, after tendering a worthless transfer, *held* not entitled to recover damages therefor. *Jones v. Omaha & C. B. Street R. Co.* 798

9. A street car company can fix reasonable rules concerning transfers to prevent it from being defrauded. *Jones v. Omaha & C. B. Street R. Co.* 798

10. As between the conductor and a passenger on a street car the transfer produced must be regarded as conclusive as to the rights of the latter. *Jones v. Omaha & C. B. Street R. Co.* 798

11. A person attempting to board an elevator moving at a high rate of speed is guilty of negligence *per se*. *Zimman v. Miller Hotel Co.* 809

12. Where, in an action for death, there was no evidence of incompetency of defendant's elevator conductor, the court properly refused to submit the question to the jury. *Zimman v. Miller Hotel Co.* 809

Charities. See MECHANICS' LIENS, 1-3.

Persons dealing with trustees of a charitable corporation are bound to take notice of the powers granted by its articles of incorporation. *Horton v. Tabitha Home* 491

Commerce.

Since a contract with a foreign corporation to publish the supreme court reports partakes of the nature of interstate commerce, such foreign corporation may make the contract without filing with the secretary of state the certificate required under sec. 725, Rev. St. 1913. *Traphagen v. Lindsay* 823

Compromise and Settlement.

Evidence *held* to show a settlement. *Platt & Frees Co. v. Scrivner* 789

Constitutional Law. See STATUTES. WATERS, 4.

1. The provision of sec. 178, ch. 17, laws 1901, as amended by sec. 123, ch. 17, laws 1909, providing that public work in certain cities shall be done by union labor and be paid for at $2 a day, and that skilled labor shall receive the current scale of union wages, and that eight hours shall constitute a day's labor, *held* unconstitutional. *Wright v. Hoctor* 342
2. Ch. 36, laws 1891, providing for the organization of sanitary districts, *held* not violative of sec. 1, art. XI*b* of the constitution, which provides that "no corporation shall be created by special law." *Whedon v. Wells* 517
3. Ch. 36, laws 1891, providing for the organization of sanitary districts, *held* to be general in its nature, complete in itself, and to apply to all municipal corporations similarly situated. *Whedon v. Wells* 517
4. Holding Sunday school or religious meetings in a country school-house not to exceed four times a year, and not so as to interfere with the school work, *held* not to constitute the school-house a place of worship, within sec. 4, art. I of the constitution. *State v. Dilley* 527

Contracts.

1. One who seeks to rescind a contract cannot retain the benefits of a beneficial portion and rescind the portion not to his advantage, but must rescind the whole. *Collison v. Ream* 29
2. Where A agreed to exchange corporate stock with B and C, he cannot rescind as to A, while affirming the contract as to B. *Collison v. Ream* 29

Contracts—*Concluded.*

3. In a suit to restrain defendant from doing plumbing work in breach of a contract not to enter into such business, evidence *held* to entitle plaintiff to an injunction. *Ammon v. Keill* 695
4. A party to a contract is justified in relying on a representation made as to a positive statement of fact, where an investigation would be required to discover the truth. *Abts Co. v. Cunningham* 836
5. Where a party negotiating for a contract knows the material facts, and the other party is ignorant thereof and does not have the means of knowledge at hand, the latter may rely upon positive statements of the former. *Abts Co. v. Cunningham* 836
6. A party who procures a contract by making false representations of material facts cannot justify by urging the negligent failure of the defrauded party to make an investigation which would have resulted in the discovery of the truth. *Abts Co. v. Cunningham* 836

Corporations. See COMMERCE. EQUITY.

One who accepts a note of the principal owner of a corporation in payment of a dividend due him cannot afterwards sue the corporation for such dividend. *Whisker v. Vera Cruz Coffee Co.* 119

Corpse.

1. The right to control the disposition of the remains of a deceased husband is primarily in the widow or next of kin, in such order. *Thompson v. Pierce* 692
2. The right to sue for mutilation of the corpse of a deceased husband does not pass to the next of kin, unless the widow has lost, abandoned, or waived her right to sue. *Thompson v. Pierce* 692

Costs.

1. Where, in an action at law in the district court, a verdict is returned for plaintiff for an amount within the jurisdiction of a justice of the peace, the jury fee and trial fee should be taxed against plaintiff. *Frazer v. Myers* 194
2. On appeal from a judgment on a motion to retax costs on account of the inclusion of unnecessary matter in the bill of exceptions, judgment affirmed. *Nemaha Valley Drainage District v. Stocker* 663
3. Interest should not be computed on the sum paid for the bill of exceptions before entry of final judgment on the mandate. *Nemaha Valley Drainage District v. Stocker*.... 663

Counties and County Officers. See STATUTES, 3. TAXATION, 4-10, 13.

1. Sec. 14, ch. 45, Comp. St. 1911, providing that a petition for a bond election shall be signed by not less than 50 freeholders of the precinct, does not require that the petitioners be residents of such precinct. *Brooks v. MacLean*.. 16
2. Failure of a county clerk to make a record of the call for a special meeting of the county board does not invalidate such call, where it was in fact made and due notice given, and the record showed a meeting pursuant thereto. *Brooks v. MacLean* 16
3. Two of the three members of a county board may call a special election to vote on a proposition to issue bonds, though the other member signed a petition for the election. *Brooks v. MacLean* 16
4. A proposition to vote bonds to aid a corporation in the construction of a bridge, *held* unauthorized; that the location of the proposed bridge was indefinite; that the rights of the taxpayers were not sufficiently guarded; and that the issuance of the bonds should be enjoined. *Brooks v. MacLean* 16
5. The term of office of a county commissioner of Cedar county is three years. *State v. Furley* 161
6. In an action to remove a county commissioner from office, defendant cannot avail himself of the failure of plaintiff to file a statement under the corrupt practice act (Comp. St. 1911, ch. 26, art. III), his remedy being under the special statute (Rev. St. 1913, ch. 20, art. XX) to have the election of his successor declared void. *State v. Furley* 161
7. Where a person designated by the sheriff performs the duties of jailer, he is a *de facto* officer, though he fails to take the oath of office. *McFadden v. Cedar County* 318
8. Where a person designated by the sheriff performs the duties of jailer and receives all his compensation from the county, the sheriff is not entitled to fees as jailer. *McFadden v. Cedar County* 318
9. Sec. 13, ch. 46, Comp. St. 1907, recognizes a distinction between sheriff and jailer, and gives the sheriff the election to act as jailer, or to appoint a deputy to act as jailer. *Afflerbach v. York County* 611
10. Sheriff *held* entitled to extra compensation for performance of duties as jailer. *Afflerbach v. York County* 611
11. A physician, a member of a county board of health, acting under an order of the state board of health in quarantin-

Counties and County Officers—*Continued.*

ing a highly contagious disease, may recover from the county his actual expenses and the reasonable value of his services. *Shidler v. York County* 652

12. A physician, paid $5 a month for treating inmates of the county poor farm and county jail, may recover from the county actual expenses incurred in suppressing an epidemic of smallpox, together with reasonable compensation for his services. *Plumb v. York County* 655

13. Sec. 9, art. I, ch. 18, Comp. St. 1891, providing that unorganized territory may be attached to an adjoining organized county, does not authorize the annexation of an unorganized county to an adjoining organized county. *State v. Hawkins* 740

14. McPherson county, since its organization, has been a *de jure* organization, and properly exercised jurisdiction over Arthur county for revenue, election, and judicial purposes, until the organization of the latter under ch. 262, laws 1913. *State v. Hawkins* 740

15. In *quo warranto* to oust officers of Arthur county, ratification of the annexation of Arthur county to McPherson county *held* not established by the evidence. *State v. Hawkins* 740

16. A sheriff is not entitled to a reward offered for the arrest and conviction of a criminal. *Ward v. Adams* 781

17. A taxpayer, though permitted by sec. 966, Rev. St. 1913, to appeal from the allowance of a claim against the county, cannot collect from the county attorney's fees paid by him for prosecuting such an appeal. *Minshull v. Sherman County* 835

18. In an action against a county for death from a defective bridge, an instruction to find for defendant, though negligent, if decedent was guilty of contributory negligence which was the proximate cause of his death, *held* not erroneous. *Lyons v. Greeley County* 104

19. Where a bridge is built on a public road between two counties, the counties are jointly and severally liable for injuries resulting from failure to use reasonable diligence to keep the bridge in a reasonably safe condition for travel. *Bethel v. Pawnee County* 203

20. Evidence, in an action for death caused by a defective county bridge, *held* to sustain verdict for plaintiff. *Bethel v. Pawnee County* 203

21. In an action for death caused by a defective county bridge, an instruction as to defendant's liability and constructive

Counties and County Officers—*Concluded.*

notice of the defect *held* not prejudicial. *Bethel v. Pawnee County* 203

22. The liability of counties for repairs to a bridge over a boundary stream is fixed by the statute existing when the repairs are made. *Buffalo County v. Kearney County* ..... 439 *Standard Bridge Co. v. Kearney County* 744

23. The legislature may change the statute governing the liability of counties for repairs to a bridge previously constructed over a stream between counties. *Buffalo County v. Kearney County* 439

24. County commissioners can ratify a contract made in behalf of the county by a member of the board, if the board had power to make the contract. *Standard Bridge Co. v. Kearney county* 455

25. Where two counties contract to repair a bridge over a boundary stream, it is not necessary to publish the advertisement for bids in both counties. *Standard Bridge Co. v. Kearney County* 455

Courts. See STATES, 3.

1. The county court has exclusive original jurisdiction over the administration of estates of decedents. *Smith v. Estate of Bayer* 488

2. The district courts, being courts of general equity jurisdiction, are not limited by statute in the exercise of such jurisdiction. *Bodie v. Bates* 757

3. Where the application of a technical rule of construction would defeat a clear equity, the rule should not be applied. *Bodie v. Bates* 757

4. Where consent to the exercise of judicial power, in a manner not authorized by statute, is relied upon as a bar to equitable relief, such consent and the action of the court based thereon should not be extended by construction, so as to defeat a clear equity of either consenting party. *Bodie v. Bates,* 757

Criminal Law. See BRIBERY.

1. In a prosecution for attempting to bribe a public officer, an instruction in the language of sec. 176 of the criminal code *held* not prejudicial. *McMartin v. State* 292

2. The court's statement in the hearing of the jury that "the instruction asked by defendant is refused," *held* not prejudicial error. *McMartin v. State* 292

Criminal Law—*Continued.*

3. Misconduct or improper argument of a prosecuting attorney will not be reviewed unless objected to and exception taken. *McMartin v. State* 292

4. The rule in relation to a cautionary instruction as to the testimony of officers *held* not to apply to a sheriff, and especially where his testimony had no reference to anything which occurred when he was acting in his official capacity. *McMartin v. State* 292

5. A motion to strike an entire answer "as hearsay and not responsive" *held* properly overruled, where a part of the answer was proper. *McMartin v. State* 292

6. In a prosecution for knowingly receiving goods stolen from freight cars of a railroad corporation, the existence of the corporation may be proved by showing that the company named in the information was operating the railroad, and that the goods were stolen from freight cars on its tracks. *Bloom v. State* 710

7. A new trial will not be granted for newly discovered evidence, unless it is material, is not doubtful, and could not by the exercise of reasonable diligence have been produced at the trial. *Bloom v. State* 710

8. It is not required that all witnesses whose names are indorsed on an information must be called at the trial. *Bloom v. State* 710

9. It is not error to refuse an instruction covered by one given. *Bloom v. State* 710

10. It is not reversible error to fail to instruct as to the defense of alibi, where defendant makes no request therefor. *Bloom v. State* 710

11. Misconduct of the county attorney in stating to the jury that defendant had an opportunity to go on the witness-stand and deny the charge, but he did not do so, does not require a reversal, where no other error was committed, and the court sustained an objection to the remark, and the county attorney stated that he should not have made it. *Hardesty v. State* 839

12. It is not error to refuse an instruction on the law as to a confession, where the record shows that it was voluntarily made and was consistent with the state's evidence, and a general instruction fully protected the rights of accused. *Hardesty v. State* 839

Criminal Law—*Concluded.*

13. The recalling of juries for instruction is so far within the discretion of the trial court as not to present a subject for review. *Hardesty v. State* 839

Damages. See CARRIERS, 5, 6.

1. Where plaintiff dies from injuries for which he brought suit, his administrator may recover the damages to which plaintiff was entitled. *Murray v. Omaha Transfer Co.* 175
2. The use of the word "permanent" in an instruction on the measure of damages for personal injuries *held* not prejudicial, where the verdict clearly showed that the jury considered that plaintiff's injuries were temporary. *Svetkovic v. Union P. R. Co.* 369
3. In an action against a city for damages from defective drainage, instruction as to measure of damages approved. *Naysmith v. City of Auburn* 582
4. Loss of a wife's services in the performance of ordinary household duties constitutes an element of damages recoverable by a husband for her death. *Moses v. Mathews*.. 672

Death. See APPEAL AND ERROR, 19.

1. Evidence *held* to establish the legal presumption of the death of plaintiff's father, through whom she claimed title. *Mitchell v. Kaufman* 108
2. In an action for death, due to the negligent sale of poison to an agent, an instruction that, unless the agent disclosed to the seller that he was acting for his principal, an action for the death of the principal could not be maintained, *held* properly refused. *Moses v. Mathews* 672

Deeds. See BANKS AND BANKING, 8. PLEADING, 5, 6.

1. Evidence in a suit to cancel a deed *held* to sustain decree for plaintiff. *Maier v. Romatzki* 76
2. Where a husband and wife executed deeds each to the other, with directions to a depositary not to deliver either deed to either grantor except on the written order of both, and upon the death of either to record the deed to the survivor, no present title passed. *Dunlap v. Marnell*..... 535
3. Where a husband and wife executed deeds each to the other, which deeds were delivered to a depositary, under an agreement that the deed to the survivor should be recorded on the other's death, equity will quiet title in the survivor. *Dunlap v. Marnell* 535
4. Where a grantor deposits a deed with a third person, without power of revocation, with directions to record it at

Deeds—*Concluded.*

grantor's death, this is a sufficient delivery, and will pass title though the grantee had no knowledge of its execution. *Dunlap v. Marnell* 535

5. The delivery of a deed is essential to render the conveyance operative. *Roepke v. Nutzmann* 589

6. Delivery of a deed is a question of intent to be determined by the facts in each case. *Roepke v. Nutzmann*..... 589

7. It is a sufficient delivery of a deed if the grantor delivers it to a third person unconditionally for the use of the grantee. *Roepke v. Nutzmann* 589

8. Where a father executed deeds to two of his children and delivered them to a notary, he to retain the custody until the grantor's death, the delivery passed title to the grantees at the date of such delivery, subject to their acceptance when informed of the conveyance. *Roepke v. Nutzmann*.... 589

Depositions. See APPEAL AND ERROR, 3.

1. An application to correct a mistake of the stenographer in copying his notes of a deposition should be made to the court before the deposition is read, and the issue as to the mistake should not be submitted to the jury. *Naysmith v. City of Auburn* 582

2. Depositions taken on questions submitted *held* admissible in evidence, though not taken at the time and place designated. *Simmons v. Simmons* 607

Descent and Distribution.

1. The French words "fonds et biens," translated as "goods and effects," as used in a treaty between the United States and Sweden, *held* to include realty. *Erickson v. Carlson*.. 182

2. Treaty rights of nonresident aliens must be enforced by state courts without regard to statutory provisions. *Erickson v. Carlson* 182

3. The word "children" as used in the statute of descent (Comp. St. 1911, ch. 23, sec. 2) does not include grandchildren. *Noteware v. Colton* 541

4. Brothers and sisters of decedent, a married man who left no will, cannot recover in ejectment, in absence of proof that his widow is dead and that he left no issue. *Powell v. Ventis* 542

Divorce.

1. A derelict husband cannot defeat the collection of alimony by remarrying and claiming the benefit of the exemption law. *Winter v. Winter* 335

Divorce—*Concluded.*

2. Decree for alimony in another state *held* not a bar to a suit in this state to recover a reasonable amount of alimony out of the husband's real estate situated in this state. *Bodie v. Bates* 757

3. Personal property decreed to a wife by a divorce decree is not subject to attachment in a subsequent action for debt against her husband. *Simmonds v. Fenton* 771

Drains.

1. The vote of the electors creating a sanitary district concludes the taxpayers residing therein as to the necessity for the creation of the district, and the benefits to be derived from the improvements. *Whedon v. Wells* 517

2. Officers of a sanitary district need not give notice of the levying of a tax which is within their power to levy. *Whedon v. Wells* 517

3. Where officers of a sanitary district exceed their power in levying taxes, they may be enjoined. *Whedon v. Wells*.... 517

4. Officers of a sanitary district have nothing to do with valuing property for assessments. *Whedon v. Wells* 517

5. Errors in assessments made by officers of a sanitary district are to be corrected by the board of equalization. *Whedon v. Wells* 517

Ejectment. See DESCENT AND DISTRIBUTION, 4.

Elections.

1. Ch. 36, laws 1913, creating the office of election commissioner for certain counties, places great responsibility and duties upon such commissioner in the matter of registration of voters. *State v. Moorhead* 80

2. An election commissioner must consider evidence and determine questions of fact and law; his action is quasi-judicial, and he is given a reasonable legal discretion in investigating the qualifications of persons applying for registration. *State v. Moorhead* 80

3. The purpose of the act creating the office of election commissioner (laws 1913, ch. 36) was to remedy the loose practices that had prevailed in conducting elections. *State v. Moorhead* 80

4. A registry law, to be valid, must be reasonable and impartial, and calculated to secure the constitutional right of suffrage, and not to restrain such right. *State v. Moorhead*. 80

5. In the registration of voters, the election commissioner need not require a naturalized person to submit and deposit

Elections—*Concluded.*

his naturalization papers, but if they are presented, and he is satisfied of their regularity, he may return same. *State v. Moorhead* 80

6. In determining the fact of naturalization the election commissioner is not concluded by the oath or sworn statement of applicant, but may require the production of the naturalization papers or a duly certified copy thereof. *State v. Moorhead* 80

7. Decisions holding statutes unconstitutional which deny to persons not on the registration list the right to vote *held* not applicable to ch. 36, laws 1913, which makes ample provision for full investigation of the right to vote. *State v. Moorhead* 80

Eminent Domain. See ATTORNEY AND CLIENT, 2.

Where the county board ordered a section-line road opened, and that the damages be paid, but the road was not opened, and ten years thereafter the owner conveyed the premises without reservation of the highway, and afterwards the county, desiring to open the road, brought the damages awarded, with interest, into court, *held* that the present owner was entitled to the damages; and that by accepting the same he thereby consented to the opening of the road, and was estopped from making any further claim. *Clay County v. Howard* 389

Equity. See PARTNERSHIP, 5.

In a suit for restoration of corporate stock pledged for a debt and to quiet title thereto, on the ground that the lien of the pledge has been extinguished by a rejected tender of the sum due pledgee, payment of the debt may be made a condition of granting relief. *Love v. Park* 729

Estoppel. See EMINENT DOMAIN. HOMESTEAD, 3. INSURANCE, 11, 14.

Evidence. See APPEAL AND ERROR. BASTARDY. BILLS AND NOTES, 2. BROKERS, 1, 3, 5, 9. CARRIERS, 1, 4. CRIMINAL LAW. DEATH, 1. DEPOSITIONS. MASTER AND SERVANT, 1. NEGLIGENCE, 4. PARTNERSHIP, 2. TELEGRAPHS AND TELEPHONES, 3, 4. WITNESSES.

1. Persons who have known the maker of a note for years, and have transacted business for her, and observed her mental condition, may, after giving the facts upon which their opinion is based, state their opinion of her ability to transact business. *Burgedorff v. Hamer* 113

Evidence—*Concluded.*

2. In an action for injuries resulting in death, admission in evidence of a photograph of the deceased taken after death *held* not prejudicial error. *Murray v. Omaha Transfer Co.* .. 175

3. In an action for death, admission of the Carlisle table showing the expectancy of life at the age of 50 *held* not reversible error, under the evidence. *Murray v. Omaha Transfer Co.* 175

4. In the absence of pleading and proof of the statutes of another state, they will be presumed to be the same as our own. *Bethel v. Pawnee County* 203

5. Refusal to allow cross-examination of a doctor as to his treatment of plaintiff's wound *held* not error, where he testified in chief solely as to the nature and extent of the injury. *Svetkovic v. Union P. R. Co.* 369

6. In an action for personal injuries, it was not error to refuse to require plaintiff to submit the scar of a wound which he had received about 40 years before the trial. *Svetkovic v. Union P. R. Co.* 369

7. Tables of expectancy need not be introduced to prove the probable duration of life, and, if introduced, are not conclusive, but will be considered with other evidence. *Moses v. Mathews* 672

8. In an action by a husband for loss of his wife's services through death, the value of her services need not be proved with mathematical certainty. *Moses v. Mathews* 672

Exceptions, Bill of. See APPEAL AND ERROR, 14, 15. COSTS, 2.

Executors and Administrators. See COURTS, 1. DAMAGES, 1.

1. The remedies, both in equity and at law, for conversion of trust funds by a trustee survive; but the remedy at law for conversion becomes changed, and must be enforced as claims against estates of decedents, at the time of the death of the trustee, are enforced. *Robinson v. Tower* 198

2. Under sec. 5189, Ann. St. 1909, a foreign administrator may prosecute an action in this state in like manner as a nonresident. *Bethel v. Pawnee County* 203

3. That a foreign administrator, after commencing an action in Nebraska, moves into the state will not *ipso facto* revoke his letters of administration. *Bethel v. Pawnee County* 203

4. Where a husband dies possessed of personal property, and the wife makes no demand for an allowance under sec. 1267, Rev. St. 1913, during her lifetime, the rights conferred thereby are waived. *Smith v. Estate of Bayer* 488

Executors and Administrators—*Concluded.*

5. Where a widow made claim for a year's allowance, which was disallowed, and before taking appeal died, she waived her right, and her administrator cannot enforce the claim. *Smith v. Estate of Bayer* 532

Forcible Entry and Detainer.

1. In forcible entry and detainer for failure to pay rent, it is a good defense that plaintiff has agreed to offset certain claims exceeding the rent. *McJunkin v. Waldo* 235
2. Judgment *held* a bar to action of forcible entry and detainer for failure to pay rent. *McJunkin v. Waldo* 235

Fraud. See CONTRACTS, 4-6. INSURANCE, 9-11.

A person relying on false representations as to the value of property may recover for the fraud, where the representations were made by his own agent and were induced by the person from whom he received the property. *Wustrack v. Hall* 384

Fraudulent Conveyances.

Real estate fraudulently transferred to prevent the collection of the grantor's debts, with full knowledge of the grantee, may be subjected to the payment of a judgment subsequently rendered against the grantor upon a claim existing at the time of the fraudulent conveyance. *Port Huron Machinery Co. v. Larson* 60

Gaming.

Sec. 226*a* of the criminal code, making the keeping of a bucket-shop unlawful, and imposing a penalty, did not affect the previous doctrine of the courts that an action to recover the sum paid to a bucket-shop keeper as margins cannot be maintained. *Boon v. Gooch* 678

Guaranty. See APPEAL AND ERROR, 13.

1. An absolute guaranty of payment of a note goes with the note without assignment of the guaranty. *Home Savings Bank v. Shallenberger* 593
2. Notice of default in payment of a note is not essential to hold the guarantor. *Home Savings Bank v. Shallenberger* 593
3. The holder is not bound to protect security on a note for the benefit of the guarantor. *Home Savings Bank v. Shallenberger* 593

Guaranty—*Concluded.*

4. Refusal of instruction that failure of the holder to attempt to collect from the maker of a note, or to take mortgaged property securing the same, is no defense to an action on an absolute guaranty, *held* error. *Home Savings Bank v. Shallenberger* 593

5. A guaranty of payment of a note *held* to be an absolute contract that the amount expressed in the note should be paid at its maturity. *Home Savings Bank v. Shallenberger* 593

6. Extension of time of payment to a principal debtor *held* a sufficient consideration for a new contract of guaranty made after renewal of the principal obligation. *Home Savings Bank v. Shallenberger* 593

7. Where a note, which was guaranteed, was transferred on condition that the guarantor should renew the guaranty, and a new guaranty was executed to the payee, who delivered it to the transferee, he could sue on the guaranty as if the guarantor had personally delivered the guaranty to him. *Home Savings Bank v. Shallenberger* 593

Habeas Corpus.

1. The right of a mother to custody of her child *held* not lost by an act of relinquishment performed under circumstances of temporary distress or discouragement. *State v. Bryant* .. 129

2. The right of a parent to custody of her child should not be set aside, where her unfitness is not affirmatively shown, or forfeiture clearly established. *State v. Bryant* 129

3. In habeas corpus by a mother for possession of her child, the best interest of the child should determine its custody. *State v. Bryant* 129

4. Evidence *held* to sustain order allowing writ. *State v. Bryant* 129

Highways. See APPEAL AND ERROR, 29. EMINENT DOMAIN.

1. Where a public road was vacated upon condition that plaintiff pay the county $25 and grant land for another road, and plaintiff complied with these conditions, *held* that proceedings to reopen the road could not be enjoined on the ground that the county had not returned the $25 and restored the land granted by plaintiff. *Cummins v. Sheridan County* 459

2. The question whether the opening of a road will be for the public benefit is within the reasonable discretion of the county commissioners. *Cummins v. Sheridan County* 459

Highways—*Concluded.*

3. The discretion of the commissioners in opening a road will not be interfered with by the courts. *Cummins v. Sheridan County* 459

Homestead.

1. A purchaser of a homestead of the value of $2,000 takes the same free from the lien of a judgment docketed prior to the purchase and during the existence of the homestead right. *Radbruck v. First Nat. Bank* 287
2. A warranty deed of a homestead, duly executed and acknowledged by both husband and wife, passes the homestead estate, though that particular estate is not specifically mentioned. *Radbruck v. First Nat. Bank* 287
3. A statement by a purchaser of a homestead to a judgment creditor of his grantor that, had he known of the judgment, he would not have purchased, *held* not to estop him from subsequently denying the validity of the judgment and quieting his title against the same. *Radbruck v. First Nat. Bank* 287
4. Under sec. 17, ch. 36, Comp. St. 1911, a homestead, upon the death of the fee-holding spouse, vests, *eo instante*, in the surviving spouse for life, with remainder in the heirs of the fee-holding spouse, regardless of whether there are children to be provided for by the survivor. *Shearon v. Goff* 417
5. During the life of the owner of the fee of a homestead, the exempt character of the property depends upon its occupancy as a homestead; but, upon the death of the fee-holding spouse, a new title is created which vests, *eo instante*, in the survivor for life, free from the right of the children of either spouse to a division of the income therefrom. *Shearon v. Goff* 417
6. Actual occupancy of lands or town lots, within the limits defined by statute, by a husband and wife at the time of the death of the fee-holding spouse will be presumed to be a selection of the same as a homestead. *Shearon v. Goff* 417

Husband and Wife. See ATTACHMENT. DEEDS, 2, 3.

Injunction. See CONTRACTS, 3. COUNTIES AND COUNTY OFFICERS, 4. HIGHWAYS, 1.

1. Where E. conveyed land to W. covenanting that a fence outside the boundary of the land conveyed should stand "where it now is, until otherwise provided for," and E. thereafter conveyed the remainder of his land to K., *held*

Injunction—*Concluded.*

that W. could enjoin K. from destroying the fence. *Wallace v. Kruzer* 615

2. An owner can make any beneficial use of his property, not out of reasonable proportion to injury to another. *Bush v. Mockett* 552
3. A landowner will be enjoined from erecting a fence on his land to the great damage of his neighbor for the sole purpose of annoying him. *Bush v. Mockett* 552
4. Evidence *held* to sustain decree enjoining maintenance of fence erected near a lot line for the purpose of annoying the adjoining owner. *Bush v. Mockett* 552

Insurance.

1. Notice that the insured premises are vacant, or that fire has rendered them uninhabitable, communicated tc the insurer's local agent authorized to issue policies and transact the usual business of a recording agency, *held* notice to the insurer. *Schmidt v. Williamsburgh City Fire Ins. Co.* 43
2. Where an insurance policy provided that it should become void if the premises remained vacant for ten days, and that in such case the unearned premium should be returned, the insurer *held* not bound to return the unearned premium, unless the policy be surrendered. *Schmidt v. Williamsburgh City Fire Ins. Co.* 43
3. Where the insurer had no notice of a breach of a condition in the policy rendering it void until after the premises were totally destroyed, the fact that the company's adjuster, while declaring the policy void and denying liability, offered a larger sum than the unearned premium for a surrender of the policy did not constitute a waiver of the forfeiture. *Schmidt v. Williamsburgh City Fire Ins. Co.* 43
4. Where there is no uncertainty as to the meaning of a valid insurance contract, it will be enforced according to its terms. *Cilek v. New York Life Ins. Co.* 274
5. Under a 20-year endowment life insurance policy providing for payment of accumulated profits only at the end of the 20 years, *held* that the beneficiary was not entitled to have profits credited to the policy to keep it in force. *Cilek v. New York Life Ins. Co.* 274
6. The provision of the insurance laws of New York, requiring notice to be mailed to the policy-holder as a condition of forfeiture for nonpayment of premiums, has no application to insurance contracts made in Nebraska by New York companies. *Cilek v. New York Life Ins. Co.* 274

Insurance—*Concluded.*

7. Where the beneficiary joins with the insured in an application for a loan on the policy, she cannot afterwards claim that the loan was made without her authority. *Cilek v. New York Life Ins. Co.* 274

8. Knowledge of the secretary of a subordinate lodge of a fraternal beneficial association as to the standing of members whose dues he receives and forwards will be imputed to the association. *Krecek v. Supreme Lodge, F. U. A.* 428

9. Where an applicant for membership conspires with the secretary and others of a subordinate lodge to withhold from a beneficial association knowledge of facts disqualifying the applicant for membership, the association is not chargeable with knowledge of such facts. *Krecek v. Supreme Lodge, F. U. A.* 428

10. Where the constitution of a fraternal beneficial association declares saloon-keepers ineligible to membership, neither the supreme officers nor a local lodge can admit or ratify such membership if illegally gained. *Krecek v. Supreme Lodge, F. U. A.* 428

11. Acceptance of dues by a local lodge of a beneficial society of a person declared by its constitution ineligible to membership will not estop the society from denying liability after the member's death, though the officers of the local lodge, when receiving such dues, had knowledge of his ineligibility. *Krecek v. Supreme Lodge, F. U. A.* 428

12. That the petition alleged that the insurance contract should be in force from noon of a certain day, and the evidence showed that it was to be in force at an earlier hour, *held* not a material variance. *Willson v. German American Ins. Co.* 774

13. The parties to a fire insurance contract may orally agree to renew it on the same terms for another year. *Willson v. German American Ins. Co.* 774

14. Where the local agent of a fire insurance company has renewed a policy from year to year, and the renewal has been acted upon by the company, the fact that the insured knew that the agent had no authority to waive written conditions of the policy will not estop him to assert that the agent was authorized to so renew the policy. *Willson v. German American Ins. Co.* 774

15. Evidence *held* to sustain finding that the insurer's agent contracted with plaintiff to renew the policy, and that he acted within his ostensible authority. *Willson v. German American Ins. Co.* 774

Interest. See COSTS, 3.

Under sec. 92 of the code, interest cannot be recovered unless prayed for. *Higgins v. Case Threshing Machine Co.* 3

Intoxicating Liquors.

1. Under sec. 30e, ch. 50, Comp. St. 1911, making it unlawful to retail intoxicating liquors in a building owned or controlled by a brewer, the owner's conveyance of a building, so owned or controlled, to a grantee not engaged in that business does not make the premises a lawful place for a licensed saloon, where grantor retains control of the building. *Enos v. Hanff* 184
2. Under sec. 3869, Rev. St. 1913, a majority of the qualified resident freeholders of a village must sign a petition for a liquor license to authorize its issuance by the village board. *Boelter v. Williamson* 285

Judges.

A litigant who voluntarily goes to trial without objection, with knowledge that the trial judge is disqualified, cannot thereafter raise such question to prevent the trial judge from ruling on his motion for a new trial. *Wustrack v. Hall* 384

Judgment. See FORCIBLE ENTRY AND DETAINER, 2.

1. Under sec. 318 of the code, a suit to vacate a judgment must be commenced within one year after its rendition, an appeal from the original judgment to the supreme court will not effect an extension of the time. *Hallowell v. Sloan.* 1
2. A settlement of a judgment obtained by fraud practiced upon a person of weak understanding will be set aside. *Grunden v. Skiles* 124
3. Where a settlement of a judgment is set aside and the judgment reinstated, payments made to secure the settlement need not be restored, but will be credited on the judgment. *Grunden v. Skiles* 124
4. The district court has power to set aside its orders and judgments during the term. *Zitnik v. Union P. R. Co.* 152
5. A judgment of a court of a sister state, duly authenticated, is conclusive on the subject-matter. *Peoples Nat. Bank v. Ring* 376
6. An action on a judgment of a sister state can only be defeated for want of jurisdiction, fraud, or on account of matters of defense arising after its rendition. *Peoples Nat. Bank v. Ring* 376

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER.

Limitation of Actions. See JUDGMENT, 1. PLEADING, 7.

The payment of interest on a note by a principal without the authority of the surety will not stop the running of limitations as to the surety. *Dwire v. Gentry* 150

Malicious Prosecution.

Where, in an action for malicious prosecution, plaintiff's evidence is insufficient to show either malice or want of probable cause, the court should direct a verdict for defendant. *Meyer v. Meese* 226

Mandamus. See MUNICIPAL CORPORATIONS, 3.

1. Demurrer *held* the proper way to test the sufficiency of a petition for mandamus. *State v. Ferguson* 63
2. Where a parent's request that his child be excused from taking a prescribed study is wrongfully denied and the child is expelled or suspended for refusal to continue such study, mandamus will lie to compel reinstatement. *State v. Ferguson* 63
3. Mandamus will not lie to compel a school district board to close a schoolhouse to religious meetings, at the instance of a taxpayer who is not required to contribute to the support of the meetings or repair of the schoolhouse. *State v. Dilley* 527

Master and Servant.

1. Where, in an action for the death of a trackman, plaintiff relied on defendant's failure to observe its custom of stationing a man on the footboard of its moving engines to warn trackmen of their approach, the burden was on plaintiff to establish such custom, and the question whether such custom existed was for the jury. *Zitnik v. Union P. R. Co.*.. 152
2. In an action for the death of a trackman, *held* that the question whether defendant was guilty of negligence in failing to warn decedent of the approach of an engine was for the jury. *Zitnik v. Union P. R. Co.* 152
3. The master is not liable for an injury to a servant occasioned by his own carelessness. *Hoffman v. McKeen Motor Car Co.* 238
4. Where a section foreman, in disobedience of orders to leave the company's yards on account of intoxication, returns, he is a mere trespasser, and, if injured, cannot recover under the employers' liability act. *Anderson v. Missouri P. R. Co.* 358
5. An engineer operating his engine in railroad yards may assume that section-men will look out for moving trains. *Anderson v. Missouri P. R. Co.* 358

Master and Servant—*Concluded.*

6. Where a section foreman suddenly goes in front of a moving engine, so near the engine that it is impossible to avoid injuring him, the doctrine of the last clear chance cannot be applied. *Anderson v. Missouri P. R. Co.* 358

7. That a section foreman was intoxicated when injured in the yards of the railroad company is evidence of contributory negligence. *Anderson v. Missouri P. R. Co.* 358

8. A railroad company owes to an employee in its yards, in disobedience of orders, no other duty than to not purposely or wantonly injure him. *Anderson v. Missouri P. R. Co.* .. 358

9. In actions not governed by the employers' liability act (laws 1913, ch. 198), an employee assumes the risks arising from unsafe conditions of the premises to which he does not object, where the conditions are known to him, or apparent to persons of his experience and understanding. *Joseph v. Cudahy Packing Co.* 397

10. A master is liable for the negligence of his servant committed within the apparent scope of his employment, though the particular act complained of was unauthorized by the master. *Moses v. Mathews* 672

11. The master is liable for his servant's negligence in selling a poison for a harmless remedy, where the sale was within the apparent scope of the servant's authority. *Moses v. Mathews* 672

Mechanics' Liens. See MORTGAGES, 1.

1. Property of a corporation organized for charitable and religious purposes *held* not subject to mechanics' liens without an order of the district court therefor. *Horton v. Tabitha Home* 491

2. Trustees of a charitable corporation cannot contract so as to subject its property to mechanics' liens without an order of the district court therefor. *Horton v. Tabitha Home*.... 491

3. Failure of trustees of a charitable corporation to object to the use of material furnished, at the order of other persons, in remodeling buildings situated on its property will not create a mechanic's lien thereon. *Horton v. Tabitha Home* 491

4. Where plaintiff furnished material for five houses to defendant, who had a credit with plaintiff, *held* that plaintiff was not entitled to a lien on one of the houses which was completed before the credit was exhausted. *Platt & Frees Co. v. Scrivner* 789

Money Received.

Evidence, in an action for a reward, *held* to sustain verdict for plaintiff. *Ward v. Adams* 781

Mortgages.

1. Where a material-man began delivery of material November 30, *held* that his lien was superior to a mortgage dated November 26, acknowledged December 1, and recorded December 6, 1909, and the money paid thereunder between December 9 and the following March. *Gabel Lumber Co. v. West* 394
2. Where a grantor executes a mortgage and a deed for the same consideration, and the grantee takes possession of the land without foreclosure, he holds as a mortgagee in possession. *Belieu v. Card* 462
3. Where, in a suit to cancel a deed executed as additional security to a mortgage, the pleadings and evidence will not justify foreclosure of the mortgage, a decree canceling the deed, without foreclosing the mortgage, *held* proper. *Belieu v. Card* 462
4. A deed executed at the same time, to the same party, and upon the same consideration, with a mortgage upon the same property will be treated as additional security. *Belieu v. Card* 462
5. Plaintiff in foreclosure *held* entitled to a recivership as to the mortgaged land in excess of the homestead. *Mackey v. Cox* 833

Municipal Corporations. See CONSTITUTIONAL LAW, 1. DAMAGES, 3. TRIAL, 8.

1. Under a city charter providing that orders for the payment of money shall require for their adoption the concurrence of a majority of all members elected to the council, the allowance of a claim *held* not legally adopted, where three of the four members of the council were present, and only two voted for the claim. *State v. Darner* 39
2. A city *held* liable for personal injuries for permitting a rope across a sidewalk to remain in a dangerous condition, though the placing of the rope was to aid a quarantine. *Sheets v. City of McCook* 139
3. Evidence in mandamus to be placed on the retired list of fireman, under sec. 1, ch. 39, laws 1895, *held* to sustain judgment for relator. *State v. Love* 573
4. Where a municipal corporation in improving drainage of streets increases the flow of surface water and negligently

Municipal Corporations—*Concluded.*

fails to provide a sufficient outlet, it is liable for damage to private property resulting therefrom. *Naysmith v. City of Auburn* 582

5. A finding that plaintiff sustained damages from defective street drainage, being based on evidence and the jury's inspection of the premises, will not be disturbed unless clearly wrong. *Naysmith v. City of Auburn* 582

6. Where a walk was old and dilapidated and its defective condition was clearly visible for a long time, the city was chargeable with notice that it was unsafe. *Warner v. City of Wayne* 682

Negligence. See CARRIERS, 11.

1. One threshing grain by power from a traction engine should exercise a degree of care commensurate with the danger from fire to which property is exposed thereby. *Friederich v. Klise* 244

2. One threshing grain by power from an engine should place and keep in repair a spark-arrester over the smoke-stack. *Friederich v. Klise* 244

3. In an action for damages to farm property by fire from a traction engine, evidence that the spark-arrester was defective and that the fire was communicated from the engine will authorize a verdict for plaintiff. *Friederich v. Klise*... 244

4. Where, in an action for damages by fire communicated to grain stacks from a traction engine, the evidence established a presumption of negligence, the burden was on defendant to prove that the engine was not faulty in construction and was properly equipped and operated. *Friederich v. Klise* 244

5. In a personal injury case, an instruction that negligence is not presumed, but must be proved, though not necessarily by direct evidence, but that facts must be established from which a reasonable inference of negligence arises, *held* proper. *Witt v. Caldwell* 484

New Trial. See CRIMINAL LAW, 7.

1. Where special findings of a jury are not sustained by any evidence, a new trial should be granted. *Albers v. Chicago, B. & Q. R. Co.* 506

2. Where an instruction given, and considered by the jury, was inadvertently marked "refused," the mistake is not ground for new trial. *Zimman v. Miller Hotel Co.* 809

Nuisance.

Evidence, in suit to enjoin the operation of a hide-dressing and leather manufactory as a nuisance on account of offensive odors, *held* insufficient to warrant the issuance of an injunction. *Rush v. Smith-Lockwood Mfg. Co.* 133

Parent and Child. See HABEAS CORPUS.

1. Where a husband and wife contract to take a child into their family and provide for her, reserving the right to determine, when she becomes of age, whether they will make her their heir or provide for her as specified in the contract, and the husband dies before she becomes of age and without taking any further action, the child will not inherit as his heir. *Fenlon v. Fenlon* 322
2. A contract, under which a husband and wife agreed to take a child into their family, construed, and *held* to give them an option, when she should become of age, either to make her their heir or to provide for her as stipulated in the contract. *Fenlon v. Fenlon* 322

Partition. See APPEAL AND ERROR, 9, 10.

Partnership.

1. Evidence *held* to establish a partnership. *Taylor & Williams v. Steinman* 217
2. In a suit to rescind a partnership settlement and recover the consideration paid a retiring partner on account of duress and fraud, the burden is on plaintiff to show, not only duress and fraud, but that the consideration paid is excessive. *Dovey v. Dovey* 624
3. In absence of special agreement partners share equally in profits and losses; and the mere fact that the partners have contributed an unequal amount of capital, or that one has contributed the capital and the others only their skill and industry, does not change the rule. *Dovey v. Dovey* 624
4. Where a surviving partner continues to use the capital of a deceased partner, the representatives of the latter may either demand interest on the capital used or the profits earned by its use. *Dovey v. Dovey* 624
5. Where partners have failed to rescind a partnership settlement, and refused to surrender the consideration received, equity will not set aside the settlement. *Dovey v. Dovey*.. 624

Payment.

1. The acceptance of a note of the debtor's husband for a prior indebtedness is not payment unless by express agreement. *Edwards & Bradford Lumber Co. v. Lamb* 263

Payment—*Concluded.*

2. Where a vendor sued for purchase money, and defendant proved that he had paid money into a bank to plaintiff's credit, and plaintiff refused to accept it because the amount was insufficient, *held* that defendant was entitled to a credit of the amount on plaintiff's claim. *Beranek v. Beranek*.... 311

Physicians and Surgeons. See COUNTIES AND COUNTY OFFICERS, 11, 12.

Pleading. See APPEAL AND ERROR, 2, 13. BANKS AND BANKING, 6, 7. CARRIERS, 4, 7. MANDAMUS, 1. SALES, 2.

1. In pleading a set-off in an action on a note, defendant should conform to the rules by which the sufficiency of plaintiff's petition would be tested, if assailed by demurrer. *Citizens State Bank v. Worden* 53
2. In an action on a note, a general denial in reply to a set-off does not waive the objection that defendant's plea does not state a cause of action. *Citizens State Bank v. Worden*.. 53
3. The objection that a set-off pleaded in an answer does not state a cause of action may be raised at any stage in the proceeding. *Citizens State Bank v. Worden* 53
4. A defendant may plead as many defenses as he has, whether legal or equitable, and they are not inconsistent, unless the proving of the one would necessarily disprove the other. *Maier v. Romatzki* 76
5. Allegations of a petition to cancel a deed that the deed is void because of incompetency of the grantor and of undue influence, and also that there was an oral agreement that the deed should be executed, *held* not inconsistent. *Maier v. Romatzki* 76
6. An allegation that a deed was executed and not delivered is not inconsistent with itself. *Maier v. Romatzki*..... 76
7. In an action for negligently causing death, the petition may be amended by alleging additional grounds of negligence, and such amendment does not render the petition vulnerable to a plea of the statute of limitations. *Zitnik v. Union P. R. Co.* 152
8. A defective or ambiguous petition may be aided by the averments of the answer. *Frazer v. Myers* 194
9. Petition for money loaned *held* sufficient. *Simmons v. Simmons* 607
10. An objection that a petition is not sufficiently specific comes too late after trial and verdict, where the general allegations are sufficient to support the relief prayed for. *Moses v. Mathews* 672

Principal and Agent. See INSURANCE, 14, 15.

Principal and Surety. See LIMITATION OF ACTIONS.

1. A departure from the terms of the initial draft of a building contract *held* not to release the contractor's surety. *Cortright Metal Roofing Co. v. Merten* 164

2. A surety on the bond of a public contractor *held* not released from liability for a default against which it had bonded obligee. *Cortright Metal Roofing Co. v. Merten*.... 164

Process.

A summons in South Dakota signed by the firm name of plaintiff's attorneys, instead of by an attorney in his own name, *held* sufficient. *Peoples Nat. Bank v. Ring* 376

Quieting Title. See DEEDS, 3.

Railroads. See CARRIERS. MASTER AND SERVANT, 1-8. WATERS, 8.

1. Sec. 1, ch. 68, laws 1881, as amended by sec. 1, ch. 138, laws 1913, *held* not to deprive the state railway commission of jurisdiction to require the construction of suitable stockyards, side-tracks, and loading and unloading facilities for the general public. *Loup Valley Land Co. v. Union P. R. Co.* 331

2. In an action for injuries from being struck by a switch engine, refusal to instruct the jury to find for defendant, unless they found that the bell on defendant's engine was not ringing when the accident occurred, *held* not error in view of the evidence. *Svetkovic v. Union P. R. Co.* 369

3. Evidence in an action by a trespasser for injuries *held* not to support judgment against defendant. *Stenberg v. Missouri P. R. Co.* 561

Rape. See CRIMINAL LAW, 11-13.

Receivers. See MORTGAGES, 5.

1. Where a receiver sold property to be paid for in money and receiver's certificates, and the certificates were delivered and part of the money paid, in an action for the remainder of the money *held* that defendants could not set off other receiver's certificates held by them. *Ten Broek v. Caldwell*. 464

2. Receivers appointed in another state can maintain an action in this state against citizens thereof upon contracts for the payment of money which such receivers are authorized to collect. *Ten Broek v. Caldwell* 464

Receiving Stolen Goods. See CRIMINAL LAW, 6.

Replevin.

1. Where the property has been delivered to plaintiff in replevin, he cannot complain that the judgment for a return of the property was not in the alternative for its value, as required by sec. 7833, Rev. St. 1913; the error being favorable to him. *Sullivan v. Hansen* 779
2. The affidavit and the writ in replevin should identify the property. *Sullivan v. Hansen* 779
3. Where the affidavit and the writ in replevin fail to identify the property, and there is no evidence identifying same, the court should direct a verdict for defendant, though no objection is made to the affidavit and writ. *Sullivan v. Hansen*.. 779
4. Evidence *held* to show an agreement by defendant in replevin to make good any deficiency in corn in a crib by the payment of money, but not to show a lien on defendant's corn not contained in such crib. *Sullivan v. Hansen* 779

Reports.

1. Under ch. 85, laws 1911, establishing a bureau of printing, all bookbinding and printing of all stationery and supplies for state officers and departments are to be let by the commissioner of printing on contracts secured by competitive bidding, except in case of emergency, as provided by sec. 10 of the act. *Traphagen v. Lindsay* 823
2. Sec. 1146, Rev. St. 1913, is not in conflict with ch. 85, laws 1911, establishing a bureau of printing, but is to be construed therewith, and the supreme court reporter should cooperate with the commissioner of printing in letting the contract for publishing the supreme court reports. *Traphagen v. Lindsay* 823

Sales. See TRIAL, 4.

1. Evidence, in an action for breach of a contract for the purchase of flour, *held* to sustain a verdict for defendant, no damage being shown. *Diels v. Kennedy* 121
2. Where, in an action for the price of intoxicating liquors, the buyer relies on illegality of the sale, he must specially plead it. *Taylor & Williams v. Steinman* 217
3. Where misbranded drugs were sold, and the buyer was prosecuted for offering them for sale, the seller may be required to take them back and credit the buyer with the price thereof. *Hessig-Ellis Drug Co. v. Harley Drug Co.* 267
4. There is an implied warranty that an article sold shall be reasonably fit for the purpose for which it is sold. *Toledo Computing Scale Co. v. Fredericksen* 689

Sales—*Concluded.*

5. Where an article proves defective on being inspected, the buyer may refuse to accept it and may rescind the contract. *Toledo Computing Scale Co. v. Fredericksen* 689

Schools and School Districts. See CONSTITUTIONAL LAW, 4. MANDAMUS, 2, 3.

1. The right of a parent to make a reasonable selection of studies from the prescribed course of studies to be carried by his child in the public schools is not limited to any particular school or grade. *State v. Ferguson* 63
2. School authorities are not unlimited in their control and regulation of the school system; but they must exercise their authority to further the best interests of the scholars, with due regard to the natural and legal rights of parents. *State v. Ferguson* 63

Set-off. See BANKS AND BANKING, 7. PLEADING, 1, 3. RECEIVERS, 1.

In order that a claim may be allowed as a set-off, it must be a subsisting cause of action at the commencement of the suit. *Citizens State Bank v. Worden* 53

Specific Performance.

1. In a suit for specific performance, the findings of fact approved, and specific performance decreed. *Abel v. Gill*.. 279
2. A written agreement for the sale of land, in which the land is correctly described, the price stated, with promise to convey upon the receipt of the purchase price, delivered to the vendee, will entitle the purchaser to specific performance. *Iske v. Iske* 603
3. Specific performance of a parol contract will be enforced, where one party has wholly and the other partly performed. *Damkroeger v. James* 784
4. Evidence *held* sufficient to establish a parol contract that plaintiffs should have the property of a decedent if they should support him while living, and compliance therewith entitling them to specific performance. *Damkroeger v. James* 784

States. See REPORTS.

1. The boundary between Iowa and Nebraska follows gradual and imperceptible changes in the main channel of the Missouri river. *O'Connor v. Petty* 727
2. A change by avulsion in the main channel of the Missouri river does not change the boundary line between Iowa and Nebraska. *O'Connor v. Petty* 727

States—*Concluded.*

3. A suit in a court of Nebraska to quiet title should be dismissed, when it is found that the land in controversy is in Iowa. *O'Connor v. Petty* 727

4. Sec. 2, art. V of the constitution, makes the lieutenant governor, during the term for which he was elected, ineligible to be elected governor for the succeeding term. *State v. Wait* 806

Statute of Frauds.

1. The statute of frauds requires only the vendor to sign the contract for the sale of land. *Iske v. Iske* 603

2. For a verbal contract to be void under clause 1, sec. 8, of the statute of frauds, it must be one that, by its terms, is not to be performed within one year, and not one which may not be performed within that time. *Simmons v. Simmons* 607

Statutes.

1. An act complete in itself is not violative of sec. 11, art. III of the constitution, providing that an amendatory act contain the sections amended, though it repeals by implication an existing statute. *Minier v. Burt County* 473

2. An act, to be complete in itself within sec. 11, art. III of the constitution, must have one main and general subject, and not be in effect simply amendatory. *Minier v. Burt County* 473

3. Ch. 101, laws 1913, providing the method of raising funds for the erection of county buildings, being amendatory of existing statutes, and not containing the sections amended nor repealing same, is violative of sec. 11, art. III of the constitution. *Minier v. Bert County* 473

4. So much of ch. 53, laws 1907, as authorizes the county board of counties having more than 100,000 inhabitants to contract with the lowest bidder for feeding prisoners in the county jail is violative of sec. 11, art. III of the constitution. *McShane v. Douglas County* 699

Street Railways.

1. The right of a street railway company to the use of its tracks between street intersections is superior to that of a person driving a vehicle. *McKennan v. Omaha & C. B. Street R. Co.* 643

2. In an action for personal injuries from collision with a street car between street intersections, the question of defendant's negligence was for the jury. *McKennan v. Omaha & C. B. Street R. Co.* 643

Taxation. See DRAINS.

1. In a suit to redeem from a tax sale, refusal to permit the filing of a supplemental petition alleging payment of the taxes *held* error. *Cornell v. Maverick Loan & Trust Co*.... 9
2. Taxes on real estate are not due so that their collection can be enforced until the 1st day of May after the tax list is delivered to the county treasurer. *Cornell v. Maverick Loan & Trust Co.* 9
3. Where a foreign corporation had property in two counties in Nebraska, the right of the respective counties to levy taxes thereon determined. *Hydraulic Press Brick Co. v. Douglas County* 87
4. On appeal from the county board of equalization, it will be presumed that the board performed its official duties. *Hatcher & Co. v. Gosper County* 543
5. A taxpayer, when requested by the assessor or county board of equalization, must furnish information as to the character, amount, and value of personalty owned by him. *Hatcher & Co. v. Gosper County* 543
6. An appeal from a valuation by the county board of equalization should be dismissed, where it appears that complainant refused to produce his books, or give information as to the value of his property, and whether it had been assessed elsewhere. *Hatcher & Co. v. Gosper County* 543
7. Where the voters elect, as provided in sec. 19, art. I, ch. 77, Comp. St. 1911, to abolish the office of county assessor, the incumbent holds until expiration of his term, unless he vacates the office, in which event the county clerk becomes *ex officio* county assessor. *Hatcher & Co. v. Gosper County* 543
8. Abolition of the office of county assessor, pursuant to sec. 19, art. I, ch. 77, Comp. St. 1911, does not divest the county board and county clerk of their powers as the county board of equalization. *Hatcher & Co. v. Gosper County* 543
9. On appeal from a board of equalization, the cause must be tried on the questions raised by the complaint before the board. *State Bank v. Seward County* 665
10. On appeal from a board of equalization, the district court should strike from the pleadings new matter not put in issue before the board. *State Bank v. Seward County*..... 665
11. Method of assessing the capital stock of a bank stated. *State Bank v. Seward County* 665

Taxation—*Concluded.*

12. Real estate mortgages on which the mortgagors pay the taxes should be deducted from the value of the capital stock of banks in assessing same. *State Bank v. Seward County* 665
13. A county board of equalization cannot without complaint and notice to the taxpayer change the assessment as returned by the county assessor. *State Bank v. Seward County* 665
14. Under sec. 6549, Rev. St. 1913, it is not essential to a suit to set aside a tax deed that all taxes due be first paid, but it is sufficient if all taxes be paid before trial and entry of the decree, and the "showing" of payment may be made by evidence as well as by the pleadings. *Cornell v. Maverick Loan & Trust Co.* 842

Telegraphs and Telephones.

1. Where a telephone company obtains permission to build its line across the pasture of a landowner, under an agreement to maintain its wire at a sufficient height to prevent injury to persons and stock, it is the duty of both parties to comply with such agreement. *Coen v. Central Telephone Co.* 814
2. As a matter of law a telephone company is required to maintain its line where it crosses the pasture of another at a sufficient height and in such condition as to prevent injury to persons and stock. *Coen v. Central Telephone Co.* 814
3. The death of a person may be shown by circumstantial evidence to have been caused by negligence of a telephone company to properly construct and maintain its wires. *Coen v. Central Telephone Co.* 814
4. Where a person was killed by a telephone wire constructed by permission across a pasture, *held* that the telephone company was bound to know of the sagged condition of the wire and to have remedied same. *Coen v. Central Telephone Co.* 814

Treaties. See DESCENT AND DISTRIBUTION, 1, 2.

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 3. CARRIERS, 12. COUNTIES AND COUNTY OFFICERS, 18, 21. CRIMINAL LAW. DAMAGES, 2, 3. DEATH, 2. DEPOSITIONS, 1. GUARANTY, 4. MALICIOUS PROSECUTION. MASTER AND SERVANT, 1, 2. NEGLIGENCE, 5. RAILROADS, 2. REPLEVIN, 3. STREET RAILWAYS, 2.

1. Permitting the reopening of a case for the introduction of further evidence is not ground for reversal, in absence of abuse of discretion. *Bethel v. Pawnee County* 203

Trial—*Concluded.*

2. A request by one party alone for a directed verdict should not be granted when the evidence on behalf of the other party will support his cause of action or defense. *Schmidt v. Williamsburg City Fire Ins. Co.* 43

3. Where it is claimed that an instruction is incomplete, complainant should tender an instruction containing the alleged omission. *Edwards & Bradford Lumber Co. v. Lamb* 263

4. In an action for the price of goods, *held* error to charge that the only question was whether the goods were misbranded, where the answer alleged a breach of the contract of sale. *Hessig-Ellis Drug Co. v. Harley Drug Co.*..... 267

5. In a vendor's action for purchase money, an instruction as to a set-off *held* not prejudicial, where no request was made for a more definite instruction as to defendant's claim. *Beranek v. Beranek* 311

6. Where the evidence is insufficient to sustain a judgment for plaintiff, the trial court should direct a verdict for defendant. *Joseph v. Cudahy Packing Co.* 397

7. Where the evidence is such that reasonable minds cannot disagree as to its effect, a verdict should be directed. *Nelson v. Nelson* 523

8. In an action against a city for damages from defective drainage, an instruction, abstractly correct, *held* harmless, though not warranted by the evidence. *Naysmith v. City of Auburn,* 582

9. Refusal of a requested instruction which fairly stated defendant's theory of the accident on which the action was based, *held* error, where there was evidence to sustain such theory. *McKennan v. Omaha & C. B. Street R. Co.* 643

10. Refusal of an instruction, tendered by defendant as soon as he ascertained that the court would not give a like instruction on his own motion, and before the instructions were given, *held* error. *McKennan v. Omaha & C. B. Street R. Co.* 643

11. It is not error to refuse an instruction covered by one given. *Warner v. City of Wayne* 682

12. Where the petition counts upon two causes of action, the first of which is sufficient, but the second is not, and the jury return a single verdict for a sum in excess of the first, without showing how much was allowed upon either, the entire verdict must fall. *Hunt v. Chicago, B. & Q. R. Co.*... 747

Trover. See TRUSTS, 2, 3.

In an action for conversion of a stock of merchandise, it is error to allow recovery for store fixtures not alleged to have been converted. *Grasborg v. Hahn & Co.* 732

Trusts. See EXECUTORS AND ADMINISTRATORS, 1.

1. The amount due a trustee appointed by a foreign court in which an estate is being administered must be determined by that court and an order made therefor before the trustee can withdraw any sum from the trust fund as compensation. *Robinson v. Tower* 198
2. The withdrawal of funds from an estate by a trustee as compensation before an allowance is made therefor by the court constitutes a conversion. *Robinson v. Tower* 198
3. Where a trustee converts trust funds, the beneficiaries, or succeeding trustees, may sue in equity to impound the money, when it can be traced, and have it declared a trust fund, or may maintain an action at law for conversion. *Robinson v. Tower* 198

Vendor and Purchaser. See APPEAL AND ERROR, 36. INJUNCTION, 1. PAYMENT, 2.

1. Evidence, in a suit to foreclose contract for purchase of land, *held* to sustain findings against defenses of false representations, intoxication, and undue influence of plaintiff's agent. *Kenney v. Krajicek* 259
2. Contract *held* to be an executory contract of sale, and not a mere option. *Abel v. Gill* 279

Venue.

A motion for a change of venue should be granted, where it is shown that the applicant cannot have an impartial trial in the county. *Albers v. Chicago, B. & Q. R. Co.* 506

Waters.

1. On appeal from an order of the state board of irrigation, the inquiry is ordinarily limited to the questions submitted to that tribunal. *Kersenbrock v. Boyes* 407
2. The state board of irrigation is a quasi-judicial tribunal, and is not disqualified to hear a controversy between the state and an appropriator whose right is contested by the state. *Kersenbrock v. Boyes* 407
3. Secs. 17, 37, ch. 153, laws 1911, authorizing the cancellation of water appropriations not put to a beneficial use, applies to applications made both before and after the passage of the act. *Kersenbrock v. Boyes* 407

Waters—*Concluded.*

4. Secs. 17-37, ch. 153, laws 1911, authorizing the cancellation of water appropriations not put to a beneficial use, *held* not void because it applies to past applications. *Kersenbrock v. Boyes* 407
5. A certificate procured by fraud from the state board of irrigation confers no right to the use of public water. *Kersenbrock v. Boyes* 407
6. A feasible plan, undertaken and carried out in good faith, is necessary to the acquiring of a vested right to a statutory appropriation of water for irrigation or power. *Kersenbrock v. Boyes* 407
7. An applicant for appropriation of water under sec. 18, ch. 69, laws 1895, did not, as a matter of right, have more than ten years to comply with statutory conditions. *Kersenbrock v. Boyes* 407
8. In an action against a railroad company for damages from flood waters, *held* that a verdict should have been directed for defendant in view of the evidence. *Albers v. Chicago, B. & Q. R. Co.* 506

Witnesses. See EVIDENCE, 5.

1. It is not error to refuse to permit evidence in support of an affirmative defense to be elicited on cross-examination. *Bethel v. Pawnee County* 203
2. A party is ordinarily bound by the testimony of his own witness on the question of negligence, where other evidence does not warrant the jury in disregarding such testimony. *Zimman v. Miller Hotel Co.* 809