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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1903.

VOLUME LXVIII.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1903.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, v. ARTHUR L. SHADER.

FILED FEBRUARY 17, 1903. No. 12,824.

1. **Pleading:** CONDITION PRECEDENT. In pleading performance of conditions precedent under section 128, Code of Civil Procedure, a plaintiff may properly assume that conditions which have been waived will not be relied upon, and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegation that all conditions on his part have been duly performed.

2. ———: ———. A plaintiff does not change his cause of action by substituting allegations of waiver for a general denial with respect to a defense of breach of conditions precedent.

3. **Policy of Insurance:** WAIVER OF CONDITIONS: CONSTRUCTION. Former decisions of this court as to waiver of conditions in policies of insurance and the construction of such conditions adhered to.

4. **Provisions of Policy:** RISK: WAIVER OF PROVISION: PAYMENT OF PREMIUM. Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid, are waived in case the policy is delivered upon an agreement to extend credit, and the insurer does not take advantage of said provisions, but treats the policy as in force.

5. **Receiving Premium After Total Destruction:** WAIVER. Receiving the premium after destruction of all the insured property, so that nothing remains to which insurance might attach, waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium.

6. ———: REPUDIATION OF ACT OF AGENT: RETURN TO AGENT WITH INSTRUCTIONS: TENDER. Where an agent who has general power to receive and collect premiums accepts a premium after loss and the insurer desires to repudiate such act, it should return or tender the money to the insured; mere return to the agent with instructions which are not executed will not suffice.

7. **Misconduct of Counsel: CONFLICTING EVIDENCE: DECISION OF COURT.** The decision of the trial court upon conflicting evidence as to misconduct of counsel will not be disturbed.

8. **Instruction.** While not to be commended, an instruction directing the jury to "do substantial justice" between the parties, is not prejudicial error where they are told to do so by finding a verdict "solely from the evidence in the case, applying the law as given in these instructions."

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

Lionel C. Burr, Charles L. Burr and *Frank A. Boehmer,* for plaintiff in error.

Halleck F. Rose and *Wilmer B. Comstock, contra.*

POUND, C.

On a former occasion a judgment for the plaintiff in this cause was reversed for the reason that the trial court permitted him to show waiver of conditions in a policy of insurance upon a reply which only denied that there had been any breach.* Upon a new trial, a verdict for the plaintiff was again rendered, and the insurance company has come to this court on error a second time.

The principal errors assigned are the admission of parol evidence as to waiver of conditions in the policy notwithstanding a provision that no agent should have power to waive such conditions otherwise than by a written indorsement, and certain instructions whereby the question as to waiver was left to the jury. It is also claimed that the amendments whereby plaintiff was allowed to set up waiver of the conditions in the policy state a new and distinct cause of action, upon which the statute of limi-

* This case is reported in 1 Neb. (Unof.) 704. Opinion by DAY, C.

tations had run, within the purview of the decision in *Buerstetta v. Tecumseh Nat. Bank,* 57 Neb. 504; that the verdict is contrary to the evidence; that plaintiff's counsel were guilty of prejudicial misconduct, and that the trial court erred in instructing the jury to "do substantial justice" by their verdict.

We are satisfied that the case of *Buerstetta v. Tecumseh Nat. Bank, supra,* has no application. In pleading performance of conditions precedent under section 128, Code of Civil Procedure, a plaintiff may safely assume that conditions which have been waived will not be relied upon, and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegation that all conditions on his part have been duly performed. *Levy v. Peabody Ins. Co.,* 10 W. Va. 560, 27 Am. Rep. 598. Hence it was entirely proper to set up the waiver in reply, and there would have been no departure from the cause of action set up in the petition had this course been taken. *Jacobs v. St. Paul Fire & Marine Ins. Co.,* 86 Ia. 145, 53 N. W. 101; *Standard Accident Ins. Co. v. Friedenthal,* 1 Colo. App. 5, 27 Pac. 88; *American Central Ins. Co. v. McLanathan,* 11 Kan. 533; *Virginia Fire & Marine Ins. Co. v. Saunders,* 86 Va. 969, 11 S. E. 794. It could make no substantial difference if the plaintiff preferred to anticipate the defense and set up waiver in the petition. He did not change his cause of action by substituting allegations of waiver for the general denial.

The question as to admissibility of the evidence objected to has been before the court in various phases in a number of cases, and, if we may rely upon past adjudications, has been completely determined. *Slobodisky v. Phenix Ins. Co.,* 53 Neb. 816; *Pythian Life Ass'n v. Preston,* 47 Neb. 374; *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559; *Hunt v. State Ins. Co.,* 66 Neb. 121, 125, and cases cited. But in a number of cases which have come before us recently, as well as in the case at bar, the prior decisions of this court on the subject of insurance have been assailed vigorously, and it has been asserted

that the court has taken positions at variance both with principle and authority. The recent decision of the supreme court of the United States in *Northern Assurance Co. v. Grand View Building Ass'n,* 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213, is chiefly relied upon in this connection, and that case has been urged upon our attention so persistently of late that it seems proper to state the reasons moving us to adhere to the course of decision long established in this jurisdiction, notwithstanding the great authority of the tribunal which has adopted a different doctrine.

The general rule that an insurance company can not take advantage of conditions in a policy whereby such policy is to be void by reason of circumstances existing at the time the policy issued, in case the facts were known to its agent at the time, has been recognized universally. More recently insurance companies have sought to avoid the consequence of this well established rule by provisions to the effect that the conditions of the policy could be waived only by written indorsement, and by clauses in which agents are forbidden to waive any of the conditions of the policy in any other manner. Notwithstanding provisions of this type, an overwhelming maority of the state courts have continued to apply the rule that an insurance company can not set up that a policy issued by its agent with knowledge of the facts was void when it was issued, by reason of facts which he well knew. Including our own court, the courts of some twenty-seven states, at least, have, upon one ground or another, adhered to this doctrine in the face of these provisions as to waiver. *Wood v. American Fire Ins. Co.,* 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Berry v. American Central Ins. Co.,* 132 N. Y. 49; 30 N. E. 254, 28 Am. St. Rep. 548; *Blass v. Agricultural Ins. Co.,* 162 N. Y. 639, 57 N. E. 1104; *Breedlove v. Norwich Union Fire Ins. Society,* 124 Cal. 164, 56 Pac. 770; *Kruger v. Western Fire & Marine Ins. Co.,* 72 Cal. 91, 13 Pac. 156, 1 Am. St. Rep. 42; *Crouse v. Hartford Fire Ins. Co.,* 79

Mich. 249, 44 N. W. 496; *Improved-Match Co. v. Michigan Mutual Fire Ins. Co.,* 122 Mich. 256, 80 N. W. 1088; *Lamberton v. Connecticut Fire Ins. Co.,* 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Anderson v. Manchester Fire Assurance Co.,* 59 Minn. 182, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400; *Reaper City Ins. Co. v. Jones,* 62 Ill. 458; *John Hancock Mutual Life Ins. Co. v. Schlink,* 175 Ill. 284, 51 N. E. 795; *Phenix Ins. Co. v. Caldwell,* 187 Ill. 73, 58 N. E. 314; *Bartlett v. Fireman's Fund Ins. Co.,* 77 Ia. 155, 41 N. W. 601; *Western Assurance Co. v. McAlpin,* 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Hobkirk v. Phœnix Ins. Co.,* 102 Wis. 13, 78 N. W. 160; *Trustees of St. Clara Female Academy v. Northwestern National Ins. Co.,* 98 Wis. 257, 73 N. W. 767; *Cole v. Union Central Life Ins. Co.,* 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201; *Hart v. Niagara Fire Ins. Co.,* 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Thackery Mining & Smelting Co. v. American Fire Ins. Co.,* 62 Mo. App. 293; *Flournoy v. Traders' Ins. Co.,* 80 Mo. App. 655; *Parsons v. Knoxville Fire Ins. Co.,* 132 Mo. 583, 34 S. W. 476; *McGonigle v. Susquehanna Mutual Fire Ins. Co.,* 168 Pa. St. 1, 31 Atl. 868; *Insurance Co. v. National Bank,* 88 Tenn. 369, 12 S. W. 915; *Hartford Fire Ins. Co. v. Keating,* 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Pope v. Glens Falls Ins. Co.,* 130 Ala. 356, 30 So. 496; *Western Assurance Co. v. Phelps,* 77 Miss. 625, 27 So. 745; *Home Ins. Co. v. Gibson,* 72 Miss. 58, 17 So. 13; *Gandy v. Orient Ins. Co.,* 52 S. Car. 224, 29 S. E. 655; *Wilson v. Commercial Union Assurance Co.,* 51 S. Car. 540, 29 S. E. 245, 64 Am. St. Rep. 700; *Cowell v. Phœnix Ins. Co.,* 126 N. Car. 684, 36 S. E. 184; *London & Lancashire Fire Ins. Co. v. Gerteson,* 51 S. W. (Ky.) 617; *Niagara Fire Ins. Co. v. Johnson,* 4 Kan. App. 16, 45 Pac. 789; *German Ins. Co. v. Gray,* 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Spaulding v. New Hampshire Fire Ins. Co.,* 52 Atl. (N. H.) 858; *Hilton v. Phœnix Assurance Co.,* 92 Me. 272, 42 Atl. 412; *German-American Ins. Co. v. Humphrey,* 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Pennsylvania Fire Ins. Co. v. Faires,*

13 Tex. Civ. App. 111, 35 S. W. 55; *Phœnix Ins. Co. v. Searles,* 100 Ga. 97, 27 S. E. 779; *American Central Ins. Co. v. Donlon,* 66 Pac. (Colo. App.) 249; *Farmers & Merchants' Ins. Co. v. Nixon,* 2 Colo. App. 265, 30 Pac. 42; *Kahn v. Traders' Ins. Co.,* 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47; *Osborne v. Phenix Ins. Co.,* 64 Pac. (Utah) 1103.

In some jurisdictions it is held that the conditions restricting the power of the agent to waive provisions of the policy have no reference to conditions in the policy avoiding the contract in its inception. *Wood v. American Fire Ins. Co.,* 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Continental Ins. Co. v. Ruckman,* 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *Rickey v. German Guarantee Town Mutual Fire Ins. Co.,* 79 Mo. App. 485; *Crouse v. Hartford Fire Ins. Co.,* 79 Mich. 249, 44 N. W. 496. Courts taking this view hold that the provision as to waiver only limits the power of the agent to waive conditions of the policy after it attaches, and not the power of the agent to make a contract in the first instance. Other courts hold that a provision against waiver otherwise than in writing may itself be waived, and that this waiver may be oral. *Phenix Ins. Co. v. Hart,* 149 Ill. 513, 36 N. E. 990; *German Ins. Co. v. Gray,* 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Orient Ins. Co. v. McKnight,* 197 Ill. 190, 64 N. E. 339; *German-American Ins. Co. v. Humphrey,* 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Western Assurance Co. v. Williams,* 94 Ga. 128, 21 S. E. 370; *Pennsylvania Fire Ins. Co. v. Faires,* 13 Tex. Civ. App. 111, 35 S. W. 55; *Kahn v. Traders' Ins. Co.,* 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. This court took the same position in *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559. Other courts hold that such a provision is invalid on the ground that it is in effect a limitation of the power of the corporation itself to waive provisions in its own contracts, since the corporation can act only through agents. *Lamberton v. Connecticut Fire Ins. Co.,* 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. In

other jurisdictions, the position is taken that issuance and delivery of the policy without objection, and with knowledge on the part of the agent of facts which would render the policy invalid, is of itself a waiver by the company of the condition against parol waiver, since the company can not take the benefit of a contract made by its agent, and at the same time escape the burden thereof. *Insurance Co. v. National Bank,* 88 Tenn. 369, 12 S. W. 915; *McGonigle v. Susquehanna Mutual Fire Ins. Co.,* 168 Pa. St. 1, 31 Atl. 868; *American Fire Ins. Co. v. First Nat. Bank,* 73 Miss. 469, 18 So. 931; *Liverpool & London & Globe Ins. Co. v. Ende,* 65 Tex. 118; *Davis v. Phœnix Ins. Co.,* 111 Cal. 409, 43 Pac. 1115.

Finally, it has been suggested that failure to strike out the clause violated by facts of which the agent had knowledge, or to indorse the written consent, should be treated as a waiver. *Devine v. Home Ins. Co.,* 32 Wis. 471.

From the very nature of the contract of insurance, it is doubtless essential that there be the utmost good faith on the part of the insured; and insurers are compelled to take great precautions to avoid imposition, and to obtain the proper data with reference to which they may determine the character of the risk which they assume. For these reasons, it is proper that the court should not merely enforce provisions in policies designed to protect the insurer in such respects, but the courts would be justified in dealing with provisions of that character somewhat liberally if so drawn as to operate no further. But insurers have to deal not only with fraud and imposition on the part of those who insure, but with carelessness and even dishonesty on the part of those whom they procure to act as their agents. Excessive zeal to procure business leads agents who are paid by commissions to do things in the stress of competition which their employers are not entirely willing to sanction; and the provisions inserted in policies with which courts have had to deal in the past have been designed manifestly quite as much to avoid responsibility on the part of the company for acts of its agents as to prevent

imposition on the part of those whom the company insured. In *Union Mutual Ins. Co. v. Wilkinson,* 13 Wall. (U. S.) 222, 20 L. ed. 617, Mr. Justice Miller made some characteristically sensible remarks upon this subject, which have been quoted frequently. As he says, the reports of judicial decisions are filled with the efforts of companies to establish the doctrine that they can stimulate agents to great activity in procuring contracts of insurance, and pay them commissions on the premiums obtained, and yet limit their responsibility for the acts of these agents substantially to the simple receipt of the premium and delivery of the policy. In consequence, there has been a contest between the courts on the one hand and counsel for insurance companies on the other, the latter devising skillfully framed clauses and provisions, and the former largely thwarting the purpose of these clauses by construing them strictly against the insurer. It can not be denied that not a little subtlety has been displayed on both sides of this contest. But it must not be overlooked that the companies are engaged in an endeavor to circumvent well established principles of the law of agency, arising upon sound policy; and there is much justification for the determination of courts that these settled doctrines of the law shall not be contracted out of existence lightly.

One principle of the law of agency which insurers have steadily sought to avoid is that the knowledge of the agent is the knowledge of the principal. The general doctrine is that notice communicated to or knowledge acquired by the officers or agents of a corporation, when acting in their official capacity or within the scope of their agency, is notice to or knowledge of the corporation. It is said that there are but three exceptions—matters which the agent has forgotten entirely or may have forgotten under the circumstances of the case, matters which for special reasons he could not impart to his principal, and matters which the previous conduct of the agent or the fact that he is engaged in some fraud upon the principal make it certain that he will conceal. 4 Thompson, Corporations, sec.

5192. The application of this rule to insurance companies is well settled. *Fishbeck v. Phenix Ins. Co.,* 54 Cal. 422; *Miller v. Hartford Fire Ins. Co.,* 70 Ia. 704, 29 N. W. 411; *St. Paul Fire & Marine Ins. Co. v. Wells,* 89 Ill. 82; *Dick v. Equitable Fire & Marine Ins. Co.,* 92 Wis. 46, 65 N. W. 742; *Pelkington v. National Ins. Co.,* 55 Mo. 172; *Phœnix Ins. Co. v. Copeland,* 90 Ala. 386, 8 So. 48; *German Ins. Co. v. York,* 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313; *Beebe v. Ohio Farmers' Ins. Co.,* 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519; *Tarbell v. Vermont Mutual Fire Ins. Co.,* 63 Vt. 53, 22 Atl. 533; *Home Ins. Co. v. Gibson,* 72 Miss. 58, 17 So. 13. This court has repeatedly announced the same rule. *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559; *Hunt v. State Ins. Co.,* 66 Neb. 121, 125, and cases cited. As the corporation can act only through its agents, it might well be a question how far it may contract that it shall not be bound by notice to and knowledge of such agents. It has been suggested that such a provision in a policy would, in effect, be a limitation of the power of the corporation itself. *Lamberton v. Connecticut Fire Ins. Co.,* 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. However this may be, it will be observed that no such stipulation is to be found in the policy in the case at bar. The provision of the policy does not say that notice to the company's agents who are given power to accept risks shall not be notice to the company, but says only that conditions of the policy may not be waived otherwise than in a prescribed manner. It goes without saying that provisions for forfeiture are not favored. *Woodmen Accident Ass'n v. Pratt,** 62 Neb. 673, 55 L. R. A. 291; *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338, 51 L. R. A. 698; *McMaster v. New York Life Ins. Co.,* 183 U. S. 25, 22 Sup. Ct. Rep. 10, 46 L. ed. 64. It has been the settled policy of the courts to construe these provisions against the insurer. Hence, so long as the language of the contract does not preclude the operation of the rule that notice to

* This case appears in the Northwestern Reporter and Lawyers' Reports Annotated as *Woodmen's Accident Ass'n v. Byers.*

the agent is notice to the company, the court will not give it such effect. It follows that the condition prohibiting the agent from waiving provisions of the policy otherwise than in the prescribed manner does not take away the duty of the company to take advantage of grounds entailing a forfeiture at the option of the company, when it is chargeable with notice thereof.

Although the policy is conditioned to be void in certain cases, it is well settled that this means voidable at the option of the company. The contract is not wholly void, but the insurer may, if it chooses, insist upon forfeiture under certain conditions. *Hunt v. State Ins. Co., supra,* and cases cited. This construction of the policy has been assailed as in conflict with the language employed and at variance with the authorities. But it is well sustained by judicial decisions elsewhere. *Hanover Fire Ins. Co. v. Dole,* 20 Ind. App. 333, 50 N. E. 772; *Kalmutz v. Northern Mutual Ins. Co.,* 186 Pa. St. 571, 40 Atl. 816; *Schmurr v. State Ins. Co.,* 30 Ore. 29, 46 Pac. 363; *Horton v. Home Ins. Co.,* 122 N. Car. 498, 29 S. E. 944, 65 Am. St. Rep. 717; *Stevenson v. Phœnix Ins. Co.,* 83 Ky. 7, 4 Am. St. Rep. 120; *Kingman v. Lancashire Ins. Co.,* 54 S. Car. 599, 32 S. E. 762; *Bouton v. American Mutual Life Ins. Co.,* 25 Conn. 542. The use of "void" in the sense of "voidable" is so common that we see nothing in the language of the policy to militate against such a construction, and it is in entire accord with the disinclination of courts toward forfeitures, and their desire to reach a just and equitable interpretation. It follows that if the company does not exercise its option to avoid the policy with knowledge of the circumstances giving it that power, and treats the policy as in force, the forfeiture is waived. This is a waiver by the company, not by the agent, and hence is not within the purview of the condition in question. It is said that such a construction of the provisions of the policy as to waiver deprives them of all force. We do not think this is true. An insured would have no standing in court if his case were that the local agent knew of the circumstances entailing a for-

feiture, and waived them, where the company, acting on the knowledge of the agent, insisted on a forfeiture. It is true that when a forfeiture is waived once it is waived for all time. But the company has limited the power of the agent to waive the forfeiture, and the attempt at waiver by him would not prevent timely action by the company. *German Ins. Co. v. Heiduk & Skibowski,* 30 Neb. 288, 27 Am. St. Rep. 402, applies to such cases. On the other hand, if the company, notwithstanding it is chargeable with notice of the circumstances entailing a forfeiture, treats the policy as in force and takes no advantage of such circumstances, an entirely different question is presented. *Hartford Fire Ins. Co. v. Landfare, supra.* Hence we think the rule as to the admissibility of parol evidence to vary the terms of a written contract has no application to this subject. There is no attempt to show by parol something which is foreclosed by the written agreement of the parties. The attempt is to show by parol that the company knew of the facts and circumstances which entitled it to enforce the provisions of the policy as to forfeiture or not, at its option, and that the company itself, not any particular agent, continued to treat the policy as in force, and declined to exercise such option. For these reasons we think the former adjudications of this court should be adhered to, and, in consequence, that the testimony objected to in the case at bar was admissable.

We come next to the instructions with reference to the claim of waiver. In some respects the wording of these instructions is a trifle extravagant. But the error, if any, in these respects, can not be said to be prejudicial, so long as the propositions of law announced are sound, and they are stated so as to leave no room for misunderstanding. We are unable to see how the company may take advantage of the provision as to nonpayment of premium in such cases as this. If the agent reports the policy issued and the premium paid, and the amount of the premium is charged to the agent in his accounts with the company, the latter has no ground of complaint because the agent was

willing to advance the premium and give personal credit to the insured. The condition in the policy does not apply to such cases. *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96. But if the agent reported the policy issued, and the premium unpaid, and the company acquiesced, neglecting to insist upon the condition in the policy, it clearly waived such condition. *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816, and cases cited. Delivery of the policy as a subsisting contract of insurance from a certain date, and charging the insured on the basis of insurance from that date, was a waiver of the printed condition in the policy; and if the company, chargeable with what was known to its agent, acquiesced and treated the policy as in force, it could not afterwards deny liability. *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423. By so holding, we do not, as has been asserted, deprive the provision in the policy of all meaning. If due, the premium must be paid, or no risk attaches. If at the time fixed it is not paid, the agent can not waive the condition so as to prevent the company from insisting upon a forfeiture. But in such case it must take advantage thereof. It can not treat the policy as subsisting and when a loss occurs claim the forfeiture notwithstanding. Whether neglect to take any steps with reference to the policy, allowing the insured to rest in the belief that he is protected, would, of itself, amount to a waiver, we need not decide. In this case, at the appointed time, the money was paid to the agent, and in due course he accounted for it to the company. Receiving the premium after destruction of all the insured property, so that nothing remains to which insurance might attach, waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium. *Johnston v. Phelps County Farmers' Mutual Ins. Co.*, 63 Neb. 21, 56 L. R. A. 127. It is true the money was sent back to the agent afterwards. But no one at any time paid or tendered it back to Mr. Shader. Something more than a mere return to the agent with instructions which have never

been executed was necessary. The company had the duty of seeing that the money was restored, or at least tendered. It was not Mr. Shader's duty to search for the representative of the company who might happen to have it. Cases where a person has assumed to act as agent without authority, such as *Turner v. Brooks,* 2 Tex. Civ. App. 451, are not in point. In this case the agent had a general authority to receive and collect premiums.

The other assignments of error require but brief notice. The evidence as to the amount of property destroyed is in sharp conflict. The chief of the fire department and several firemen gave testimony tending to show that little or nothing could have been lost. On the other hand, there is no little evidence from creditable witnesses to the contrary. It is contended on behalf of the plaintiff that the goods were so light, and so inflammable in character, that almost nothing remained when the firemen arrived, and that such a hypothesis accords with the evidence showing what was in the building shortly before the fire, with the testimony of a bystander as to what he saw when the fire broke out, and with evidence as to fragments found in the debris the next morning. While it must be confessed that the evidence is not entirely satisfactory, we can not say that the hypothesis suggested is entirely unreasonable, nor that the jury had no right to adopt it. The question was for them, and we have no authority to disturb it in such a case, with respect to the alleged misconduct, the trial court found against the defendant upon conflicting affidavits. We see no reason to disturb its ruling. *Sang v. Beers,* 20 Neb. 365; *Everton v. Esgate,* 24 Neb. 235. The instruction directing the jury to "do substantial justice" between the parties is not to be commended. But, taken as a whole, we do not consider it prejudicial error. After directing the jury to retire and choose a foreman, the court told them to determine upon a verdict "solely from the evidence in the case, applying the law as given in these instructions," and thereby "do substantial justice between the parties." Of course, it is for the law to determine what is

just, and the jurors are merely to say what are the facts to which the legal standards of justice are to be applied. Juries, as a rule, need no encouragement to take such a line as they think will lead to a just result. But here they were told to do so solely by means of the evidence and the rules of law laid down by the court. They can hardly have supposed they were at liberty to go out of the evidence, or go counter to the law as declared in the instructions, in the supposed interests of substantial justice.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THOMAS HOVORKA ET AL. V. JOHN HAVLIK ET AL.

FILED FEBRUARY 17, 1903. No. 12,456.

1. **Husband: WIFE: TRANSFER: BURDEN OF PROOF.** The burden of proof is upon the husband or those claiming under him to show that a gratuitous transfer to him from his wife was made freely and deliberately, and that the transaction was fair and proper.
2. **Administrator's Sale: EXECUTORY CONTRACT: REAL ESTATE.** Under our probate system an administrator can not sell the interest of the estate in an executory contract for the purchase of lands except as real estate, and after a license obtained from the court therefor.
3. **Husband: WIFE: ADVERSE POSSESSION.** The husband, while living with his wife, can not gain title to her land by adverse possession.
4. **Deed: DURESS: LIMITATION.** A deed for the conveyance of land, if obtained by duress, may be avoided by the entry of the grantor or his heirs within the statutory period of limitation.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Archibald S. Sands, Leonard W. Colby and *E. S. Abbott*, for plaintiffs in error.

Fayette I. Foss, Bert Kohout, R. D. Brown and *William G. Hastings, contra.*

DUFFIE, C.

At the date of his death—the date of which does not clearly appear in the record—John Havlik resided on a homestead claim consisting of the northwest quarter of section 15, township 8, range 4 east of the sixth P. M., in Saline county, Nebraska. He also held a contract from the state of Nebraska for the purchase of twenty acres of school land, being the east half of the southeast quarter of the northeast quarter of section 16, township 8 north, of range 4 east of the sixth P. M. He left surviving him a widow and three children, one of whom is the defendant herein. After his death his widow proved up on the homestead claim, and a patent for the land was duly issued to her under the provisions of section 2291 of the Revised Statutes of the United States. Some time after the decease of John Havlik, his widow married one Frank David, and on July 3, 1884, she made a deed of the northwest quarter of section 15 to one Frank Nedela, and on the same day Frank Nedela conveyed said premises to Frank David. There is evidence in the record that these deeds were made on the agreement that David should pay $800 to each of the three children of John Havlik, and $1,200 to the wife in case they should not continue to live together. Prior to this time the widow of John Havlik (then Mrs. David) assigned the school-land contract held by her deceased husband to Frank David, and on March 22, 1879, he procured a patent from the state for the land therein described. Frank David departed this life on the 23d day of April, 1891, and at the date of his death held the legal title to the homestead quarter section and to the twenty

acres of school land above described. After his death Mrs. David continued to reside upon the homestead until her death, which occurred August 13, 1891. She left a will by which she devised all her real and personal property to John Havlik, a son by her first husband, the homestead and school land being specifically described in her will as the real property conveyed thereby. Since the death of his mother, John Havlik has been in possession of the above described property, claiming title thereto under his mother's will; and some time in the year 1900 this action was commenced by a part of the heirs of Frank David and the grantees of the other of those heirs to recover possession of said lands. A verdict was returned for the defendants, and the plaintiffs have brought error to this court. The defense interposed was that Frank David had procured title to the homestead property from his wife by coercion and duress, and that her assignment of the school-land contract, being made without a license from the court, was void.

The seventh and eighth instructions of the court were excepted to by the plaintiffs in error, who now insist that they were erroneous. They are as follows:

"7th. If you find from the evidence, gentlemen, that Frank David, deceased, became the husband of Mary David, and while living with her as her husband she at his request conveyed the northwest quarter of section 15 to Frank Nedela, who, by previous arrangement and without any consideration paid by said Frank David, conveyed said quarter section to Frank David, such transaction will be presumed fraudulent and void and to have been made by said Mary David under duress by her husband and against her will unless it appears from the evidence that the transaction was fair and just and understood by Mary David and entered into by her voluntarily.

"8th. If you find, gentlemen, that the deed of Mary David to Frank Nedela, bearing date of July 3, 1884, which has been shown here in evidence, was made by her because of threats made against her by her husband, and

because of threats on his part to leave her, and of threats against her children, and was without consideration on the part of the said David, but was made solely for his benefit, then such deed is void as against the said Mary David, and neither Frank David nor any one claiming through him can base any claim of title thereon."

The law is well settled that the burden is upon the husband to show that a gratuitous transfer to him from his wife was made freely, and that the transaction was fair and proper. *Hall v. Otterson,* 52 N. J. Eq. 522; *Wales v. Newbould,* 9 Mich. 45; *Penniman v. Perce,* 9 Mich. 509; *Darlington's Appeal,* 86 Pa. St. 512, 27 Am. Rep. 726; *Boyd v. De La Montagnie,* 73 N. Y. 498, 29 Am. Rep. 197.

The jury was told in the seventh instruction that if the conveyance to David was without consideration, the presumption obtained that it was void; while the eighth instruction informed the jury that if the transfer to David was induced by threats made against Mary David and her children, and without consideration, then the conveyance so obtained was void. As we have seen, the seventh instruction announced a well-established rule placing the burden on the husband, or those claiming through him, to show that a gratuitous transfer from his wife was made freely and without any compulsion; that the transaction was a fair one, and while there is evidence in the record tending to show that David did pay a consideration for the conveyance to him, still this was a question for the jury to determine, and one which was properly submitted for its determination. The eighth instruction was more favorable to the plaintiffs in error than authorized by legal rules, in requiring a want of consideration for the transfer, in addition to duress in obtaining it, to avoid the conveyance. No one can be required to part with his property against his will, and no consideration, however great or valuable, will validate a deed obtained by coercion and duress. The plaintiffs in error have no cause to complain of these instructions.

Complaint is also made of the ninth instruction, given

as follows: "You are further instructed, gentlemen, that under the laws of the state of Nebraska when one dies possessed of a contract for the purchase of land, his interest in such land under said contract may be sold in the same manner as if he had died seized of the land itself, and in no other way." It is insisted that a contract for the purchase of school lands from the state is personal property, the title to which passes to the administrator, and that he has the right to sell it the same as other personal property of the deceased. It is said that at common law the executor or administrator has an absolute power of disposition of the personal estate of deceased, by sale or otherwise as he sees fit; and that while the statutes of this state provide for an application by an administrator to the probate court for a license to sell personal property of an estate, the statutory provisions are not exclusive, and the administrator may still sell without an order of the probate court making himself and his bondsmen liable for the value of the property if the sale is for less than its true value. We might admit the correctness of this claim so far as it relates to personal property pure and simple, but as a decision of the case does not, in our opinion, depend upon whether the administrator may sell and pass good title to such property without a license from the court, we refrain from expressing an opinion on the question. Sections 94 and 95 of chapter 23 of our statute (Annotated Statutes, 4968, 4969) provide:

"Sec. 94. If a deceased person, at the time of his death, was possessed of a contract for the purchase of land, his interest in such land and under such contract may be sold, on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this subdivision in respect to lands of which he died seized, except as hereinafter provided.

"Sec. 95. Such sale shall be made subject to all payments that may thereafter become due on such contracts, and if there be any such payments thereafter to become

due, such sale shall not be confirmed by the judge of the district court until the purchaser shall execute a bond to the executor or administrator for the benefit and indemnity of the person entitled to the interest of the deceased in the land so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the judge of the district court shall approve."

This statute, as we understand, was borrowed from the state of Michigan, and had as early as 1863 received a construction by the supreme court of that state, by which it was held that "under our probate system, an administrator can not sell the interest of the estate in an executory contract for the purchase of lands, except as real estate and after license." *Baxter v. Robinson,* 11 Mich. 520. But even in the absence of this statute and of its construction by the supreme court of Michigan, we can not believe that it was the intention of the legislature that valuable landed estates, held by the decedent under a contract of purchase, should pass to the administrator, to be disposed of by him in the same manner as the goods and chattels coming to his possession. There are numerous cases where valuable farms and other property are held under a contract of purchase. The decedent and his family may have lived upon the property for years; the purchase price may have been mostly paid; and it would be so unusual and unjust to allow the administrator to claim title to this property, and a right to dispose of it as personalty coming to his hands without a showing that it was necessary in the settlement of the estate, that a statute authorizing such a procedure should be the only authority of this court to declare it to be the law.

The plaintiffs in error requested an instruction to the effect that Frank David's title to the school land was based upon the deed from the state of Nebraska, which deed was based upon an assignment of a sale contract issued by the state to Havlik, deceased, and assigned by his administratrix to said David, and that if the jury found

that David entered into the exclusive, open, notorious and adverse possession of said premises under said deed, and retained and occupied the same for ten years or more continuously thereafter, that it was then wholly immaterial as to the form or manner of making an execution of the assignment or the existence of the same, and that such continued possession would establish a legal and sufficient title in the deceased. The refusal of this instruction is assigned as error. We do not think that under the circumstances error can be predicated upon the refusal of the court to give this instruction. The evidence is undisputed that the possession of this school land by Frank David was a joint possession with his wife. He had no greater possession than did she, and we do not think that where the husband and wife reside together, and are jointly in possession, one can acquire title as against the other by prescription.

The claim that the defendant's right to assert title to the homestead tract is barred by the statute, can not be sustained. The deed to David was made in 1884. He died in 1891. Even if his possession had been exclusive, the statutory period of ten years had not expired at his death. Mrs. David attempted to convey this land by her will, made after the death of David; and John Havlik, the defendant, took possession under his claim as devisee on the death of his mother—all in 1891. If the deed to David was obtained by duress, it may be avoided by the entry by the grantor or her heirs within the statutory period. *Inhabitants of Worcester v. Eaton,* 13 Mass. 371, 7 Am. Dec. 155. The evidence in this case satisfies us, as it did the jury, that the transfer of title from Mrs. David to her husband was made under coercion and duress. The evidence of any consideration having been paid is not of the most satisfactory character, and while we would not be inclined to interfere with a finding of the jury that a consideration was paid, we are entirely satisfied with the verdict returned, which, under the instructions, must have been based on a finding that David paid nothing for the

conveyance made to him, or that such conveyance was coerced from his wife, or both. We find no error in the record of which the plaintiffs in error can complain. We are satisfied with the verdict of the jury, and recommend an affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CATHERINE J. SICKLER v. ELLEN MANNIX.

FILED FEBRUARY 17, 1903. No. 12,595.

1. **Petition for Alienation of Husband's Affections.** Petition for alienating the affections of a husband examined, and *held* sufficient.

2. **Judgment Record as Evidence.** A judgment record can not be used in favor of a stranger to establish facts recited in the judgment unless such finding is based on an admission made by the party against whom it is sought to be used.

ERROR to the district court for Buffalo county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

William Gaslin, Andrew G. Wolfenbarger and *John Everson,* for plaintiff in error.

E. Frank Brown and *Hector M. Sinclair, contra.*

DUFFIE, C.

This action was brought by Ellen Mannix to recover from Mrs. Sickler damages sustained for alienating the affections of her husband, W. W. Mannix. A trial resulted in a verdict for the plaintiff below for $10,000. The court ordered a remittitur of $7,000, to which the plaintiff submitted, and judgment was entered in her favor for $3,000, from which the defendant below has taken error.

Twenty separate assignments of error are set out in the petition filed in this court, but as the brief filed in support thereof fails to discuss many of these assignments, we are required to notice only those that are supported therein by argument and upon the oral presentation of the case when it was submitted.

It is insisted that the petition does not state a cause of action against the defendant, in that it fails to charge that the plaintiff in error was actuated by malicious motives in alienating the affections of the plaintiff's husband. *Westlake v. Westlake,* 34 Ohio St. 621, 32 Am. Rep. 397, is one of the authorities relied on by the plaintiff in error in support of this contention. In that case the defendant requested a charge that "to entitle the plaintiff to recover the defendant must have maliciously caused the separation of the husband and wife." Relating to this, the court said (p. 634): "This charge ought to have been given. The term malice, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. *Weckerly v. Geyer,* 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged." This, we think, is the trend of all the decisions on the question, and a petition which charges that the defendant "wrongfully, wickedly and unlawfully sought and courted the society of plaintiff's husband," as does the one under consideration, sufficiently charges that it was maliciously done.

It is not controverted that after the commencement of this action and before the trial was had, W. W. Mannix, the husband, obtained a divorce from Ellen Mannix, the defendant in error. The decree was entered in the circuit court of Fall River county, South Dakota, after a trial at

which Mrs. Mannix appeared and litigated her husband's right to a divorce. The court found that Mrs. Mannix was guilty of extreme cruelty to her husband, and judgment went against her on that ground. This decree was offered in evidence by the plaintiff in error and refused by the court, and complaint is made of this ruling on the ground that the finding of the court of cruel treatment on the part of Mrs. Mannix was evidence against her and would tend to explain the reason why her husband refused to live with her. We do not think that error can be predicated on the refusal of the court to allow the record in evidence. Mrs. Sickler was not a party to that suit, and it is only where a judicial record contains an admission of one or the other of the parties to it that it is admissible as such in favor of a stranger. Greenleaf, in his work on Evidence (16th ed.), section 527*a*, speaking of such records, says: "A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission, or judicial declaration by such party, in regard to a certain fact. But in that case, it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs." After stating several cases where the record may be used in favor of a stranger as containing an admission made by one of the parties, the author continues: "And on the same ground, in a libel by a wife for a divorce, because of the extreme cruelty of the husband, the record of his conviction of an assault and battery upon her, founded upon his plea of guilty, was held good evidence against him, as a judicial admission of the fact. But if the plea had been not guilty, it would have been otherwise." Mrs. Mannix did not admit in her pleadings in the divorce case that she had been guilty of extreme cruelty to her husband. On the contrary, she denied and contested the charge, and the fact that the court found against her on the trial does not

make such finding admissible against her in favor of a stranger on the trial of another action.

It is further insisted that the evidence does not support the verdict. That there was sufficient evidence for the jury to act on, no unprejudiced person who reads the testimony can deny. We do not care to review it here, or to take time to analyze the explanations attempted to be made of the conduct and actions of the plaintiff in error. A woman who was seeking to avoid the society of Mannix would not be found habitually living in the towns and at the same hotels where he from time to time took up his abode, or if, as is said, she took up her residence in these various towns because of her wish to be with her brother, he, or both together, could undoubtedly have found some way to rid her of an unwelcome association, if such it really was.

We recommend the affirmance of the judgment of the district court.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSHUA PALMER v. FRED N. BURLEIGH, EXECUTOR OF THE LAST WILL AND TESTAMENT OF DAVID B. BURLEIGH, DECEASED.

FILED FEBRUARY 17, 1903. No. 12,411.

1. **Party: WITNESS: CROSS-EXAMINATION: CONTRADICTORY STATEMENT.** When a party to the suit testifies as a witness, it is competent to ask him on cross-examination if he has not on a specified previous occasion made a particular contradictory statement or admission against his own interest.

2. **Witness: IMPEACHMENT.** It is competent as preliminary to impeachment to ask a witness, on cross-examination, if he has not on a

previous trial of the same case made a particular statement as a witness contradictory to his present testimony.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

Joshua Palmer and *Ezra S. Abbott,* for plaintiff in error.

John D. Pope, contra.

AMES, C.

This is an action to recover a sum of money alleged to be a remainder due from the defendant to the plaintiff as attorney's fees for assisting in obtaining a judgment in favor of the former. One of the evidences relied upon by the plaintiff in support of the amount and validity of his claim was the alleged fact that the defendant had promised to pay it after the services had been rendered. The defendant denied having made such a promise. When he was being cross-examined as a witness he was asked if he had not testified on a former trial of the case that he did make the promise for the purpose of inducing the plaintiff to release an alleged lien upon the judgment. The question was objected to upon the grounds that it was "incompetent and not a proper impeaching question and no foundation laid." The objection was sustained. We think the ruling was erroneous. The witness being a party, it was competent to prove his admission against his own interest, either by his own oath or otherwise. The fact that his answer might have tended to affect his credibility did not affect the right of the plaintiff to prove the admission in the way attempted. If, however, the purpose had been to lay a ground for impeachment we think the time, place and circumstances of the alleged statement were sufficiently called to his attention. Counsel for defendant suggests in his brief that the question was not proper in cross-examination, but he does not point out why it was not so, and it was not objected to in the trial court on that ground.

It is recommended that the judgment of the district court be reversed and a new trial ordered.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial ordered.

REVERSED AND REMANDED.

PHINEAS WILLIAMS V. SAMUEL W. AUTEN ET AL.

FILED FEBRUARY 17, 1903. No. 10,488.

Contract: CONSTRUCTION: COURT: PARTIES. As a rule, courts will adopt the construction which the parties themselves have placed on a contract.

REHEARING of case reported in 62 Neb. 832.

ERROR to the district court for Saunders county: SAMUEL H. SEDGWICK, DISTRICT JUDGE. *Former judgment of reversal adhered to.*

H. Gilkeson, Conrad Hollenbeck and *Frank Hollenbeck,* for plaintiff in error.

Charles H. Slama and Edwin E. Good, contra.

ALBERT, C.

This case is before us on rehearing. The former opinion, by HOLCOMB, J., reported in 62 Neb. 832, contains a full statement of all the facts necessary to an understanding of the questions discussed.

The only question involved is whether the contract of the defendant Williams was an original undertaking, or merely to answer for the debt or default of another. If the former, the judgment of the district court is right and should be affirmed; if the latter, the promise, not being in

writing, is within the statute of frauds, consequently the plaintiff in error is not liable thereon, and the judgment of the district court should be reversed.

In the body of the former opinion it is said: "In this case the contract was made with and the goods sold to either Williams or Welty, but not to both of them. There is nothing in the record warranting the inference of a joint liability. * * * If one is liable under the agreement, the other is not."

In an opinion by SEDGWICK, C., in *Swigart v. Gentert,* 63 Neb. 157, the rule is thus stated: "In an action to recover for services rendered to a third person, the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds."

The soundness of the rule above stated is not questioned, but the defendants in error insist that the evidence is sufficient to warrant a finding that the promise of the plaintiff in error was an original undertaking, and that he alone was liable to them for the goods sold to Welty. The answer to this is that the parties themselves have placed an entirely different construction on the contract. Courts, as a rule, will adopt the construction placed on a contract by the parties themselves. *Lawton v. Fonner,* 59 Neb. 214; *Hale v. Sheehan,* 52 Neb. 184, 188; *Wittenberg v. Mollyneaux,* 55 Neb. 429, 433. From the facts stated in the former opinion, it is clear that the parties to the contract regarded Welty as primarily liable for the goods; that is, with a full knowledge of the facts, the undertaking of the plaintiff was construed by them as a collateral one, and as a promise to answer for the debt or default of Welty. We are bound by that construction, and the contract thus construed is within the statute of frauds. The former opinion is right, and we recommend that it be adhered to, and that the judgment of the district court be reversed.

AMES and DUFFIE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to and the judgment of the district court is

REVERSED.

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

THOMAS COLEMAN V. SPEARMAN, SNODGRASS & COMPANY.

FILED FEBRUARY 17, 1903. No. 12,556.

1. **Appeal:** TRANSCRIPT: WAIVER. Although the filing of a duly authenticated transcript is required in order to perfect an appeal from the county court to the district court, and although the transcript filed for such purpose is not thus authenticated, yet, if the parties proceed in the district court on the theory that the appeal has been perfected, they will not be heard to question the sufficiency of such transcript in this court.

2. **Appeal:** ISSUES. Where, in an appeal from the judgment of the county court, in a term case, the petition filed in the district court is assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is determinable solely by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court.

3. ———: ———. The rule requiring cases on appeal to be tried on the same issues as those upon which they were tried in the court below, does not require that the petition filed in the appellate court be in the precise language of that filed in the lower court, but is satisfied if the ultimate facts relied upon for a recovery are substantially the same, and provable by evidence of the same character.

4. **Petition.** Petition filed in the county court examined, and *held* to state a cause of action.

ERROR to the district court for Sarpy county: BENJAMIN S. BAKER, DISTRICT JUDGE. *Reversed.*

John P. Breen, for plaintiff in error.

Carl Wright and *John F. Stout, contra.*

ALBERT, C.

This action was commenced in the county court for Sarpy county. The petition in that court was as follows:

"Comes now the plaintiff and files his petition in words and figures following, to wit:

"Comes now the above named plaintiff and complains of the defendants and for cause of action does allege:

"First. That said defendant is a copartnership, duly chartered and authorized by law of this state to do a general banking business in Gretna, Nebraska, and were on or about the 8th day of March, 1896, doing a general banking business at said place. That part of the usual and ordinary business of said defendants, at the date aforesaid, was to receive notes and other negotiable papers for collection for hire, and so advertised and conducted said collections as a part of the business of said bank.

"Second. This plaintiff further alleges that on the date above and for some time prior thereto he was the owner and holder of three promissory notes, of which the following are copies:

"GRETNA, NEB., July 18, 1895. $152.57.

"December 15 after date we or either of us promise to pay to Langdon Bros., or order, One Hundred Fifty-two and 57-100 Dollars, value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. JOHN H. WELCH.

"Due Dec. 15, 1895.

"GRETNA, NEB., July 18, 1895. $145.00.

"Dec. 15 after date we or either of us promise to pay to Langdon Bros., or order, One Hundred Forty-five and no-100 Dollars, for value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. WILLIAM (his X mark) BAILEY.

"H. MERRYMAN, witness to mark.

"Due Dec. 15, '95 JOHN H. WELCH.

Nebraska State Library

"GRETNA, NEB., July 18, 1895. $116.31.

"Dec. 15 after date we or either of us promise to pay Langdon Bros., or order, One Hundred Sixteen and 31-100 Dollars, value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. JAMES H. HAGANS.
"Due Dec. 15, '95. JOHN H. WELCH.

"That the above notes were duly indorsed by the said Langdon Bros. to this plaintiff without recourse for value.

"Third. This plaintiff further alleges that said notes were purchased by him on the fact that John H. Welch was the party out of whom he expected to collect said notes. The other makers thereon were wholly insolvent and without property. That at the time said notes were transferred to this plaintiff the said John H. Welch had sufficient property out of which the notes aforesaid would be collected.

"Fourth. This plaintiff further alleges that some time prior to the 8th day of March, 1896, he left said notes with the above defendants for collection and said defendants accepted and received the same for said purpose and under the collection thereof for him. That on the 8th day of March, 1896, this plaintiff instructed, requested and notified said defendant that he wanted said notes collected or secured as he was at that time a little doubtful about the solvency of the said John H. Welch, and he knew that if the defendant would press and insist the said John H. Welch would secure same; this defendant promised and agreed with the plaintiff that he would attend to said matter and endeavor to have said notes secured; that at the time this defendant agreed and promised to attend to said matter and for a long time thereafter the said John H. Welch had ample property with which he could have secured the payment of said notes and the said John H. Welch would have secured the same had he been requested and asked so to do, but this defendant neglected and failed

to make any effort towards getting said notes secured as he had promised and had failed and neglected to ask the said John H. Welch to pay or secure said notes or any of them for payment or security while the said Welch had property by which said notes could have been secured; that after the said John H. Welch was securing other of his creditors, including this defendant, this defendant neglected and failed to present these notes to said Welch for payment or security until all of the property of the said Welch was incumbered, and had this defendant used due diligence and ordinary care he would have had said notes secured and their payment assured.

"Fifth. This plaintiff further alleges, that by reason of the negligence, carelessness and want of ordinary business care he had lost the amount of these notes to his damage in the sum of $450.

"The plaintiff therefore prays judgment against said defendant for the sum of $450 and interest thereon at ten per cent. from March 8, 1896, and costs of suit."

The issues were made up, and, on a trial thereof, the county court found for the plaintiff and gave judgment accordingly. The defendants appealed to the district court. The final petition filed by the plaintiff in the district court was as follows:

"For an amended petition herein the plaintiff for his cause of action says:

"First. That said defendant is and was on the 8th day of March, 1896, and for some time prior thereto, a copartnership engaged in a general banking business at the town of Gretna, Sarpy county, Nebraska. A part of its said banking business then carried on was the taking and receiving of notes, drafts, bills and other evidences of indebtedness, for collection, and it solicited and advertised for such collections as part of its general business.

"Second. That on the said 8th day of March, 1896, and for some time prior thereto, this plaintiff was the owner and holder of three promissory notes, copies of which are as follows, to wit:

"GRETNA, NEB., July 18, 1895. $152.37.

"December 15 after date we or either of us promise to pay to Langdon Bros., or order, One Hundred Fifty-two and 37-100 Dollars, for value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. JOHN H. WELCH.

"Due December 15, 1895.

"GRETNA, NEB., July 18, 1895. $145.

"Dec. 15 after date we or either of us promise to pay to Langdon Bros., or order, One Hundred Forty-five and no-100 Dollars, for value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. WILLIAM (his X mark) BAILEY.

"Due Dec. 15, 1895. JOHN H. WELCH.

"GRETNA, NEB., July 18, 1895. $116.31.

"Dec. 15 after date we or either of us promise to pay to Langdon Bros., or order, One Hundred Sixteen and 31-100 Dollars, for value received, payable at Spearman, Snodgrass & Co., Gretna, Nebraska, with interest at the rate of ten per cent. per annum from date until paid.

"P. O. Gretna, Neb. JAMES B. HAGANS.

"Due Dec. 15, 1895. JOHN H. WELCH.

"That plaintiff purchased said notes from the payees thereof, said Langdon Bros., for a valuable consideration and that said Langdon Brothers indorsed the said notes at the time of the transfer to the plaintiff, but without recourse, on them.

"Third. That said notes were purchased by plaintiff with the belief and understanding that one of the makers, John H. Welch, was financially responsible and able to pay the said notes when due, and alleges the facts to be that said John H. Welch then was, and for a long time

thereafter, the owner of valuable property both real and personal, and was financially able to meet the payment of said notes; but that the other makers of the notes were irresponsible financially and without property and were insolvent then and thereafter.

"Fourth. That some time prior to the said 8th day of March, 1896, plaintiff delivered the above described notes to this defendant for collection and that the defendant received and accepted the same and undertook and agreed for hire, to make collection of them from the makers and especially from the said John H. Welch; that on the said 8th day of March, 1896, the report having come to this plaintiff that said Welch was and was becoming financially embarrassed and involved in financial distress and difficulties, he (the plaintiff) especially notified defendant of this report, and again instructed the defendant to be alert and diligent in the proceeding with the collection of said notes and to get them secured or paid at once, and stated to the defendant then that reports had reached him, plaintiff, that said Welch was becoming financially embarrassed and that diligence must be pursued in seeking the collection of said notes and that if defendant would insist upon and press the said Welch for the payment of said notes or for security for their payment, that, no doubt, Welch would either pay or secure them; that the defendant promised to attend to the matter of the collection of said notes at once.

"Fifth. That at the time defendant made this last named promise and for nearly two months thereafter, the said John H. Welch was the owner of ample and sufficient property, both real and personal, to meet the payment of said notes or to have secured the payment of them and had the defendant then asked for and insisted upon the payment of said notes, Welch would have paid or secured the payment of said notes, but defendant failed and neglected to make any effort whatever to have said notes or their payment secured and failed and neglected, while the said Welch had unincumbered property with which he could

have secured the payment of said notes, to even ask the said Welch for the payment or the securing of the payment of said notes, and failed, and neglected to ask for and insist upon the payment or the securing of the payment of said notes until the said Welch had lost and incumbered his property so as to be and become insolvent and unable to either pay or secure the payment of said notes and that at all times since and still the said Welch has remained insolvent and unable to pay said notes or secure the payment thereof and has no property or means out of which the payment of said notes could be enforced and the said Welch has wholly failed to pay said notes or any part thereof; that for nearly two months after said defendant received the said special instructions to take immediate steps to make demand upon the said Welch, for payment of said notes and to take immediate steps to secure the payment of them, the said defendant neglected to make any attempt to get said notes either paid or secured although said defendant, during said time, well knew that said Welch was securing other creditors and other claims and demands including claims of the defendants themselves, and that notwithstanding this the said defendants made no effort to have plaintiff's claim either paid or secured; and had defendants exercised ordinary care, due diligence and business prudence, during the time said Welch's property was unincumbered they could have secured either the payment or security for the payment of plaintiff's said notes; but that by reason of defendants' failure and neglect to present said notes to said Welch and demand payment and ask for, insist upon and press their collection, the plaintiff lost the full amount of said notes, to his damage in the sum of $450 together with interest thereon.

"Wherefore the plaintiff prays judgment against the defendant for the sum of $450 and interest thereon at ten per cent. from the 8th day of March, 1896, and costs of suit."

The defendants filed a motion, asking that the foregoing

petition be stricken from the files. The grounds of the motion are, in substance: (1) That the amended petition tenders other and different issues than those upon which the case was tried in the county court; and (2) that the amended petition narrows and limits the issues upon which the action was tried below. The court sustained the motion, and the plaintiff electing to stand on his amended petition, and refusing to plead over, judgment was given for the defendants. The plaintiff brings error.

The prinicpal question presented for review is whether the motion to strike the amended petition was erroneously sustained? But to the consideration of that question the defendants interpose the objection that the record fails to show that an authenticated transcript of the proceedings had in the county court was filed in the district court, and before it, when the motion in question was heard. In view of the entire record, we do not think that objection is well taken. The motion to strike is framed on the theory that the case was in the district court on appeal from the county court. The record before us begins with these words:

"Be it remembered that heretofore, to wit, on the 15th day of June, 1900, there was filed in the above named district court a transcript from the county court of said county, which transcript is in the following figures and words, to wit:"

Then follows what purports to be a transcript of the record of the county court, showing the pleadings filed and proceedings had in that court, including a final judgment in favor of the plaintiff, and an appeal bond, executed by the defendants and their sureties. Then follows the signature of the county judge, but there is no certificate attached. But the certificate of the clerk of the district court to the record, omitting the formal parts, is as follows:

"I, Charles Behrendt, clerk of the district court of, in and for Sarpy county, state of Nebraska, do hereby certify that the above and foregoing is the original bill of excep-

tions, also a true and perfect transcript of the records in the above entitled cause of action as the same appears of file and record in my office."

From the certificate of the clerk of the district court, it follows that the only transcript of the proceedings had in the county court, filed in the district court, is that above mentioned. The motion to strike is based on the theory that the action was pending in the district court on appeal from the county court. It follows, therefore, that what purports to be a transcript of the proceedings had in the county court, as shown by the record before us, was treated by the parties and the district court as a transcript of the record of the county court. Having thus treated it in the district court, neither party can now be heard to say that it should not be treated as a part of the record in this court. It should be noted here that there is no bill of exceptions in the record, the certificate of the clerk to the court notwithstanding.

The defendants further insist that the motion to strike raised an issue of fact, upon which there must have been some evidence, and which, in the absence of a bill of exceptions, will be presumed to have been correctly determined by the trial court. It will be observed that this case is what practitioners before the county court call a term case. In such cases, the issues are made up in the same manner as in the district court. That being true, although the motion to strike did raise issues of fact, it does not follow that the evidence in support of such issues would be of such a character as to necessitate a bill of exceptions. The county court is a court of record; the pleadings filed before it are a part of its record and are the best evidence of the issues presented thereby. Consequently, the issues of fact, raised by the motion in question, were determinable from an inspection of the transcript of the record of the county court. In other words, the question of fact raised by the motion, was, whether the amended petition stated a different cause of action from that stated in the petition upon which the case was sub-

mitted to the judgment of the county court, and the only legitimate way to determine that question was by a comparison of the former with that contained in the transcript of the proceedings had before the county court.

This brings us down to the principal question in the case, hereinbefore stated. That actions must be tried in the appellate court, upon the same issues upon which they were tried below, is settled by a long line of cases decided by this court. But this rule does not require that the petition in the appellate court shall be in the precise language of that upon which the cause was submitted below. The most that it requires is that the ultimate facts relied upon for a recovery shall be the same in both courts, and provable by evidence of the same character. While the facts are more fully stated in the amended petition—and are stated, perhaps, with greater precision than they were stated in the county court—we are unable to discover any ultimate fact, necessary to a recovery under the amended petition, that is not covered by the allegations contained in the petition upon which the cause was submitted to the county court, or to sustain which would require evidence of a different character than was necessary below. The ultimate facts in each case are: (1) That the defendants undertook and agreed to collect certain notes for the plaintiff; (2) that they failed to exercise due diligence in the premises; and (3) that by reason of such failure the plaintiff sustained damages in a certain sum. All other matter, in either petition, is but an amplification of those facts, tending in no way to destroy the identity of the issues, within the meaning of the rule requiring that they be the same in both courts.

The defendants insist that the petition in the county court does not state a cause of action. We think it did. It is true, both pleadings are somewhat argumentative. But a petition is not, for that reason alone, vulnerable to the objection that it does not state a cause of action. The remedy for that vice is by motion.

It is recommended that the judgment of the district

court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

BEE BUILDING COMPANY V. WILLIAM DALTON.

FILED MARCH 4, 1903. No. 12,570.

1. **Dismissal After Submission.** A plaintiff can not dismiss his action without prejudice, after there has been a final submission of it either to the court or jury.
2. **Demurrer to Evidence: ELIMINATION OF JURY.** A jury impaneled to try issues of fact is practically eliminated by a decision sustaining a demurrer to evidence. Such a decision is essentially a denial of the litigant's claim that he is entitled to a jury trial.
3. ———: **DIRECTION, RECEPTION AND RECORDING OF VERDICT, CEREMONIAL ACTS.** When a court has sustained a demurrer to evidence, the direction, reception and recording of a verdict are mere ceremonial acts. The verdict in such a case has no legal significance; it does not furnish the basis of the judgment nor serve any other useful purpose.
4. **"Submission of a Case to a Jury."** The "submission of a case to a jury," contemplated by section 430, Code of Civil Procedure, is the submission of an issue of fact which the jury is at liberty to decide in favor of either party.
5. **Demurrer to Evidence: SUBMISSION: DISMISSAL.** When a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost.
6. **Dismissal After Submission in Discretion of Court.** The district court may, in the just exercise of its discretionary power, permit plaintiff to dismiss his case after it has been finally submitted to the court or jury.
7. **Where Dismissal After Submission Is Made as Demandable Right.** But where the discretionary power of the court is not invoked

and the application to dismiss after final submission is made and allowed as a demandable right, the order of dismissal will not be upheld unless a denial of the application would amount to an abuse of discretion.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Reversed.*

Charles J. Greene, Ralph W. Breckenridge and *James C. Kinsler,* for plaintiff in error.

James P. English and *Timothy J. Mahoney, contra.*

SULLIVAN, C. J.

William Dalton sued the Bee Building Company to recover damages for a personal injury. A jury was impaneled to try the issues, and, the plaintiff having submitted his evidence and rested his case, defendant moved the court to direct a verdict in its favor on the ground that there was neither averment nor proof of an actionable wrong. The motion was sustained, but before the peremptory instruction could be given plaintiff asked that the case be dismissed without prejudice, and his request was granted. By this proceeding in error the order of dismissal is brought to this court for review.

Section 430 of the Code of Civil Procedure is as follows: "An action may be dismissed without prejudice to a future action: First—By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. Second—By the court, where the plaintiff fails to appear on the trial. Third—By the court, for want of necessary parties. Fourth—By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence. Fifth—By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the action, the decision must be upon the merits."

Obviously the principal question to be decided is

whether there was, within the meaning of this section, a final submission of the case upon defendant's motion. The contention of counsel for plaintiff is that the trial was to the jury and that there could be no submission of the case until the jury had complete authority to deal with it. This argument is plausible, but we can not believe that it is sound. It is true a jury was impaneled, but it is equally true that the case was tried by the court, and not by the jury. The case was submitted upon an issue of law, and the determination of that issue eliminated the jury and ended the controversy. After it had been adjudged that the plaintiff had no case, and that there was no issue of fact to be decided, the direction, reception and recording of a verdict would have been mere ceremonial acts. These acts would, we know, be in accordance with conventional procedure; they would satisfy the requirements of judicial formalism, but they would be as useless and idle, and almost as absurd as the archaic practice of withdrawing a juror in order to secure a continuance. To direct the jury to return a verdict in favor of the defendant would have been to command the triers of fact to ratify a decision already made by the court upon a question of law. When the legislature, in section 430, spoke of "the final submission of the case to the jury," it must have had in mind the submission of an issue of fact—the submission of a disputed question, which might be resolved by the jury in favor of either party. In this case there was no issue of fact—the court so decided; and if a verdict had been rendered in obedience to a peremptory instruction, it would have no legal significance; it would not furnish the basis for a judgment in favor of defendant. In every such case the judgment rests, not on the decision of a question of fact, but wholly and exclusively upon the decision of a question of law. When it was determined that the plaintiff had failed to make a case the court might, without taking from the jury a meaningless verdict, have proceeded at once to render judgment in favor of defendant. To be sure, the procedure would not be according to

established usage, but it would be legal and logical and in harmony with modern methods of transacting business. It is, as we view it, entirely clear that the "submission of the case to the jury" contemplated by the statute is the submission of an issue of fact; and where there is no such issue there can not, in any proper sense, be said to be a trial by jury. Indeed, the very essence of a decision sustaining a demurrer to evidence is a denial of the litigant's claim that he is entitled to a jury trial. Before plaintiff moved to dismiss the action without prejudice, his case had been, not only submitted to the court upon a vital issue of law, but that issue had been decided against him and nothing remained open for contention.

"Where a demurrer to the evidence is sustained," says Mr. Justice Brewer in *St. Joseph & D. C. R. Co. v. Dryden,* 17 Kan. 278, 280, "the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss then than he has after a verdict is returned. The case is decided, and the plaintiff has no right to avoid that decision by a dismissal." To permit a party to dismiss under such circumstances is, in substance, to grant him a new trial after he has been fairly defeated and to deprive his adversary of the fruits of a fairly won victory. It is contrary to good sense and sound policy to allow a party to take his case from one court to another until fortune favors him with a judge who is willing to accept his view of the law or his construction of the evidence. "Such a mode of proceeding would," as was said in *Conner v. Drake,* 1 Ohio St. 166, 170, "be trifling with the court as well as with the rights of defendants." One who is defending against a claim which he believes to be unjust ought not to be subjected to the expense of litigation which settles nothing. And since he is not permitted to choose another forum when it is discovered that the court is against him, it is manifestly unfair to give the plaintiff an unlimited freedom of choice. The tax-paying public, too, have rights which it may be presumed the legislature took into account in adopting section 430. It is, of course,

entirely proper that courts should be maintained at public expense to hear and determine all controversies that may be submitted to them, but it is no part of the business of the state in administering justice to provide for sham trials, or to maintain courts for experimental investigation. Indeed, it would be a reproach to our judicial system to permit a defeated litigant to abandon his case and sue again, thus harassing the defendant and wasting money raised by taxation for public purposes. Our conclusion is that the court erred in sustaining plaintiff's motion and this conclusion is, we think, supported by *State v. Scott,* 22 Neb. 628; *State v. Hazelet,* 41 Neb. 257; *Beaumont v. Herrick,* 24 Ohio St. 445, and other cases. Authorities sustaining the position for which plaintiff contends are numerous enough, but they fail to distinguish between cases in which there is an issue to submit to the jury and those in which there is not. Their reasoning is not convincing and we decline to follow them.

A further contention on behalf of plaintiff is that if the dismissal was not a matter of strict right it was at least a warrantable exercise of a discretionary power vested in the court. The record does not show that the court undertook to exercise a discretionary power or that the situation called for the exercise of such power. The application was evidently made and granted as a demandable right. The plaintiff's only reason for wishing to dismiss was that the court held his evidence to be insufficient. He did not claim then, and he does not claim now, that he failed to produce all the evidence obtainable. There is no suggestion of surprise, mistake or accident; there is no intimation that the case submitted was not as strong as it is ever possible for plaintiff to make it. If the dismissal be regarded as an exercise of judicial discretion, it must have been claimed and allowed on the theory that it was right and proper that plaintiff should have the judgment of another trial court upon his case. Such a theory is, of course, inadmissible. The ground upon which the court actually proceeded is shown with reasonable certainty by

the following extract from the record: "Mr. Breckenridge: 'The defendant now moves the court to instruct the jury to return a verdict in favor of the defendant for the reasons, first, because the second amended petition does not state facts sufficient to constitute a cause of action, and second, that under the undisputed evidence in this case plaintiff is not entitled to recover.' Mr. Mahoney: 'I understand from that that the defendant does not avail itself of the election to have a continuance of the cause at our costs.' Mr. Breckenridge: 'No, we will proceed.' The Court: 'Motion to instruct the jury sustained.'" Before the court had in fact instructed the jury to return a verdict in favor of the defendant, the following proceedings took place: "Mr. Mahoney: 'If your honor please, the plaintiff now in open court dismisses his cause of action without prejudice to the bringing of a new action.' Mr. Breckenridge: 'Do I understand that our supreme court has passed upon the right of a party to do that after he has tried the lawsuit and been defeated?' The Court: 'I think he can do that up to any time until the case is submitted to the jury.' Mr. Breckenridge: 'But this case has been submitted to the jury. The defendant objects to the dismissal of this case at this time after the submission of the case upon a motion to instruct a verdict for the defendant, after the plaintiff has rested his case, and after the court had announced his decision upon the motion to instruct the verdict in favor of the defendant.' The Court: 'The plaintiff having moved for leave to dismiss his case without prejudice before the instruction asked for by the defendant had been in fact given to the jury, the court therefore sustains the motion of the plaintiff and grants leave to plaintiff to dismiss this action without prejudice.' To which ruling of the court the defendant duly excepts."

The discretionary power of the district court to set aside a submission and receive further evidence, or to postpone the trial, or even to permit a dismissal of the case, is not doubted; but there is nothing in the present record to indicate that there was any just ground for the exercise of

such power, or that there was any attempt to bring it into action. The court was evidently of the opinion that, the peremptory instruction not having been yet read to the jury, the right of plaintiff to dismiss was absolute. This was an erroneous conception and it led to a wrong result.

The decision is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LAWRENCE E. LARSON V. FRANCIS M. COX.

FILED MARCH 4, 1903. No. 12,684.

1. **Libel**: SLANDER: TRUTH: COMPLETE DEFENSE PER SE. Section 132, Code of Civil Procedure, in effect declares that in an action for a libel or slander the truth of the defamatory matter is *per se* a complete defense.
2. **Section Constitutional.** Said section, so far at least as it relates to spoken defamation, is in harmony with the constitution and is valid.
3. **Action for Slander**: PLEA IN JUSTIFICATION. In an action for slander, a plea of justification is good without alleging that the defamatory words were spoken with good motives or for justifiable ends.
4. **Evidence.** Evidence examined, and found sufficient to sustain the verdict.
5. **Loss of Written Instrument**: SECONDARY EVIDENCE. When the loss or destruction of a written instrument is shown, secondary evidence of its contents is admissible.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Affirmed.*

Albert W. Crites, for plaintiff in error.

Ernest M. Slattery and *C. Dana Sayrs, contra.*

SULLIVAN, C. J.

This was an action by Larson against Cox to recover damages for slander. The defamatory words set out in the

petition amount to a charge of larceny. The defendant in his answer alleged that the charge was true, and that it was made with good motives and for justifiable ends. The jury found against the plaintiff and judgment followed the verdict.

The assignments of error discussed by counsel relate for the most part to the plea of justification, and raise the question whether the truth of slanderous matter is *per se* a complete defense. The contention of counsel for plaintiff is that the truth is unavailing unless it was uttered with a good motive and for a proper purpose. His argument is grounded altogether upon the provision of the constitution which declares that "in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Constitution, art. 1, sec. 5. The provision here quoted is a substitute for section 3, article 1, of the constitution of 1866, which was an almost literal copy of a New York statute adopted soon after the trial of the celebrated case in which Croswell was convicted of publishing a libel on Thomas Jefferson. *People v. Croswell,* 3 Johns. Cas. (N. Y.) 337. This statute was intended to secure and safeguard the freedom of the press, and is now fundamental law in many of the states. It was a modification of the doctrine of the common law that, in public prosecutions for libel, the truth of the libel is no excuse for its publication. When considered in the light of history, there is much reason to suppose that the constitutional provision upon which plaintiff relies was designed as a sure and permanent protection, both in civil and criminal actions, to persons who have occasion, in the discharge of some legal, social or moral duty, to write and publish criticisms on the character and conduct of others, and that it was not any part of its purpose to take away from the defendant in a libel case any right given him either by the statutory law or the common law. The truth of a defamatory publication is still a complete and perfect defense in a criminal case, irrespective of the mo-

tive or object of the publisher. The legislature has made it so by definition of the crime. Section 132 of the Code of Civil Procedure in effect declares that in an action for a libel or slander the truth of the defamatory matter may be pleaded and proved as a defense. *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127. The validity of this section was of course necessarily involved in *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64, and *Neilson v. Jensen*, 56 Neb. 430, which seem to have been decided on the assumption that the constitutional provision above quoted, so far as it relates to libels which are the subjects of civil action, was intended as a restraint upon the freedom of the press, and that it operated as a partial repeal of the statute. It is not necessary at this time to either affirm or deny the doctrine of these cases, as the constitutional provision with which they deal has no reference to actions for slander. Section 132, so far at least as it relates to spoken defamation, is in harmony with the constitution and is, therefore, valid.

Under the instructions given by the court at plaintiff's request the jury must have found that the plea of justification was sustained by the proof. In our opinion, the evidence was sufficient to warrant the conclusion that Larson had committed the crime imputed to him. This being so, the verdict and judgment are right even though defendant did not make the accusation with good motives and for justifiable ends. It is insisted that the court erred in receiving secondary evidence of the contents of a letter claimed to have been written by plaintiff to defendant. There was, we think, sufficient excuse shown for the nonproduction of the primary evidence to justify the court in permitting the defendant's testimony as to the contents of the letter to go the jury.

There is no material error in the record, and the judgment is therefore

AFFIRMED.

NATIONAL WALL PAPER COMPANY, APPELLEE, V. COLUMBIA NATIONAL BANK, APPELLANT, IMPLEADED WITH CLASON & FLETCHER COMPANY ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,930.

1. **Insolvent Corporation:** TRANSFER OF ASSETS IN SETTLEMENT WITH CREDITOR: CLAIM ON WHICH OFFICERS OF CORPORATION ARE PERSONALLY LIABLE: TRUST: DISTRIBUTION OF ASSETS. When an insolvent corporation transfers all of its assets to a creditor in settlement of a claim upon which the officers of the corporation are personally liable, and the transfer is for that reason held invalid, the transferee holds the property in trust for all creditors of the corporation, and is entitled to participate in the distribution of the assets.

2. **Action in Equity:** DISTRIBUTION OF ASSETS. In an action in equity against such trustee the court will distribute the assets to all creditors, parties to the suit, in proportion to their respective claims. *Merchants' Nat. Bank of Omaha v. McDonald*, 63 Neb. 363, distinguished.

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

Halleck F. Rose, E. E. Brown and *Wilmer B. Comstock*, for appellant.

Arthur W. Lane, Henry H. Wilson, Arnot C. Ricketts, Orpheus B. Polk and *Frederick Shepherd, contra.*

SEDGWICK, J.

A statement of the facts in this case may be found in the opinion of the court upon the former appeal, 63 Neb. 234, 56 L. R. A. 121. The reason for reversing the former judgment of the district court is stated in the syllabus: "An insolvent corporation can not make a preference of a debt due from it on which the officers and directors are bound as sureties." The opinion closes with the following language: "There is a controversy between the plaintiff and the interveners as to their respective rights in the

premises. The district court not having passed upon that question, the cause is reversed and remanded to that court, with direction to enter a decree against the bank, and determine the rights of plaintiff and interveners."

The district court construed this language to mean that the defendant, the Columbia National Bank, should not be allowed any part of the proceeds of the goods then in the hands of the bank, and made findings and entered judgment to that effect, and entered several judgments against the bank in favor of the plaintiff and the intervening creditors, respectively, in the amount of their respective claims, with interest to the time of entering judgment. From this action of the court the defendant, the Columbia National Bank, has appealed to this court. After the cause was remanded there was no change made in the pleadings and no evidence taken, the findings and judgment of the district court being predicated entirely upon the prior findings and judgment of that court and the opinion and mandate of this court.

1. The plaintiff and interveners contend that an insolvent corporation can secure its creditors the same as an individual can, and that from this it follows that, if the corporation can voluntarily create a lien in favor of a creditor, the creditor can acquire a lien by appropriate adversary proceedings, and that, when this action was begun, and when the respective interveners filed their respective cross-petitions, the property of the debtor corporation was subject to levy for the satisfaction of the claims of the plaintiff and interveners, and under the decision of this court in *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363, the plaintiff and interveners by these proceedings acquired liens in the order of the filing of their petitions and cross-petitions. The question whether the assets of an insolvent corporation are a trust fund for all its creditors, and the relation of that question to this controversy, are also much discussed.

It is insisted that in this case the property of the corporation was in the hands of a fraudulent grantee, and

that therefore the creditors might levy on the same, treating the fraudulent grant as void as against these creditors. This question depends for its solution upon the character that is to be given to the transaction between the debtor corporation and the defendant bank. It is conceded that the bank acted in good faith in taking the stock of goods for its claim against the corporation; that the goods were sold by the bank for their fair market value, and the proceeds thereof were not more than the actual claim of the bank against the corporation. When the transaction was questioned, there was no disguise or attempt at disguise of the facts in relation thereto. The goods had been delivered to the bank. The bank had disposed of them with prudence and fairness, realizing the full value thereof. The plaintiff and interveners contested the right of the bank to the attempted preference, and the court sustained that contention on the ground that public policy would not allow the insolvent corporation to pay the bank its claim in full, to the prejudice of other creditors because the claim of the bank was also secured by the personal indorsement of the officers of the corporation.

In *Holbrook v. Peters & Miller Co.*, 8 Wash. 344, 36 Pac. 256, 257, the syllabus is as follows: "(1) An assignment by an insolvent corporation of all its property to one of its creditors for the purpose of satisfying its debt to such creditor is not a conveyance 'with intent to delay and defraud creditors,' within the meaning of the attachment law, since preferring one creditor does not necessarily constitute fraud in fact. (2) In such case the remedy of the other creditors is by suit in equity to compel an equal distribution of the corporate assets." And the court said: "It is not a fraud in fact for a debtor, whether a natural person or a corporation, to prefer a creditor, and it is only because the law regards the assets of an insolvent corporation as a trust fund for all its creditors that it interferes with preferences made by debtors of that class. If the Peters & Miller Company was an insolvent corporation at the time it transferred its prop-

erty to the bank, its other creditors can have adequate relief upon alleging sufficient grounds therefor, by complaint in equity, to subject its assets in the hands of the bank to an equal distribution, in which all its creditors can participate. The ground upon which they must base an action for that purpose will be equitable, and not purely legal. To sustain this attachment would be to permit the respondent to make itself a preferred creditor, which is the very gist of its complaint against the appellant in its treatment of another creditor."

In *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 4 S. W. 260, 263, an insolvent corporation transferred its assets to a creditor whose claim was also secured by the indorsement of the directors of the debtor corporation. Thereupon other creditors attempted to attach the property on the ground that it had been fraudulently conveyed. In the syllabus the law is declared to be: "The fact that an insolvent corporation makes a deed preferring some creditors, including some of its directors, does not give an unpreferred creditor the right to take out an attachment at law charging the corporation with attempting to defraud its general creditors." And the court said: "Much has been said, and very ingeniously said, by counsel for plaintiff that the directors of the company, it being insolvent, were trustees, and that the assets of the corporation were a trust fund, etc. These premises will readily be admitted. But grant them. Grant, further, for argument's sake, that a breach of trust has been committed by these directors in manner as aforesaid. How is such official dereliction to be reached? Is it a constructive fraud, within the meaning of the attachment act? Certainly no case has gone to that length. The corporate assets being a trust fund, the forum for its enforcement is a court of equity."

These two decisions seem to go upon the ground that the assets of the corporation constituted a trust fund for the benefit of all of its creditors, and to hold that such fund can only be reached by proceedings in equity. It is

urged that in this state a creditor may attach the property of an insolvent corporation. It is insisted that this result necessarily follows from allowing an insolvent corporation to prefer one creditor to the exclusion of another; but however that may be while the property is in the hands of the corporation, when, as in this case, the debtor corporation has assigned its property to a creditor interested therein, and without fraud, the reasoning of the cases cited seems to apply.

In *Beach v. Miller,* 130 Ill. 162, 22 N. E. 464, 467, it is said in the syllabus: "A sale and delivery by an insolvent corporation of its property to one of its directors in satisfaction of a pre-existing debt, though voidable in equity, does not render the property subject to levy at the suit of the corporation's creditors." And in the opinion the court said: "After a careful examination of the authorities, we are inclined to the opinion that, if this corporation was insolvent at the time of the sale, Miller, who was a director, could not lawfully purchase the property in satisfaction of his own debt, to the exclusion of other creditors, but he took the property charged with the trust in favor of other creditors, which may be enforced in an appropriate action. Miller, being a creditor, would doubtless be entitled to share with the other creditors in the property, but he could not appropriate the entire amount to the payment of his own debt. This, however, conferred no right upon appellants to seize the property and sell it in satisfaction of the debt of Blatchford & Co., as creditors of the corporation. They occupied no better position than Miller. It may be, and no doubt is, true, that if Blatchford & Co. had levied on the property while in the hands of the corporation, before the sale to Miller, they would, under such circumstances, have been entitled to hold it; but after the sale and delivery to Miller they had no such right. The property had passed beyond the reach of their execution. It had passed into Miller's hands, charged with a trust which a court of equity might enforce in favor of all the creditors of the corporation, or such as might invoke the aid of that court."

The principle thus announced by the Illinois court seems to be applicable in this case. Whether the creditors could have attached the goods in the hands of the corporation is not a decisive question here. The goods had been transferred to one creditor. It was expressly found by the trial court that "the preference of such bank to the exclusion of all other creditors was not in any way tainted with fraud." That is, there was no actual fraud upon the part of the bank nor of the debtor corporation. The question of fraud is, by statute, in this state made a question of fact. The right of the bank to the intended preference is not denied on account of fraud, but because it is supposed to be against public policy to permit an insolvent corporation to prefer its creditor when the officers of the corporation are personally liable on the claim which it is sought to prefer. The bank, then, had as good right to the property of the corporation as had any creditor, and when all of the goods of the corporation were transferred to it, and it was not allowed to prefer its claim, it became trustee for all the creditors. When this trustee was called upon in a court of equity to account for this property, the other creditors might come in and share in proportion to their claims, but they could not themselves obtain a preference by attachment or other proceedings.

In *Merchants' Nat. Bank v. McDonald, supra*, an insolvent corporation made a bill of sale of all its stock in trade to the bank to secure the payment of notes which were signed by the corporation and also by one McKell, the president and director of the corporation. It does not appear in the opinion that the property was delivered to the bank; on the other hand, it is expressly stated that the indebtedness was in reality the indebtedness of McKell, and that the corporation was not liable therefor. The bank not being a creditor, the bill of sale was fraudulent and the property subject to attachment. If there are expressions in the opinion inconsistent with the principle here announced, such expressions were not warranted by the facts in the case as disclosed by the record.

It is contended that "there was nothing before the trial court upon which a decree recognizing the claim of the bank could have been based," but the facts alleged in the pleadings are sufficient to show that the bank was entitled to participate in the distribution of the proceeds of the property in its hands, which, as heretofore shown, it held as trustee for all the creditors. A court of equity, having taken control of the funds under such circumstances, will enforce the trust and distribute the funds to the parties entitled thereto.

It is also urged that "the bank is estopped from presenting its case here on a different theory from that urged upon the first appeal." But the bank ought not to be refused the portion of the assets to which it is justly entitled, for the sole reason that it demanded more than was found to be due it. Its present claim is included in the former one; it is not inconsistent with it.

2. It is urged that the language above quoted from the opinion in this case upon the former appeal is a determination that the bank could not participate in the distribution of the assets. But the only issue that had at that time been considered either by the trial court or by this court was the right of the bank to take the property as a preferred creditor in settlement of its claim. This was the issue that the court had in mind when the direction was made to enter decree against the bank. The question of the right of the bank to participate in the distribution of the assets was not mentioned in the pleadings nor findings of the trial court, nor in the briefs of counsel upon the former hearing in this court. It was of no importance until the issue presented had been determined against the bank. The effect of that determination was that the assets did not belong exclusively to the bank, but constituted a trust fund in the hands of the bank for all of the creditors of the debtor corporation. It may, however, be observed that if the questions presented upon this appeal had been discussed and urged upon the court upon the former appeal, the language of the opinion referred to

might have been made to more accurately express the views of the court upon these questions.

We think that the defendant bank is entitled to participate in the distribution of the assets in its hands. The findings and judgments complained of are therefore reversed, and the cause remanded with instructions to find the respective claims of the parties in accordance with this opinion, and to decree a distribution of the funds accordingly.

REVERSED AND REMANDED.

NEW OMAHA THOMPSON-HOUSTON ELECTRIC LIGHT COMPANY V. JOHNERSON C. ROMBOLD.*

FILED MARCH 4, 1903. No. 12,306.

1. **Personal Injury: ELECTRICITY: NEGLIGENCE: INSTRUCTION.** Where evidence tended to show that a lineman of an electric lighting company was injured by inadvertently passing between a pair of exposed splices situated within two feet of a post on wires carrying a strong current of electricity, and that the lack of insulation had continued during time of lineman's employment, *held* not error to tell the jury that failure to make reasonable effort to provide a safe working place for the employee, and consequent negligence, might be inferred from the mere fact that the splices were not insulated, if the jury found that reasonable care would have required their insulation.

2. **Due Care: QUESTION OF FACT.** *Held*, that whether or not due care on the lineman's part required that he see and avoid contact with the exposed splices was properly left to the jury.

3. **Evidence: ASSUMPTION OF RISK: QUESTION OF FACT.** The evidence showing that no inspectors were employed, and that lineman was instructed to repair or report defects of insulation observed by him, the question as to whether or not he had assumed the risk from this defect of insulation was properly left to the jury.

4. **Receipt: ESTOPPEL.** One to whom a receipt in full settlement of all damages has been, in order to procure his signature, misread so as to cause him to think it a receipt and settlement of certain expenses only, is not estopped from disputing its validity by the fact that, relying upon such information as to its contents, he signs without reading it.

* Reversed on rehearing. See opinion, p. 71, *post*.

5. Damages. Where plaintiff, an electric lineman of 33 years of age, earning $65 monthly, has been injured in both feet and one ankle in such a manner as to compel amputation of the right foot almost eleven months later, with severe suffering, a verdict for $15,000 will not be reduced or set aside as excessive.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Affirmed.*

Charles J. Greene, Ralph W. Breckenridge, James C. Kinsler and *W. W. Morsman,* for plaintiff in error.

Timothy J. Mahoney, J. J. Boucher, Herbert M. Crane, Thomas D. Crane and *O. S. Erwin, contra.*

HASTINGS, C.

June 12, 1899, plaintiff below, Rombold, commenced his action against the New Omaha Thompson-Houston Electric Light Company to recover alleged damages in the sum of $25,000 for an injury received by him in defendant's service, as he alleged, in the following manner: That March 22, 1898, he entered the company's employ as lineman, it being his duty under defendant's direction to erect poles, place cross-bars on them, and string wires in the streets of Omaha wherever and whenever defendant directed; that he continued in the company's employ up to July 1, 1898, and on that day was stringing wires on poles and cross-bars at Jones street, between Fourth and Fifth; that he was directed to climb to the top of the pole, about 45 feet, for the purpose of stringing a wire upon the top cross-arm; that there were eight cross-arms about twenty inches apart attached to the pole, and on each arm electric and telephone wires to the number of from four to six, the wires being about sixteen inches apart; that there were twenty-six electric wires covered with insulating material; that on the second cross-arm from the top were two wires fourteen inches apart, known as No. 4, which were insulated, and charged with a heavy current

of electricity; that these wires were spliced at a distance of about two feet west from the cross-arm, and so negligently that the ends of said wires extended out at right angles to a distance of one inch and beyond the insulation; that it was defendant's duty to cover all splices with tape, prepared for that purpose, to protect employees from contact with any wires not insulated and from receiving injuries in that manner; that these splices were not taped, and remained without any covering whatever; that plaintiff went up on the east side of the cross-arms and to the north of the pole between these two wires, completed the stringing of the wire, started to descend on the west side of said cross-arm, between the same wires, until he came to a point between the said splices, and there, without any fault on plaintiff's part, his right arm came in contact with the uncovered splice of the wire next to the pole, and at the same instant the back of his left shoulder came in contact with the uncovered splice on the second wire; that this permitted a "short circuit" between the wires through the body of the plaintiff as a conductor, and gave plaintiff an electric shock which overpowered him, caused him to lose his hold, and threw him to the ground, breaking his left foot and right ankle; that as a result of the injury it became necessary to amputate his right foot, on May 25, 1899; that he was permanently injured and rendered wholly unable to perform any labor, and suffered great pain, to his damage in the sum of $25,000, and that he expended for medicine, care and hospital services $600.

The answer admits defendant is a corporation lighting the streets of Omaha by electricity, and maintaining a plant for that purpose; admits the employment of the plaintiff up to July 1, 1898, as alleged, and denies plaintiff's remaining allegations. The answer also alleges that plaintiff's employment required him to go among defendant's "live wires"; that his work required great care and attention on account of dangerous electricity, as plaintiff well knew, and that while so employed he received an electric shock which caused him to fall a con-

siderable distance to the ground; but says that it was not negligent toward the plaintiff, and that his fall and any other injury were occasioned entirely by the careless and negligent manner in which he performed his work under conditions all of which he well knew.

The answer also alleges that on October 12, 1898, plaintiff demanded reimbursement for his damage; that defendant, while denying liability, paid him $325, and received from him a release in full in the following terms:

"Received of New Omaha Thompson-Houston Electric Light Co. this twelfth day of October, 1898, the sum of three hundred and twenty-five dollars, in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the first day of July, 1898, while in the employment of the above.

"325.00. J. C. ROMBOLD.

"Witness: W. F. WHITE.

"Address, Omaha, Neb."

And the answer alleged that this release was intended to and did cover all the plaintiff's claim in this action.

The plaintiff's reply denied all this answer except so far as it admitted matter in his petition; he alleged that the defendant's vice-president and general manager, White, represented to him that the defendant had a contract of insurance for the benefit of its employees; represented that the insurance company was required to and did pay for injuries received by defendant's employees, the amount of expenses incurred for medicine, doctor's service and hospital fees; stated that the $325 was not in payment of defendant's liability, but a payment to the employee regardless of the liability of defendant, and its receipt would be no discharge of the defendant; and stated further that such payment was simply to reimburse plaintiff for his expenses; alleged that White agreed to assist plaintiff to get a speedy and favorable settlement with the insurance

company, and agreed that in addition to whatever the latter should pay, defendant would in April following pay plaintiff $500, and give him employment so long as he saw fit to retain it; that at defendant's instance plaintiff went up to its office to meet the representative of the insurance company and make a settlement; that an agreement was entered into whereby the insurance company was to pay plaintiff $325 as his expenses incurred by reason of the injuries; that the insurance company's representative paid $325, and that said sum was received by plaintiff on account of expenses alone; that the question of damages was not discussed during the negotiations for the receipt; that plaintiff did not read the receipt, but the insurance company's agent pretended to read it and misread it so that from the reading and the representations plaintiff understood that it was simply a receipt for his expenses and had nothing to do with any claim for damages, and in reliance upon such understanding and representations he signed the receipt; that White, in promising that defendant should pay $500 and employ plaintiff, acted without authority and without intention on White's part to bind defendant, and without intention that defendant should pay plaintiff any such sum, and with intention to defraud and deceive plaintiff, who believed in and relied upon the honesty and good faith of White, and believed fully all the statements made by him, and was thus induced to sign said receipt without a personal examination of it; that at the time of signing such receipt he was suffering intensely with pain and ill with fever, not in his right mind, and in no condition to know what he was doing or to make a contract, and that he never did in fact agree to any settlement of his damages.

Under these issues trial was had, and verdict returned for $15,000. A motion for a new trial was overruled, and from a judgment on the verdict the defendant brings error.

Two briefs have been filed on behalf of the defendant company. The first, at page four, is summarized by its writer as follows:

"1. The company did not owe to the plaintiff the duty of inspecting the wires and making repairs in order that he might have a safe place to work at the place where this accident occurred.

"2. It was the duty of the plaintiff himself to observe the condition of the wires where he was working, and avoid contact with them and his failure to do so, shown by his own testimony, defeats a recovery.

"3. The court below erred in the fifth and eighth paragraphs of the charge, and in refusing to direct the jury to render a verdict for the defendant, on defendant's motion, upon the whole of the evidence."

The other brief states the claims of defendant as follows:

"1st. Assuming that the plaintiff was injured in the manner he describes, can it be said that his injuries were caused by the failure of the defendant to perform any duty it owed him as a regular lineman engaged in its service?

"2d. Assuming, again, that at the time of the accident the condition of the No. 4 wires was the same as the plaintiff found them in October following, was not the hazard incident to their condition, the same being open and obvious to even a casual and inexperienced observer, one of the assumed risks of the plaintiff's employment?

"3d. Assuming, again, that it was the duty of the defendant to have the wires properly taped before sending the plaintiff to work near them, and that it had neglected to perform this duty, was not the danger incident thereto an open and obvious one which the plaintiff was bound to see and guard against, and his failure to do so the proximate cause of his injuries?

"4th. Is the plaintiff not bound by the terms of the settlement, evidenced by the written release, signed by him?

"5th. Are not the damages excessive?"

Plaintiff contends, on page 7 of his brief:

"1st. That the evidence sustains the finding of the jury that the defective condition alleged was in existence at the time of the injury.

"2d. That the defendant is by law held to exercise ordinary and reasonable care to provide a safe place for its employees to perform their duties; that this reasonable and ordinary care required it to tape all splices and joints in insulated wires, and that in not having done so the defendant was guilty of negligence.

"3d. That plaintiff did not assume the risk of injury from contact with the untaped splices and joints, and in any event whether or not he did so was for the jury.

"4th. That it can not be said, as a matter of law, that plaintiff was guilty of contributory negligence in failing to see the untaped splices, and consequently whether or not he was guilty was for the jury.

"5th. The release signed by plaintiff was obtained by fraud and is not binding upon him so as to defeat a recovery."

It is clear from the examination of these briefs and from the record that the question in this case is upon the instructions. If the view of the law adopted by the trial court is sound, there is evidence to support the findings of the jury upon each disputed question of fact. These are practically two: First—Were the uninsulated splices on the wires July 1, 1898, and were they the cause of plaintiff's fall? Second—Was the receipt in full fraudulently obtained, and without an agreement for settlement?

As to the first, there is plaintiff's statement as to the manner of his fall; that he was doubled up by a severe shock, just as his shoulders were passing between these two wires, strong enough to draw his feet from the lower crossbar on which they rested. He also says that his right arm and the back of his left shoulder were burned by the electric discharge. As he went down between these wires with his face towards the pole, these exposed points, if they were then there, would strike him naturally at those places. He says that on October 1 or 2, after the accident, he went to the place and found the exposed splices. They seem to have remained there as late as the following spring. The attending physician testifies to the presence of burns ap-

parently from electrical contact, on plaintiff's shoulder and back, at his first examination after the accident. The line foreman for defendant testifies that he examined the place of the accident, with a view to ascertain its cause, immediately after it, and saw nothing of the splices and he thinks he would have seen them if they had been there. There is other testimony to the same effect. But the testimony goes to show that these splices were put on at some time to furnish electricity to a consumer, and when the service was discontinued the service wires were cut away leaving the splices and short projecting ends exposed. The plaintiff testifies that he had passed by this place and was acquainted with the line at that point, and during his employment with defendant there had been no service connection there. There seems to have been none afterwards, so far as the evidence shows. Defendant seems not to have attempted to show when the service wires were cut away, or the history of these splices in any way. It contents itself with denying that they were there on July 1, 1898. It would seem clear that there was evidence for the jury to consider as to whether or not the exposed points of these splices were there on July 1, and were the cause of plaintiff's shock. Defendant urges that the first positive evidence of their existence dates from October 1, three months after the accident, and that this is too remote to be considered. But where there is absolutely nothing to show that any service connection at this point had been either made or cut during that time, and plaintiff had been incapable of getting to the place sooner than that, there seems no error in admitting this evidence.

As to the other question of fact, defendant's counsel do not claim that there is no evidence of deceit on the part of its manager, White, and of the insurance company's agent, Gilbert. They do not claim that there is no evidence that the signing of the receipt in full was in consequence of such deceit. They say, however, that there was no fiduciary relation between plaintiff and either White or Gilbert; that plaintiff had full opportunity on his own story

to read the instrument, and if he did not do so, but negligently signed, he is estopped. They also claim that the evidence of plaintiff alone as to the fraud in procuring his signature to the receipt is not enough to overcome that of the paper itself, which was executed in duplicate, and the testimony of White and Gilbert in denial of his statements. It seems clear, however, that plaintiff was somewhat corroborated by other witnesses as to negotiations with White touching his expenses, and by the circumstances of the case. If the trial court was correct in telling the jury as to the effect to be given to the statements of White and Gilbert to plaintiff, if the jury should find them to have been made as plaintiff testified they were, then it must be conceded that the verdict—that this receipt constituted no valid defense—is supported by evidence.

The dispute therefore turns upon the instructions given by the trial court, and as to these the question is rather in reference to the application of principles, than concerning principles themselves, of law involved in the case. The question raised as to the sufficiency of the evidence of negligence on defendant's part turns upon the trial court's application of the doctrine of an absolute duty resting on the employer to make reasonable efforts towards providing a safe place for the employee to work.

The eighth instruction was in the following terms:

"It was the duty of the defendant company to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among the electric-light wires. If such a degree of care and caution required said wires to be insulated, then it was negligence in the defendant to permit said wires, or a wire, or part of a wire, to be without proper insulation, and thereby subject its lineman to risk of injury; and if by reason of a want of such insulation a lineman, without fault on his part, suffers injuries, then the negligence of the company would be actionable and the injured lineman could recover proper damages."

This instruction told the jury that it was competent for them, if they concluded that "reasonable care" required defendant to insulate its wires, to find negligence from the simple fact that the wires were not insulated. A complaint is made that this instruction assumes as an established fact that the wires were not insulated when the accident happened. It is hardly open to this criticism. It, of course, assumes that the wires may not have been insulated, but does not, necessarily, assume anything more than that. The next instruction explicitly told the jury that, to recover, plaintiff must show by a preponderance of the evidence that the untaped splices were on the wires when he was hurt, and caused his shock and injury, and that the fact that they were found there some months afterward would not alone warrant a finding that they were there on July 1. This instruction 8 distinctly told the jury that if they thought reasonable care and caution on defendant's part required the taping of these splices, and plaintiff was hurt, without fault on his part, because they were not taped, he could recover. That is, the trial court held that it would not say that an absolute duty to insulate these wires at that point rested on the defendant, or that it did not so rest. It left the decision of that question to the jury, under the evidence. Counsel complain that the wording of the instruction led the jury to believe that the court meant to say that an absolute duty to insulate the splices rested on defendant. Such is not the meaning of the words, and if the distinguished counsel of defendant desired a clearer statement of the proposition they should have furnished it. In truth, their contention was then, and is now, that under the facts in this case, no duty to this plaintiff on defendant's part to insulate these wires existed. They said then, and say now, that defendant was relying upon plaintiff and his fellow linemen to do just this work of insulating, and, if he and they did not do it, they had no right to complain of the consequences. The evidence is that there were no inspectors of work of this kind other than the linemen and

their foreman. The latter testified that the duty of finding and repairing such defects rested upon the lineman who first went up the pole; that if any such defects were found the lineman should repair them at once, if he could, and if not, report them. Plaintiff testified that no duty of inspection rested upon him, but admitted that if he saw such a place his instructions were to tape it or report it, and that there were no inspectors of the line other than the linemen themselves. He also testified, as has been stated, that no work on the line at this point had been done while he was with the company. He stated, too, that these were the only untaped splices he ever found on the lines. There was no plea, and there is now no claim, that he was injured by a fellow servant's negligence. Under these circumstances the trial court left the question, as to whether plaintiff assumed the risk, to the jury, as he had done the question whether leaving the splices untaped was negligence on defendant's part. This was done by instructions numbers 5 and 6, as follows:

"When the plaintiff entered the employment of the defendant, he assumed all of the ordinary and usual risks incident to the work that he was hired to do; but he did not assume any risk of which he had no knowledge and which was due to the negligence of the defendant. In going about and performing his work, the plaintiff had the right to assume that the defendant had exercised reasonable care to furnish him a reasonably safe working place, and he was not required to suspect that the defendant had been guilty of negligence, or to make any such investigation or inspection as would be prompted only by the suspicion that the defendant had omitted to perform its duty.

"If you believe from the preponderance of the evidence that the plaintiff was injured as alleged in his petition, and that said injuries were the result of a risk usual and incident to the work of a lineman, and not to the negligence of the defendant alone, your verdict must be for the defendant; but if you do not find that his accident was

the result of a risk assumed by him when he engaged in said work as a lineman for the defendant, then you will proceed to examine the evidence and determine therefrom whether or not said accident is attributable to the negligence of the plaintiff or of the defendant, or both, or neither."

That is to say, the jury were told to determine whether this risk from these untaped splices was one which the plaintiff assumed when he undertook the work, and as to which he was expected to look out for himself, or whether it was, as he claimed, the only instance of uninsulated splices on the line and a risk which reasonable care on the defendant's part would and should have prevented.

Plantiff urges that assumption of the risk by him is not pleaded, and cites *Union Stock-Yards Co. v. Goodwin,* 57 Neb. 138. That case holds that the company could get no advantage from assumption of risk on Goodwin's part by his continuing to work with knowledge of a rule that loaded cars were to be taken to the chutes without inspection, because no such assumption of the risk was pleaded. It is contended that in this case the only issues raised are denial of the untaped splices and settlement, and that no assertion is made that plantiff assumed the risk. No exception, however, was taken by plaintiff to instruction 5, and it is clear that the trial was conducted by both parties under the theory that the plaintiff assumed the ordinary risks incident to his employment, and that these could be shown. The jury, however, found that this one from untaped splices was not among them, but was the result of his employer's neglect. The trial court evidently took the view that it was at least possible for impartial and reasonable jurors to take the view that the exposed conditions of these wires was due to the employer's neglect of the proper precautions for the employee's safety, and that the latter had no knowledge of any such danger from an untaped splice, and therefore did not assume it. To the contention of defendant that because it was plaintiff's duty to look for this defect and

remedy it, therefore he is chargeable with knowledge of it and assumed all risk from it, the reply is that the evidence does not show any such duty of inspection; that plaintiff is simply a lineman; and that the most which the evidence shows is that he was charged with the duty of repairing or reporting structural defects which came under his observation. We are not prepared to say that, under this evidence, the trial court was wrong either in leaving to the jury the question as to whether exposed splices might constitute negligence, or in submitting the question as to plaintiff's assuming the risk.

The question as to contributory negligence is urged at length. Defendant claims that these exposed splices constituted so obvious a danger upon two wires, which the lineman must have known, from the fact that they were both spliced, to be corresponding positive and negative wires of a circuit, that to go between them without any attention to the insulation was foolhardiness. It appears that the linemen were instructed as to the danger of a "short circuit" between positive and negative wires, but it does not clearly appear that there was anything unusual or out of the ordinary in the manner in which plaintiff in this instance performed his work. If the exposed splices were there on July 1, they seem to have escaped the foreman's notice when he was looking for the cause of the accident. There was some testimony tending to show that different wires were paired as positive and negative at different times, and that the workmen depended upon the insulation.

Counsel for plaintiff claims that there is no pleading of contributory negligence, and therefore, if there was any, it can not avail the defendant. In this again we find that counsel took no exceptions to the instruction in which this question was submitted to the jury. They treated this answer, with its allegations of plaintiff's negligence and denial of any on defendant's part, as a plea of contributory negligence, and permitted the court to so instruct without exception. They can not now claim this issue is not in the

case. If the evidence of his starting down between these wires, with the exposed splices there, is conclusive proof of contributory negligence on plaintiff's part, he ought not to recover, and the court should have so instructed the jury. The question, however, was left to the jury.

It is complained that there was error in telling the jury, in the seventh instruction: "Neither negligence nor contributory negligence can be presumed. Whoever alleges that another was guilty of negligence or contributory negligence must establish it by a preponderance of the evidence, or fail in his action or defense."

It is claimed that this omits a feature present in this case, namely, that a party's own evidence may show contributory negligence. But by instruction No. 11 the court told the jury: "If plaintiff's own testimony tends to show that he was guilty of carelessness which caused or aided in causing his injuries, then the burden shifts and it devolves upon the plaintiff to satisfy you by a preponderance of the evidence that he was not guilty of contributory negligence."

Is seems to be conceded that if these were in one instruction they would together correctly state the law. It is thought that they must be considered together. If their effect, when so taken together, is to correctly submit the issue of contributory negligence, the placing of them in separate paragraphs can hardly have been prejudicial. It is thought that the trial court was right in refusing to say, as a matter of law, that the proof showed contributory negligence, and that defendant can not justly complain of the manner in which the instructions submitted this question.

It remains to consider the questions raised as to the settlement, and to excessive damages. The settlement seems to have been the hardest contested matter at the trial. In regard to this, defendant's manager, White, and Gilbert, the insurance company's western agent, both denied plaintiff's statement, and it is insisted now that the receipt, backed by their testimony, is conclusive against

plaintiff. The right of plaintiff to have this question submitted to a jury on the trial court's view of the law has been indicated. The court refused an instruction in these terms: "If you find from the evidence that plaintiff had the capacity to read the release signed by him in duplicate and that Gilbert pretended to read same to plaintiff, though you believe Gilbert in fact misread said release, yet if before plaintiff signed it the plaintiff had an opportunity to read it, but nevertheless chose to rely upon what Mr. Gilbert told him about its contents, the plaintiff is estopped by his own negligence from claiming that said release is not legal and binding upon him according to its terms."

The instruction actually given was as follows: "If you find from a clear preponderence of the evidence that the paper offered as a release does not correctly recite the settlement that was in fact made between the plaintiff and Mr. White or Mr. Gilbert, or both; and if you further find that the settlement really made was limited to the matter of doctor's bills and hospital expenses, and that the plaintiff was induced to sign such release by its being misread to him in such a way as to cause him to understand and believe that it was a receipt only to an insurance company for money paid on account of his hospital expenses and doctor's bill, and not on account of his injuries generally, and if such misreading was done for the purpose of deceiving him, and procuring his signature to a paper which was contrary to the settlement he was making, the plaintiff would not be bound by such receipt. If you find that said release is not binding on the plaintiff, then you will proceed to a consideration of the evidence with respect to the charge of negligence made against the defendant; but if you find that said release truly states the settlement that was made when the receipt was signed, then you need proceed no further in the consideration of the case, but should return a verdict for the defendant."

As before stated, unless plaintiff is to be held to have been under a duty to read this paper and so inform him-

self as to its contents, and to be estopped from denying its validity inasmuch as he did not do so, there is evidence that should go before the jury. Upon this question of estoppel by reason of failure to read the release defendant cites and relied upon *Wallace v. Chicago, St. P. M. & O. R. Co.*, 67 Ia. 547, 25 N. W. 772. The instruction, which in that case the court says should have been given, does bear a considerable analogy to the one tendered at the trial of this case. It, however, wholly omits the misreading to induce signature, charged in the present case and mentioned in the instruction here given. The court in the Iowa case expressly says of the plaintiff (p. 550): "He does not claim that he requested the instruments to be read to him, and that the contents were purposely misrepresented in the reading, or that he was deceived by any sleight of hand, legerdemain, or artifice." In the present case the court was asked to say, as a matter of law, that plaintiff, because he could read, had the opportunity to read it and did not, but relied upon the other party, was estopped to deny the effect of an instrument which he claimed, and has some corrobaration in claiming, did not represent the agreement he had made, and which, he says, was intentionally misread to him to procure his signature. We hardly think it can be pronounced error to tell the jury that if they found the plaintiff's allegations supported by a clear preponderance of the evidence, the receipt was not binding.

Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203, cited by defendant, was a case of suit by an assignee against a stockholder for unpaid portions of the capital stock. As against the creditors, the taking of the stock upon fraudulent representations was held to fix the liability, unless the contract had been seasonably repudiated and the stock tendered back on rescission. Upon the latter question, it was held that plaintiff had a right to the opinion of the jury.

In *Woodbridge v. DeWitt*, 51 Neb. 98, 100, this court says: "It is elementary that where a contract is reduced

to writing, parol evidence is not admissible to contradict it or vary its terms. It is also true that a party can not generally avoid the effect of a written instrument by showing that he signed it without reading it or in ignorance of its terms, but he may avoid it for fraud. The general rule referred to is not applicable in a suit between the original parties to the contract, where the defense is that the writing, by reason of fraud, does not embrace the contract actually made." The third paragraph of the syllabus of the same case says that there is no estoppel where fraud is resorted to "in order to induce the other to sign without reading." If a "clear preponderance of the evidence" in the present case, as the jury found, shows that this writing did not represent the contract made, and that it was misread to plaintiff by those procuring it for defendant, the conclusion seems inevitable that it was done to induce him to sign without reading. The jury was told that the evidence must show "by a clear preponderance" that it was for this purpose.

A contention is made, but apparently not with great confidence, that the $325, which was paid on the settlement, should be returned. The trial court instructed that if the settlement was void the $325 must be credited upon the damages. If the fraud was established, and plaintiff's claim was found to exceed the sum paid, this seems to make a just application of the money. As counsel for plaintiff say, the settlement admitted to have been made of the expenses, is not sought to be impeached. It would seem that only the writing, so far as it embodies a settlement of damages, is attacked, and no obligation to restore the $325 rested upon plaintiff. *Missouri P. R. Co. v. Goodholm*, 60 Pac. (Kan.) 1066; *O'Brien v. Chicago, M. & St. P. R. Co.*, 89 Ia. 645, 657.

It is urged that the damages are excessive, and so much so as to show passion and prejudice on the jury's part. Cases are cited in which, for loss of a foot, awards somewhat smaller than this one have been held excessive and remittiturs ordered. Other cases are cited by plaintiff

where the award for the loss of a foot was larger than in this case and was yet sustained. In this case both feet were injured, the right one was amputated nearly eleven months after the injury and after much suffering. The plaintiff was 33 years of age, and earning $65 monthly at his employment. It can not be said that the amount alone of this verdict is such as should absolutely set it aside. It is true that for a slightly smaller sum an annuity to the full amount of plaintiff's former earnings could be obtained, and his present earning capacity must be something. On the other hand, his sufferings have undoubtedly been great and their value can not be adequately measured. We have no measure which we can apply to determine that any reduction should be made in these damages. If the findings that there was negligence of the defendant, no contributory negligence of plaintiff, no assumption of the risk and no settlement of damages, are all sustained, it would seem that the judgment should be affirmed.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THE following opinion on rehearing was filed January 6, 1904. *Judgment below reversed:*

1. **Employer: EMPLOYEE: REASONABLE CARE IN INSURING SAFETY OF LATTER.** Ordinarily, in providing his employees with a place to work, or tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees.

2. **Continuing Duty.** The foregoing duty is a continuing one, and the employer is also bound to keep such place, tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view.

3. **Duty Devolving Upon Employee.** But where, from the nature of

the work, the contract of employment, or other facts and circumstances, the duty to make inspection and discover defects devolves upon the employee, the employer is not liable for an injury resulting to such employee from a defect which the latter, by reasonable inspection, would have discovered.

4. **Instruction.** An instruction which, in effect, directs a finding on an issue upon which the evidence is conflicting, is erroneous.

ALBERT, C.

This case is before us on rehearing. The former opinion is reported *ante* p. 54, and contains a statement of the issues and of the questions presented for review. By reference to that opinion it will be seen that the defendant is a corporation, and maintains a system of wires for the purpose of carrying electricity for lighting and other purposes; that the action is for damages for personal injuries sustained by the plaintiff while in the employ of the defendant, and in the course of his employment as a lineman; that the injuries were occasioned by his coming in contact with the ends of spliced wires, which ends, it is alleged, were not insulated. Negligence is the gist of the action, and the negligence upon which the plaintiff bases his right to recovery is the omission of the plaintiff to insulate the ends of the wires with which he came in contact.

We are satisfied with the conclusion reached in the former opinion upon every question, save that relating to the eighth paragraph of the charge to the jury, which is as follows: "It was the duty of the defendant company to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among the electric light wires. If such a degree of care and caution required said wires to be insulated, then it was negligence in the defendant to permit said wires, or a wire or part of a wire, to be without proper insulation, and thereby subject its linemen to risk or injury; and if by reason of a want of such insulation, a lineman, without fault on his part, suffers injuries, then the negligence of the company would be actionable and the injured lineman could recover proper damages."

It is undoubtedly a general rule of law that the employer is bound to exercise reasonable care not to expose his employees to unreasonable or extraordinary danger by putting them to work in dangerous places or with dangerous tools and appliances. 2 Thompson, Negligence, 972; Wood, Law of Master and Servant, sec. 398. This rule not only makes it the duty of the employer to provide suitable tools and appliances in the first instance, but also to use all reasonable care in keeping them safe and serviceable, and to make seasonable inspection of the condition thereof with that end in view. *Union Stock-Yards Co. v. Goodwin,* 57 Neb. 138; *Brann v. Chicago, R. I. & P. R. Co.,* 53 Ia. 595, 36 Am. Rep. 243; *Ford v. Fitchburg R. Co.,* 110 Mass. 240; *Shanny v. Androscoggin Mills,* 66 Me. 420; *Solomon R. Co. v. Jones,* 30 Kan. 601; *Chicago & N. W. R. Co. v. Jackson,* 55 Ill. 492, 8 Am. Rep. 661. The foregoing rule is subject to many qualifications and exceptions, one of which is that where, from the nature of the work, the contract of employment, or other facts and circumstances, it is the duty of the employee to make inspection and discover defects in the tools or appliances furnished him, the employer is not liable for an injury resulting to such employee from a defect which the latter, by reasonable inspection, could have discovered. *McGorty v. Southern New England Telephone Co.,* 69 Conn. 635, 61 Am. St. Rep. 62; 20 Am. & Eng. Ency. Law (2d ed.) 142, and cases cited. In other words, under such circumstances, it is no longer the duty of the employer to protect the employee against such defects, but of the latter to protect himself.

One of the theories of the defense in this case, abundantly supported by the evidence, is that it was a part of the duty of the plantiff as a lineman, from the nature of his work, his contract of employment, and the facts and circumstances in the case, to inspect the wires, among which he worked, for defects and imperfections, including such defects as those alleged to have caused the injury in question; that a reasonable inspection would have disclosed

such defects; and that he failed to make such inspection. In other words, one of the issues of fact in the case is whether it was the duty of the defendant to protect the plaintiff from the defects in question, or whether that duty devolved upon the latter himself. The instruction referred to is to the effect that such duty devolved upon the defendant, and amounted to the direction of a finding against the defendant on that issue. That, in view of the evidence, which, to say the least, is sufficient to entitle the defendant to the submission of that issue to the jury, is erroneous. We have not overlooked the qualification in the instruction that the injury must have been without fault on the part of the plaintiff. But it is obvious, we think, that this was not intended to qualify or limit the duty imposed upon the defendant by the first sentence, but rather to cover the theory of contributory negligence. As thus qualified, the instruction still assumes that the duty devolved upon the defendant, which was one of the questions for the jury.

We have examined the other instructions in this case, especially those relating to contributory negligence and the assumptions of risks by an employee, and find nothing that would warrant us in holding that the error hereinbefore pointed out is cured by any other portion of the charge.

The plaintiff contends, however, that the defects in question were in the original construction of the line, and were not such as the plaintiff could be expected to look for or discover. But the evidence is amply sufficient to sustain a finding that it was the duty of the linemen to look for and discover, not only defects which arose from accident or wear and tear, but defects of every character, including those in the original construction. Hence, whether the defects which caused the injury were in the original construction, or originated afterward, is immaterial for present purposes.

It is recommended that the former judgment of this court be vacated, that the judgment of the district court

be reversed, and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

FALLS CITY STATE BANK v. JOHN WEHRLI.

FILED MARCH 4, 1903. No. 12,712.

1. Check: PAYEE: RIGHT OF ACTION: DRAWEE: FUNDS. The payee of a check has a right of action against the drawee if the latter has funds to meet it when it is presented.
2. Evidence: AGREEMENT: HONOR OF CHECKS. Evidence *held* sufficient to sustain a finding that there was an agreement by the bank to honor checks to be given in payment for a car-load of horses by the drawers.
3. ———: ———: ———. LIABILITY OF BANK. An agreement to honor checks for a car-load of horses, the drawee bank to be secured by a draft and bill of lading on their shipment, *held* valid, and the bank liable for the payment of the checks, it having sufficient funds for such purpose derived from the draft.
4. Objection: OTHER LIABILITY. It is no objection to such an agreement that the drawers were already indebted to the bank on other transactions.

ERROR to the district court for Richardson county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

Isham Reavis and *Frank Reavis*, for plaintiff in error.

Francis Martin, *John Kennish* and *Arthur J. Weaver*, *contra.*

HASTINGS, C.

The first error complained of in this case is that the bill of particulars, originally filed in justice court, and on which, by agreement, the case was subsequently tried on appeal in the district court, does not state a cause of action. The petition alleges that the defendant bank is a corporation; that on May 16, 1901, the plaintiff, Wehrli, sold to M. A. and Jacob Miller, doing business in the name of M. A. Miller, a horse for $78; that the Millers shipped the horse to St. Louis, and deposited with defendant for plaintiff's use $78 as the proceeds of the sale, and that the defendant bank agreed to pay plaintiff the amount on Miller's order; that the Millers, father and son, gave their check in the name of M. A. Miller in plaintiff's favor for the amount; that it was presented, and payment by defendant refused; that the defendant holds the said sum of $78, the proceeds of said sale of plaintiff's horse so deposited by the Millers, for plaintiff's use and benefit, and is indebted to the plaintiff in the sum of $78 and interest, and $3 protest fees upon the check.

Defendant admitted its incorporation, and denied the other allegations of the bill of particulars. It claims that there is no privity of contract between plaintiff and defendant, and no cause of action is alleged for that reason. We are unable to hold to this contention. It is well settled in this state that the payee of a check has a right of action against the drawee for the amount if the money is still there. *Fonner v. Smith,* 31 Neb. 107, 11 L. R. A. 528, 28 Am. St. Rep. 510; *Union P. R. Co. v. Metcalf,* 50 Neb. 452, 461; *Columbia Nat. Bank of Lincoln v. German Nat. Bank of Lincoln,* 56 Neb. 803, 807. There seem to be facts enough alleged to justify the bringing of an action by the payee of this check. He alleges that the money, expressly deposited to pay it, is still in the bank.

It is next claimed that the allegations and proof do not agree. The basis of this claim is the fact that among the allegations of the bill of particulars is that the horse was

sold in St. Louis, and the proceeds of the sale, in the sum of $78, deposited with the defendant. The evidence discloses that the horse was bought May 16, $2 paid in money and $78 by the check on the bank dated May 18, and the horse had been shipped nowhere. The check designated no particular fund out of which it was to be paid. It is urged—and this is probably the real question in the case—that the evidence does not disclose any agreement on the part of the bank to pay this check out of the proceeds of the sale of this horse or any other horse. Stress is laid by counsel on the proposition that the name of the plaintiff, Wehrli, was never mentioned between the Millers and the bank in their negotiations with regard to the shipment of these horses. This seems to be true, but there clearly was an understanding between the Millers and the cashier of the bank, Greenwald, that they might check on the bank in payment for a car-load of horses and turn in a draft and bill of lading of the horses in settlement for the checks.

The horses were bought and the Millers drew checks on the defendant bank to the amount of $2,175.50. When shipment was made a draft for $2,200 and the bill of lading were turned over to the bank. The bank had paid only a small number of the checks. As soon as it was informed that the $2,200 draft had been paid it refused to cash any more checks and applied the remaining proceeds of the draft to the payment of some claims it held against the Millers. At the time the $2,200 draft was drawn the amount of the outstanding checks drawn in purchase of the car-load of horses was computed, and a statement, the correctness of which is not disputed, was given by the Millers to the cashier of the bank, Greenwald. The bank claims that the Millers' account, before anything was checked for this car-load of horses, was overdrawn about $3,000. It is claimed that any arrangement to permit their checking would be an agreement by the cashier to allow an overdraft on the bank, and could not be upheld. It is urged that the cashier had no authority to make any such agreement that the Millers might draw on the bank

without funds, and that whatever arrangements were made were void.

It is also urged that even if the agreement to honor these checks for horses was made by the cashier, Greenwald, it did not give to the payee a right to bring an independent action for the payment of the check; that at the most the proceeds of the horses purchased in this manner would be only a trust fund for the payment of all the checks issued for horses on the strength of such agreement; and that the money could only be reached by a suit in equity brought by some beneficiary of the trust to vindicate his own right and that of all the rest.

In fact, the defenses in this case are, in the first place, that the cashier of the bank never entered into such an arrangement as is claimed; that the arrangement, if there was one, was not expressly for the benefit of the plaintiff Wehrli; that the arrangement, if made, was void because providing for an overdraft and therefore beyond the cashier's authority; and, finally, that the arrangements in no event carried the right to sue at law in a justice court, but only gave a right in equity to the owners of the horses.

This first claim of the defendant bank was found against it by the trial court, and we see no occasion for disturbing its finding. There was certainly an arrangement between the bank's cashier and the Millers that they might buy a car-load of horses, pay for them by checks on the bank, and settle for these checks by turning in a bill of lading and draft for the proceeds of the horses when sold in the market.

As to the second point, whatever might be the rule of law as to a simple agreement to permit a party to overdraw his account, it seems clear that it was competent for the cashier to agree to advance money to the Millers to pay for a car-load of horses under an arrangement for securing the bank by draft for the proceeds accompanied by the bill of lading. At all events, such transactions are made daily, and the fact that the Millers were already overdrawn at the bank, as a result of previous dealings, would not affect the right to maintain this action.

The third point, that there was no right to sue at law, can not be sustained if the agreement that the Millers might check out for these horses is upheld. The cases before cited amply uphold the doctrine that in the state of Nebraska the payee of a check has a legal action against the drawee as long as the latter has funds subject to the check.

In our view of the case, the agreement that the Millers might check, was equivalent to putting the amount of money necessary to purchase this car-load of horses to their credit for that purpose, and until it was drawn out for that purpose, or the horses otherwise paid for, it would be there. There is no claim that the money has been drawn out for this purpose or for any other, nor that there is any uncertainty as to the amount of the outstanding checks given for horses, or as to the persons to whom they are payable. The bank, after making the arrangement and getting the $2,200 draft, applied its proceeds, so far as they were not already paid upon checks, to the satisfaction of its own previously existing claim. If it be granted, as we think it must, that the finding as to an agreement to honor this check and to have as a fund for its ultimate payment the $2,200 draft, should be upheld, then the judgment of the district court is right.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

L. J. HAZEN V. WILLIAM WILHELMIE.

FILED MARCH 4, 1903. No. 12,695.

Sale of Chattels: CONTRACT: QUALITY OF GOODS: ACCEPTANCE: WAIVER. In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he

inspected, retained and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required.

ERROR to the district court for Merrick county: JAMES A. GRIMISON, DISTRICT JUDGE. *Reversed.*

John C. Martin, for plaintiff in error.

John Patterson, contra.

LOBINGIER, C.

This is an action to recover for nursery stock alleged to have been sold and delivered in pursuance of the following contract:

"I have this day bought of L. J. Hazen the following nursery stock, to be packed at the Arlington nursery, at Arlington, Neb., for which I agree to pay him or bearer twelve dollars in cash, on delivery at Grand Island during the fall of 1899.

"I hereby agree to come or send for the goods purchased herein on the day set for delivery, at which time said goods are to be in good order, but after that date will be wholly at my risk.

"It is agreed that the entire contract is printed herein and that no verbal agreement is binding and I agree not to countermand this order.

"All trees, etc., that fail to grow will be replaced at one-half price; provided stock is planted and cared for according to directions. [Here follows a description of the stock.] Purchaser's signature: WM. WILHELMIE.

"P. O. Address, Chapman. Location, C. 8. Date. P. O. Box, 125.

"I agree that the fruit trees, plants, etc., shall all be delivered in a healthy condition. L. J. HAZEN, *Salesman.*"

The answer contained a general denial, and alleged that the Arlington Nursery Company, and not plaintiff, was the real party in interest, and pleaded a counter-claim

against it for a breach of the contract. The jury returned a general verdict for defendant, and plaintiff brings the case here by petition in error.

The principal defense relied upon at the trial was the defective quality and condition of the nursery stock. This defense was not expressly pleaded in the answer, but it is claimed that since the contract requires the stock to "be delivered in a healthy condition," the burden was upon plaintiff to show this as a condition precedent to recovery. Had the contract remained executory this would, doubtless, have been true, but, as will presently be disclosed, there was a delivery of nursery stock on the part of plaintiff and consequent action on defendant's part, which required the application of a different rule.

Among the instructions given by the court and duly excepted to by plaintiff was the following:

"So, if you believe from the evidence that the stock was not in a healthy condition when it was delivered, if it was delivered, and the defendant did not know of the defect when he received it, if he did receive it, and could not with reasonable care have discovered such fact, but proceeded on the assumption that the stock was in a healthy condition, then you should find for the defendant."

It is complained that this instruction is inapplicable to the evidence, and improperly submitted a question of law to the jury; and after a careful examination of the record, we are of the opinion that the complaint is justified. The evidence discloses that the stock was delivered by a liveryman from Grand Island at the home of defendant. The latter was absent at the time, and the evidence is conflicting as to what took place there. Defendant's wife and son, who were at home, testify that they declined to receive it; the latter stating, as he claims, that he was not entitled to do so because he did not buy it, and the former testifying that the trees "were bad and they were dead." Both state that the liveryman left the trees at the house. But he denies that any complaint was offered as to their quality. The defendant testifies that on his return, a few days later,

he found that his son had buried the trees, but that he examined them, and found they were rotten, and that the roots broke off when handled. Nevertheless he testifies that he buried them again and the next spring resurrected and planted them, caring for them according to plaintiff's instructions, but that they never grew or sprouted. He admits, however, he never asked plaintiff or any one representing him to replace the stock.

We think the evidence thus adduced on behalf of defendant conclusively showed an acceptance of the stock on his part and a waiver of his right to object on the ground of quality. We may concede that the original delivery at defendant's home during his absence was not binding upon him, though the contract merely called for delivery at Grand Island, and required defendant "to come or send for the goods" there, and plaintiff was thus going beyond his strict legal duty in sending them to defendant's home. But at least after defendant had returned, found the stock there, and made a complete inspection of it, we think it was his duty to take some steps to notify plaintiff that the quality was unsatisfactory, if such were the case, and that the stock would not be received. We can not reconcile his statement that the trees, when he first saw them, were rotten, so that the roots broke off, with his further testimony that he planted them the next spring and cared for them, apparently expecting them to grow. At any rate, having elected to keep them and to exercise acts of ownership over them, he waived any objection as to their quality. In *Roman v. Bressler,* 32 Neb. 240, where the subject-matter of the sale was corn, which it was claimed was hot and damaged, this court said: "The defendant accepted the corn, as he claims, with knowledge of its condition. If it did not fill the conditions of sale he should have refused to receive it." In Newmark, Sales, section 266, the rule is thus stated and supported by authorities: "The receiving and retaining of the property under the contract with knowledge of such defects, though under objection as to the defective quality of the property, has

the effect of an acceptance of the property delivered, as a performance of the executory contract, and a waiver of the implied condition."

Even where the article sold is delivered for trial and inspection, only, the vendee must act with reasonable promptness in giving notice of objections. As was said in *McCormick Harvesting Machine Co. v. Martin,* 32 Neb. 723, 726, "If after a reasonable fair trial the purchaser finds that it does not conform to the warranty he may return the same. If he retains it beyond a reasonable time he will be deemed to have waived all objections to it." See also *Moline, Milburn & Stoddard Co. v. Pereau,* 52 Neb. 577; *Havens v. Grand Island Light & Fuel Co.,* 41 Neb. 153.

But it is claimed that defendant did not know plaintiff's address, and was therefore unable to notify him of the alleged defective quality of the stock. The evidence fails to show, however, that defendant made the least effort to find plaintiff or to ascertain his address. Defendant testifies that he never even asked plaintiff where he was living. We think, moreover, that there were certain facts brought to defendant's attention which would at least have put him on inquiry as to where plaintiff could be notified. Thus the contract recites at its very beginning that the stock was to be packed at the Arlington Nursery, at Arlington, Nebraska, and plaintiff is described as a "salesman," presumably of that nursery. That this was understood by defendant, seems to be indicated by his answer and counter-claim, in which he alleges that the nursery company is the real party in interest and the owner of the claim sued upon. The evidence discloses that defendant had a copy of this contract, and with all these facts before him, we think it was at least incumbent on him to show that he had made an effort to reach plaintiff by addressing him at or in care of the Arlington Nursery. Again, both plaintiff and the liveryman who delivered the stock testify that they wrote defendant at his post-office at Chapman, relative to the nursery stock. Defendant denies that he

received any notice from plaintiff, but fails to deny the testimony of the liveryman, who was known to defendant's son, as the testimony shows, to be a resident of Grand Island. We do not think that defendant can claim a legal excuse for his failure to give notice of the alleged defects in the nursery stock without showing an attempt to utilize at least one of these different means of reaching plaintiff. The testimony shows that one Wilkinson went out to defendant's farm about the last of May, 1900, to collect plaintiff's bill for the trees. Defendant testifies that he showed the trees to Wilkinson, and that they were dead, while the latter says that only a small portion of them were dead and that the rest were growing. But whichever statement might have been believed by the jury, we can not think that it affects the question of notice, for this was more than seven months after the stock was delivered, and meanwhile defendant had retained and treated it as his own.

Under the terms of the contract plaintiff was entitled to a replacement at half price of such of the stock purchased as failed to grow. We think he would have been entitled to enforce that right in this action had he pleaded it, and shown a proper demand on plaintiff. But we can not think that under the testimony which he himself has produced, defendant was entitled to be relieved entirely of liability for the purchase price of the stock.

There was a conflict in the evidence as to whether three of the trees purchased were ever delivered at all, and plaintiff requested an instruction covering this point, which we think should have been given.

The objection as to the admission of portions of the trees in evidence is not assigned in the petition in error, and the remaining questions are not such as are likely to arise upon another trial.

We recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

JOSEPH HARKER V. SARAH J. BURBANK ET AL.

FILED MARCH 4, 1903. No. 12,475.

1. **Appeal Bond: JOINT OBLIGEE: ACTION: REAL PARTY IN INTEREST.** Under the provisions of section 29 of the Code of Civil Procedure, a joint obligee in an appeal bond may maintain an action thereon in his own name without joining the other joint obligee, where he alleges and proves that he has purchased the interest of his joint obligee, is the owner of the bond, and the real party in interest therein.
2. **Petition: ALLEGATION: ANSWER: DENIAL: PROOF: EVIDENCE.** Where such an allegation is contained in the petition and is denied by the answer, the plaintiff must prove the facts so alleged by some competent evidence, and, failing to do so, he can not maintain the action.
3. **Not Error to Direct Verdict.** In such a case, plaintiff having introduced all of his evidence without proving such allegations, it is not error for the court to direct a verdict for defendants.
4. **Withdrawal of Juror: CONTINUANCE OF CASE: DISCRETION OF COURT.** The propriety of allowing the plaintiff, under such circumstances, to withdraw a juror and continue the case in order to obtain further testimony, is a matter resting in the sound discretion of the court. *Violet v. Rose*, 39 Neb. 660.
5. **No Abuse of Discretion.** The record of the trial court examined, and *held* that the court was not guilty of an abuse of discretion in refusing such a request.

ERROR to the district court for Burt county: CHARLES T. DICKINSON, DISTRICT JUDGE. *Affirmed.*

Howard H. Baldrige, William H. De Bord and *Willis G. Sears*, for plaintiff in error.

H. Wade Gillis and *Harrison H. Bowes, contra.*

BARNES, C.

The plaintiff in error commenced this action in the district court for Burt county to recover of the defendants a sum of money alleged to be due and owing to him on an appeal bond given to himself and one William Harker, jointly, in the words and figures following:

"Know all men by these presents, That we, Sarah J. Burbank, as principal, and J. B. Walker and C. H. P. Busse, sureties, are held and firmly bound unto Joseph Harker and William Harker as in the following conditions set forth: The condition of the above obligaton is such, that whereas, in an action of forcible detainer tried before Charles T. Dickinson, county judge, in and for Burt county, Nebraska, wherein Joseph Harker and William Harker were plaintiffs, and Sarah J. Burbank was defendant, judgment was rendered by said county judge in favor of said plaintiffs, from which judgment the defendant now appeals to the district court of said county: Now, therefore, the condition of this obligation is such that if final judgment shall be rendered against said defendant in the district court, to satisfy said final judgment and costs, and to pay the plaintiffs a reasonable rent for the premises during the time of the wrongful withholding of the same."

Plaintiff set out the bond in his petition, and, in addition to the usual statements in such cases, alleged that afterwards, and prior to the — day of December, 1895, William Harker sold and transferred his interest in said premises and in the bond in suit to the plaintiff, Joseph Harker, and the said Joseph Harker became, for a valuable consideration, the sole and absolute owner of the interest of the said William Harker in said premises.

The answer of the defendants, among many other things, contained the following: "Defendants admit that the plaintiffs, on the 22d day of March, 1894, were the owners of the land described in their petition, say that William Harker deeded to Joseph Harker his interest in said land

on the 9th day of April, 1894, deny that he transferred his interest in the bond in suit to the plaintiff."

The questions of plaintiff's ownership of the bond and the rights of William Harker therein were thus made direct issues in the action.

The cause was tried to a jury, and after the plaintiff had introduced all of his evidence the defendants requested the court to direct the jury to return a verdict in their favor for the following reason: That the instrument on which this suit is founded is one which runs jointly to Joseph and William Harker; William Harker is not in any way a party to this suit, and there is an absolute failure of proof to show that the plaintiff, Joseph Harker, is the owner of the bond sued on. The court sustained the motion, and thereupon the plaintiff asked leave to withdraw a juror and continue the case to make additional proof. The court refused the request, and instructed the jury to return a verdict for the defendants, which was accordingly done. Judgment was rendered thereon, dismissing the action, and plaintiff prosecuted error to this court.

It appears that prior to April 9, 1894, the plaintiff and one William Harker were the joint owners, each owning an undivided one-half interest in a certain tract of land situated in Burt county; that on the 22d day of March of that year they entered into a written agreement by which they jointly leased said premises to the defendant Sarah J. Burbank, and placed her in possession thereof; that on the 21st day of May, 1895, the plaintiff and the said William Harker commenced a suit as joint plaintiffs and owners of said land, before the county judge of Burt county, Nebraska, against Sarah J. Burbank, setting up a termination of the lease, and a failure on her part to pay the rent of said premises, and praying the court to oust her from the possession thereof. The cause was tried and resulted in a judgment directing the return of the possession of the premises to be made by the said Sarah J. Burbank to the plaintiffs therein, and ordering a writ of dispossession to issue against her. Afterwards, and within

the time required by law, the defendants J. B. Walker and C. H. P. Busse, as sureties for Sarah J. Burbank, and with her, entered into the appeal bond on which this action is founded, and thus perfected an appeal to the district court.

It further appears that the cause was tried, and the trial resulted in a verdict and judgment for the plaintiffs, and that thereby the bond was matured and the defendants became liable to the said plaintiffs thereon. It further appears that on the 9th day of April, 1894, and before the commencement of the forcible detainer suit, William Harker executed and delivered to the plaintiff herein a warranty deed by which he conveyed to him his undivided one-half interest in the land so leased by them jointly to Sarah J. Burbank. The record further discloses that the plaintiff's deposition was taken twice in this action, and that he gave no testimony whatever as to his interest in the bond in question herein. In his first deposition we find the following: "State whether or not you ever purchased the interest of William Harker in the aforesaid land, being the land known as the Burbank farm? And state whether or not he made a transfer to you of his interest prior to September 20, 1899, and after March, 1895, and if so state as near as you can when said transfer was made?" This question was objected to as calling for a conclusion of the witness. The objection was sustained, and the plaintiff excepted. No other or further offer of proof was made as to the ownership of the plaintiff, or his interest in the bond in question herein. The warranty deed above spoken of, however, was attached to the deposition and made a part of it. After the deed was identified and attached as aforesaid, the following question was asked of the plaintiff: "State whether or not you ever purchased the interest of William Harker in this suit, or his interest in the rents due from Mrs. Burbank?" This question was objected to as calling for a conclusion of witness. The objection was sustained, and the plaintiff excepted, but offered no further proof on that point. In plaintiff's second deposition

the following appears: "State whether or not you and William Harker ever had any arrangement or agreement as to who should have the rentals of the property referred to in this suit, and state what the agreement or arrangement was?" This question was objected to as asking for a conclusion of the plaintiff. The objection was sustained, and the plaintiff excepted. He made no offer of proof of the facts indicated by the question, and there was no other or further proof to establish the title of the plaintiff to the interest of William Harker in the bond in question herein, except the general statement that he owned the premises described in the deed above mentiond.

The sole question presented for our consideration is whether or not there was evidence upon the question of the ownership and right of the plaintiff herein to maintain his suit on the bond in question, sufficient to require a submission of that question to the jury. The bond ran in favor of Joseph Harker and William Harker as joint obligees. By section 42 of the Code of Civil Procedure it is provided that the parties to an action who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason being stated in the petition. Under this section it has been held that parties jointly liable must be joined as defendants. *Fox v. Abbott,* 12 Neb. 328, 331; *Leach v. Milburn Wagon Co.,* 14 Neb. 106, 109; *Bowen v. Crow,* 16 Neb. 556, 559, and of course the same rule would apply as to plaintiffs.

It is thoroughly settled at the common law that joint obligees must sue jointly in actions *ex contractu,* and if it appears on the face of the pleadings in such cases that there are other parties to the contract who ought to be joined as plaintiffs, but are not, it is fatal to the action, and the defendant may raise the objection by demurrer or by motion in arrest of judgment, or he may urge it as a ground of reversal on error.

Section 29 of the Code of Civil Procedure provides that

every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32, and that section has no application to a case of this kind. We are satisfied from an examination of the petition that sufficient was alleged therein to enable the plaintiff to maintain this action in his own name, under the provisions of section 29, and without joining his joint obligee as a party plaintiff. Having alleged that he was the sole owner of the bond, that he had purchased the interest of William Harker therein, and was the real party in interest, it was incumbent on him to prove that fact by some competent evidence, and failing to make such proof, he could not recover.

As we have before stated, no direct evidence was introduced to substantiate the fact of the plaintiff's sole ownership of the bond. It is contended, however, that the deed which was attached to plaintiff's deposition was sufficient to authorize him to recover. We can not agree with this contention. The deed merely conveyed the undivided interest of William Harker in the premises, for the possession of which the action of forcible detainer was instituted, to the plaintiff. The recitals of this deed were not necessarily inconsistent with the fact that William Harker still had some interest in the suit in which the bond was given. We may well presume that he did have an interest therein notwithstanding the deed, because the suit was instituted at a time subsequent to the making of that instrument. The action was prosecuted to judgment in the county court in the name of Joseph Harker and William Harker, jointly, and judgment was rendered therein in their favor. One of the conditions of the bond was that the defendants would pay the costs of the action, which it appears amount to a considerable sum. Both obligees in the bond were interested in the payment of those costs, even if it be conceded that William Harker had no interest in the land. It follows that without some competent evidence to support plaintiff's allegation that he had purchased the interest of his joint obligee in that suit, was the

owner of the bond in question and the real party in interest therein, he was not entitled to maintain this action, and the court did not err in directing a verdict for the defendants.

It is contended by the plaintiff that the court erred in refusing to permit him to withdraw a juror and continue the case for the purpose of making further proof. It has often been held that the propriety of granting a request of this kind rests in the sound discretion of the court. *Violet v. Rose,* 39 Neb. 660. After a careful examination of the record of the trial, we are unable to say that the court was guilty of an abuse of discretion in refusing this request.

We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE W. SEIVER, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE, IMPLEADED WITH GEORGE MILTONBURGER ET AL., APPELLANTS.

FILED MARCH 4, 1903. No. 12,726.

1. **Injunction:** GARNISHMENT: WAGES: EXEMPTION: MULTIPLICITY OF SUITS. A suit in equity may be maintained to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject the wages of laborers, mechanics and clerks, which are absolutely exempt by law from attachment, execution, and garnishee process, to the payment of his judgment.
2. **Employer:** NECESSARY PARTY. The employer from whom such wages are due and who has been served with garnishee process is a proper and necessary party to such suit, in order to authorize the court to make a decree which will afford plaintiff suitable, adequate and complete relief.

3. ———: ———: SUMMONS TO ANOTHER COUNTY: JURISDICTION. Where the employer is thus made a party and the suit has been properly brought against him in any county, and service of summons therein has been made on him, a summons issued to the sheriff of another county, where the judgment creditor resides, which is properly served on him, gives the court jurisdiction of all the parties to the action, and full power to grant the proper relief therein.

4. **Defendant:** SUBSTANTIAL INTEREST. In such cases it must appear that the defendant served in the county where the suit is brought has a substantial interest in the legal questions involved, and the relief prayed for in the action, and that he is a real and not a sham defendant. *Miller v. Meeker*, 54 Neb. 452, and *Stewart v. Rosengren*, 66 Neb. 445, distinguished and approved.

APPEAL from the district court for Sarpy county: GUY R. C. READ, DISTRICT JUDGE. Judgment for plaintiff. *Affirmed.*

W. J. Courtwright and *S. S. Sidner*, for appellants.

H. Z. Wedgwood, for appellee Seiver.

John N. Baldwin and *Edson Rich*, for appellee, Union Pacific Railroad Company.

BARNES, C.

This was a suit in equity, in which George W. Seiver was plaintiff and the Union Pacific Railroad Company, George Miltonburger and Walter Miltonburger were defendants. The trial resulted in a decree enjoining the Miltonburgers from suing out or prosecuting any further or other proceedings in garnishment against the said Seiver, and at the same time the Union Pacific Railroad Company was restrained and enjoined from answering any such further or other proceedings, and from paying the wages which it owed to Seiver into court thereon, or to any one except him, on the ground that such wages were absolutely exempt to him from execution or proceedings in garnishment. From that decree the Miltonburgers bring the case here on appeal.

It appears that the appellants obtained a judgment before a justice of the peace at North Bend, in Dodge county, Nebraska, against the appellee and another, on a claim for damages caused by the breaking of a buggy; that appellee was a married man, the head of a family and resided at Papillion, Sarpy county, Nebraska, and was employed by the Union Pacific Railroad Company as its station agent at that place when the action was commenced; that appellants resided in Dodge county, and that they sued out garnishment proceedings against the appellee before the justice of the peace in that county and served the writ, or notice, on the Union Pacific Railroad Company, requiring it to answer in said court and pay over the wages due appellee, if any, in satisfaction of the judgment; that appellee employed an attorney, who went to Dodge county and successfully defended against the proceedings, and the garnishee was discharged; that within a month thereafter the Union Pacific Railroad Company was again served with garnishee process, and appellee was again required to and did employ an attorney to go to North Bend and defend against the proceedings, in order to save his exempt wages for the support of his family; that, on the appearance of appellee's attorney therein, the second proceeding was dismissed for want of prosecution; that within thirty days thereafter a third writ in garnishment was sued out by appellants and served on the Union Pacific Railroad Company, and said company then notified appellee that something must be done, or it would be necessary for it to, and that it would, pay over the wages then due him into court. In order to protect his right to the said wages, which were absolutely exempt to him, and to prevent a further multiplicity of suits and save himself from further trouble, annoyance and expense, appellee commenced this action in the district court of Sarpy county, where he resided, against the Union Pacific Railroad Company and the appellants, setting up the foregoing facts in his petition and praying for the relief which was decreed to him as aforesaid. The company was duly served with a sum-

mons in Sarpy county and thereupon a summons was issued to the sheriff of Dodge county and was served on the appellants. The railroad company defaulted, and thus, on its part, confessed all of the allegations of the petition to be true. Appellants appeared specially and objected to the jurisdiction of the court for the reason that the railroad company was only a nominal party, was improperly joined with them as a defendant in the suit, and that therefore the court obtained no jurisdiction over them. The same objection to the jurisdiction of the court was pleaded in their answers, and, while the court did not specifically rule thereon, still the objection was in effect overruled by retaining the action for trial, in trying the same and rendering its decree for the appellee herein. On the trial the appellee introduced his evidence, the Union Pacific Railroad Company by its default confessed the allegations of the petition as to it to be true, and the court so found, while the appellants introduced no evidence to contradict the allegations of the petition or rebut the evidence introduced by the appellee. Therefore the sole question for our consideration is one of jurisdiction.

It must be conceded that the decree, so far as the railroad company is concerned, is a proper one, and if the court had jurisdiction of the persons of the appellants, then the judgment is just and equitable as to them and must be affirmed. The facts pleaded and proved by the appellee surely call for the interposition of a court of equity, and demand the relief prayed for. It can not be successfully asserted that the appellee had an adequate remedy at law in this case. The court found that his wages, sought to be subjected by the proceedings complained of to the payment of the judgment, were absolutely exempt to him by law. The appellants knew this as well as he did, and yet, by a series of garnishment proceedings, amounting to a persecution in this case, they sought to compel him to pay the judgment out of such exempt money, or expend it all in protecting his legal right thereto. Not only this, but they evidently sought to annoy and harass

his employer until he must pay, or perhaps lose his employment. Again, it may be fairly assumed that by suing out a number of writs of garnishment appellee would at some time be unable to protect his rights, or the company would inadvertently default, and an order would thereupon be obtained which would result in compelling it to pay the money into court, leaving it still liable to pay the wages to appellee, or perhaps altogether deprive him thereof. Against such iniquitous proceedings there is no adequate remedy at law, and such practices should receive our severest condemnation. When the property of a debtor is exempt he is entitled to the possession of it, and should be protected in this possession in the most expedient manner. *Cunningham v. Conway,* 25 Neb. 615, 617; *Johnson v. Hahn,* 4 Neb. 139, 149. Appellee was entitled to the decree to save him from being harassed by a multiplicity of suits. *Johnson v. Hahn, supra; Uhl v. May,* 5 Neb. 157, 161; *Normand v. Otoe County,* 8 Neb. 18, 21; *Touzalin v. City of Omaha,* 25 Neb. 817, 824; *Schock v. Falls City,* 31 Neb. 599, 605; *Morris v. Merrell,* 44 Neb. 423, 430.

This brings us to the consideration of the question of jurisdiction. Section 65 of our Code of Civil Procedure provides that "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at plaintiff's request." Title IV (secs. 51-61*b*), after designating the actions which must be brought in a certain specified county, provides that every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned; and it is further provided in said title that a railroad company may be served with summons in any county into or through which its line of road passes. It follows that the Union Pacific Railroad Company was properly sued and served with summons in Sarpy county, and if it was properly made a defendant in the action, the issuance of a summons to the sheriff of

Dodge county, and its service therein on appellants, gave the court full and complete jurisdiction over them. If, on the other hand, the railroad was not a necessary, or at least a proper, party, there was what would amount to a collusive joinder, and the court was without jurisdiction of the appellants. It is well established that the defendant, who may be sued in the county where the action is brought, must be a necessary, and not a sham defendant, joined solely for the purpose of bringing in the defendants served in another county. *Dunn v. Haines,* 17 Neb. 560; *Cobbey v. Wright,* 23 Neb. 250, 29 Neb. 277; *Hanna v. Emerson,* 45 Neb. 708, 710; *Miller v. Meeker,* 54 Neb. 452, 454; *Stewart v. Rosengren,* 66 Neb. 445.

The true test, however, for determining whether or not the venue is proper so that summons may issue to another county is whether the defendant served in the county where the suit is brought is a bona-fide defendant to that action—whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendant, and in equity actions may be added the inquiry as to whether or not plaintiff can obtain full, suitable and satisfactory relief without joining such party, and binding him by the terms of the judgment or decree.

Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law—different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties which really grow out of, or are connected with, the subject-matter of that suit. The primary object is that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed and all

may be bound in respect thereto by the single decree. Pomeroy, Equity Jurisprudence, sec. 114.

Speaking of the question of parties in actions to prevent a multiplicity of suits, Pomeroy says: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and nothwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." Further speaking of the objection raised to this doctrine, Pomeroy says: "The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue, and perhaps in the kind of relief, and the single decree has without any difficulty settled the entire controversy and determined the separate rights and obligations of each individual claimant. The same principle therefore embraces both the technical 'bills of peace,' in which there is confessedly a common right or title, or community of interest in the subject-matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such common right or title or community of interest in the subject-matter, but only a community of interest in the question involved and the kind of relief obtained." Pomeroy, Equity Jurisprudence, sec. 269.

It can not be said that the railroad company and appellants were not mutually interested in the questions involved in this case, and in the effect of the relief granted by the decree. Again, garnishment proceedings had been already commenced for the third time, notice had been served on the railroad company requiring it to answer and pay the money into court; therefore a decree against the appellants alone would not have been binding on the company; it could still answer and pay over the money into court to the irreparable injury of the appellee. In any event, it was holding back the money due to him, and it was necessary to make the company a party and by the decree release the fund and require it to be paid to the owner thereof. It would thus appear that the railroad company was a proper party, and it may be further stated that it was a necessary party in order to enable appellee to obtain suitable and complete relief in the case at bar. A decree restraining the appellants from prosecuting further proceedings to subject appellee's exempt wages to the payment of their claim would not have been effective, for the reason that a transfer of their claim to another would have enabled such other person to still proceed with further illegal attempts to obtain the money. Again, although enjoined from prosecuting further in the courts of this state, they might transfer their claim to Iowa, where the Union Pacific Railroad Company has a part of its line and maintains some of its offices. The exemption laws of this state have no extra-territorial force, and it has been the universal policy of the courts of Iowa to disregard the exemption laws of other states. So that without a decree enjoining the Union Pacific Railroad Company from paying over the money in satisfaction of the appellants' claim, it would be required to answer proceedings instituted in Iowa and pay the money into court there; thus depriving the appellee of the wages which are absolutely exempt to him by the laws of this state. Notwithstanding we have a law prohibiting such transactions, yet it has in many cases failed to prevent parties from unlawfully col-

lecting their claims in that manner. A decree, however, against the railroad company, enjoining it from paying the money into any court, or upon any proceedings, wherever instituted, could be pleaded in bar to such proceedings with binding effect.

So we are constrained to hold that the Union Pacific Railroad Company was not only a proper but a necessary party in the suit; that the action having been properly commenced against it in Sarpy county, and it having been served with summons therein, the issuance of summons to the sheriff of Dodge county and the proper service thereof on the appellants gave the court full and complete jurisdiction to hear and determine the questions involved in the action and render a suitable and proper decree therein.

We further hold that according to the facts disclosed by the record, the decree of the district court was right, and we recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SUSAN L. BRECK, APPELLANT, V. CHARLES MEEKER ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,734.

1. **Principal and Agent:** SUBSTITUTE. If a principal constitutes an agent to do a business which obviously and from its very nature can not be done by the agent otherwise than through a substitute, or if there exists in relation to the business a known established usage of substitution, in either case the principal would be held to have expected and authorized such substitution.
2. **Evidence:** JUDGMENT. Evidence examined, and *held* sufficient to sustain the judgment of the district court.

APPEAL from the district court for Chase county: GEORGE W. NORRIS, DISTRICT JUDGE. *Affirmed.*

S. S. Bishop, Claude C. Flansburg and *Richard O. Williams,* for appellant.

Charles W. Meeker and *Jefferson H. Broady, contra.*

OLDHAM, C.

This was a suit to foreclose a real estate mortgage on 160 acres of land situated in Chase county, Nebraska. The mortgage was given to secure a note for $300 from Charles Meeker, payable to the order of John L. Farwell, at Claremont National Bank, of Claremont, N. H., dated November 27, 1886, and due January 1, 1892, bearing eight per cent. interest annually. The loan was negotiated through the agency of C. C. Burr, of Lincoln, Neb., and the money was remitted to Meeker by a draft from Mr. Burr. Before the loan matured, the mortgaged premises were conveyed to defendant Mary E. Meeker. Defendant filed a separate answer to plaintiff's petition, admitting the execution and delivery of the note and mortgage, and alleging that for the purpose of clearing her title to the premises she had fully paid the entire mortgage indebtedness on June 5, 1894. Plaintiff replied to this answer with a general denial, and on issues thus joined a trial was had to the court, and judgment was rendered in favor of defendant Mary E. Meeker, and plaintiff brings the cause to this court by appeal.

The question which we are asked to determine is as to whether the evidence is sufficient to sustain the judgment of the lower court. Certain facts in the record are undisputed. These are that the loan was negotiated through C. C. Burr, at Lincoln; that the mortgage and note were delivered to him, and the money received on his draft; that each interest coupon, except the last, was paid to Burr and remitted by Burr to Farwell. It is also undisputed that

on June 5, 1894, the remainder of the note and interest was paid to the sheriff of Chase county on an order which he had received from Burr for such amount. It is undisputed that Farwell indorsed the note before maturity to Susan A. Judkins, and that she indorsed the same, long after maturity and after it had been paid, to the plaintiff in this cause of action.

The question of the sufficiency of testimony, similar to that in the case at bar, to establish an ostensible agency in C. C. Burr for the collection of notes and coupons for John L. Farwell, the Sullivan Savings Institution, and others, having transactions with him similar in nature and extent, has been frequently reviewed by this court, and held sufficient to sustain a judgment based on a finding of such agency. *Harrison Nat. Bank of Cadiz v. Austin,* 65 Neb. 632.

In fact, the learned counsel for appellant frankly concedes that if the note had been retained by Farwell, he would in deference to the previous rulings of this court on the question of Burr's agency of Farwell, admit that the judgment of the trial court should be affirmed. But he contends that there is no testimony in the record tending to show that Burr was the agent of either Mrs. Judkins or the plaintiff in this cause of action; here neither of these in any event should be bound by Burr's agency of Farwell.

The testimony with reference to Mrs. Judkins tends to show that she kept the note in controversy and other valuable papers in a trunk in the vault of the Claremont National Bank, of which Farwell was president, and that she gave Mr. Farwell a duplicate key to this trunk, so that he could procure papers when called for payment. The evidence shows that the mortgage in suit remained in this trunk from 1887 until 1897, when Mrs. Judkins assigned the note, without recourse, to Mrs. Beck, who is the plaintiff in this cause of action and a sister of John L. Farwell.

Mrs. Judkins says in her deposition: "I purchased a number of western loans from John L. Farwell and he acted as my agent in collecting the same, and he agreed to

pay me my interest every January 1." We think this testimony tends to show that Mr. Farwell was the agent of Mrs. Judkins fully and generally authorized to do whatever prudence and diligence might seem to require in the collection of principal and interest on her western loans, and if it was, as he undoubtedly deemed it to be, expedient to prosecute the collection of this note and interest through the agency of Mr. Burr, the authority to collect and receipt for the payment of the debt and interest was imputed to Burr through the agency of Farwell.

The rule is laid down in 1 Parsons, Contracts (9th ed.), ch. 3, sec. 13, p. 84: "If a principal constitutes an agent to do a business which obviously and from its very nature can not be done by the agent otherwise than through a substitute, or if there exists in relation to that business a known and established usage of substitution, in either case the principal would be held to have expected and have authorized such substitution." From this view of the case, we think there is competent evidence to sustain the judgment of the trial court as to Burr's authority to act in the matter for Mrs. Judkins; and if Burr was authorized to bind her by his receipt for the payment of the debt, it follows that the plaintiff in this cause of action, who did not purchase the note until long after its maturity and payment, took it subject to the defense of payment which existed against her indorser.

It is finally contended that the evidence fails to show that the payment of the debt was actually made in money to Burr. The testimony with reference to the payment is substantially as follows: Mr. Burr had been foreclosing numerous mortgages in Chase county, and had become indebted to the sheriff of that county for a sum of money either a little more or a little less than the amount due on the Meeker loan. The Meekers notified Burr that they were ready to pay the loan. He thereupon gave an order to the sheriff of Chase county on Meeker for the amount due on Meeker's loan. When the sheriff presented the order to Meeker it was paid to him, $100 in cash, and the re-

mainder by check which was paid on presentation to the bank. As soon as Burr received his deeds, he conveyed the lands to Farwell and the Sullivan Savings Institution as security for this loan, and credited Farwell with the amount of the loan on his books. Plaintiff's evidence shows that Farwell subsequently came with Burr to Chase county and was informed by Meeker of the fact of this payment, in the presence of Mr. Burr, and that he stated that as soon as he returned east he would forward the papers to Mr. Burr to be delivered to the Meekers. We think this evidence shows that the payment was made in money, and does not place this case within the rule announced in *Gilbert v. Garber*, 62 Neb. 464.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SALINA F. BROWN, APPELLEE, V. SAMUEL CAMPBELL ET AL., APPELLANTS.

FILED MARCH 4, 1903. No. 12,698.

1. **Head of Family:** HOMESTEAD: FRAUDULENT ALIENATION. The head of a family has a homestead right of the value of $2,000 in 160 acres of land, owned and occupied by him as a homestead, which is not the subject of a fraudulent alienation.
2. **Conveyance:** CANCELATION: ERROR. It is error for a trial court to cancel a conveyance of such homestead right as having been made in fraud of creditors.
3. **Homestead Limits:** SURPLUS. If, above any valid incumbrances thereon, there be a surplus in excess of the sum of $2,000 within the homestead limits, a conveyance of such surplus can be set aside when made in fraud of creditors.

APPEAL from the district court for Pawnee county: JOHN STULL, DISTRICT JUDGE. *Reversed.*

John C. Watson, John V. Morgan and *Robert Ryan,* for appellants.

Henry Matters and *Francis Martin, contra.*

OLDHAM, C.

This was a suit in the nature of a creditors' bill instituted by the plaintiff in the court below for the purpose of canceling a conveyance of 160 acres of land situated in Pawnee county, Nebraska, made by the defendants Samuel Campbell and wife to their son, Walter Campbell, on January 8, 1900. The petition is in the ordinary form of a creditors' action, alleging that plaintiff had recovered a judgment in the county court of Pawnee county for $886.97 and costs on October 2, 1900; that a transcript of the judgment was filed in the office of the clerk of the district court of said county, and that an execution was issued thereon October 17, 1900, and returned *nulla bona.* The petition then alleges that the conveyance was made by the defendants Samuel Campbell and wife to their son, defendant Walter Campbell, without consideration, and for the purpose of hindering, delaying and defrauding the plaintiff and other creditors of Samuel Campbell.

Defendants Samuel Campbell and wife answered this petition separately, admitting the execution and delivery of the conveyance, but denying that it was made with fraudulent intent, and alleging that the premises conveyed were the homestead of these defendants.

Defendant Walter Campbell also answered separately, alleging that the conveyance was made in good faith for a valuable consideration, and that at the time of the conveyance the premises were occupied by his father and mother, who were husband and wife, as their family homestead.

Plaintiff replied to this answer with a general denial. On issues thus joined, the trial court found for plaintiff, and declared the conveyance to have been made without consideration, and for the purpose of hindering and defrauding creditors, and entered a decree canceling the deed, and defendants bring the cause to this court by appeal.

After a review of the testimony contained in the bill of exceptions, we have no criticism to offer on the finding of the fact by the trial court that the conveyance was made without consideration, and probably with the intent on the part of the grantor to hinder and delay his creditors. But the evidence shows without dispute that the grantor in the deed had occupied these premises for twenty-five years as his homestead; that he was the head of a family, consisting of a wife and some minor children, at the time the conveyance was made. It is admitted in the record that there was a valid mortgage of $3,000 on this land at the time of the conveyance to defendant Walter Campbell. Plaintiff's testimony tended to show that the premises were worth from $5,000 to $6,000 at the time of this conveyance, while the testimony of the defendant tended to show that the premises were not worth to exceed $5,000 at the time the deed alleged against in plaintiff's petition was made.

It is too well established to require any citation of authorities to say that it appears from the undisputed facts in this case that a homestead interest of the value of $2,000 in the lands in dispute existed in Samuel Campbell and wife at the time the premises were conveyed to Walter Campbell, which was not the subject of fraudulent alienation. It is also clear that the deed alleged against conveyed all the interest that Samuel Campbell and his wife could convey in these premises to the grantee therein named, or, in other words, that the deed in issue, as between the parties, conveyed the homestead right in these lands to Walter Campbell, and that the conveyance could only be held fraudulent as to creditors in so far as it attempted to convey a surplus of the homestead which would, if still

remaining in the hands of the grantor, be subject to sale on execution. Whether or not an interest of the value of more than $2,000 over and above the mortgage exists in the lands in dispute is a matter left in some doubt by the testimony.

Provision is made in sections 5, 6, 7, 8, 9, 10, 11, 12, and 13, chapter 36, Compiled Statutes (Annotated Statutes, secs. 6204-6212), for ascertaining the surplus, if any, of the value in lands within the limits of a homestead. If we treat the petition, answers, reply and evidence offered in this case as a substantial compliance with the preliminary steps necessary to procure the appointment of appraisers to ascertain the surplus in the homestead limits, it would still be necessary, before determining as a matter of fact that there was a surplus, to wait for the coming in of the report of the appraisers so provided. We are inclined to think that the court, being possessed of the cause to do full equity between the parties, may with propriety, in view of the issues arising on the testimony, determine that there is a sufficient showing of a surplus to warrant it in the appointment of appraisers to ascertain that fact in the manner above pointed out.

It is therefore recommended that the decree of the court below be reversed and the cause remanded, and the trial court be directed to appoint the appraisers as provided by statute, and have the value of the real estate in controversy determined, and, if it appear by said proceedings that the value of said premises exceed the amount of $2,000 and the amount of the mortgage thereon, then, if the land can be divided without material injury, the court shall direct the said appraisers to set off to the grantee in the deed so much of the land, including the residence thereon, as will amount in value to the sum of $2,000 over and above the amount of the said mortgage thereon, and the residue be sold and the proceeds be applied in satisfaction of plaintiff's judgment. In case the value of said land, when determined as aforesaid, shall not exceed the exemptions and the amount of the mortgage as aforesaid,

then the court is directed to enter a decree in favor of the defendant.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and the trial court is directed to appoint the appraisers as provided by statute, and have the value of the real estate in controversy determined, and, if it appear by said proceedings that the value of said premises exceed the amount of $2,000 and the amount of the mortgage thereon, then, if the land can be divided without material injury, the court shall direct the said appraisers to set off to the grantee in the deed so much of the land, including the residence thereon, as will amount in value to the sum of $2,000 over and above the amount of the said mortgage thereon, and the residue shall be sold and the proceeds be applied in satisfaction of plaintiff's judgment. In case the value of said land, when determined as aforesaid, shall not exceed the exemptions and the amount of the mortgage as aforesaid, then the court is directed to enter a decree in favor of the defendant.

REVERSED AND REMANDED.

RILEY E. HASKELL, APPELLEE, V. HENRY B. READ ET AL., APPELLANTS.*

FILED MARCH 4, 1903. No. 12,430.

1. **Written Contract:** EXTRINSIC EVIDENCE. Where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact.

2. **Right to Vote Pledged Shares of Stock.** As a general rule, the

* Motions for rehearing denied. See opinion, page 115, *post.*

right to vote pledged shares of stock remains in the pledgor until foreclosure.

3. **Corporation:** REGISTERED STOCKHOLDERS: ELECTION: BOOKS OF CORPORATION. The officers of the corporation, in conducting an election, will not look behind the books of the corporation which show who are registered as stockholders; but a court of equity may do so, and may enjoin a pledgee from voting the shares pledged in prejudice of the rights of the pledgor.

4. **Excessive Issue of Stock:** NO CONSIDERATION: INJUNCTION: CANCELATION. A stockholder may maintain a suit to enjoin the holder of shares issued in excess of the amount authorized by the articles of incorporation, and without consideration, from voting such shares in prejudice of his rights, and to procure cancelation thereof.

5. **Estoppel.** Whatever might be the rule as to a bona fide purchaser of or subscriber for such an overissue of shares, one who procures the overissue without consideration, by false representations, will not be heard to assert that a stockholder who voted therefor, relying on such representations, is estopped to question the validity of the shares.

6. **Private Corporation:** STOCKHOLDER: OFFICERS: VALIDITY OF ELECTION: EQUITY. It seems that in this state a stockholder may maintain a suit in equity to try the validity of an election of officers and directors of a private corporation, and determine whether persons claiming to be such are entitled to act in that capacity.

7. **Validity of Election:** JURISDICTION OF COURT. In any event the court may inquire into the validity of the election and pass upon the title to corporate officers when necessary to do complete justice in a suit of which it has jurisdiction on other grounds.

8. ———: MAJORITY OF SHARES. Where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election in the absence of some rule to the contrary.

9. **Voting Shares.** It is not necessary that a stockholder shall have paid for his stock in full to enable him to vote all his shares at an election.

APPEAL from the district court for McPherson county: HANSON M. GRIMES, DISTRICT JUDGE. *Modified.*

John H. Bower, N. P. McDonald and *Edwin E. Squires,* for appellants.

Hoagland, Hoagland, Wilcox & Halligan, contra.

POUND, C.

Haskell, the plaintiff, had a ranch in McPherson county, and certain horses, cattle and farming implements thereon. Read, one of the defendants, had a certain amount of capital which he desired to make use of in the business of conducting a ranch. Accordingly, they entered into a written contract for the purpose of forming a corporation, in which they agreed to incorporate with a capital stock of $32,000, divided into 320 shares of $100 each, of which each of the parties was to subscribe for one-half. They further agreed that the plaintiff should pay for his stock by conveying his ranch property, horses, cattle and farming implements to the corporation while the defendant Read should pay for the stock by him subscribed for in cattle. Pursuant to this contract a corporation was formed, and the plaintiff and the defendant Read each subscribed for $16,000 of the capital stock. The latter became president, secretary and treasurer, while the plaintiff was vice-president, and manager of the ranch. After the company was incorporated, Read advanced some $700 to the plaintiff, secured by mortgages, under an agreement whereby the plaintiff was to "redeem" with shares of stock when issued. Afterwards two shares of stock which had been issued to plaintiff were transferred by him to Read in lieu of the mortgage. When Read turned over the cattle to the corporation in payment of his stock subscription, as provided for in the contract, he claimed to have turned over and delivered more cattle than were necessary for that purpose, and, in the belief and under the representation that he had done so, the plaintiff agreed and consented that additional stock in the amount of $2,000 should be issued in payment therefor. This was done and the shares were duly registered in the name of Read on the books of the corporation. Afterwards a dispute arose with reference to this claim

that additional cattle had been turned over, and in consequence of difficulties between the parties, this suit was brought against Read and the corporation to enjoin the former from voting the two shares of stock transferred to him under the agreement with reference to security and the twenty shares issued in payment for the alleged additional cattle, and to procure the cancelation of said twenty shares. The plaintiff averred that the annual election of the corporation was approaching and that Read was threatening and about to exclude him from all share or participation in the corporate business, by voting said twenty-two shares at such election, and was about to fill all the offices with persons in his interest, contrary to the agreement of the parties that each should have an equal voice and share in the business and affairs of the company. He claimed further that he had turned over his ranch and other property to the corporation, relying upon such agreement, and that to deprive him of his office of manager of the ranch and deny him any share in the management of the business, would work him a great and irreparable injury. The court granted a temporary injunction, and upon final hearing found for the plaintiff upon all the issues, made such injunction permanent, and canceled said twenty shares. Before trial, but after the temporary injunction had issued, the annual election of the corporation came on, and upon the production of the order of injunction, the defendant Read, as president of the company, declared the meeting adjourned until the right to vote the shares of stock in dispute could be determined. The plaintiff, however, and one of his attorneys, to whom he had assigned ten shares of his stock, proceeded to hold an election at which they filled the several offices of the company. The validity of this election and the right of the persons chosen to hold office thereunder is challenged by Read in a cross-petition, and a decree adjudging the election invalid is prayed for. Upon this point also the trial court found adversely to said defendant, and upheld the election.

The findings of fact made by the trial court, both as to the two shares of stock and the twenty shares taken in payment for cattle, are complained of. On each point the evidence is conflicting, and, while there are many circumstances of more or less weight which tend to confirm the contentions of appellant, we think there is sufficient to sustain the findings. The force and weight to be given to the circumstances, as against the testimony of the parties, must be left largely to the trial court; and so long as there is sufficient testimony in support of plaintiff's contentions upon each question, and the findings are not clearly wrong, they should not be disturbed. A more serious question arises upon the written agreement wherein it is provided that the plaintiff is to "redeem" the mortgages by shares of stock when issued. It is contended on behalf of appellant that this agreement bound Haskell to turn over the shares of stock in payment of the debt secured by the mortgages, while the plaintiff claims that there was to be a mere substitution. The construction of a written instrument ordinarily is a question of law. But where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact. *Coquillard v. Hovey,* 23 Neb. 622, 8 Am. St. Rep. 134; *Rosenthal v. Ogden,* 50 Neb. 218; *Meyer v. Shamp,* 51 Neb. 424. The meaning of the word "redeem" in this agreement, is by no means clear from the face of the instrument, and in order to determine whether the debt was to be paid by transfer of the shares of stock or there was to be a mere substitution of the shares for the mortgages, it becomes necessary to inquire into all the circumstances surrounding the transaction. Hence the interpretation to be given to that provision becomes a question of fact, and the finding of the court, having sufficient support in the evidence, is to be accepted on appeal.

Assuming, therefore, that the two shares of stock were merely pledged, and were held by Read as pledgee and not as owner, the question arises, who was entitled to vote

such shares in the election of officers and directors? This question is settled in many states by statute. In this state, however, we have no statute, and are left for guidance to the general principles of the law of corporations. As a rule, the right to vote pledged shares of stock is held to remain in the pledgor until foreclosure. Jones, Pledges, sec. 442; 1 Thompson, Corporations, secs. 732, 733, 735. Undoubtedly, where the pledgee is registered as owner of the shares on the books of the company, its officers, in conducting an election, will not look behind the books to ascertain who are the real owners of the shares. But a court of equity may do so, and may enjoin a pledgee from voting the shares pledged in prejudice of the rights of the pledgor. *State v. Smith,* 15 Ore. 98, 14 Pac. 814, 15 Pac. 137, 386; *Brewster v. Hartley,* 37 Cal. 15, 99 Am. Dec. 237; *Vowell v. Thompson,* 3 Cranch (U. S. C. C.) 428, Fed. Cas. No. 17,023; *McHenry v. Jewett,* 26 Hun (N. Y.) 453.

With respect to the twenty shares issued for the alleged additional cattle turned over by Read, we think the decree is right. The court has found that no such cattle were in fact turned over, and that the shares were issued without consideration, and upon a misrepresentation as to the number of cattle contributed. The full amount of the capital stock provided for in the articles of incorporation had been subscribed for already, and it is apparent that it was not intended that twenty of the shares subscribed by Haskell were to be issued to Read, but that there were to be twenty shares in addition to the 320 fixed by the articles of incorporation. We are unable to see how these twenty shares can be viewed in any other light than as an overissue procured without consideration and upon false representations. A stockholder may maintain a suit to enjoin the holder of shares issued in excess of the amount authorized by the articles of incorporation, and without consideration, from voting such shares in prejudice of his rights, and to procure cancelation thereof. 2 Thompson, Corporations, sec. 1497; 2 Morawetz, Private Corpora-

tions, sec. 762. We do not think any question of estoppel arises in this case, for the reason that Read, under the findings of the court, is in no sense a bona-fide holder. If the shares had been subscribed for or purchased in good faith, without any knowledge of the circumstances by reason of which they must be considered a fraudulent overissue, a serious question might arise by reason of the fact that Haskell participated in the issue. 2 Morawetz, Private Corporations, secs. 763, 765. But whatever might be the rule as to a bona-fide purchaser of or subscriber for such an overissue of shares, one who procures the overissue without consideration, by false representations, clearly has no standing to assert that a stockholder who voted therefor, relying on such representations, is estopped to question the validity of the shares. He can not take advantage of his own false representations, nor claim that acts of others based thereon and done in reliance upon their truth, put him in a better position.

We think, however, the court erred with respect to the validity of the election held by Haskell and his attorney; and in our opinion the decree should be modified so as to grant the appellant relief against such election, as prayed in his cross-petition. It is held generally that a court of equity is without jurisdiction to pass upon the validity of an election of officers and directors of a private corporation, or determine whether persons claiming to be such are entitled to act in that capacity. *Kearney v. Andrews,* 10 N. J. Eq. 70; *Owen v. Whitaker,* 20 N. J. Eq. 122; *Hullman v. Honcomp,* 5 Ohio St. 237; *Hartt v. Harvey,* 32 Barb. (N. Y.) 55. But in this state, suits in equity seem to be maintainable for such purposes. *Humboldt Driving Park Ass'n v. Stevens,* 34 Neb. 528, 33 Am. St. Rep. 654; *Reynolds v. Bridenthal,* 57 Neb. 280. In any event, the court may inquire into the validity of the election and pass upon the title to corporate offices, when necessary to do complete justice in a suit of which it has jurisdiction on other grounds. *Mechanics' Nat. Bank of Newark v. H. C. Burnet Mfg. Co.,* 32 N. J. Eq. 236; *Elliott*

v. Sibley, 101 Ala., 344, 13 So. 500; *Pond v. Vermont V. R. Co.*, Fed. Cas. No. 11,364. The case at bar seems to come within the latter rule. The court had obtained jurisdiction of the controversy between these parties for other purposes, and, having done so, was under a duty of rendering such a decree as would dispose of the whole controversy and completely adjudicate the points in dispute. *Morrissey v. Broomal*, 37 Neb. 766; *Tulleys v. Keller*, 45 Neb. 220. It would be inequitable and could result only in a multiplicity of suits to require appellant to test the validity of the election in some other manner and in some other proceeding. The election was invalid. Where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election, in the absence of some rule to the contrary. This is elementary. 3 Thompson, Corporations, sec. 3868; 1 Thompson, Corporations, sec. 726. We are unable to perceive any ground upon which the plaintiff and his attorney could pretend to have held or represented more than 160 out of the 320 shares of the corporation. This is the utmost to which, on any ground, they were entitled. The articles of incorporation provide for an election by the stockholders, and, in the absence of some rule or provision for an election by a majority of those present at the meeting, a majority of all the shares was clearly required. It can make no difference whether the remaining 160 shares were fully paid for or not. It is not necessary that a stockholder shall have paid for his stock in full to enable him to vote the full number of shares at an election. *Price v. Holcomb*, 89 Ia. 123, 56 N. W. 407; *Savage v. Ball*, 17 N. J. Eq. 142. The articles of incorporation provided that ten per cent. should be paid down and the remainder upon call of the directors. There can be no question that both the plaintiff and Read had paid more than ten per cent. and, as far as any question of full payment for their respective shares is concerned, the plaintiff, under the evidence, is in no better position than his adversary.

We therefore recommend that the decree be modified by striking out the sixteenth finding of fact, to the effect that the election held by Haskell and Hoagland, his attorney, —to whom he had assigned a part of his stock—was regular and valid, substituting a finding that such election was invalid and of no force, and by adding to said decree an adjudication in accordance with such substituted finding, and that, so modified, the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be modified by striking out the sixteenth finding of fact of the trial court, substituting therefor a finding to the effect that the pretended election held by the plaintiff and his attorney, Hoagland, was invalid and of no force, and adding to said judgment an adjudication in conformity with such substituted finding, and that as so modified the judgment be

AFFIRMED.

The following opinion on motions for rehearing was filed October 7, 1903. *Rehearing denied:*

1. **Corporation:** STOCKHOLDERS: ACTS OF MINORITY. Whether less than a majority of the shares of stock in a corporation having a fixed capital stock, divided into a definite number of shares, may hold a valid meeting and bind the corporation, in the absence of any rule upon the subject, left undecided.

2. **Minority of Shares:** SPECIAL MEETING: ELECTION OF OFFICERS. Whatever may be the rule in case of stated meetings, or those regularly called or convened, a minority of the shares, after failure of the stated meeting for election of officers, can not call a new meeting on their own authority and hold a valid election.

POUND, C.

It sometimes happens that a proposition, true enough in respect of the case in hand, is put in a general form which

not only is broader than the decision to be rendered really requires, but is open to question in point of law. We think we fell into such an error in our former opinion in this cause. We stated, citing a well known text-writer, that "where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election, in the absence of some rule to the contrary." *Haskell v. Read, ante,* p. 107. Upon further examination, we find that the authorities cited do not entirely sustain the conclusion of the learned author, and that the question is one upon which there is some conflict of opinion. It is not essential to a disposition of the case at bar to pass upon that question, and we are of opinion that it should be left open.

The circumstances out of which the controversy as to the election arises are these: After the district court had issued a temporary injunction, restraining Read from voting the twenty-two shares of stock in controversy, the annual meeting for election of officers came on. Upon production of the order of injunction, it became substantially impossible to hold an election, as the shares which could be voted were evenly divided between the contending factions, assuming that Haskell could vote the two shares he had pledged. Under these circumstances, all the stock being present, Read, as president, adjourned the meeting until the injunction proceedings could be determined. We are inclined to think that this was within his powers as presiding officer, in view of the impossibility of doing any business at the meeting. However this may be, the only proper course for those who objected was to appeal from the ruling and put the matter to a vote. *Procter Coal Co. v. Finley,* 98 Ky. 405, 33 S. W. 188. It did not authorize the plaintiff and his faction, after lapse of some time, to convene what was in effect a new meeting and hold a valid election. Whatever may be the rule in case of stated meetings, or those regularly called or convened, a minority of the shares, after failure of the stated meeting for the election of officers, can not call a new meeting on their own

authority and hold a binding election. To permit this would be to concede to a minority of the shares the power to govern the corporation. This is not a case where a majority withdraw from a meeting regularly convened and suffer the minority to conduct it. Right or wrong, the president had adjourned the meeting in the presence of all the stockholders, and no appeal had been taken from his ruling. The attempt of plaintiff, after some time spent in consultation, to hold the meeting with less than a majority, was to all substantial purposes a new meeting.

We therefore recommend that the motions for a rehearing be denied.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motions for a rehearing be denied.

REHEARING DENIED.

HENRY H. GENAU v. RAYMOND J. ABBOTT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH GENAU, DECEASED.

FILED MARCH 4, 1903. No. 12,574.

1. **Equitable Relief**: PROBATE COURT: RULES OF PLEADING. Applications for equitable relief on the probate side of the county court in matters within the exclusive jurisdiction of that court, are to be deemed suits in equity, and are governed by the general rules of pleading applicable to such suits in the district court.

2. ———: PETITION: STRIKING FROM FILES. It is not proper practice to strike from the files a duly verified petition by an heir at law of the testator seeking equitable relief against an order admitting a will to probate. Such a petition should be met by demurrer or answer.

3. **Petition**: ORDER TO STRIKE: ERROR. If the petition states a cause of action on its face, an order striking it from the files is not to be held error without prejudice because such petition is ob-

noxious to motion with respect to form, and the record in the probate proceedings discloses facts at variance with some of its allegations.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

George H. Hastings, Henry W. Wilson and *Elmer W. Brown,* for plaintiffs in error.

Ezra S. Abbott and *Roy Abbott, contra.*

POUND, C.

Plaintiff in error filed in the county court a petition, duly verified, alleging that he was one of the heirs at law of Joseph Genau, deceased; that an instrument purporting to be the last will of said Joseph Genau had been admitted to probate in said court; that he had no actual knowledge that such will was to be offered for probate or probate proceedings had on the day when the order of probate was made, and was informed by the sole beneficiary of the will, and led to believe, that it would only be opened and read at that time; that he was not present when the subscribing witnesses were examined and the will probated, and did not know of such action till afterward; that he was afforded no opportunity to make and file objections; and that before the time for an appeal had elapsed, he was induced to abandon the matter and suffer the order to stand without appeal, by a contract of settlement entered into between himself and the beneficiary of the will, which said beneficiary afterwards repudiated. He attaches as an exhibit certain objections to probate of the will, under oath, which set up, on their face, good and substantial grounds of contest, and makes them a part of his petition. He prays to have the order admitting the will to probate set aside, for a hearing upon his objections, and for general equitable relief. A motion was made to strike this petition from the files, which was granted, and the judgment of the district court affirming such action is assigned as error.

We think the county court erred in its view as to the practice applicable to such a case. We know of no warrant for trial of the sufficiency of a petition in an independent suit in equity upon affidavits as to the merits and the record in the proceedings attacked by such petition on a motion to strike it from the files. Applications for equitable relief on the probate side of the county court in matters within the exclusive jurisdiction of that court, are to be deemed suits in equity. *Williams v. Miles,* 63 Neb. 859. There is no express statutory provision for such suits. They are permissible because the county court is given full, complete and exclusive jurisdiction in probate matters, and such jurisdiction would not be complete if the necessary equity powers did not exist somewhere. The provisions of the Code as to pleading and practice before justices of the peace are obviously inapplicable. Accordingly we think the general rules of pleading governing suits in equity in the district court should be applied, and that section 901, Code of Civil Procedure, affords good ground for so holding. The petition should have been met by answer or demurrer.

It is contended, however, that the motion to strike the petition from the files was intended as a demurrer, and that the error is without prejudice. It is probably true that the petition is obnoxious to motion with respect to its form in some particulars, and the manner in which the allegations that plaintiff has a good defense to proceedings for probate and substantial grounds for contesting the will are incorporated is not to be commended. It may be, moreover, that there are matters in the prayer which might be amended. But under the Code, all that is essential is a statement of facts showing a cause of action and a prayer for general equitable relief. *Merriman v. Hyde,* 9 Neb. 113; *Pefley v. Johnson,* 30 Neb. 529; *Skinner v. Skinner,* 38 Neb. 756; *Ball v. Beaumont,* 59 Neb. 631. Neither the fact that the petition may be informal or open to objection in respect of particular allegations, nor the fact that the record in the probate pro-

ceedings attacked may disclose facts at variance with some of its allegations, affords any ground of demurrer or warrant for striking it from the files. The petition is the commencement of an independent suit in equity, directed against the probate proceedings, and the record in those proceedings is not before the court until some issue of fact or law is properly raised requiring an investigation thereof.

We recommend that the judgment of the district court be reversed and the cause remanded.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

JOHN T. RITCHEY ET AL. V. JAMES E. SEELEY.*

FILED MARCH 4, 1903. No. 12,564.

1. **Answer: MISTAKE IN NAME: TESTIMONY.** The testimony of an attorney who prepared an answer is competent to show that by inadvertence and mistake he used the name of one party to the action while intending to name another party.

2. **Foreclosure: DEFICIENCY: CREDITOR'S BILL: EVIDENCE.** On the foreclosure of a mortgage a deficiency judgment was entered against R. and G., the mortgagors. The judgment creditor thereafter brought an action to subject a farm conveyed by R. to his son to the payment of this judgment. The conveyance was made some two years prior to the entry of the deficiency judgment. Prior to the foreclosure proceedings R. had conveyed to G. his interest in the mortgaged premises, and G. had assumed and agreed to pay the mortgage. R. testified that he had no knowledge of the foreclosure proceedings and offered to show that at the time he made the conveyance to his son he understood that G. was alone liable for the mortgage debt. *Held*, That R.'s understanding was immaterial and incompetent, but that it would be com-

* Judgment vacated. See opinion, p. 127, *post*.

petent and material to show that a solvent and responsible party had assumed the mortgage debt on which the deficiency judgment was entered, as bearing on the question of the character of the conveyance by R. to his son, and whether fraudulent or not, but that the offer did not go far enough, in not proposing to show that G. was solvent and able to meet any deficiency that might arise after exhausting the mortgage security.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Reversed.*

Mathew Gering, for plaintiffs in error.

Webster S. Morlan, Allen J. Beeson, Jesse L. Root and *S. R Smith, contra.*

DUFFIE, C.

Some time in 1894 John T. Ritchey, one of the plaintiffs in error, and James H. Goodrich purchased 800 acres of land in Hayes county, Nebraska. James E. Seeley, the defendant in error, held a mortgage on the land which Ritchey and Goodrich discharged, giving their own note for $2,650 secured by mortgage in lieu thereof. Foreclosure proceedings were instituted on this mortgage and a decree of foreclosure entered March 24, 1896. A deficiency judgment for $2,050 was ordered by the district court for Hayes county against Ritchey and Goodrich November 23, 1897, but this was not entered of record by the clerk until April 16, 1900, when the same was ordered journalized. A copy of the order directing the deficiency judgment was filed in the office of the clerk of the district court for Cass county, February 18, 1898, and a transcript of the judgment itself was filed in said county on August 2, 1900. Execution issued on this judgment September 14, 1900, and was returned wholly unsatisfied. For some years previous to these transactions John T. Ritchey was the owner of 240 acres of land in Cass county, which he conveyed to his son Edward on

March 15, 1897, for the consideration expressed in the deed, of $9,600, and this action was brought by the defendant in error to subject said land to the payment of his deficiency judgment. A decree was entered in favor of the plaintiff below, and the defendants have taken a writ of error to this court complaining that the decree is not supported by the evidence and that the court refused to receive and consider certain evidence which they claim was competent and material. It is first insisted that the district court for Hayes county had no jurisdiction to enter a deficiency judgment against the defendants, and the act of the legislature of 1897, repealing the statute then in force allowing a deficiency judgment to be entered on the foreclosure of a mortgage, is referred to in support of plaintiffs' contention. We have held in several cases that the repeal of the statute permitting the recovery of deficiency judgments did not affect actions then pending. *Thompson v. West,* 59 Neb. 677, 49 L. R. A., 337; *Hanscom v. Meyer,* 61 Neb. 798; *Patrick v. National Bank of Commerce,* 63 Neb. 200.

Some time in 1893 a farm of 120 acres in Cass county, known as the "Walters Farm," was sold under a decree of foreclosure and bid in by John T. Ritchey, as is claimed, for his son, Edward Ritchey, one of the plaintiffs in error. The sheriff's deed was made to Edward Ritchey, who took possession and occupied the land, either by himself or his tenants, for three or four years, and until a sale by him to one Henry Bornemeyer, made in 1897. A consideration of this transaction becomes material, for the reason that it is claimed by the plaintiffs in error that the proceeds of the sale of this farm was paid by Edward to his father on the purchase of the 240-acre farm, the conveyance of which is assailed in this action; while the defendant in error claims that this farm, while standing in the name of Edward Ritchey, was purchased and paid for by his father, who was the real owner thereof and of right entitled to the purchase money.

Complaint is made that the court unduly extended the

privilege of cross-examining John T. Ritchey in relation to the purchase of this farm, to the payment of the consideration, and whose money was used in the payment. The evidence is undisputed that $4,000 in cash paid by Bornemeyer was turned over by Edward Ritchey to his father, and whether this was a bona-fide payment of that amount on a sale of the 240-acre farm, made by the father to his son, or whether the money actually belonged to the father, was a question before the court necessary for its decision, and depending principally upon the evidence of John T. and Edward Ritchey. That either or both of these witnesses should be subjected to a most searching cross-examination relating to that transaction ought not to be questioned. It was a dealing between father and son, which if honestly made ought to be open to the creditors of either in all its details, and neither party can, with any degree of fairness, claim that any light that they can throw upon the transaction ought to be denied by any technical objections made under the guise that such inquiries are not cross-examination under the strict rules applicable to the cross-examination of disinterested witnesses. The court did not unduly extend the privilege of cross-examination in this case. After the conveyance of this 120 acres of land to Edward Ritchey, some litigation took place concerning the same, in which Edward and his father were parties defendant. In an answer filed by them in that case occurs the following allegation: "That the said John T. Ritchey continued after such sale to occupy and control said land and so continued to do until about the month of February, 1897, when said Ritchey conveyed said land to the defendant Henry Bornemeyer, Sr., who now occupies the same and claims to own it." John T. Ritchey had testified that he had no interest in this land and that after the conveyance to his son his son had owned, occupied and controlled the same until the sale to Bornemeyer, and this answer and the above allegation were offered by way of impeachment and contradiction of this testimony. Ritchey testified that at the time he signed

and verified this answer he did not know it contained the above-quoted paragraph, and called Byron Clark, his attorney who had prepared the same, and offered to show by him that the name John T. Ritchey appearing in the said paragraph was a clerical error made in the preparation thereof, and that the name intended to be used was that of Edward Ritchey. On the objection of the defendant in error, this evidence was excluded, and it is now said in his brief that "the court could as readily determine whether it was intended as meaning Edward Ritchey or John T. Ritchey as could the witness Clark."

Under ordinary circumstances, and with reference to ordinary writings or contracts, this may be true; but here was a pleading prepared by the attorney having full charge of the case, and presumably knowledge obtained from his clients of all the circumstances surrounding it. Clark, who was attorney for both John T. and Edward Ritchey, drew this answer. It is not an uncommon circumstance that an attorney, in preparing a pleading, inadvertently uses the name of one party while intending to name the other. No one has such absolute knowledge of what was intended as the attorney himself. In this case it is undoubtedly true that the evidence is wholly undisputed that Edward Ritchey alone was in possession of the 120-acre farm, either by himself or his tenants, from the time the same was conveyed to him until its sale to Bornemeyer, and his deed to Bornemeyer, which was introduced in evidence, shows conclusively that the clause in the answer above referred to, as follows: "When said Ritchey conveyed said land to the defendant Henry Bornemeyer, Sr.," pointed out the Ritchey intended to be named in the answer as Edward Ritchey. Under these circumstances it may be true that the court could not have been misled by a clerical error in naming John T. Ritchey when Edward Ritchey was intended. But however that may be, this answer was introduced to contradict the evidence of John T. Ritchey given upon the trial, to the effect that he never had any interest in the land, the court received

it for that purpose—it was wholly immaterial for any other—and defendant in error now insists, as he probably did in the court below, that it was for the court to say from the mere reading of the answer whether any mistake in drawing it had been made. That the court must determine whether the name "Edward" or "John T." was intended is undoubtedly true; but the court in determining that question should take into consideration all proper and material evidence upon the issue, and we regard the evidence of Mr. Clark, who prepared the answer, as not only competent, but quite material, and evidence which the court should have received and considered.

Some time after Ritchey and Goodrich had purchased the Hayes county land Ritchey conveyed his interest therein to Goodrich, who assumed and agreed to pay the mortgage indebtedness thereon. Plaintiffs in error offered to show by John T. Ritchey that at the time he conveyed his 240-acre farm to his son he had no knowledge of this deficiency judgment or any claim made therefor, and did not understand that he was liable upon the debt which had been assumed by Goodrich. This evidence was refused by the court and this ruling is assigned as error. The petition in foreclosure was filed in the district court for Hayes county on August 31, 1895; summons was served on John T. Ritchey and Phœbe Ritchey, his wife, in Cass county, Nebraska, September 11, 1895, by delivering to Phœbe Ritchey a copy of the summons, and on John T. Ritchey by leaving a copy at his usual place of residence. It may well be that this copy left for him never came to his knowledge and that he had no personal knowledge of the existence of the suit or the claim made against him. The notice of an application for a deficiency judgment was served upon him personally in Cass county on August 16, 1899, more than two years after the conveyance to his son which is attacked in this case. As a matter of law it will be conceded, of course, that a conveyance by Ritchey to Goodrich of the Hayes county land and Goodrich's assumption of the mortgage thereon did not release Ritchey from

the payment of said mortgage, and that he was still liable for the debt; but as between himself and Goodrich the latter was primarily liable, and if Goodrich was responsible in 1897, when Ritchey conveyed his farm to his son, it is a circumstance that ought to be taken into consideration by the court in determining whether such conveyance was fraudulent and made for the purpose of defrauding the creditors of Ritchey. While he may have been liable to Seeley for the payment of this debt, it is a matter of some importance that a solvent third party had agreed to relieve him of liability therefor, and if this was the only debt for which he was liable at the time it is a matter of great interest in determining the character of his conveyance to his son, whether fraudulent or not, that a third party had assumed and agreed to relieve him from this liability. But Goodrich was one of the defendants against whom execution, issued on the deficiency judgment, had been returned unsatisfied. At the time of the trial Goodrich certainly was not responsible, and we think that the offer should have gone further and have been to show that he was solvent and able to pay any deficiency that might remain after exhausting the mortgaged premises when the conveyance to Edward Ritchey was made.

Other matters are discussed in the briefs of counsel, but as the case will have to be reversed and a new trial awarded because of the error already pointed out it will be unnecessary to discuss them, as they will not probably arise on the second trial of the case.

For the reasons above given we recommend that the judgment of the district court be reversed and the case remanded for a new trial.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

On motion to vacate the proceedings in the supreme court and dismiss the error proceedings, the following opinion was filed May 6, 1903. *Motion sustained:*

1. **Death of Defendant in Error After Judgment Below: VOLUNTARY APPEARANCE BY HIS ATTORNEYS: JURISDICTION OF THIS COURT.** Seeley obtained a judgment in the district court, and after his death a petition in error making Seeley the sole party defendant was filed in this court, and attorneys of this court who were attorneys of record for Seeley in the district court, filed with said petition in error a written statement, signed by them, as attorneys for Seeley, purporting to waive the issuing of summons in error and to enter the voluntary appearance of Seeley in this court. *Held*, That this court acquired no jurisdiction.

2. **Void Judgment.** A formal judgment entered in this court upon such attempted voluntary appearance is void, and will be so declared, when, at the same term at which the judgment was entered, the facts are brought to the knowledge of the court.

SEDGWICK, J.

James E. Seeley recovered a judgment against John T. Ritchey and Edward Ritchey in the district court for Cass county on the 10th day of January, 1902. On the 25th day of February, 1902, a petition in error was filed in this court by the said John T. Ritchey and Edward Ritchey against the said James E. Seeley to reverse the judgment. No summons in error was issued on this petition, but with the petition in error there was filed in this court a "voluntary appearance" and waiver of the issuance and service of summons in error, which was in writing, and signed by the attorneys who were the attorneys of record for the said James E. Seeley in the district court.

The said Seeley died four days before the petition in error and "voluntary appearance and waiver" were filed in this court. Afterwards the cause was regularly submitted to this court for determination without any suggestion of the death of the said Seeley, and at the present term of court a judgment was formally entered herein reversing the judgment of the district court and remanding the cause for further proceedings. Afterward the at-

torneys who had represented Mr. Seeley in the lower court, and had assumed to represent him in this court, appeared as friends of the court and filed an objection to the jurisdiction of the court and motion to "vacate, quash, and hold for naught" all the proceedings had in this court in the said case, and "dismiss the said error proceedings." We think that this motion must be sustained. Proceedings in error in this court to review a judgment of the district court constitute a new action having for its object the reversal of the judgment complained of. "The proceedings in this court are quite analogous to those in ordinary actions. The plaintiff in error is required, within the time limited by the statute, to file a petition showing his right to the relief demanded. He must bring his adversary into court in the usual way and affirmatively establish the material averments of his pleading." *Webster v. City of Hastings,* 56 Neb. 245, 246. This was an attempt to begin and prosecute an action against one who was already dead, and such proceedings could not give this court any jurisdiction. The case is to be distinguished from *Link v. Reeves,* 63 Neb. 424. In that case it was held that service of summons in error upon the attorney of record in the lower court was good service, although the defendant in error was dead at the time of the service. This was predicated upon the peculiar language of the statute, which provides that "a service on the attorney of record in the original case shall be sufficient,"* but in that case the petition in error was filed and the summons issued on the same day of and presumably before, the death of the defendant in error. The filing of the petition in error and issuance of summons were valid because the defendant in error was living at the time, and it was thought that service of summons upon the attorney of record in the lower court was authorized by the express language of the statute above quoted. If the action had been begun against Mr. Seeley in his lifetime by filing a petition and issuing

* Code of Civil Procedure, sec. 584.

summons in error, such summons might be served after his death upon his attorney of record in the lower court, and if such summons had been properly served before his death, the action, if relating to real estate, might be revived against his heirs, and if relating to personal property might be revived against his personal representative. *Urlau v. Ruhe,* 63 Neb. 883.* But the filing of a petition against a dead man is a nullity, and no summons or appearance thereon can give the court any jurisdiction. "When the record shows that no jurisdiction over the defendant has been acquired, the judgment rendered against such defendant is void, and its invalidity may be shown in any action in which it may be called in question." *Fogg v. Ellis,* 61 Neb. 829. This judgment having been entered at the present term of court, we have no doubt of the power and duty of this court, upon its attention being called to its want of jurisdiction to render such judgment, to vacate the same.

The motion is sustained.

MOTION SUSTAINED.

The following opinion on rehearing was filed December 16, 1903. *Former decision, Ritchey v. Seeley, ante,* p. 127, *re-examined and adhered to,* SULLIVAN, C. J., dissenting:

HOLCOMB, J.

A re-examination of the points involved in the present controversy which were considered and decided at a former hearing is productive of no different result or conclusion from that heretofore reached and announced in the opinion filed in the case. *Ritchey v. Seeley, ante,* p. 127. The precise point in controversy is whether under the facts stated in the former opinion this court has acquired jurisdiction over the cause and the parties to the controversy so that it may rightfully review the record

* This case appears in 89 N. W. 427, as *Urlau v. Weeth.*

and pass upon the alleged errors occurring at the trial in the court below. While a proceeding in error under our statute is not essentially the institution of a new and independent action, but rather a proceeding whereby the cause may be removed from the trial court to this court for the purpose of having reviewed alleged errors committed during the progress of the action in the court in which final judgment was rendered, yet, as has been stated by this and the courts of other jurisdictions: "The proceedings in this court are quite analogous to those in ordinary actions. The plaintiff in error is required, within the time limited by the statute, to file a petition showing his right to the relief demanded. He must bring his adversary into court in the usual way and affirmatively establish the material averments of his pleadings." *Webster v. City of Hastings,* 56 Neb. 245, 246, and the authorities therein cited. Repeated decisions of this court hold that in order to entitle an aggrieved party to a review of the record of the trial had in the district court, the requirements of the statute providing for a review by error proceedings must be complied with—that is, that the error proceedings must be begun within the time limited; that a petition in error must be filed in the reviewing court, accompanied by a duly authenticated transcript of the record which it is sought to have reviewed as a basis for the obtaining of such rewiew; that thereupon a summons in error may issue, and service be had, and the adverse party thus brought into court and subjected to its jurisdiction. It is argued that the waiver of summons in the present proceedings by the attorney of record in the lower court is equivalent to a service of summons on the attorney of record, and that the court has thereby acquired jurisdiction over the cause and the parties, and that such service is, on principle, within the rule announced in *Link v. Reeves,* 63 Neb. 424. It may, we think, be seriously doubted whether that part of section 585 of the Code of Civil Procedure wherein it is provided the defendant in error or his attorney may waive

in writing the issuing and service of the summons in error can be construed to mean the attorney of record. While not agreeing entirely with the construction contended for, we are of the opinion that, even if accepted, the difficulties in the way of the plaintiff in error have not thereby been removed. It is more probable that the provision of the section referred to means just what it says; that is, that the defendant in error or his attorney at the time of the waiver, whether it be the attorney of record in the court below or another attorney employed for the purpose of defending the error proceedings, may waive the issuing and service of the summons in error. But it has been held, and we are not disposed to question the correctness of the ruling, that the provision of section 584 authorizing the service of summons in error on the attorney of record in the original case is of itself sufficient authority for such attorney to waive the issuance and service of summons. *McDonald v. Penniston,* 1 Neb. 324. Whichever may be the correct construction, it occurs to us that the crucial point in the present controversy is not whether the attorney of record may waive the issuance and service of summons, but what is the force and effect of the waiver as attempted to be made in the case at bar, and when, if at all, could it become effective? We have decided repeatedly that a summons in error can not issue until after the filing of a petition in error with a transcript of the record of the district court, and that these preliminary steps were necessary in order to give the court jurisdiction. *City of Brownville v. Middleton,* 1 Neb. 10; *Benson v. Michael,* 29 Neb. 131, 133; *Garneau v. Omaha Printing Co.,* 42 Neb. 847, 849; *Jandt v. Deranlieu,* 43 Neb. 422, 423; *Slobodisky v. Curtis,* 58 Neb. 211, 212. If the rule announced in the decisions cited be a sound one, we think it must follow as a logical deduction therefrom that the waiver of the issuance and service of summons can not be of any force or effect even though executed by a defendant in error, or with full authority by his attorney or the attorney of record in the original case,

until there has been filed in the reviewing court a petition in error with a duly authenticated transcript of the record which it is sought to have reviewed. This is the view entertained by the supreme court of Ohio in *McGuire v. Ranney,* 49 Ohio St. 372, and must, we think, be held to be correct. For the purpose of deciding the precise point in the present controversy, we have confronting us the same condition of affairs as would be the case had the plaintiff in error instituted his error proceedings at the time he did, and had issued and served, if you please, on the attorney of record, a summons in error in the ordinary way; or as would be the case had the attorney of record at the time of the commencement of the error proceedings come into court and attempted to waive the issuance and service of a summons in error. The question, therefore, to be decided is, can a dissatisfied party to the judgment or final order in the court below after the death of his adversary institute error proceedings in the appellate court, and have summons issued and served on the attorney of record, or have that individual waive issuance and service thereof, and this court thereby acquire jurisdiction over the cause and the parties to the controversy? The question must, we think, on principle and authority, be answered in the negative. While it is earnestly insisted that there is no difference in principle between the case at bar and *Link v. Reeves, supra,* we are satisfied there is a marked distinction, which is quite apparent upon a careful consideration of the two cases. In the *Link* case the error proceedings were begun within the time limited by statute, and against a party who was then living, and the service subsequently made on the attorney of record was held good because of the force of the statute providing for such service. Had the law provided, as undoubtedly might be done without violating any fundamental principle, that notice or citation of the commencement of the error proceedings would be effective, and give the court jurisdiction, if filed in the original case in the court below, it could not be doubted that compliance with such provisions,

even though after the death of the adverse party, would give this court jurisdiction when the error proceedings were instituted before death, and permit the revival of the action herein in the name of the proper parties as successors to the rights of the deceased. In the present case, however, the error proceedings were instituted subsequent to the death of the defendant in error. There was in reality no action pending, no proceedings begun in this court, and such as were had, were in fact *ex parte,* and not adversary in character. The action had never been properly removed to this court, because the death of one of the parties while it was yet pending in the trial court prevented further proceedings until the action was revived in the name of the proper party. A marked distinction exists between proceedings in error to obtain a reversal of a judgment or final order in a law action and an appeal in a suit in equity, which latter brings up the case for trial *de novo,* and is accomplished solely by the filing in due time in this court of a transcript of the record containing the judgment, decree or final order appealed from. In case of an appeal in a suit in equity, the filing of a transcript operates *ipso facto* as a removal of the cause to the appellate court, and in the event of death, proceedings for a revivor and substitution are authorized as though the action had been pending in the appellate court since prior to the death of the party. But as we have seen, the right to review by proceedings in error is regulated by an altogether different method of procedure, which must be followed in order to obtain such review. Ordinarily, after the death of a party to an action, subsequent action before revivor materially affecting the rights of successors in interest is null and void. This must be so in the nature of things, because the court has lost jurisdiction over the deceased and has not acquired it over his legal representatives. The judgment obtained in the trial court in favor of one who afterwards dies, becomes final, except as the record may be reviewed and the judgment reversed by proceedings in

error conducted in the mode pointed out by statute. In *Kuhnert v. Conde,* 39 Kan. 265, the syllabus reads: "After a judgment was rendered in the district court in favor of the plaintiff, he died; and afterward the defendant, for the purpose of reversing such judgment, filed a petition in error and case in the supreme court, purporting to make the former plaintiff, and him only, the defendant in error. More than one year after the judgment was rendered, it was revived in the district court in the names of the representatives and successors of the former plaintiff. *Held,* That the proceeding in error in the supreme court must be dismissed, for the reason that it was not legally brought in the supreme court, and there has at no time been any defendant in error." It is said in the opinion: "Before any revivor was had or even attempted, an attempt was made to bring the case to the supreme court. Of course that attempt was abortive. It was attempted to make Conde the defendant in error, but as Conde was dead he could not be made a defendant in error. He could not appear in any court and defend, nor could Bird nor any one else legally appear for him as an attorney or otherwise. Bird ceased to be an attorney for Conde when Conde died. No service of summons could be made upon Conde after his death and no waiver of service or of summons could be had by the consent of Bird, or otherwise." "Indeed," says the court, "there never has been any defendant in error in this court; the case has never legally been brought to this court and in law has never been in this court at all and it is now too late to bring it here." *Coffin v. Edgington,* 23 Pac. (Idaho) 80, is a case decided by the supreme court of Idaho. It is there held that in an appeal to that court under provisions of statute requiring notice of appeal the appellate court will not acquire jurisdiction where, after judgment is rendered in the trial court, but before notice of appeal was filed or served, one of the defendants died and no substitution has been made. The proceedings on appeal, it is ruled,

were null and void as to representatives of the deceased defendant. The decision of the Idaho supreme court is in harmony with and follows those of the supreme court of California, several of which are cited in the opinion. The following authorities may also be cited as being in point on the questions herein considered and in support of the conclusion reached: *Harryman v. Harryman,* 49 Md. 67; *Smith v. Cunningham,* 2 Tenn. Ch. 565; *Shartzer v. Love,* 40 Cal. 93; *Branham v. Johnson,* 62 Ind. 259; *Moore v. Slack,* 140 Ind. 38; *Kennard v. Kennard,* 35 Ohio St. 660; *Ray v. Pease,* 37 S. E. (Ga.) 875; *Terry v. Schultz,* 38 S. W. (Tex.) 374. The former judgment is adhered to.

FORMER DECISION ADHERED TO.

SULLIVAN, C. J., dissenting.

I dissent altogether from the reasoning and conclusion of my associates. In this state the writ of error in civil cases has been abolished. But the right to be heard in such cases in the court of last resort is preserved by the constitution. The procedure is statutory. In actions in equity the cause is removed from the district court to this court by filing here a duly certified transcript of the record. Nothing further is required. Whether the action be legal or equitable, the defeated litigant may, after final judgment, transfer the controversy from the district court to this court by filing here a certified copy of the record and procuring the issuance and service, or written waiver, of the statutory process. When this court has obtained jurisdiction either by appeal or error proceeding, it has authority to make a final disposition of the cause by rendering such judgment as the court below should have rendered. The proceedings in this court in the exercise of jurisdiction acquired under the provisions of title 16, Code of Civil Procedure, are, as we said in *Webster v. City of Hastings,* 56 Neb. 245, quite analogous to those in ordinary actions. But certainly the analogy does not

prove that this statutory proceeding for the correction of errors is essentially and for all purposes a new suit. The statute (section 584, Code of Civil Procedure) describes it as a proceeding; that is, a further step in the litigation. Even the writ of error, which was an original writ, and indispensable to the jurisdiction of the appellate court, was said in *Nations v. Johnson,* 24 How. (U. S.) 195, 205, 16 L. ed. 628, to be "rather a continuation of the original litigation than the commencement of a new action." The effect of the proceeding in error is to bring the record of the case into this court for re-examination—to change the forum.

If the legislature had seen fit to do so, notice of any kind might, as in cases of appeal, have been dispensed with altogether, without infringing any constitutional right of the defendant in error. But notice has not been dispensed with. The statute prescribes the conditions upon which a defeated suitor may be heard in this court. If these conditions have been fulfilled in this case, jurisdiction has attached and the order dismissing the proceeding is wrong. The statute provides (section 584, Code of Civil Procedure) that a summons in error shall be issued and served on the defendant in error or his "attorney of record in the original case," or else (section 585, Code of Civil Procedure) that there shall be a waiver in writing of the issuance and service of the summons by "the defendant in error, or his attorney." I can come to no other conclusion, after carefully considering the matter, than that the attorney who is authorized to accept service is the attorney upon whom the statute authorizes service to be made; that is, "the attorney of record in the original case." Service upon such attorney is good service whether the defendant in error be living or dead (*Link v. Reeves,* 63 Neb. 424); and by parity of reasoning a waiver in writing by such attorney is a good waiver under section 585, Code of Civil Procedure, whether the defendant in error be living or dead. In other words, jurisdiction of the cause is obtained when those things have been done

which the law requires to be done in order to transfer the litigation from the district court to this court. In *Link v. Reeves* a summons in error served upon the attorney of a dead man was held to be good service. The court said: "Robertson being the attorney of record of Preston Reeves in the original case, the service of summons upon him conferred jurisdiction, though Mr. Reeves was then dead."

The written waiver authorized by section 585 was manifestly intended as a substitute for, and the legal equivalent of, the service provided for by section 584. The legislative thought was that whoever may be served ought to have authority to waive service. The writer of the majority opinion is surely mistaken in assuming that the legislature may have authorized waiver of service by an attorney other than the attorney of record in the original case. To permit one not subject to service to waive service would be illogical, and, so far as I know, without precedent in judicial procedure. The suggestion has been made that a proceeding against a dead man is a nullity. But *Link v. Reeves* is an authority to the contrary, and there are many others. *Hohenthal v. Turnure,* 50 Tex. 1; *Black v. Hill,* 29 Ohio St. 86; *Cox v. Whitfield,* 18 Ala. 738; *Beard v. Hall,* 79 N. Car. 506. It would hardly be claimed that the right of a party to remove a case from an inferior court to the district court by appeal would be lost or impaired by the death of his adversary. A party against whom judgment has been rendered before a justice of the peace or in the county court transfers the cause to the district court by giving a good bond and filing a transcript within the time limited by the statute. The death of the other party after judgment and before the bond is given and the transcript filed does not prevent the jurisdiction of the district court from attaching. In such cases, as in the case we are considering, the law prescribes the conditions upon which a change of forum may be had; and there are no other conditions. The legislature saw no necessity for a revivor, and so it was not made a condition

either expressly or by implication. When the prescribed conditions have been performed, the transfer of the controversy from the inferior court to the superior court is effected, and the appellate tribunal should then, if the appellee or defendant in error be dead, direct a substitution of parties and proceed to judgment. The giving of the bond in such case is a proceeding; so is the filing of the transcript; and yet, notwithstanding the death of the party who recovered the judgment, they are valid and effective steps in the progress of the case.

In the majority opinion it is sought to distinguish this case from *Link v. Reeves* by pointing out that in the latter case the petition in error and transcript had been filed and the summons issued before the death of Reeves. How is this actually or possibly material? The action had been pending in the district court, and, as a matter of course, it remained there until this court acquired jurisdiction. When did this court acquire jurisdiction? When the summons in error was served, and not before. The service of the process was as essential to a transfer of the litigation as was the filing of the petition in error and transcript. Each step in the proceeding was necessary; each was vain and useless without the other. When Reeves died this court was not possessed of the action, and it had no more authority to hear and determine than it had in this case when Seeley died. *Ex parte Munford,* 57 Mo. 603. In each case the purpose of the unsuccessful party to remove the litigation to this court was unexecuted when the defendant in error died. In each case the action was still pending in the district court and was not pending here. The fact that the pleading and transcript had been filed with the clerk of this court in one case and not in the other is, it seems to me, without legal significance. In each case the effort to transfer the controversy from the district court to this court during the life of the defendant in error was abortive, and it was no less abortive in one case than in the other.

It is conceded that an appeal will remove a case to this

court without proceeding in the district court to bring in the legal representatives of a party who died after final judgment. The reason is said to be that the law in relation to appeals contemplates a trial *de novo,* and does not require assignment of errors. This can hardly be regarded, if true, as a convincing or even a persuasive reason. The inference does not follow from the premises. But in truth there is, accurately speaking, no trial *de novo* in appeal cases, and there is, necessarily, in such cases an assignment of errors. In both appeal and error cases the judgment of the district court stands until there has been a re-examination of the record. There is then an affirmance, a reversal or a modification. Both methods of review are prescribed by the statute, and the difference between them is formal, rather than substantial. Why the legislature should require a revivor in the district court if one method is pursued and not if the other is followed is beyond comprehension; it is one of those difficult problems which Lord Dundreary would characterize as "a thing no fellow can find out." Suppose there is a revivor in the district court after judgment, what good purpose can it serve? Why is it necessary or desirable that the representative of the deceased litigant be made a party in the district court if the litigation in that court is ended? There seems to be no reason for it, absolutely none, whether the action be legal or equitable. Reason and utility suggest that the order of revivor be made in the court in which the litigation is to be continued, and not in the court in which the controversy has been brought to a conclusion. The first section of the Code of Civil Procedure requires that "its provisions and all proceedings under it shall be liberally construed with a view to promote its object and assist the parties in obtaining justice." The decision dismissing the proceeding in error is, it seems to me, made in utter disregard of this legislative injunction. The plain words of the statute are disregarded in order to give effect to a judicial theory which obstructs justice in this case and has no tendency to promote it in any case.

ELLA LAKE JONES ET AL. V. ROBERT A. PIGGOTT, ADMINISTRATOR OF THE ESTATE OF JABEZ J. PIGGOTT, DECEASED.

FILED MARCH 4, 1903. No. 12,666.

County Court: APPEAL. A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute, has been executed and filed.

ERROR to the district court for Thayer county: GEORGE W. STUBBS, DISTRICT JUDGE. *Judgment vacated and proceeding dismissed.*

John Heasty, O. H. Scott, Charles L. Richards, Charles S. Lobingier and *James Dinsmore,* for plaintiffs in error.

Charles H. Sloan, T. C. Marshall and *C. A. Capron, contra.*

AMES, C.

This is a petition in error to review a proceeding evidently intended as an appeal from an order of a county court settling the accounts of an administrator. In the district court it was objected by the appellee the administrator that that court had not obtained and could not acquire jurisdiction over the supposed appeal, and that it had no jurisdiction of the subject matter, and the court was asked to dismiss the proceeding. We think that, upon the record before us, the motion should have been granted, or, rather, that it was the duty of the court of its own motion to refuse to retain the proceeding.

Section 42 of chapter 20 of the Compiled Statutes (Annotated Statutes, 4823) enacts that "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to

the district court by any person against whom any such order, judgment, or decree may be made or who may be affected thereby."

Section 43: "All appeals shall be taken within thirty days after the decision complained of is made."

Section 44 provides for giving a bond upon appeal in all cases in which the appellant is not an executor, administrator or guardian.

Section 45: "After such bond has been filed, the appeal shall be granted," etc.

Section 46: "When such appeal is taken, the county court shall, on payment of his fees therefor, transmit to the clerk of the district court within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from."

Section 47: "Upon the filing of such transcript in the district court, that court shall be possessed of the action, and shall proceed to hear, try, and determine the same," etc.

It is quite evident from the foregoing that the district court does not obtain possession or jurisdiction of such an appeal unless within forty days from the date of the order appealed from a transcript thereof, and of the proceedings relative to it in the county court, is filed with the district court clerk, nor unless within thirty days from the date of the order the bond required has been executed and filed. We do not find in the record before us anything purporting to be such a transcript, nor any evidence when, or that ever, any such order was made or bond given. So far as appears, therefore, the proceeding in the district court was without jurisdiction, and it is recommended that the judgment of the district court be vacated and set aside, and the proceeding dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, it is ordered that the judgment of the district court be vacated and set aside and the proceeding dismissed.

JUDGMENT VACATED.

FIRST NATIONAL BANK OF GREENWOOD, NEBRASKA, V. A. L. VAN DOREN ET AL.

FILED MARCH 4, 1903. No. 12004.

Attachment: DISSOLUTION: SEVERAL CAUSES OF ACTION: DISMISSAL OF PART. Where a writ of attachment issues for the whole amount claimed in several causes of action included in the same petition, and afterward, and before trial, some of such causes of action are dismissed by the plaintiff, a motion to dissolve the attachment, based on such dismissal, should be sustained.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Order dissolving attachment affirmed.*

C. S. Polk, for plaintiff in error.

Byron Clark and *C. A. Rawls, contra.*

ALBERT, C.

The plaintiff filed a petition stating five causes of action, the amount claimed aggregating $1,700, and the necessary affidavit for an order of attachment for the full amount claimed. The writ issued, and was duly levied on the property of the defendant. Afterward, for reasons not material to the present inquiry, four of the causes of action were dismissed. The defendant answered, and before trial filed a motion to dissolve the attachment, on the grounds, among others, that four of the causes of action on which the attachment was issued had been dismissed, and that the levy was excessive. The motion was sustained, and from the order of the court dissolving the attachment, the plaintiff prosecutes error to this court.

The remedy of attachment is a harsh one. To prevent, so far as possible, its oppressive use, it is hedged about with certain restrictions, chief among which is that the writ will not issue until after the action in which it is sought has been brought, and then only on the filing of an affidavit showing, among other things, the nature of the plaintiff's claim, that it is just, and the amount the affiant believes the plaintiff is entitled to recover thereon. Sections 198, 199, Code of Civil Procedure. The writ limits the property to be seized thereunder to sufficient to satisfy the amount the affidavit shows the plaintiff is supposed to be entitled to recover, and the probable cost of the action, not exceeding $50. Section 201, Code of Civil Procedure.

In the present case the action had been duly brought and the necessary affidavit for an attachment filed. As before stated, the petition stated five causes of action. The amount shown by the affidavit as that which affiant believed the plaintiff entitled to recover, was the aggregate amount claimed on the five causes of action, and the writ issued accordingly. But when four of the causes of action were dismissed, so far as the writ is concerned, it was the same as though they had never been brought; and such dismissal further operated as a retraction of that part of the affidavit based on such four causes of action. We have, then, a writ of attachment, authorizing the seizure of the defendant's property for the satisfaction of five claims, when the action is for the enforcement of but one, which is not supported by an affidavit showing the amount the affiant believes the plaintiff is entitled to recover, because, after the retraction, necessarily implied from the dismissal of the four causes of action, the affidavit does not show such amount. It is true it shows the amount the plaintiff seeks to recover, but the statute is specific that it must show the amount the affiant believes the plaintiff is entitled to recover. Section 199, *supra*. Had these omissions existed when the writ issued, it will not be claimed that it could be upheld. In our opinion,

they are no less fatal when arising subsequently. To hold otherwise would, in effect, permit the very abuses which the statute, making the affidavit a prerequisite to the issuance of the writ, was designed to prevent. The motion to dissolve the attachment was rightly sustained, and we recommend its affirmance.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court is

AFFIRMED.

SEDGWICK, J., concurring.

The defendant A. L. Van Doren executed five several promissory notes jointly with as many different parties, no two of the notes having the same makers. Plaintiff began this action against all of the makers of the notes, the petition containing five counts, each declaring upon one of the notes. The amount due upon the five notes aggregated about $1,700, and the plaintiff procured an attachment in the action for the full amount, which was directed against the property of Van Doren only. All of the defendants except Van Doren demurred severally to this petition for misjoinder of causes of action. Thereupon plaintiff, instead of docketing several actions as it might have done, dismissed three of its causes of action, and dismissed the action as to all of the defendants except Van Doren, who then demurred to the petition for the reason that there was a defect of parties defendant. The demurrer was sustained by the court. Plaintiff then dismissed another cause of action, and again made the makers of the note constituting the remaining cause of action parties by a new summons. The amount of this note was $549. Van Doren then answered, and filed a motion to discharge the attachment on the ground, among other things, that the grounds alleged for the attachment were

untrue, and that the attachment was excessive and malicious. The court found that the defendant Van Doren and his wife had fraudulently conveyed their property, which conveyance had resulted in defrauding the creditors of the said Van Doren, and also found that "the petition filed, and affidavit for an attachment herein and the writ issued thereon alleged that there was due upon the several causes of action the sum of $1,700; that subsequent to the levying of said writ the plaintiff dismissed from its said petition four causes of action aggregating the sum of $1,230. The court further finds as matter of law that by the dismissal of said causes of action a presumption attaches that the grounds for the attachment as alleged in said affidavit did not exist as to these four causes of action, dismissed from said petition and said attachment being wrongful as to one cause is vitiated as to all of said causes of action." The court therefore discharged the attachment.

The opinion of the commissioner is that the attachment was excessive, and for that reason the order discharging it was correct. I felt much hesitation in consenting to this view of the case. No doubt the plaintiff, when it dismissed its causes of action, should also have released a part of the property from the attachment, and, when the motion was filed to discharge the attachment upon the ground that it was excessive, the plaintiff without doubt might have asked the court to discharge the attachment as to the excessive levy, and retained its lien for the claim which it succeeded in establishing. The plaintiff seems to have put itself in the position of insisting upon holding all of the property or none. It clearly was not entitled to hold all the property under this attachment, and for this reason I am constrained to concur in the conclusion reached.

CHRISTINA A. COLE ET AL., APPELLANTS, V. ISAAC BOYD ET AL., APPELLEES.

FILED MARCH 4, 1903. No. 12,638.

1. **Fraud:** LIMITATION OF ACTION. An action for relief on the ground of fraud, is barred in four years from the date of the discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to such discovery.

2. **Administrator's Sale:** SETTING ASIDE. Where an administrator becomes the purchaser at his own sale of the lands of his intestate, and applies the proceeds in payment of the debts of the estate, in an action by the heirs to set aside such sale they are not required to offer to reimburse him for the purchase price, where it appears that the rents and profits in his hands, accruing since the sale, exceed the amount of his disbursements on the venture.

APPEAL from the district court for Adams county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

Robert A. Batty and *Harry S. Dungan,* for appellants.

Addison S. Tibbets, George W. Tibbets and *Charles F. Morey, contra.*

ALBERT, C.

On the 6th day of February, 1880, John M. Cole died intestate, in Adams county, seized in fee of the land in controversy in this suit, lying in that county, leaving the plaintiffs, Christina A. Cole, his widow, and Florence I. Walters (born Cole), William A. Cole and John G. Cole, his children, his sole and only heirs at law. The children, at the date of their father's death, were respectively thirteen, ten and three years old. In March, following the death of the intestate, the defendant Isaac Boyd and the widow were duly appointed administrators of the estate. In March, 1881, they presented their petition to the judge of the district court for said county for license to

sell the land for the payment of the debts of the estate. License was duly granted, and the land duly offered for sale in pursuance thereof. It appears from the evidence that the administrator Boyd was apprehensive that the land would not bring its fair value, and arranged to become the purchaser in case its fair value was not offered by some other person. He informed the county judge of his intentions in that behalf, and was advised that he could not become the purchaser directly, but would be obliged to have some other person act as the ostensible purchaser. He then arranged with one Tappen to bid on the land up to $700, and buy it, in case no more than that amount was offered for it. Tappen was the highest, but not the only, bidder, and the land was sold to him for $700, Boyd being the actual purchaser. The sale was confirmed by the district court for Adams county in December, 1881, and a deed executed in pursuance thereof by the administrators on the 26th day of the same month to Tappen, the widow at the same time conveying to him her right of dower. Five days thereafter Tappen conveyed to the defendant Isaac Boyd, the real purchaser, and on the same day both deeds were filed for record and recorded in the office of the county clerk of Adams county.

On the 8th day of February, 1900, the plaintiffs filed their petition in the district court for Adams county against Isaac Boyd and his wife, setting forth the facts hereinbefore stated, and charging, in substance, that the first-named defendant fraudulently procured the license for the sale of the land for the purpose of acquiring the title thereto, and that in procuring a confirmation of such sale he concealed from the district court and his coadministrator the fact that he was the real purchaser at such sale. The petition further alleges that said defendant, since the sale in question, has received the rents and profits of the land, amounting to $2,500. The relief asked is the cancelation of the administrator's deed to Tappen, and of his deed to the defendant Isaac Boyd, that the latter be required to convey the title to them, and for judgment for the rents and profits.

The defendants, by their answer, negatived any presumption of actual fraud, charged that the plaintiffs had been guilty of such laches as to bar their right of action, pleaded the statute of limitations as to all of the plaintiffs except John G. Cole, and alleged the payment of taxes on the land and the expense of certain improvements thereon by the defendant Isaac Boyd.

In the reply the plaintiffs allege, among other things, that the facts constituting the alleged fraud were not discovered by them until December, 1899.

The court found for the defendants generally, as against all of the plaintiffs except John G. Cole, and also made the following specific findings:

"The defendant Isaac Boyd was duly licensed as administrator, together with plaintiff Christina Cole, to make sale of the premises described in the petition; that bond was duly given and approved; the oath taken as prescribed by law; notice given as required by law and said premises duly offered, sold and such sale duly confirmed by the court; that at such sale said premises were declared sold to one Israel Tappen who purchased the same for the use and benefit of defendant Isaac Boyd and afterwards conveyed the same to him; that in so doing there was no actual fraud on the part of said Boyd or Tappen, they both acting in good faith and said premises being sold for their full value and the proceeds of such sale having been duly turned into said estate and used for the benefit thereof; that plaintiffs had full, actual and constructive notice that said premises were purchased for the use of said Isaac Boyd, at the time thereof; that plaintiffs aside from Christina Cole, were minors at the time of said sale, but have all become of full age since the same—more than five years having elapsed, prior to the commencement of this suit, since the coming of age of plaintiffs, Florence I. Walters and William A. Cole; that plaintiff Christina Cole conveyed her dower estate in said premises to Israel Tappen and he subsequently by his deed, to defendant, Isaac Boyd; that no part of the pur-

chase price at such sale has ever been repaid or offered by any of the plaintiffs to said Tappen or these defendants; that the average fair rental value of the whole of said premises, from said sale to the present time, is $100 per year and taking the interest of the defendant John G. Cole herein which is two-ninths thereof, or $22.22 per year, or $440 for said period, and deducting therefrom the proportion chargeable to him for purchase price, taxes paid by said Isaac Boyd and improvements, which amounts to $314, there is now due him, on so accounting, the sum of $130."

A decree was entered in accordance with the findings. The plaintiffs, against whom the decree runs, bring the case here on appeal, and the defendants ask a reversal of that portion of the decree against them and in favor of John G. Cole.

The principal question in this case is whether the statute of limitations had run as against all of the plaintiffs, except John G. Cole, at the time this action was commenced. The case is presented to the court on the theory that it is an action for relief on the ground of fraud, and that by the provisions of section 12, Code of Civil Procedure, it did not accrue until the discovery of fraud, and would not be barred until four years after such discovery. The plaintiffs appealing insist that the evidence is insufficient to sustain the findings of the trial court; that four years intervened between their discovery of the fraud and the commencement of the action. We have gone over the evidence covering this point with more than usual care, and to our minds it leaves little room for doubt that at least four years before the commencement of this action all of the plaintiffs were in possession of sufficient facts concerning the transaction to put them upon their inquiry, which, had it been pursued in the light of such facts, with ordinary diligence, would have laid bare the entire transaction. The statute in question begins to run, not from the actual discovery of the fraud, but from the time of the discovery of such facts as would put a person

of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to such discovery. *Gerner v. Mosher,* 58 Neb. 135, 46 L. R. A. 244. Such being the rule, the evidence, in our opinion, is abundantly sufficient to sustain the finding of the trial court on this point as to the appellants, the youngest of whom was thirty-one years old when this action was brought, so that the question of disability does not arise as to them.

The defendants contend that the decree, so far as it is in favor of the plaintiff John G. Cole, is erroneous and should be reversed. The statute of limitations is not invoked as to him, as he was only twenty-three years old when the action was commenced. But the reversal as to him is sought on the ground that he has not offered to do equity by offering to reimburse the defendant, who was the real purchaser at the sale in question. The finding of the court, amply sustained by the evidence, shows that such purchaser has in his hands of the rents and profits more than sufficient to reimburse him for all that he has paid out on account of the land. The allegations of the petition are to the same effect. That being true, no formal offer to do equity was required; in fact, under the circumstances shown there was nothing equity required of such plaintiff.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the decree of the district court is

AFFIRMED.

GEORGE PRATT v. CHARLES S. SMITH.

FILED MARCH 18, 1903. No. 12,689.

Error: RECORD: PRESUMPTION. Where it is claimed that the court erred in permitting a pleading to be amended during trial, the alleged fact must be shown by the record; its existence will not be presumed.

ERROR to the district court for Buffalo county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

J. F. Walker, for plaintiff in error.

D. C. Wenzell, contra.

SULLIVAN, C. J.

This action involving an examination of a long list of mutual charges and credits was submitted to a jury, who returned a verdict in favor of the plaintiff for $2.15. Two assignments of error are discussed by counsel for defendant. They are as follows:

"1. The court erred in permitting the plaintiff in said court to introduce an item or items for team work amounting to $40, said item or items being no part of the amount sued upon or sought to be recovered by the plaintiff, and was not in his items of account against the defendant and not in the plaintiff's petition.

"2. The defendant was surprised by the introduction of said item of $40 introduced by the plaintiff for team work, he having no knowledge that such item of charge existed and was not prepared to meet it and answer thereto, the same being material to the issue changing the computation of the jury resulting in a verdict against the plaintiff."

The difficulty with these assignments is that they have no adequate foundation in the record. If the item for

team work was not in the petition when the trial was commenced, the record fails to show that fact. It is certainly in the petition now and there is no evidence of an amendment having been made during the trial. Error will not be presumed; it must appear affirmatively.

The judgment is

AFFIRMED.

WILLIAM KOEPKE V. STATE OF NEBRASKA.

FILED MARCH 18, 1903. No. 12,878.

Criminal Offense: BOWLING ALLEY. The running of a bowling alley in connection with a saloon or hotel, is in this state a criminal offense.

ERROR to the district court for Colfax county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Affirmed.*

George H. Thomas, Frank J. Everett and *George W. Wertz,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown,* for the state.

SULLIVAN, C. J.

The defendant, Koepke, a licensed vender of intoxicating liquors, was found guilty of establishing and maintaining upon the premises where his saloon was located a ball or ninepin alley. Motions for a new trial and in arrest of judgment were overruled and sentence imposed.

The facts charged in the information are admitted, but it is claimed that they do not constitute a crime. Section 221 of the Criminal Code, the section upon which the prosecution was grounded, is as follows:

"If any keeper of a public house, or retailer of spirituous liquors, in this state, shall establish, keep, or permit to be kept upon his or their lots or premises, any ball or ninepin alley, or shall in whole or in part be interested in any ball or ninepin alley, upon the lot or premises of

another, he or they shall pay a fine of not less than ten nor more than one hundred dollars; and this section shall be construed to extend to any alley denominated a nine-pin alley, whether such alley is used for playing therein a greater or less number than nine pins."

It is argued by counsel for defendant that this section forbids a retailer of intoxicants or the keeper of a public house from keeping, or being interested in, a bowling alley anywhere in the state, and that it is, therefore, an unreasonable restriction upon individual freedom, and a violation of the right of every citizen to the equal protection of the laws. Under counsels' construction the statute as a whole would perhaps be indefensible; but we are not disposed to think it was designed to exclude innkeepers and saloonkeepers from a business in which all other citizens are permitted to engage, but rather to prevent evils supposed to result from running a bowling alley in connection with a saloon or hotel. It is rather to be presumed that the legislature failed to express itself clearly than that it intended to enact an unconstitutional law. *Pleuler v. State,* 11 Neb. 547; *State v. Stuht,* 52 Neb. 209. But if we were to accept the view that the prohibition against keeping a bowling alley, or being financially interested in one, is subject to no implied limitation, it would not follow that the judgment is wrong. The enactment of a law prohibiting the running of a bowling alley in connection with a saloon or hotel was of course a legitimate exercise of legislative power, and the prohibition is valid even if it be regarded as embraced within a broader prohibition which is void to the extent that it is broader. Where there is a conflict between a statute and the constitution, the statute, if the valid and invalid parts are severable, yields to the extent of the repugnancy, but it yields no further, unless the invalid part was an inducement to the adoption of the remainder. *Scott v. Flowers,* 61 Neb. 620.

The judgment is

AFFIRMED.

AUGUST F. JAHNKE V. STATE OF NEBRASKA.*

FILED MARCH 18, 1903. No. 12,979.

1. **Felony:** PRELIMINARY EXAMINATION. In a prosecution by information for a felony, in the absence of his waiver of a right to a preliminary examination, a defendant can not be put upon trial for the crime charged over his objections, until such preliminary hearing is accorded him, and he is held by the examining magistrate to await a trial in the district court.

2. **Plea in Abatement.** By the interposition of a plea in abatement after the filing of an information against one accused of a felony the question may properly be determined as to whether a preliminary examination has been had or waived.

3. **Preliminary Examination.** The statute providing for preliminary examinations contemplates that before a person can be proceeded against by information, he must be brought before an examining magistrate, charged with the commission of a crime, and that the magistrate shall proceed to hear the complaint, examine such witnesses as are produced in support thereof or to controvert the same, and then exercise judgment or discretion of a judicial character in determining from the evidence adduced whether the accused should be held to appear for trial in the district court, or should be discharged for want of probable cause, or because it is not made to appear that a crime has been committed.

4. **Plea in Abatement:** PRELIMINARY EXAMINATION. When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of the complaint such as to invoke an honest exercise of judgment or discretion in the weighing of such evidence and in reaching a conclusion as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense and he is held to await trial in the district court, a preliminary examination has been had within the meaning of the statute and the plea in abatement would be unvailing.

5. ———: DEMURRER. *Held*, That a preliminary examination within the meaning of the statute had been accorded the defendant in

* Rehearing allowed. Judgment below affirmed. See opinion, page 181, *post*.

the case at bar, and that the trial court properly sustained a demurrer to his plea in abatement alleging that no such examination had been had.

6. **Change of Venue.** An application for a change of venue is addressed to the sound discretion of the trial court, and its ruling thereon will not be held erroneous, unless an abuse of discretion is shown.

7. ———. If, upon the showing made in support of and against an application for a change of venue, it does not appear that there exists reasonable grounds on which to found a belief that the defendant can not have a just trial in the county by a fair, unbiased and impartial jury, the trial court may properly overrule the application.

8. **Juror:** QUALIFICATION. Where, on a challenge of a proposed juror for cause on the ground that he has formed or expressed an opinion concerning the guilt or innocence of the defendant, it appears that such opinion is not unqualified and is formed from reading newspaper accounts of the transaction, or from common talk or rumor regarding the same, and that notwithstanding such opinion the juror is unbiased, and can impartially hear and consider the evidence and arrive at a verdict solely with reference thereto and the instructions of the court, uninfluenced by anything heard or read prior to the trial, the court may admit such person to sit in the trial of the case as a qualified juror.

9. **Challenge for Cause:** REVIEW. An exception by the defendant to a ruling of the trial court on a challenge for cause in a felony case, is not properly presented for consideration on review, where the juror is afterwards excused, and the record does not show the exhaustion of all his peremptory challenges, and that the proposed juror to whom the exception relates was excused by him in the exercise of his right of peremptory challenges.

10. **Evidence:** PRIOR ATTEMPTS TO COMMIT THE SAME CRIME. It is competent, in the prosecution of a person for murder, for the state to prove prior attempts by the defendant to kill the deceased, as tending to establish an intent to kill, and plan and design adopted and resorted to in the commission of the crime.

11. **Privileged Communication.** Statements made by one to an attorney in the capacity of a client communicating with his counsel, is a privileged communication, which can not lawfully be divulged by counsel, nor drawn from the witness on cross-examination without his consent.

12. ———. *Held*, in the case at bar, that the relation of attorney and client exists, and that the testimony sought to be elicited on cross-examination was properly excluded by the court.

13. **Principals in First and Second Degree.** Under the Criminal Code

of this state the law does not distinguish between principals in the first and second degrees.

14. ———: Where a person accused of the commission of a felonious homicide is present at the time aiding, abetting, and assisting or counseling and procuring its commission, and a felony is committed, then he is guilty in the same degree and to the same extent as though he had performed the act causing death.

15. **Instructions.** Where by the evidence it is conclusively shown that the defendant either committed the crime charged,—that is, murder in the first degree,—or is entirely innocent, noninstruction to the jury by the trial court with respect to the lesser degrees of homicide embraced in the charge alleged in the information is not erroneous.

16. ———. Other instructions given and refused, excepted to by the defendant, examined, and the ruling thereon *held* proper.

17. **Discharge of Jury:** LEGAL DISCRETION. The time which jurors shall be kept together before they are finally discharged because of their inability to agree on a verdict rests largely in the discretion of the trial court, but this is a legal discretion, and if legal rules and principles governing are transgressed, the action can not be upheld.

18. **Verdict.** Where the jury, after being kept together for an unusual length of time, have returned a verdict of guilty and there is nothing in the record inconsistent with the view that it was agreed to voluntarily by all the jurors solely from a consideration of the evidence and the instructions of the court unaffected by anything in the nature of coercion, the verdict will not be disturbed.

19. **Evidence.** Evidence examined, and found sufficient to support a verdict of guilty of murder in the first degree, as returned by the jury.

20. **Other Errors.** Other errors assigned examined, and found to furnish no sufficient basis for a reversal of the judgment.

ERROR to the district court for Box Butte county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Affirmed.*

Robert C. Noleman and *Benjamin F. Gilman* (on rehearing *Francis G. Hamer* and *Thomas F. Hamer*), for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *William B. Rose*, for the state.

HOLCOMB, J.

The defendant, August Jahnke, was tried and convicted in the district court of Box Butte county upon an information filed by the county attorney charging him with murder in the first degree. In the verdict returned by the jury, imprisonment in the penitentiary for life was fixed as the punishment to be inflicted for the crime of which he was found guilty. The homicide was committed by shooting one Michael Sirck in the right side and back with a loaded shotgun, the shot from which penetrated his lungs, causing death within four to six hours thereafter. The gun at the time the load was discharged, was in the hands of one Oliver Olson. The prosecution by the state was conducted upon the theory that the homicide was committed by shooting as above stated by Olson, who fired the shot with felonious intent and in pursuance of a prearranged plan between the defendant and Olson; the defendant at the time being present, aiding, abetting, assisting, and procuring the commission of the crime, and by reason thereof was a principal in the transaction. The motive actuating the parties was to procure insurance in the sum of $4,000, which prior thereto had been procured on the life of the deceased, payable to his estate; the defendant Jahnke being the sole beneficiary under a will executed in his favor by the deceased at the time of procuring the life insurance policy, and as a part of the same transaction. The life insurance money, according to the testimony of Olson, was to be divided equally between the defendant and himself after the doctor's bill and funeral expenses had been paid. As a part of the prearranged plan, according to Olson's version of the affair, the shooting of the deceased and his death by that means was to be accomplished, and thereafter be reported and treated as having been occasioned by an accidental discharge of the shotgun. The defense of Jahnke was conducted on the theory that the shooting was in fact

accidental, and that Olson's testimony to the contrary was manufactured by reason of influences and inducements exerted on and held out to him by the county attorney and the sheriff of the county and in the hope of receiving immunity for his participation in the crime. After the defendant's conviction, Olson pleaded guilty to murder in the second degree, which was accepted by the county attorney, and a sentence imposed by the court of twenty years' imprisonment in the penitentiary. The testimony of Olson disclosed that several prior attempts had been made to take the life of the deceased, all of which had proved unsuccessful, and that thereupon it was agreed between them that a shotgun should be procured and his death accomplished by shooting under the pretense that it was the result of an accident. The uncontradicted evidence goes to show that while the deceased, who was a bachelor, living alone, was sitting at the breakfast table at his home, the defendant being seated on the opposite side of the table talking to him, Olson came from an adjoining room through a partition door immediately to the right and to the rear of where the deceased was sitting, and that just as he passed through the door the charge in the gun was exploded, the shot striking the deceased in the right side or back near the spinal column, penetrating his lungs, from which his death soon resulted. The deceased at the time lived in the country some twelve miles from Alliance, the county seat of Box Butte county. The defendant and Olson had frequently stopped with him for meals and overnight when in that vicinity. The defendant, at the time of the homicide, was living at Alliance, but within a year or two prior thereto had lived on another farm or ranch in the neighborhood where deceased was living. Olson is a brother-in-law of the defendant. The morning preceding the homicide defendant, with his son, who was about eighteen years old, and Olson, drove from Alliance to the home of the deceased, where they remained over night. It was testified by Olson that the plan was to shoot the deceased on the same evening they ar-

rived at his home, but because of the presence of a relative who visited him during the evening, these plans miscarried. During the night, says Olson, while he and the defendant were occupying the same bed in a room by themselves, it was agreed between them that they would undertake to accomplish their object on the following morning, and that the shooting at the time and in the manner narrated was the final consummation of the conspiracy they were engaged in.

The record which is presented for review by defendant is quite voluminous, and the petition in error contains near three hundred assignments of alleged errors, of which only those which are argued in brief of counsel will be considered. Some, even, of the assignments of error which are argued are not deemed of sufficient importance to be noticed and considered more than in a very brief way.

When called upon to answer the information filed against him, the defendant interposed a plea in abatement on the ground that there had been no preliminary examination of the offense of which he was informed against, such as is by law required. In the plea in abatement was set out in full all the proceedings had before the examining magistrate, including the testimony which had been introduced at such hearing. The county attorney filed a demurrer to this plea, which, upon consideration, was sustained by the court. The ruling on the demurrer is now assigned as error. The contention of the defendant is that while there was in form a preliminary inquiry to a limited degree, it was not such as is required by law, and that the evidence upon which the examining magistrate acted failed altogether to show that any crime had been committed; that the order of commitment on the evidence adduced was entirely unwarranted and without legal justification; and the district court therefore erred in holding, as it did in effect, that the defendant had been accorded a preliminary examination within the meaning of the law. The question directly presented to us, is what shall be the standard by which to determine whether a preliminary

examination has been had such as will authorize a county attorney to proceed in the trial of a person accused of a felony, when such an examination has not been waived, and where at least a form of examination has been had, some evidence introduced, and a finding by the magistrate that a crime has been committed, and also that there is probable cause to believe the person charged guilty of its commission? It has frequently been held in this and in other jurisdictions that where prosecutions by information are allowed in the absence of a waiver by a defendant accused of crime of his right to a preliminary examination, he can not be put upon trial for the crime charged over his objections until such preliminary hearing has been accorded him and he held to await a trial in the district court, and that a plea in abatement is the proper method of determining whether or not such hearing has in fact been had or waived. *White v. State,* 28 Neb. 341; *Coffield v. State,* 44 Neb. 417; *Latimer v. State,* 55 Neb. 609, 70 Am. St. Rep. 403. In the case last cited it is said that the object of a preliminary examination before an examining magistrate is to ascertain whether the crime charged has been committed, and if it is found to have been, then whether there is probable cause to believe the accused committed it, and if such is found to be the case, to insure his appearance in the district court to answer the complaint by recognizing him to appear thereat, or, in default of recognizance, to commit the accused to jail until an information may be presented against him and he be required to answer for the crime charged. What the statute evidently contemplates is that when a person is charged with the commission of a felony, before he can be proceeded against by information he must be brought before an examining magistrate on such charge, and that the magistrate shall proceed to hear the complaint and examine such witnesses as are produced in support thereof or to controvert the same, and then exercise judgment or discretion of a judicial character, with which he is invested, in determining whether from the evidence ad-

duced, the accused should be held to appear for trial in the district court or should be discharged for want of probable cause, or because it is not made to appear that a crime has been committed. It was not, we apprehend, the intention of the statute that by a plea in abatement errors in the judgment of the examining magistrate should be corrected, or that the evidence introduced should be weighed for the purpose of determining its sufficiency, as might be the case by a reviewing court when the questions involved are those solely of guilt or innocence of the accused.

When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime is called in question, as in the case at bar, by a plea in abatement, the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result reached can not be determined by a plea in abatement. It is only where there is in fact no preliminary examination, either in form or substance, that advantage can be taken of by such a plea. It is the rule in this jurisdiction that while the question of the sufficiency of the evidence introduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings, yet where it appears that the court had jurisdiction, that an offense had been committed, and there is testimony tending to show that the accused committed the offense, the court will not weigh the evidence further to see whether it was sufficient to hold the accused on the ground of probable cause. It is not necessary in such cases that the evidence should be sufficient to support a verdict of guilty, or show guilt beyond a reasonable doubt. *In re Balcom,* 12 Neb. 316; *State v. Banks,* 24 Neb. 322, 326; *Rhea v.*

State, 61 Neb. 15. We feel quite certain that when the same question is raised on a plea in abatement that the inquiry can go no further nor be entered into to any greater extent in the determination of such a plea, nor do we say that the sufficiency of the evidence may be inquired into to the same extent upon such plea as it can in proceedings under a writ of habeas corpus. We are disposed to the view that the true test should be whether in fact there was a hearing as to the crime charged in form and substance as contemplated by the statute, and whether the evidence introduced at such hearing is such as to invoke an honest exercise of judicial discretion, a bona-fide judgment or determination on the part of the examining magistrate by weighing and considering such evidence in arriving at a conclusion as to the order or judgment to be entered; and if such is the case, then it can not be said that a preliminary examination, within the meaning of the statute, which will support the filing of an information in the district court, has not been had. If, after the filing of a complaint charging a felony, the magistrate proceeds to inquire into the complaint by an examination of the witnesses offered by the state and the accused, and from the evidence thus adduced he is required to determine therefrom whether a crime has been committed, and whether there is probable cause to believe the accused guilty of its commission, and does so determine upon evidence sufficient in quantity to necessitate consideration and deliberation judicial in character in reaching a fair legal deduction and to justify an inference of probable guilt, when the party is held to answer the charge, the statute is satisfied, and a preliminary examination such as the accused is entitled to, in the absence of a waiver, has been accorded him. In the case at bar, as shown by the record of the preliminary hearing of the defendant before the county judge acting as an examining magistrate, two witnesses were sworn and testified for the state. The defendants offered no testimony, and were content, under advice of counsel, to rest on a motion to discharge them

for want of sufficient evidence to hold them to answer in the district court, which was presented after the state had introduced all the evidence offered in its behalf. The evidence introduced disclosed without doubt the commission of a homicide. The only question for determination by the magistrate in reaching a conclusion was whether or not the killing was excusable as the result of an accident. There was proof of the nature of the wound which produced death, the place where inflicted on the body of the deceased, and that the shooting was done while the gun was carried by Oliver Olson in the presence of the defendant. It developed at the hearing that the parties accused had stated that the shooting was accidental. The evidence showed that the parties accused had removed the clothing from the deceased when the physician, the first one who saw him after he was shot, arrived at his house. The course of the shot producing the injury was described, and the position of the parties at the time the shot was fired. It appeared that the clothing worn by the deceased at the time had been burned, evidently as a result of the explosion of the powder, and that when the gun was fired the person holding it was standing not to exceed four feet from the deceased; that from the relative positions of the parties, Olson, as he passed through the door, was immediately to the right of and quite close to the deceased, who was sitting in a chair at the table, and that when the gun was discharged the shot struck his body on the back and right side, ranging slightly downward and inward from his spinal column. From the whole of the evidence, the relative position of the parties, the way the gun must have been held, and the direction in which pointed, we think it manifest that legal deductions are fairly warrantable wholly inconsistent with the theory of an accidental discharge of the gun unaccompanied by any explanation other than the naked statement that the shooting was accidental. If the evidence made a prima-facie showing of the commission of a felony, or warranted a legal deduction that one had been committed, then the probable guilt

of the defendant followed as a logical and necessary sequence. Nothing is disclosed by the record of the preliminary examination as to any explanation offered concerning the details of the alleged accidental killing. All that appears is that defendants stated that the deceased was shot accidentally while Olson was carrying the gun as he came through a door near where deceased was sitting. We think that it is obvious that the evidence offered by the state was of such a nature as to call for an honest judgment on the part of the examining magistrate in determining what should be the result of the preliminary examination, and that his conclusion, reached from a consideration thereof, can not be said to be the result of an arbitrary order unsupported by evidence, or that no preliminary examination was in fact held. The examination, we have said, is for the benefit of the accused. It is not only to advise him of the exact nature of the crime with which he is charged, and ascertain whether there is probable cause to believe that he committed it, but also affords him an opportunity to relieve himself of an accusation, and dispel all probabilities of guilt by offering evidence in his own behalf. The defendant offered nothing to disprove the state's evidence, nor made any objection to the order of commitment save to move the examining magistrate to discharge him for want of sufficient evidence. He is not now, in our judgment, under the record, in a position to say that no examination has been had, or that he has been denied any right which is accorded him by the statute before he may be required to answer to the information of the county attorney charging him with the commission of the crime for which he was tried and convicted, and the ruling of the district court on the demurrer to the plea in abatement is, therefore, without error.

It is also argued that the court erred in refusing to grant a change of venue on the application of the defendant. In support of the motion there were filed the affidavits of the defendant, his son, who at the time stood

jointly charged with him with the commission of the same offense, and four of the citizens of Box Butte county. The affidavits of all save those of the attorneys for the defendant in support of the motion were of a general character, alleging, in substance, that the defendants could not have a fair and impartial trial on account of strong prejudice and bias of the citizens of the county generally. The affidavits filed by the two counsel for the accused narrated what a number of citizens, and especially those residing in Alliance, are purported to have said, to the effect that the defendants could not get a fair trial because there was a strong prejudice existing against them and a deep feeling that they were guilty of the crime charged; that such parties would not sign affidavits in support of the motion for personal and business reasons,—and that the defendants could not, as the affiants believed, have a fair trial in Box Butte county. Much is set out in detail in the affidavits of counsel as to what different persons had said to those making the affidavits, and of the connection of the insurance company (a local organization) and its principal officers with the transaction preceding the homicide, and of their influence and standing in the county, and of the feeling of defendants' guilt prevailing generally, occasioned by rumors which had been set afloat in all parts of the county. There was also narrated the purported expressions of a number of citizens of a positive and emphatic character concerning the defendants' guilt, and of the impossibility of securing a fair, unbiased and impartial jury to try them in that county. The counter affidavits offered by the state were signed by over a half hundred of the citizens of the county, and were to the effect that there has been no unusual feeling exhibited in the case, or interest taken in the prosecution of the defendants; that a large majority of the people knew nothing of the merits, and, when the subject was mentioned, it was uncoupled with any feeling of prejudice or resentment, and that but few of the citizens were acquainted with the defendants or the deceased; and that more than seventy-five

per cent. of the voters were absolutely free from bias, prejudice or opinion in regard to the guilt or innocence of the accused, and could serve as fair and impartial jurors, and that a fair and impartial trial by an unprejudiced jury could be secured in the county. In the counter affidavits of the state appear the names of several who, by the affidavits in support of the motion, it is said had expressed the opinion that a fair and impartial trial could not be had. As to all such there was a direct conflict between the affidavits made by themselves and what by the affidavits in support of the motion they are represented as saying. While the affidavits in support of the motion appear formidable, we think they must be reconciled with counter affidavits on the theory that counsel in their zeal and earnestness for their client have magnified every expression more or less unfavorable to their client's interest, which very probably found vent here and there, into a widespread sentiment and deep-seated conviction hostile to their client; and that the expressions of opinion of guilt from what had been heard or read in the newspapers which came to the ears of counsel were accepted as unmistakable evidence of bias and prejudice prevailing generally throughout the county, which would result in a conviction of their client in any event, who, to them, was guiltless of crime or wrongdoing. The motion was addressed to the sound discretion of the trial court, and its ruling thereon will not be held erroneous unless an abuse of discretion is shown. *Smith v. State,* 4 Neb. 277; *Stoppert v. Nierle,* 45 Neb. 105, 110; *Olive v. State,* 11 Neb. 1; *Lindsay v. State,* 46 Neb. 177, 181; *Welsh v. State,* 60 Neb. 101. The motion, we think, is without any merit, save by reason of the fact that the county of Box Butte is sparsely populated, and that by far the larger number of its citizens reside in Alliance, where an inquest was held over the body of the deceased, and where the preliminary examination was conducted, which necessarily must have resulted in giving quite general currency in that particular locality to the supposed facts and circumstances attending the

homicide and in relation thereto. There is altogether a lack of evidence showing unusual excitement, heated discussion or violent remarks by the citizens generally concerning the matter. Public feeling and sentiment apparently did not run high by reason of the homicide, but continued to flow in its accustomed channels. Those who became acquainted with what purported to be the facts doubtless formed opinions of a more or less fixed character, and probably some may have expressed themselves in strong language concerning the apparent atrocity of the crime and the venality exhibited in its perpetration. The citizens generally, however, did not allow the tragedy to ruffle their feelings nor disturb their minds to an extent beyond that which might reasonably be expected by reason of the happening of such an event in any peaceable and well-disposed community. Upon the whole the showing does not impress us as warranting the conclusion that there exist reasonable grounds on which to found the belief that the defendant could not have a just trial in that county by a fair, unbiased and impartial jury, and, such being the case, the court's denial of the motion for a change of venue can not be said to be erroneous. *Argabright v. State,* 62 Neb. 402; *Goldsberry v. State,* 66 Neb. 312.

Error is sought to be predicated upon the trial court's rulings on challenges for cause to certain of the jurors impaneled and sworn to try the defendant. The grounds of challenge in each and every instance relate solely to the qualifications of the several jurors objected to by reason of their having formed or expressed an opinion concerning the guilt or innocence of the defendant, based either on newspaper reports, or rumors, or hearsay concerning the occurrence. In no instance does it appear that any of the jurors to which challenges for cause were interposed by the defendant had talked with witnesses or others who purported to be acquainted with the facts nor to have been present at a coroner's inquest held over the body of the deceased, or the preliminary hearing before the examining magistrate, or to have heard of or read the testimony taken

at such hearings. Such an opinion as was held to or entertained by these several jurors arose exclusively from common talk or rumor circulating through the county, or by reading a newspaper account of the affair. An epitome of the *voir dire* examination of one of the jurors thus accepted over defendant's objection is here produced, which is a very fair illustration as to the qualifications of all those selected over defendant's objection, and which we regard as favorable to the views entertained by defendant's counsel as any that could be selected. In his *voir dire* examination on behalf of the state, juror Lorence stated that he had heard about the case; that what he had heard was just the common talk, none of the particulars; that he had never heard what purported to be facts from any person who claimed to know them; that he had read a newspaper account of the matter in the *Alliance Herald*, and that his opinion was based solely on what he had read and the common talk. On the examination on behalf of the defendant the juror stated that he was not acquainted with the defendant nor the deceased; that he thought he heard about the matter the next day; that he knew nothing about the coroner's inquest, and never talked with any one who claimed to know the facts concerning the case; that he heard what purported to be the motive for the killing, which caused him to form an opinion; that what he heard did not prejudice him against the accused; that the opinion he formed after he heard of the alleged motive was with respect to whether the defendants were guilty, and that he had the opinion at the time of the examination, and would believe that way until he had heard somehing different; that it would remain with him during the trial till he heard something that would change it, and that he could not go into the case with the same free mind that he would if he had never heard anything about it; that he had no prejudice, but had an opinion about the case; that it was such an abiding and fixed opinion as would stay with him during the trial of the case till he heard something to change it. When interrogated by the court, the juror

stated that all he had heard was from rumors and reading about the case in the newspapers, and that it was from these sources of information that he had made up his mind concerning the merits of the case, which would remain with him till he had heard something different as to what was the motive of it; that he knew nothing of the truth of the rumors, and that the opinion which he had he did not think would influence him in finding a verdict should he be retained as a juror; that he did not think it would influence him in any degree whatever; that he thought he could wholly disregard everything he had heard and read and render a verdict solely upon the evidence introduced at the trial and the instructions of the court, and that he would do so if selected as a juror. Thereupon the challenge was overruled, to which the defendant excepted. Other jurors, whose qualifications were in all respects substantially the same as the one whose evidence we have spoken of, were likewise accepted over the defendant's objection. By section 468 of the Criminal Code it is provided: "That if a juror shall state that he has formed, or expressed, an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." This section has been frequently construed, and the rule now seems to be that if, upon the whole examination of a juror, it appears that notwithstanding what he has heard upon rumor or hearsay, or what he has read in the newspapers, he appears to be wholly free from any such pre-

conceived opinion or bias as would interfere with his determination of the question of the guilt or innocence of the accused solely from the evidence at the trial and the court's instructions, that he is a competent and qualified juror and it would not be an abuse of discretion to overrule a challenge for cause on that ground. In *Curry v. State,* 4 Neb. 545, 548, it is said that if a juror expresses any doubt of his ability to render an impartial verdict upon the law and the evidence, he should not, in the face of a challenge for cause, be retained; and that even where by his formal answers a juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of prejudice, or unfairness, or an evident desire to sit in the case, in justice both to the state and the accused the juror should be rejected. This rule was quoted approvingly in *Cowan v. State,* 22 Neb. 519, 523. In *Basye v. State,* 45 Neb. 261, it is held that the trial court should exercise a sound discretion in respect to the examination of jurors as to their qualification, and that in order to constitute prejudicial error a clear abuse of discretion must be shown. This rule has been reaffirmed in *Rhea v. State,* 63 Neb. 461, where it is held that greater latitude will be given in rejecting than in retaining a juror whose qualification to try the cause is challenged. In the late case of *Dinsmore v. State,* 61 Neb. 418, where the grounds of challenge were very similar to those in the case at bar, it is held that an opinion formed by one called as a juror in a criminal cause does not affect his competency, or afford cause for challenge unless it is unqualified as to the guilt or innocence of the accused of the crime charged, and that an opinion formed solely on rumor and newspaper reports will not disqualify a juror where it is shown that the opinion is merely hypothetical, and such as will not prevent his returning a fair and impartial verdict upon evidence adduced on the trial under the instructions of the court. We are disposed to the view that the qualifications of the jurors in the case at bar who were retained notwithstanding the exceptions of the defendant are not

open to question under the rule last announced, and that there was no abuse of discretion such as would work a reversal of the judgment in the rulings of the trial court on the challenges for cause made by the defendant. A full consideration of the *voir dire* examination of each of the jurors accepted who were challenged renders it manifest that the opinion which at the time was entertained was founded upon the supposed facts of the case, knowledge of which was gained by rumor or hearsay or by reading newspaper accounts of the affair, and was not of such a character as to interfere with a fair and impartial consideration of the evidence adduced at the trial, and reaching a verdict therefrom solely by a consideration of the same under the court's instruction uninfluenced by anything which had been heard or read prior to the trial. In this day and age of rapid and widespread dissemination of information concerning all current events of any public interest it would be unfortunate, indeed, if the formation of an opinion based solely on such knowledge and information were to disqualify every person who had acquired the information and formed a qualified opinion from serving as jurors to try questions regarding which information had thus been disseminated generally throughout an entire county. The effect would be to discount intelligence and place a premium on ignorance. The tendency would be to have the most important questions of fact involving life and property placed in the hands of those least capable of reaching correct conclusions. It was to avoid this very condition of affairs that led to legislative recognition of the fact that an intelligent juror, even though he had read of or heard spoken what purported to be a narration of facts concerning a transaction afterwards becoming the subject of litigation, was as well or better qualified to decide the questions of fact involved than one who, because of ignorance or indolence, had received no knowledge concerning the matter. While scrupulous care should be exercised vigilantly for the purpose of having every question of fact determined by an absolutely fair and impar-

tial jury, we can not believe it conducive to the desired end to exclude those who read the newspapers and are sensible of the rumors and common talk that gain currency upon the happening of any event of general public interest. As to one juror who was sworn to try the defendant, it was disclosed on his *voir dire* examination that he held a policy of insurance in the same company which issued the policy on the life of the deceased. This fact was made a ground of challenge for cause, the overruling of which is assigned as error. No reason is given in support of this contention, nor is our attention called to any rule of law by which it can be said a legal disqualification existed because of the fact mentioned, nor do we perceive any from an examination of the statutes with reference to the qualification of jurors to sit in the trial of a cause where a felony is charged. The information elicited was very proper for the purpose of enlightening the defendant regarding matters which he had a right to know for the purpose of advising him more intelligently in exercising his right to peremptory challenges; but the fact that the juror was a policy holder in the insurance company was no legal ground of disqualification. The rulings of the trial court regarding the qualification of the jurors who tried the cause must, we think, be held to be not prejudicially erroneous.

It is likewise contended that the court erred to the defendant's prejudice in overruling several challenges for cause to proposed jurors thereafter excused on peremptory challenges. To the writer it seems that these several rulings and the consideration thereof are entirely eliminated because the jurors did not sit in the trial of the cause. The ultimate question for our determination is whether the defendant was tried by a fair and impartial jury, such as is guaranteed him by the constitution; and such determination can be correctly reached by a consideration alone of the qualification of the jurors who were finally impaneled and sworn to try the issue presented by a plea of not guilty. *Loggins v. State,* 12 Tex. App. 65. The

authorities, however, are quite evenly divided on the question, and this court, so far as it has committed itself, is committed to the contrary doctrine. *Thurman v. State,* 27 Neb. 628. It is there held that where a challenge for cause is erroneously overruled, the fact that the juror was peremptorily challenged thereafter by the defendant would not cure the error. We are enabled in the present case to dispose of the exceptions now under consideration to our satisfaction without further passing on the question as to the waiver of error, if any there be, by excusing the jurors in the exercise of the right of peremptory challenges. What has been said as to the jurors who sat in the trial of the case applies with equal force to the rulings of challenges for cause to those who were afterwards excused by peremptorily challenging them. There may be some slight differences as to the grounds of challenge for cause, but in the main they are substantially the same. We have examined with some care the testimony elicited in the *voir dire* examination of these several proposed jurors, and do not hesitate to say that with scarcely an exception the court was clearly right in overruling the challenge for cause. But suppose it should appear, which it does not, that error was committed in one or two instances in passing on the challenges for cause as to these jurors afterwards excused by peremptory challenges, we can not say in the state of the record as we find it, that the exceptions were well taken, and were preserved so as to entitle the defendant to a review thereof in this court. The bill of exceptions discloses that nineteen peremptory challenges were availed of, three by the state and sixteen by the defendant. As to the individual jurors excused by the exercise of these several peremptory challenges the record is entirely silent. It will not be seriously argued, we apprehend, that, even though an error might be committed by a ruling on a challenge for cause, if the proposed juror was afterwards excused by the state in the exercise of its peremptory challenges that the defendant could predicate error on the court's ruling. If the state has ex-

cused the juror, then by no possible view of the question can it be said the defendant is prejudiced by the ruling of the court. Error, it is frequently said, must affirmatively appear, and all presumptions of regularity will be indulged in until the contrary is shown. It is thus made manifest that in no event can the defendant predicate error on the trial court's ruling, unless we can determine from the record not only that he exhausted all of his peremptory challenges, but that he did so in order to relieve himself of a juror who should have been excused by the court on his challenge for cause. We find no error in the rulings complained of.

Numerous assignments of error relate to the admission and rejection of evidence offered during the trial. Many of these assignments are of the most general character, and no effort is put forth by counsel to point out to us the principles of the law of evidence which it is claimed are violated, or by argument assist us in reaching a correct conclusion in respect thereof. Several pages of defendant's brief are devoted to an abstract statement of the evidence, interspersed here and there with suggestions that the evidence received or rejected was certainly erroneous, or highly prejudicial; no reason being given or argument made in support of the error thus alleged. We probably would be warranted in disposing of all these objections in the same summary manner by simply saying we observe no prejudicial error in the rulings complained of. We have, however, examined the evidence with some care, and are impressed with the view that the rights of the defendant were at all times respected and fully protected by the trial court, and that no just ground of complaint exists to its ruling regarding the admission and rejection of evidence.

It is contended that the court erred in permitting the witness Olson to testify as to prior attempts which had been made to take the life of the deceased, as this was permitting proof of the commission of other and independent crimes to establish guilt in the one on trial. The ob-

jection is untenable. According to the testimony of this witness, he and the defendant had conspired together to take the life of the deceased. To accomplish this object they made three separate attempts—one by causing him to fall into a well, one by poison, and one by shooting at him with a revolver under the pretense that the shooting was accidental. All of this testimony was pertinent, and related to the ultimate fact sought to be established, to wit, the intentional killing of the deceased. It was material for the purpose of proving an intent to commit the act, and of the plan and design adopted and resorted to for its accomplishment. It possessed probative value in establishing the truth of the matters as raised by the issues, and, if believed by the jury, tended to establish with greater certainty and stronger probability the felonious homicide charged as finally committed. *Reinoehl v. State,* 62 Neb. 619, and authorities there cited.

It is also contended that the court erred in not permitting counsel for the defendant to cross-examine the witness Olson as to certain statements alleged to have been made by the witness to the defendant's counsel while he, with the defendant and his son, were under arrest, charged with the intentional killing of the deceased. The proposed testimony was excluded on the ground that it was a privileged communication, made to counsel while the relation of attorney and client existed. We are satisfied the court was eminently correct in its ruling. It is manifest that the relation did in fact exist, and that the witness did not waive the privilege which he was entitled to under the law. While it is argued that counsel were retained only by the defendant Jahnke, and that what Olson said was in the capacity of a witness, or a third party in no wise related to counsel, we think it is entirely clear from the record that both the witness and the defendant were at the time jointly accused of the crime, and were then acting in conjunction in preparing for their defense; that Jahnke was acting as spokesman and leader in the employment of counsel, yet the employment was in behalf

of all the defendants charged with the crime, and the communications and conversations thereafter engaged in between the counsel and the witness Olson—especially the one sought to be elicited by the cross-examination objected to—were those of a client communicating with his attorney, and therefore he was entitled to the protection of the statute. While it is true that later on Olson declined to join with Jahnke in a defense to the accusation, or to further counsel with the attorneys he first counseled with, and who continued to act for Jahnke, it is too plain for argument that at the time of the statements sought to be elicited the relation of attorney and client in every sense of the word existed, and it would have been a gross violation of the rights of Olson to permit anything that was said between him and his attorney during such time to be given in evidence over his objection. *Spaulding v. State,* 61 Neb. 289; *Farley v. Peebles,* 50 Neb. 723, 729; *Nelson v. Becker,* 32 Neb. 99; *Romberg v. Hughes,* 18 Neb. 579.

Another complaint that is made is that the court erred in instructing the jury that if they found from the evidence beyond a reasonable doubt that the defendant Jahnke was at the time of the killing present, aiding, abetting, procuring, and assisting Oliver Olson in the commission of the crime, and that the killing was done with felonious intent, and with deliberate and premeditated malice, then the defendant Jahnke would be guilty as a principal in the transaction. It is contended that, in the absence of evidence showing some overt act at the very time of the killing on the part of Jahnke, he can not be held as a principal in the transaction; in other words it is said that, if guilty at all, it is as a principal in the second degree, or an accessory before the fact, neither of which offenses were properly charged in the information or supported by the evidence. The propositions contended for are unsound. Under the criminal jurisprudence of this state there exists no distinction between what is termed a principal in the first and second degree. If the defendant is guilty at all, it is as a principal.

He was never charged nor tried as an accessory. If he were present at the time of the commission of the homicide, as he indubitably was, and was aiding, abetting, and assisting or counseling and procuring its commission, and the killing was done purposely, with deliberate and premeditated malice, then he is guilty in the same degree and to the same extent as though he had fired the fatal shot. *Hill v. State,* 42 Neb. 503; *Hawkins v. State,* 13 Ga. 322, 58 Am. Dec. 517; *Brennan v. People,* 15 Ill. 511; *Williams v. State,* 47 Ind. 568; *State v. Shenkle,* 36 Kan. 43.

It is also argued that the court erred in instructing the jury only as to the law of murder in the first degree, and gave no instructions regarding the lesser degrees. Under the evidence it is obvious that if we give it a strict legal construction and application, the defendant was guilty of murder in the highest degree, and a verdict should be so returned, or he was entitled to an acquittal. It was the theory of the prosecution that the crime was committed purposely, and of deliberate and premeditated malice, and the evidence tended to establish such a theory, and all the essential ingredients of the crime of murder in the first degree, and none other. The defense was that the killing was purely accidental and therefore excusable. This was the issue submitted to the jury by the instructions of the trial court. No instructions defining murder in the second degree and manslaughter were requested at the time, and it is apparent from the evidence that such instructions would have been inappropriate.

It has been repeatedly urged in this court that instructions defining the lesser degrees of homicide when by the evidence the highest degree of the crime has been committed or the accused is guiltless, are prejudicially erroneous, and should not have been given; but the rule is established that such instructions are not prejudicial to the defendant, and he has no just cause of complaint because found guilty of a lesser degree of crime than the evidence warrants. *Kastner v. State,* 58 Neb. 767; *Russell v. State,* 66 Neb. 497. The noninstruction by the trial

court in the case at bar on the lesser degrees of the crime charged against the defendant was warranted by the evidence or the lack thereof, and on principle comes within a rule in this state which is firmly settled and which we see no good reason for departing from. In *Strong v. State,* 63 Neb. 440, it is held: "The court, in charging the jury, is only required to state the law applicable to the facts proved and those which the evidence tends to prove. So, where it is conclusively shown that the defendant either committed the crime charged or is entirely innocent, the failure to instruct with respect to other crimes, or inferior degrees of the crime, embraced within the facts alleged in the information, is not error." See, also, *Vollmer v. State,* 24 Neb. 838; *Botsch v. State,* 43 Neb. 501; *Fager v. State,* 49 Neb. 439.

Other instructions given are excepted to, as well as exceptions being taken to some requested by the defendant and refused, which we find upon examination were properly given and refused, which we pass without further notice.

It is also complained of that the defendant's rights were seriously prejudiced because of the time the jury were kept together deliberating on the evidence before finally reaching a verdict. It appears the jury retired to deliberate at noon on the 28th of May, and did not reach a verdict until five minutes before 9 o'clock P. M. on the 3d day of June. To accentuate the cause of complaint in this regard, it is alleged in the affidavits in support of a motion for a new trial that the jury, after deliberating for forty-five hours returned into the court and reported that they had agreed to disagree, to which the trial court responded that such a report was no verdict, and that the jury were really in contempt of court. After a statement by a juror to the effect that the report was only meant to express an inability to agree, and the court responding the jury probably did not understand or know what a verdict such as was returned meant, the jury again retired for deliberation, arriving at a verdict of

guilty at the time stated. The affidavits in support of the motion for a new trial because of the unusual length of time the jury were deliberating are grounded on allegations to the effect that the jury were intimidated by the incident just mentioned, and were afraid to return into court and report their inability to agree, and were improperly brought within hearing of angry crowds assembled on the streets, and were intimidated by threats of violence to return a verdict of guilty; and further that scandalous and infamous reports of the trial were published in the papers, which unduly influenced the jury during their deliberation. Counter affidavits were filed by the state. The trial court found—and, as we think, rightly—that there existed no substantial cause for charges of fear or intimidation or undue influences on the jury in any way. The evidence satisfies us, as it did the trial court, that the deliberations of the jury were free from baneful influences of any kind, and that the verdict was reached as the result of deliberation and consideration of the evidence uninfluenced by extraneous matters. In fact, there does not appear to have been any undue excitement or any inflammatory reports or comment in the newspapers, as contended for, during the deliberations of the jury, or that they were brought within the sphere of any such influences had they existed. The more serious objection, we think, and one which seems not to be urged or relied on by counsel, is the fact that the jury were held together for such an unusual length of time, which suggests a possibility that the verdict arrived at was not the result of perfect freedom of action, and was not reached voluntarily by each member of the jury from a consideration alone of the evidence and the instructions of the court. The thought is suggested that the conclusion reached may possibly have resulted from weariness, exhaustion, and the overcoming of opposition and differences of opinion by force of numbers, and sheer physical and mental inability of a few to withstand the arguments and importunities of a majority of the jurors

for such a long period of time. If such were true, then the action taken results in a species of coercion rather than free action and voluntary agreement on a verdict by each individual juror. Such a condition could not be tolerated, and, if made to appear, would vitiate a verdict returned under such circumstances. On the contrary, if the jury were provided with suitable quarters, were able to sleep when nature required it, and were laboring under such surroundings and circumstances as permitted them to proceed leisurely and comfortably in their deliberations, and did in fact deliberate among themselves in an effort to agree until a final verdict was reached, which was the result of free and voluntary action on the part of all the jurors, the verdict could not be successfully attacked as being the result of coercion or undue restriction of freedom of action on the part of each and every individual juror composing the panel. The time which jurors shall be kept together before they are finally discharged because of inability to agree on a verdict rests largely in the discretion of the trial court, but this is a legal discretion, and if legal rules and principles governing and underlying the jury system are transgressed the action can not be upheld. There has been a time when jurors were treated as prisoners, and kept in confinement as are offenders against the law until a verdict has been reached; but present-day civilization does not comport with such methods. The functions of a jury are as important as those to be discharged by the court, and anything tending to restrain perfect freedom of action and voluntary agreement should not receive judicial sanction. If the verdict is the deliberate and voluntary act of the jurors, it will not be disturbed. *Russell v. State,* 66 Neb. 497. Errors must affirmatively appear, and we can not say from the record in the case at bar that the verdict was not an expression of the deliberate judgment of each member of the panel of jurors, unaffected by any undue restraint or unwarranted restriction of liberty of action on the part of each and all of them. There being nothing

in the record inconsistent with the view that the jury reached the verdict returned voluntarily after due deliberation on the evidence, unaffected by anything in the nature of coercion or by fatigue or exhaustion, it should be left undisturbed.

It is argued that the evidence is not sufficient to support the verdict. The argument is based on the alleged improbability of the testimony of Olson, an accomplice, and the part taken by the defendant Jahnke in the commission of the alleged crime. We are of the opinion the evidence is sufficient to support the verdict. There is little doubt but that if defendant's contention of an accidental shooting is to be rejected, then his guilty participation is such as to stamp him the greater criminal of the two. It was his brain that conceived, planned and directed the execution of the heinous offense. It was his stronger will and vicious bent of mind that caused the commission of the crime. Olson was but as clay in the hands of the potter, used as an instrument to execute the plan of the other defendant. The jury determined the question of the guilt of the defendant as one of fact which was peculiarly within its province to decide, and having found that the homicide was in fact committed in the manner and by the means contended for by the state, and there being, in our opinion, sufficient competent evidence to support the finding, we can not rightfully disturb it.

Numerous other errors are assigned, which have been examined, and are found to furnish no sufficient basis for a reversal of the judgment, and the same is accordingly

AFFIRMED.

The following opinion on rehearing was filed June 22, 1905. *Judgment of supreme court vacated. Judgment of district court reversed.* HOLCOMB, C. J., *dissenting:*

1. **Murder:** EVIDENCE OF MOTIVE: ERROR. If upon trial of a charge of murder evidence is introduced by the state tending to prove that

the life of deceased was insured in favor of defendant as showing a motive for the alleged crime, it is error to exclude evidence tending to show that the policy of insurance was of very little, if any, value and that the defendant was aware of that fact.

2. **Evidence of Accomplice.** The evidence of an accomplice should be closely scrutinized. If it appears that such witness has willfully sworn falsely in regard to a material matter upon the trial, his evidence can not be sufficient, if uncorroborated, to support a verdict of guilty.

SEDGWICK, J.

At the former hearing it was thought that the evidence of the witness Olson was sufficient to require the issue as to the defendant's guilt to be submitted to the consideration of the jury, and that the jury having found the defendant guilty, the verdict was so far supported by the evidence as to require this court to affirm the judgment. It was said that the record is quite voluminous, and that there were nearly 300 assignments of error in this court. No exhaustive analysis of the evidence was attempted. Upon the motion for rehearing the court having re-examined the evidence with great care, there was doubt in the minds of the court as to the sufficiency of the evidence and a rehearing was therefore ordered mainly upon that question. We have since this last argument again carefully reviewed the record, and are convinced that the evidence is not of such a character as to exclude all reasonable doubt of the defendant's guilt. The whole case against the defendant rests upon the evidence of the witness Oliver Olson. It is claimed that there was evidence other than that of the witness Olson which tended to show a motive on the part of this defendant to commit the crime, but it is not contended that any other witness has testified to any fact or circumstance tending to show his guilt. The special motive for the crime is found in the fact that there were two policies of insurance on the life of the deceased amounting upon their face to $4,000. This insurance was payable to the defendant August Jahnke,

and there was evidence that the defendant had assisted in procuring the insurance and had made some payments to the company thereon. This insurance, however, was in a local company that had been in existence but a few months. It was a mutual benefit association. Evidence was offered that there had been but one death in its membership since its organization; that upon his life there was a policy of $2,000, and that there was only $500 in the fund available for its settlement. It was also offered to prove that there was at the time of the death of the insured only about 300 members who could be assessed for the payment of the loss and that but a very small amount could be realized upon a policy of $4,000, and that defendant was aware of these facts. This evidence was excluded by the court and an exception was taken by the defendant.

The evidence shows that there had been a long-time friendship between the deceased and the defendant Jahnke, and there is no intimation in the record, outside of the evidence of the witness Olson, that there had ever been any misunderstanding between them, or any reason to suppose that the defendant had any designs upon the life of the deceased. This evidence in regard to the value of the policy, together with evidence that the defendant knew of the facts showing the worthlessness of the policy, ought to have been admitted; and if we consider it as in evidence, the proof of the motive under the circumstances for the murder of a life-long friend is not very conclusive and in itself furnishes, of course, no evidence of the defendant's guilt. It becomes then very important to carefully consider the evidence of the witness Olson, upon whose sole testimony this conviction rests. He testified upon the trial that the defendant and himself had planned the death of the deceased for the purpose of obtaining the insurance upon his life. There were four separate attempts on their part to carry out this plan before it finally succeeded.

The witness and defendant both resided in the town of

Alliance. The witness testified that he had known Michael Sirck (the deceased) for ten or twelve years and that Sirck lived about fourteen miles northwest of Alliance in Box Butte county, Nebraska. That the witness and the defendant were at Sirck's residence about the 4th of March, 1902. The defendant Jahnke had a farm about two miles further from town than that of Mr. Sirck. The witness and defendant started from Alliance in the morning and reached Mr. Sirck's place about 1 o'clock in the afternoon. They found Mr. Sirck at home. They went out there "to take a pump out of Jahnke's well." They took dinner with Mr. Sirck, and then went up to Jahnke's place "to get out the pump and pipe out of Jahnke's well, and move it down to Mike Sirck's." After they had taken out the pump and pipe, the witness says:

"Well, there was a piece of pipe down in the well, and Jahnke he said, we will let Mike down there and let him get that piece of pipe and give it to him."

The questions then asked and the answers given by the witness were as follows:

Q. Well, did you let Mike Sirck down in the well?

A. We had a pulley and we put the pulley up in the tower, and put a clevis up there and let the rope on, and we put a board on one end of the rope and started in and let Mike Sirck down as far as the rope went, and when he got down to the end of the rope, as far as it would go, he said he was quite a ways from the water; and so we pulled him up again. Then we took a chain and put across from one post to the other and put the pulley on the chain, and then fixed the rope again and let him down with another small rope and a hook, so he could fish around for the piece of pipe.

Q. Well, after Mike got to the bottom of the well, what did you do?

A. Well, when he was down there, Jahnke said, Now let's hitch a team on the rope.

Q. Well, what did Jahnke say when Mike was in the bottom of the well?

A. He said, we will hitch a team on to the rope and pull Mike out, and when he gets pretty near to the top, we will cut the rope and let him down in the well.

Q. Did you hitch a team to the rope?

A. Mr. Jahnke got his team and took them around there and we pulled the rope up so far, so that we could get the clevis on, we had a clevis that was a square shape like, and then he said, you can drive the team, and when we get so far, we will cut the rope and make it appear that the clevis cut the ropes. And I said, no, you take the team, they are used to you.

Q. What did you do further?

A. Mr. Jahnke told me, he said, Yes, I will drive out. I will drive out and when he gets pretty near to the top of the well, you make a motion, and I will cut the rope. And he had his knife in his hand when he started.

Q. Did you draw Michael Sirck to the top of the well?

Q. Tell the jury what you did with Michael Sirck?

A. Mr. Jahnke started with the team, and his knife in his hand, and when Mike got pretty near to the top of the well, I raised my hand and Jahnke made one cut at the rope, but I didn't see how many times he cut, but he said he cut two or three times before the rope separated, he had one ply on one side of the clevis and two on the other, and Mike Sirck went down to the bottom of the well. And the water rebounded again and he remained on the curbing. There was curbing sticking out about a foot and a half from the well.

Q. Where did the defendant cut the rope?

A. He cut it close to the clevis.

Q. How close to the singletree that the horse was hitched to?

A. Right close up to the clevis that was on the whippletree.

Q. Now had you had any talk with August Jahnke prior to going out to Mike Sirck's relative to letting him drop in the well?

A. Yes, sir.

Q. What was that talk?

A. He said he had a great scheme on hand.

Q. Tell if you can what he said the scheme was.

A. He said he had the life of Mike Sirck insured and a will made out in his favor.

Q. What did he say, if anything, that he intended or proposed to do with Mike Sirck?

A. He proposed to me if I would assist him in killing Mike Sirck he would give me half of the insurance policy except to pay the doctor's bill and the funeral expenses.

This well, according to the witness's testimony, was 110 or 115 feet in depth. He says he thinks that Sirck fell about 100 feet. Olson called to Sirck immediately from the top of the well and asked him if he was hurt, to which Sirck answered that he was not. He was then assisted from the well and they all went to Sirck's house together. They remained there over night. The deceased seems to have suffered no inconvenience from the fall. On the next day the defendant and Olson planned the second attempt on the life of Mr. Sirck. Olson's account of this attempt, upon his direct examination, is as follows:

Q. What did Jahnke say to you about killing Sirck that night?

A. He said we had got to get rid of him some way, and Mike Sirck has an old revolver here, and there is something wrong with it, and you are pretty handy fixing a revolver; I will get Mike to let you fix the revolver, then I will have Mike get some cartridges and you take the gun and make an accidental shot and kill Mike Sirck.

* * * * * * *

A. I put the cartridges in the gun as soon as Jahnke requested me, and Mike was staggering to one side of me, and I held the gun in my left hand in this position, and slipped the thumb over the hammer and pulled the hammer back, and let the thumb slip off and the gun went off.

* * * * * * *

He testified that Sirck was not over two feet from him when he fired the revolver. Sirck immediately said he

was not hit, but they both thought that he was, and after remaining another night at Mr. Sirck's place, on their way home they discussed the matter between themselves and concluded that Sirck must have been shot in the stomach and would die. Mr. Janke then said "he thought he had better go out and see whether Mike was dead or not; and I thought it would be a good idea." Three days later Mr. Jahnke, according to this witness's testimony, went out to Sirck's place to see if he was yet alive, and having stayed over night, upon his return informed the witness that "Mike was not hurt a particle."

The witness then procured some corrosive sublimate and this is the way he tells what they did:

Q. State what August F. Jahnke stated to you in that conversation at that time.

A. Why, he said he didn't think a bullet would kill Mike Sirck, and he thought poison would be the best thing; he thought we had better get some poison, strychnine or arsenic, but if we got that, why, he would suspicion us.

Q. Well, did you get any poison?

A. Yes, sir. I told him that corrosive sublimate was about as strong a poison as there was.

Q. Did you get the corrosive sublimate?

A. Yes, sir. He told me to get the corrosive sublimate and I got it.

Q. Now, after you got this corrosive sublimate, what did you do?

A. Why, two or three days afterwards we started out to Mike Sirck's again, and we was going to bring the horses belonging to Jahnke.

Q. Well, did Jahnke—Who was it suggested if anyone did, the manner of using this corrosive sublimate to poison Mike?

A. August Jahnke.

* * * * * * *

A. When we got there we unhitched the horses and went to work and got dinner ready; and when we got

done eating Mike stepped outside and Jahnke said, I will go out and while Mike and I are hitching up, you can put the corrosive sublimate in the sugar. And they went out and I put the corrosive sublimate in the sugar, part of it.

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Q. Go ahead now and state what happened at supper that night.

A. At supper that evening, after we had supper ready, Mike Sirck set down and eat supper and took two spoonfuls of that corrosive sublimate and sugar and put in his coffee.

Q. What effect, if any, did it seem to have on Mike?

A. The first cupful didn't seem to have any effect on him. When he got that drank I poured another cup and put in two more spoonfuls of corrosive sublimate and sugar.

Q. What effect did that have on him?

A. He drank a little of it and said it tasted bad. * * *

Q. After Mike had taken the second cup of coffee, what effect did it have on him that you could see?

A. I couldn't see any effect. After August said, my coffee don't taste good, and throwed it out, Mike said mine don't taste good either, and he threw it out.

* * * * * * *

Q. Well, what did you do the next morning?

A. The next morning we got breakfast.

Q. What did Mike Sirck do, if anything?

A. Well, after we got breakfast, we sat down and eat our breakfast again. I poured the coffee out and Mike took two more spoonfuls of the corrosive sublimate and sugar and put in his coffee.

Q. What effect did it seem to have on him this time?

A. The first cup of coffee didn't seem to have much effect on him, and after he drank that he took another cup and put two more spoonfuls of the corrosive sublimate and sugar in it.

* * * * * * *

Q. State if you know what condition Mike was in when you left.

A. After breakfast awhile, Mike said he thought that coffee was too strong for him, and so he took another small coffee pot and put some water in that and boiled some coffee that wasn't so strong, and when he got that cooked to suit himself, he poured a cupful—he had a small dipper, and he poured the coffee in and took a tablespoonful of sugar and corrosive sublimate, and put some bread in it and eat that.

Q. What effect did that have on him?

A. That didn't have any effect at all; it staid right with him.

* * * * * * *

Q. What did Mike Sirck drink for dinner that day?

A. Coffee.

Q. What did he put in the coffee, if anything?

A. He put some more of that corrosive sublimate and sugar in his coffee.

Q. State what was done if anything, with the sugar and corrosive sublimate when you left there that day?

A. It was left there. I think most of the corrosive sublimate was used.

The fourth attempt was successful. This is Olson's version of it:

Q. State whether he said anything afterwards, relative to the killing of Mike Sirck.

A. A few days afterwards, he said, we will go out there again, and he said, you take your revolver along. I said my revolver wouldn't be any good; I said the only thing that would be any good would be a shot gun, and I don't know whether that would be any good or not.

Q. What did Jahnke say?

A. He said, I will get the shotgun, and we will pretend we are going out hunting, and when we get out there you make an accidental shot and kill Mike Sirck.

They then went out to Sirck's place and arrived there about 2 o'clock in the afternoon. They took dinner with him. The witness was asked:

Q. State why the shot wasn't made that night, if you know.

A. Because Joe Wismiller came over.

Wismiller was a cousin of Sirck's. He stayed there about two hours in the evening. After he had gone the witness and Mr. Jahnke retired. They occupied the same bed. The witness was asked what the conversation was after they had retired and answered:

A. Well, he said, we can't do it to-night, but in the morning will do just as well.

Q. Who said that?

A. August F. Jahnke.

Q. The defendant?

A. Yes, sir.

Then comes the witness's statement of the killing:

A. We went on and got breakfast, and when we had breakfast ready, we waited awhile, Mike Sirck didn't appear; he had gone out after cattle. So we sat down and eat our breakfast, and we sat there probably five minutes before he arrived. While we were eating our breakfast, August Jahnke said, while Mike Sirck is eating his breakfast you can take the shot gun and accidently shoot him.

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Q. State what, if anything, you did.

A. Well, after Michael Sirck got his breakfast, or come back and set down to eat his breakfast, Jahnke was sitting on the east side of the table, and Mike on the west, and the boy was sitting in the room. And I went out in the bedroom and got the gun and come out through the door, and as I did so, I pulled the trigger of the gun and shot Mike Sirck.

Q. Where did you shoot him?

A. I didn't know just exactly where it hit him at that time.

Q. Did you find out afterwards.

A. Yes, sir, he was shot in the back.

The fall in the well was something over 100 feet, but

the consequences to Mr. Sirck were not serious. He went to his home that night as usual, a distance of about two miles, and next day was back at the well assisting in removing the pump and other materials. The attempt to kill him with a revolver was equally futile, although the weapon was supposed to have been discharged point blank against his body at a distance of less than two feet, and although both parties present felt confident that the bullet must have entered Mr. Sirck's body; so confident that notwithstanding Mr. Sirck was around the next morning as usual, protesting that he had not been hurt, they still went home with the belief that he must die from the effects of the shot, and several days afterward took a special journey to his place to ascertain his condition, and yet Mr. Sirck was not hit. Expert witnesses testified that a tablespoonful of corrosive sublimate would contain from 400 to 480 grains and that ordinarily three to five grains would cause death. It is, as its name indicates, a corrosive burning poison. If it touches human flesh it will cauterize it. Olson testifies that he put a tablespoonful of this poison into Mr. Sirck's sugar and that he believes the whole of it was used. That is, during about twenty-four hours Mr. Sirck must have taken from time to time in quantities sometimes larger and sometimes smaller enough of this poison to have killed at least 100 men, and suffered no injury from it except a slight vomiting which was very temporary in its nature. All of these three attempts upon his life together did not seem to have made any impression upon him. No one was found who had ever heard him discuss it, and although these two men who had planned these attempts at murder afterwards spent an evening in conversation with Mr. Sirck and his cousin Mr. Wismiller, none of these unsual circumstances were mentioned in that conversation. Mr. Wismiller was put upon the stand on behalf of the state, and an attempt was made to show that he had used some of the sugar that had been poisoned, and that it had but slight effect upon him, but no evidence was obtained of

any admissions or statements of Mr. Jahnke or Mr. Olson during the evening's conversation that they had with this witness and Mr. Sirck, nor was it shown that the unusual circumstances testified to by Olson were in any manner referred to during that conversation. If the unsupported evidence of an accomplice which furnishes so many indications of inherent weakness and incredibility is the only evidence of guilt, it becomes interesting and important to discover whether that evidence has been in any respect corroborated or in any respect contradicted by other evidence. So far as corroborating testimony is concerned, it may be said that it was shown that Mr. Jahnke borrowed or hired the shotgun which was the instrument that caused the death of the deceased. But as this was in the hunting season and as the person from whom the gun was obtained was in that business, loaning, out, as he testified, three or four guns each day, this circumstance was as consistent with innocence as with guilt. There were some other unimportant circumstances of a like nature, nothing that can be said to furnish any substantial corroboration of the evidence of Olson. So far as contradictions of this evidence are concerned, it may be noted that the witness himself has contradicted it as strongly as it is possible for human evidence to do. Before he testified in this case he was a witness before the coroner's jury, and there in substance corroborated the testimony of the defendant and of his son Alfred Jahnke, who testified that the shooting was accidental; that while the deceased was sitting at the breakfast table the witness Olson came out of an adjoining room with his arms full of heavy fur overcoats and the shotgun lying across them, and as he passed through the door in some way struck the gun against the door frame which caused the discharge of the gun, thus inflicting the injury upon the deceased from which he died. Again after the trial when Olson was in the penitentiary he informed the officers there that he had given false testimony upon the trial and that he wanted to correct it. He made an affidavit in which he said:

"The testimony which I gave at the coroner's inquest upon the remains of Michael Sirck was the truth and was an accurate description of the manner the deceased met his death; I was coming out of the house, having three overcoats on one arm and a shotgun in the other hand; the gun struck on the frame of the door and was thus discharged; I did not know at the time the gun was loaded; my reason for changing my testimony at the trial was that I was told if I did not, I would either be hanged or get a life sentence in prison; I was not placed in jail while I was awaiting trial, but took my meals at a restaurant and slept in a hotel in charge of the sheriff; I did as the county attorney and sheriff told me. I had typhoid fever in 1898 and never fully recovered, and at times I do not know what I am saying or doing; I have pains in my head nearly all of the time.

"I make this statement to relieve my conscience and to right the great wrong I have done August F. Jahnke."

And the officers having notified the attorneys, Olson again in the most solemn manner under oath detailed the circumstance of the accident, as he called it, corroborating his former evidence before the coroner's jury and also the evidence of Mr. Jahnke upon the trial. In this sworn statement he explained that he had been induced to testify as he did upon the trial by promises and threats. He afterwards retracted this statement and again swore that the evidence he gave upon the trial was the truth.

If the testimony of an accomplice who can so readily change his evidence from time to time is alone sufficient to support a conviction of so serious a charge, still this record contains a conclusive reason compelling us to reject his testimony. The witness was not always explicit and positive as to his dates and other matters of that nature, but upon the question of the corrosive sublimate he was absolutely positive. He testifies that he bought five cents' worth of corrosive sublimate for this purpose at the drug store of Mr. Tillotson in Alliance. That he bought it on the Monday or Tuesday before Easter and carried it in his

coat pocket from that time until he used it in Mr. Sirck's sugar. He shows in his testimony clearly that he knew when Easter was, and he was clear and positive in his statement of the time and place, when and where he bought this poison. Mr. M. R. Tillotson, the proprietor of this drug store, was upon the witness stand, and testified that Olson had not bought any corrosive sublimate at his store at any time during that year. He kept a record of poisons sold, and had always recorded each sale, and never failed to record the name of the purchaser except in one instance which was in the year before. The witness appears to be disinterested and reliable and his cross-examination rather strengthened than weakened his testimony. If this witness is to be believed, the statements of Olson in regard to the purchase and use of the corrosive sublimate must be false, and if he is false in regard to this attempt upon the life of Sirck he cannot be believed in his testimony in regard to other attempts. It is true that questions of fact are to be determined by the jury, and ordinarily, where there is substantial conflict in the evidence, the verdict of the jury must be conclusive, but it is a rule of law that a witness who has wilfully sworn in regard to some material matter upon the trial is not to be believed upon any matters unless his testimony is corroborated.

Under this rule of law the evidence of the witness Olson can not be believed and the verdict of the jury is therefore unsupported.

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

REVERSED.

HOLCOMB, C. J., dissenting.

With all due deference to my associates, I find myself unable to agree to the views hereinbefore expressed. A re-examination of the record strengthens my convictions

relative to the correctness of the conclusions first reached and announced in the opinion heretofore filed. *Jahnke v. State, ante,* page 154. It is now held in the majority opinion that the evidence is insufficient to support the verdict of guilty as found and returned by the jury sitting in the trial of the case in the court below. I can not but feel that the conclusion thus reached trenches on the prerogative of that body of men who are the lawfully constituted triers of fact. That instead of the jury's finding, there is substituted the judgment of this court regarding purely questions of fact with reference to which there is much competent evidence both pro and con. I do not understand the law to be that a jury must disbelieve all of the testimony of a witness if uncorroborated, even though it may be shown that such witness has willfully sworn falsely upon the trial in a matter material to the subject of inquiry. The jury are the judges of the credibility of the witnesses and of the weight to be attached to the testimony of each and all of them. Nor do I think the necessary inference from the record is that the witness Olson, the accomplice of the accused in the crime, if one was committed, willfully or purposely swore falsly regarding any matter material to the issue raised by the defendant's plea of not guilty. That he may have been mistaken in many of the details narrated by him and failed to with precision and accuracy state all the facts as they actually transpired is probably true. He was laboring under great mental strain and excitement naturally attendant on one in his situation. But there is nothing to indicate to my mind that he is a willful perjurer or that he deliberately and purposely warped his testimony and spoke falsely in order to convict the accused. He had no object in doing this, and in adhering under conditions of a most extraordinary character to what he asserts to be the truth, he has brought upon himself a sentence of confinement of long duration at hard labor in the penitentiary of the state. While it is asserted by counsel for the accused that Olson is insane or is an imbecile, the whole history

of the case as disclosed by the record warrants no such conclusion. He is not a strong-minded man but rather the reverse. His will power can be overcome and it appears that he is easily influenced by others in whom he has confidence or with whom he is associated. He has not the strength of mind possessed by the average man of mature years. The case is a most extraordinary one in the criminal history of the state. That Michael Sirck was killed by a gunshot wound while the weapon, a shotgun, was held in the hands of Olson is beyond all peradventure of doubt. If the killing was done purposely there can be no reasonable doubt as to the accused's guilty participation in the crime nor as to his being the one who planned the homicide and executed the plan through the instrumentality of Olson, who it is shown by the evidence was a pliant tool in his hands and wholly under his influence. It is stoutly asserted that the killing was purely accidental. There is much in the evidence tending to prove that the accused had conceived the idea of encompassing the death of Sirck for the purpose of pecuniary gain and advantage and that in carrying into execution this idea, his plans were to have it appear that when death did result, it should be under such circumstances as that it might be said it was accidental. In other words that while the homicide was to be caused by forces purposely set in motion, yet it was to be given the appearance of having been the result of an accident. It is not, therefore, at all unreasonable that the theory of an accidental killing should have some color of support in the evidence adduced to establish the crime. The witness Olson had no personal interest to subserve nor motive for making an effort to fasten guilt upon the accused contrary to the truth for he too must also suffer from the exposure. It is almost unbelievable that a person of the mental capacity of Olson can manufacture out of whole cloth the startling story he narrates in his testimony. It is said that fools and children always speak the truth and this saying is, I think, quite applicable to the testimony of Olson. There is to his testimony a simplicity and di-

rectness which carries conviction of his effort to speak the truth of and concerning those things which his own senses have witnessed and experienced. In order to break down his testimony and to account for his change of attitude after the coroner's inquiry where he testified that the killing was accidental, it is boldly intimated by the defense that the sheriff and prosecuting attorney, two sworn officers of the county who are honorable and reputable citizens so far as the record discloses and presumably so till the contrary is shown, have violated their oaths and every principle of honesty and justice by conspiring together and with the witness for the purpose of convicting an innocent man by subornation of perjury. I unhesitatingly repudiate such thought as being altogether unsupported by any act or circumstance disclosed by the record and one which ought not even to have been suggested in proceedings of the gravity of those now under consideration. The evidence alone of the witness Olson covers, with objections, nearly 200 pages of typewritten matter in the bill of exceptions. The bill as a whole, in so far as it relates to the testimony of all the witnesses for the state and for the defendant, covers between 450 and 500 pages of typewritten matter. It is quite difficult if not impossible to give even a fair epitome of the evidence found in the bill of exceptions without extending this opinion to an unwarranted length. The jury heard these several witnesses testify, noted their manner of testifying, and their demeanor while on the witness stand and were, in my judgment, far better qualified to judge of the truth of the matters in controversy than we can possibly be by reading the record in cold, lifeless type.

The rule is well established that a person accused of crime may be convicted on the uncorroborated testimony of an accomplice. The weight to be given the testimony of such a witness is for the jury to determine after a careful examination of the same in the light of all the other evidence in the case. *Lamb v. State,* 40 Neb. 312; *State v. Sneff,* 22 Neb. 481. As I view the record, the testimony

of Olson is not only corroborated but, upon the whole, the record is bristling with facts and circumstances of a corroborative character all tending to strengthen and confirm the truth of his statements as to the essential facts and circumstances connected with the commission of the crime charged. I can only refer briefly to some of the important events in the series of transactions testified to. As to the immediate transaction resulting in the death of Michael Sirck, the evidence as it presents itself to me tends to disprove rather than to confirm the theory of an accidental killing. Manifestly, I think, the jury were warranted from a consideration of all the evidence in rejecting the accused's testimony and the theory of the defense as to the shooting being the result of an accident. Quoting from the majority opinion, which I think is a fair statement as to how the accident is supposed to have occurred, it is said: "That while deceased was sitting at the breakfast table, the witness Olson came out of an adjoining room with his arms full of heavy fur overcoats and the shotgun lying across them, and as he passed through the door, in some way struck the gun against the door frame which caused the discharge of the gun, thus inflicting the injury upon the deceased from which he died." The door in the partition opened into the room from which Olson was passing in going into the room where Sirck was sitting. Olson is a large man, being six feet four inches tall. The deceased was sitting at the table in the northwest corner of the room close to the partition wall and between it and the table with the door leading into the other room immediately to his right. The table was so close to the partition that there was just room enough to slip a chair between it and the table, as testified to by Jahnke himself. Sirck occupied this chair and his back must, therefore, have been almost against the wall. He was eating his breakfast and sitting with his face to the east. Jahnke, according to his testimony, was sitting at the end of the table facing the north and, according to Olson's testimony, at the opposite side of the table from the deceased and fac-

ing him. The partition door was so close to the deceased that, when the shot was fired as Olson came through the door, whether accidentally or otherwise, the burning of powder set fire to the clothing worn by Sirck. In no event could he have been more than three or four feet distant from the muzzle of the gun when the charge exploded. Jahnke says that at the time he was busy talking to Sirck and he did not look around at anything. "All at once" says he, "a shot went off and Mike (the deceased) fell against the wall. I heard Olson holler and looked round and he was out of doors, and I noticed the coats right there in this bed room door; they laid right in the center, three buffalo coats, and Oliver was out of doors." According to Olson, the accused was to sit at the table, although he had eaten his breakfast, and engage Sirck in conversation while Olson was to come through the door with the gun and have it accidentally discharged in order that the plan of killing might be successfully carried into execution. It is hardly to be wondered at under the circumstances that the accused was busy talking to Sirck at the time and that Olson sprang out of the door under the excitement of the moment.

The testimony of the physician who examined the wound was that the shot penetrated the body about five and one-half inches to the right of the spinal column, penetrating the vertebræ and shattering them and separating the ribs on either side from the vertebræ, some of the shot going inside of the thoracic cavity; that some of the shot had penetrated both lungs in the back part; that the direction or course of the charge was slightly downward, striking five inches to the right and going in a direction so as to strike the vertebral column; that it was not quite parallel but slightly in towards the center of the body, possibly a half an inch inward. From this evidence it appears that the gun-barrel was held in a position nearly level when the gun was discharged and that it pointed in a direction parallel with the back of the body of the deceased and almost parallel with the partition by which

he was sitting. Under these circumstances, the jury might very well reject as inconsistent the testimony to the effect that the injury was caused by the gun striking the side of the door frame as Olson was carrying it in his arms with the coats when coming into the room where Sirck sat immediately to his left.

The course taken by the charge of shot when they penetrated the body is a circumstance altogether in harmony with the statements of Olson that he purposely held the gun in such a position as to point directly toward Sirck's body with the gun-barrel on a level or approximately so, and low enough to strike Sirck where the shot entered his body, the range of the shot being parallel with the partition and the trigger of the gun pulled after the gun was clear of the door frame and opening. Concerning the alleged inconsistency or falsity of Olson's testimony relative to the attempt to poison Sirck with corrosive sublimate much is said about his taking spoonful after spoonful on several different occasions of this poisonous substance. Whether Olson's testimony of the purchase or the druggist's denying the sale was to be accepted as true was purely a matter for the jury. The jury were not forced to believe the druggist and disbelieve Olson. There is evidence tending to show that the druggist did not keep a record of the sale of poisonous substances and to whom sold in every instance as the law required, and he may not have done so in this instance. Olson testifies that he bought five cents' worth. He put only a portion of it in the sugar he says he thinks about half but that he poured a part of it in and made no effort to measure it. While he estimates it at a tablespoonful he, as I read the record, was referring to a teaspoon. He calls the spoon used to put sugar in the coffee a tablespoon. Five cents' worth of the poison would probably not exceed a half ounce. This could not be more than a teaspoon level full altogether. If I am correct in this respect, not over half of a level teaspoonful of the poison was placed in the sugar. He said he put it in the sugar bowl and then shook the bowl to mix the poison with

the sugar. The weight of this substance or specific gravity is testified to be the same as that of lead and to be in a crystallized form. It may have all settled in the bottom of the bowl. It is, therefore, not wholly impossible, even though Olson did buy the poison and did put it in the sugar, that Sirck never got enough of it to produce fatal results nor more than enough to produce the nausea and sickness which Olson testifies followed the sweetening of the coffee which Sirck drank with the sugar taken out of this bowl. Wismiller, a witness for the state, testifies that he took the sugar that was in this bowl after the death of Sirck and that there was something in the bottom that looked like flour, and that the sugar had a queer taste and was thrown out. There is unmistakably in the record other evidence than given by Olson tending to prove that some foreign substance was found in the sugar bowl and that the sugar had an unnatural taste. Whether this was corrosive sublimate or whether Olson had been imposed upon by the druggist and something else given him instead of the poison and which he believed to be poison, or whether he was in error, is a matter of conjecture, but I do not think it can be said that he was willfully falsifying when he gave his testimony concerning this attempt on the life of Sirck. Concerning the revolver episode, there is evidence tending to prove that the accused and Sirck were engaged in a drunken debauch and the ridiculous attempt, as testified to, to terminate his life by the accidental discharge of the revolver in the manner testified to, may have occurred; and whether Olson's testimony respecting what was afterwards said as to the probable fatal termination of the attempt may not have had reference in fact to the poison rather than to the shooting is not free from doubt. The incident at the well is not so incredible as to compel the belief that there is no basis in truth for what is testified to have there transpired. The evidence establishes beyond reasonable doubt that Jahnke was instrumental and active in procuring insurance on the life of the deceased, and himself to be the beneficiary in a very large

sum of money in view of the situation of the parties, and in keeping the assessments paid in order to keep the insurance alive until after the death of Sirck. That he expected pecuniary profit and advantage therefrom can scarcely be doubted. Under the will which he was instrumental in having Sirck execute, he was the beneficiary of all of his property of whatsoever kind. Concerning the affidavit of Olson, made after the trial of the case while confined in the penitentiary, retracting what he had before testified to, it is, to my mind, very satisfactorily shown that this affidavit was procured by coercion and intimidation and in fear of bodily injury and that Jahnke was at the bottom of the forces set in motion which resulted in such affidavit. An affidavit by Olson's father in the record, if these affidavits may be considered, ought to satisfy the most skeptical that the influences for evil exerted over Olson after his incarceration in the penitentiary by Jahnke were but a continuation of those exerted by him leading up to and culminating in the tragedy in which Sirck lost his life. The retraction of Olson can be satisfactorily explained only on the theory that the two county officers procured and conspired with him to have him testify falsely in order to convict the accused, and this view of the case is not to be thought of or given the slightest recognition. As to the holding in the majority opinion that evidence concerning the financial standing of the insurance company was erroneously excluded, I copy from the brief of counsel for the accused: "August Jahnke was fully aware that this company had already refused to pay a policy of insurance on the life of one Bean in March, 1902. Jahnke had called at Noleman's office (one of the attorneys for the accused) and had fully discused the liability financially of this company. Noleman had told him that it was a mutual company and that it was unable to pay its losses; that it was started without money. He told him how he knew it and what the treasurer had told him. The accused knew full well that there would be no profit to him if Michael Sirck were to die." Again it is said: "He (Jahnke) knew the in-

surance policies were practically of no value. See testimony of Noleman 700, 701." The trial court, out of an abundance of caution, allowed the attorney to testify to all of these things just as narrated in the brief. I find no serious complaint in the original brief as to the exclusion of the evidence on which error is predicated in the majority opinion. The evidence offered and excluded on which error is predicated went no further than to show that the mortuary fund of the association did not exceed $500, that the membership was about 300 and that there was a death claim against the fund of $2,000, and that Jahnke knew of such facts before Sirck's death. The insurance company was a mutual concern doing business on the assessment plan and with assets consisting of the obligations of its members, and probably other available property, with power to assess its membership to pay losses as they would reasonably be expected to occur in the ordinary course of the business. For these reasons, the excluded evidence did not tend to show the company was not solvent and able to meet its liabilities on account of death losses as they occurred in the ordinary course of its business. I do not think that the exclusion of the evidence referred to affords any sufficient ground upon which to base a reversal of the judgment of conviction. The conclusion announced in the majority opinion must, I think, logically result in an acquittal. In all reasonable probability the state has offered all the evidence that can be adduced in support of the charge made in the information.

Viewing as I do the record as disclosing evidence sufficient to support the verdict of the jury, and finding no prejudicial errors of law, I am constrained to adhere to the views expressed in the former opinion and to hold that the judgment of conviction should remain undisturbed. I, therefore, respectfully dissent from the views now expressed by my associates.

RAYMOND SMITH V. STATE OF NEBRASKA.

FILED MARCH 18, 1903. No. 13,060.

1. **Statutory Crime**: CRIMINAL CODE: INFORMATION: ALLEGING OVERT ACT. In charging the statutory crime defined by section 49 of the Criminal Code, it is essential to aver in apt terms an attempt by the accused to commit one of the felonies enumerated by alleging the overt act or acts constituting such attempt, and in the absence of such allegations an information by which it is sought to charge an offense under said section is fatally defective, and will not support a sentence of imprisonment for a violation of the provisions thereof.

2. **Insufficent Allegation.** An allegation of an unlawful entering of a building with intent to commit one of the crimes enumerated in the section is not sufficient to charge a crime as therein defined.

3. **Plea of Guilty**: ARREST OF JUDGMENT. A plea of guilty of the acts alleged in an information charging no offense is not a plea of guilt of the crime attempted to be charged, and the sufficiency of the information and the authority and jurisdiction of the court to pronounce sentence of imprisonment may properly be challenged by a motion in arrest of judgment.

ERROR to the district court for Sheridan county: JAMES J. HARRINGTON, DISTRICT JUDGE. Indictment for burglary. Plea of guilty. Sentence to one year at hard labor in the penitentiary. *Reversed.*

Allen G. Fisher, for plaintiff in error.

HOLCOMB, J.

This is a criminal cause brought here for review by the defendant, who stands convicted of an alleged felony and has been sentenced to imprisonment in the penitentiary for a period of one year. The record is a peculiar one and leaves us in some doubt with reference to the lines on which the prosecution was conducted in the trial court. The particular crime to punish which the prosecution was instituted is not made certain and entirely clear from anything appearing in the record presented for review. The

legal department of the state has not favored us with a brief or oral argument in support of the judgment entered by the trial court, from which we infer that it is not prepared to defend the regularity and validity of the proceedings resulting in the imposition of the sentence of imprisonment which the defendant seeks to have reversed.

The information under which the defendant was prosecuted contains two counts, the second of which unmistakably charges burglary, but this count, during the trial of the cause, was dismissed by the county attorney. Thereupon the defendant pleaded guilty to the charge contained in the first count, and moved in arrest of judgment that the count stated no crime under any of the criminal laws of the state. The motion was overruled and sentence pronounced and the defendant brings error, relying for a reversal principally on the ruling just mentioned.

The count of the information on which the sentence of imprisonment was imposed, omitting formal parts, charges that the defendant, on the 17th day of August, 1902, into a certain dwelling-house, describing it, feloniously, burglariously, willfully, maliciously and forcibly did break and enter, with the intent then and there, one Hannah Swanson then and there being in such dwelling-house, unlawfully, purposely and feloniously, her the said Hannah Swanson to rape, ravish and carnally know against her will. As we interpret the record, the county attorney attempted to charge a crime under the provisions of section 49 of the Criminal Code, and this is the construction given the information by the trial court. This section provides that if any person shall willfully and maliciously, either in the day time or night season, enter any dwelling-house, and shall attempt to commit any of the several felonies therein enumerated, including the crime of rape, every person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year. It is evident that the information, after the dismissal of the second count, did not charge the crime of burglary, for it is essential, in order to charge that crime, that it be

alleged the felonious breaking and entering into the building was in the night season. *In re William McVey,* 50 Neb. 481. The information on which the conviction was had in the case at bar is wholly silent as to an allegation of time when the unlawful breaking and entering was committed.

By an inspection of section 49, it is obvious that one of the essential ingredients of the statutory crime as therein defined is an attempt by the accused to commit one of the felonies enumerated, and that unless in apt words an allegation is inserted in the information averring an attempt to commit one of the crimes mentioned, such information would be fatally defective, and would not support a sentence of imprisonment for the commission of the crime as therein defined. The information contains no allegation showing any overt act by the defendant tending toward the commission of the crime of rape on the person named. It nowhere alleges any act or acts of the accused showing an attempt to commit the crime of rape, nor does it aver anything more than the unlawful entering into the building was with an intent to commit the act. The section declares there must be a willful and malicious entering into the building and an attempt made to commit one of the offenses enumerated therein. These are both essential and necessary ingredients to constitute the crime. The allegation of an intent to commit the crime, unaccompanied by any averments of overt acts tending towards its accomplishment, is insufficient to meet the requirements of the statute defining the offense and the information is for that reason fatally defective and charges no crime under said section. *State v. Colvin,* 90 N. Car. 717; *State v. Harney,* 101 Mo. 470; *State v. Frazier,* 53 Kan. 87; *In re Lloyd,* 51 Kan. 501; *Proctor v. Commonwealth,* 20 S. W. (Ky.) 213. The plea of guilty of the acts charged in the first count of the information is not a plea of guilty of the statutory crime defined by section 49 of the Criminal Code, and by a motion in arrest of judgment the defendant properly challenged the authority and jurisdiction of the court

to pronounce sentence of imprisonment in the penitentiary against him as if he were guilty of the commission of such crime.

The judgment of conviction is accordingly reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ALBERT T. MCNUTT V. STATE OF NEBRASKA.

FILED MARCH 18, 1903. No. 13,097.

1. **Burglary:** INFORMATION: DESCRIPTION OF PLACE. In an information for burglary, a drug store is properly described as "a store house, commonly called a drug store."
2. **Evidence.** Evidence found sufficient to support the allegation of the ownership of the building burglarized and property stolen.
3. **Description of Property in Information:** PROOF. In a prosecution for burglary and larceny, the proof must agree with the allegations of the information in the description of the property, but when the property stolen is described in the information as "one Elgin gold watch" and "thirty-two gold watch chains," the verdict will not be set aside as unsupported by the evidence because no witness testified that the articles were gold, if the articles are produced and offered in evidence at the trial, and there is nothing in the record to show that the jury could not determine the truth of the allegation from an inspection of the articles.
4. **Conduct of Sheriff:** EVIDENCE OF ADMISSIONS. The conduct of the sheriff, who, upon arresting one charged with crime, immediately furnishes him with intoxicating liquors and proceeds to question him for the purpose of obtaining evidence against him, is unjustifiable, and evidence of admissions made under such circumstances should be excluded.
5. **Admission of Evidence:** NOT PREJUDICIAL. But the admission of such evidence will not be held prejudicial so as to require a reversal if there is uncontradicted evidence that the defendant afterwards, when free from the influence of liquor, and without any undue influence of any kind being brought to bear upon him, made the same admissions to various other persons.

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

Addison M. Gooding, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *R. J. Millard,* for the state.

SEDGWICK, J.

The defendant was convicted in the district court of Cedar county of the crime of burglary, and has brought the case here for review. The information described the building as "a certain store house, commonly called a drug store, owned and occupied by Henry D. Spork and Loyd K. Spielman." The proof was that the building was a drug store, and the question is whether, under the statute, a drug store is properly described in the information as "a certain store house, commonly called a drug store." It could not be better described under our statute. If this description is bad, no prosecution can be had for the burglary of a drug store. The statute,* in naming the buildings that may be the subject of burglary, does not use the word "store" unconnected with the word "house," but does use the words "shop," "warehouse" and "store house," and there can be no doubt that a store building or a store house is included, and is made the subject of burglary by the statute, nor can there be any doubt that the words "store house, commonly called a drug store" sufficiently and properly described the building burglarized in this case.

2. It is contended that the proof does not show that the building and the property stolen were the building and the property of Henry D. Spork and Loyd K. Spielman. The witnesses testified that the building was owned and occupied by the firm of Spork & Spielman, and that the property stolen was the property of the firm of Spork & Spielman, and that the firm of Spork & Spielman was Loyd K. Spielman and Henry D. Spork. This, being uncon-

* Criminal Code, sec. 48.

tradicted, is sufficient to prove that the property and building were owned and occupied by "Henry D. Spork, and Loyd K. Spielman, who were doing business under the firm name and style of Spork and Spielman," as charged in the information.

3. The property stolen was described in the information as "one Elgin gold watch, of the value of twenty-five dollars, the property of said Spork and Spielman, and thirty-two gold watch chains of the value of four dollars each, the property of said Spork and Spielman." Of course, the objection that this is not a sufficient allegation that these goods were the property of Henry D. Spork and Loyd K. Spielman is without any merit, since the words the "said Spork and Spielman" in this allegation must necessarily refer to the former allegation, in which the parties are fully named. But it is insisted that there is no evidence in the record that the watch was a gold watch or the chains were gold chains, and we find upon examination of the record that no witness testified to that effect, but the record shows that the watch and the chains were in court, and were offered in evidence before the jury, and, the jury having found that the allegations were true, this evidence must be considered sufficient to support such finding in the absence of any evidence to the contrary.

4. It is complained that the court in its instructions referred to "said Spork and Spielman" instead of naming them in full, "Henry D. Spork and Loyd K. Spielman," as owners of the property and building; but the court having first described them by their full names, might properly afterwards refer to them as "the said Spork and Spielman."

5. By instruction No. 10 the court told the jury that possession of the stolen property immediately after the offense was committed was a criminating circumstance "unless the evidence and the facts and circumstances proved show that he may have come honestly in the possession of the same," and it is urged that this places the burden upon the defendant to prove that he acquired the

goods honestly, and, as the defendant admitted upon the trial that he knew that the goods were stolen, it is urged that this instruction was prejudicial. There seems to be no reason why the jury should not consider the defendant's admissions in that regard in determining whether there was reason to believe that he obtained the property honestly.

Objection is also made to other instructions of the court, nine of them being specified in the brief as erroneous, but without pointing out any particular in which we are able to discover error. Also a number of instructions were requested by the defendant and refused by the court. Upon examination of those requested we are unable to find any substantial matter which the defendant was entitled to have given to the jury not sufficiently and properly explained in the instructions given by the court.

The state showed, by the evidence of several witnesses, admissions made by the defendant as to his connection with the burglary complained of, and it is urged that it was not sufficiently shown that no inducements were offered the defendant to procure the admissions testified to, and in this connection it is shown that immediately after the defendant's arrest, while the sheriff who arrested him was returning him to Hartington, where the crime was committed, the sheriff not only allowed the defendant to have intoxicating drinks, but himself furnished such drinks to the defendant, and afterwards questioned the defendant in regard to the offense. Such conduct on the part of the sheriff is not justifiable, and under ordinary circumstances the admitting in evidence of the testimony in regard to admissions so obtained would be erroneous and require a reversal of the judgment of conviction, but in this case the evidence of the defendant himself shows that this conduct of the sheriff was due rather to thoughtlessness than to any attempt on his part to procure damaging evidence against the defendant, and also shows that the defendant afterwards, of his own free will, repeated the same statements to several other parties, and

made other similar statements in open court upon his preliminary examination, so that it is impossible to believe that the defendant has been prejudiced by this improper conduct of the sheriff. Upon considering the whole evidence, it is difficult to see how the jury could have arrived at any other verdict than the one reached. The trial appears to have been carefully conducted by the court with a view of protecting the defendant in all his rights.

We find no error in the record and the judgment is

AFFIRMED.

SOLOMON C. ALLEN V. JOSEPH CERNY.

FILED MARCH 18, 1903. No. 12,665.

1. **Chattel Mortgage:** CONSTRUCTION OF LANGUAGE. The words "feels unsafe and insecure," in a chattel mortgage do not mean that the mortgagee may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do or must have done some act which tends to impair the security of the mortgagee in order that the latter's right to take possession may become operative. *Newlean v. Olson*, 22 Neb. 717.

2. ———: SALE OF CHATTELS BY MORTGAGOR: RIGHT OF MORTGAGEE. Where the mortgage by its terms provides for a seizure of the property if it or any part of it is disposed of or taken out of the county without the mortgagee's assent, a sale in the open market of a substantial part of the wheat covered by the mortgage, without the mortgagee's assent, and against his express prohibition, will entitle the mortgagee to recover possession of enough of the remainder to satisfy his claim.

3. **Peremptory Instruction, Erroneous.** It is error to instruct a jury to return a verdict for defendant where there is any competent evidence adduced which, if believed by the jury, would support a verdict for plaintiff. *Habig v. Layne*, 38 Neb. 743.

ERROR to the district court for Butler county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Reversed.*

Arthur J. Evans, E. W. Hale and *Roy M. Harris*, for plaintiff in error.

Matt Miller and *Hastings & Hall, contra.*

HASTINGS, C.

This case is a replevin suit begun by plaintiff in error in the district court for Butler county on August 19, 1901. Plaintiff's petition sets out a special ownership in 2,000 bushels of wheat grown on the east half of section 31, town 15, range 2, in that county. He alleges a special ownership by reason of a chattel mortgage, executed June 8, 1901, to secure payment of a note for $800, dated December 13, 1900, and due January 1, 1902; that the mortgage covered 150 acres of wheat, 110 acres of corn and 40 acres of oats, on the land before mentioned. Plaintiff says that he is the owner of the mortgage and note; that the same was given for the rent of the land; that no part has ever been paid and at its maturity, on January 1, 1902, there would be due him upon it the full sum of $800; he alleges that the 150 acres of wheat has matured and been harvested and threshed; that the amount of wheat was about 4,000 bushels; that when threshed it was stored in the barn, house and corn-crib on the farm; that by reason of the mortgage he had a lien upon the whole of said 4,000 bushels of wheat; and that the 2,000 bushels replevied is a part of that grown upon the said 150 acres, and was embraced in the mortgage. It is alleged that the mortgage contained a clause that if the defendant "does not take proper care of said property, or if said party of the second part shall deem himself or themselves insecure, or in case of said first party attempting or permitting an attempt to injure or dispose of, or remove from said county of Butler," the property described or any part of it, it should be lawful for the mortgagee to take immediate possession of it wherever found, and sell it at public auction or private sale, or so much of it as would suffice to pay the amount due or to become due, with unliquidated damages, not to exceed ten per cent. of the principal and interest, and all

reasonable costs of keeping, advertising and selling the property. The petition alleged that, by reason of the partial failure of the other crops included in the mortgage, they were of little value; that by reason of the threshing of the wheat and placing it in bins, its character and description had been so far changed that plaintiff's mortgage, and the public record of it, were no longer notice of plaintiff's interest in it; that defendant had refused to give any specific lien on the wheat in the bin to secure the note, though requested so to do, and had wrongfully and unlawfully disposed of and sold a part of the wheat without plaintiff's knowledge or consent, and was then threatening and attempting to sell, mortgage, dispose of or incumber the rest of the wheat; that the co-maker of the promissory note had died insolvent the preceding May, and that defendant was insolvent; that plaintiff deemed himself insecure, and the conditions of the chattel mortgage had been broken, and he was entitled to the possession of the wheat and had demanded the same, which had been refused. A copy of the chattel mortgage was attached to the petition. The affidavit conforms substantially to the statements of the petition. Bond was filed, and 1,839 bushels of winter wheat and 98 bushels of spring wheat were taken by the sheriff and delivered to the plaintiff. Defendant denied all the allegations. At the trial, upon the close of plaintiff's evidence, defendant asked a peremptory instruction for a verdict in his favor, which was granted. During the progress of the trial it was agreed that the value of the wheat at the time it was taken was $1,022.05. It was further agreed that on January 1, 1902, its value was $1,215.69. It was further agreed that the wheat had been sold by plaintiff's agent and could not be returned. The instruction for a verdict was asked on the ground that the petition did not state facts sufficient to constitute a cause of action, and also that the evidence was insufficient to show any right of recovery. The motion was sustained upon the second ground, and the jury was instructed to render a verdict for defendant, but no particular sum was stated.

The jury found the right of property and right of possession in the wheat at the beginning of the action was in the defendant, and that it was of the value of $1,057.82, and assessed defendant's damage by reason of plaintiff's taking the property at $193.64. This verdict was rendered February 20, 1902. Defendant was required to remit $35.77 from the value of the wheat as found by the jury, and judgment was entered for its agreed value, $1,022.05, $193.64, the damages found by the jury, and costs in favor of the defendant. Motion for new trial was overruled, and the plaintiff brings error to this court. The sole complaint is that, under the evidence tendered by the plaintiff at the trial, defendant was not entitled to any such instruction for a verdict; that the amount of damages assessed by the jury is excessive; and errors of law occurring at the trial which were excepted to.

The real questions in the case seem to be whether the circumstances disclosed by plaintiff's evidence show a reasonable ground for his action in deeming himself insecure and in proceeding to seize the mortgaged property before the maturity of his note, and a breach of the conditions of the mortgage by a sale of a substantial part of the mortgaged property. The facts, as shown by the evidence, are briefly as follows: The wheat raised on the farm, about 3,500 bushels, was threshed out during the last six days of July, and stored in the farm buildings. About 500 bushels were placed in the house. Defendant at once began selling wheat. On July 31, he sold and delivered 104 bushels at Foley. Evidently, it was this wheat, as defendant had not yet threshed the wheat on another farm rented by him. On August 7 he contracted to sell 150 bushels more at the same place. On August 12 plaintiff's agent and an interpreter and an attorney visited defendant. He admitted these two sales, and declared his intention to sell more. He was told that any further sales of the mortgaged wheat were forbidden. Defendant stated that he must sell this wheat to make payments on some land. This last statement was stricken out by the court over plaintiff's

objection, as was a similar statement of defendant to the witness Welch. August 15 defendant sold and delivered to the witness Steiner 202 bushels of wheat, and on August 17, 105. These facts all coming to plaintiff's knowledge on the last-named date, plaintiff's agent, accompanied by an attorney, demanded 2,000 bushels of the wheat, or a new mortgage covering threshed wheat specifically, or a deposit of enough proceeds of the wheat to make plaintiff safe, if was to be sold. This was refused, and on the 19th fifty-five bushels more were delivered to Steiner by defendant. The same day this action was brought, and no wheat found in the room of the house where 500 bushels or more had been stored at the threshing. It appears that there were about 800 bushels of oats which were also subject to the mortgage of plaintiff. There were 120 acres of corn, which is stated to have been in a very unsatisfactory condition at that time. Defendant had several teams and a number of cattle. The sheriff testifies that he had shortly before held an execution against him, under which he could not find property upon which to levy. Defendant's stock was covered with mortgages. Testimony of plaintiff and his attorney that they deemed plaintiff's claim insecure was tendered and refused. Probably the latter testimony was unnecessary, as the commencing of the action itself was a solemn declaration of the same thing. The rulings of the trial court excluded all evidence of the offers of plaintiff to accept a new mortgage upon a part of the wheat in the bin, and permit a sale of the rest if defendant wished to do that. As tending to show the good faith of plaintiff and the intentions of defendant with reference to disposing of the rest of the wheat, it would seem that this evidence should have been received. As it was duly tendered, and much of it taken and afterwards stricken out, it should be considered in determining whether or not there was enough evidence to take the case to the jury. The trial court seems to have thought that, as long as there was actually enough left to satisfy plaintiff's claim, he had no right to take any steps in anticipa-

tion of threatened action of defendant. This would not seem to be the case, even with only the clause in the mortgage providing for a foreclosure, if the mortgagee should deem himself insecure. In *Case Plow Works v. Marr*, 33 Neb. 215, which sustains the taking of a threshing machine, because it was left unhoused, and one of the makers of the notes for it had left the state, the first note was paid, and the other two were only for $226 each. The machine was sold for $500, but the taking of it before either of the notes was due, in anticipation of possible loss, is upheld.

Of course there can be, in this state, no arbitrary discretion in taking property before a mortgage is due. The mortgagee, in taking the contract payable at a future time, impliedly agrees to await that time. *Newlean v. Olson*, 22 Neb. 717; *Lichtenberger v. Johnson*, 32 Neb. 185; *Rector-Wilhelmy Co. v. Nissen*, 35 Neb. 716; *Brown v. Hogan*, 49 Neb. 746. He need not wait, however, till loss is actually incurred before attempting to protect himself.

In the present case, too, there is evidence tending to show that one of the absolute conditions of the mortgage—the disposing of a part of the property—had been broken. It seems clear to us that there was sufficient evidence tendered in this case to require its submission to a jury, and that the learned trial judge was in error in giving his peremptory instruction.

The holding in *Gillilan v. Kendall*, 26 Neb. 82, and *Fines v. Bolin*, 36 Neb. 621, that a mortgage upon growing crops is not notice to any one who buys the same grain in open market after harvest, would be calculated to render the mortgagee uneasy when 500 bushels of the wheat had disappeared within less than three weeks after threshing. The suggestion in *Gillilan v. Kendall* that the evident need which the farmer has for using coarse grains as feed may imply a consent that he may so use them, would weaken the security on the oats and corn, and, upon a consideration of the whole case made, there seems no doubt that plaintiff was entitled to have the good faith of his claim of insecurity, as well as of a disposition of a part of the mortgaged property, passed upon by the jury.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM FIFER, ADMINISTRATOR OF THE ESTATE OF RAYMOND C. FIFER, DECEASED, V. MILTON BURCH ET AL.

FILED MARCH 18, 1903. No. 12,729.

Lord Campbell's Act: NEGLIGENCE: LIABILITY OF EMPLOYER. An employer's act of unbridling, in connection with the driver, a mare theretofore always gentle and tractable, and putting on her a halter, and then leaving her ordinary driver to lead her to a feed-box to eat, and doing this in front of a tent on the state-fair grounds without unhitching her from a wagon, to which she was attached, there being nothing in the surroundings apparently calculated to frighten the mare, *held*, not negligent nor creating any liability of the employer, although immediately after she became unmanageable, and ran over the driver and fatally injured him.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

Royal D. Stearns and *James C. McNerney*, for plaintiff in error.

William M. Morning, Halleck F. Rose and *Wilmer B. Comstock, contra.*

HASTINGS, C.

Plaintiff in error in this case instituted an action in the district court for Lancaster county under Lord Campbell's act to recover the sum of $5,000 for the death of Raymond C. Fifer. The latter died on May 31, 1901, as a result of injuries received in attempting to lead, by a halter, a horse hitched to a heavy wagon, after the bridle had been taken off by defendants on the state fair grounds.

The trial court instructed the jury to find for the defendants. It instructed the jury that plaintiff based his sole right of recovery upon the negligence of the defendants in removing the bridle from the horse; that negligence is the failure to do what reasonable and prudent persons would have ordinarily done under the circumstances, or the doing of what such persons would not have done; that it was necessary for plaintiff to show that the removal of the bridle from the animal, under the circumstances, was something which a reasonable and prudent person, under the circumstances, would not have done. The trial court also told the jury that the evidence shows that the animal was tractable and gentle, and had never shown any vicious disposition, and that after the bridle was removed a strong and sufficient halter was upon the horse, and that defendants' act in removing the bridle was not an act of negligence under all of the circumstances, and would warrant no recovery against them. The court also instructed the jury that a fair preponderance of the evidence showed that the deceased had hold of the halter and was standing by the horse's side when it took fright and commenced to run, and he could have relinquished his hold of the animal and avoided injury; that it was no part of his duty to risk injury by holding the animal, and whether he heard defendants' advice to let go was immaterial, if in the exercise of ordinary prudence and caution he could see danger in retaining hold of the animal, and failed to let go, he could recover nothing in this action. The court also instructed the jury that the testimony showed that a young boy was

in the wagon at deceased's invitation at the time of the accident, and if the deceased could see the danger of the boy, and as an act of heroism sought to save him from injury, then he assumed all responsibility on his part for any danger he placed himself in by his act at the time of the injury complained of.

The validity of these instructions seems to depend upon the question of whether or not, in view of all the circumstances, the unbridling of the horse, while attached to a wagon in the fair grounds, and turning her over to deceased to be led to a feed-box, was an act of negligence. If it was, and only a fair preponderance of the evidence showed contributory negligence of the deceased, that question should have been submitted to the jury; and if the boy in the wagon, although there by the deceased's invitation, was placed in danger by the negligent act of the defendants in taking off the bridle, any risk taken by the deceased in order to save the boy would not be contributory negligence, unless it was an act of rashness under the circumstances, and the incurring of a danger which no prudent person would hazard, even for such a purpose.

The essential question, therefore, seems to be whether or not the trial court was right in telling the jury that it was not negligence on defendants' part to remove the bridle. If it was negligence, it would seem that the whole question of contributory negligence, and of the right of the deceased to interpose to save the boy in the wagon, should have gone to the jury.

The animal in question was a Clydesdale mare weighing sixteen hundred and fifty pounds. She had been in use by the defendants since the preceding February. She had previously to that been owned by a Mr. Tewkesbury, who used her at first to work on a well machine drawing a rope attached to a singletree. The latter was constantly coming in contact with her heels but did not disturb her. Later she was used by Mrs. Tewkesbury and the children of the family to drive to a buggy and a two-seated carriage as a family horse. Mrs. Burch, defendant, and her

aged mother, on two occasions rode with only Mrs. Tewkesbury and the latter's sister in the surrey through the streets of Lincoln.

There is evidence by deceased's father, and by the surgeon who attended at the time of the accident, that Mr. Burch said at the time he had often told deceased that if the mare "took one of her spells to let her go." Mr. Burch denies this, and says he knew nothing of any spells on the mare's part; that what he did say was that he had told deceased on this occasion to let her go and that some spell was on her. This conversation is the only thing tending in any way to indicate any previous misconduct of the animal. The uniform testimony of all the witnesses is that she was a remarkably gentle and tractable horse, and was so considered by all who at any time had to do with her.

On the day in question the defendants, who had been engaged in gathering the tents furnished by them to the Dunkards' meeting on the fair grounds, had stopped for noon at their supply tent. Deceased, who, in working for defendants, had principal charge of the mare, drove her and the wagon about forty rods to the race track to water her, and a boy of twelve who had been assisting to gather tent stakes rode with him, and sat in the wagon while he drew water in a bucket for her. After watering they drove back and stopped at the supply tent. Mr. Burch, with the assistance of the deceased, slipped off her bridle, while deceased slipped on the halter. He then turned to hang up the bridle. His attention and that of the persons in the tent was attracted by loud calls of "Whoa" from deceased, and the mare was seen trotting away, with deceased holding the halter and trying in vain to stop her. Mr. Burch called to the boy of twelve, who was still in the wagon, to jump out, and to deceased to let the mare go. Neither obeyed. The boy says his clothes caught on the seat. Probably he was too frightened to get them loose. The man seems to have tried to get in front, and get the mare by the head. He only succeeded in getting her to trample him down and draw the heavy wagon over him.

It seems that it was proposed by some one, when the wagon was stopped before the tent, to unhitch the mare, but it was determined that it was unnecessary; that her bridle be removed, and the halter put on, and she led to the feed-box. Whose propositions these were does not appear, but in carrying them out the boy says that after Mr. Burch started away with the bridle the mare looked back at the wagon and started; that Fifer partly stopped her, and she looked back again and started faster, and Fifer ran along at her side for a while, and, in some way, reaching for her head, fell down, and she stepped on him twice and the wagon passed over him, as has been stated. The boy stayed in the wagon and was taken out unhurt when the mare was caught just outside the fair-ground gate, from which place Mr. Burch led the mare back to the tent.

We are constrained to think that the trial court was right, and that in taking off the bridle from this mare, and helping to put on her halter, and leaving her driver to lead her up to the feed-box, there was no negligence on the part of the defendant Milton Burch for which defendants should in any manner be held liable.

It is recommended that the judgment of the trial court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WALTER K. F. VILA ET AL., APPELLEES, V. GRAND ISLAND ELECTRIC LIGHT, ICE & COLD STORAGE COMPANY, IMPLEADED WITH REXFORD E. HULETT ET AL., INTERVENERS, APPELLANTS.*

FILED MARCH 18, 1903. No. 12,342.

1. **Receivership:** ANCILLARY REMEDY. A receivership is a purely ancillary remedy and can not be maintained in a proceeding instituted solely for that purpose.
2. **Receiver:** CORPORATE PROPERTY: JURISDICTION. Unless expressly authorized by statute, a court has no jurisdiction to appoint a receiver of corporate property upon grounds which would not be sufficient were the owner a natural person.
3. ———: MORTGAGEE. A receiver can not be appointed at the instance of a mere mortgagee for property not covered by the mortgage.
4. ———: JURISDICTION: NOTICE. Jurisdiction to appoint a receiver of corporate property, can not be conferred by the mere consent of the corporation where neither equitable nor statutory grounds exist and where other parties whose rights are affected have not been notified; nor is a stockholder concluded by such an order.

APPEAL from the district court for Hall county: JOHN R. THOMPSON, DISTRICT JUDGE. *Reversed.*

Charles G. Ryan and *Richard C. Glanville* (*Leo Cleary*, on motion for rehearing), for appellants.

William H. Thompson and *Virgil O. Strickler*, *contra.*

LOBINGIER, C.

On December 6, 1900, appellees filed in the district court for Hall county a petition making the Grand Island Electric Light, Ice & Cold Storage Company a defendant, alleging that it had, on June 18, previous, mortgaged its plant and other property to appellee Vila for $15,000; that $4,000 of this had been used for other purposes than paying off a prior mortgage as agreed; "that said defend-

* Rehearing allowed. See opinion, p. 233, *post.*

ant is now and will be wholly unable to pay the interest or any part thereof to become due on its said mortgage indebtedness on January 1, 1901; that defendant is also wholly without ability or means to pay any part of its floating indebtedness amounting to about the sum of eighty-six hundred and sixty-two dollars ($8,662) and its creditors are threatening to attach the mortgaged property hereinbefore described"; that defendant had failed to keep its plant in repair as required by the mortgage; and that by the terms of the mortgage the noncompliance with its covenants entitled plaintiff to an appointment of a receiver. Another clause of the mortgage quoted in the petition authorizes such appointment "upon the commencement of suit to foreclose," and the petition contained the following prayer: "Wherefore the plaintiffs pray that a receiver be appointed for defendant and the said receiver be given authority to do each and all of the things mentioned in said mortgage, to wit: To take possession of all the defendant's property covered by said mortgage and to manage and operate the business and to collect its income and profits and to apply the same upon the expenses and charges for maintaining and operating said business and paying the obligations secured by plaintiffs' mortgage and for such other and further relief as to the court may seem meet and proper."

On the next day the following answer was filed on behalf of the defendant:

"Now comes the above named defendant and for answer to the plaintiff's petition admits the facts therein stated and consents to the appointment of a receiver in this action as prayed in the plaintiffs' petition."

On the same day a receiver was appointed to take charge of the "property, business and assets of the defendant" (part of which is enumerated), "and all other property of every kind or character, belonging to or pertaining to said defendant and its business." By the terms of this order the receiver is directed, *inter alia*, "to operate and carry on the business of the defendant." The next order ap-

pearing in the record is dated March 5, 1901, and recites "that it is for the best interest of the parties hereto, of the said trust and all persons interested therein that the business of the said defendant, the Grand Island Electric Light, Ice & Cold Storage Company be speedily closed and the affairs thereof wound up as soon as possible." In this order also the receiver is directed to notify all creditors of the defendant to file their claims. It does not appear in the record upon what this order is based or at whose instance it was obtained. On March 25, the several appellants filed individual petitions of intervention, alleging the recovery of judgments before a justice of the peace on claims for labor performed in defendant's behalf. The aggregate amount of these claims was about $700, and each petitioner prayed that his claim should be given preference, and alleged that the property in the hands of the receiver included about $9,000 worth of personalty which was not covered by plaintiffs' mortgage, and each prayed that he might share in the fund arising from the sale thereof. An order granting leave to intervene as prayed, was entered on the same day that these petitions were filed, and on the following day the receiver filed a report as to the condition of the business, in which he recommended a speedy sale of the entire property in his hands. Objections to this application to sell were filed by the interveners, and also by appellee Kinkel, a stockholder in the defendant corporation. These were overruled, and an order made requiring an inventory and appraisement of the property, in pursuance of which the appraisers fixed the valuation of the plant in the aggregate at $25,000. On May 6, a decree was rendered, in which demurrers to the several petitions of intervention were sustained, but the claims of the interveners, among others, were allowed, less the court costs of placing them in judgment. By this decree, the court also found that certain of the property in the receiver's hands was personalty and was not covered by plaintiff's mortgage, but it also found "that all of the property, goods and franchises, real, personal or mixed,

coming into the hands of the said receiver, save that which is herein specifically found to be personal property, is covered by the said plaintiff's mortgage." The decree directed a sale, subject to the mortgage, of all property covered thereby, and a separate sale of the remaining personalty, and on June 8 the entire property was sold to G. H. Payne, trustee, president of appellee Payne-Knox Company, for $2,800 for the mortgaged property and $150 for the balance. This is about one-third of the floating debt alleged, as we have seen, to exist at the beginning of the suit. Objections to confirmation of the sale were filed by interveners, they having previously objected to the appraisement, but these were overruled and the sale confirmed on June 22. Interveners bring the cause here by appeal, attacking both the decree of May 6, directing a sale, and also the order of June 22, confirming the same. These orders are both made a part of the transcript which was filed here October 11, and a review of them brings before us also the question as to the validity of the order appointing the receiver (*Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214, 216), for if this was invalid the subsequent proceedings, being based thereon, are necessarily so.

Apellants contend that there was no "suit actually commenced and pending" as required by section 267 of the Code before a receiver may be appointed. This requirement is jurisdictional. "The order appointing a receiver was void, for the reason that it was made when there was no suit pending." Cooley, J., in *Merchants' & Manufacturers' Nat. Bank of Detroit v. Kent Circuit Judge*, 43 Mich. 292, 296.

"No authority is given by the statutes of this state to its courts, or to judges thereof in vacation, to make such an appointment, except in a pending suit, nor does it inhere in any of them under their general jurisdiction as courts of equity." *State v. Ross*, 122 Mo. 435, 456; Cf. *In re Brant*, 96 Fed. 257, where the authorities are collated.

Moreover, the suit which must be "actually commenced

and pending" as a condition precedent to an appointment of a receiver, must be one in which the main relief sought is independent of the receivership. The latter is a purely ancillary remedy.

"It is not the office of a court of equity to appoint receivers as a mode of granting ultimate relief. They are appointed as a measure ancillary to the enforcement of some recognized equitable right." Baldwin, J., in *Barber v. International Company of Mexico,* 73 Conn. 587, 593.

"Unless, possibly, in cases provided for by the statute, the appointment of a receiver can only be made in aid of the main action; although such appointment may be a part of the relief sought by the complaint." *State v. Union Nat. Bank of Muncie,* 145 Ind. 537, 550.

"The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding." *State v. Ross,* 122 Mo. 435, 456.

Tested by these authorities, we are unable to say there was "a suit actually commenced and pending" when the receiver in this case was appointed. It is true that a petition had been filed the day previous, but this would not constitute such a suit, unless it set forth grounds instituting an actual controversy and demanding substantial relief beyond the mere appointment of a receiver.

In *State v. Ross,* 122 Mo. 435, a corporation filed a petition alleging that its plant was heavily incumbered, and praying for the appointment of a receiver, with a prayer, as here, for general relief. A receiver was appointed, but upon application to the supreme court a writ of prohibition was granted, and the court said (p. 457): "The filing of that petition no more instituted an actual controversy between contending suitors in court, than would the filing of a copy of the Lord's Prayer. It laid no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver, unless some ground for the exercise of that jurisdiction can be found other than an actual, pending controversy in the court which undertook its exercise."

The petition in this case contains no prayer for specific

relief other than the appointment of a receiver. Some of its allegations, indeed, resemble those of an ordinary petition to foreclose a mortgage. But no such relief is asked, and, waiving the question whether a decree of foreclosure may be rendered under a prayer for general relief, we have searched this petition in vain for averments which declare plaintiff's right to a foreclosure. The mortgage itself is not attached to or made a part of the petition, and while some of its provisions are quoted, they are confined to such as show the holder's right to a receiver; they set forth no default which would entitle him to foreclose. The petition conclusively shows not only that the principal debt is not due, but that not even the first coupon had matured at the time the proceeding was begun. The petition merely alleges that the mortgagor will be unable to meet this when the coupon shall fall due—nearly a month later. Not even the appointment of a receiver will be made on anticipated grounds. *Chadron Banking Co. v. Mahoney,* 43 Neb. 214. Much less will a decree of foreclosure be rendered. And not only does the petition fail to state facts which authorize a foreclosure, but the conduct of plaintiffs indicates that they never intended to seek such relief. No attempt has been made anywhere in the progress of the litigation to obtain a decree of foreclosure, and the defendant's property was finally purchased by the president of the corporate plaintiff under a decree which expressly directed the sale subject to and not by virtue of the mortgage.

Nor can this petition be upheld as one for the dissolution of the corporate defendant. It contains no prayer that the corporation be dissolved, but, on the contrary, asks that a receiver be appointed, and that he apply the income "for maintaining and operating said business." The idea of a dissolution does not appear to have been entertained until March 5,—three months after the filing of the petition—when the order was made reciting that it was for the best interests of the parties that the affairs of the corporation be wound up.

But even had the petition contained a specific prayer for dissolution, this would not have supplied a sufficient basis for the appointment of a receiver.

"A court of equity has no inherent power as such to appoint a receiver over an insolvent corporation." Smith, Receivers (3d ed.), sec. 288.

"The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. And courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequestrate the effects of the corporation, or take the management of its affairs from the hands of its own officers and entrust it to the control of a receiver of the court, upon the application either of creditors or shareholders." High, Receivers (3d ed.), sec. 288.

Our legislature has enacted statutes which authorize the appointment of receivers for winding up the affairs of particular corporations, as in the case of banks, but none of these apply to such a corporation as the defendant below. This receivership must be sustained, if at all, by the general statutory provisions relating to the appointment of receivers or by the general rules of equity jurisdiction.

"In the absence of a statutory enlargement of equity jurisdiction, a receiver of a corporation will not be appointed unless the same relief would be given, when claimed in an action against an unincorporated association of natural persons." *Barber v. International Company of Mexico,* 73 Conn. 587, 593.

Our statute on this subject is similar to that of Iowa. In *Wallace v. Pierce-Wallace Publishing Co.,* 101 Ia. 313, 323, it was observed: "We have heretofore held that this section* does not authorize the dissolution of the corporation by a court of equity, nor the placing of its property in the hands of a receiver which practically accomplishes the same purpose."

* Code, sec. 2903.

We have not overlooked *Ponca Mill Co. v. Mikesell,* 55 Neb. 98, but we find nothing there to change our conclusions. It was an action by a stockholder to establish and foreclose a lien upon corporate property, and by the same order which granted him this relief a receiver was appointed on the ground that the majority stockholders were mismanaging the corporate business and misappropriating corporate property. It follows *Haywood v. Lincoln Lumber Co.,* 64 Wis. 639, which was an action to foreclose a mortgage executed by the corporation. In both cases, therefore, the plaintiffs were seeking to enforce liens, and the receivership was not, as here, the sole apparent purpose of the proceeding. In both cases grounds for the appointment of a receiver existed independent of the fact that the defendant was a corporation.

But if we were permitted to overlook the fact that no main action was pending when this receiver was appointed, we would still be unable to uphold the order of appointment and the subsequent proceedings thereunder, because it resulted in the sequestration of property by the receiver to which, in no view of the case, was he entitled. The petition merely prayed that he be authorized to take possession of the "property covered by said mortgage," and this would have been the limit of his rightful possession even had the petition sought and set forth grounds for a foreclosure. But the order of appointment gave him possession of "all other property of every kind or character, belonging to or pertaining to said defendant and its business." There never was an application to extend the receivership to other property and this part of the order, at least, was void on its face. Plaintiffs were not entitled in any event to a receivership of property in which they had no definite interest. *Smith v. Wells,* 20 How. Pr. (N. Y.) 158.

The case at bar strongly resembles *State v. Union Nat. Bank of Muncie,* 145 Ind. 537, where a similar course was followed by the trial court, and upon appeal it was observed (p. 551): "In the case before us, the plaintiff had

no judgment or other general lien against the defendant's property. His only lien was that of his chattel mortgage; and without a suit to foreclose that mortgage he had no right to a receiver even for the property covered by that mortgage. Still less was there a right to a receiver for property not covered by plaintiff's chattel mortgage. The rights of judgment creditors could not thus be cut out by one who had no judgment or other lien upon the defendant's property. From any point of view, therefore, it must be apparent that the court had no jurisdiction to appoint a receiver in this case."

In the case at bar the trial court distinctly recognized that there was property in the hands of the receiver not included in the mortgage, for it directed a sale of this apart from the other. But upon what possible theory had plaintiff a right to seek or obtain the appointment of a receiver of this nonmortgaged property?

Moreover, while the court ordered a sale of some of the personalty without subjecting it to the mortgage, the record shows that other property of that class was not sold in this way, for the decree expressly recites, as we have seen, "that all of the property * * * real, personal or mixed * * * save that which is herein specifically found to be personal property, is covered by the said plaintiff's mortgage." How much personal property was thus included in the mortgage, we have no means of knowing, for that instrument is exceedingly comprehensive in its terms and purports to include "all and every description of personal and mixed property."

But the decree plainly shows that some of the personal property was treated as covered by the mortgage, and sold subject thereto. And the result of this must necessarily have been to reduce the assets from which interveners might satisfy their claims.

We do not agree with counsel for appellants that the labor claims of interveners constitute a preferential lien on the assets of the corporation. For, as we interpret the rule in *Fosdick v. Schall,* 99 U. S. 235, 25 L. ed. 339, it

merely upholds the discretionary power of the court which appoints a receiver to impose as terms of the appointment the prior payment of such claims as these. The doctrine is more fully elaborated in *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182. But while these intereveners may have had no liens other than those afforded by their judgments, they were certainly entitled to share as general creditors in every dollar that could be realized from the corporate assets not clearly appropriated to some higher claim.

Now, this mortgage, though purporting to cover personalty, was never filed as a chattel mortgage and was, therefore, in respect to chattels, "void as against the creditor of the mortgagor." Compiled Statutes, ch. 32, sec. 14 (Annotated Statutes 5963). These interveners were judgment creditors, and therefore within the letter of the rule laid down by this court in *Farmers' & Merchants' Bank of York v. Anthony*, 39 Neb. 343, 348. Whether it was necessary that their judgments should have antedated the mortgage, we do not here decide, for the record discloses that in any event the receiver took possssion of and sold, by virtue of the decree complained of, property which confessedly was not covered by the mortgage.

We see no escape then from the conclusion that the order appointing this receiver was made without jurisdiction and that the subsequent proceedings thereunder were invalid.

We are cited to *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Neb. 636, and *Hawkins v. Glenn*, 131 U. S. 319, in support of the contention that appellant Kinkel, as a stockholder, was bound by the court's order as regards the defendant corporation. The cases referred to simply announce the rule that a stockholder is concluded by a decree compelling the enforcement of a corporate duty. But there was certainly no duty on the part of the corporate defendant below to consent to the appointment of a receiver. Nor was it or any other party bound by an order which the court had no jurisdiction to make. It is a familiar rule that consent never confers jurisdiction over

the subject-matter. This applies in the case of receiverships as completely as elsewhere.

"Consent of the parties before the court will not avail to secure resort to the remedy in a case otherwise improper, or if the rights of other persons will be affected adversely or put in danger of violation." Beach, Receivers, sec. 150.

This case has some of the features of *Merchants' & Manufacturers' Nat. Bank of Detroit v. Kent Circuit Judge*, 43 Mich. 292, where Cooley, J., said (p. 298): "We do not enlarge upon this aspect of the case, as it is not necessary here; but it must be manifest that the parties were creating a trust by means of the mortgage and of a consent order which could not stand the test of the law. * * * It resembles very closely an attempt by circuitous methods to avoid a legal principle."

In this case the consent of those now complaining was never sought or obtained. Although the petition distinctly averred that there were creditors who "are threatening to attach," and although the statute expressly requires that notice of an application for a receiver shall be given "to all parties to be affected thereby" (Code of Civil Procedure, sec. 267), none of the interveners now holding judgments against the corporate defendant were notified, or given an opportunity to be heard as to the order appointing the receiver.

Under these circumstances, the mere fact that they did not except to the order should not prevent a review of it here. And in any event these objections being jurisdictional, may be raised even in the appellate court for the first time. *City of Lansing v. Chicago, M. & St. P. R. Co.*, 85 Ia. 215; *Orcutt v. Hanson*, 71 Ia. 514.

There are other questions presented in appellants' brief, but as their solution is not necessary to a determination of the case, we will not further prolong the limits of this opinion. We recommend that the decree of May 6, and the order of June 22, confirming the sale, be reversed, and that the order appointing the receiver be vacated.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of May 6, 1901, and the order of confirmation of June 22, 1901, are reversed, and the order appointing the receiver is vacated.

REVERSED.

The following opinion on rehearing was filed December 2, 1903. *Judgment of reversal adhered to:*

1. **Petition**: NO CAUSE OF ACTION: APPELLATE COURT. The question of whether a petition states a cause of action or discloses grounds sufficient for the granting of equitable relief, may be raised at any stage of the proceedings in the appellate court, up to and including the filing of a motion for a rehearing.

2. **Prayer for General Equitable Relief.** A prayer for general equitable relief, coupled with that of one for specific relief, can not be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of fact contained in the pleading.

3. **Appointment of a Receiver**: IS ANCILLARY REMEDY. The appointment of a receiver in an equitable action is ordinarily an ancillary remedy, provisional in character, and incidental to the main object or purpose of the suit.

4. **Jurisdiction to Appoint a Receiver.** Save in certain classes of suits in equity which constitute well-recognized exceptions, the jurisdiction of courts of equity does not warrant the appointment of a receiver to take charge of and administer the property and business of a corporation in an independent action, where that is the main object and purpose of the suit and the sole and only relief asked for.

5. **Defective Petition.** Petition in the case at bar examined, construed, and *held* defective in substance, and insufficient to support the orders of the court appointing a receiver to take charge of and sequestrate the property and business of the defendant corporation, directing a sale thereof, and the confirmation of the sale made under such orders.

6. **Jurisdiction of Equity Courts Over Corporation.** In the absence of statutory authority, courts of equity do not possess jurisdiction over corporate bodies to the extent of, on the application of private parties, appointing a receiver, sequestrating the property and business and selling the same through the instrumentality of such receiver, and thereby wind up the affairs and terminate the business and indirectly dissolve the corporation.

7. **Stare Decisis.** The former judgment of reversal in *Vila v. Grand Island Electric Light, Ice & Cold Storage Co., ante,* p. 222, adhered to.

HOLCOMB, J.

A rehearing having been granted, this cause has been submitted on oral arguments and printed briefs for further consideration. The opinion heretofore formulated, prepared by one of the commissioners, is found under the title *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.* and others, as interveners, *ante,* p. 222. The case is there quite fully stated and a repetition will here be avoided as far as is consistent with a proper discussion of the subject in the present opinion. Gauged by the pleadings, and the procedings had and done thereunder, the suit appears to have been instituted by a mortgagee of the plant and property of the defendant corporation for the purpose of having its property sequestrated, and, through the aid of a receiver, its affairs wound up by a sale of the property and a division of the assets among those entitled thereto. The suit in its practical workings has many of the earmarks of a proceeding had under our statute for the appointment of a receiver and the winding up of the business of an insolvent banking corporation incorporated under the laws of this state. The plaintiffs, as trustee and *cestui que trust,* were the owners and holders of certain bonds executed and delivered by the defendant company, and secured by a mortgage on its plant, consisting of both real and personal property. The defendant company at the time of the institution of the suit filed its answer, admitting the truth of the allegations of the petition and consenting to the appointment of a receiver as therein prayed for. The essential averments of the petition which it seems advisable here to state for the purpose of the further discussion of the case are in substance as follows: That it was agreed by the defendant when the loan was made, evidenced by the bonds executed at the

time and described in the petition, that the proceeds should be used to pay off a prior mortgage, and the balance for the completion of the plant; that prior to the inception of the litigation, the plaintiff learned for the first time that a large proportion of the proceeds of the loan so made had been misappropriated and used for other purposes, and that the plant remained in an unfinished and incomplete condition; that the defendant was at the time, and would be, wholly unable to pay the interest or any part thereof thereafter and within a short time to become due on the mortgaged indebtedness, and was wholly without ability to pay any part of its floating indebtedness, amounting to a large sum, and that its creditors were threatening to attach the mortgaged property; that the defendant was entirely without credit, unable to purchase supplies needed in its business, was without money, and that its business was likely to be stopped either by attachment suits or because of its inability to procure the necessary materials and appliances; and that should the business be discontinued, the value of the property would be greatly diminished, the public put to great inconvenience and great financial loss ensue. The mortgage, it was averred, contained the following provisions: That the defendant agreed to keep all the buildings, machinery, engines, etc., in good repair and condition, and that such agreement had not been kept; that the mortgage also provided that in case of default in the payment of the bonds or interest, or failure to comply with any of its terms, the trustee should thereupon become entitled to the appointment of a receiver to take possession of the property, manage and operate the business, collect the income and profits, apply the same on the expenses and charges for maintaining the plant and business, and paying the obligations secured by such mortgage. Wherefore it is prayed that a receiver be appointed and given authority to do each and all of the things mentioned in the mortgage, to wit, to take possession of the property covered by the mortgage and manage and operate the busi-

ness, collect its income and profits, and apply the same upon expenses and charges for maintaining and operating the business, and in paying the obligations secured by plaintiff's mortgage, and for such other and further relief as to the court may seem meet and proper. Upon the filing of the petition and the answer of the defendant company, a receiver was appointed, who qualified, took possession of the property of the defendant corporation and managed its business until it was sold at receiver's sale under order of court, which sale was afterward confirmed, and from which orders and decrees an appeal is prosecuted by the interveners, one a stockholder of the corporation, and the others general creditors who had reduced their demands to judgment before intervening in the action. To the report of the receiver advising a sale of the property and the order of the court directing the sale and the confirmation thereof when made, the interveners objected, protested, and excepted, but without avail.

Counsel for appellee devote a portion of their argument to the question of whether these intervening parties can be heard to complain on appeal after going into court and asking to have their judgments satisfied out of the corporate property, and after, as is claimed, the stockholder had assisted in and consented to the appointment of a receiver. This phase of the case may, we think, be properly disposed of by the suggestion that in our judgment the pivotal point of the whole controversy and the chief inquiry to be made are with relation to the sufficiency of the petition filed in the case, and whether or not it states a cause of action or discloses equitable grounds for the granting of the relief prayed for or granted to the plaintiffs.

It has frequently been held that the question of the sufficiency of a petition, and whether it states a cause of action, may be raised at any step of the proceedings, even in the supreme court on an appeal, and is open for consideration in the appellate court at any time until and including the filing of a motion for a rehearing. *Kemper v. Renshaw,*

58 Neb. 513; *State v. Moores,* 58 Neb. 285. If the petition filed in this case does not state a cause of action, if it is defective in substance, if its allegations do not warrant the granting of any equitable relief, then such defect is open for consideration, and the participation of the interveners and appellants in the proceedings had in the court below can in no wise preclude them from urging the insufficiency of the petition to support the orders, decrees and judgment of the court entertaining jurisdiction and trying the cause below. While the prayer to the petition contains a request for general equitable relief, it must, we think, be admitted that it can not be extended so as to warrant the granting of relief not embraced within or comprehended by the allegations of the pleading. To be sure, the prayer for relief is a part of the petition, but it is no portion of the statement of facts required to constitute a cause of action. Consequently, while it may be broader than the allegations of the petition, the cause of action pleaded can not be enlarged or made the basis for the granting of relief other than that warranted by the allegations of facts. *Fox v. Graves,* 46 Neb. 812, 816, and authorities cited therein.

An examination of the petition in the case at bar renders it obvious that no cause of action is stated therein disclosing a right to the recovery of a money judgment for the amount called for by the bonds, or any portion thereof, or for a foreclosure of the mortgage in satisfaction of any sum which might be found to be due; in other words, none of the debt secured by the mortgage had at the time matured, and there was no breach nor default in the conditions of the mortgage disclosed by the pleadings warranting a foreclosure of the title to and equity of redemption of the property mortgaged, owned and held by the defendant company. This, manifestly, is the view taken by the parties to the suit and the trial court, since no attempt was made to enforce the obligation secured by the mortgage, or for the sale of the property of the defendant company and the application of its proceeds in satisfac-

tion thereof. What was in fact done was to seize all the property of the corporation, place it *in custodia legis* by means of the receivership, manage it under the direction of the court for a short period of time, and then dispose of it at receiver's sale subject to the mortgage and the indebtedness secured thereby, mentioned in the pleadings as being held and owned by the plaintiffs. The cause of action, therefore, stated or attempted to be stated, was not in respect of plaintiff's right to collect its indebtedness held against the defendant and enforce their mortgage lien, but their right under the allegations of the petition to have a receiver appointed to take charge of and manage the property and business of the defendant company, and to wind up its affairs by a sale of the plant subject to plaintiff's lien, and the distribution of the proceeds, after paying the costs and charges of the receivership, to those found entitled thereto.

We are thus brought to a consideration of the proposition as to whether the plaintiff was warranted in asking solely for the appointment of a receiver to take charge of and administer the corporate estate and to sell the same as was done, and whether the court was authorized to make such appointment and to enter the orders and decree thereafter made and rendered in the further proceedings, to which exceptions are taken. It is to this proposition that counsel have devoted most of their arguments and to which our attention will now be directed. In the former opinion, it was held that a receivership is a purely ancillary remedy and can not be maintained in a proceeding instituted solely for that purpose. The enunciation of this proposition is vigorously challenged by appellees' counsel, but a full investigation and consideration of the subject has dispelled from our minds all doubts, if any have heretofore existed, as to its being a correct and sound declaration of the principles of equity governing and controlling a suit when applied to a condition of facts such as are presented by the record in the case at bar. Of course, where the statute authorizes it, and in some well-recog-

nized exceptions to the general rule, the appointment of a receiver may be and is the main object and purpose of the suit or proceedings. It is likewise true that in some cases of extraordinary character affecting quasi-public corporations, and where public interests are so involved as to demand the extension of the equitable principles applicable to receiverships so as to protect such interests, some courts have assumed jurisdiction, and claim authority to appoint a receiver where that is the main purpose of the suit, yet such cases have been characterized as announcing a doctrine both novel and unusual. In all such cases the object of such appointment is to preserve and hold intact the property intrusted to the receiver, and not to destroy, dismember, or by receiver's sale dispossess the corporation of its property and franchise. Possibly the subject may be made a little clearer by some reference to the nature and character of receiverships and the principles underlying the subject, as gathered from the text-writers and the decisions of the courts of last resort. A receiver by his appointment does not become a litigant in the action, nor does he represent one more than the other of any of the parties to the controversy. He, when appointed, takes possession of the property as the right arm of the court for the benefit of the party ultimately entitled to it. Beach, Receivers, sec. 2. "A receiver is," says the same author, "a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite,* the fund or property in litigation." 2 Beach, Private Corporations, sec. 772. The sequestration of property by a receiver in a suit in equity is analogous to the seizure of property by attachment in an action at law. The appointment of receivers, says the supreme court of Ohio, is classed as one of the provisional remedies, like the proceedings by injunction or in attachment. Says the court: "A provisional receivership is, in effect, an injunction, and something more stringent still. It is to be granted with great caution, and only in a case of apparent pressing

necessity. Edwards, Receivers, 13. The appointment of a receiver is an equitable remedy, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been said to be an equitable execution. Jeremy, Equity Jurisdiction, 249." *Cincinnati, S. & C. R. Co. v. Sloan,* 31 Ohio St. 1, 7. See also *Davis v. Gray,* 83 U. S. 203, 217, 21 L. ed. 447. It must be made to appear affirmatively that there is a reasonable possibility that the plaintiff will ultimately succeed in obtaining the general relief sought in the suit in which the receivership is asked. Smith, Receiverships, sec. 5 (*b*); Beach, Receivers, sec. 48. "The appointment of a receiver," says the supreme court of Pennsylvania, "is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion." *Chicago & Allegheny Oil & Mining Co. v. United States Petroleum Co.,* 57 Pa. St. 83.

"The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. It adjudicates and determines the rights of no party to the proceeding and grants no final relief directly or indirectly." Smith, Receiverships, sec. 2; Beach, Receivers, sec. 51; Pomeroy, Equity Jurisprudence, secs. 171, 1319, 1330; *Miller v. Bowles,* 58 N. Y. 253. In support of the rule announced by the text-writers to the effect that generally the appointment of receivers at the instance of private parties is an ancillary remedy administered by the court, provisional in character, and in aid of the primary object of the litigation, may be cited *French Bank Case,* 53 Cal. 495, 550; *Jones v. Bank of Leadville,* 10 Colo. 464; *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.,* 37 Fed. 286; *Wallace v. Pierce-Wallace Publishing Co.,* 101 Ia. 313, 38 L. R. A. 122, 63 Am. St. Rep. 389; *Barry v. Briggs,* 22 Mich. 201; *People v. Weigley,* 155 Ill. 491.

Aside from the question of the sufficiency of the petition because the appointment of a receiver is the sole and primary object of the suit, and no cause of action or ground for equitable relief otherwise being stated, another insuperable obstacle, and one closely related to the subject heretofore discussed, is the fact that the jurisdiction of a court of equity is invoked for the purpose of seizing the corporate property of the defendant company and winding up its affairs without statutory authority therefor, and without the case being brought within equitable principles sanctioned and taken cognizance of by the courts of chancery of England, from which the equity jurisdiction exercised by the courts of this state is derived. Some authorities are cited by counsel for appellees to the effect that a sale of all the corporate property does not necessarily work a dissolution of the corporation or terminate its legal existence. This, doubtless, is true, and in the cases cited the property, in all probability, was properly seized in satisfaction of just obligations, leaving the corporate entity unaffected, and nothing further was attempted. It may be, and probably is, true that a dissolution of a corporation in a technical sense can be accomplished by the expiration of its charter or the decree of a court of competent jurisdiction forfeiting the same. Yet in the case at bar, in truth and substance, the corporation has been, through the instrumentality of a receiver and by the order and decrees complained of, stripped of its estate, divested of its property and franchise, and its affairs brought to a final termination as completely and successfully as if its dissolution were the avowed object and purpose of the suit.

In *Neall v. Hill,* 16 Cal. 145, 149, it is said: "We are also of opinion that the court erred in the appointment of a receiver, and in decreeing a sale of the property and a settlement of the affairs of the corporation. This decree, if permitted to stand, must result in the dissolution of the corporation; and in that event the court will have accomplished in an indirect mode that which, in this proceeding,

it had no power to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies, for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised, in the absence of a statute conferring the jurisdiction."

In *Wallace v. Pierce-Wallace Publishing Co.*, 101 Ia. 313, 322, it is said: "It is certainly true that, in the absence of express statutory authority, jurisdiction of courts of equity does not exist over the corporate bodies to such an extent as to justify them in dissolving corporations, or of winding up their affairs and sequestrating their property. This seems to be so well settled that there is scarcely a dissenting voice in authority." See also, *Wheeler v. Pullman Iron & Steel Co.*, 17 L. R. A. (Ill.) 818; *Link Belt Machinery Co. v. Hughes*, 63 N. E. (Ill.) 186; *State v. Second Judicial District Court*, 15 Mont. 324.

We have examined with diligence and care the many authorities cited by appellee in support of its contention as to the authority of the court on equitable grounds to appoint a receiver, the regularity of the appointment in the case at bar, and the subsequent proceedings had, but we find none of them to give substantial support to the doctrine contended for. In each and all of the authorities save the exceptional cases heretofore referred to, the jurisdiction of the court in appointing a receiver was invoked as an exercise of power ancillary and incidental to the principal relief sought by the parties to the litigation. The parties all appear to have been either stockholders or creditors who had an actual and subsisting demand, a present right or claim which it was sought to have enforced, and the appointment of a receiver was in aid of and for the purpose of making effective a prospective judgment or decree to be rendered in the action which, *prima facie*, they were shown to be entitled to at the time of its commencement and the appointment of such receiver. We find no authority giving unqualified support to the doctrine that a mere mortgage of corporate prop-

erty, because of an anticipated default of the indebtedness, a possible inability to continue much longer the conduct of the business, threatened attachments, financial weakness or insolvency, and in the event of the suspension of business, a consequent depreciation of the value of the mortgaged property, may for these reasons, in an independent action and for no other purpose, have a receiver appointed, the corporate property sequestered, the business conducted by the receiver until by a receiver's sale the estate may be sold subject to the mortgage indebtedness, and the affairs of the corporation terminated. To establish such a doctrine in this jurisdiction is, in our judgment, unwarranted, unsupported by authority and fraught with dangerous consequences.

The petition, we are satisfied, states no cause of action, nor warrants the granting of any equitable relief, and therefore the order of sale of the corporate property and the confirmation thereof, as well as the appointment of a receiver, was without authority, unsupported by the pleadings, and for such reasons, the judgment heretofore rendered reversing the orders and decrees so entered should be adhered to, which is accordingly done.

FORMER DECISION ADHERED TO.

SARAH E. VAN DOREN ET AL. V. GUST H. WIEDEMAN ET AL., REVIVED IN THE NAME OF JOHN E. WIEDEMAN, ADMINISTRATOR OF THE ESTATE OF GUST H. WIEDEMAN, DECEASED, ET AL.

FILED MARCH 18, 1903. No. 12,391.

1. **Sheriff's Deed**: HOMESTEAD: EXECUTION SALE: JUDGMENT AGAINST HUSBAND. A sheriff's deed made in pursuance of a sale of a debtor's homestead, which at the time of the levy is occupied as such by the debtor and his family, the judgment running against

the husband individually, will not devest the debtor of his title to the homestead, nor invest the purchaser with any title thereto.

2. Homestead: LEVY: SALE: WAIVER. A homestead was levied upon and sold by the sheriff on an ordinary execution. After confirmation of the sale and application of the proceeds to the payment of the judgment and costs, a surplus amounting to the sum of $2,449.08 remained in the hands of the sheriff. The wife had not been a party to the proceedings, but subsequently, by application to the court, obtained an order for the payment of the surplus to her. The sheriff, acting in pursuance of this order, required that the husband join with the wife in signing the receipt for the money. *Held*, That a waiver of the homestead right by the husband could not be predicated solely upon the fact that he signed the receipt. Whether in any event a homestead right can be waived, *quære*.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Reversed.*

Byron Clark and *C. A. Rawls*, for plaintiffs in error.

Carey S. Polk, contra.

KIRKPATRICK, C.

This is an error proceeding prosecuted from a judgment of the district court for Cass county in an action of ejectment brought by Gust H. Wiedeman, now deceased, the action having been revived in the name of his administrator and heirs at law, defendants in error, against Sarah E. Van Doren and Aaron L. Van Doren, plaintiffs in error. There was judgment for plaintiff below. The petition filed in the district court alleges, "that plaintiff is the owner and is entitled to the possession of the northwest quarter of section seventeen (17) in township twelve (12) north, range nine (9) east of the sixth principal meridian, in said county of Cass, and that said defendants and each of them since the 18th day of April, 1899, have unlawfully kept and still keep the plaintiff out of possession thereof. Wherefore the plaintiff prays judgment for the delivery of possession of said premises to him and for his costs herein expended." Separate answers by the Van Dorens consisted of general denials.

The court found that the Van Dorens were husband and wife, and as such were living upon the premises; that on April 2, 1898, Aultman, Miller & Co. recovered a judgment against A. L. Van Doren for $154.70, a transcript of which was filed in the office of the clerk of the district court April 4, 1898; that on November 11, 1898, A. L. Van Doren transferred the title to the premises to his wife, the deed being recorded on March 11, 1899; that execution was issued on the judgment February 7, 1899, and levied upon the premises; that no proceedings have been taken by the creditors, either to set aside the conveyance, or to have the homestead interest of the Van Dorens appraised; that the land was sold under the execution on March 31, 1899, the sum realized being $2,725; and after the deduction of the costs and judgment, there remained in the hands of the sheriff $2,449.08; that the sale was confirmed April 10, 1899, a sheriff's deed issuing to G. H. Wiedeman, the purchaser; that up to May 1, 1899, Sarah E. Van Doren had not been a party to the proceedings; that on that day she filed a motion in the case of Aultman, Miller & Co. v. A. L. Van Doren, her husband, asking the court to direct the sheriff to turn over the surplus of $2,449.08 to her (the fund arising from the sale of the premises), claiming to be the owner thereof; that the district court granted this motion, directing the surplus to be paid to her; that the husband joined with his wife in demanding of and receipting to the sheriff for such surplus; that subsequent to the confirmation of the sale, and on April 22, 1899, G. H. Wiedeman asked the court to set aside the sale and relieve him of his bid, for the reason that he could not obtain possession of the land; that the Van Dorens made no appearance on the hearing of such motion, neither of them having any actual notice of the motion to confirm the sale; that Wiedeman's motion to set aside the sale, and Sarah E. Van Doren's motion asking that the surplus be paid to her, were submitted and passed upon the same day, June 21, 1899, the former being overruled, the latter sustained.

Upon these findings of fact the court held, first, that the

ownership and occupancy of the premises by the Van Dorens was a sufficient selection of the premises as a homestead, and that all persons, including the plaintiff G. H. Wiedeman, were charged with notice of the homestead character of the premises, and that such character continued in said land up to and including the sale under execution; second, that when Sarah E. Van Doren appeared in the case of Aultman, Miller & Co. against A. L. Van Doren, filing a motion asking that the surplus of the sale be paid to her, she waived antecedent irregularities, and waived the right to claim the land as a homestead; that A. L. Van Doren and Sarah E. Van Doren are now estopped to deny the validity of the sale and to claim the land as a homestead. Thereupon judgment was rendered for plaintiff below, which was superseded, plaintiffs in error being still in possession of the premises.

The findings of fact by the trial court are in the main supported by the evidence, with the exception that the record fails to show that A. L. Van Doren took any part in securing the payment of the surplus to his wife further than that he made an affidavit, which his wife filed with her motion, and that he, apparently at the instance of the sheriff, who by the court was ordered to pay the money to Mrs. Van Doren, joined with his wife in receipting for the money. In addition to matters found by the court, it appears that the land was appraised by the sheriff in gross at $6,400, which sum, after the deduction of a prior incumbrance of $2,000 and certain unpaid taxes, was reduced to $4,081.63. It was twelve days after confirmation of the sale, and on April 22, 1899, that Wiedeman, the purchaser, desiring to be relieved from his bid, filed a motion assigning the following reasons why the sale should be set aside:

"First, for the reason of mistake and irregularity in said sale; second, for the reason that said property was appraised as the property of said A. L. Van Doren, and sold as such to this plaintiff, when in truth and in fact the said A. L. Van Doren was not the owner thereof; third, for the reason that the said G. H. Wiedeman is unable to get or secure title thereto."

The motion of Mrs. Van Doren referred to, and filed May 1, 1899, is as follows:

"Now comes Sarah E. Van Doren, owner of the real estate sold in the above cause to the purchaser, G. H. Wiedeman, and moves the court to order the sheriff to pay the surplus arising from sale to this owner, Sarah E. Van Doren."

Neither of plaintiffs in error were parties to the motion of Wiedeman to be relieved from his bid, apparently having no knowledge thereof, although Mrs. Van Doren was present in court on June 21, 1899, by attorney, urging her own motion. However, both motions appear to have been ruled upon at the same time, the journal entry being as follows: "Now on this day this cause came on for decision, having been heretofore argued and submitted, on the motion to set aside sale under execution and confirmation thereof, on consideration whereof the court doth overrule the same, and the sheriff is ordered to pay over money to Mrs. Van Doren"; to which order it appears Wiedeman took an exception.

Upon paying the money on the same day, the sheriff made a condition of such payment the requirement that the husband sign with Mrs. Van Doren. Wiedeman resided near the land in controversy, was well acquainted with plaintiffs in error, and knew they occupied the premises as a homestead. He was the notary who took the acknowledgment to the deed conveying the premises to Mrs. Van Doren.

It is contended by plaintiffs in error that the rule of *caveat emptor* applies to the purchaser at this sale; that by the confirmation of the sale the homestead was in no manner affected; that the record discloses nothing to estop plaintiffs in error to assert their homestead right herein; that the parties being without power to alienate or incumber their homestead except in the manner prescribed by statute, no estoppel can be invoked, as estoppel can not supply the want of power; that judgment against the husband was no lien against the homestead; that sale on such

judgment did not devest title; that the homestead interest embraced the entire tract, and that no appraisement of the property and severance of the homestead interest was had in pursuance to the statute, this in itself being a complete defense in the action of ejectment.

On the part of defendants in error it is contended that by accepting the proceeds of the sale in the hands of the sheriff, plaintiffs in error estopped themselves from questioning the validity of the sale; that, by so accepting the surplus, they ratified any irregularity in the proceedings theretofore had; that they actively affirmed the sale by seeking to procure the surplus; and, further, that all such matters could be shown in ejectment, although not specially pleaded.

The question thus presented is whether Mrs. Van Doren, by filing her motion asking for the payment of the surplus of the sale to her, a fund created by the sale of the premises, and thus appearing in the action after sale and confirmation thereof, has placed it beyond the power of herself and husband to assert a right to the homestead exemption. Section 1 of chapter 36, Compiled Statutes (Annotated Statutes, 6200), limits the value of the homestead; section 3 designates the instances in which the homestead will be liable to forced sale; section 4 provides that both spouses must join in a conveyance. We think it is in entire accord with judicial construction of exemption laws to regard the sections referred to as exclusive of all other modes of conveying or incumbering the homestead, or rendering it liable to forced sale, unless, as hereinafter considered, the claimants, while in possession, may waive their right, and whether plaintiffs in error did so waive it.

Other sections of the same chapter contain authority for creditors to satisfy their claims out of the property of homestead claimants when the homestead is so intertwined with other property that the latter, which is liable upon execution, can not be severed and rendered available without destroying the value or identity of the homestead. But it will scarcely be contended that this is a forced sale of the

homestead, but rather a transformation of the entire property, including the homestead, into a form of wealth or property in order that the severance may be accomplished. The claimants have not suffered a loss of the homestead, but only the unavoidable prejudice of having the homestead transformed into a money equivalent. The statute is unambiguous, and the forced sale of the premises constituting the homestead is made to depend upon certain conditions, none of which are found to exist in the case at bar. The only basis for the right of defendants in error must be found in an alleged waiver by plaintiffs in error.

Much has been said in the argument of this case as to the right or ability of homestead claimants to waive the right. On the part of plaintiffs in error it is said that the power to waive does not exist, and numerous authorities are cited tending to show, in cases where waiver was interposed to defeat the claim of homestead, that there is no power exclusive of the modes laid down by statute, and that want of such power can not be supplied by estoppel. *Minnesota Stoneware Co. v. McCrossen,* 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927; *Cumps v. Kiyo,* 104 Wis. 656; *Tapley v. Ogle,* 162 Mo. 190, 62 S. W. 431.

By defendants in error it is said that the homestead right is a personal privilege, to be waived or surrendered by the claimant whenever he sees fit, and that it will be held to have been waived, unless he has made a timely assertion of the right. In support of this theory it may be admitted that numerous expressions to the effect that the exemption is a personal privilege occur in the prior decisions of this court, to obviate which, it is suggested by counsel for plaintiffs in error that, however applicable such language may have been under the law as it obtained in this state prior to 1873, by subsequent amendments thereto, notably that providing for the signature and acknowledgment of both spouses to any instrument conveying or incumbering the homestead, all reference to exemption being a personal privilege of the head of the family subject to waiver is in conflict with the spirit as well as the letter of the law as it now reads.

With reference to this contention it may be said that possibly some confusion has resulted by reason of the fact that the law of 1867 has been amended in some important particulars, especially with regard to the voice of the wife in the disposition and control of the homestead. The law, prior to the amendment referred to, was construed as conferring upon the head of the family a personal privilege, waivable by the husband alone. *Jackson v. Creighton,* 29 Neb. 310.

Speaking of the law as it then obtained, Judge LAKE, in *Rector v. Rotton,* 3 Neb. 171, 176, said: "Even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best." Clearly this language would be inapplicable to the law as it now stands, and it has accordingly been held that a waiver can only be invoked when those entitled to assert the right have been parties to the proceedings resulting in the sale of the premises, and these proceedings must have been adversary in their character, and an opportunity must have been afforded to the claimants to assert their homestead right. *Brownell v. Stoddard,* 42 Neb. 177.

The soundness of the holding that the homestead right can in any event be waived, or that the doctrine of equitable estoppel can be invoked to nullify the requisites of the statute as to the alienability of the homestead, is open to serious question, in the opinion of the writer of this opinion. It is not difficult to conceive instances wherein such rule would be effective to sacrifice the rights of those whose welfare it is the especial and apparent design of the legislature to conserve. But however that may be, the decisions of this court have never gone further than holding that the waiver, in order to be effective, must be alike and equally imputable to both husband and wife. If confined to the acts or conduct of the husband alone, he would be enabled to do indirectly what the law has shorn him of all power to do directly.

In this case, Mrs. Van Doren had appeared in no proceedings against her husband. The trial court concluded,

and we think rightly, that the Van Dorens had made a timely selection of their homestead, and that the purchaser, Wiedeman, knew of the homestead character of the premises. The statute clearly contemplates that the creditor, after the homestead has been selected, should be the moving party to procure an appraisement, to the end that his execution may attach to the excess over and above the homestead exemption. Compiled Statutes, ch. 36, sec. 5 (Annotated Statutes, 6204.) At the time the execution was levied, it can not be said that the Van Dorens had neglected any duty owing by them. No valid sale as affecting the homestead right could be effected until after an appraisement, in the manner prescribed by statute, at the instance of the creditor. *Quigley v. McEvony,* 41 Neb. 73. No attempt whatever was made to procure such appraisement. The sale as affecting the homestead was therefore wholly void, and the homestead right of the Van Dorens was not devested thereby. If thereupon, without any intervening act of the plaintiffs in error, the purchaser had brought ejectment, his absence of right could have been easily demonstrated upon the theory that the sale, not having been made in conformity with law, was wholly nugatory as affecting the homestead right. The exemption law is for the benefit of the family as an entity. The law jealously guards this entity, and seeks to preserve it intact, because the highest concern of society demands its preservation. To that end the law has always been construed as mandatory, making observance of its various requirements imperative before the homestead will be rendered available to creditors of the husband. In *Baumann v. Franse,* 37 Neb. 807, it was held that a sheriff's deed made in pursuance of a sale of the debtor's homestead, which at the time is actually occupied by himself and family, the levy being made under an ordinary execution, will not devest the debtor of his title or convey any title to the purchaser. It is well settled in this state that the rule of *caveat emptor* applies to judicial sales. We are therefore very clear that by proceeding to sale under the execu-

tion without first having followed the provisions of the statute for appraisement, the execution creditor did not succeed in devesting the Van Dorens of any right of homestead they enjoyed in the premises, and that the purchaser obtained no right as against such homestead. There is still another consideration which it seems would make this sale without any force or legal effect. It appears conclusively that the title to the premises had been transferred to the wife long prior to the attempted sale, and that Wiedeman had actual notice of such transfer. It is true that, prior to this transfer, the lien of the judgment had attached to the property of the judgment debtor which was not exempt, but that fact we think is immaterial. No proceedings were had to annul this conveyance. Being a homestead, it is difficult to see how it could have been avoided. Upon what theory could the property of Mrs. Van Doren be subjected by this process to satisfy the personal debts of her husband? It is certainly elementary that an execution against A can not be levied upon the property of B.

The denial by the court of Wiedeman's motion to be relieved from his bid, he having apparently become aware of the defects in the proceedings already had, neither placed him in any better position than he was when he made his bid nor the Van Dorens in any worse position.

Another reason might be suggested why Wiedeman obtained no rights as affecting the homestead under the sheriff's sale. Section 499 of the Code provides: "The sheriff or other officer, who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser or purchasers thereof as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same, at the time they became liable to the judgment, or at any time thereafter." Under this statute Wiedeman would get the same title to the homestead that A. L. Van Doren, the husband, could have conveyed by

deed. In the face of the statute providing that a conveyance of a homestead must be signed and acknowledged by both husband and wife, A. L. Van Doren was absolutely powerless to convey or incumber the homestead in any way, and it follows that as against the homestead the sheriff's deed was void, conveying no rights.

We come now to the question whether the gross defects in the proceedings as pointed out were cured, and the sale validated, by the application of Mrs. Van Doren to have the surplus paid to her. If the sale had been merely irregular, confirmation would have been sufficient to cure these irregularities. *O'Brien v. Gaslin,* 20 Neb. 347. A voidable sale is effective to pass title until attacked directly. It is capable of ratification. But a void sale conveys no title, is incapable of ratification, and is subject to be shown to be null, even in collateral proceedings. *Moody's Heirs v. Moeller,* 72 Tex. 635, 13 Am. St. Rep. 839.

We are unable to find merit in contention of counsel for defendant in error, urged with much earnestness, that Mrs. Van Doren is estopped to claim a homestead right in the premises. Long before she appeared in the action, Wiedeman had purchased at sheriff's sale, he had paid in his money, the sale had been confirmed, he had received his sheriff's deed, the money he paid in had been distributed to other creditors all except the surplus—and all this before Mrs. Van Doren had ever appeared in the proceedings. In order for Wiedeman to invoke an estoppel, it must appear that he changed his position, relying upon some action taken by Mrs. Van Doren. He has taken no action since her appearance, except his attempt to recover the premises in ejectment. *Lingonner v. Ambler,* 44 Neb. 316; *Macfarland v. West Side Improvement Ass'n,* 56 Neb. 282.

Again, it would seem that in no event could estoppel supply the want of power in Mrs. Van Doren to convey the homestead except in the manner provided by statute. *France v. Bell,* 52 Neb. 57; *Cumps v. Kiyo,* 104 Wis. 656, 80 N. W. 937; *Minnesota Stoneware Co. v. McCrossen,* 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927; *Tapley v.*

Ogle, 162 Mo. 190, 62 S. W. 431; *Whitlock v. Gosson,* 35 Neb. 829, 833; *Hubbell v. Canady,* 58 Ill. 425.

It can not be contended that Mrs. Van Doren did anything inconsistent with the theory that the money she received was the money realized from the sale of the land over and above the homestead right. There was nothing in the order of the court which would give her any intimation that the money she was receiving was money realized from the sale of her homestead. The court did not order the surplus paid to her and her husband, as should have been done if it was money realized from the sale of the homestead. The order of the court was to pay the money to Mrs. Van Doren, owner. If it was money realized from the sale of the homestead right, it was the money of herself and husband jointly. She had a right to suppose that, inasmuch as the legal title stood in her name and the court ordered the money paid over to her, she was receiving only the surplus purchase price of the land above the homestead exemption. When we say "void," referring to the sale had herein, we mean that the sale was wholly ineffectual to deprive the Van Dorens of their homestead right in the premises. It is quite probable that under the authority of *Horbach v. Smiley,* 54 Neb. 217, 220, *Whitlock v. Gosson,* 35 Neb. 829, 834, and *Swift v. Dewey,* 20 Neb. 107, the sale, together with the acts of the Van Dorens thereafter, resulted in conveying to the purchaser whatever interest there may be in the premises in excess of the homestead interest of the van Dorens. This being an action in ejectment, the question of the interest obtained by the purchaser in the premises above the homestead exemption can not be, and is not, determined in this case. But it is evident that the interest obtained by the purchaser can not be a basis for a right of recovery of the entire premises in an ejectment proceeding.

There can be no doubt that what Mrs. Van Doren did in the premises is entirely consistent with the contention of plaintiffs in error, that their homestead interest in the land has never been set off or sold, and that they are in no way estopped to claim their homestead right.

But, even if our conclusion upon this branch of the case were otherwise, defendants in error would still be in no position to sustain the correctness of the judgment of the trial court. If the sale is to be validated by the action of Mrs. Van Doren in asking for and obtaining the surplus, obviously it must be upon the theory that her act constituted a waiver of the homestead right. As already indicated, this waiver must be one imputable to both her and A. L. Van Doren. It is conceded in this case that neither of the Van Dorens had done anything which would furnish the basis of a waiver prior to the filing of the motion by Mrs. Van Doren asking for the payment to her of the surplus of the sale. If any waiver of the homestead, happen when or how it may, must be chargeable to both spouses, then it is immaterial in this case, under our view of the record, whether, by asking for or retaining this surplus, Mrs. Van Doren waived the homestead right on her part. We may for the present purpose assume she did, and confine our inquiry to whether such a waiver can be imputed also to A. L. Van Doren. The trial court, adopting the theory that Mrs. Van Doren did waive the right by asking for the surplus, concluded that her husband was equally chargeable with the waiver. In this conclusion we are quite clear the learned trial court erred. Its only basis is that after the motion of Mrs. Van Doren had been favorably ruled on, and an order issued to the sheriff to pay the surplus to her, the sheriff, apparently upon his own motion and out of abundant caution, required that Mrs. Van Doren's husband sign the receipt for the surplus with her. It is difficult to see what power the sheriff had to extend the scope or legal effect of the order to pay the money to Mrs. Van Doren. His function was purely and exclusively ministerial. The order was to pay the money to Mrs. Van Doren. He would have been chargeable with no dereliction of official duty had he contented himself with merely obeying the order in his hands. The right of Mrs. Van Doren, if any, to the money, must be established by the order of the court, and not by arbitrary

conditions annexed thereto by the sheriff. The circumstances under which A. L. Van Doren was induced to sign the receipt with his wife can not be said to have been in any sense a proceeding in which any duty rested upon him to assert his homestead right, nor can his conduct in such a situation be construed into a waiver of the family homestead. It would be a perversion of the law so to hold. If the homestead right of the Van Dorens is to be defeated in this action on the ground of waiver, and if that waiver must be imputable to both husband and wife, it is clear that under no theory of the case can it be said that A. L. Van Doren ever waived the homestead right. *Campbell v. Babcock*, 27 Wis. 512; *Cumps v. Kiyo*, 104 Wis. 656, 80 N. W. 937.

It follows that the sheriff's deed issued in pursuance of the attempted sale of the homestead was insufficient upon which to base a right of recovery in the plaintiff in this ejectment action. The judgment of the trial court is, therefore, wrong and it is accordingly recommended that the same be reversed, and the cause remanded for further proceedings in conformity with the law.

HASTINGS and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MODERN BROTHERHOOD OF AMERICA V. JOHN P. CUMMINGS.

FILED MARCH 18, 1903. No. 12,545.

1. **Insurance Company: POLICY: LIABILITY: ACTION.** Where an insurance company denies all liability on a policy, basing its refusal on the ground that the loss or injury insured against has not occurred, the insured may bring an action thereon without waiting

for the expiration of the period limiting the time within which an action may be brought.

2. **Accident Policy: ACTION: DEFENSE: EVIDENCE.** In an action on an accident insurance policy, plaintiff alleged the accidental breaking of his arm. The theory of the defense was that the arm had not been broken, and resistance of the claim was based upon this ground. *Held*, That it was not error to exclude evidence that the action was prematurely brought, under the terms of the policy.

3. **Proof of Loss: INSTRUCTION.** The evidence that proofs of loss or injury under an insurance policy were duly furnished being undisputed—the defendant at no time urging the failure to furnish such proofs, litigating its case upon the merits—an instruction purporting to state the essential elements of plaintiff's proof will not be held erroneous for omitting to mention the necessity of filing proofs of loss.

4. **Affidavits: REPORTER'S NOTES: AMENDMENT.** Affidavits addressed to the trial court after judgment on a motion to amend the reporter's notes of the evidence can not be considered by the appellate court, in the absence of a ruling by the trial court on such motion.

5. **Instruction: AMOUNT OF RECOVERY.** An accident insurance policy provided that in case of death resulting from an accident, the beneficiary would be entitled to the full sum of one regular assessment upon all members of the association in good standing, not to exceed $3,000, and in case of the accidental breaking of an arm or leg, the insured would be entitled to one-tenth of the sum which the beneficiary would have received in case of the death of the insured. In an action on the policy, alleging the accidental breaking of an arm, the plaintiff asked a witness if he knew how many members the defendant order had. Objection that the testimony was "immaterial and irrelevant" was sustained. The defense was based solely upon the ground that the accident as alleged had never occurred. An instruction authorized the jury, if they found for plaintiff, to assess his recovery at the full sum of $300. *Held*, That the absence of proof as to the membership of defendant would not warrant the setting aside of a verdict in that sum.

6. **Affirmative and Prejudicial Error Necessary for Reversal.** A judgment will not be reversed except for error, prejudicial to the party complaining, affirmatively appearing in the record.

7. **Instruction: EXPERT TESTIMONY.** Instruction examined, and *held* not erroneous.

ERROR to the district court for Buffalo county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

Ira D. Marston and *E. S. James,* for plaintiff in error.

Norris Brown and *E. Frank Brown, contra.*

KIRKPATRICK, C.

On November 20, 1900, John P. Cummings filed in the county court of Buffalo county his petition against the Modern Brotherhood of America, alleging, in substance, that the defendant was a corporation organized in the state of Iowa, with authority to issue life and accident insurance policies; that on September 4, 1899, it issued to him a policy. From a copy of the policy which is set out in the petition, it appears that the defendant association, "in case of the death of said member while in good standing permits his beneficiary to participate in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity, not to exceed $3,000, which shall be paid to Martha J. Cummings * * *. Should said member while in good standing, accidentally break his leg or arm, he shall receive one-tenth the amount his beneficiary would have been entitled to receive in case of the death of said member." It was further alleged that on or about the 26th day of September, 1900, while said policy was in full force and effect, plaintiff received a personal injury by reason of accidentally falling from a flight of stairs, thereby breaking his arm between the elbow and shoulder, being an injury insured against by defendant; that all premiums and charges due by plaintiff to defendant had been fully paid up at the date of the accident; that he had performed all the conditions in the policy on his part to be complied with, and that he was a member in good standing; that he had given notice of the accident on October 18, 1900, to defendant, and had made a claim of damages in the sum of $300; that he was injured through no fault of his own; that at the time of the injury and the furnishing of due proofs of injury, there was a sufficient

number of members belonging to defendant fraternity to raise by one regular assessment more than enough to pay plaintiff's demand.

There was judgment in the county court in favor of plaintiff, and the cause was removed to the district court by defendant, where, by leave, the plaintiff filed the same petition filed in the lower court, to which defendant answered, admitting its corporate character, the issuance of the policy, and denying generally all other allegations. Trial to a jury resulted in a verdict and judgment thereon in favor of plaintiff, and the cause is presented to this court by the Modern Brotherhood of America by petition in error. The errors assigned relate to the exclusion of evidence, and in the giving of certain instructions by the trial court.

Plaintiff in error on the trial offered section "e," division 13, of its fundamental laws, which reads as follows: "It will pay within ninety days from the receipt of satisactory proofs of the accidental breaking of an arm or leg, one-tenth of the amount the beneficiary would have been entitled to in case of the death of the member, provided that complete and satisfactory proofs of such accidental injury have been filed with the supreme secretary within thirty days of such accident." This testimony was excluded, and its exclusion is the first error assigned. It was offered for the purpose of showing that the action was brought prior to the time that the alleged claim became due under the terms of the section, as the record shows that the accident occurred on September 26, 1900, and that the action was first tried in the county court on December 11, 1900. The theory of the trial court in excluding this evidence was that it was inadmissible under a general denial.

The contention of plaintiff in error is that under a general denial all evidence tending to show nonliability would be admissible, and that if the action were brought sooner than the time limited in the section of the fundamental laws of the association, which are a part of the policy, defendant in error could not recover.

It appears from the record in this case that in the trial had in the county court, after the filing of defendant in error's petition, plaintiff in error filed a motion to require defendant in error to submit to a physical examination by a board of physicians for the purpose of ascertaining whether, in fact, the injury alleged had occurred, and, if so, the extent thereof. This motion was allowed, and the testimony of the examining board of physicians was taken in the county court, whereupon judgment was rendered for defendant in error in the full sum of $300. It was from this judgment that the appeal was prosecuted to the district court. It appears from the record of the trial had in the district court that the theory of plaintiff in error throughout was that the injury had never occurred; that the action was an attempted fraud upon the company. Plaintiff in error's theory was that the arm had not been broken, and it consistently maintained this theory, and litigated its case vigorously upon the merits. It is true that plaintiff in error, in its answer, pleaded specially that the action was prematurely brought; but the court, instructing the jury, stated the substance of this answer and omitted any reference to the defense that the action was prematurely commenced. To this instruction no exception was taken, and in brief of counsel for plaintiff in error in this court an identical statement is made of the substance of the answer. It would seem, therefore, that the trial court did not regard the plea of premature commencement of the action as an issue in the case.

The rule applicable to this state of facts would seem to be that announced in *Northern Assurance Co. v. Hanna*, 60 Neb. 29, that where liability is denied, the company refusing to pay at any time, an action may be commenced on the policy without waiting for the expiration of the period of limitation. The object of the provision is apparently to give a company an opportunity to investigate the circumstances of the alleged injury or loss, and satisfy itself whether it is liable or not, and if liable to make provision for payment. The attitude assumed by plaintiff in error

very clearly indicates that it had decided not to pay the claim in any event or at any time. Under such circumstances it is difficult to see how it was prejudiced by the commencement of the action before the expiration of the limitation. That this defense has been waived is clearly decided in *Northern Assurance Co. v. Hanna, supra,* and the cases there cited. *Phenix Ins. Co. v. Rad Bila Hora Lodge,* 41 Neb. 21.

It is contended that instruction 3 given by the court is erroneous, in wrongfully limiting the scope of the issues. Therein the jury were told that plaintiff had the burden of proving, first, that his arm was broken as alleged in the petition; and, second, that at the time of the injury he was in good standing. This instruction is assailed because it says nothing about the necessity of filing proofs of injury within the time required. There is no contention anywhere that such proofs were not duly filed. The evidence that proofs were furnished is undisputed. Plaintiff in error made no request to have this issue submitted. But assuming that proofs of injury were not formally furnished in the manner prescribed in the policy, the company denied liability and placed its denial upon other grounds, and it therefore waived its right thereto. *Omaha Fire Ins. Co. v. Dierks,* 43 Neb. 473, 475. We can not see that plaintiff in error was prejudiced by the giving of instruction No. 3.

The court instructed the jury that if plaintiff was entitled to recover at all, he is entitled to recover the full amount claimed, namely, $300. The policy provided that in case of death the beneficiary would be entitled to the full amount of one regular assessment on all members in regular standing, not to exceed $3,000, and in the event of injury the member would be entitled to one-tenth of what the beneficiary would have been entitled to in case of the member's death. There is no proof of the number of members of the association. The instruction is accordingly assigned by plaintiff in error as a reason why the judgment must be reversed. It is clear that the basis

of the recovery must be upon the number of members in good standing. Defendant in error alleged that the membership was sufficient to raise more than enough to pay his claim. This must be understood as meaning that one regular assessment would realize more than $3,000. The record sheds no light on this question.

The absence of all proof on this question was called to the attention of the trial court in the argument of a motion for a new trial. Thereupon it seems that counsel for defendant in error filed a motion for leave to supply and correct the record and the reporter's notes of the trial. This motion was supported by several affidavits, stating that an admission was made by counsel for plaintiff in error at the trial in the presence of the court, jury and opposing counsel, that the membership was sufficient to authorize a judgment for the full sum prayed for. A counter affidavit was filed by the attorney, stating that he had made no such admission. There is no record of any ruling by the court upon this motion and it does not appear that the record was supplied as asked for. We are now asked to consider these affidavits and decide the question presented—whether such admission was in fact made. We are quite clearly of opinion that we can not do so. The jurisdiction of this court is appellate only. In the absence of any ruling by the trial court allowing the amendment, it would seem that the record stands in this court as if the motion had never been made. The judgment sought to be reviewed in this proceeding must be tested by the evidence submitted to the jury, as that evidence appears in the certified bill of exceptions. Clearly, this court can not go beyond the bill of exceptions, which is duly certified as containing all the evidence adduced, and look for light in certain affidavits and counter affidavits addressed to the trial court after judgment, raising the question as to the correctness of the bill of exceptions, which question was not decided by the court. The trial court was peculiarly in a position to decide this question, and for this court to attempt to do so, after the lower court's omis-

sion to act, would be to grope in the dark, and there would be no assurance that justice was being done. We must therefore decide the question without reference to the contents of these affidavits although they appear in the record as a part of the bill of exceptions.

It is, of course, elementary that the burden was on defendant in error to prove the essential and material allegations of his petition. He alleged sufficiency of membership to authorize a recovery in the full sum prayed for. This, under the general issue, must be taken as denied. While the question is not discussed in briefs, we have regarded it proper to consider whether the instruction under consideration can not be sustained upon the theory that the evidence of membership, being matter peculiarly within the knowledge of plaintiff in error, should have been offered by it, and, having failed to show that the membership was less than that alleged, a presumption would arise that it was sufficient. It is a well-settled rule that where the plaintiff's right depends upon the truth of a negative averment, as where the defendant is charged with selling liquor without a license (*State v. Shaw,* 35 N. H. 217; *State v. Schar,* 50 Mo. 393, 394), or it is charged that a transfer was made by defendant without consideration (*Lovell v. Payne,* 30 La. Ann. 511), the other party having it peculiarly within his power to show the facts favorable to him, if they do exist, the averment will be taken as true, unless disproved. *Smith v. New York C. R. Co.,* 43 Barb. (N. Y.) 225, 229. This is upon the theory that a negative does not admit of easy proof, and, all of the proof upon the subject being in the control of defendant, he can disprove it at once. *Great Western R. Co. v. Bacon,* 30 Ill. 347, 83 Am. Dec. 199. There are some cases, however, to the effect that the party making the averment must offer some evidence, although slight and vague, as will render the existence of the negative probable, before the burden will fall on the opposite party. *City of Beardstown v. City of Virginia,* 76 Ill. 34. This would not be a shifting of the burden of proof, or of producing a preponderance

of the evidence, which remains upon him who has the affirmative of the issue throughout the trial, but the burden of meeting a *prima-facie* case, "which latter burden may shift back and forth in the course of the trial." *Scott v. Wood,* 81 Cal. 398.

The issue as joined in this case, we think, is an affirmative allegation by defendant in error that the membership was sufficient, and a denial by plaintiff in error of this averment. There can be no question as to the meaning of the contract, namely, to pay to the member in case of the accidental breaking of his arm, one-tenth of what his beneficiary would have received in case of the member's death; and this latter sum was the full sum of one regular assessment, not exceeding $3,000. It is clear that the provision in the contract is consistent with a membership of any conceivable number. It, therefore, furnishes the basis for no presumption. We search the record in vain for any evidence, however, vague or slight, that would make a *prima-facie* case in favor of defendant in error. If such were the case, we would experience no difficulty in holding that the burden was on plaintiff in error to introduce evidence overcoming this *prima-facie* showing, because such evidence was doubtless in its power and possession.

It is not clear to us that some evidence of the number of the order's membership at the time of the accident was not within the possession of defendant in error. He was a member of the local lodge in good standing, and it would seem that he would have had access to some evidence upon this question. Questions similar to that here suggested have arisen before, but the decisions are not uniform.

In *St. Clair County Benevolent Society v. Fietsam,* 97 Ill. 474, the policy contained a provision that the society would pay the assured or his legal representatives $1 for every person a member of the society and of the same division or divisions "at the time of such payment." It appears that in order to arrive at the measure of damages, parol evidence was admitted to show the number of members. The admission of this evidence was in the supreme

court alleged as error by the society. The court there said (p. 481): "That decision was clearly correct. Such evidence is admissible for that purpose, otherwise there would be no mode of ascertaining the sum recoverable under the policy."

The policy considered in *Fairchild v. Northeastern Mutual Life Ass'n,* 51 Vt. 615, provided for the payment of as many dollars, not exceeding $1,000, as there should be members at the time of payment. Various notices of assessment had been introduced in evidence by plaintiff, which contained statements of the number of members at the date of the assessment. The company contended that this evidence having reference to the number of members at dates prior to the date at which payment was demanded, had no tendency to show the number of members at the date of the death of Mrs. May. Upon this contention the court, after reviewing the evidence, said (p. 629): "This membership being shown at a date so shortly prior to the death of Mrs. May, and the evidence showing an uninterrupted increase prior and up to that time, the presumption, in the absence of proof to that effect, certainly can not be that there was a decrease between February 18, 1875, and the date of Mrs. May's death; and we think that this evidence, taken together, did have a tendency, at least, to prove that at the last mentioned date there were as many as a thousand members, and was properly submitted to the jury for that purpose."

Another case bearing somewhat upon this question is *Neskern v. Northwestern Endowment & Legacy Ass'n,* 30 Minn. 406. The action had been tried before a referee, who found that at the time of the death "the defendant had 1,231 members in good standing, who were liable to pay assessment for death losses." The evidence to support this finding seems to have been the number of membership certificates which had been issued, and these were held to be *prima-facie* evidence of the number of members. The company seems to have contended in the appellate court that there was no inference deducible from this evi-

dence that such members were "contributing" members. The supreme court said (p. 409): "We think the court below was right in holding that if any of the persons to whom these certificates were issued had ceased to be members by forfeiture, suspension or otherwise, the burden was upon defendant to show it. The means of doing so are or ought to be peculiarly within its possession. To require the plaintiff to prove a negative in the case of each person who had been received into membership, and that such person had not been suspended, * * * would be unreasonable and impracticable."

From the three cases last above cited, it appears that the plaintiff did assume the burden of proving the membership, and in each instance technical objections to the sufficiency of such evidence was overruled, especially if to sustain them would be to require the plaintiff to prove a negative, when the facts were peculiarly within the possession of the defendant.

We do not doubt that the better practice would be in harmony with the cases cited, for the plaintiff to prove by such evidence as he may have the membership of the defendant order; slight evidence thereof being sufficient to make a *prima-facie* case, whereupon the burden would be clearly upon the defendant to show the contrary.

The facts of this case, as shown by the record, are, in our opinion, sufficient to bring it out of the rule above indicated. Defendant in error was called as a witness, and when under examination was asked by his counsel whether he knew how many members there were in defendant order. Counsel for plaintiff in error objected to this testimony on the ground that it was immaterial and irrelevant. The objection was sustained. Whether the defendant in error was competent to answer this question, and knew the fact called for, is a question which can not be decided. As already stated, the company denied liability on the ground that the accident had in fact not occurred. Inasmuch as this was the theory by it maintained at the trial, it is conceivable that the trial court, in sustaining

the objection to this testimony on the ground that it was immaterial and irrelevant, assumed that the insufficiency of the membership of plaintiff in error was no part of its defense, that it relied upon proving that the alleged accident had not occurred, and that if it failed in its proof as to that defense, it was willing and able to pay the full sum prayed for, as provided in the policy. Its defense in the lower court being that there was no liability, because the arm was not broken, plaintiff in error ought in fairness not to be permitted to urge in this court, as a reason why it should not pay the claim, a wholly different reason, namely, that the proof fails affirmatively to show that one regular assessment will raise a sum sufficient under the terms of the policy. It regarded evidence upon this question immaterial and irrelevant in the trial of the cause, and it can not now base a right upon its absence.

In *Kansas Protective Union v. Whitt,* 36 Kan. 760, 59 Am. Rep. 607, this question was considered under a policy substantially like that in this case, and the supreme court of that state said (p. 764): "It (the association) made no complaint to the beneficiary about the amount due; it did not intend to pay anything, and denied all liability, not because the assessments had not been made or paid, but because it claimed that Whitt's certificate had been canceled by nonpayment. Fair dealing on the part of the company would require it to make a statement to the beneficiaries of its reasons for nonpayment. It had no right to pretend and give as an excuse for nonpayment one reason before suit, and now another."

We think it follows from what has been said that it was not error for the trial court to instruct the jury that if they found for defendant in error, they should assess his recovery at the full sum prayed for.

The last error complained of is that the court gave instruction No. 1 while the jury were deliberating on their verdict. This instruction relates to the subject of expert testimony, much of which was introduced at the trial, and, in substance, gave a definition of expert testimony, and

states that in weighing such testimony the same test is to be applied as in weighing other testimony, and continued as follows:

"In weighing expert testimony, it is important that you should consider whether the fact upon which the opinion of the witness is given has been satisfactorily proved; whether the expert is in any way biased and prejudiced as shown by the evidence. You should also consider what skill, learning and experience in his profession the expert is shown to have. In weighing expert testimony offered for the purpose of contradicting the testimony of other witnesses who have positively stated facts claimed by them to have been within their personal knowledge, you should not fail to distinguish between those inferences or conclusions of the expert which are shown to be only probable and generally true, and which have their exceptions, and those other inferences and conclusions, if any, which are necessary and invariable and which have no exceptions. You should also consider whether the opinion of the expert is speculative, theoretical and states only the belief of the witness, while yet some different opinion, conclusion or inference may be drawn from the same facts. You will further understand that the question in dispute in this case of whether the plaintiff's arm was broken or not is not for the expert to determine. That question is alone for you to determine from all the testimony in the case."

An exception to this instruction was taken, and the objections urged against it are, first, that it was given in the absence of counsel for plaintiff in error; and, second, that as an abstract proposition of law relative to expert testimony, it is erroneous and prejudicial to plaintiff in error. There is nothing in the record to show that counsel for plaintiff in error was absent at the giving of this instruction, and, conceding that his absence would be prejudicial, under the familiar rule that error must affirmatively appear, we can not say that there is any presumption under the record in this case that plaintiff in error was not represented when this instruction was given. We can not see

that the instruction incorrectly announced the law relating to the testimony of experts. It is a fair and reasonable exposition thereof, and as both parties relied to some extent upon the testimony of experts, it can not be said that the instruction was less favorable to one than the other.

We have carefully examined the record, and are brought to the conclusion that the judgment of the district court is free from error, and it is therefore recommended that the same be affirmed.

HASTINGS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CARLETON E. MANN v. CHARLES W. BURKLAND.

FILED MARCH 18, 1903. No. 12,743.

1. **Action:** MORTGAGE: FORECLOSURE: CODE. Under provisions of section 848 of the Code of Civil Procedure, prior to its amendment in 1897, no action at law could be maintained to recover on a debt secured by a mortgage, after a petition to foreclose the mortgage had been filed, or after a decree had been rendered, without authority from the court having jurisdiction of the foreclosure proceedings.
2. **Petition:** DEMURRER. A petition in an action at law seeking to recover on an indebtedness secured by a mortgage, where foreclosure proceedings have been instituted under the mortgage, are pending, or have gone to decree, is subject to demurrer if it fail to allege authority from the court having jurisdiction of the foreclosure proceedings to maintain the action at law.
3. ———: ———. Petition examined, and *held*, demurrer properly sustained.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, DISTRICT JUDGE. *Affirmed.*

Hoagland & Hoagland and *T. C. Patterson*, for plaintiff in error.

Wilcox & Halligan, contra.

KIRKPATRICK, C.

This is a proceeding in error brought to obtain the reversal of a judgment entered by the district court for Lincoln county sustaining a demurrer to the petition of plaintiff in error and dismissing his action at his costs. The petition sets out that on the 28th day of July, 1890, one George E. Edge executed a note and mortgage to the McKinley-Lanning Loan & Trust Company in the sum of $600; that thereafter he sold the land covered by the mortgage to defendant in error, Charles W. Burkland, conveying the same to him by warranty deed, subject to the mortgage existing against it; that in said deed of conveyance defendant in error expressly assumed and agreed to pay the mortgage indebtedness; that the note and mortgage, before maturity, in the usual course of business, were transferred to plaintiff in error; that by their terms the note and mortgage became due August 1, 1895; that plaintiff instituted foreclosure proceedings in the district court for Lincoln county, and obtained a decree of foreclosure and order of sale of the premises in satisfaction of the amount found due; that thereafter an order of sale was duly issued, and the land described in the mortgage sold; that on June 10, 1899, the sale was duly confirmed; and that there remained due on the note and mortgage over and above the amount realized at the sale, the sum of $343.43. It is further alleged that no judgment for a deficiency was rendered against defendant in error in the foreclosure proceedings, but that on March 9, 1900, an application for a deficiency judgment was dismissed, without prejudice to further action thereafter; that no part of said deficiency has been paid, although often demanded. To this petition a demurrer was interposed, for the reasons, first, that the petition failed to state facts sufficient to constitute a cause of action; and, second, "that said petition does not show that an order of court was ever obtained authorizing the plaintiff herein to prosecute this action at law to recover the balance of the mortgage debt remaining

after the foreclosure of the mortgage securing the same." This demurrer was by the trial court sustained, and plaintiff in error electing to stand on his petition, and refusing further to plead, judgment of dismissal was entered.

It appears from the petition that the note and mortgage matured August 1, 1895, and that proceedings to foreclose the same were commenced thereafter. Thus the cause of action arose, and the proceedings to enforce it were commenced, long prior to the passage of the act of 1897, repealing sections 847 and 849 and amending section 848 of the Code of Civil Procedure (Session Laws, 1897, ch. 95, secs. 1, 2). It follows that the right of plaintiff in error to relief must be determined by the law as it existed prior to 1897. *Thompson v West,* 59 Neb. 677, 49 L. R. A. 337.

Section 848 of the Code, prior to the enactment of the law of 1897, read as follows: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." The section quoted was considered by this court in *Meehan v. First Nat. Bank, of Fairfield,* 44 Neb. 213, in a proceeding in all respects apparently like the one at bar, and there it is said: "Where a mortgage debt is secured by the obligation or other evidence of debt of any other person besides the mortgagor, the mortgagee can not, during the pendency or after decree rendered in the action to foreclose the mortgage, enforce such obligation or evidence of debt in an action at law unless authorized to commence such action by the court having jurisdiction of the suit of foreclosure." And in the same case it is further said: "The lack of authorization to bring such an action is not a defense necessary to be pleaded, but the contrary should be alleged, or at least proved by the plaintiff, as, without such authorization, the action can not be maintained." This case was quoted with approval and followed in *Maxwell v. Home Fire Ins. Co.,* 57 Neb. 207, and *Waugh v. Newell,* 62 Neb. 438. The rule thus announced is not only

settled by prior decisions, but it is difficult to see how, under the terms of the statute, any other construction could be adopted. It was certainly competent for the legislature to enact the provision, and it is clearly in accord with sound principle, that, where a party has elected to seek in a court of equity the foreclosure of his mortgage, that court is entitled to say whether he should recover a deficiency judgment therein or be given permission to bring an action at law.

In answer to this position, it is contended by plaintiff in error that if the effect of the section quoted is to prevent him from prosecuting his action at law after foreclosure proceedings are finally terminated, the section is unconstitutional, and further that the order of the court permitting him to dismiss his application for deficiency judgment without prejudice was, in effect, an entry of an order granting the permission contemplated by the section. We are unable to discover merit in either of these contentions. Plaintiff in error suggests no valid reason for holding the statute under consideration unconstitutional. Further, the order dismissing the application without prejudice clearly falls far short of the express authorization which is the necessary basis of an action at law. The statute contemplates an application for authorization to institute an action at law to be addressed to the court having jurisdiction of the foreclosure proceedings, consideration thereof by it, and, if deemed proper in the premises, a formal order granting the prayer of the applicant. Without an allegation that such authorization has been given by the court in which the foreclosure proceedings were had, the petition will on demurrer be held defective. It follows that the demurrer in the case at bar was properly sustained, and it is, therefore, recommended that the judgment of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JONATHAN LYDICK V. THOMAS R. GILL ET AL.

FILED MARCH 18, 1903. No. 12,585.

1. **Request for Instruction:** ASSUMPTION: REFUSAL. Where an instruction was requested that assumed the existence of a judgment unreversed and unmodified as a bar to a defense of adverse possession, and the evidence disclosed that such judgment had been annulled by a decree enjoining its enforcement and declaring it of no force and effect, such instruction was properly refused.

2. **Several Defendants:** INSTRUCTION APPLICABLE TO ONE: REFUSAL. In an action where there are several defendants all defending on distinct and different grounds, an instruction in general terms which can apply to the defense made by only one of them, should be refused.

3. **Instruction:** NOT APPLICABLE. The instruction tendered should have been specific in its terms, and limited in its application to the one defendant.

4. **Estoppel:** SILENCE. Where one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he will not afterwards be permitted to exercise his legal right against such person. A willful design to mislead and deceive is not necessary in such a case. *Gillespie v. Sawyer*, 15 Neb. 536, approved and followed.

5. ———: INTENTION. Whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was made to be acted on, and he did act upon it as true, the party making the representations will be precluded from contesting their truth.

6. ———: ———. An estoppel may be binding and effectual, even though there was no intention to deceive, and it is not necessary for the holder of an adverse interest to deny his interest, or expressly declare his intention to abandon it.

7. **Evidence.** Evidence objected to examined, and *held* to have been properly admitted.

8. **Verdict:** SEVERAL DEFENDANTS: JOINT MOTION FOR NEW TRIAL. Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants.

9. **Motion for New Trial:** EXAMINATION OF RECORD. Where a motion

for a new trial is overruled under such circumstances, this court is only required to examine the record far enough to ascertain that fact.

ERROR to the district court for Burt county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed.*

H. E. Carter and *Ira Thomas*, for plaintiff in error.

Albert W. Jefferis and *Frank S. Howell, contra.*

BARNES, C.

The plaintiff in error commenced this suit in ejectment in the district court for Burt county against Riley T. Gill, Robert Light, Walter Lydick, Ed Latta, Peter Kessler, Hiram C. Lydick and R. A. Barnett, for the recovery of certain real estate described in his petition. Summons was issued and served on all of the defendants above named. H. C. Lydick, Walter Lydick and Peter Kessler failed to answer, and a default was entered against them. The answer of R. A. Barnett was a general denial and a disclaimer of title to any of the lands described in the plaintiff's petition, except a part thereof which was described specifically in the answer, amounting to only about six acres, and it was alleged therein that as to that part he and his grantors had acquired title by adverse possession and the operation of the statute of limitations. To this answer the plaintiff replied, admitting defendants' occupancy of the tract described in the answer, and denying each and every other allegation contained therein.

Defendant Ed Latta answered as follows: First, a general denial; second, a claim of ownership of only a part of the lands described in plaintiff's petition, and a disclaimer as to the remainder; third, adverse possession and the statute of limitations; fourth, affirmative matters relating to the mutual establishment of boundary lines, mutual construction of partition fences of a permanent and lasting character, complete enclosure of all the lands described in the answer; that one David Deaver was the owner of

about eighty acres of the land included with the other part thereof; the establishment of the boundary lines of the whole of Deaver's holdings in 1893; subsequent deeding to defendant Latta of all of the body of land, except about eighty acres; that since the establishment of the boundary lines and construction of the partition fences, Deaver, at a very large expense, had enriched and improved the entire body of land, redeemed it from a wild condition and brought it to a high state of cultivation; alleged the planting and growing of fruit trees, construction of buildings, barns, sheds, cribs, wells, windmills, tanks, fences and other improvements, all made openly and notoriously and with the full knowledge and consent of the plaintiff, and without any objection on his part; and, in fact, matters amply sufficient to create an equitable estoppel as against the plaintiff's claim to any portion of the lands described in the answer.

Plaintiff replied, admitting the possession of Latta, and denying each and every other allegation contained in his answer.

Thomas R. Gill filed a separate answer in which he alleged, first, that he had been served as Riley T. Gill, and his true name was Thomas R. Gill; second, a general denial; third, that he was in possession and owner of about twenty acres of the land lying south of a portion of the Latta claim; fourth, that in 1892 the plaintiff and his brother, Hiram C. Lydick, owned the land lying south and west thereof, and by mutual agreement and consent the boundary and division lines were established, dividing their lands, and in so doing he surrendered to the said Lydicks by compromise about fifty acres of the land then claimed by him; that a boundary line and division fence was established between them, and it was agreed that the same should constitute the boundary lines between his own and the Lydick lands; fifth, adverse possession and the statute of limitations; sixth, a disclaimer of any interest in any other portion of the land.

Plaintiff replied to this answer, first, by a general denial,

except as to admissions; second, admitted the true name of the defendant to be Thomas R. Gill; third, admitted that in 1892 plaintiff and H. C. Lydick were jointly owners of the land, as alleged in said answer; fourth, plaintiff set up an adjudication of title in a suit wherein plaintiff and his brother, H. C. Lydick, were plaintiffs, and Gill was the defendant, and that since said time plaintiff had purchased the entire interest of his brother.

Robert Light filed a separate answer, which contained, first, a general denial; second, a disclaimer to all lands, except a small tract described therein; third, as to that part of the land adverse possession and the statute of limitations.

To this answer the plaintiff replied by a general denial, except admissions, and admitted possession by Light of the lands described in his answer.

After entering the default of Kessler, Walter Lydick and H. C. Lydick, a trial was had to a jury on the foregoing issues, which resulted in a verdict against the defaulting defendants and in favor of the defendants Latta, Light, Barnett and Gill, and against the plaintiff. The plaintiff thereupon filed a single motion for a new trial as to each and all of the successful defendants. The motion was overruled and a judgment was entered on the verdict in favor of the said defendants. The plaintiff thereupon prosecuted error to this court, and filed one petition in error herein, directed against the defendants Latta, Gill, Light and Barnett jointly, praying that the judgment of the lower court be reversed and a new trial of the whole cause as to all of the defendants be granted.

It is contended that the court erred in refusing to give the paragraph number one of the instructions asked for by plaintiff. Before considering this question it is proper to state that it was stipulated on the trial, and the court instructed the jury, that the land in question was an accretion to lands owned by the plaintiff, and that their verdict should be for the plaintiff unless they should further find from a preponderance of the evidence that defendants, or

some of them, were entitled to recover under one or more of the affirmative defenses set out by them in their respective answers. It may be further stated that it appears that the court properly instructed the jury as to the issues raised by the pleadings in the way of affirmative defenses. The instruction tendered was as follows:

"The court instructs you that, should you find, from a fair preponderance of the evidence, that since the commencement of the occupancy of any of the lands in controversy in this action by the defendant Thomas R. Gill, should you find from the evidence that he has actually occupied any, an action was commenced against him for the possession of these lands, or any of them, by the plaintiff or any one to whose title he has succeeded and that that action was prosecuted to judgment, and resulted in favor of the plaintiff or plaintiffs therein and against the said Thomas R. Gill, and that said judgment has never been reversed; then you are instructed that as to so much of said land as was included in said judgment, the said Thomas R. Gill and all persons claiming under him are forever estopped from claiming any right or interest in said lands, because of any occupancy by him of the same, or by reason of any claim, conveyance, or color of title, which he may have made or possessed prior to the said judgment, and that his occupancy thereof since that time has not been adverse to the title which was in that action adjudged against him, unless you should find that since that time he has been in the actual, open, notorious, exclusive possession thereof, claiming to be the owner thereof as against the whole world, for a period of ten years, before the 8th day of April, 1901, under an occupancy initiated since the rendition of said judgment."

There are several reasons why this instruction was properly refused. It was not confined to the land claimed and occupied by Gill at the time of the present suit, and it appears that different tracts of land had been in litigation and in dispute between Gill and the plaintiff from time to time before this suit was brought. It was properly

refused because it is shown by the record and the bill of exceptions that the judgment mentioned in the instruction had been enjoined in a suit in equity for that purpose, and had been annulled and set aside as void and of no force and effect because of a lack of a sufficient description of any land therein. Therefore the cases cited by counsel for the plaintiff, in which it was held that where adverse possession was interrupted by an adjudication of the question by a judgment of a court of record, afterwards the land could not be claimed by adverse possession, because the future possession by a party to such judgment was not under any claim of right or color of title, and was not subject to the statute of limitations, are not in point. No claim of right can be based on a judgment or decree which has been vacated or annulled, and, while the language of the instruction comprehended only a reversal of the judgment, still it was as effectually disposed of by the decree in the injunction suit as though it had been reversed on a direct proceeding for that purpose. The question of the effect of the judgment mentioned in the instruction was a question of law for the court, and should not have been submitted to the jury. If the plaintiff desired to found any right on that question he should have framed a proper instruction and submitted it to the court so that the jury would have been instructed, as a matter of law, that the judgment did or did not interrupt adverse possession. For these reasons the instruction in question was properly refused.

Plaintiff complains because the court refused to give paragraph number two of his requested instructions, which is as follows:

"The court instructs you that the holding of real estate must be with a claim of right thereto as against the whole world to be adverse, and that the occupancy of another's land in the belief that it is land belonging to the state or the government, does not constitute adverse possession so as to bar the right of the real owner of the land to recover the same, no matter how long continued."

We have examined the bill of exceptions to ascertain, if possible, on what theory of the case this instruction was based. The only thing we find which would in any manner authorize the giving of such an instruction is an exhibit attached to the bill of exceptions, found on page 1289, which is an answer of Thomas R. Gill in a certain action, filed on March 25, 1889. It appears that a suit had been brought previous to that time by Jonathan Lydick, plaintiff herein, and his brother, Hiram C. Lydick, as joint owners of a part of the land in controversy, against Thomas R. Gill, to recover the possession thereof; that in that action Gill filed his answer, which is the exhibit above mentioned, in which we find the following statement:

"Defendant says that he believes that said lands are government lands, unsurveyed, and that the same are subject to settlement, and that he has made settlement and improvement thereof and claim thereto and is residing thereon for the purpose of taking the same as a homestead whenever they shall be surveyed and subject to entry."

In that case one of the questions in dispute was whether or not the land was an accretion, and it was claimed by Gill, among other things, that it was not an accretion to the plaintiff's land, but was a separate and distinct tract.

It will be observed that this instruction was general, and had no application to any of the other defendants in this case. To have given it without limiting its operation to the defenses interposed by the defendant Gill alone, would have been reversible error, so far as the other defendants were concerned. It was only applicable to a small portion of the land against which the plaintiff evidently intended it should operate, and was not applicable to the evidence as to the whole case. The failure to give an instruction, even though it be a correct abstract proposition of law, is not error, where it is not applicable to the whole case. *Wells v. State,* 47 Neb. 74; *Hurlbut v. Hall,* 39 Neb. 889.

Again, the jury were told in paragraph 14 of the instruction given by the court on his own motion that the

holding under adverse possession must be under a claim of ownership. This was correct and was applicable to each and all of the defendants, and was just as effective, so far as the defendant Gill was concerned, as the one tendered. For these reasons the request was properly refused.

It is alleged that the court erred in refusing to give the jury plaintiff's fourth request. By this instruction the court was asked to define estoppel as it was claimed should be applied to the facts in this case. Under this head we will also dispose of the fourth, fifth and tenth assignments of error. It is admitted that the seventeenth instruction, which defines estoppel, given by the court on his own motion, is not greatly different from the definition given in plaintiff's fourth request. The main difference is in the omission of the words "intent or design" in the instruction given. Whatever may be the law in other jurisdictions, in this state willfully permitting another to deal with property with the intention in the mind of the true owner to actually deceive and mislead, is not an essential element of estoppel. In *Gillespie v. Sawyer,* 15 Neb. 536, 541, it was said: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, [he] shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." "When one of two innocent persons, that is, persons each guiltless of an intentional or moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct, acts or omissions, has rendered the injury possible." *Nash v. Baker,* 40 Neb. 294, 297.

By instruction number 4 asked for by the plaintiff, it was sought to tell the jury that before the owner of the land could be estopped by statements as to matters of fact,

or as to his intended abandonment of existing rights, or by his silence when it was his duty to speak, he must have designedly induced another to change his condition, before such matters would create an equitable estoppel. The true rule is as follows: Whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was made to be acted upon, and he did act upon it as true, the party making the representations will be precluded from contesting their truth. *Heidenbluth v. Rudolph,* 152 Ill. 316, 38 N. E. 930; *Commercial Loan & Building Ass'n v. Trevette,* 160 Ill. 390, 394, 43 N. E. 769, 771; *Pitcher v. Dove,* 99 Ind. 175.

The instruction given by the trial court in place of the one requested met with general approval in the case of *Lydick v. Gill,* 57 Neb. 89, which involved practically the same facts, and a portion of the same body of land in question in the case at bar. In that case it was held that the conduct of the Lydicks, after the purchase by Deaver and Gill, estopped them from claiming the land in controversy therein. The same facts are pleaded as an equitable estoppel in this case, and the instruction given conforms to the one given in that suit. An estoppel may be binding and effectual even though there was no intention to deceive. Where the real owner resorts to any affirmative acts or words or makes any representations, it would be in the highest degree inequitable to permit him to say that the other party who had relied on his conduct and had been misled thereby, might have ascertained the falsity of his representations. 2 Pomeroy, Equity Jurisprudence, sec. 810. There is a wide difference between silence and encouragement, and the man who induces another to buy by positive assertion may be free from any conscious purpose to deceive. 2 Herman, Estoppel and Res Judicata, sec. 964; *Steel v. St. Louis Smelting & Refining Co.,* 106 U. S. 447, 456, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; *Gillespie v. Sawyer, supra; State v. Graham,* 21 Neb. 329; *Forbes v. McCoy,* 24 Neb. 702.

It is proper to say that the evidence fully established the facts pleaded in the several answers of the defendants, and is sufficient to create an equitable estoppel and sustain the verdict of the jury. In fact, the plaintiff does not contend that the evidence is not sufficient to sustain the verdict, and we are constrained to hold that the definition of estoppel contained in the instruction given by the court on his own motion was correct, and was especially applicable to the facts in this case. Therefore the court did not err in refusing to give the fourth instruction requested by the plaintiff.

The plaintiff further contends that the court erred in refusing to give the fifth paragraph of his requests. By this instruction the jury were told, among other things, that to constitute an estoppel they must be satisfied by a preponderance of the evidence that at the time of the transaction relied on for that purpose, the holder of the adverse interest must have denied his interest or declared his intention of abandoning it. This is not the law of equitable estoppel recognized by this court, as we have already shown by the authorities heretofore cited and quoted from, and this instruction was properly refused.

Plaintiff asserts that the court should have given instruction number 6 tendered by him. All that is contained in this instruction was fairly covered by the instructions of the court, and in a manner most favorable to the plaintiff.

Lastly, it is contended that the court erred in the admission of the evidence of the witness Deaver. This evidence was offered to show what had taken place between himself and the plaintiff with relation to certain parts of the land in dispute, and to establish an equitable estoppel in connection therewith. The same evidence was held competent in the case of *Lydick v. Gill*, 57 Neb. 89, where the same question and some of the same land was involved.

An examination of the bill of exceptions convinces us that the case was fairly tried, and the evidence complained of was competent.

By a strict adherence to our rules, we could have avoided the consideration of this case on its merits. As we stated at the outset, there were several defendants pleading separate and distinct defenses, each of whom obtained a verdict against the plaintiff on separate and distinct grounds, and yet plaintiff filed one joint motion for a new trial, general as to all of them. This would have only required us to examine the record far enough to ascertain that the motion was properly overruled as to one of the defendants, and we could have affirmed the judgment for that reason alone. *Long v. Clapp,* 15 Neb. 417; *Scott v. Chope,* 33 Neb. 41; *McDonald v. Bowman,* 40 Neb. 269; *Minick v. Huff,* 41 Neb. 516; *Dorsey v. McGee,* 30 Neb. 657. But owing to the importance of the questions involved in this case, and in order to give them suitable consideration, we have passed on the merits of every substantial question presented by the plaintiff in error.

A motion was submitted with the record asking this court to fix a supersedeas bond. As the judgment of the trial court must be affirmed it is unnecessary to consider the motion.

We are satisfied that the cause was fairly tried; was submitted to the jury under proper instructions; that the judgment of the trial court was right; and we recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ÆTNA LIFE INSURANCE COMPANY V. JENNIE M. REHLAENDER.

FILED MARCH 18, 1903. No. 12,691.

1. **Revival of Policy: STATEMENT BY THE ASSURED: NOT A WARRANTY.** A statement, signed at the request of the agent of a life-insurance company by the assured, to obtain a revival of his policy, where, by its terms, it should have been signed by the beneficiary, and in which the assured states that he is in good health and that there is nothing in his habits or condition which is likely to impair his health or shorten his life, is a representation and not a warranty.

2. **Defense: FALSE REPRESENTATIONS: PROOF.** In order to defeat a recovery in such a case the company must prove that the representations are untrue, and were made by the assured knowingly with the fraudulent intent to mislead and deceive; that they were material to the risk, and were relied on by the defendant.

3. **Verdict: THEORY OF THE CASE.** Where the insurance company treats the statement as a representation, pleads its falsity, alleges that the false statement was knowingly and intentionally made in order to deceive, and cause it to revive the policy, which it otherwise would not have done, and the cause is tried and the jury properly instructed on that issue, a verdict against the company will not be set aside if there is competent evidence to sustain it.

4. **Instructions.** Instructions tendered by the defendant examined, and *held* to have been properly refused.

5. **Case Distinguished.** The case of *Royal Neighbors of America v. Wallace*, 66 Neb. 543, examined and distinguished.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

Arthur W. Lane and *F. M. Tyrrell*, for plaintiff in error.

Charles O. Whedon, contra.

BARNES, C.

This action was commenced in the district court for Lancaster county by Jennie M. Rehlaender to recover the sum of $1,000 and interest thereon from the 29th day of March, 1901, alleged to be due her from the Ætna Life Insurance Company, on a policy of insurance on the life

of her deceased husband, Rudolph L. Rehlaender. The petition was in the usual form in such cases. It set out the policy and all of its conditions, with sufficient other averments to constitute a cause of action thereon. The defendant company filed its answer, in which the following allegations appear:

Further answering, the defendant alleges that the policy of insurance set forth in the plaintiff's petition, being No. 283,484, upon the life of one Rudolph L. Rehlaender, was issued on or about the 21st day of February, 1900, and was issued and delivered subject to all the conditions therein expressed, and subject especially to the following conditions, which were attached to and made a part of said policy of insurance:

In consideration of the advanced payment of $4.96, under policy No. 283,484, on the life of Rudolph L. Rehlaender, temporary insurance subject to the conditions of said policy, shall commence when the same is delivered, and shall cover the term intervening between said delivery and 5 o'clock P. M. of the date of said policy, when if the regular premium required by said policy is not paid, the insurance will cease.

That the first or regular premium provided by said policy to be paid upon the 15th day of August, 1900, the date of said policy, was not paid, whereby said policy lapsed and became void, and the insurance thereunder ceased and determined.

That thereafter, on or about the 25th day of September, 1900, for the purpose of obtaining a revival of said policy, the said Rudolph L. Rehlaender executed the following warranty in writing and delivered the same to the defendant:

"LINCOLN, NEB., Sept. 25th, 1900.

"For the purpose of obtaining the revival of policy No. 283,484, issued by the Ætna Life Insurance Co., on the life of Rudolph L. Rehlaender, which policy lapsed because of the nonpayment of the premium due on the 15th

day of August, 1900, I hereby certify that said Rudolph L. Rehlaender is now in good health, and that there is nothing in his habits or condition which is likely to impair his health or shorten his life, and if this representation shall prove in any respect untrue, said policy shall cease and be treated in the same manner as if it had not been revived. I also agree that by accepting this premium now, the said company incurs no obligation to accept any future premium after it becomes due.

"(Signed) RUDOLPH L. REHLAENDER.

"Witness: Z. DWIGGINS."

That said Rudolph L. Rehlaender was not at the time of the signing and delivery of said warranty, and the payment of the said premium, in good health; but was then and there suffering from a dangerous and fatal disease and malady from which he afterwards died, which fact was well known to said Rudolph L. Rehlaender at and prior to the time of making said representations and warranty; and that same were made for the purpose and with the intent to mislead and deceive this defendant; and that said fact was not known to the defendant then and thereafter until on or about the —— day of April, 1901, and after the death of said Rudolph L. Rehlaender; that by reason of said false and fraudulent representation and warranty the defendant was misled and deceived, and induced to consent to a revival of said policy, to which it would not have consented except for said false and fraudulent representations and warranty; that by reason thereof said policy was, and continued to be, void; and was never revived, and was of no effect and no obligation exists or has existed thereby or thereunder since the death of the said Rudolph L. Rehlaender, on the part of this defendant.

This defense having been thus tendered by the pleading, the plaintiff joined issue by a reply, which denied each and every allegation contained in the answer. The cause was tried on these issues to a jury, and a verdict was returned

in favor of the plaintiff and against the defendant for the full amount of the policy and interest. The company filed its motion for a new trial, which was overruled. Judgment was rendered against it on the verdict, and it thereupon prosecuted error to this court.

It appears that on the 21st day of February, 1900, the deceased, Rudolph L. Rehlaender, applied for, and, in the regular way, upon a proper and suitable medical examination, obtained a policy of insurance in the defendant company for the sum of $1,000, payable to his wife, Jennie M. Rehlaender, in case of his death; that arrangements were made by which the policy was really to be issued on the 15th day of August, 1900, but temporary insurance was secured by payment of a part of the premium, which was to be credited at the time the first semiannual payment should be made. It was provided that if the premium due at that time was not paid, the policy should lapse and the insurance should terminate.

It further appears that the insured neglected to pay the balance of the premium when it became due, and it may be conceded at the outset that the policy thereupon lapsed. It further appears that shortly thereafter the agent of the company, who was the general state agent, notified Rehlaender of the fact that his policy had lapsed, and solicited him to pay the premium and have it revived. Rehlaender assented to this arrangement, and at the request of the agent signed the paper dated September 25, 1900, which is set forth in the petition, and in which he stated that he was in good health, and that there was nothing in his habits or condition which was likely to impair his health or shorten his life. The beneficiary, Mrs. Rehlaender, thereupon paid the premium, which was accepted, and the policy was thus revived.

It further appears that on the 15th day of February following, she paid the second premium due at that time, amounting to $37.30. It is claimed that at the time of this payment the agent who received it was notified of the fact of the serious illness of the assured, and that he

took the money with full knowledge of his condition. This fact is disputed, and there is a conflict of evidence in the record on this point. It further appears that about the 17th or 18th of September, Rehlaender consulted Dr. Reynolds, of the city of Lincoln, in regard to his health, stating to him that he was not feeling very well; that something was the matter with his stomach. The doctor at that time said to him, "You are a druggist," and suggested some remedies which were good for stomach trouble.

It also appears in evidence, without dispute, that a few days thereafter assured again saw the doctor, and said to him that he thought his suggestions had hit the nail on the head, as he was feeling all right. About this time, or shortly afterwards, Rehlaender signed the statement or representation pleaded and relied on as a defense herein; and Mrs. Rehlaender paid the premium and procured the revival of the insurance policy, as above stated. At that time, assured, who was foreman and stock clerk of the Lincoln Drug Company, was attending to the duties incident to his employment, and continued to do so, and held his position and performed all the duties required of him up to the afternoon of the 9th of October following. It further appears that sometime after the 25th of September, the date of the revival of the insurance policy, Doctor Reynolds informed Mrs. Rehlaender that her husband was seriously ill, and that it would be necessary for him to be examined in order to ascertain the nature and extent of his disease. Mrs. Rehlaender informed her husband of this fact. An examination was made, and in order to ascertain what was the matter with him, the physicians conducting such examination resorted to the use of what is known as the X-ray process. Not being able to thus determine what was the matter with him, they informed him that it would be necessary to perform an operation, or, in other words, make what is known as an exploratory incision into the abdominal cavity, in order to be sure of the nature and extent of his disease. Rehlaender assented thereto, and on the 9th day of October, after performing his day's

labor, walked over to the hospital and submitted himself to the operation. It was then ascertained that he was suffering from a growth of a malignant nature, that could not be removed without causing death. In fact, he never recovered from the operation, but continued under the doctor's care until he died, sometime in the following March. So it may be fairly stated that at the time assured signed the statement or representation on which, together with the payment of the premium, the policy was revived, he was, as a matter of fact, afflicted with an incurable disease, and the representations made therein were not strictly and absolutely true.

It is now contended by the defendant company that the paper thus signed was a warranty, and the fact that it was not strictly true rendered the policy void, and that in fact there was never any revival of it, while it is contended on the part of Mrs. Rehlaender that the statement was nothing more than a representation, and that it having been made in good faith, under the belief that it was true, it, together with the payment of the premium, operated as a revival of the policy, and that she is entitled to recover.

From an examination of the answer of the defendant company, but one conclusion can be reached, and that is that the company itself has treated this statement as a representation, and not as a warranty. If it was a warranty the question of knowledge, good faith or intent would not arise, because in that event, if the statement was untrue in any material particular, a revival of the policy never took place. But it must be observed that the company has alleged that the representation was untrue; that assured was not at the time of the signing and delivery of the statement in good health, but that he was then and there suffering from a dangerous and fatal disease and malady, from which he afterwards died. It was further alleged that this fact was well known to him at and prior to the time of making the said representation and warranty, and that the same was made for the purpose and with the intent to mislead and deceive the defendant, and

said fact was not known to the defendant then and thereafter until the —— day of April, 1901, and after the death of the said Rehlaender; that by reason of said false and fraudulent representation and warranty the defendant was misled and deceived, and induced to consent to a revival of said policy, to which it would not have assented except for said false and fraudulent representation and warranty. This was denied by the reply, and this was the issue that was made by the defendant itself, and which was tried and submitted to the jury. The trial court treated the statement as a representation, and instructed the jury on that theory, in strict accordance with the issues made by the pleadings and the evidence introduced on the trial. If the trial court was right in this matter the judgment must be affirmed.

In the case of *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, it was held that statements contained in an application for a policy of insurance will not be construed as warranties unless the provisions of the application and policy, taken together, leave no room for any other construction. In construing a contract for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements. In that case suit was brought on a life insurance policy which was issued on an application, which contained, among other things, the following:

"That I am now in good health, and do ordinarily enjoy good health, and that in the above application I have not withheld any circumstances or information touching the past or present state of my health or habits of life with which the Pythian Life Ass'n ought to be made acquainted.

* * * And I do hereby declare and agree that each and every statement and answer contained in this application is material to the risk, and I hereby warrant all the answers and statements, and each and every one of them contained herein * * * to be full, complete, and true. And it is agreed that this warranty shall form the basis and shall be a part of the contract between me and said association. * * * I do hereby further agree that if any of the answers or statements made and contained herein are not full and complete, or that if the same, or any of them, whether made in good faith or otherwise, are in any respect untrue, then said policy and this contract shall be null and void."

It was held that these answers and statements were representations, and not warranties, and that although it might be conceded that they were not absolutely true in point of fact, yet, in order to defeat an action on the policy, it was necessary for the company to plead and prove that the statements and answers were made as written in the application, that they were false in some particular material to the insurance risk, that they were made intentionally by the assured, and that the insurance company relied and acted upon such statements.

In the case of *Ætna Ins. Co. v. Simmons,* 49 Neb. 811, it was held that a warranty in insurance law is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion; that a representation, in insurance law, is also the assertion by the insured of some fact, but the validity of the policy does not depend upon the literal truth of the assertion; that, if a doubt exists as to whether a statement made is a warranty or a representation, it will be held a representation; and that warranties are not to be created or extended by construction.

Statements like those made by the assured in this case have been held to be representations in *Campbell v. New England Mutual Life Ins. Co.,* 98 Mass. 381; *Daniels v.*

Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Supreme Lodge of Knights of Pythias of the World v. Edwards*, 15 Ind. App. 524, 41 N. E. 850; *Northwestern Mutual Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia. 216, 7 Am. Rep. 122; *Anders v. Supreme Lodge, Knights of Honor*, 51 N. J. L. 175, 17 Atl. 119; *Northwestern Benevolent and Mutual Aid Ass'n v. Cain*, 21 Ill. App. 471; *Price v. Phœnix Mutual Life Ins. Co.*, 17 Minn. 473, 10 Am. Rep. 166; *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466, 28 L. ed. 447; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Modern Woodmen Accident Ass'n v. Shryock*, 54 Neb. 250, 257, 39 L. R. A. 826; *Phœnix Life Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644.

It is thus well settled, not only in this state, but in many others, that the statement in question herein was properly held by the trial court to be a representation, and not a warranty. Again, it is difficult to see how the court could have treated it in any other manner, under the issue tendered by the company itself. Upon this issue there was an abundance of evidence to sustain the verdict of the jury. It is true that Dr. Reynolds testified that at some time, which he was not quite sure about, before the 25th of September, he told assured that he was dangerously ill. Opposed to his testimony is that of Mrs. Rehlaender, in which she states that the doctor told her after the 25th of September that her husband was seriously ill, and that he had not said anything to him about it; that he deemed it best to consult and advise with her before he made the matter known to her husband. Even Dr. Reynolds refused to testify that on the 25th of September there was anything in Rehlaender's condition that would likely impair his health or threaten his life. When asked that direct question his answer was: "That is too much of a question." He would only state that on the 25th of September assured was not, in his judgment, in good health. Doctor Giffin, who was called by the company as one of its witnesses, testified as follows:

Q. From your examination at that time, October 9, 1900, and from the nature of the disease you found him suffering from, I will ask you whether, in your judgment, there was anything in his condition fourteen days prior to that, that was likely to impair his health or threaten his life?

A. I could not make a prognosis on that, and I never saw him previously until that morning.

Q. Without having seen him prior to the time you would not be able to testify?

A. No, sir, I could not tell.

Q. When were you first asked to assist in the operation?

A. The morning of the operation.

Q. When were you first consulted?

A. That morning, I think.

Q. I will ask you from your examination of Mr. Rehlaender at that time whether in your judgment there was anything there which would inform him on the 25th of September previous that he was suffering from any disease which would likely shorten his life, or if he could know of that fact?

A. No, he could not know of it.

He was then asked by the attorney of the company this question:

Q. Would you say there was anything in his condition that would inform him that he was not in good health?

A. A man could have that and not know it. That is a hard question to answer until it reached to the point where it commenced to press upon the nerves of the aorta.

Q. The question is whether he did know that or not?

A. He could not know it; no, sir.

It will thus be seen that the jury could well determine that the defendant company had failed to make out the defense pleaded in its answer, and that the evidence fully justified them in finding for the plaintiff.

It is contended by the defendant company that the court erred in refusing to give its instructions as requested. An examination of these requests discloses that they are all based on the theory that the statement signed by the as-

sured was a warranty, and the jury were thereby told that in case they should find that the statement or representation was untrue, their verdict should be for the defendant. These requests are not the law, as recognized by this court, and were not proper under the issues and the evidence produced at the trial.

It is further contended that the court erred in his instructions to the jury given on his own motion. We have examined them and find that they are based on the issues and the evidence. Counsel for the plaintiff in error cites the case of *Royal Neighbors of America v. Wallace*, 66 Neb. 543, as an authority in support of his contention. That case is readily distinguishable from the one at bar. The error there was that the court left the jury at liberty to disregard all representations as immaterial to the risk; while here they were instructed that the statements or representations were material, and if they found them to be untrue, and to have been made knowingly by the assured, with intent to deceive the company, and thus procure a revival of the policy, their verdict should be for the defendant.

It appears that the state agent of the defendant company requested the assured to sign the statement in question, although by its terms it should have been signed by the beneficiary; that he was willing to accept it in place of a doctor's certificate, which he might have required before reviving the policy; that he took the premium from the beneficiary and retained the same; that he accepted the second instalment thereof, and has never returned or offered to return these payments. The company was well aware of the infirmities naturally inherent in such a statement, and the liability of the assured to be honestly mistaken as to the state of his health and his true physical condition. It should not now be permitted to avoid its liability on the ground that the representation was untrue without showing that the assured knew of the untruthfulness of his statement, and that he made it fraudulently with the purpose and intent to deceive, and thus obtain a renewal of the policy.

It appears upon a careful examination of the whole case that it was fairly tried, and was submitted to the jury under proper instructions. We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

POUND, C., concurring.

I concur for the reason that the instructions complained of submitted to the jury the issue tendered by the defendant's answer. Not only has the defendant framed its answer upon the theory upon which the case was submitted to the jury, but it tried its case upon that basis. Having pleaded and introduced evidence upon one theory, it was in no position to ask the court to instruct the jury upon another, or to complain of the action of the court in adopting the theory presented by the answer and the evidence.

FRANCIS C. FAULKNER ET AL., APPELLANTS, V. BENJAMIN M. SIMMS ET AL., APPELLEES.*

FILED JANUARY 22, 1902. No. 10,367.

1. **Principal: AGENT: ESTOPPEL.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. *Holt v. Schneider*, 57 Neb. 523, followed.

2. ———: ———: **AUTHORITY INFERRED.** Ostensible authority to act as agent may be inferred if the party to be charged as principal affirmatively, or intentionally, or by lack of ordinary care, causes

* Rehearing allowed. See opinion, page 299, *post*.

or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb. 644, and *Phœnix Ins. Co. v. Walter*, 51 Neb. 182, followed.

3. **Evidence: DECREE.** Evidence examined, and *held* in part to support the decree.

APPEAL from the district court for Harlan county: F. B. BEALL, DISTRICT JUDGE. *Reversed.*

Claude C. Flansburg and *Richard O. Williams,* for appellants.

William H. Kelligar, Edgar F. Ferneau and *J. C. Thompson, contra.*

DAY, C.

The Sullivan Savings Institution brought this suit in the district court for Harlan county against Benjamin Simms et al., to foreclose a real estate mortgage upon certain lands in Harlan county. Subsequently Francis C. Faulkner and Henry C. Sanders, assignees of the Sullivan Savings Institution, were substituted as parties plaintiffs.

It appears that on July 1, 1885, Benjamin M. Simms negotiated a loan of $800 through one C. C. Burr, of Lincoln, a mortgage broker, which was secured by a mortgage upon certain real estate situated in Harlan county. The note and mortgage were made payable to John L. Farwell, were due January 1, 1891, and payable at the Clairmont National Bank, Clairmont, New Hampshire.

On December 8, 1886, Simms transferred to Frank W. Reisenburg a part of the mortgaged premises, to wit, the S. W. ¼ of the N. W. ¼, and the N. W. ¼ of the S. W. ¼ section 30, town 3, range 17; and on February 7, 1887, he transferred to Elliott Lowe the remainder of the mortgaged premises, to wit, the E. ½ of the N. E. ¼ of section 25, town 3, range 18.

The defendant Reisenburg answered that the part of the mortgaged premises purchased by him was subject to a lien of $300 of the $800 mortgage sought to be foreclosed,

and that he had paid to the plaintiff on February 12, 1892, the sum of $300, together with the accumulated interest thereon, and prayed that the mortgage lien upon the premises purchased by him be canceled.

The defendant Lowe answered that he had paid to plaintiff on February 11, 1892, the sum of $573, together with the accumulated interest thereon in full of the amount of the mortgage which was a lien upon the part of the premises purchased by him, and also prayed that the mortgage lien upon his part of the premises be canceled. The trial resulted in a finding and decree in favor of the defendants, from which the plaintiffs appeal.

The record discloses that a few days after the execution and delivery of the note and mortgage, Farwell indorsed the note without recourse and transferred the same to the Sullivan Savings Institution, of which company he was treasurer. There is no dispute in the evidence but that Lowe paid to Burr on February 11, 1892, the sum of $573, and that it was received by Burr in satisfaction of the mortgage lien upon the portion of the land owned by Lowe. This sum, however, was not remitted by Burr to the plaintiff, and the fact of its collection was not ascertained until the fall of 1894.

There was not sufficient testimony to establish that Reisenburg had paid the sum of $300 and interest, as alleged in his answer. Burr testified that the whole debt was paid February 12, 1892, by Elliott Lowe, but it seems quite clear from the entire record that his reference to the payment related to the sum of $573 paid by Lowe on February 11, 1892.

The real question presented by the record is whether Burr, in receiving this money from Lowe, was the agent of the plaintiff. The question of agency is always one of fact, to be determined from the evidence in the case. The evidence disclosed that Burr had collected the interest coupons on the note as the same became due, and had remitted the interest to the holder, and also that between the plaintiff and Burr very extensive dealings had been car-

ried on, running up, as one of the witnesses testified, to nearly $1,500,000, and also extending over a great many years. Burr seems to have had general authority to extend the payment of notes when, in his judgment, it seemed best that that course should be pursued, and also to commence suits of foreclosure when such proceedings seemed to be advisable.

It also appeared that Burr had collected the interest and principal of many of these loans, and had reinvested money collected on some of them, and that plaintiff had acquiesced in his conduct in so doing; also that Burr had charged himself in his account with the plaintiff for the amount of money received, and that plaintiff's attention had been directed to this fact in the fall of 1894.

From the fact that plaintiff permitted Burr for a period of years to collect not only the interest on the loan in question, but the principal of other loans made by him for plaintiff, together with the fact that he was given general authority and discretion to renew loans or enforce their payment by foreclosure, are circumstances strongly tending to establish his agency.

The facts of this case bring it within the doctrine announced in *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, in which it was ruled:

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority."

The case at bar is also within the rule laid down in *Thomson v. Shelton*, 49 Neb. 644, where it is said: "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency."

We, therefore, recommend that the judgment of the lower court be reversed, with direction to enter a decree in favor of the plaintiff for $300 and interest, in accordance with this opinion, and that the premises described in the opinion as belonging to Reisenburg should be first sold in satisfaction of the judgment.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, with direction to enter a decree in accordance with this opinion.

REVERSED.

The following opinion on rehearing was filed March 18, 1903. *Former judgment modified:*

1. **Appeal:** CONFLICTING EVIDENCE: REVIEW OF FINDING. In passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such finding may be entitled to.

2. **Review of Finding Based on Oral Evidence.** In ordinary cases, where the evidence is entirely oral, and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the trial court is often entitled to almost decisive weight.

3. **Finding:** CONFLICTING ORAL EVIDENCE. A finding on conflicting evidence in such cases will be adhered to unless clearly wrong; but, if clearly wrong, it will be set aside, notwithstanding there may be some competent evidence in support thereof. *Seymour v. Street*, 5 Neb. 85, approved.

4. **Dicta in Prior Opinions Explained and Qualified.** *Dicta* in prior opinions of this court with respect to review of findings of fact explained and qualified.

5. **Dicta Disapproved.** The statements that the reviewing court will not "weigh conflicting evidence," that it "will not review findings on conflicting evidence," and that "findings on conflicting evidence are conclusive," as announced *obiter* in several prior decisions, disapproved.

6. **Review of Finding Based on Written Testimony.** Where a finding is based largely upon depositions or written testimony, as to which the trial judge has no special advantage over the reviewing court, the rule that his findings will be adhered to unless clearly wrong does not apply with the same force.

7. **Application of Rule:** FINDINGS ADHERED TO UNLESS CLEARLY WRONG. But in such case, if the oral testimony is evidently the basis of the finding, or the written testimony relates to matters as to which the trial judge is better able to reach a satisfactory conclusion than the reviewing court, the rule may be applied. *Male v. Dahlgrin*, 66 Neb. 524; *Waldron v. First Nat. Bank of Greenwood*, 60 Neb. 245.

8. **Rule in Case of Written Evidence.** If the evidence before the trial court is entirely written and relates to matters as to which the trial judge is in no better position to reach a correct solution than this court, the rule has no application, and this court should be governed by its own conclusion as to the weight of the evidence.

9. **Appeal:** FINDING SET ASIDE: REMANDING CAUSE. In furtherance of justice, where a finding is set aside on appeal and the former trial was unsatisfactory, instead of entering or directing a new decree, this court will remand the cause for further proceedings.

POUND, C.

At a former hearing, the decree of the district court was affirmed as to one of the defendants, but as to another was held contrary to the evidence and was reversed. The latter obtained a rehearing upon the ground that there was evidence to support the finding as to him, and now urges that the finding must be sustained for that reason.

The reported decisions of this court leave the question as to the power and duty of the court on appeal from findings of fact in some seeming confusion. Often, in the same volume of reports, statements on this subject are to be found in very different terms, if not in absolute contradiction. In general, there are two views, each supported by a long line of decisions running far back in the reports, and in particular cases extreme statements have been made *obiter* which, if adhered to, would amount in effect to an entire abdication by this court of one of its important functions. On the other hand, extreme statements are also to be found which would extend its power of reviewing

findings of fact to an unreasonable extent, and, as a consequence of this confusion, some support may be found for taking any course with respect to findings of fact challenged on appeal, which the court may choose. Consistently with prior decisions or *dicta,* it may refuse to do more than to ascertain whether there is some evidence in support of the finding, or it may go no further than to see whether the evidence is conflicting, or "fairly conflicting," or it may stop when it finds that the conclusion below is reconcilable with some reasonable construction of the testimony, or, notwithstanding the evidence is conflicting, it may set the finding aside on the ground that it is "clearly wrong," or, acording to some of the cases, it may reverse a decree because, in its opinion, against the weight of the evidence. Such a condition should not be tolerated, and we think it time that this subject be re-examined, and a definite, settled rule announced.

Considering the matter upon principle, we think it clear that in passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such finding may be entitled to. It goes without saying that, in general, the trial judge has a great advantage in that he sees and hears the witnesses. Moreover, he commonly knows more or less of their general character and standing, and may have a general local knowledge as to matters referred to in evidence and surrounding circumstances which enables him to weigh conflicting evidence with much greater assurance of reaching a correct solution than is possible in the reviewing court. Hence, in ordinary cases, where the evidence is entirely oral and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the

trial court is often entitled to almost decisive weight. It is a matter of common knowledge that a written record can not reflect the oral testimony at the trial with absolute accuracy. For these reasons, it is eminently proper that findings on conflicting evidence in such cases be adhered to unless clearly wrong. It must not be forgotten, however, that there are sometimes advantages on the side of the reviewing court. In long and complicated equity cases, especially where an accounting is involved, there is a marked difference between reaching a finding on one's recollection of what he has heard in the course of a trial lasting weeks or even months, and a finding as a result of patient investigation of a written record, with the aid of printed briefs, where comparisons may be made, computations tested, circumstances weighed, and conflicting statements sifted, upon the certain and assured foundation of a written page. Moreover, the court is instituted to review causes, and the right to resort to it for that purpose is guaranteed by the constitution. It has no right to renounce its functions. If, giving due weight to every advantage possessed by the trial court in the particular case, it is satisfied that a finding is clearly wrong, it should set such finding aside, notwithstanding there may be some competent evidence in support thereof. Otherwise it has not fulfilled its duty of reviewing the finding when properly challenged.

We think these propositions are supported by the preponderance of authority, and that so far as prior decisions or *dicta* conflict therewith they should be limited or overruled. From an early period until the latest reported decisions, and in nearly every volume of the reports, this court has said repeatedly that findings on conflicting evidence will not be disturbed "unless clearly wrong." The same idea has been expressed somewhat differently in many other cases; as, for instance, that a finding upon "evidence conflicting and apparently evenly balanced" will not be disturbed, or that the finding will not be set aside "where the evidence is such as to justify impartial minds in reaching different conclusions," or "solely because the

court may think that if it had tried the case it would have reached another result," or where the evidence is "conflicting without a decided preponderance in favor of appellant," or "where the evidence is conflicting, and reasonable minds might fairly differ," or where the evidence is "equivocal, or fairly conflicting," or though rendered "on conflicting evidence, if there is sufficient favorable evidence to sustain it." In other cases to be referred to this line of authority, the language used is not so clear, but the obvious intention is to announce the same rule. Thus, it has been said at times that a finding on conflicting evidence will be adhered to if "supported by sufficient evidence," or "unless unsupported by sufficient competent evidence," or if based upon "substantially conflicting testimony." The phrases last cited approach very closely to a different view, sometimes countenanced by loose expressions, which will be considered presently. But the context in each case makes it sufficiently clear that the court meant such a substantial conflict as to create a doubt to be settled only by passing on the credibility of witnesses, and that by "sufficient" evidence it meant sufficient in the mind of the reviewing court. This appears more clearly by reference to numerous cases in which the court has stated the same rule more strongly in the other direction; as, for instance, that a finding on conflicting evidence will not be disturbed unless "clearly against the weight of the evidence," or "clearly not sustained by the evidence." Of course, the converse would follow, that if the finding is "clearly against the preponderance of the evidence," it should be set aside, and the court has so held several times. On the whole, it may be doubted if any better statement of the rule to be followed in ordinary cases heard upon oral testimony is to be found than that in *Seymour v. Street*, 5 Neb. 85: "The correct rule appears to be that if the verdict or finding is clearly wrong, it should be set aside; but if we only doubt its correctness, it will not be disturbed." See, also, *Storms v. Eaton*, 5 Neb. 453.

Another and entirely different view is apparently sup-

ported by a line of decisions beginning with *Burt v. Baldwin,* 8 Neb. 487. In that case the court announced that it would not disturb a decree if there was "evidence to sustain it on each material point." The statement, however, was a mere *dictum,* and does not appear to have been framed carefully or advisedly. In the opinion the whole testimony was analyzed and carefully weighed, and, as a result, the court said (p. 491): "After a careful examination of the evidence, we think it sufficient to sustain such finding as to each point." But, as the work of the court increased, its dockets became overcrowded and the necessity of great dispatch in disposing of business became urgent, a tendency to limit review of findings of fact more narrowly along the line suggested in *Burt v. Baldwin* became increasingly manifest. As a result, it began to be suggested in the latter cases that "findings made upon conflicting evidence would not be disturbed." Even as so stated, with a little amendment, the rule may be reconciled with the one announced in the majority of the cases by holding "conflict" to mean such a substantial conflict as would prevent the reviewing court from arriving at the conclusion that the finding was clearly wrong. But at an early period expressions crept into the reports which appeared to give it a different interpretation. In one case, which has been followed several times, the court said it would not disturb a finding "unless it can not be reconciled with any reasonable construction of the testimony." In other words, taking the statement literally, if there was any question at all to be decided by the trial judge, this court will accept its finding. This case was cited in subsequent cases to the proposition that "it is a settled rule of this court that the findings of fact made by a trial judge will not be disturbed if supported by competent evidence." Following these cases, some of the judges began to announce *obiter* that the court would not disturb findings on conflicting evidence "if there was evidence to sustain them." Nevertheless, at the same time, in a number of cases reported in the same volumes, the court was re

peating the correct rule that the findings would not be disturbed "unless clearly wrong." Hence we think the several propositions last quoted are to be regarded merely as unadvised and careless statements, rather than as establishing a different doctrine, and that they must be limited to cases where the evidence is sufficient to justify the findings in the mind of the reviewing court, in view of the weight to be given to the conclusion of the trial judge under all the circumstances. But the apparent divergence from the rule as originally announced did not stop here. In time, members of the court, citing the cases wherein it had said that findings on conflicting evidence would not be disturbed as authority, began to suggest that if the evidence was conflicting it would go no further than to ascertain such fact. In several cases it was said: "Questions of fact determined upon conflicting evidence will not be reviewed in this court." This statement has been repeated in varying forms, the court, while holding the evidence below sufficient, remarking that "conflicting evidence will not be weighed on appeal," or that "this court must decline to weigh conflicting evidence," or that "where the evidence is conflicting the findings of the trial court are conclusive." We think these several statements are wrong, and should be disapproved. The statement that the court will not weigh conflicting evidence, taken literally, is entirely counter to the doctrine, repeatedly announced, that findings on conflicting evidence will be set aside when clearly wrong, and tends to create an impression that this court has nothing to do with findings of the trial court upon the facts, more than to see that they have some scintilla of support. The other statement, that a reviewing court will not review a matter fairly and properly presented, and within its jurisdiction, is obviously somewhat Milesian.

If the general proposition that the reviewing court should go over the evidence and reach a conclusion of its own, giving the finding of the trial court such weight as it may be entitled to, is correct, and if the advantage pos-

sessed by the trial court in particular cases is behind the rule that findings upon conflicting evidence will be adhered to unless clearly wrong, it follows that the application of that rule is to be measured by the advantage which the trial court had in view of the nature of the evidence adduced. Hence, where a finding is based largely upon depositions or written testimony, as to which the trial judge has no special advantage over the reviewing court, the rule that his findings will be adhered to unless clearly wrong does not apply with the same force. *Delorac v. Conna,* 29 Neb. 791, 811; *Gibson v. Hammang,* 63 Neb. 349. Of course, in such a case, if the oral testimony is evidently the basis of the finding, or the written testimony relates to matters as to which the trial judge is better able to reach a satisfactory conclusion than the reviewing court, his finding must be given corresponding weight, and the rule may be applied. *Male v. Dahlgrin,* 66 Neb. 524; *Waldron v. First Nat. Bank of Greenwood,* 60 Neb. 245. On the other hand, it must follow, equally, that if the evidence before the trial court is entirely written, and relates to matters as to which the trial judge is in no better position to reach a correct solution than this court, the rule has no application, and this court should be governed by its own conclusion as to the weight of the evidence.

Tried by these rules, we think the former judgment, so far as it sets aside the decree as to the defendant Reisenburg, is right, and should be adhered to. All of the evidence was written, and much of it in the form of stipulations as to what certain witnesses would testify to, if present. There is no reason why this court should adhere to the finding below unless that finding appears to be right. The burden was upon the defendant in question to sustain his plea of payment by a preponderance of the evidence. He showed a receipt written many years after the date of payment by an agent of the mortgagee, and had a stipulation that said agent and the person who was alleged to have made the payment would testify that the latter had paid the whole amount of the mortgage. But, on the other

hand, the check by which payment was made was in evidence, and showed that he had only paid the portion which he had assumed on a division of the mortgaged property. There is no evidence or suggestion how he paid the rest, or why he paid it when he had not assumed it. Hence, in the face of the check, showing clearly how much was paid, we do not think the plea of payment as to Reisenburg sufficiently established. We may say, however, that the former trial is unsatisfactory in every way. There were no pleadings, but only stipulations, after trial, as to what was regarded as in issue. There was no examination of witnesses, but instead there were stipulations as to what they would testify. The main contest was upon other points, and between other parties. We should hesitate, therefore, to recommend the entry or direction of a final order upon such a record. In furtherance of justice, where a finding is set aside on appeal, and the former trial was unsatisfactory, instead of entering or directing a new decree, this court will remand the cause for further proceedings. This course was followed in *Topping v. Jeanette,* 64 Neb. 834, and upon motion for a rehearing, in *Gilbert v. Garber,* 62 Neb. 464. We think it should be taken in the case at bar. Upon a new trial, the question will doubtless be settled by satisfactory evidence adduced by the one party or the other.

We therefore recommend that the former judgment be modified by remanding the cause for further proceedings as to the defendant Reisenburg, and that, so modified, it be adhered to.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is modified by remanding the cause for further proceedings as to the defendant Reisenburg, and, so modified, it is adhered to.

FORMER JUDGMENT MODIFIED.

FRANK FIALA ET AL. V. JOHN V. AINSWORTH, RECEIVER OF THE STATE BANK OF MILLIGAN, NEBRASKA.

FILED MARCH 18, 1903. No. 12,917.

1. **Bond**: NEGLIGENCE: LIABILITY OF SURETIES. Where an officer of a bank gives a bond conditioned that he will "honestly, faithfully, and efficiently" perform his duties, he and his sureties are liable for loss resulting from his negligence, even though the directors may not have used due diligence.
2. **Verdict.** Evidence examined, and *held* sufficient to support the verdict.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Frank Dolezal and *John Barsby,* for plaintiffs in error.

Charles H. Sloan, F. W. Sloan, John D. Pope, Fayette I. Foss, Ben V. Kohout and *R. D. Brown, contra.*

POUND, C.

A number of questions of law involved in this controversy were determined at a former hearing. *Fiala v. Ainsworth,* 63 Neb. 1. At that time, we held that the bond sued on, being conditioned that the principal would "honestly, faithfully and efficiently discharge the duties" of his office, covered not only his honesty as an officer but also his competency, skill and diligence. We held further that an assistant cashier, though bound in general to comply with the directions of the cashier, is not justified in aiding in or conniving at misappropriation of funds by his superior, and can not escape responsibility for so doing by showing that he acted under the latter's instructions. We recommended reversal of a judgment for the plaintiff, however, because matters had been submitted to the jury with respect to which, under the evidence, we considered that the principal was not responsible. Conceding that there was evidence tending to show

that the principal in the bond had knowingly aided the cashier in obtaining money from the bank by forged and fictitious paper, and in concealing the transactions from the directors, so long as the evidence on this point was conflicting, and all the items of damage alleged were left to the jury, so that it was impossible to say upon which item or items the verdict was based, or that the jury had in fact rested their conclusion upon the conflicting evidence as to the abstraction of money by forged paper, we were of opinion that the judgment could not stand. Upon a new trial, the plaintiff confined his case to the one question as to misappropriation by means of forged and fictitious notes, and the complicity of the principal in the bond therein; and for the third time a jury found in his favor.

It is asserted the former decision establishes that the sureties are not liable for any loss occurring after December 1, 1899, because on that date the directors became aware that the cashier had been speculating on the board of trade and had lost money. This goes much further than the opinion warrants. One of the items submitted to the jury at the trial then under review related to a sum of $3,000 consigned to the bank, which was taken by the cashier before it came into the bank and made away with. With respect to this item it was urged that if Fiala (the principal in the bond) had notified the directors of what he knew, they would have discharged the cashier before he could have abstracted this sum. On this point, OLDHAM, C., said (p. 9): "It would be going far into the realms of speculation to determine just how much more notice of Zirhut's shortcomings than that which the president and board of directors of the bank must have had at their meeting on the 1st day of December, 1894, would have induced that board to discharge him, and we do not believe that any vague theorizing on this question should be indulged in at the expense of Fiala's bondsmen." But in so holding we did not say that the bond was not to be held for loss caused by negligence or dishonesty of the

principal after December 1, if the natural and direct result of such negligence or dishonesty. The abstraction of the $3,000 could have been prevented only by discharging Zirhut, the cashier; and it could not be said that the failure to discharge Zirhut was due to negligence on the part of Fiala. It is quite another matter, however, when proof is adduced to show that Zirhut misappropriated other sums after December 1, and that Fiala assisted him in or connived at the transactions. In such case, Fiala's negligence or dishonesty would be a proximate cause of the loss, since, had he refused to carry out the instructions of his superior, and given prompt information of what was in progress, the money could not have been taken out. Counsel contend that the "directors of the bank owed it as a duty to Fiala's bondsmen to have discharged Zirhut on December 1," and that "having knowledge of Zirhut's dishonesty, the bank could not keep him there to tempt the honesty of another employee." But neither negligence on the part of the directors nor dishonesty on the part of Zirhut affords an adequate excuse for negligence or dishonesty on the part of Fiala. So far as loss ensued as a natural and direct result of his acts, he is liable, notwithstanding some of his superiors may have been careless, and some dishonest. Officers of a bank who are concerned in a misappropriation of its funds are liable, although they do not profit thereby; and those who negligently fail to prevent it, when they have knowledge of it, are within that category. *Williams v. McKay,* 46 N. J. Eq. 25, 18 Atl. 824. That the directors failed to use due diligence, and, in consequence, rendered themselves liable, also, does not relieve Fiala. *Batchelor v. Planters' Nat. Bank of Louisville,* 78 Ky. 435.

A further point is made, that the former decision conclusively establishes notice of Zirhut's peculations on December 1, 1894. As a general proposition, where the evidence at a new trial may be presumed to be materially different from that at a trial already reviewed, this court will investigate the record on a subsequent review unin-

fluenced by the former decision, except so far as questions of law were there adjudicated, which apply equally to the evidence at each trial. *State v. Paxton,* 65 Neb. 110. Hence, we should not be bound by a mere expression of opinion at the former hearing with reference to the evidence then before us. In the present record there is a conflict between the directors of the bank on the one hand, and certain witnesses for the defendant upon the other, as to what was known to the directors on December 1. The latter assert that they knew only that Zirhut had lost some $5,000 in board of trade speculations, but did not know that it was the bank's money which had been lost. Indeed, they testify that they were assured it was not the bank's money. They claim that Zirhut was indebted to the bank at that time by reason of other transactions, and contend that they took collateral security to cover such indebtedness and prevent loss by reason of Zirhut's inability to pay, owing to his losses by speculation, and not for the purpose of indemnity against an abstraction of the bank's moneys, of which they knew nothing. No such question was considered in the former opinion, and we see nothing to indicate an intention to decide the question of fact presented by this testimony. This was pre-eminently a question for the jury, and a finding on their part that the directors had no such notice on December 1 is amply supported by the evidence. We think, therefore, that the trial court did not err in refusing to limit liability upon the bond to loss accruing before December 1.

The principal contention of counsel is that the verdict is contrary to and not sustained by the evidence. As the question of fact whether the forged and fictitious paper was made use of to abstract money from the bank, or was merely placed in the bank and on its books for the purpose of deceiving a bank examiner, who was expected to examine its affairs in the near future, was submitted to the jury at the request of the plaintiffs in error, since they requested instructions leaving this matter to the jury, it

may be doubted whether they are now in a position to ask us to review the evidence. *Farmers' Bank of Nebraska City v. Garrow,* 63 Neb. 64. But we have examined the evidence, and are of opinion that the verdict must be sustained. The plaintiff introduced seven notes which are shown to have been forged and fictitious. These notes have numbers upon them, in the handwriting of Fiala, referring to the discount register, and almost all of these numbers are false; the corresponding entries upon the discount register showing entirely different notes. The fictitious note in almost every case is omitted from the register. He showed, also, a letter written and signed by Fiala, in which five of these notes were sent to a bank at St. Joseph, Missouri, on November 22, 1894, for the purpose of obtaining a loan of $3,000 at that bank. This was after the last of the four fraudulent drafts which Zirhut had drawn on the same bank, and there is nothing to show that it was done to cover up those drafts. The forged notes were not entered on the books of the bank until sometime later; but this circumstance does not establish that they had not been used to abstract funds prior to that time, since, as to several of the notes, as we have already seen, there is evidence of their existence in the bank several weeks previously. As to some of the notes, it appears affirmatively that the proceeds were deposited to Zirhut's personal account, and the deposit slips and entries are in Fiala's handwriting. The plaintiff proved, also, the condition of Zirhut's account with the bank between December 6 and 13, the dates at which these notes were entered on the books, and this account showed the deposit of the proceeds of several of the notes, also sums marked as loans, aggregating a considerable amount; and the entries were in the handwriting of Fiala. Moreover, there was an entry of drafts charged to Zirhut corresponding to a check on Zirhut's account drawn by Fiala at the latter's direction. A number of witnesses testify that, when the bank closed, Fiala indicated voluntarily the forged and fictitious notes, and admitted that

he had known their character ever since they had been put in the bank. One witness, moreover, testifies that he charged him with knowing that the notes were forged at the time he enclosed them in the letter to the bank at St. Joseph, and that Fiala made no reply. Two of these witnesses are entirely disinterested, and their testimony is very convincing. Taking all of this evidence together, it certainly makes a strong case that Fiala knew of, if he did not actually assist in and connive at, Zirhut's fraudulent manipulations. The sole question, therefore, is whether any money was abstracted by means of these notes. Sometime before Zirhut absconded, Fiala drew up, at his dictation, a statement of his indebtedness to the bank. This statement, which foots up in all $13,915.65, sets forth the seven forged notes, and five other items amounting to $7,000. These last items do not correspond to the drafts by which money had been abstracted, as set forth in the former opinion, and evidently refer to notes, though their exact nature does not appear in the evidence. It does appear, however, that Zirhut was indebted to the bank by reason of other transactions. In view of sections 26 and 27, chapter 8, Compiled Statutes (Annotated Statutes, 3726, 3727), we should not be justified in presuming that this indebtedness, if legitimate, was by any means large enough to reach the sum indicated on the memorandum; moreover, if the seven notes had been put in the bank merely to deceive the examiner, it is difficult to see why Zirhut should have listed them as he did. Upon the whole, in the absence of any attempt on the part of the defendants to meet what is certainly a *prima-facie* case by showing the exact nature of Zirhut's other indebtedness, and its amount, and by showing the state of his account in the bank in detail, we think the jury were justified in concluding that he had abstracted much more than the money withdrawn by the drafts and that it had been done by means of these notes.

Error is assigned in that the trial court refused an instruction to the effect that if the notes were put into the

bank to cover up prior defalcations, the plaintiff could not recover. But the court stated clearly and repeatedly that the plaintiff could not recover unless the notes were made use of to abstract or misappropriate money, and, having so stated, we do not perceive that it was under any duty of repeating the proposition in a different form. Moreover, the instruction tendered is erroneous, in that it requires the jury to find that "money was actually paid or got from said State Bank of Milligan by such forged or spurious notes." If by reason of such notes Zirhut was enabled to use the bank's credit at St. Joseph, and make away with funds for which the bank at Milligan would ultimately be liable, the plaintiff would be entitled to recover.

Complaint is made, also, that the court refused to receive evidence tending to show that Zirhut had wrecked a former bank at the same place by speculation on the board of trade, and that the directors knew of this fact. As we have seen already, the negligence or dishonesty of others affords no excuse for negligence or dishonesty on the part of the principal defendant. We have little doubt that he suffered himself to be used by his superior, and that he did not appreciate the responsibility attaching to his position; but an assistant cashier of a bank, who gives a bond for faithful performance of his duties, is in no position to act as a mere puppet. His sureties have promised that he will discharge the duties of his office with reasonable skill and diligence, and that he is competent to perform them, and though the greater portion of the blame may attach to the cashier, it is his fault and that of his friends who became his sureties, if he undertook a position he was incompetent to fill.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES B. STRONG, SHERIFF, V. CHARLES COMBS.

FILED MARCH 18, 1903. No. 12,646.

1. **Action for Damages:** EXEMPT PROPERTY: CODE. An action against a sheriff to recover damages for the seizure and sale of exempt property under an execution, is not a suit for misconduct in office within the meaning of section 907, Code of Civil Procedure; following *Neihardt v. Kilmer*, 12 Neb. 35.
2. **Sheriff:** CONCEALMENT: DEFENSE. Where the sheriff fails to inform the appraisers, called by him to appraise personal property seized on execution, of a mortgage lien existing thereon, which lien is set forth in the claim made by the defendant in execution that the property is exempt from seizure and sale under the execution, and the appraisement is made without knowledge of such lien on the part of the appraisers and without any allowance being made therefor, the sheriff can not interpose the appraisement so made as a defense to an action brought against him for damages for selling the property, when the amount of the lien, if deducted from the appraisement as made, would reduce the defendant's interest in the property to less than $500.
3. **Instruction:** FACTS NOT IN CONTROVERSY. In instructing the jury, the court may and should assume as established all facts over which there is no controversy.
4. **Request for Instructions:** EXCEPTION. Where one of several instructions asked by a party fails to correctly state the law, error can not be predicated upon an exception taken to the refusal of the court to give the instructions as a whole.

ERROR to the district court for Johnson county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

Ed M. Tracy, for plaintiff in error.

Samuel P. Davidson and *Al N. Dafoe, contra.*

DUFFIE, C.

Combs, the defendant in error, sued the sheriff in the county court for selling his exempt property on execution. The case was removed to the district court on error, where it was retained and tried, and judgment entered against the sheriff for $85 and costs, from which he has taken error to this court.

The facts are as follows: The sheriff levied on certain personal property of Combs under an execution. Combs claimed the property as exempt, and filed an affidavit and inventory under section 522 of the Code of Civil Procedure. Two or three days later he filed with the sheriff an amended inventory for the purpose of claiming two or three articles of personal property which were not included in the first inventory. This was done before an appraisement of the property was made, and the sheriff called appraisers and had all the property included in both inventories appraised. Among other articles claimed as exempt was a threshing machine and engine, which the inventory filed by Combs showed to be incumbered by a mortgage of $1,700. For some reason the attention of the appraisers was not called to the fact that the thresher and engine was mortgaged, and they fixed its value at $1,500, the total appraisement being $1,950; and the defendant's interest therein was less than $500 had allowance been made for the mortgage on the thresher and engine. Notwithstanding this, the sheriff sold certain of the articles claimed as exempt and this suit was brought against him for a conversion of the property.

It is first insisted that this is an action against the sheriff for official misconduct; that the county court where the action was commenced had no jurisdiction of the subject-matter; and that the district court could not acquire jurisdiction by error or appeal.

Neihardt v. Kilmer, 12 Neb. 35, was a similar action, and it was there held that a justice of the peace has jurisdiction of an action for the taking and converting of personal chattels of the value of $200 or under, and is not ousted of such jurisdiction by pleading and proof that defendant took such chattels by virtue of an execution, he being a sheriff.

The same principle was reaffirmed in *Spielman v. Flynn,* 19 Neb. 342.

In Freeman, Executions (1st ed.), sec. 215, it is said: "The officer who, after due notice and demand, persists in

taking exempt property, may be proceeded against at law as a trespasser; but he is not liable in this form of action if there was any serious doubt whether the property was exempt, nor if the benefit of exemption or selection was not claimed." Authorities are cited by the author to sustain the text that an action of trespass may be maintained against a sheriff or constable who refuses to recognize the right of a defendant in execution to the possession of his exempt property. These authorities make it clear that the action, as brought, is one for trespass and conversion, and not for misconduct in office.

It is further insisted that the sheriff was bound by the appraisement fixed by the appraisers, and could not therefore release or return the property which he sold. The evidence is clear to the effect that the sheriff was fully aware that the appraisers were not informed of the mortgage existing on the thresher and engine and that the mortgage was not taken into account by them in their appraisement. The fact that he sold the thresher and engine for $5 makes it very clear that he was not attempting to dispose of anything but Comb's equity therein.

Complaint is further made that the court allowed in evidence the second inventory and affidavit made by the defendant in error. While the affidavit attached to the second inventory was not such as the statute required, the sheriff understood and accepted it as a mere correction of the first inventory. It embraced a few articles not set out in the first, and the conduct of the sheriff undoubtedly led the defendant in error to suppose that no objections were made to it on account of any informality. He proceeded to have the property appraised, and conducted himself in such a manner as to lead to the belief that he accepted both inventories as presenting the claim made by the defendant in error for the release of his exempt property as sufficient under the law. Having so treated it at the time, he should not be allowed, on the trial of the case, when damages are sought against him for his refusal to recognize the property as exempt, to take

advantage of informalities which were undoubtedly waived at the time the claim was made.

Complaint is further made of some of the instructions given by the court, and its refusal to give others asked by the plaintiff in error. It is said in reference to one instruction that it assumes facts which should have been left to the determination of the jury. This criticism is without merit. The instruction referred to does not refer to any facts about which there was any dispute or controversy, and the court is not required to submit to the jury a question over which there is no dispute. Of the several instructions asked by the defendant, no particular instruction is selected either in the motion for a new trial or in the petition in error, and complaint made that the court erred in refusing to give it. Exception is taken to the refusal of the court to give these instructions as a whole. The third instruction asked by the plaintiff in error is clearly erroneous. It is to the effect that if the jury finds from the evidence that the plaintiff swore falsely in making his list and affidavit for exemption, the jury were at liberty to disregard all his statements, except in so far as he was corroborated by other credible evidence. We do not understand that this is the law. Where one knowingly testifies falsely to a material fact, then his evidence may be disregarded by the jury upon other matters, unless corroborated, but a witness who inadvertently misstates a fact is not to be discredited and have his whole evidence disregarded because of an innocent mistake. The exception going to the instructions as a whole, and one of them failing to state the law correctly, we are not required to examine the others to ascertain whether some one or more of the balance may have enunciated a correct rule.

We find nothing in the record requiring a reversal of the case, and therefore recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIDELITY & DEPOSIT COMPANY OF MARYLAND V. WILLIAM PARKINSON.

FILED MARCH 18, 1903. No. 12,707.

1. **Judgment:** ACTION ON BOND: PETITION. An action by a subcontractor, brought on the bond of a contractor for the erection of a public building, demanded judgment for work and labor in said building furnished by said subcontractor. Judgment in his favor was entered for the sum of $127.70 for labor and material furnished. *Held*, That the judgment could not be supported by the allegations of the petition.

2. **Mechanic's Lien:** PUBLIC BUILDING: BOND: SUBCONTRACTOR: STATUTE. The object of the statute, section 4, article 2, chapter 54 of the Compiled Statutes of 1901 (Annotated Statutes, 7117), was to secure to mechanics and laborers the amount due them for work and labor performed in the erection of a public building on which no lien is allowed for such work and labor. While the mechanic and laborer doing work on such building may resort to the bond required of the contractor, it is doubtful if the subcontractor who furnishes work and material in the construction of such building is within the terms of the statute, even though he has paid the mechanics and laborers doing the work contracted for by him. *McCluskey v. Cromwell*, 11 N. Y. 593.

3. **Demurrer:** ANSWER. A demurrer to the petition is not, by the provisions of our code of practice, a proper part of the answer filed in a case, and should be disregarded.

ERROR to the district court for Madison county: JAMES F. BOYD, DISTRICT JUDGE. *Reversed.*

M. B. Foster, John L. Kennedy and *Myron L. Learned*, for plaintiff in error.

S. O. Campbell and *Isaac Powers, contra.*

DUFFIE, C.

June 21, 1900, Frank Moore entered into a written contract with School District No. 1 of Madison county to erect a schoolhouse in Madison. He was required to execute and deliver, and did execute and deliver, to the school district a bond in the penal sum of $6,000, conditioned for the faithful performance of the contract, and this bond was signed by himself as principal and the Fidelity & Deposit Company of Maryland, the plaintiff in error, as surety. Moore entered upon the construction of the building but abandoned the work before its completion, and under the provisions of the bond the surety company undertook to finish and did finish the building, except in some minor particulars, for which an allowance was made by the school district. This action was brought in the county court of Madison county by defendant in error against Moore and the plaintiff in error on the bond to recover $119.38, being the balance alleged to be due for work and labor performed by defendant in error on the building. Judgment was entered for defendant in error, and the plaintiff in error appealed to the district court. Moore was not served with process and did not appear. A petition was filed in the district court. Plaintiff in error filed an answer which was a general denial, and a demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. On a trial in the district court judgment was entered in favor of the defendant in error for $127.70, with interest and costs. The plaintiff in error has brought the case to this court for review.

Section 99 of our Code of Civil Procedure provides that the answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; and (2) a statement of any new matter constituting a defense, counter-claim or set-off, in ordinary, concise language, and without repetition. Section 94 of the Code of Civil Procedure specifies the grounds

upon which a demurrer to a pleading may be filed, and it is nowhere intimated that a demurrer to the petition may be set forth in the answer as a part of that pleading. We are aware that it has been the practice in some of the district courts of this state to allow a paragraph in the answer assailing the petition upon the ground that it does not state facts sufficient to constitute a cause of action, but we are not aware of any rule of practice authorized by the statutes of this state which allows a demurrer to the petition to be set forth in the answer, which should only contain a general or specific denial of the allegations of the petition, or a statement of new matter constituting a defense, counter-claim or set-off to the matters alleged in the petition. If the petition is not sufficient in its statements to require the defendant to answer its allegations, a demurrer should be filed and passed on by the court. If it is insufficient to require an answer, the defendant may stand on his demurrer. But we do not think that it was the purpose of the framers of our code to allow the defendant to set up matters in his answer which he believes to be a defense thereto, or to plead a counter-claim or set-off, and in the same pleading to question the sufficiency of the petition to state a cause of action against him. If he does not think that the petition states facts which make him liable, he should question its sufficiency by demurrer and not incorporate it in an answer which alleges other substantial matters of defense to the plaintiff's claim. This view is, we think, fully sustained by section 96 of our code. The statute under which the bond was required and given is ch. 54, art. 2 of the Compiled Statutes of 1901 (Annotated Statutes, 7117). It is entitled "An act to secure the payment of mechanics' and laborers' wages on all public buildings where the provisions of the general mechanics' lien laws do not apply," and took effect June 21, 1889. The act is as follows:

"Sec. 4. It shall be the duty of the board of public lands and buildings, boards of county commissioners, the contracting board of officers of all cities and villages and

all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building, bridge or other public structure to which the general provisions of the mechanics' lien laws do not apply and where mechanics and laborers have no lien to secure the payment of their wages, to take from the person or corporation to whom the contract is awarded a bond with at least two good and sufficient sureties conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing or repairing of the building or in performing the contract; said bond shall be to the board awarding the contract; and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. The said bond shall be safely kept by the board making the contract and may be sued on by any person entitled to the benefit of this act. The action shall be in the name of the party claiming the benefit of this act."

It will be seen from a reading of this statute that it was intended to secure to all laborers and mechanics who performed labor in the erection or reparation of a building for which a mechanic's lien was not allowed, payment for the amount of their wages, whether the work was done under a contract with the original contractor or a subcontractor. The petition filed in this case contains the following statements, and our opinion is based wholly upon the statements of that pleading.

The second and third paragraphs are as follows:

"2d. That between the 21st day of June, and the 9th day of November, 1900, the plaintiff furnished to the defendant, Moore, for the construction of said building, material and labor to the amount and value of $921.78, which said labor and material were used by the said Moore in the erection and construction of said building, under said contract.

"3d. And there is still due and unpaid to the plaintiff from the defendant Frank Moore, for the work and labor

so furnished by the plaintiff to said defendant as aforesaid, the sum of one hundred and nineteen 38-100 dollars ($119.38)."

Judgment was demanded for the amount due for labor furnished. It will be noticed that the plaintiff's claim set forth in his petition was for $921.78 for material and labor, and the petition contained a further allegation that the work and labor not paid for amounted to $119.38, for which alone judgment was demanded. The judgment entered in the case is as follows:

"This cause having come on for trial before the court on a former day of this term of court, a jury having been waived by counsel in open court, the cause having been argued by counsel and submitted to the court, on consideration thereof the court finds: That there is due from the defendant, Fidelity & Deposit Company of Maryland, to the plaintiff, William Parkinson, the sum of $127.70 for materials and labor furnished by the plaintiff to Frank Moore, such materials and labor being used in the construction and completion of the schoolhouse referred to in the petition."

While the petition only asked judgment for the labor performed, the judgment was for labor and material furnished, and the judgment can not, in any event, be supported by the allegations of the petition. The plaintiff in error has alleged, as one of the errors complained of, the following:

"4th. The court erred in holding this plaintiff liable for labor furnished by the defendant herein to Frank Moore, for the reasons that the defendant herein performed none of such labor himself, but furnished the labor of others under a contract by which his agreed compensation was the contract price for the completed roof of a school building, including both labor and materials, and he is, therefore, not protected by the contract and bond on which he brought this action."

The fact that the plaintiff below sued only for the amount that was due for labor performed under his con-

tract, while the judgment is for labor and material furnished under that contract, is sufficient to work a reversal of this case. The plaintiff in error insists, and it is supported by eminent authority in that contention, that our statute was intended to allow only to the laborer himself an action on a bond given by the contractor under a provision of the statute similar to the one in question.

In *McClusky v. Cromwell*, 11 N. Y. 593, the court of appeals of the state of New York, in construing a bond similar to the one given in this case, held that a bond given by a public contractor to the state pursuant to the act of 1850, ch. 278, conditioned for the payment of all laborers employed by him in the work specified in the contract, does not secure the payment of laborers employed by a subcontractor, though the contract forbids the subletting of the work.

And in a later case (*Balch v. New York & O. M. R. Co.*, 46 N. Y. 521) it was held that "the words 'laborer' and 'labor,' as used in the general railroad act of 1850 (section 12, ch. 140, Laws of 1850), which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual sense, and imply the personal service and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams for work, whether with or without his own services."

These cases, with which we are inclined to agree, seem to imply that a statute like the one under consideration is intended for the protection of the laborer who does the manual labor on the building, and not for the contractor who furnishes both labor and material in the construction of the work embraced within the contract. While not definitely passing on this question, because not orally argued on the submission by defendant in error, the case will have to be reversed for the reason that the judgment was given for labor and material, while the suit was brought for labor alone.

We recommend that the judgment of the district court be reversed.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

ISAAC GEHRIS, ROAD OVERSEER, v. MORRIS FUHRMAN ET AL.

FILED MARCH 18, 1903. No. 12,717.

1. **Public Road: VACATION: STATUTE.** A public road was surveyed and located in 1869, but there was never any public travel along or upon the line of the survey. *Held*, That the road was vacated by the provisions of section 3, chapter 78, of the Compiled Statutes.
2. **Referee: EVIDENCE: FINDINGS.** The findings of a referee examined and *held* to be supported by the evidence.
3. **Highway: PRESCRIPTION.** To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action for the recovery of the land.

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

Fred D. Hunker and *Andrew R. Oleson*, for plaintiff in error.

Milton McLaughlin and *Thomas M. Franse, contra.*

DUFFIE, C.

February 15, 1869, the legislature passed a special act appointing three commissioners to view, locate, lay out and establish a state road from Blair to West Point by the nearest and best route, specifying, however, certain points where said road should touch. The commissioners

named in the act located the road during the months of June and July of that year. They employed a surveyor, who filed his field notes and a plat of said road in the proper office in Cuming county so far as the road was located in that county. This road is numbered in the plat book "Road No. 1," but is more commonly referred to as the "Blair Road." We understand from the record that the proper authorities of Washington and Dodge counties vacated the road so far as located in these counties some years prior to the commencement of this action, and other parts of the road located in Cuming county have been vacated by the authorities of that county. A resurvey of this road was made in 1876, the surveyor using the field notes of the original survey; and that one or the other of the surveys was incorrect is plainly demonstrated by the fact that the two surveys do not correspond, the distance between the two lines varying from some feet to a number of rods. Another and a later survey, made in 1900, differs from both the earlier ones, it being along the line of travel at the time the survey was made. Previous to the commencement of this action the board of supervisors of Cuming county appropriated the sum of $200 to open and work the road through the lands of the defendant in error, who brought this action to enjoin the road overseer and others joined with him as defendants, and who were subsequently dismissed from the case by order of the court, from entering upon or working the alleged highway across their lands. A temporary injunction was granted by the court, and after numerous motions and demurrers to the pleadings had been settled, issues were finally joined, the answer of the defendant alleging, first, that a highway had been regularly established over the lands of the defendants in error; and, second, claiming the existence of a highway across said lands by use and prescription. By order of the court, Honorable John R. Hays, of Norfolk, was appointed referee in the case to take the evidence and report his findings of fact and conclusions of law. The referee filed his report December 17, 1901, from which we quote the following:

"Second. That in pursuance of an act of the legislature, approved February 15, 1869, entitled 'An act to locate a state road from Blair in Washington county to West Point in Cuming county,' a survey was made and the record of courses and distances of the survey of that portion pertaining to the road in controversy has been preserved in the proper office in Cuming county, Nebraska, but that there is not now and never has been any public travel along or upon the line of said survey.

"Third. That in 1876, by direction of the county commissioners of Cuming county, the then county surveyor made another survey, of which the record of the courses and distances is preserved in the proper office of Cuming county, but the course of which, while in the same general direction of the former survey, does not correspond or coincide with it, but is remote in varying distances from a few feet to approximately twenty-five rods.

"Fourth. That in 1900, by direction of the board of supervisors of Cuming county, the present county surveyor made yet another survey, of which the record of the courses and distances is preserved in the proper office in Cuming county, but the line of which, while in the same general direction of both former surveys, does not coincide with either, but was intended to be, and was, along the line of travel at the time of the survey.

"Fifth. That for several years after the survey made in 1869, the land adjacent to the route surveyed was wild and unenclosed prairie, and along some portions it still so remains, and, where in that condition, public travel has been over a wide section of varying width.

"Sixth. That the orders for surveys so made in 1876 and 1900 were made without petition therefor, and without the consent of the owners of the lands across which the surveys were made, and the orders for such surveys were made without jurisdiction or authority.

"Seventh. That the deviation in the travel from the surveys made, and from former traveled lines did not come from the existence of obstructions, but the travel has

varied from year to year according to the caprice or will of the user.

"Eighth. That previous to eight years ago those whose official duty it has been to improve the public highways, expended no labor or money in the betterment of any portion of the route of either survey, and since eight years ago there has been no such improvement as was intended or did indicate a claim of right adverse to the occupancy of the owners of the land.

"As conclusions of law it is submitted:

"First. That there is now no legally established road along the line of either survey hereinbefore referred to across the town of Sherman, in Cuming county, Nebraska.

"Second. That defendant Isaac Gehris, the road overseer of that portion of the town of Sherman through which the surveys mentioned have been made, and his successors in office, should be perpetually enjoined from establishing, opening or improving a highway along or upon the line of either of the surveys hereinbefore mentioned."

A motion for a further report from the referee was overruled, his report confirmed by the court, and judgment duly entered thereon. The plaintiff in error thereupon filed a motion for a new trial, which, being overruled, the case has been brought to this court for review.

It is earnestly insisted that the evidence does not justify the decree, and for that reason we have examined with more than usual care the evidence reported by the referee. There is some evidence to support the contention of the plaintiff in error that some portions of the road as traveled at the commencement of this action had been used by the public for a length of time sufficient to establish a prescriptive right therein. While this is true, we are entirely satisfied with the report made by the referee. The evidence of many of the witnesses—some called by the plaintiff in error himself—show quite conclusively many changes, not caused by any natural obstructions, varying from two to twenty-five rods between the road as now traveled and the route of travel for many years previous. If the question

were before us as an original proposition, we would be inclined to agree with the referee that "the travel has varied from year to year according to the caprice or will of the user." The road as originally surveyed and located never having been traveled, must, under the provisions of section 3, chapter 78, of the Compiled Statutes of 1901 (Annotated Statutes, 6006), be deemed vacated, and, no prescriptive right having attached by user for the necessary length of time to that portion of the road now traveled, the rights of the defendants in error to the free use of their land can not be denied.

The findings of the referee and the judgment entered thereon are not without support in the evidence, and should be affirmed, and we so recommend.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN R. WILLIAMS ET AL., APPELLANTS, V. EDWARD D. SMITH, ROAD OVERSEER, APPELLEE.

FILED MARCH 18, 1903. No. 12,498.

Roads: VACATION: CONSTRUCTION OF STATUTE. The proviso in section 3, chapter 78, Compiled Statutes (Annotated Statutes, 6006), "that all roads that have not been used within five years shall be deemed vacated," was intended to apply exclusively to roads that had not been used within five years before the enactment of such section.

APPEAL from the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

Ernest O. Kretsinger, for appellants.

Harry E. Sackett and *Harry E. Spafford, contra.*

AMES, C.

The plaintiffs are the owners and in possession of lands lying on both sides of a certain section line. A section-line road on and along such section line, and on the plaintiffs' land, was duly opened in 1879, and continuously open to travel until 1892. In the year last mentioned a large bridge on the road was destroyed, whereby the public use of the road was interrupted. Afterward, in the same year, the then owner of the said lands, now belonging to the plaintiffs, and their immediate grantor, erected substantial fences across that portion of the boundaries of the land crossed by the road. In 1899, and after plaintiffs had acquired title to the lands, the defendant, as road overseer of the road district in which the lands lie, duly notified the plaintiffs to remove the fences, as obstructions to a public highway, and that if they should fail to comply with such notice within a reasonable time, he would remove the fences in the manner provided by law. The plaintiffs then commenced this action to restrain the defendant from removing the fences, and a temporary injunction was allowed. On a final hearing, the court found for the defendant and entered a decree accordingly. The plaintiffs appeal.

The only question presented by the record is whether the road was vacated by reason of its nonusage from 1892 to 1899, and the determination of that question depends on another, namely, whether the proviso contained in section 3, chapter 78, Compiled Statutes (Annotated Statutes, 6006), was intended to apply generally, or only to such roads as had not been used for the period of five years prior to the enactment of that section. If it was intended to apply generally, the decree of the district court is wrong and ought to be reversed, otherwise, it is right and should be affirmed.

In *Henry v. Ward*, 49 Neb. 392, 396, IRVINE, C., speaking for the court, says: "The object of section 3 was to remove

all uncertainty as to the existence of highways, first, by continuing in existence all theretofore legally laid out and not vacated; and second, by vacating all such highways as had not been used within five years. This road had not been used within five years, and therefore fell within the terms of the proviso of section 3." From the language quoted it is clear that the learned commissioner construed the proviso in question to apply only to such roads as had not been used for five years prior to the enactment of the law of which the proviso is a part. The language, however, is somewhat broader than was necessary to cover the precise point involved in that case. That, like the present, was an action to restrain the removal of fences across an alleged public road on a section line. The defendants therefore contend that the road was established by the act of 1873, page 959, and that the act of 1879, page 120, the present road law, which includes section 3, *supra*, did not repeal the former act, and did not vacate any road established under such former act, notwithstanding the proviso in said section. It was conclusively shown in that case that the road had not been established prior to 1884, unless by virtue of the general provisions of the act of 1873, and that it had not acquired the character of a public road by prescription or otherwise, after that time. Hence the only question presented was whether the proviso in question applied to section-line roads established by virtue of the act of 1873. The opinion, therefore, from which the foregoing excerpt is taken, so far as it purports to dispose of the question presented in the present case, is *dictum*. Nevertheless, we are satisfied that the construction placed upon section 3 by the learned commissioner who prepared that opinion is the proper one. The first part of the section refers exclusively to roads that had been established prior to the enactment of the law of which that section is part. The verbs "laid" and "vacated" are both in the past tense, and there is nothing in the context to indicate that they were intended to include any other than past acts. The proviso appears to be merely supplemental to the

clause "which have not been vacated in pursuance of law," in the section.

It is recommended that the decree of the district court be

AFFIRMED.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

JOSEPH STANDLEY V. CLAY, ROBINSON & COMPANY.

FILED MARCH 18, 1903. No. 12,617.

1. **Answer: REPLY: WAIVER.** Although a defense is pleaded in an answer with lack of technical precision, so as to be obnoxious to attack in the first instance, yet, if the plaintiff reply thereto without objection, and the matter is treated upon the trial both by counsel and by the court as properly in issue, the defect can not be taken advantage of for the first time in this court.

2. **Agency: PROOF.** The existence of an agency, and the nature and scope of its powers, may be proved by the course of dealing between the persons alleged to sustain the relation of principal and agent, and between the latter, with the consent of the former, and third persons.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Affirmed.*

C. M. Williams, E. G. McGilton and *Prigg & Williams*, for plaintiff in error.

L. F. Crofoot and *Edgar H. Scott, contra.*

AMES, C.

One H. H. Farabee, a resident of Lincoln county, in this state, purchased a herd of cattle of a corporation engaged in the live-stock commission business at Denver, Colorado, and put the animals upon premises belonging to him at Wallace, in that county. At the time of the purchase he executed to his vendor a negotiable promissory

note, secured by a mortgage upon the live stock, which was duly executed and made of record. Within a few days afterwards the commission company indorsed the note, and, for a consideration, sold and delivered it, together with the mortgage, to the Denver National Bank. At the time of the purchase Farabee obtained from the commission company a herd of heifers, which were also put upon his premises, and which he undertook to sell as agent. There is evidence tending to show that a few weeks afterwards it was agreed between the commission company and Farabee that the latter should become the purchaser of the heifers, and should have permission to sell a part of the mortgaged cattle as a means of raising money to pay for them. Pursuant to this agreement, as is alleged, Farabee did sell 155 of the animals in the open market at South Omaha to the defendants Clay, Robinson & Co. and absconded with the proceeds of the sale. Clay, Robinson & Co., who were also live stock commission dealers, immediately sold the cattle to their customers. Of all these facts, until after they had occurred, the bank remained in ignorance, unless it had constructive notice of them by reason of the circumstances below stated. Shortly afterward the plaintiff Standley, who is a director in the bank, purchased the rights of action of that institution arising out of the transaction, and begun this action to recover the value of the cattle so sold. It is not contended that the rights of the plaintiff as a litigant are superior to what would have been those of the bank.

It is pleaded as a defense that whatever title or interest the bank acquired in the note and mortgage, it obtained by discounting them from the commission company, and that as a part of said transaction the latter was, by an expressed or implied agreement with the bank, "authorized and empowered to look after the mortgage security and to make all arrangements with the said Farabee regarding the disposition and sale of said mortgaged cattle." It was further alleged that this agreement and authorization were evidenced by the fact that it was and

had been customary with this bank, and with other banks in the city of Denver, to entrust such powers to the commission company and to other persons engaged in like business in all cases of the discounting of securities of like character. Some objection is made in the plaintiff's brief to the technical sufficiency with which this defense is pleaded, but the answer was not attacked in this respect in the court below, either by motion or demurrer, and the record shows conclusively that it was treated upon the trial, both by counsel and by the court, as tendering the principal issue in the case. The rule is well settled in this court that under such circumstances the pleading will be upheld if by a liberal construction it can be said to present a cause of action or defense. *Fire Ass'n of Philadelphia v. Ruby,* 60 Neb. 216; *First Nat. Bank of Coblcskill v. Pennington,* 57 Neb. 404.

A sufficient amount of evidence to establish the existence of the course of dealing outlined in the answer, both by the Denver National Bank and by other institutions of like character, was offered and received on the trial. Part of this evidence was received without objection, and part of it over an objection for incompetency, but none of it was incompetent if the matter pleaded constituted a valid defense. Or, to be more accurate, there can be no doubt that it was competent for the bank to appoint the commission company as its agent for the purposes and with the powers alleged in the answer, and the real question is whether such appointment is sufficiently proved, in the absence of other evidence, by the course of dealing outlined in the pleading and established by the testimony. The question was submitted to the jury by the following instructions, which were excepted to:

"13. You are instructed that the defendant claims that there was and is a custom or usage existing among live-stock commission men and banks, which deal in cattle paper, by which when cattle paper secured by mortgages upon cattle, is discounted or sold to banks, that it becomes the duty of the commission man to look after the chattel

security and see to and look after the sale and disposition of the same, directing the manner and place of sale, etc., and to see that the proceeds arising from the sale of the cattle so mortgaged are applied to the satisfaction of the mortgage debt, which custom defendant claims existed between the Denver National Bank and the Sigel-Campion Live Stock Commission Company, and that such general custom was well known to the said bank and to the said live-stock commission company; that by reason of such custom the said live-stock commission company had the authority and the right to consent that Farabee, the mortgagor of the cattle in question, might sell and dispose of the cattle described in said mortgage, and that the said commission company did in fact so consent that the said Farabee might sell and dispose of the mortgaged cattle, collect the proceeds, and account for the same to the said commission company, and have the proceeds applied to the satisfaction of the mortgage debt. I instruct you, therefore, that the burden of proof rests upon the defendant to prove the existence of the general custom above referred to, and that such custom or usage was well known and understood by both the Denver National Bank and by the said Sigel-Campion Company, and that when said commission company sold and transferred the note and mortgage in question to the said Denver National Bank, that it was presumed to have contracted with reference to such custom or usage; that the burden is also upon the defendant to prove that the said commission company under and by reason of such authority, did consent in writing, that the mortgagor of the cattle in question, H. H. Farabee, might sell and dispose of the cattle mentioned and described in the said chattel mortgage, including the cattle in controversy, and collect and account to the said commission company for the proceeds thereof. And I instruct you further that if you find from the evidence, such usage and custom did exist, and that the said bank and live-stock commission company had knowledge of same, and contracted and dealt with each other with reference

thereto, and that in pursuance thereof the said live-stock commission company did consent to and authorize, in writing, a sale of the said cattle to the said Farabee, and that Farabee sold same pursuant to such consent, all as alleged and claimed by the defendant, all of which are questions of fact for you to determine from all the evidence in the case, then, if you so find, your verdict should be for the defendant.

"14. The court instructs you that a usage and custom of trade or business, in order to be binding upon the parties, must be generally known and established among those who are engaged in the business where the usage and custom are claimed to exist, and so well settled and so uniformily acted upon as to raise a fair presumption that it was known to both the contracting parties, and that they contracted in reference to it, and in conformity to it. While a usage or custom of trade and business can not be set up to contravene an established rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulation to the contrary, are presumed to be made in reference to the usages and customs of such business, if any such exists."

Concerning these instructions, counsel for plaintiff say in their brief: "We have no fault to find with the proposition of law involved in these instructions; they state the law in the abstract, but were not applicable to the facts in this case; the only usage and custom alleged in the answer of the defendant in error (see paragraph 6 of answer, page 24 of record) was a local usage and custom, alleged to exist in the city of Denver, and all the proof offered was confined to banks and live-stock companies at the city of Denver. No general custom was alleged or proved; that is, no such general custom and usage as would justify the court in submitting this instruction to the jury." We think that this criticism is unsound. It puts too much stress upon the words "usage and custom" or, rather, it makes an inapplicable use of those terms.

That which was proposed by the answer, and which the evidence tended to prove, and to which the instruction called attention, was not a usage or custom changing or modifying the general rules of law, or controlling the interpretation of a contract, but a course of business tending to establish a fact, namely, the creation and scope of an agency. This is an every-day matter. It more often than otherwise happens that an agent has no specific appointment as such, and that where he has one his duties and powers are not particularly specified. When the questions arise the court inquires, what were his relations to his alleged principal and to the business and affairs of the latter? What transactions was he accustomed to conduct for his supposed employer, and what powers and authorities, with the knowledge and consent of the latter, was he in the habit of exercising concerning them?

If a bank has a teller or a corporation has a secretary, we do not necessarily inquire what functions are prescribed for him by the corporate records and by-laws, but what duties and services he is in the habit of performing, with the knowledge and approval and to the profit of his principal. If they are such as such officers in similar institutions are usually charged with, there is a presumption, often, but not always, conclusive, that he is charged with them also, but it may happen that with the knowledge and consent of his employer his activities may extend beyond the customary sphere. From a survey of all the circumstances we determine whether he is an agent at all, and, if so, what is the scope of his agency and powers. This is not at all a question of ostensible agency, in which case one may be bound by the conduct of another whom he has permitted to falsely represent himself as an agent, but it is one of actual agency, in which case the principal is bound, if the agent acts within his powers, whether the person dealing with the latter knew him, at the time, to be an agent or not. For this purpose it is not requisite to prove any custom at all, general or special, but merely the course of dealing between the supposed principal and

the alleged agent, and between the latter, with the consent of the former, and third persons.

Applying these principles to the case at bar, if, by the usual course of dealing between the Denver National Bank and the commission company, the latter were entrusted by the former with the management, control and disposition of mortgaged property in behalf of the former, and the disposition of the cattle which was made in this case was such as, in consonance with such habit of dealing, they had a right to make, and if in this particular instance there was no restriction upon such authority, of which there is no proof, then the act of the commission company in directing Farabee to make sale of the cattle was the act of the bank, and the institution is as much bound by it as though the direction had been given by its own president or cashier or board of directors. All these matters are questions of fact which were relevant to the issues, and fairly submitted by the court to the jury, and the verdict thereon is conclusive upon the parties.

It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

DANIEL PORTER V. NE-DA-WI PARKER.

FILED MARCH 18, 1903. No. 13,021.

Public Land: ALLOTMENT UNDER ACT OF CONGRESS: EQUITABLE ESTATE IN FEE: DESCENT. An allottee and patentee of lands in severalty pursuant to an act of congress entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska, and for other purposes," approved August 7, 1882, is seized of an equitable estate in fee, which, upon

his death before the issuance of a final patent therefor by the United States, descends to his heir or heirs at law according to the laws of inheritance of this state.

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

Hiram Chase, for plaintiff in error.

Thomas L. Sloan, contra.

AMES, C.

The sixth section of an act of congress of August 7, 1882, providing for the allotment of certain lands in this state reserved for the Omaha tribe of Indians to the members of that tribe severally, enacts as follows: "That upon the approval of the allotments provided for in the preceding section by the secretary of the interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered." On the 29th day of December, 1884, a patent for 160 acres, or a quarter section, of such lands, reciting, in substance, the terms of the foregoing

section of the statute, was issued to one Philip Porter, a member of the tribe, in satisfaction of his right to participate in such allotment. At that time Porter was the head of a family consisting, besides himself, of his wife, the defendant, Ne-da-wi Parker, and of a daughter. After the delivery of the patent, Porter died intestate, leaving his wife and daughter surviving. Some time afterward the daughter died, also intestate and without issue. The allottee was the son of Daniel Porter, the plaintiff in this action. Since the death of her husband and daughter, the defendant has remained in the exclusive possession of the land, claiming to be lawfully entitled thereto. The foregoing matters were submitted to the district court for Thurston county upon an agreed statement of facts praying the judgment of the court whether the plaintiff or the defendant has a better right in the premises. To review a judgment in favor of the defendant, the plaintiff prosecutes a petition in error in this court.

The statute of descents and distributions of this state, so far as it affects the present inquiry, is as follows: "When any person shall die seized of any lands, tenements, or hereditaments or of any right thereto or entitled to any interest therein in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: *First,* in equal shares to his children, and to the lawful issue of any deceased child by right of representation. * * * *Fourth,* if the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother or sister." Compiled Statutes, 1901, ch. 23, sec. 30 (Annotated Statutes, 4930).

When Philip Porter died intestate all his heritable estate in lands descended to his daughter as his sole heir at law, and when she died intestate and without issue all her estates of like character vested in her mother as her sole heir at law.

The first question presented, therefore, is whether by

the above quoted act of congress and the patent the allottee acquired a "right or interest" in the land in fee. We think the answer should be in the affirmative. The language of the act appears to us to have been aptly chosen for the purpose of conveying the whole beneficial interest in the lands to the allottee and his heirs at law according to the Nebraska statute of descents, the retention of the legal title in trust in the United States evidently being intended mainly, if not solely, as a restraint upon the power of alienation during the period limited. The act expressly contemplates that the lands shall be descendible to the heirs at law of the allottee, and makes provision for the conveyance of the legal title to such heirs in cases in which the allottee shall die before the expiration of the trust. This intent is in consonance with the general principle that equitable estates are conformed, as nearly as may be, to the general rules of law governing legal estates, and follow the rules respecting the latter as to their descent. 2 Washburn, Real Property (6th ed.), pars. 1441, 1444, 1453; Perry, Trusts, par. 357 *et seq.* If there was nothing more to be said, it would seem evident that the sole beneficial interest and right of possession of the lands in question, and the right to the legal title to them upon the expiration of the trust-period, have descended, under the Nebraska statute, from the allottee, through his daughter, to the defendant. But counsel for the plaintiff suggests another inquiry to the following effect: He contends, in substance, that the inheritable character of the estate in the lands is limited and qualified, or, perhaps, more correctly speaking, suspended, by the circumstances that the fee title is not to be conveyed from the United States until the expiration of the term of the trust, and is then to be granted to the allottee, or to such person or persons as shall at that time be his heir or heirs at law. According to this view, if on the expiration of the twenty-five year period a final patent should be issued to the heir or heirs of Philip Porter, deceased, and the plaintiff should be then living, the estate would vest in him as the only

person answering the description in the grant. The argument is ingenious, but, in our opinion, is unsound, for the reasons already stated and because the principal purposes sought to be accomplished by the act in question would be embarrassed and postponed and in a great measure defeated by such construction. If the daughter did not inherit the premises upon the death of Philip, neither did the plaintiff inherit upon her death or upon that of his son, and the equitable title and right of possession are and will remain in abeyance until it can be ascertained who will be entitled to succeed at the date of the issuance of the final patent. In case of the previous death of the father, the estate would go to the collateral heirs of the allottee or, perhaps, escheat. Thus the evident object of the act, to induce the Indians to occupy the allotted lands in severalty, and to encourage habits of domesticity and thrift, and to promote a sense of individual proprietary right during the existence of the trust, would in this and like instances be defeated. It was, we think, for the purpose of guarding against such a contingency that the proviso enacts "that the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered." To suppose, with the plaintiff, that this proviso has reference only to the final patents issued at the termination of the trusteeship of the United States, would be to treat it as mere surplusage, because upon the issuance of such patents the entire title to the lands, legal and equitable, will be acquired in individual ownership and the laws of the state respecting descents and partition will apply to such lands as a matter of course, and independently of congressional legislation. It may be added that if the contention of the plaintiff can be upheld, he has no present interest or right of possession in the lands entitling him to maintain this action, because, according to his view, the person or persons entitled to succeed to the deceased allottee can not now be identified, and if the state statute did not operate to confer them upon the daughter and heir at law of the

latter, it is ineffectual to bestow them upon himself as present heir presumptive.

The conclusion thus arrived at renders unnecessary a discussion of the subject of dower. If the defendant acquired an estate in dower upon the death of her husband it merged in the equitable fee which she inherited upon the death of her daughter.

In our opinion, an allottee and patentee of lands in severalty, pursuant to the above mentioned act of congress, is seized of an equitable interest and estate in fee, which, upon his death before the issuance of a final patent therefor by the United States, descends to his heir or heirs at law according to the laws of inheritance of this state. *Non-she-po v. Wa-win-ta,* 37 Ore. 213, 62 Pac. 15, 82 Am. St. Rep. 749.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ERNEST PEYCKE ET AL. v. EDGAR SHINN, ADMINISTRATOR OF THE ESTATE OF J. L. SHINN, DECEASED.

FILED MARCH 18, 1903. No. 12,075.

1. Contract: PROOF OF: LETTERS. Where it is sought to establish a contract by letters, there must be evidence tending to prove that they are in the handwriting of the defendant, or that they came from him or his authorized agent, or were received in due course of mail, in answer to letters duly mailed to the address of the party sought to be bound.

2. Evidence: COPY OF WRITING. Ordinarily, to justify the reception of a copy of a private writing in evidence, it must appear that it is a true copy of some writing, admissible in evidence, which has been

lost or destroyed, or which is in the possession of the adverse party, who refuses to produce it on due notice.

3. **Telegram**: AGENT: ESTOPPEL. If a message to be sent by telegraph is not reduced to writing by the sender, he makes the company his agent for that purpose, but he is not thereby estopped to deny that a paper offered in evidence was in fact reduced to writing by the telegraph company, or delivered as his message.

4. **Depositions**: REFILING. Where depositions are withdrawn from a case, to entitle them to be read on the trial they must be refiled in accordance with the provisions of section 387, Code of Civil Procedure.

5. ———: STATUTE. In this state the taking of depositions is regulated by statute, and there is no provision which requires leave of court to entitle a party to take a second deposition of the same witness for use in the same case.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Reversed.*

Charles S. Elgutter and *Alvin F. Johnson,* for plaintiff in error.

Alex A. Altschuler, contra.

ALBERT, C.

This action was brought in the county court of Douglas county, by J. L. Shinn against Ernest Peycke and Julius Peycke, partners doing business under the name of Peycke Bros., to recover the value of certain potatoes, alleged to have been sold and delivered by the plaintiff to the defendants. The case was carried on appeal to the district court. Subsequently the action was revived in the name of Edgar Shinn, administrator of the estate of the original plaintiff. The sale was made to one Oberste, who, it is claimed, was at the time the agent of the defendants, acting for them in the premises. The principal question, coming to the merits of the case, appears to be whether the alleged agent was in fact the agent of the defendants. The defendants offered no evidence touching the issues in the case. The court directed a verdict for the plaintiff. The defendants bring the case here on error.

The evidence by which it is sought to establish the agency of Oberste consists of certain letters and telegrams alleged to have been received by him from defendants. The defendants insist that these letters and telegrams were erroneously admitted in evidence, because they were not sufficiently identified. Before the introduction of any of the letters, the alleged agent testified, in effect, that his contract of agency was made entirely by correspondence, and that he was not personally acquainted with the defendants. It was not shown that he was acquainted with their signatures, or that the letters were received in answer to any letters addressed by him to them at their address. There is nothing to identify them, save the conclusion of the witness that he received them from the defendants. It seems to us that the objections should have been sustained. It is well settled that where a contract is sought to be proved by letters, there must be testimony tending to prove the handwriting, or that they came from the defendant or his authorized agent, or were received in due course of mail in answer to letters mailed to the address of the alleged writer. The letters should have been excluded. *Gartrell v. Stafford,* 12 Neb. 545, 41 Am. Rep. 767.

The plaintiff contends that the errors complained of in the admission of the letters are grouped in one assignment in the petition in error, and that unless all were erroneously admitted, the assignment should be disregarded. Without going into the merits of that contention, it will suffice to say that the plaintiff has pointed out no letter admitted in evidence to which the objections hereinbefore considered do not apply, nor has our examination disclosed any; consequently, even under the strict rule invoked, the assignment is sufficient.

As regards the telegrams, the local manager of the Western Union Telegraph Company at Omaha, the point from which the telegrams are claimed to have been sent, was sworn as a witness to lay the foundation for the introduction of copies of the telegrams instead of the orig-

inals. He testified that at the time the messages purport to have been sent the defendants had a private operator at their place of business, who transmitted their messages by wire to the local office of the company, where they were reduced to writing and then transmitted to their destination; that, according to the rules of the company, the messages thus received and written out at the local office were there retained for six months, and then destroyed, and no record kept of them. He was then shown the copies sought to be introduced in evidence, and asked whether the originals had been destroyed. His answer was, in effect, that, if received at the local office, they were certainly destroyed, as more than two years had elapsed since their date. He was unable to say whether the copies offered were of messages sent over the line of his company or not. The foregoing is the substance of the foundation laid for the introduction of the copies in evidence. The defendants objected to their introduction in evidence on the ground that a sufficient foundation had not been laid. It is clear that the objection should have been sustained. It is elementary that to warrant the reception of an alleged copy of a private writing in evidence, it must first be shown that it is a true copy of some writing admissible in evidence, which has been lost or destroyed, or which is in the hands of the adverse party, who refuses to produce it on due notice. No such foundation was laid in this instance. The defendants having neglected to put their messages in writing, may be considered to have made the telegraph company their agent for that purpose, but the papers offered in evidence were not shown to have been written by the company and delivered to plaintiff as the messages of the defendants.

Certain depositions were used by the plaintiff on the trial of the cause in the county court. After the trial there, he withdrew them on leave of court, and they passed into the custody of his attorney. They were offered in evidence in the district court. The defendants objected to their reception on the ground that the record showed

they had been withdrawn. The objection was overruled, and parts of them were read in evidence. There is considerable parol evidence tending to show the purpose for which they were withdrawn, but we do not regard that as material, the fact that they were withdrawn conclusively appearing of record. We are unable to find that they were ever refiled before they were offered in evidence.

It is true that section 383 of the Code of Civil Procedure provides that when a deposition has once been taken, it may be read in any stage of the same action or proceeding. But the same section makes it subject to all such exceptions as may be taken under the provisions of the code relative thereto. One of such provisions (section 387) is that every deposition intended to be read in evidence must be filed at least one day before the day of trial. When the depositions in question were withdrawn, it seems to us they were no longer on file, and that refiling was necessary before they could be properly received in evidence. We think the depositions should have been excluded.

On the question whether these depositions had been withdrawn, the defendants offered a transcript of the record of the county court in evidence. The court refused to receive it. The transcript was a part of the record of the case in the district court. The question under investigation was exclusively for the court, and it was required to take judicial notice of the record. The offer of the transcript in evidence was unnecessary, and it was not error to reject it.

Another deposition was assailed by the defendants by motion to suppress, on the ground that a former deposition of the same witness had been taken in the case, and no leave of court had been granted for the taking of the second deposition. The taking of depositions is wholly regulated by statute. We find nothing there to prevent the taking of a second deposition of a witness in the same case, nor that leave of court is necessary to that end. We think the motion was properly overruled.

With the evidence erroneously admitted eliminated from the record, the remainder is wholly insufficient to sustain the verdict.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

WILLIAM REISCHICK, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHRISTIAN YOESEL, DECEASED, ET AL., V. DANIEL RIEGER, ADMINISTRATOR OF THE ESTATE OF CHRISTINA RIEGER, DECEASED, ET AL.

FILED MARCH 18, 1903. No. 12,455.

1. **County Court:** JURISDICTION. The county court has exclusive original jurisdiction of all probate matters, and where the relief sought by an action is such as the county court, in the exercise of its probate jurisdiction, might grant, the district court has no original jurisdiction.

2. **District Court:** WILL: CONSTRUCTION: JURISDICTION. On the facts stated, *held*, that the district court was without jurisdiction to construe a will and order distribution.

ERROR to the district court for Richardson county: JOHN S. STULL, DISTRICT JUDGE. *Reversed.*

Francis Martin, Arthur J. Weaver and *Edwin Falloon*, for plaintiff in error.

Isham Reavis and *Frank Reavis, contra.*

ALBERT, C.

This action was commenced in the district court. The facts sufficiently appear in the petition, upon which the case was tried below, which is as follows:

"Comes now the plaintiff and represents unto the court that he is the administrator of the estate of Christina Rieger, deceased, duly appointed by the county court of Richardson county and qualified according to law.

"2. The plaintiff complains of the defendant for that Christian Yoesel, on the 15th day of February, 1895, died seized of a personal estate of the value of $1,183 and the following described real estate situate in Richardson county, Nebraska, to wit: S. ½ of the N. W. ¼ and the S. ¾ of the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of section 33, township 2, range 17, in Richardson county, all of the value of $6,800.

"3. Plaintiff further complaining alleges that the said Christian Yoesel, deceased, left a duly executed and attested will which was admitted to probate in the county court of Richardson county, Nebraska, on the 9th day of March, 1895, and was duly recorded as required by law. The following is a copy of said will:

* * * * * * * *

" 'Item 2. It is my will and desire that my son John have the use of my home farm of 150 acres in section 33, town 2 north, range 17 east, 6th P. M., in Richardson county, Nebraska, for the term of seven years, or until March 1, 1902, and to pay my administrator for said rent the sum of four hundred and fifty dollars ($450) each year, to be paid as may be agreed upon between John and my administrator.

" 'Item 3. It is my will and desire that when my youngest child, viz.: David, becomes of age, which will be in said year, 1902, then my said farm of 150 acres is to be the property of all my then living children, share and share alike, to be disposed of by them as in their judgment may

seem best for all of them and should any of my now living children die before the division above mentioned then said child's share shall go to my remaining children, share and share alike, provided however, that should such deceased child leave any children, then his or her share shall go to his or her said children; which said division or bequest in this item shall also include the three children of my deceased daughter Mrs. Catherine Rieger, who shall be entitled to an equal share in my estate as though their mother was living, and said estate or any moneys derived from said estate shall not be paid to said three children or any of them until they or each of them become of legal age. Also the $450 received annually as rent shall be divided equally among all my heirs and those that are not of lawful age shall be paid their portion by their respective guardians when they become of age.

"'Item 4. I give and bequeath to my oldest daughter Caroline after my decease one hundred and fifty dollars in cash in addition to my above bequests to be paid to her by my administrator, and also I make the same bequest as to my daughter Christina, who shall receive one hundred dollars in cash. Also my daughter Lydia shall be paid fifty dollars in cash. I also direct that the bequest of three hundred dollars herein be paid out of my life insurance policy of $2,000 and that my debts in item 1st also be paid out of said $2,000 and the remainder of said $2,000 after said amounts are paid as herein enumerated shall be equally divided among my living heirs share and share alike.'

* * * * * * * *

"Plaintiff further represents unto the court that the said defendant is the sole executor named in said will, and has been duly qualified and is now the sole executor and trustee thereunder.

"Plaintiff alleges that said Christian Yoesel, deceased, left surviving him the following named children, John E. Yoesel, Caroline Yoesel, Christina Yoesel, Lydia Yoesel, Louisa Denkinger, Elizabeth Rieger, Gustave Yoesel,

David Yoesel and Walter Rieger, Otto Rieger and Sophia Rieger, grandchildren of Christian Yoesel and children of Catherine Rieger, deceased, a daughter of said testator.

"Plaintiff further represents that Elizabeth Rieger, one of the daughters of said testator, has died intestate and without issue since said testator's death.

"That since the death of said testator, Christina Yoesel intermarried with one Daniel Rieger and on the —— day of March, 1899, said Christina died intestate, leaving surviving her a daughter Christina and her said husband; the said daughter, Christina Rieger, died subsequent to the death of her said mother, to wit: on the —— day of June, 1899, intestate and without issue, leaving surviving her, her said father as next of kin.

"Plaintiff further alleges that said Christina Rieger, granddaughter of Christian Yoesel, deceased, and the issue of the deceased child of said Christian Yoesel, took and inherited under and by the terms of said will of Christian Yoesel a vested estate in the lands so owned by said Christian Yoesel and conveyed by said will, to share equally with the other legatees thereunder, to wit: One-eighth of the whole; and by the terms of said will she, or her legal representative, is entitled to one-eighth of the rents and profits of said land.

"Plaintiff further complains of the defendant for that he, as executor and trustee of said estate, has in his possession the sum of $450 the property of said legatees, now due and payable to them, said sum being the annual rental for the year last past of said land, and to one-eighth of which, under said will the legal representatives of Christina Rieger, deceased, is entitled, but which one-eighth part, said defendant has refused to pay over to plaintiff though demand has been made therefor.

"Wherefore plaintiff prays that on a final hearing of this said cause the court may construe said will, and enter a decree setting forth the rights of this plaintiff in and to the one-eighth part of said $450 as the legal representative of one of the legatees under said will, and that the

court may order said defendant to pay over to this plaintiff as administrator of the estate of said Christina Rieger the said one-eighth part of the said sum of $450, and for such other and further relief as equity may require."

The issues were made up and a trial had, whereupon the court found for the plaintiff, and entered the following decree:

"Wherefore, the court being fully advised in the premises, it is by the court hereby considered, decreed and adjudged that said Christina Rieger deceased took by the terms of the will of her said grandfather, Christian Yoesel, as the daughter and sole issue of Christina Rieger, nee Christina Yoesel, deceased, a vested estate in and to an undivided one-eighth part of the lands devised in said will, to wit: The south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) and the south three quarters (S. $\frac{3}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the northeast quarter (N. E. $\frac{1}{4}$) and the northwest quarter (N. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section thirty-three (33), township two (2), range seventeen (17), in Richardson county, Nebraska, and that said vested interest so taken was capable of transmission to her legal representatives upon the decease of said Christina Rieger and that plaintiff, as administrator of the estate of Christina Rieger, deceased, have and recover of said defendant William Reischick the said one-eighth part of said sum of $450, to wit: $56.25 and his costs herein expended taxed at $——."

The defendants bring the case here on error.

The defendants contend that the subject matter is within the exclusive original jurisdiction of the county court, and that the district court was without jurisdiction in the premises. The decree consists of two parts: (1) A construction of the will; (2) a judgment against the executor of said will in favor of the administrator of one found to be a legatee thereunder, for her distributive share, according to the terms of the will, as construed by the decree, of certain funds in the hands of the executor.

In other words, the decree is a construction of the will,

and an order for distribution of a part of the estate of the testator. The assignment of the estate of a decedent is peculiarly a probate matter, and section 289, chapter 23, Compiled Statutes (Annotated Statutes, 5154), expressly provides for a decree therefor by the county court. That the construction of a will is also a probate matter is equally clear, because a construction of the will, when there is one, is necessarily involved in such decree. That being true, the question arises whether the original jurisdiction of the county court in such matters is exclusive. Article 6, section 16, of the constitution gives the county court original jurisdiction in all probate matters. Such jurisdiction is exclusive. Section 3, chapter 20, Compiled Statutes (Annotated Statutes, 4787). In such matters it is a court of general jurisdiction. *Lydick v. Chaney,* 64 Neb. 288. Within its exclusive jurisdiction, its chancery powers are plenary. *Williams v. Miles,* 63 Neb. 859.

It seems to us, from the constitutional and statutory provisions quoted, taken in connection with the cases cited, the conclusion is irresistible that, on the case stated, the district court was without original jurisdiction. It is true, as has been urged by counsel, that it has been the practice in this state to invoke the original jurisdiction of the district court for the construction of wills, and the practice appears to have been recognized by this court. But we are aware of no case in which this court has held that the district court has original jurisdiction in such actions, nor in which the question was squarely raised. We do not wish to be understood, however, as holding that the district court has no jurisdiction, under any circumstances, to construe a will. On the contrary, we can readily conceive of actions of which the district court has original jurisdiction, wherein the construction of a will would be necessarily involved. But in an action involving only matters of which the county court, as a court of probate, has jurisdiction, such jurisdiction is exclusive, and the district court can acquire jurisdiction only by appeal. In this case the probate proceedings in both estates are still

pending in the county court. So far as appears from the record in this case, no question was adjudicated by the district court that the county court, in the exercise of its constitutional and statutory jurisdiction, might not have adjudicated. No excuse is shown for an invasion of its province by the district court. It follows, we think, that the decree of the district court was without jurisdiction.

It is recommended that the decree of the district court be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

AMANDA M. WILLIAMS ET AL. V. ED FULLER.*

FILED MARCH 18, 1903. No. 12,642.

1. **Libel**: PUBLICATION LIBELOUS PER SE. Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or deprive him of the companionship of respectable people.

2. ———: CIVIL LIABILITY. The proprietor of a newspaper is civilly liable for a libelous article published therein, although such article be published without his knowledge.

3. **Pleading**: INNUENDO. The office of an innuendo in pleading is to point out the meaning of words which are vague or indefinite in meaning or application; but where the words have definite and certain meaning and application, and thus taken are libelous, explanatory words or phrases, or innuendoes are not required.

4. **Damages**: EVIDENCE IN MITIGATION. In an action for libel in this state, the recovery is limited to compensatory damages, and the

* Rehearing allowed. Judgment below affirmed. See opinion, p. 362, *post*.

defendant is not permitted to show, in mitigation thereof, that the publication was without his knowledge.

5. ———: EVIDENCE OF. Where the publication is libelous *per se*, the plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages.

6. **Tender of Proof.** No formal offer to prove is required, to obtain a review of a ruling of the trial court excluding the answer of a witness to a question, where the question itself clearly indicates what the party expected to prove by the witness.

ERROR to the district court for Franklin county: ED L. ADAMS, DISTRICT JUDGE. *Reversed.*

A. H. Byrum and *Andrew G. Wolfenbarger,* for plaintiffs in error.

G. M. Caster, contra.

ALBERT, C.

This is an action for libel. There was a verdict for the plaintiff, and judgment accordingly. The defendants bring error.

"The plaintiff complains of the defendant and for his cause of action, says:

"First. That he is and was on the 19th day of July, 1901, the duly appointed and acting village marshal of the village of Riverton, in Franklin county, Nebraska.

"Second. That the defendants are the owners and publishers of a newspaper known as the *Riverton Review,* which said newspaper is printed and published weekly in the said village of Riverton in said Franklin county, Nebraska.

"Third. That the defendant Amanda M. Williams is and was the publisher of the said *Riverton Review* on the 19th day of July, 1901; that the defendant Paris A. Williams is the editor of the said *Riverton Review,* being a weekly newspaper printed and published as aforesaid in the village of Riverton, Nebraska; and the said Gold Williams is a compositor in the office of said newspaper and is in

the employ of the said Amanda M. Williams and Paris A. Williams, publisher and editor respectively of the said newspaper, the said *Riverton Review.*

"Fourth. That the said *Riverton Review* is a newspaper published in Riverton, Nebraska, and is in general circulation in the village of Riverton, Nebraska, and in Franklin county, Nebraska.

"Fifth. That on or about the 19th day of July, 1901, the said defendants Amanda M. Williams, Paris A. Williams and Gold Williams, being respectively publisher, editor, and compositor of the said newspaper, the *Riverton Review,* wickedly intending to injure the plaintiff, did maliciously publish of and concerning this plaintiff a certain false, scandalous and defamatory libel in their said newspaper, the said *Riverton Review,* being a weekly newspaper printed and published by the defendants in the village of Riverton, Franklin county, Nebraska, which said false, scandalous and defamatory libel is in the words as follows, to wit:

" 'Riverton's New Marshal. Yes, we have a new marshal. He's a peach; well, we should say so; no one else could be found who would have the place, so the present incumbent who was aching to show his authority took the job. It's a bright specimen of degenerated humanity who lives off his wife and the misdeeds of other men. If he wants a sack of flour now all he has to do is to arrest somebody. He never shows his authority on the gamblers and other members of his clique, but only shows it on people he knows are law-abiding. Why does he not arrest the lazy louts who are buying booze for boys as young as 14 years? No, this pot-bellied beer-guzzling old specimen of a degenerated race stands in with just this crowd. It is strange that our town board could not find a decent man instead of a lazy and dishonorable libertine. A man who would not hesitate to steal the coppers off a dead man's eyes. This man has been caught in numerous dirty deals, and is no more fit to be an officer than the poorest beast. He is without shame, honor, or humanity, as has been

shown in the past by his outrageous attack on a young man, who afterwards died. Such a man has no right to live in a decent community, yet he is allowed to exist here. I wonder why?"

"Sixth. By reason of the publication of the above-described false, scandalous and defamatory libel by the said defendants, Amanda M. Williams and Gold Williams and Paris A. Williams in their said weekly newspaper, *The Riverton Review,* on the 19th day of July, 1901, this plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, to his damage in the sum of $5,000."

A part of the defendants demurred to the petition generally, and on the ground of a defect of parties. The latter appears to have been abandoned in the argument. The court overruled the demurrer, and the ruling in that behalf is now assigned as error. In support of that assignment, the defendants contend that the article is not actionable *per se.* This contention is wholly without merit. Any false and malicious writing published of another is libelous *per se,* when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him. Cooley, Torts, *206; *World Publishing Co. v. Mullen,* 43 Neb. 126, 47 Am. St. Rep. 737. That the language as set out in the petition, and alleged to have been published of and concerning the plaintiff, has that tendency, is too clear to admit of argument.

It is next urged that there is no allegation in the petition sufficiently alleging that the article complained of was published of and concerning the plaintiff. This complaint is also unfounded. The petition contains the positive averment, and leaves no room for doubt, that the article in question was published of and concerning the plaintiff. That being true, further allegations by way of inducement or colloquium would be superfluous and redundant.

It is next argued that the petition fails to point out the meanings of the words used in the libelous article. If the

words used were of doubtful significance, or ambiguous, or were not sufficiently explained by the context, there would be much force in the argument on this point, but such is not the case. With the possible exception of one or two words, no one acquainted with our language can be left in doubt as to the meaning of the words employed. If those exceptions should be entirely disregarded, the article would still be libelous, and the petition good as against a general demurrer. The demurrer was properly overruled.

Upon the overruling of the demurrer the defendants answered, two of them joining in one answer, the other filing a separate answer. The plaintiff filed a motion to strike out portions of the answers, and one assignment of error is that the court erred in sustaining that motion. We are unable to find any order of the court sustaining that motion, and for that reason it cannot be considered. The defendants offered to prove, on behalf of the proprietors of the paper, that the article was published without their knowledge. The theory upon which this evidence appears to have been offered is that their lack of knowledge would go in mitigation of damages. The proprietor of a newspaper is civilly liable for a libelous article published therein, even though it be published without his knowledge or consent. *Storey v. Wallace,* 60 Ill. 51; *Detroit Daily Post v. McArthur,* 16 Mich. 447; *Andres v. Wells,* 7 Johns. (N. Y.) 260, 5 Am. Dec. 267. The defendants appear to recognize the foregoing rule, but argue that the evidence should have been received in mitigation of damages. In some states, where, in addition to compensating damages, the plaintiff is allowed punitive or exemplary damages, such evidence is admissible in mitigation of the latter, but not in reduction of actual or compensatory damages. In this state, however, the recovery is limited to actual or compensatory damages, and no punitive or exemplary damages are recoverable. Hence, such evidence, going only to damages which are not recoverable in this state, was properly excluded.

The court, at defendants' request, gave the following instruction:

"The jury are instructed that if you find from the evidence that the plaintiff's name was not mentioned in the article alleged to have been published in this case, you have a right to consider this fact in arriving at the amount of damages, in case you find for the plaintiff, and so far as any damages he might sustain by reason of said publication, would only extend in circulation, to such persons as were acquainted with him, both as Ed Fuller and as marshal of Riverton, and to such other persons as might afterwards become acquainted with him in both of these capacities."

The defendants claim that the verdict is contrary to this instruction, because there is no evidence showing that anyone knew the plaintiff both by name and as marshal of Riverton. The evidence shows that the plaintiff had resided in Riverton, where the paper containing the objectionable article was published and circulated, for some sixteen years; that he is a married man, his family consisting of seven persons; that he was appointed marshal of that village in the fore part of July, 1901, and the article in question was published on the 19th day of the same month. In the face of this evidence, we think the contention that there is no evidence that he was known to any person, both personally and in his official capacity, is wholly unfounded.

The defendants claim that the verdict is contrary to another instruction of the court, which limited the recovery to compensatory damages, and, in this behalf, urge that there is no evidence of any actual damages. The article is libelous *per se,* and in the absence of any evidence of damage the law presumes some damage, and it is for the jury, under proper instructions from the court, to determine the amount; nor are they limited to nominal damages. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713, 719, and cases there cited.

The defendants complain of an instruction, given by the court on its own motion, where the jury were instructed that the following portions of the article in question are libelous *per se:*

"It's a bright specimen of degenerated humanity who lives off his wife and the misdeeds of other men." "He never shows his authority on gamblers and other members of his clique, but only shows it on people he knows are law-abiding." "No, this pot-bellied, beer-guzzling old specimen of a degenerated race stands in with just this crowd." "It is strange that our town board could not find a decent man instead of a lazy and dishonorable libertine." "A man who would not hesitate to steal the coppers off a dead man's eyes." "This man has been caught in numerous dirty deals and is no more fit to be an officer than the poorest beast." "He is without shame, honor or humanity, as has been shown in the past by his outrageous attack on a young man, who afterwards died."

We think each of these sentences just quoted falls squarely within Judge Cooley's definition, hereinbefore given, of language which is libelous *per se*. But the theory of the defendants, if we understand it, is that words, to be libelous *per se*, must be sufficient of themselves to indicate the identical person to whom they apply, without any evidence *aliunde*, and that, as the words quoted in the instruction complained of are not of that character, they are not libelous *per se*. There is not a single authority cited that supports this theory, and we are well satisfied that none exists. It would be impossible to pen a libel in such a way that the party libeled could recover therefor without evidence, *aliunde*, showing that it was published of and concerning him. Even were he pointed out by name, it would still be necessary for him to prove that the name was his. The theory is wholly untenable.

Complaint is made of certain rulings of the court whereby evidence tending to show the truth of the article, and that it was published with good motives and for justifiable ends, was excluded. The plaintiff contends that such evidence was inadmissible under the pleadings. It is alleged in the answer that "the matters and things, and the statements made therein [in said article] are true," and that "said article was printed with good motives, and with-

out malice toward the plaintiff, * * * and for good and justifiable ends." The plaintiff insists that the answer should have been more specific to warrant the admission of the testimony under consideration. We are not called upon, at this time, to state just how specifically a party is required to plead such facts. The remedy for failure to plead specifically is by motion for a more specific statement. No such motion was made, and the plaintiff, having elected to join issue on the facts as they were alleged in the answer, must be held to have waived his right, if any he had, to a more specific statement. Under the pleadings, as they stand, the defendants had a right to prove the truth of the matters contained in the publication, and the motives with which, and the ends for which, it was published.

But it is urged by the plaintiff that the record shows no offer to prove such facts. The rule requiring a formal offer to prove, in order to obtain a review in the appellate court of a ruling by which evidence is excluded, is of doubtful value at best; it is a matter of grave doubt whether its application does not more frequently defeat than promote justice, and retard, rather than expedite, its administration. The reason generally assigned for it is that such offer challenges the attention of the trial court to the nature and character of the evidence sought to be introduced, and enables it to rule on the objection interposed advisedly. We are not disposed to extend the rule beyond the reason underlying it. In this case, the questions propounded clearly indicate what the defendants expected to establish by the answers thereto. Under such circumstances, it would have savored of an insult to the intelligence of the court to make an offer showing what the defendants expected to prove by the witnesses. To enforce the rule, under such circumstances, would be absurd. We think the evidence was improperly excluded, and that the defendants were thereby deprived of a constitutional and statutory right. Constitution, art. 1, sec. 5; Code of Civil Procedure, sec. 132; *Larson v. Cox, ante,* p. 44.

It is recommended that the judgment of the district court

be reversed, and the cause remanded for further proceedings according to law.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

The following opinion on rehearing was filed October 21, 1903:

1. **Assignment of Error Too General.** An assignment that "the court erred in excluding from the testimony proof as to the truth of the article and the charges made therein," is too general and indefinite to be entitled to consideration where a portion of the testimony offered upon the subjects mentioned was rightly excluded.

2. **Pleading: INCONSISTENCY: EXCLUSION OF EVIDENCE.** The answer in an action for libel alleged, among other things, that the article complained of was not published of or concerning the plaintiff, and that it was true. *Held*, That these allegations must be construed so as to be consistent, and hence that evidence that the charges contained in such article were true of the plaintiff was properly excluded.

POUND, C.

The facts are fully and accurately stated in the former opinion. Upon re-examination we are fully in accord with that opinion upon substantially every question passed upon therein. But our attention has been called to two further points, which do not seem to have been brought sufficiently to the notice of the court at the former hearing, and escaped attention. The petition in error contains twelve assignments. Of these, eleven are clearly insufficient to raise any question whatever for review. The remaining assignment is that "the court erred in excluding from the testimony proof as to the truth of the article and the charges made therein." In view of the fact that at least a portion of the testimony offered with respect to the truth of the article and the charges therein made was rightly excluded upon points of practice, and that this assignment is not

confined to the remainder but seeks to strike at some seventy different questions contained at different points of a large record, we think it is entirely too general and indefinite to be entitled to consideration. *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380; *Chicago, St. P. M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, and cases cited.

Moreover, upon the merits, we think the testimony offered in justification was rightly excluded. We do not think that this was a case for a motion for more specific statement, nor that the plaintiff joining issue on the answer, without requiring a more definite statement, waived his right to insist that the particular portions of the answer in question were insufficient to serve as the foundation for evidence as to the truth of the article with respect to the plaintiff. The answer, among other things, denies that the libelous article "was published of and concerning the plaintiff," and then proceeds to allege that it was true. The several allegations of a pleading must be construed so as to make them consistent, if possible. If we accept the allegation that the charge was not published of and concerning the plaintiff, or, in other words, that it did not refer to him, we must construe the allegation that it was true as meaning that it was true of the person of and concerning whom it was published, which would be some other person than the plaintiff. The case is on all fours with *Shanks v. Stumpf*, 51 N. Y. Supp. 154. While this is the decision of an inferior court, it is based on sound reason and commends itself to us as a correct exposition of the law. We are therefore of opinion that the trial court was right in refusing to admit the evidence offered, and that the judgment should be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion it is ordered that the former judgment of this court be vacated and the judgment of the district court be

AFFIRMED.

NEWMAN GROVE STATE BANK V. NELS F. LINDERHOLM ET AL.

FILED APRIL 9, 1903. No. 12,777.

1. **Petition:** FRAUD: DEMURRER. A petition demanding relief on the ground of fraud, is demurrable if it shows that the action was not commenced within four years, and fails to show when the fraud was discovered.

2. **Execution Sale of Real Estate:** TITLE OF JUDGMENT DEBTOR: JUDGMENT LIEN: SUBSEQUENT FRAUDULENT TRANSFER: CREDITORS' BILL. The thing offered at an execution sale of real estate being the title which the judgment debtor had at the time the judgment became a lien, a subsequent fraudulent transfer of the property furnishes no ground for a creditors' bill.

ERROR to the district court for Madison county: JAMES F. BOYD, DISTRICT JUDGE. *Affirmed.*

William Vincent Allen and *Willis E. Reed,* for plaintiff in error.

John S. Robinson, M. B. Foster and *M. J. Moyer, contra.*

SULLIVAN, C. J.

This is an action by the Newman Grove State Bank against Nels F. Linderholm, Esther Linderholm and A. Sophia Linderholm to subject real estate in Madison county to the payment of two judgments in favor of the plaintiff and against Nels F. Linderholm and another. The substantive averments of the petition are as follows:

"The plaintiff, a corporation duly organized and doing business under the laws of the State of Nebraska under name and style of Newman Grove State Bank at the several times mentioned in this petition, complains of the defendants and alleges:

"1. That the defendant Nels F. Linderholm is the father of the defendants Esther Linderholm and A. Sophia Linderholm; that each of said defendants is and for many

years past, including the several times mentioned in this petition, has been an adult and transacting business for himself and herself; that December 23, 1896, the plaintiff duly recovered a judgment in this court which said judgment was duly given and rendered by the court against the defendant Nels F. Linderholm and one George Morgan, in a case entitled Newman Grove State Bank against Nels F. Linderholm and George Morgan, being case No. 2334, for the sum of $690.30 to draw interest at the rate of seven *per centum per annum* and costs of suit in the sum of $38.33, which judgment still remains in full force and is wholly unsatisfied.

"2. That October 29, 1897, this plaintiff in a certain other action then and there tried and determined in this court entitled Newman Grove State Bank against George Morgan and Nels F. Linderholm, recovered a judgment against the said George Morgan and defendant Nels F. Linderholm, which said judgment was duly rendered by said court, in the sum of $700 to draw interest at the rate of seven *per centum per annum* and costs of suit taxed at $113.48, which judgment still remains in full force and wholly unsatisfied.

"3. That April 5, 1897, an execution was duly issued against the defendants on said first named judgment and placed in the hands of the sheriff of Madison county, Nebraska, for service and was thereafter duly returned by him *nulla bona;* that an execution was duly issued on said second judgment January 31, 1898, and placed in the hands of the sheriff of Madison county, Nebraska, for service and was thereafter duly returned by him *nulla bona;* that executions were duly issued on each of said judgments respectively in the month of October, 1901, and placed in the hands of the sheriff of Madison county, Nebraska, for service and duly returned by him *nulla bona.*

"4. That there is now due the plaintiff from said defendant Nels F. Linderholm and said George Morgan upon said judgments the sum of $2,025.17 which is wholly unpaid.

"5. That said Nels F. Linderholm is and for many years prior to the filing of this petition and during all of the times mentioned herein was the owner in fact of the north half of the northwest quarter and the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section thirty-five, in township twenty-one north of range four west of the sixth principal meridian in Madison county, Nebraska.

"6. That December 24, 1894, the said defendant Nels F. Linderholm being largely indebted to divers and sundry persons including the plaintiff, intending to wrong, cheat, hinder, delay and defraud his creditors in the collection of their just debts against him, and particularly to wrong, cheat, hinder, delay and defraud the plaintiff without any consideration being paid or given therefor, voluntarily made, executed and delivered unto his daughter, his co-defendant, Esther Linderholm, a mortgage on said above-described land for the sum of $728; that on April 4, 1899, the said defendant Nels F. Linderholm, still intending to cheat, hinder, delay and defraud his said creditors including the plaintiff in the collection of their just debts against him, voluntarily executed and delivered a pretended warranty deed of said above described land to his said daughters, his codefendants Esther Linderholm and A. Sophia Linderholm, which said pretended deed was recorded in the county clerk's office of Madison county, Nebraska, May 20, 1901; that said pretended conveyance was wholly without any consideration whatever and fraudulent and void as against the creditors of the said defendant Nels F. Linderholm, the said defendant Nels F. Linderholm having made such conveyance and his codefendants having received the same with the specific intent and purpose of cheating, hindering, delaying and defrauding creditors of the said defendant Nels F. Linderholm, and particularly cheating, hindering, delaying, and defrauding the plaintiff in the collection of its said judgments.

"7. That the said defendant Nels F. Linderholm is still the owner in fact of the above described land, notwith-

standing said pretended conveyance thereof to his co-defendants and the plaintiff's said judgments are liens thereon; that said pretended conveyance of said land by defendant Nels F. Linderholm to his codefendants Esther Linderholm and A. Sophia Linderholm was a mere device for covering up and hiding the title to the land and beneficial use of said land for the defendant Nels F. Linderholm, and to mislead, cheat, defraud and delay his creditors and particularly the plaintiff herein from enforcing said judgments against the same; that said real estate is of the fair and reasonable value of $7,000 and after deducting all legitimate liens thereon and incumbrances thereof prior to the judgments of this plaintiff said land is of more than sufficient value to satisfy the plaintiff's said judgments.

"8. That said George Morgan is wholly insolvent and the said defendant Nels F. Linderholm has no property other than the above-described land from which the amounts of said judgments or any part thereof can be made."

The court sustained a general demurrer to this petition and gave judgment on the merits in favor of the defendants. The case comes here by proceeding in error.

We have read with care the very able brief of counsel for plaintiff, but it has failed to convince us that the decision is wrong. The action was instituted November 27, 1901, nearly seven years after the mortgage was executed. The right to maintain an action to clear away the fraudulent incumbrance is, therefore, apparently barred. It may be that the fraud was not discovered immediately and that the right to sue did not accrue at once, but this will not be presumed; the burden was upon the plaintiff to make it appear by proper averment. This is the doctrine of two cases recently decided by this court. *Westervelt v. Filter*, 2 Neb. (Unof.), 732, and *State Bank of Pender v. Frey*, 3 Neb. (Unof.) 83. These cases are believed to be in harmony with the decisions in other jurisdictions, and even if they are not entirely free from logical infirmities it is bet-

ter, considering the matter from the standpoint of utility, to adhere to them, than to unsettle the practice by adopting a different rule.

As to the warranty deed, it is, we think, very evident that it does not operate as an obstruction to the enforcement of the judgments by execution. The purchaser at an execution sale would take the land clear and free of every right and interest vested in the grantees by the conveyance; he would take whatever title Nels F. Linderholm had at the time the judgments were recovered. Code of Civil Procedure, sec. 500; *Wright v. Smith*, 11 Neb. 341; *Hart v. Beardsley*, 67 Neb. 145; *Cornman v. Sidle*, 65 Minn. 84, 67 N. W. 667. A cancelation of the warranty deed would not result in either an actual or apparent change in the character or value of the title to be offered for sale and sold for the satisfaction of the plaintiff's judgments.

The decree is

AFFIRMED.

OLON P. BAKER V. GEORGE K. GILLAN.

FILED APRIL 9, 1903. No. 12,792.

1. **Legislation**: CLASSIFICATION OF OBJECTS. It is competent for the legislature to classify objects of legislation, and if the classification is reasonable, and not artificial or arbitrary, it will be upheld as a legitimate exercise of legislative power.
2. ———: CONTRACT FOR SALE OF REAL ESTATE: CONSTITUTIONAL LAW. The act of 1897 (Session Laws, 1897, ch. 57), entitled "An act to provide for the making of contracts in writing between owners of land and brokers or agents employed to sell lands," is not repugnant to the constitutional inhibition against special legislation; and every provision of said act is clearly expressed in its title.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Henry H. Wilson and *Elmer W. Brown*, for plaintiff in error.

John Barsby, contra.

SULLIVAN, C. J.

This action was brought by Baker against Gillan to recover the sum of $100 claimed to be due as a land agent's commission. It appearing from the petition that the alleged contract of agency was not in writing, the court held that the facts pleaded did not constitute a cause of action and gave judgment on the merits in favor of the defendant.

The only question suggested by the petition in error and discussed in the briefs is whether an oral agreement like the one upon which plaintiff relies is valid and enforceable. The first section of the act of 1897 (Session Laws, 1897, p. 304), is as follows: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." It is conceded that the case falls within the provisions of this section, and that if the law is constitutional the judgment is right. We think the law is constitutional, and that the argument in support of the claim that it is special legislation is obviously unsound. It is, of course, competent for the legislature to classify objects of legislation; and if the classification is reasonable, and not artificial or arbitrary, it will be upheld as a legitimate exercise of legislative power. The statute here considered is only a new instance of the exercise of that power. It may be that it is without exact precedent, but it has many familiar analogies in the legislation of this and other states. It is no more special legislation than are those provisions of the statute of frauds which require certain contracts to be evidenced by writing. It is, in fact, a virtual extension or enlargement of the statute of frauds, and like that statute was designed to prevent the bringing of actions which experi-

ence had shown were often conceived in fraud and maintained by perjury. It purports to be, and it is, a general law; its operation is uniform throughout the state; it affects alike all persons under the same conditions and circumstances; and, its object being the suppression of an evil believed to be peculiarly connected with the class of contracts with which it deals, it is not, in our judgment, open to the constitutional objection urged against it. *Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200, 205; *State v. Farmers & Merchants' Irrigation Co.,* 59 Neb. 1.

The title of the act being "An act to provide for the making of contracts in writing between owners of land and brokers or agents employed to sell lands," is certainly broad enough to cover the provision relating to the land-agents' compensation, and the contention that the whole subject of legislation is not clearly expressed in the title is therefore overruled. *Rosenbloom v. State,* 64 Neb. 342.

The judgment is

AFFIRMED.

JOHN F. ANTHES, APPELLANT, V. JOHN SCHROEDER ET AL., APPELLEES.

FILED APRIL 9, 1903. No. 12,403.

1. **Marshaling Assets**: LIMITATION OF RULE: CREDITOR HAVING LIEN ON TWO SECURITIES. The rule as to marshaling assets has its proper exceptions and limitations, and where, by reason of the circumstances in a particular case, it would be inequitable and work an injustice to require one of two creditors having a lien on two securities to first resort to the one on which the other creditor has no lien, a court of equity will not enforce the rule.

2. ———. Ordinarily, where several creditors having a common debtor, who has several funds, all of which can be reached by one creditor and only a part of the funds by others, a court of equity will require that the former shall take payment out of the funds to which he can resort exclusively, so that all may receive payment.

3. **Subrogation.** It is likewise a rule in equity, that if a prior creditor having security on two funds satisfies his demand out of the security or fund which alone is pledged to a junior creditor, and thereby exhausts that fund or security, the latter creditor will be subrogated to the former's lien upon that fund or security which is not exhausted.

4. ———. *Held*, In the case at bar, that the plaintiff is entitled to equitable subrogation to the lien of a prior creditor on other security for any balance remaining due after the application of the proceeds of the security on which both have liens to the payment in full of the prior incumbrance.

APPEAL from the district court for Clay county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

William M. Clark and *George H. Hastings*, for appellant.

John C. Hartigan and *Michael A. Hartigan, contra.*

HOLCOMB, J.

This cause, a suit in equity, comes here by appeal from the district court for Clay county. The controversy is with respect to the rights of junior and senior incumbrancers of lands situated in that county, the senior incumbrancer also holding a mortgage to secure the same indebtedness on other lands situated in Jefferson county. In a proper disposition of the case, are involved the questions of marshaling assets and of subrogation. The plaintiff, a junior incumbrancer, was denied any relief in the district court, and by this appeal seeks to have a decree therein rendered against him overturned, and he be permitted to have such action taken by the senior incumbrancer, in the nature of marshaling assets, as will protect him in the enforcement of his second lien, or, if that can not be done, that he be decreed to be subrogated to the rights of the senior mortgagee in his mortgage security on property not common to both mortgagees, to the extent necessary to satisfy his junior lien, after the exhaustion of the common security. The record discloses that the plaintiff, who is appellant,

was the owner of four hundred acres of land in Clay county, which he sold to the appellee John Schroeder. In effectuating the sale, it appears that the grantee, Schroeder, obtained a loan from the appellee Thompson for a considerable portion of the purchase price, and secured the same by mortgage on the land purchased, and also a mortgage upon a half section of land in Jefferson county. The latter mortgage was subject to two prior mortgages on the land therein described—one on each quarter—for $1,400 and $1,600, respectively. To secure the plaintiff, as grantor, for a balance due him of something over $2,400, a second mortgage was executed by Schroeder and wife on the Clay county land alone. Afterwards, default having been made in the payment of the indebtedness due the plaintiff, he instituted an action in the district court for Clay county to foreclose his mortgage lien, making the senior incumbrancer a party, who appeared in the action and obtained a finding of the amount due him under his first mortgage lien, and a decree directing a sale of the premises for its satisfaction. The plaintiff, it appears, prior to the institution of his foreclosure action, had reduced his demand to judgment, and attempted by execution to sell the lands of Schroeder in Jefferson county to satisfy or in partial satisfaction of his judgment. For some reason not clearly disclosed by the record, his action to foreclose was dismissed without prejudice, and the senior incumbrancer proceeded to obtain a decree for the sale of the Clay county lands, as before stated. After appellant had fully exhausted his legal remedies, realizing but $100 on his demand, and after executions on his judgment had been issued and returned unsatisfied in both Jefferson and Clay counties for want of property on which to levy, he filed his amended petition in the original action of foreclosure begun in the Clay county district court, setting forth the facts, as heretofore narrated, and alleging that the Clay county land was of insufficient value to pay both the senior and junior incumbrances thereon, and praying an injunction restraining the senior incumbrancer from

proceeding further in that action until he had first exhausted his security on the Jefferson county land, or, if the court would not grant him that relief, that, upon payment of the senior incumbrance from the proceeds of the Clay county security, appellant be subrogated to the rights of appellee Thompson, under his mortgage on the land in Jefferson county, to the extent necessary to satisfy the balance due plaintiff under his second mortgage lien on the land in Clay county on which both held mortgages, and for general equitable relief. Thompson, the senior mortgagee, the mortgagors Schroeder, his wife, their grantee, and a son and his wife, were all made parties defendant to the suit. Thompson answered, denying that the plaintiff was entitled to the relief asked or that his petition stated a cause of action, and alleged facts affirmatively as grounds of defense, and as reasons why he should not be required to abandon the proceedings in the court into which he had been brought, as before stated, and be compelled to go into Jefferson county and there exhaust the security which he held, and on which the appellant had no lien. The Schroeders answered by a general denial, and by allegations of other facts attempted to state an affirmative defense.

It is alleged that the decree in favor of Thompson is an adjudication of the questions presented by the plaintiff's petition, and that an action was still pending and undetermined by which the plaintiff was attempting to satisfy his demands, from and out of the Jefferson county lands. Regarding this latter, it may be said that an execution on plaintiff's judgment was issued and levied on one quarter section of land in Jefferson county, subject to prior incumbrances, and by the sheriff sold to the plaintiff for the sum of $100. After obtaining a deed as purchaser at sheriff's sale, he instituted an action to set aside an alleged fraudulent conveyance of the land to the wife of the judgment debtor, which latter action resulted adversely to him in the district court, and in this court. *Anthes v. Schroeder,* 3 Neb. (Unof.) 604. The cause was not finally de-

termined at the time of the trial of the case at bar. It is manifest, however, that entirely aside from these proceedings to set aside the conveyance after purchase at public sale the plaintiff had exhausted his remedy at law. The present action and the right to maintain it were in no way affected or qualified by the proceedings he afterward took in aid of execution. The land had been sold under an execution issued on his judgment for $100, which had been credited on the judgment; and whether he succeeded or not in his efforts to set aside the prior conveyance, would not, at least, satisfy or diminish further the amount yet remaining due on his judgment. For the balance yet due he was at liberty to proceed in obtaining satisfaction in any way open to him, either by further proceedings at law or by a suit in equity. The Schroeders really have no defense of a substantial character in the present action, as disclosed by the pleadings and the proofs. The trial court, we think, must have entertained this view, in that no finding or judgment was entered in respect of the issues as raised by the pleadings of the plaintiff and the defendants Schroeder. These defendants were entirely ignored in the finding and decree, and in the final disposition of the controversy in the court below. The real and substantial controversy is between plaintiff and appellee Thompson, as holders of mortgage securities on the lands mentioned, and of the character stated. It involves the adjustment under equitable considerations of their respective rights and liens on the two securities.

It is urged, and, as we think, with much propriety and merit, that it would be inequitable and result in an unwarranted hardship to require the appellee Thompson, after he had obtained his decree in Clay county, when he had been brought there upon the initiation of the plaintiff, to leave the district court of that county and go into Jefferson county and there institute a new suit to foreclose his mortgage security on the land covered thereby with the additional expense, delays and vexation necessarily incident to the litigation resulting therefrom; and no com-

plaint can justly be made because of the action of the trial court in refusing to grant the injunction asked, and remanding the senior incumbrancer to his remedy against the Jefferson county lands before proceeding further in the action, under the decree he had obtained in the district court for Clay county in the case at bar. But, conceding that the plaintiff was not entitled to the relief he demanded, wherein he seeks to compel the senior incumbrancer to first resort to his security in Jefferson county, can it be said that he is entitled to no relief at all and that the trial court's action in dismissing his bill for want of equity should be sustained? It seems to us not, and that such disposal of the case denies to the plaintiff substantial rights he is obviously entitled to by the application of sound equitable principles. His bill not only asked for relief of an alternative nature, but also for general equitable relief. If, under the facts heretofore narrated, he is entitled to any relief of an equitable character, the learned trial court was in error in altogether denying him any standing in a court of equity. While the general rule as to the marshaling of assets, where the common debtor is proceeded against by creditors having two different funds as security has its proper exceptions and limitations, and while we think the present case comes within the exception in so far as the general rule is applicable which requires the senior incumbrancer to first proceed against the fund or security on which the junior incumbrancer has no lien, so that both may be satisfied without injury to either out of both funds, so far as possible, yet, because of the exception, it does not follow that the plaintiff is not entitled to some relief, nor that the same result may not be accomplished by equity decreeing that the junior incumbrancer shall be subrogated to all of the rights of the senior incumbrancer in and to the fund or security, on which he has the exclusive lien, because of and to the extent of the impairment of the junior incumbrancer's security, when recourse is had to it alone for the satisfaction of both demands. There is nothing in the record which dis-

closes any waiver on the part of the appellant of his right to insist on the application of the doctrine of marshaling assets, or, in lieu thereof, of equitable subrogation as between him and the other creditor, Thompson, or that would operate as an estoppel or bar to the assertion of such right. He may not have pursued and probably did not pursue the wisest course in the efforts put forth by him in securing, or attempting to secure, satisfaction of his demands against the common debtor, Schroeder. But he did nothing in that regard by reason of which it can be said that he lost any right in equity to have both securities subjected to the payment of the two debts by marshaling assets or by subrogation. When he accepted his second mortgage on the Clay county land as security for the balance due him on the purchase price thereof, he had the undoubted right to act in reliance on and under the belief that for the satisfaction of the two debts the prior mortgagee would look to and if necessary be compelled to have recourse to the security on which he alone held a mortgage lien, in order that no injustice be done either, and nothing has occurred subsequent thereto to deprive him of the assertion of such right.

The rule is that where there are several creditors having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part of the funds by others, the former shall take payment out of the funds to which he can resort exclusively, so that all may receive payment. 3 Pomeroy, Equity Jurisprudence, 1414; *Lee v. Gregory,* 12 Neb. 282, 284; *Dorr v. Shaw,* 4 Johns. Ch. (N. Y.) *17; *Evertson v. Booth,* 19 Johns. (N. Y.) *486. And from this doctrine there is deduced the further rule that, in equity, if a prior creditor, having security on two funds, satisfies his demand out of the security or fund which alone is pledged to a junior creditor, and thereby exhausts that fund or security, equity will subrogate the latter creditor to the former's lien upon that fund or security which is not exhausted. Sheldon, Subrogations, sec. 62; *Hawkins v. Blake,* 108 U. S. 422; *Hudkins v.*

error.

Ward, 30 W. Va. 204, 8 Am. St. Rep. 22; *Milligan's Appeal,* 104 Pa. St. 503; *Ross v. Duggan,* 5 Colo. 85; *Farwell v. Importers & Traders Nat. Bank of New York,* 90 N. Y. 483. It is, we think, in the failure to note and make proper application of this latter rule to the facts in the case at bar that the learned trial court erred in denying to the plaintiff any relief whatever. It seems obvious, on principle, and under the authorities cited, that the appellant's rights were such as to compel recognition and enforcement in a court of equity, and that he is entitled to a decree subrogating him to the rights of appellee Thompson to his security on the Jefferson county land to the extent necessary to satisfy the plaintiff's demand, after the land in Clay county has been sold and the proceeds applied to the payment of the prior incumbrance and such portion of the second lien as may be applicable thereon.

Appellee Thompson insists that, inasmuch as he has offered to assign to the plaintiff all of his rights in both securities upon payment of the amount of his obligation and plaintiff has failed to pay him such sum and take an assignment of the securities, as proffered, he is entitled to no relief at all. But this offer to assign upon payment of his demand, clearly is not a test of plaintiff's rights in the premises. By the payment of the prior incumbrance in order to protect his own, the plaintiff would be entitled, as a matter of law, to be subrogated to all the rights of the first mortgagee; but his failure or inability to do this ought not to cut him off from any and all equitable relief. What he does do, in effect, when the fund on which he has the second security is taken to satisfy the first mortgage, is to pay from his funds and his security the prior mortgage, which should, under the doctrine of marshaling of assets, have been paid out of the fund on which he had no lien. Can there be any difference in principle between his paying the prior lien in the first instance, and being subrogated to the rights of the senior mortgagee, and the payment being taken from the funds on which he has the

prior equity, as between himself and the first mortgagee, with respect to that fund and the other fund, on which he has no security, but on which the senior incumbrancer has a lien and which he may take in satisfaction of his debt? In either view of the subject, the ultimate fact accomplished is the taking of both funds in order to prevent unnecessary injury to the junior incumbrancer and deprive him of the full satisfaction of his demand. A realization of the amount due to each could, probably, be had, in the event recourse be had to the fund pledged exclusively to the senior incumbrancer, on which the junior could have no lien or claim save by the doctrine of marshaling assets or by subrogation; otherwise the junior mortgagee would suffer a loss unnecessarily.

Something has been said in respect of the rights of appellee Schroeder and his wife as to their homestead in and to a part of the land in Jefferson county, and because thereof it would be inequitable to decree subrogation in favor of the plaintiff to the mortgage thereon in favor of appellee Thompson, as such decree would result in the destruction of the homestead rights. This question is neither presented by the pleadings in the case, nor was it in any way determined by the trial court. It would seem that if the homestead right was acquired prior to the time of the execution of the mortgages in favor of the creditors, Thompson and the plaintiff, equity would not, either by the marshaling of assets or by equitable subrogation, give to the plaintiff a claim on the homestead superior to the rights of the homestead claimant. But this question can better be presented and raised under proper pleadings and by proofs disclosing the facts in regard thereto; and until such is done, it is unnecessary to discuss the subject. We are of the opinion that the plaintiff, under the pleadings and proof, is entitled to a decree subrogating him to the rights of the appellee Thompson in and to the mortgage the latter held on the land lying in Jefferson county, for such sum as is found due plaintiff remaining unsatisfied after a sale of the land in Clay county on which both held

mortgages, and the application of the proceeds thereof to the payment of the full sum due the senior to the exclusion of the junior incumbrancer.

The decree of the district court is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

GEORGE BECKER ET UX. V. JOHN P. BREEN.

FILED APRIL 9, 1903. No. 12,496.

1. **Written Offer to Allow Judgment to Be Taken: ACCEPTANCE: NOTICE.** A written offer to allow judgment to be taken against a defendant for a sum specified, made under the provisions of section 565 of the Code of Civil Procedure, to be available for the purpose of the rendition of a judgment on such offer of compromise, must be accepted and notice thereof given to the party making the offer within five days from the time of making the same.

2. **Motion to Vacate Judgment Rendered on Offer to Compromise: ERROR.** *Held*, In the case at bar, the trial court erred in overruling a motion to vacate a judgment rendered on an offer to compromise made in pursuance of the provisions of said section, it being disclosed by the record that there was no acceptance of such offer and no notice of acceptance given within the time and manner required by statute.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Reversed.*

Carl E. Herring and *Charles S. Lobingier*, for plaintiffs in error.

John P. Breen, pro se.

HOLCOMB, J.

In this action the plaintiff sued to recover $100 for attorney's fees alleged to be due him from two defendants, husband and wife. In the lower court, where the case was

pending on appeal, the wife answered separately by a general denial, and the husband answered, alleging that the services performed were by virtue and in pursuance of an express oral contract for which the answering defendant was to pay the sum of $25, which at all times he had been ready and willing to pay, and which he brings into court and tenders to the plaintiff.

After the issues were formed and the cause had been regularly continued over the term, the plaintiff filed in the action what purported to be a written offer to allow judgment to be taken against the defendants for the sum of $75, whereupon the order of continuance was set aside and vacated, and judgment entered against the defendants for the sum mentioned in the offer. The defendants at the same term, and on the second day following, filed a motion praying the court to set aside and vacate the judgment so rendered, assigning different reasons therefor, the substance of which was that the judgment was erroneously entered, and the written offer on which the court acted was improperly filed in the case. The motion was supported by affidavits. In the order overruling the motion, it is recited that "even if it be conceded that the said judgment was irregularly entered in this case, still the court find that there being no evidence or showing offered by the said defendants in support of their motion that they have any defense to the said plaintiff's cause of action or to the said judgment as it stands, their motion to vacate the said judgment should be overruled." The offer to allow judgment to be taken against the defendants was served on the plaintiff October 23, 1900. An acceptance by the plaintiff is noted thereon, without any date as to the time accepted. The offer was not filed in the case until June 29, 1901. It is disclosed by the record that the defendants had no notice of any acceptance of the offer of compromise, and no knowledge of the proceedings had in the district court at the time it was filed in the case, the order of continuance vacated, and judgment rendered according to its terms. The paper filed appears to have

been a copy left with the plaintiff at the time it was made in October, 1900. It is, we think, manifest that the offer was made as an offer to compromise under and in pursuance of the provisions of sections 565 and 566 of the Code of Civil Procedure, title 15, chapter 1, entitled "Offer to Compromise."

While there are other provisions relating to the confession of judgments (sections 433 to 437 of the Code of Civil Procedure), and offers to confess judgment (section 570), it is apparent from an inspection of the record in the case at bar that the proceedings taken were not in pursuance of either of the sections last referred to. There was no appearance in court by defendants, and no paper filed therein by them, whereby they either confessed or offered to confess judgment under the provisions of said last mentioned sections. Recurring, then, to section 565, it is to be observed that when an offer in writing to allow judgment to be taken against a defendant for a sum specified is served on the plaintiff, and he accepts the offer and gives notice thereof to the defendant or his attorney within five days after the offer is served, the offer and an affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff, which shall be noted on the journal, and judgment rendered accordingly. If, however, the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. These provisions were not complied with and the written offer expired by limitation, when not accepted and notice thereof given within the time stated. The plaintiff was not authorized to make any use of the written offer different from that contemplated by the statute, and his failure to give notice of the acceptance of the offer within five days from the time it was served on him operated, by reason of the provisions of this section, as a withdrawal of the offer, and thereafter it could have no force or effect, and could not serve as a basis on which a judgment could be rendered, with-

out the consent of the defendants. The judgment, it is manifest from an inspection of the record, was irregularly and erroneously entered, and the motion to have it vacated ought to have been sustained.

The reason given by the trial court for overruling the motion, because no showing of a defense was presented, can not, we think, be upheld in the face of the record disclosing a meritorious defense to the plaintiff's cause of action pleaded in the separate answers of the two defendants. The offer was in its nature an offer to compromise, and was withdrawn because of failure to give notice of its acceptance. It was thereafter as though no such offer had been made. It could serve no further purpose in the case. It could not be used as evidence, or as a basis for the rendition of a judgment against the defendants. The offer of compromise having no virtue or life after non-acceptance for five days, we are confronted with a record from which it appears that the trial court rendered its judgment in favor of the plaintiff with the pleadings in the state in which we find them, and with no evidence in support thereof, and nothing from which it can be said the judgment was by consent of parties, nor in pursuance of a confession that the amount for which the judgment was rendered was due from the defendants to the plaintiff. A judgment so rendered is erroneous and contrary to law, and can not be upheld when properly challenged.

For the error committed in the rendition of the judgment and in overruling the motion to vacate the same, the judgment complained of is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN D. KNIGHT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF HELENA V. W. KNIGHT, DECEASED, V. AMOS H. DENMAN ET AL.*

FILED APRIL 9, 1903. No. 11,503.

1. **Pleading:** ALLEGATION: DENIAL. The denial of an allegation that "Helena V. W. Knight, on and prior to the 25th day of April, 1898, was the owner in fee simple and entitled to the possession of" certain premises, in *ipsis verbis*, accompanied by a plea that prior to October 25, 1898, defendant had acquired title to the premises by adverse possession, and accompanied by a denial that the plaintiff, who was claiming as executor of Helena V. W. Knight, had title or right of possession, and accompanied by specific denials of plaintiff's alleged executorship, of the death of Helena V. W. Knight, and of plaintiff's right in the premises, does not deny the antecedent title of Helena V. W. Knight.
2. **Former Holding Reaffirmed.** Former conclusion adhered to, both as to the negative pregnant in defendant's denial of Helena V. W. Knight's title, and as to error in the instructions by which the issue of defendant's adverse possession was submitted to the jury.

ERROR to the district court for Butler county: EDWARD BATES, DISTRICT JUDGE. *Judgment of reversal adhered to.*

Edmund C. Strode, Jesse B. Strode and *Matt Miller,* for plaintiff in error.

George P. Sheesley, Edwin E. Good and *Charles H. Slama, contra.*

HASTINGS, C.

This is a rehearing of the case which appears in 64 Neb. 814. It was held that the judgment of the lower court should be reversed, because the question of the adverse possession by the defendant of the land in controversy for the time requisite to bar plaintiff's action was not properly submitted at the trial. The judgment was sought to be supported by the claim that the evidence of the plain-

* Rehearing of case reported in 64 Neb. 814.

tiff had wholly failed to establish the title of plaintiff's testatrix, and that, therefore, the verdict was right whatever error might have been committed in submitting the question of adverse possession to the jury. The conclusion was reached that the answer of Denman raised no issue as to the original title of plaintiff's testatrix, and that, therefore, the failure to offer sufficient evidence to maintain it was no bar to a recovery on his part. This contention at the former hearing is now strenuously asserted, and less earnestly the other contention, also, that the question of adverse possession was properly submitted by the instructions given.

The petition, as stated in the former opinion, alleged that on and prior to April 25, 1898, Helena V. W. Knight was the owner and entitled to the immediate possession of the land; that plaintiff was her executor, and that by the terms of her will the title passed to him, and he had duly qualified, and that defendants kept him out of possession. Plaintiff proved at the trial no title in his testatrix. He merely tendered a deed to her made by one McLeod. The question is whether the answer tendered by the defendant Denman, in whose favor the judgment runs which is sought to be reversed, required the production of such proof. That answer was filed, under leave of court, as an amendment, and first denies "that Helena V. W. Knight on and prior to the 25th of April, 1898, was the owner in fee simple and entitled to the possession" of the premises in controversy; the answer denies her death; denies that she left a will making the plaintiff her executor; denies that plaintiff was her husband, or qualified as executor; denies that he is executor; denies that he is entitled to the possession of said premises, and denies that the defendant unlawfully keeps him out of such possession. The next paragraph of the answer alleges that defendant is the owner, and for more than ten years prior to the 15th day of October, 1898, he was the owner of said premises, and that during more than ten years immediately preceding the said 15th day of October, 1898, he has been

continuously in the actual, exclusive, open, notorious, hostile and adverse possession of said premises. He denies that plaintiff is entitled to any interest or has any interest in said premises or is entitled to possession thereof. In the next paragraph he denies that he was ever wrongfully in the possession of said premises, and denies that plaintiff is entitled to any rents or profits thereof, and denies that he is indebted to the plaintiff in the sum of $640 *per annum* or in any sum whatever.

The first question raised is whether or not this answer denies the original title of the plaintiff's testatrix. This court at the former hearing concluded that it did not. A somewhat careful consideration of the case leads us to the same conclusion, namely, that the answer, taken as a whole, merely alleges, when fairly construed, a title by adverse possession, with a special denial that the title had passed to plaintiff. It fails to deny in such terms as to raise an issue, the allegation that prior to the 15th day of April, 1898, Helena V. W. Knight was the owner. It alleges that for more than ten years prior to October 25, 1898, defendant had been continually in the adverse possession of the land. It denies in *ipsis verbis* that on and prior to April 25, 1898, Helena V. W. Knight was the owner and in possession. This can not be treated as a denial that she was the owner prior to the acquirement of defendant's alleged right by adverse possession. The denial in its literal terms would be true, if only she was not the owner on the 25th day of April, or if, being the owner on that day, she was not owner prior to that time; when construed in connection with the allegation of adverse possession more than ten years prior to October 25, 1898, the denial should be given no broader effect than that specific plea. The answer might every word of it be literally true, and the original title of the testatrix have been perfect up to April 25.

The fact that the defendant Denman tendered no proof of title in himself, except by adverse possession, should be allowed no weight in considering the mere terms of his

answer; but where the evidence only puts in issue the question of possession on the part of the defendant, it would seem that justice requires that the pleadings should not be allowed to constructively present in this court an issue of title. The title of plaintiff's testatrix not being put in issue by a direct denial, it should not be held to be put in issue simply by mere inference, through the assertions by defendant of title in himself. Such assertions should be referred to his claim of adverse possession. Defendant's allegations of title in himself, accompanied by his allegation and attempted proof of adverse possession, should be construed to have reference only to the case made by him. If he wished, under such circumstances, to put the plaintiff upon proof of the testatrix's original title, he should have made his denial explicit enough to cover in terms plaintiff's allegations of title in the testatrix. We think that the denial in the first paragraph, which is the only one in the answer as to Helena V. W. Knight's ownership, is a negative pregnant, entirely reconcilable with the proposition that Helena V. W. Knight did have title prior to the accruing of the defendant's right by adverse possession. It merely denied that both on and prior to April 25, 1898, she had a title. No inferential denial of that title by reason of a mere assertion of defendant's would amount to a demand of proof. The subsequent denials in the answer as to the right, title and possession of the plaintiff did not operate to put in issue Helena V. W. Knight's original title, because they are accompanied by special denials of the devolution of that title upon the plaintiff. It follows that there is nothing in this answer which puts in issue the original ownership of the testatrix prior to the accruing of defendant's alleged title by adverse possession. There is no call in this case to apply the rule that pleadings are to be liberally construed to accord with the theory on which evidence has been introduced. The evidence of the defendant puts nothing in issue as against Helena V. W. Knight's title. No injustice, therefore, can be done in this case by re-

quiring him to put her title in issue by express terms. There are numerous cases where a negative pregnant, having been treated as a good denial at the trial, is so treated on appeal. Here, however, the party who won on the issue presented by the evidence is seeking to justify alleged errors in the manner of submitting that issue by saying that it does not make any difference whether or not that issue was rightly tried; that the one as to the original title was made by the pleadings but was not met by the evidence, and the verdict was right on that ground. When such technical use is sought to be made of a pleading, it should itself conform to technical requirements.

This brings us to the consideration of the second question raised, namely, were the instructions given at the trial misleading as to the necessity of continuous adverse possession? We see no reason to alter the conclusion in that respect reached at the other hearing. The court by its sixth instruction, given at defendant's request, told the jury, in substance, that if the cause of action accrued to the plaintiff more than ten years before the institution of this action, then it was barred. As a matter of fact there might have been an action ten years previously for the possession of these identical premises against the same defendant; that cause of action might have been interrupted in various ways; the defendant might have removed from these premises, and simply stayed away from them. While he was away the cause of action would have been interrupted. He might have entered into an agreement with the plaintiff's testatrix to pay rent and while such promise lasted of course his possession would not be adverse. The cause of action would be at once restored in the first supposed case when he returned to the premises; in the second, when he repudiated his agreement and refused to continue the payment of rent. This sixth instruction seems to leave the whole element of continuity in the adverse possession entirely out of the statute of limitations, and make the sole test the mere question of whether a cause of action for these same premises had accrued against this

defendant ten years before the institution of the present action.

Each party in this case appeals to the conduct at the trial and what took place as establishing his own construction of the pleading. The question of title in the plaintiff is submitted by the court in the fourth instruction given on the court's own motion, but the construction contended for by the plaintiff called for such a submission of that question. While there is no denial of Helena V. W. Knight's title, there is a denial in express terms that it ever developed upon the plaintiff, and a denial of plaintiff's right of possession.

Counsel say that the plaintiff in this case could not be permitted to claim the advantage of the opening and closing which would be theirs only if their case was denied, and at the same time claim that their case was not denied. There is no force in this contention. So long as the devolution of this title from the testatrix to the plaintiff was denied, the right to open and close manifestly belonged to the plaintiff, and there can be no force in the claim that the submission of the question of plaintiff's title and right of possession to the jury shows that Helena V. W. Knight's title was treated as denied. We are constrained to think that if the action of the trial court and of the parties at the trial is to be taken as interpreting this pleading, it certainly must be taken to have interpreted them to the effect that Helena V. W. Knight's original ownership was undenied, but that its devolution was and that defendant was claiming by adverse possession.

Nor do we think that any force can be given to the fact that the first answer filed by the defendant in this case was a general denial. After filing such answer he seems to have been alarmed at the possibility of not being permitted to introduce, under such a plea, his evidence of adverse possession, and he thereupon resorted to the allegations in the answer which we have recited. The making of such an answer is manifestly an abandonment of the first one, and the court and the parties were evidently justi-

fied in holding that the trial was conducted upon the amended answer, which was the only one mentioned in the instructions or appealed to in the trial.

The proposition that the motion for a new trial and the petition in error do not raise the objection which is now made, namely, that Mrs. Knight's original title was not put in issue, seems to us also to have little force. It was not necessary that it should be so raised. The question is not now raised except by the defendant in error, who brings it forward as a reason why errors committed in the course of submitting to the jury the issue of adverse possession should now be disregarded. When the plea is raised that these errors could have no force because the verdict is right and no evidence of title was introduced, it is time enough, then, for the plaintiff in error to reply that that title was not disputed by the answer.

It is recommended that the former conclusion be adhered to.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former conclusion is adhered to.

FORMER DECISION ADHERED TO.

OMAHA BRIDGE & TERMINAL RAILWAY COMPANY V. DAVID C. WHITNEY, JR., ET AL.*

FILED APRIL 9, 1903. No. 12,710.

1. **Use of Land by Railway Company: CONSENT OF OWNER.** Where a railway company, having no estate in land, places on it, with the knowledge and consent of the owner, an embankment, riprapping, ties and rails, and maintains and uses such track for its own purposes, without objection from the owner, such track remains the property of the railway company in the absence of any agree-

* Rehearing allowed. Judgment modified. See opinion, p. 399, *post.*

ment to the contrary and of any intention on its part to make such track appurtenant to the real estate.

2. **Implied Agreement.** Under such circumstances, an agreement by the licensor that the track shall remain the property of the railway company is implied. *Fischer v. Johnson*, 106 Ia. 181.

3. **Railway Company:** AGREEMENT: DEED: ESTOPPEL. Where the railway company, before constructing its track, has settled a dispute as to the boundaries with the owner of the land, by the terms of which settlement deeds are to be made by each party to the other of their respective holdings, the fact that such deed is not made until after the construction of the track, and by its terms conveys the land "and all appurtenances thereto belonging," will not prevent the railway company or its grantees from showing, as against the owner and his grantees with notice, the true state of the title, when the track was built; nor will such deed carry the ownership of the tracks, they not being expressly mentioned, and not being legally appurtenant to the owner's estate.

4. **Condemnation Proceedings:** DAMAGES: VALUE OF TRACK. In condemnation proceedings by the grantee railway company to obtain a right of way over the land, the value of the track should not be added to the owner's damages for the taking of the land, the railway company having remained continuously in possession, since the first construction of the track by itself and its grantor.

ERROR to the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed in part.*

John C. Wharton, William Baird, Edgar A. Baird and *Clair J. Baird,* for plaintiff in error.

Frank H. Gaines, James E. Kelby and *John A. Story, contra.*

HASTINGS, C.

The question in this case is the ownership of certain railroad embankments, riprapping, rails and ties of an agreed value of $3,979, which are upon the premises in East Omaha sought by the plaintiff in error to be condemned for its right of way. The track was originally laid in 1889 and 1890 by the Union Pacific Railroad Company. The riprapping was placed in 1891, and the Union Pacific Company operated the line until March, 1894, when the

plaintiff in error acquired it by assignment from the Union Pacific Company, through the Nebraska Construction Company, under a decree of the United States court, in connection with other portions of the same line, and in consideration of the sum of $85,000. In accordance with this decree, and upon the payment of the $85,000, the Union Pacific Company turned over to the bridge and terminal company about seven miles of trackage, and the bridge and terminal company went into possession, and have used and occupied it ever since. Neither the Union Pacific Company nor the bridge and terminal company made any claim to possessing the right of way over the premises on which this particular portion of track was located, and in May, 1900, the bridge and terminal company filed in the county court of Douglas county its petition, alleging that it was duly incorporated under the laws of the state of Nebraska as a railroad company, and for the purpose of constructing a railroad bridge over the Missouri river, and operating a railway line between the cities of Council Bluffs and Omaha, and that a part of its road was located over the land in question in these proceedings. Appraisers were appointed, who returned an assessment of the value of the land sought to be taken. An appeal was taken from their assessment by the owners of the lands, and a hearing had, and the value of the lands taken was assessed at $9,614.50. From this finding as to the value of the lands no appeal has been taken. The question as to the ownership of the railway trackage over it, for the securing of the location for which the condemnation proceedings were taken, was, by stipulation, separately tried, and the court found that the railway trackage, embankments and riprapping, of the agreed value of $3,979, was the property of the owners of the land, and not of the bridge and terminal company, and added to the damages returned by the jury the sum of $3,979. A motion for new trial having been overruled, from this last portion of the judgment error proceedings were taken, and the question now in this action is simply the ownership of this partic-

ular portion of the railroad track, embankments and riprapping.

The title of the defendants in error to these premises is by virtue of deeds from the Council Bluffs & Nebraska Ferry Company and from Anthony W. Street, its trustee, made in December, 1892. Just previous to these conveyances, and as preliminary to them, the Union Pacific Company made in December, 1892, to Street, a deed reciting that there had been certain controversies between the Union Pacific Railroad Company, the East Omaha Land Company, the Council Bluffs & Nebraska Ferry Company, and Anthony W. Street, its trustee, with respect to the ownership of certain lands in the county of Pottawattamie and state of Iowa; that in a suit pending between the said parties in the circuit court of the United States for the district of Nebraska, to settle their respective interests in such real estate, the parties had settled their respective interests in such real estate, and determined the portions belonging to each, and in such settlement the Union Pacific Railroad Company had agreed to convey these premises in question to such persons as the ferry company and Street, its trustee, should designate, and that said Anthony W. Street, trustee, had been designated as such grantee; that the Union Pacific Company, therefore, in consideration of the sum of $1 and of the premises aforesaid, "granted, bargained, sold, demised and quitclaimed, and by these presents does grant, bargain, sell, demise and quitclaim," to Street, the lands on which this railroad track is situated. The deeds of the ferry company and of Street to defendants each contained the proviso, "subject also to right of way, if any, fifty feet wide, now occupied by tracks of Union Pacific Railroad Company."

It is clear that the railway company constructed this track, and did so after the settlement of 1889. It is clear that both the ferry company and Street were aware of such construction, and of the presence of the railroad track upon these premises, and the continuance in their use by the Union Pacific Company. They discontinued their in-

junction proceedings against such use of their land as a part of the settlement of 1889. The assignment of the Union Pacific Company's interest in this trackage to the East Omaha Land Company was pursuant to a decree of court, as stated before, and on the same day the East Omaha Land Company assigned its right in the trackage to the Nebraska Construction Company, which at once assigned to the bridge and terminal company, plaintiff in error.

The question presented, therefore, is simply, whether or not, after the settlement of the "divers controversies and disputes" between the Union Pacific Company and the East Omaha Land Company and the Council Bluffs and Nebraska Ferry Company, in 1889, and after the making of the deed by the Union Pacific Company in 1892, it still retained its ownership of 1,251 feet of trackage, embankments and riprapping on this land which purported to be conveyed by the deed. If the deed conveyed the track to Street, as it assumed to convey the land on which it was situated, then Street's deed to defendants carried the track to them, and their judgment for its value is right.

It is true that neither party will quite admit that this is the sole question in the case; or, rather, after doing so, each seeks to indicate a line of retreat. The plaintiff, after admitting that this land in question is embraced within the limits of the specific description in the deed of the Union Pacific Company to Street, urges that it is excluded by the recital that the conveyance is of certain lands "in Pottawattamie county, in the state of Iowa," whereas these lands are in Nebraska. It seems unnecessary to discuss this contention. The specific description will control the general recital. There seems no doubt as to the intention of the parties as gathered from the instruments and the facts to which it is to be applied.

The defendants urge that the decree under which the trackage was assigned to the plaintiff, relates to trackage on "lands of the East Omaha Land Company"; that the decree found the $85,000, in consideration of which the

assignment was made, was the amount of a lien held for expenditures by the Union Pacific Company on lands of the East Omaha Land Company in laying tracks under a contract for the latter company's accommodation. But they admit that this track in question is specifically included in the description. They admit that the track was laid under the Union Pacific's contract with the land company, which included an agreement by the latter to furnish right of way. The decree and assignment were evidently a settlement of the entire transaction, and included in specific terms the transfer of any rights the railroad company had in this piece of track. In the case of this decree and assignment, as in that of the deed to Street, the specific description and the intentions of the parties should control a general recital.

One other point made by the plaintiff, aside from the construction of this deed, should also be noted. This is the claim that in certain cases where a railroad company has without rights entered upon land and put down its track, on subsequently entering proceedings to condemn it, takes the premises as they were when it entered upon them. Its right of eminent domain clothes it with a *quasi* public character, and the evident use and purpose of the taking prevents any presumption of an intention to dedicate as a part of the owner's realty the things attached to the soil. It seems clear that such is not this case.

In this case, the track was laid under an agreement with the East Omaha Land Company and for its accommodation, and not with a view to acquiring any right of way by the railroad company. The right of way was to be furnished by the land company, and the railroad retained the ownership of its track, as the $85,000 decree shows. It would not seem that under such circumstances the right of seizure for public purposes would apply.

In any event, any inchoate right derived from taking the land and laying track upon it would pass under this deed of December, 1892, to Street, if the terms of the deed and the circumstances, taken together, indicate such an inten-

tion. We, therefore, do not hesitate to say that the sole question is whether or not the track in question went to Street, as trustee, by the railroad company's deed of December, 1892. If it did, of course, there is no question that it went to defendants by Street's deed to them, notwithstanding the express proviso in Street's deed to them, "subject also to right of way, if any, over said premises fifty feet wide, now occupied by tracks of Union Pacific Railroad Company." On the other hand, it seems that this proviso was ample to preserve to the railroad company and to its grantee, the plaintiff, any rights which, under all the circumstances, the railroad company retained as against Street.

The trial court in this present case held that the deed conveyed to Street all the rights of the Union Pacific Company, including everything which was attached to the soil, inasmuch as the deed made no reservations. Plaintiff in error claims that the deed was made merely pursuant to the settlement of 1889, and that the track was laid after the settlement was completed; that the railroad company intended, as the recitals of the deed and the circumstances of its making show, merely to acknowledge that it had no interest in the land, and did not mean, and was not understood to mean, to abandon its claim to the trackage, embankments and riprapping, which had been built at the Union Pacific Company's expense, with Street's full knowledge and concurrence.

The identical question here was before the Iowa supreme court in *Van Husen v. Omaha B. & T. R. Co.*, 118 Ia. 366, 92 N. W. 47. The portion of this same track really lying in the state of Iowa was held to have passed to Street under the railroad company's deed of December, 1892, and from him to the defendants. This conclusion is reached on the ground that the description in the deed does not disclose any ambiguity; that its terms are clearly sufficient to include the track, embankments, and riprapping, which are all appurtenant to the land, and therefore no evidence can be adduced to show any other intent than to include them.

It is held that the embankment thrown up out of the soil itself was certainly a part of the real estate. The ties and rails and the riprapping are distinctly and strongly attached to the land. It is by the Iowa court conceded that where such materials are attached by one not the owner, they do not, in a proper case, become part of the realty. Here it is found by the Iowa court that they do, because they must, as against one who conveys that land together with all "appurtenances hereunto belonging," be held to pass in the absence of any reservation.

The Iowa court grants the doctrine that one who, by sufferance of the owner, erects improvements for his own use on the land of another, retains their ownership in the absence of any restricting condition, and may remove them, or, if a railroad company, may institute condemnation proceedings, and acquire the land without paying the owner, who never had a right in them, for their value. But it finds that such doctrine introduces no reservations into a deed. It finds the question at issue a very narrow one, and wholly settled by the doctrine of estoppel. It says that the railroad company's deed, if it did not convey this roadbed, conveyed nothing, and neither it nor its grantees should be permitted to claim this. It concedes that but for the estoppel in this deed the Union Pacific Company and its grantees would be at liberty to claim this embankment, track and riprapping so far as it consists of material brought there by the company, and is the result of its efforts, as personal property. *St. Louis, K. & S. W. R. Co. v. Nyce,* 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241; *Justice v. Nesquehoning V. R. Co.,* 87 Pa. St. 28.

The Iowa court finds the reservations in the deeds of the ferry company and of Street of no importance, as they neither recognize nor affirm a right in the Union Pacific Company. Evidently, they are of no importance if the main thesis of the Iowa decision is allowed, namely, that the deed of 1892 left no rights in the Union Pacific Company as regards this portion of the tracks it was using and continued to use. If, however, there was no such estoppel

as regards Street wrought by the deed to him against the railroad company's claiming an ownership of the track, it would seem that the acceptance of these subsequently made deeds would prevent defendants from claiming more rights than he had.

We entirely agree with the Iowa court that the question here turns upon the effect of this deed. We entirely disagree as to the particular estoppel which defendants may rely on. A deed which recites that it is made in consideration of a previous agreement that the maker should be deemed to have no title to the lands purporting to be conveyed, can hardly constitute an estoppel against the grantor's asserting, as against the grantee, that between the time of making the agreement and that of executing the deed he had no title, especially when in fact he never had one.

The agreement of 1889 does not, in terms, say that the railroad company had no title. It does, however, recite that in settlement of litigation over the title and boundary of lands the three parties have mutually agreed to convey certain portions to each other. The making of this agreement certainly was an abandonment of any claim or title on the railroad's part to this land. As against Street, who was a party to the agreement, it was certainly at liberty thereafter to say that any improvement put by it subsequently on the land with his knowledge and consent was not so placed by it as owner, and did not become appurtenant to the soil.

Defendants are in no better position than Street. The railroad company was in possession of its improvements. In this state it has been held that the continued possession of a grantor is notice to the world of any interest he still retains in the land, even contrary to the express recitals of his deed. *Kahre v. Rundle,* 38 Neb. 315.

The reservations in the deeds of defendants expressly told them that their grantor was not covenanting against claims of the railroad company, and that defendants were getting only such rights as Street and the ferry company

actually had to that portion which the railroad company was occupying.

We are constrained to think that as against this deed, which recites that it is made pursuant to and in consideration of an agreement relinquishing all title to this land, which was made in 1889, the railroad company was at liberty to set up its ownership of improvements made by Street's sufferance after the agreement, although they were not reserved. They were made at a time when the railroad company was recognized by all parties to have no interest in the land. They were made distinctly for the maker's own purpose, and remained wholly under its control. While physically appurtenant to the soil, they were not so legally, and consequently did not pass with the subsequent deed made pursuant to the settlement, in which they are not in express terms either included or reserved. That Street so understood is clear from his reservations, which apprised the defendants that these were the railroad company's tracks. To hold that this deed to Street estops any one from asserting that between 1889, when the agreement was made, and December, 1892, the date of the execution of the deed, the railroad company held no title to this land, is to "stick in the bark" of the doctrine as to estoppel by deed. This deed is anything but an assertion of title on the railroad company's part during that time. Whatever effect is to be given to the surrounding circumstances and the situation of the subject matter of a deed in determining the intentions of its parties, it is clear that the ownership of these improvements must become legally appurtenant to Street's estate in the land before his conveyance to defendants can of itself vest them with such ownership. We are clear that it never became so appurtenant, and that there are no facts shown in the record that estop plaintiff from so claiming in this proceeding.

It is recommended that so much of the trial court's action as added the agreed value of these improvements, to wit, $3,979, to the judgment, be set aside and vacated, and that the judgment be affirmed for the amount found by the

jury as the value of the 2.87 acres of land taken, to wit, $9,614.60.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, so much of the trial court's action as added the agreed value of these improvements, to wit, $3,979, to the judgment, is set aside and vacated, and the judgment affirmed for the amount found by the jury as the value of the 2.87 acres of land taken, to wit, $9,614.60.

AFFIRMED IN PART.

The following opinion on rehearing was filed April 21, 1904. *Former judgment modified:*

1. **Eminent Domain:** AWARD: VALUE OF IMPROVEMENTS. Ordinarily, when a railroad company enters upon land of another and constructs a road-bed and tracks thereon, and occupies the land for right of way purposes, and thereafter condemnation proceedings are had to appropriate the land on which the road-bed is constructed, under the law of eminent domain the landowner can not in such proceedings have the value of such improvements included in his award.

2. **Agreement With Third Parties:** PRIVATE USE. Where, however, such improvements are made on the land of another under a contract, arrangement or agreement with third parties, to be used for private purposes, the law relative to the seizure of property for a public use does not apply.

3. **Determination of Rights.** The rights of parties in such a case are to be measured and determined by legal principles generally applicable to improvements in the nature of trade fixtures by a tenant or licensee in the possession and use of the real estate on which the improvements are made.

4. **Road-bed and Track:** DEED. A road-bed or embankment built out of the soil, and with riprapping for its protection, on which ties and rails are laid for use as a railway-track, is not an improvement placed upon land in the nature of a trade fixture, but is a part and parcel of the land itself, and where there are no exceptions or reservations will pass by a deed of conveyance as does the real estate on which constructed.

5. **Estoppel by Deed.** Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the

face of such instrument, by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance. *Hagensick v. Castor*, 53 Neb. 495.

6. **Eminent Domain:** DEED: ROAD-BED: TIES AND RAILS: FIXTURES. A railroad corporation, under an agreement with a land company to furnish the latter certain trackage facilities, entered upon land belonging to a third party and constructed a road-bed and railway-tracks thereon, and occupied and used the same as a licensee. Afterwards negotiations were entered into for the sale of the real estate, a part of which was thus occupied, by the owner to a purchasing syndicate. During the negotiations a deed for the land on which the improvement was made was requested and obtained from the railroad company, which was executed and delivered so as to consummate the sale, and in pursuance of a prior agreement with the landowner, in settlement of existing controversies over land boundaries, and which conveyance contained no reservation or exception, and ran to the owner, who in turn conveyed to the purchasing syndicate. *Held*, (1) That in proceedings begun thereafter by those claiming under and through the railroad corporation to condemn a right of way along where such embankment was constructed, the title to the embankment or road-bed thus constructed had passed by such conveyances, and that the owners of the land were entitled to recover the value of the road-bed in such proceedings; (2) that the ties and rails constituting the railway-track had not, under the circumstances disclosed in the record, lost their character as personal property in the nature of removable trade fixtures, and remained the property of the railroad company and those claiming under it, the value of which should not be included in the award to the landowners in such condemnation proceedings.

HOLCOMB, C. J.

This cause is submitted on rehearing. The object of the action begun in the lower court was to condemn real estate, for right of way purposes, belonging to the defendant in error, a syndicate owning land in East Omaha. On the right of way sought to be condemned, there existed at the time an embankment of earth thrown up for a road-bed, with riprapping to protect it from the ravages of the Missouri river, and overlaid with ties and rails, thus con-

stituting a completed railroad-track. The road-bed had been constructed by the Union Pacific Railroad Company under an agreement with the East Omaha Land Company, for the purpose of furnishing trackage facilities in that vicinity. The bone of contention is the ownership of the road-bed thus constructed, and whether in the condemnation proceedings the plaintiff in error, the Omaha Bridge and Terminal Company, shall be obliged to pay to the owners of the real estate the value of the improvements thus constructed, which has been agreed upon by stipulation, in addition to the value of the land taken, as if no such improvements had been placed thereon.

In the former opinion, formulated by one of the commissioners, it was held that the syndicate was not entitled to recover the value of the road-bed, ties and rails overlying the same, as an element of the damages sustained by reason of the appropriation of the real estate. *Omaha B. & T. R. Co. v. Whitney, ante,* p. 389. The conclusions heretofore reached run counter to an opinion of the supreme court of Iowa shortly before handed down in a case between the same parties and involving an identical state of facts, and calling for the application of the same principles of law. *Van Husen v. Omaha B. & T. R. Co.,* 118 Ia. 366, 92 N. W. 47. The anomalous condition in which the litigants find themselves by reason of these two decisions does nothing more than to perhaps emphasize the fact that the courts sometimes err, as does fallible, mortal man in other fields of human activities. Because of the different conclusions reached by the two opinions referred to, we have felt it incumbent upon us to give to the controversy more than the usual degree of investigation and consideration.

Our attention is earnestly challenged by counsel for owners of the land to the proposition that in the former opinion there was a failure to give to the deed of the railroad company to their immediate grantor, which was executed after the railroad-track had been constructed by that company, the weight and importance, the nature and

character of the instrument and the circumstances surrounding its execution and delivery, demanded. It is urged, with apparent sincerity and much plausibility, that the legal status of the parties is to be controlled and determined almost wholly by this instrument, which, it is asserted, conveyed unreservedly and without exceptions or qualifications the full and absolute right and title of the railroad company in and to the disputed property, and every part thereof, to the grantor of the syndicate, and that the railroad company and those claiming under and through it, including the bridge company, the defendant in error, are estopped and can not be heard to say that the railroad company did not have title to the road-bed when it made its said deed of conveyance, nor to deny that all interest and property rights therein passed by such conveyance. It is urged upon us that at the time of the negotiations for the purchase of the land by the syndicate, a part of which it is sought to have condemned, and on which the road-bed is constructed, before the negotiations were consummated, and as a condition upon which the sale was made, a conveyance such as was made was demanded by the syndicate; and that when executed in pursuance thereof, without exception or reservation, the grantees relied upon the deed as conveying the full and absolute title to the real property included therein, and every part thereof, and the appurtenances thereunto belonging, and that, relying upon the muniments of title thus shown, they purchased the real estate, the embankment, and riprapping thereon, constituting the road-bed now in controversy, and that the railroad company and the bridge company, as its successor in interest, are, under the circumstances, barred and estopped from denying that the railroad company had no title to the real property thus attempted to be conveyed, and did not in fact convey its title and interest herein, including the said embankment or road-bed.

The former opinion proceeds upon the theory that the railroad company had constructed the road-bed in controversy under an agreement with the land company for

trackage facilities on lands not its own, and that such track, including the road-bed or embankment, notwithstanding the deed mentioned, remained the property of the railroad company, and that the improvement thus made, which in fact was appurtenant to the real estate on which located, yet legally it was not so appurtenant, and remained the property of those constructing it, and was owned and occupied by them as a licensee under an implied agreement with the owner of the land that it should remain the property of the railroad company, and because thereof, in the condemnation proceedings, the value of the track, including the embankment and riprapping, could not be recovered by the owners of the realty as a proper element of damages, in determining the value of the land taken for right of way purposes. It is also held that the railroad company never having been in fact the owner of the real estate described in the deed of conveyance, or, if it ever was, it had, before the construction of the road-bed in controversy, relinquished its right and title thereto under an agreement hereafter to be noticed, so that its conveyance by deed of the real property on which the track is constructed amounted to no more than a release and quitclaim of title, and that under all the circumstances it, or those claiming through it, were not estopped from denying that it had title, nor from showing the true situation with respect to the ownership and title to the real property, and to the improvements placed thereon by the construction of the railroad-track.

The facts, briefly stated, as gleaned from the record, are these: In 1889 the land now owned by the syndicate was claimed by one Anthony W. Street for himself, or as trustee for the Council Bluffs & Nebraska Ferry Company. At that time the railroad company, under a contract, agreement or arrangement with the East Omaha Land Company, undertook to furnish for the latter company certain trackage facilities to and over its own lands in East Omaha; the land company to furnish title to the lands upon which the tracks were to be laid. The boundaries

of the lands over which the tracks were to be constructed appear to have been in controversy. When construction work was begun, Street and the ferry company began an action to enjoin the railroad company from constructing a road-bed and laying its tracks on the lands claimed by the former, and at the same time began an action in the federal court against the land company, the object of which was to have adjusted the disputed boundaries, and to quiet title to the lands claimed by the plaintiff in that action. From what followed, it is obvious that a tract of real estate lying in East Omaha, on each side of the Iowa and Nebraska boundary line, was claimed in separate parts by the railroad company, the land company and the ferry company, or Street as its trustee. It is not made to appear what particular tract included in the whole was claimed by each or either of the contestants. An agreement was entered into by the three parties whereby a settlement and final adjustment of all the controversies growing out of the conflicting claims was had, and for an adjudication of which the suits mentioned were instituted. A duly executed contract was entered into, under the terms of which certain portions of the real estate in controversy, as therein described, were by the others to be conveyed to each of the respective parties, the suits dismissd, and a release given of all damages on account of the commencement of the same. The land company and the ferry company agreed to make their separate deeds for certain lands therein described to the railroad company. The railroad and the land company agreed to make their separate deeds to the ferry company of certain of the lands as therein described, this part of the agreement to convey describing the land on which the road-bed and embankment now in controversy was constructed. The land company agreed to make its deed to other of the land in controversy to the ferry company or a trustee for the use and benefit of its stockholders, and the ferry company agreed to make to the land company a deed for certain other of the land in controversy; the agreement for these several deeds of convey-

ances manifestly covering and including all of the lands in controversy to which either of the parties laid any claim of title when the injunction suit and the suit to quiet title were begun. After the execution of the agreement mentioned, the railroad company resumed the construction of the road-bed and track under its agreement with the land company, the part in controversy being constructed on the land which by the tripartite agreement belonged to and was to be conveyed to the ferry company or Street, its trustee; such construction work continuing from time to time until 1890, when it was completed, and since which a railroad-track has been maintained thereon. In 1892 Street sold the land to the syndicate, who are defendants in error. In consummating the sale a deed was required from the Union Pacific Railroad Company, which was executed and delivered to Street, and Street, in turn, conveyed to the syndicate. At the same time the East Omaha Land Company conveyed, by deed in all essential features the same as the railroad company's, the land in controversy, with other lands, direct to the purchasing syndicate. The rights of the syndicate are, therefore, such as it acquired by its purchase from Street, which included whatever title he held in his own right or as trustee, including those rights which he acquired from the railroad company by its deed above referred to, and also whatever rights were transferred by the deed of the land company to the syndicate, executed and delivered at the same time.

Thereafter, in 1894, by a decree of the federal court in an action on the contract between the land company and the Union Pacific Railroad Company, the land company was adjudged to be the owner of the improvements made by the railroad company in its construction of the trackage facilities referred to under its contract with the land company, subject to a lien in favor of the railroad company for $85,000, which was paid by the land company, which thereupon became possessed in its own right of the property in controversy in that action. The decree, as we understand it, could not undertake to nor did it adjudicate title to

lands or any interest therein, but only those property rights arising out of the construction of the railroad-tracks under the contract between the litigants, which was treated as personal property in the nature of improvements or fixtures on real estate. The syndicate was not a party to the action, and, of course, not bound by the adjudication, so far as its rights and interests in the property are concerned. The bridge company's rights in the premises were acquired from the East Omaha Land Company after the litigation last referred to.

What, then, in view of what has been said, are the legal rights of each of the litigants, how are they to be measured, and what legal principles may we properly invoke in the determination of the controversy?

The bridge company contends that a fair construction of the several contracts of the parties interested, with a view of ascertaining the true intention and meaning thereof, leads to the conclusion that the railroad embankment, as property, has never passed to the syndicate owners of the land on which located, and that such improvements were at the time of the commencement of the condemnation proceedings in the nature of trade fixtures, which did not pass by the conveyances under which the syndicate claims, but were acquired by the bridge company by the several transactions referred to, and as such were no part of the real estate sought to be condemned, and for the payment of which the company is not legally liable. On the contrary, the syndicate contends that such property was a part of the real estate purchased, or appurtenant thereto; that it is a purchaser for value, relying, as it had the right to do, on the terms of the grant from Street and his immediate grantor, the railroad company, as well as the deed from the land company, all of which were without reservation or exception, and that it is in the attitude of a *bona fide* purchaser, without notice, of the real estate, including the appurtenances thereunto belonging, which included the property in controversy. It is said in the former opinion, and, as we think, correctly, that the railroad company,

in entering upon the land and constructing the road-bed and tracks under the agreement with the land company, was not doing so with a view of exercising any of its powers under the law of eminent domain. Its operations in regard to such improvements were the same as those of a natural person, and any rights it acquired thereby for itself or for the land company are to be gauged and determined as though the improvement was of some other character, and to which the rules of seizure and appropriation of property for public purposes had no application. The rule, no doubt, is that a railroad company, when it enters upon the land of another, constructs a road-bed, and places its ties and rails thereon, and occupies the land for right of way purposes, has created property which would inure to the benefit of and belong to the company thus constructing it, or to its grantees, and a landowner could not, in condemnation proceedings, have the value of such work and improvement included in his award.

It is obvious in this case that the railroad company, when it entered upon the land which under the tripartite agreement belonged to Street, and constructed the embankment and riprapping constituting the road-bed in controversy, did so as a licensee. The consent of Street, the owner, to the making of such improvements, will, under the circumstances, be inferred. An implied agreement arises, by operation of law, to the use of the improvement thus made during the existence of the license, and to a removal thereof, in the event the property is susceptible of removal, at the termination or revocation of the license. Had the agreement of 1889 constituted the executed contract between the parties thereto, or had deeds in pursuance thereof been at once executed and delivered, it seems to us entirely clear, upon principle and authority, the right of property in the road-bed and tracks would remain in the parties constructing, using and occupying the same, and would not have passed by the deed evidencing their title to the real estate on which located, and should not be included in the award for the land taken in the con-

demnation proceedings in the case at bar. In the deed from Street to the syndicate is found the following recital: "subject also to right of way, if any, over said premises fifty feet wide now occupied by tracks of Union Pacific Railroad Company." This was sufficient to put the purchasers on inquiry as to the rights of the railroad company to property then occupied and in use by them, whether as a licensee or otherwise, and the rights of the grantees would be no greater than those of their grantor, Street. But no such deed had then been executed. The railroad company ostensibly had some rights to the improvements and to the occupancy of the railroad-tracks, notice of which was given by its possession and use thereof. The prospective purchasers had knowledge of these facts. They refused to buy until the railroad company should convey to them or their grantor all of its rights and title to the land and its appurtenances. Thereupon the deed was executed and delivered by the company, purporting to grant all the real estate described therein, together with all appurtenances thereunto belonging. It is obvious that the syndicate relied upon the conveyance from the railroad company to their grantor as passing title to the very property that is in controversy. This is testified to positively by the two chief actors in the negotiations, one of whom represented the purchasing syndicate, and the other the sellers. Again, it is testified that because of some slight inaccuracy in description, the deed executed by the railroad company was returned to it for correction. It was then remarked by the legal representative of the railroad company that there was no particular objection to making a new deed, but, it appearing that no reservation of a right of way had been made in the deed executed, the company ought to reserve the right of way in the requested new deed. The representative of the owners of the land, not wishing that any reservation should be made in the deed, after some further talk, accepted the old deed as executed, because, as he puts it, the representative of the syndicate would not take the land with the railroad dividing it. The con-

veyance of Street to the syndicate, in which the deed recited that it was made subject to a right of way, if any, fifty feet wide, can scarcely mean more than that the grantor was desirous of absolving himself from any possible liability or litigation in consequence of the land which he was conveying being encumbered by the railroad tracks. It is apparent that whatever title thereto which passed by the deed of the railroad company to Street of necessity inured to the benefit of the purchasing syndicate, who might rightfully look beyond their own deed, and to that instrument, in determining the nature and extent of the title secured through the then owner. The proof further shows that the bridge company, several years after the purchase by the syndicate, on more than one occasion, by correspondence with the owners of the real estate, disclaimed any right or interest in or to the road-bed or embankment, and offered to remove therefrom the tracks—that is, the ties and rails—whenever requested so to do, upon the giving of sixty days' notice, or in the alternative, to, in the exercise of eminent domain, acquire title to a right of way on which the property was located by proceedings in condemnation.

From what has been said we are not prepared to concede the correctness of the position of counsel for the bridge company to the effect that a fair construction of the contracts under which the parties claim, in the light of surrounding circumstances, and with a view of ascertaining the true intentions of the parties thereto, warrants the inference that the property made up of the road-bed or embankment has never lost its character as personalty in the nature of trade fixtures, and was never acquired by the several conveyances of real property under and by virtue of which the syndicate claims title. As to the deeds of conveyance executed by the railroad company and by the land company in the execution of the prior contract, and to bring about a consummation of the sale of the lands therein described to the purchasing syndicate, bearing dates December 15 and 16, 1892, they both purport to

convey all present interest in the realty described therein, and the appurtenances thereunto belonging. They grant, bargain, sell, remise and quitclaim the real estate and appurtenances to the grantees and their heirs, so that neither of the grantors, nor any person claiming in their name and behalf, shall or will hereafter claim or demand any right to the premises or any part thereof. And it is especially covenanted that the premises are free from any incumbrances placed thereon by the grantors, and that they covenant to warrant and defend the title against any and all persons claiming under or through them. There were no reservations or exceptions of any character contained in either of the two deeds. The consideration named was the premises recited in the prior agreement and its fulfillment, and the sum of one dollar. The consideration, of course, is open for inquiry by parol testimony, but not so the written contract in respect of the property conveyed, and the nature of the title and estate passing to the grantee. The written contract must, in respect of these matters, speak for itself. At the time of the execution and delivery of the deed, the improvements in controversy were upon the land therein described.

It is contended with much earnestness that the deed of the railroad company is to be construed in the light of the prior agreement, of which it became the executed contract, and as being merely a fulfillment of that agreement, and as passing only any apparent or possible interest and estate in the land held by the railroad company at the time of the making of such agreement, and nothing further or greater, and that it was never in the contemplation of the parties that the road-bed and tracks passed by the conveyance, but, on the other hand, they remained and were in fact personal property belonging to the company, and in its use and possession as a licensee, with an implied agreement of the right of removal on the termination of the tenancy. We can not but regard the conveyance as in fact and in legal contemplation transferring to the grantee named the after acquired interest of the railroad company of all

that part of the improvements placed on the real estate in its construction of the road-bed, as a licensee, which may fairly and properly be denominated real estate or appurtenances attached thereto. The deed, as made, and under the circumstances, performed the office of an executed contract in fulfillment of the prior agreement, and in the eye of the law, was a present conveyance of after-acquired rights in the real estate conveyed. The situation and legal relations of the parties affected by the conveyance were, as it seems to us, the same as though the agreement had been executed by the making and delivery of a deed in pursuance thereof, and thereafter the railroad company had entered upon the land as a licensee, and had constructed the embankment in controversy, and, upon the negotiations for the purchase of the land, the purchasers demanded and were given an instrument of conveyance such as was given in this case. Under such circumstances, can it be doubted that the railroad company and those claiming in privity with it, would be estopped from claiming that title to the road-bed did not pass by such conveyance? We think the views expressed by the Iowa supreme court as to the nature of the property denominated the road-bed or embankment are correct, and should, in a large measure, determine the question of its inclusion or exclusion in the execution of the deed by the railroad company. "As to the embankment itself," says that court, "it was not a fixture, no more so than a dyke or levee or a well put on the land. It was part of the land itself, and undoubtedly passed by the deed. As to the riprapping, we think the same rule applies." *Van Husen v. Omaha B. & T. R. Co.*, 118 Ia. 366, 378. It is true that, in a sense, and in a proper case, a road-bed constructed on land belonging to another, in an action to condemn a right of way, might be said to be not legally a part of the land, or at least not such part of it as would give to the owner the right to have its value included in the award to which he was entitled for the appropriation of his land for public purposes. As we have seen, however, in the case

at bar, this rule has no proper application. Nor are we prepared to say that, upon principles analogous to the one just adverted to, when an improvement such as the one under consideration had been made by one acting as a licensee, and used, with the implied consent and agreement of the owner, as his own, and later on such licensee, or those in privity with him, were authorized to invoke the powers of eminent domain, and appropriate as a right of way, or for other public use, the land upon which the improvement was constructed, that, in awarding compensation for the appropriation of such land, the improvement so made and used and the value thereof could properly be included or considered in estimating the damages sustained. In the present case, however, we have yet another and a different question to deal with. The deed of the railroad company was made after the improvements were constructed by it. By no manner of reasoning can it be said that the terms of the grant did not include and convey the embankment on the land described therein, either as a part and parcel of the realty or as an appurtenance thereto. It must, for obvious reasons, be construed according to its terms and date. To do otherwise is by parol to engraft exceptions and reservations thereon which is clearly inadmissible. *Smith v. Price,* 39 Ill. 28; *Van Husen v. Omaha B. & T. R. Co.,* 118 Ia. 366. Even if the deed had been executed and accepted in performance of the prior contract, with no other element properly to be considered, the contract itself became thereby *functus officio,* and thenceforth the rights of the parties are to be measured and determined by the deed, and not by the contract; the presumption being that the deed gives expression to the final purposes of the parties. *Griswold v. Eastman,* 51 Minn. 189, 53 N. W. 542; *Chloupek v. Perotka,* 89 Wis. 551, 62 N. W. 537. The Union Pacific Railroad Company, after having constructed the embankment in controversy, and ostensibly owning or having some interest therein, and a right to the use and occupancy thereof and the land out of which the same was con-

structed, by its deed conveyed its title and interest unqualifiedly, and can not now, in the face of the solemn asseverations of title and ownership or those in privity with it, be heard to say that it had no title to such land, and conveyed nothing by such instrument. The doctrine of estoppel by deed would be of no value if such could be done. This court has held: "Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument by way of recital or averment, either in express terms or by necessary implication, that he is seized of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance." *Hagensick v. Castor,* 53 Neb. 495. This utterance is in harmony with the views expressed by the supreme court of Iowa, wherein it is said: "The doctrine of estoppel is a salutary one, and to establish the rule contended for by appellee would be to destroy the security of all land titles, and permit grantors, after solemnly affirming that they had title, to insist that they did not, although subsequent good faith purchasers may have parted with their money, as in this case, on the strength of the integrity of the title. There are, as it seems to us, no two sides to this question." *Van Husen v. Omaha B. & T. R. Co.,* 118 Ia. 366, 378.

We conclude, therefore, that the property denominated the road-bed or embankment on the land described in the conveyance of the railroad company, passed to the purchasers thereof from Street, the grantee therein named, and that the value thereof may, in the condemnation proceedings, be recovered as a part of the compensation justly due for the appropriation of the land on which constructed for right of way purposes.

As to the ties and rails on the embankment, which constitute the track proper, we are satisfied with the conclusion reached in the former opinion. These are more distinctively personal property. They have more of the

characteristics of personal property than of real property. Whether or not they passed with the conveyance of the land, must, we think, be determined by the nature of the transaction, and the circumstances surrounding the same. They are undoubtedly a species of property easily removable at the termination of the tenancy without material injury to the freehold. The railroad company, long after the purchase of the land, and until the proceedings in condemnation were begun, retained the possession and use of these tracks, and, of course, in a sense, the entire right of way, without objection and with the implied assent of the landowners. There may have been, and probably were, during this long period, changes, improvements and repairs. Under all accepted rules governing the rights of a licensee who has placed improvements in the nature of trade fixtures on real property, which, by agreement of parties, are to retain their character as personal property, an implied agreement of the right of removal is raised; and of rights of this character, when applied to this particular species of property, the purchasers of the land, we are satisfied, acquired no title or interest therein. They were not buying railroads, but real estate. What they contracted for was all the real estate described in their deed, with appurtenances properly belonging and attached thereto.

Respecting this subject it is said in *Rowand v. Anderson,* 33 Kan. 264, 268: "It may be conceded that a party who, under a parol permission or license, places upon the land of another a permanent improvement, with the right, when he desires, to enter and take it therefrom, may exercise that right at any time before the permission or license is revoked by the landowner, and probably he has the right to enter to remove a fixture within a reasonable time after the revocation; and it would seem that any subsequent vendee who purchased the land with notice of such parol agreement or license, and of the interest of the parties in the fixture, would be bound by such agreement. But we think this doctrine can not be carried to the extent

of binding or affecting injuriously third parties to whom the land has been conveyed without reservation, and to whose notice the parol license has not been brought." To the same effect it is said in an opinion by the supreme court of New York: "It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and can not in general be changed by the convention of the parties. Thus it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams or other materials of which the walls of a house were composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate." *Ford v. Cobb,* 20 N. Y. 344.

The right of removal of this property as personalty, under the circumstances disclosed by the record, comes fairly within the rule as above announced. If the property may be rightfully removed, as we think it may, then we see no good reason for holding otherwise than in the condemnation proceedings; its value is not properly an item for which compensation should be awarded to the owners of the real estate taken.

The judgment heretofore entered is modified so as to permit the recovery of the value of the embankment, including the riprapping; otherwise it is adhered to.

FORMER JUDGMENT MODIFIED.

MONTPELIER SAVINGS BANK AND TRUST COMPANY, APPELLEE V. FAY C. FOLLETT ET AL., APPELLANTS.

FILED APRIL 9, 1903. No. 12,711.

1. **Judgment: FORECLOSURE: PETITION.** To entitle a mortgagee, who has taken a judgment, to foreclose, it is only necessary that the judgment and a return of execution as required by section 851, Code of Civil Procedure, be set out. It is not necessary in the petition to state the nonexistence of other proceedings to enforce the judgment.

2. **Transcript of Judgment Filed in Another County: REQUIREMENT OF CODE.** Where a judgment has been transcripted to another county, issuance and return of execution, there will be a sufficient compliance with the requirements of section 851 of the Code of Civil Procedure, unless it affirmatively appears that the defendant did not reside there.

3. **Oral Agreement of Mortgagee to Accept Deed: STATUTE OF FRAUDS.** An oral agreement between the owner of the fee and a mortgagee of real estate that the latter shall accept a deed from the former of the property in full satisfaction of the indebtedness secured by the mortgage, is within the statute of frauds, and, in the absence of facts to take it out of the statute, is not enforceable.

APPEAL from the district court for Adams county: ED. L. ADAMS, DISTRICT JUDGE. *Affirmed.*

Addison S. Tibbets, George W. Tibbets and *Charles F. Morey,* for appellants.

William Gaslin, contra.

HASTINGS, C.

Appellants in this case, against whom a decree of foreclosure was rendered, set up four reasons why that decree should be reversed and one entered requiring the plaintiff and appellee to accept a deed of the mortgaged premises in full satisfaction of the mortgage debt:

First. That the petition makes an insufficient allegation as to a prior suit at law on which judgment was rendered for the debt secured by this mortgage, and execution

issued and returned unsatisfied, in that the allegations fail to negative other proceedings to enforce that judgment.

The allegations in this behalf of the petition are that the plaintiff commenced an action in the district court of Douglas county February 1, 1900, against the grantee of the mortgaged premises, who had assumed the note, Fay C. Follett, and recovered judgment March 5, 1900, for $2,202.50 and $14.98 costs; that the transcript was taken to Adams county and execution issued there, and delivered to the sheriff and returned wholly unsatisfied; that plaintiff has been unable to find any property to satisfy his judgment, and has been compelled to resort to the foreclosure; that nothing has been collected, and the full amount of the mortgage note, coupon and interest is due; that the mortgaged premises have been conveyed to one Anna R. Brockell. There is no allegation that the defendant Follett resides in Adams county.

It is claimed by the appellee that the presumption that courts and officers act in good faith applies to the proceedings on this judgment. We do not exactly see the application. It is not a question of good faith in any one besides the plaintiff in transferring the proceedings to Adams county, and endeavoring there to collect the judgment.

It is objected there is no authority shown to issue execution in Adams county, and that the return of the sheriff in Adams county that he can find no property is not the return required by section 851 of the Code of Civil Procedure. The requirement of section 850 is simply that the petition shall state whether proceedings have been had at law for the recovery of the debt or any part thereof, and whether anything has been collected and paid. The allegations of the petition are sufficient in this respect; they show a judgment for the whole amount of the debt, and that nothing has been collected and paid.

With regard to the return of the execution, it is true that it is not in the precise words of the statute, in that it omits the clause "except the mortgaged premises." The

allegations in the petition, however, are that the mortgaged premises had been transferred to the defendant Brockell, who does not appear to be in any other way holden for the payment of the debt. The mortgaged premises, therefore, could not properly be referred to in the return of the officer as being the property of the defendant Follett. The evidence discloses, and it is not denied, that in fact the defendant Follett lives in Adams county. Neither section 850 nor 851 seems to require any other or different allegations than are made in this petition, and we think it should be held to be sufficient.

The answer, after asserting the insufficiency of the petition, admits the execution of the extension agreement and interest coupon for the one year's extension, and in its third paragraph alleges that on or about the 22d of September, 1898, plaintiff agreed to accept a conveyance of the mortgaged premises, and in consideration thereof to release the trust deed; that a deed was tendered and plaintiff refused to accept it, basing its refusal on the ground that defendant had removed from the premises a hot-air furnace; that the furnace was a temporary fixture, placed upon the premises long after the execution of the mortgage and removable without injury to the premises; that defendants left the premises in accordance with the arrangement, and were put to much loss and damage in such removal and the renting of other property; that they have always been ready and willing to carry out the agreement, but plaintiff refuses to do so. In the fourth paragraph it is alleged that Blanche Follett is the wife of F. C. Follett; that she signed the extension agreement as surety for her husband, without any intention to bind her separate estate. Defendants ask for a decree denying the relief of plaintiff, and directing it to execute and discharge the mortgage indebtedness and accept a deed to the premises.

Plaintiff's reply denies the agreement for settlement; denies the allegations of coverture, suretyship and lack of intention to bind her separate estate on the part of Blanche Follett; and alleges that the matters set up in this second

part of the answer were not sufficient to constitute a defense.

The court found in favor of the defendant, Blanche Follett, and no appeal has been taken by plaintiff. It is not necessary, therefore, to discuss the allegations of the petition with regard to her.

It remains to consider whether or not the agreement to release the mortgage debt in consideration of a conveyance of the land is sufficiently pleaded and sufficiently shown. Appellee urges, in the first place, that it is not sufficiently pleaded; that the mortgage interest held by the plaintiff was an interest in land and could not be surrendered or affected except by an agreement in writing, and none such is alleged.

It is also urged that the agreement was simply an arrangement for the payment of a debt, and would constitute no consideration in any event for a promise to discharge the debt. We are entirely unable to see how the transaction can be so considered. It is an agreement, not for the payment of a debt, but to do something else instead of paying it, namely, to surrender possession of real estate against which the owner of the debt has only a lien in consideration of the discharge of the indebtedness. The contract would seem to be a valid and enforceable one if it had been in writing, but we do not think that the plaintiff could be compelled to surrender the interest in the real estate which it before had, or to accept of another or different one except upon part performance, unless upon a contract valid and binding under the statute of frauds. Such a contract does not seem to be shown by the evidence, and is certainly not alleged in the answer. It is not thought that the court committed any error in finding against the defense of this alleged settlement agreement.

We have experienced more difficulty with the question as to whether, in the absence of any allegation of defendant's residence in Adams county, the sheriff of that county was "the sheriff or other proper officer," who must, under section 851, return the execution, before a mortgage fore-

closure would lie. Inasmuch, however, as the residence of the defendant would certainly be a fact well known to himself, it would seem that the plaintiff would hardly be required to allege it, even though it be held that such residence in Adams county would be necessary to make the return of the sheriff of that county of any effect.

It is recommended that the decree of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

FALLS CITY V. BENNETT SPERRY.

FILED APRIL 9, 1903. No. 10,522.

Setting Aside Verdict: PERSONAL KNOWLEDGE OF JURYMEN. Where it appears, by an undisputed showing in an action for damages for the change of a street grade, that one of the jurors had prior knowledge of the premises involved in the controversy, that he based his own conclusion partly thereon and used it to influence his fellow jurors in arriving at their verdict, the latter must be set aside.

ERROR to the district court for Richardson county: JOHN S. STULL, DISTRICT JUDGE. *Reversed.*

B. D. Poland and *J. E. Leyda*, for plaintiff in error.

Edwin Falloon, Frank Reavis and *Isham Reavis, contra.*

LOBINGIER, C.

Defendant in error obtained a judgment against Falls City for damages alleged to have resulted from a change in the grade of the street in front of the former's premises. In support of its motion for a new trial the city filed the affidavits of several of the jurors, to the effect "that Joseph

McCormick was one of the jurors on said case and that Joseph McCormick stated in the jury room before the members of the jury when said cause was under consideration, that he (McCormick) was well acquainted with the premises in question, that he had observed the street and premises of Bennet Sperry before the grading in question and that he knew from his own observation before and after the grading complained of in plaintiff's petition how the water took its course before said grading, along said street in front of plaintiff's premises." Affidavits of several outsiders were likewise filed, stating that the same juror had said to them "that he (McCormick) had arrived at his verdict, or the amount Sperry was damaged by the grading in question, partly from his own knowledge of the premises, gained from his observation of the street and premises in question before and after the grading complained of in plaintiff's petition." Plaintiff in error's attorneys also presented affidavits, one of which set forth that affiant "did not know that said Joseph McCormick personally knew anything about the premises at the time of the trial, and the knowledge of juror McCormick's knowledge came to me after the verdict had been rendered in said case; that said Joseph McCormick upon his *voir dire* examination before being sworn to try said case stated that he knew nothing concerning the case nor the merits thereof and that he had no knowledge of the facts in the case."

There was no counter showing, and these affidavits were incorporated in a separate bill of exceptions which was served within the forty days after the overruling of the motion. The affidavits are admissible because their purpose is "to prove matters occurring during the trial or in the jury room which do not essentially inhere in the verdict itself." *Johnson v. Parrotte,* 34 Neb. 26, 30; *Harris v. State,* 24 Neb. 803; *Savary v. State,* 62 Neb. 166, 179. Whether the facts therein recited were sufficient, therefore, to entitle plaintiff in error to a new trial, is one of the questions presented by this proceeding.

There was a time in the history of the law when a verdict

arrived at by the method here complained of would have been proper. The primitive English jury, while not, as is sometimes loosely said, a mere body of witnesses, was permitted to and did base its verdict chiefly upon the prior personal knowledge of its members. 6 Ency. Pl. & Pr. 668 *et seq.*, where the authorities, legal and lay, are collected. This rule was continued in force longer than it otherwise would have been, by the fact that jurors were liable to the penalties of attaint for a false verdict. 3 Blackstone's Commentaries, p. 374. And it was retained in *qui tam* actions until well into the eighteenth century. *Mattison v. Allanson,* 2 Strange (Eng.) 1238. But with the supplanting of the practice of attaint by that of new trials it came to be the rule that a juror could not use his personal knowledge of the subject matter of the controversy unless he was sworn and gave it to his fellow jurors like any other witness. *Bennet and the Hundred of Hartford,* Style (Eng.) 233 (1650); *Rex v. Rosser,* 7 Car. & P. (Eng.) 648; *Manley v. Shaw,* Car. & Mar. (Eng.) 361; *State v. Powell,* 7 N. J. Law, *244; *Anschicks v. State,* 6 Tex. App. 524, 539. This did not necessarily prevent him from still acting as a juror (*Howser v. Commonwealth,* 51 Pa. St. 332, 336; *Dunbar v. Parks,* 2 Tyl. (Vt.) 217; 1 Wharton, Evidence, sec. 602), but it did preclude him from communicating, simply as a juror, matters within his own knowledge.

The modern jury must arrive at its verdict from evidence regularly produced in the course of the trial proceedings. That evidence may be no different from such as might be acquired by the jurors unofficially, but still the latter could not be considered. Thus, the jury under the proper supervision may view the premises in controversy, and in this state such view may afford a proper basis for their verdict. *Chicago, R. I. & P. R. Co. v. Farwell,* 60 Neb. 322. But if one or more of the jurors should visit unofficially the same locality during the progress of the trial and reach a conclusion as a result of such inspection, the verdict would be vitiated. *Winslow v. Morrill,* 68 Me. 362; *Bowler*

v. Washington, 62 Me. 302; *Eastwood v. People,* 3 Parker Crim. Rep. (N. Y.) 25; *Flanders v. Mullin,* 73 Vt. 276; *Consolidated Ice-Machine Co. v. Trenton Hygeian Ice Co.,* 57 Fed. 898. There would seem to be no difference in principle between a juror's using knowledge irregularly acquired during that trial and relying on that acquired prior thereto.

On the principle above stated, jurors are not allowed to make private experiments or investigations for the purpose of determining essential controverted points. *People v. Conkling,* 111 Cal. 616, 627; *Wilson v. United States,* 53 C. C. A. 652, 654, 116 Fed. 484, 486. In short, they are not permitted to consider any fact not brought before them in the regular way (*Heffron v. Gallupe,* 55 Me. 563, 568; *Thompson v. Mallet,* 2 Bay (S. Car.) 94), and if one of their number, at any time before an agreement is reached, makes a statement to his fellow jurors based upon his prior personal knowledge and having a material bearing on the subject of their deliberations, the verdict is vitiated thereby. *Sam v. State,* 1 Swan (Tenn.) 60; *Ryan v. State,* 97 Tenn. 206; *Citizens' St. R. Co. v. Burke,* 98 Tenn. 650, 652; *Forsyth v. Central Mfg. Co.,* 103 Tenn. 497, 498; *Anschicks v. State,* 6 Tex. App. 524, 537. A juror is entitled of course, to use his general knowledge and experience on a subject for the purpose of testing the credibility of the witnesses, as on a question of value. *Rex v. Rosser,* 7 Car. & P. (Eng.) 648; *Patterson v. City of Boston,* 20 Pick. (Mass.) 159. But if he have knowledge of any specific matter in controversy, it is his duty to so inform the court, and have it placed before his fellow jurors, if at all, according to the established rules of trial evidence.

It is claimed, however, that the question of the alleged misconduct of the juror is not properly before us; that the *voir dire* examination should have been taken down by the reporter and can not be shown by affidavits. In our view, the question is not material, because the vitiating circumstance is the undisputed use, in the deliberations, of prior knowledge of the juror, which could only be shown by

affidavits, and which would have been equally fatal had the question not been covered by the *voir dire* examination. We think it proper to add that the affidavits, as we read them, did not necessarily impugn the good faith of the juror. He might have been perfectly sincere in his answer that "he knew nothing concerning the case" or its merits or facts. The affidavits do not indicate that the location of defendant in error's property was so described in the opening statements that the juror must necessarily have recognized it as that with which he was familiar. Moreover, most laymen, when interrogated as to their knowledge of a "case" or its facts or merits, would probably not understand that this referred to property that might be involved in the case; they would rather infer that this meant the dispute between the parties. Indeed, in the case at bar, the subject matter of the case was not plaintiff in error's property, but the amount of damage, if any, resulting from the change of grade. We think, therefore, that the juror might have answered as he did in good faith, even though at the time conscious of his familiarity with the premises. If, on the other hand, as well might have been the case, he did not recollect his acquaintance with the premises from anything said in the opening statements, his answer would have constituted no ground for a new trial. *Fitzpatrick v. People,* 98 Ill. 269.

But with a distinct and undisputed showing that this juror not only had this prior knowledge and based his own conclusions partly thereon, but that he used it to influence his fellow jurors in arriving at their verdict, we are unable to see how it can be permitted to stand. The facts are exactly opposed to those in *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1, 15.

It is also claimed that the affidavits are defective in failing to show that the officers of plaintiff in error were ignorant of the juror's prior knowledge. Had it been shown that plaintiff in error's agents and representatives did actually know of this, and permitted it to stand without protest, the objection would have been waived. *Stam-*

pofski v. Steffins, 79 Ill. 303; *Whitcher v. Peacham*, 52 Vt. 242; *Consolidated Ice-Machine Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 898. But no such showing was made and we can not presume that such was the case, especially as the attorneys distinctly state in their affidavits that they knew nothing of it.

There are other questions discussed in their briefs, but their determination is not necessary to a disposition of this proceeding, and they are not likely to be raised upon another trial.

We recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

HANNAH JOHNSON v. J. S. WINSTON ET AL.

FILED APRIL 9, 1903. No. 12,198.

1. **Tender of Proof**: PRELIMINARY QUESTION. An offer of proof in support of a preliminary question, need not be confined to the same limits as the answer, but may extend farther *in medias res*, provided both relate to the same subject matter.

2. **Expert Witness**: PRELIMINARY QUESTION. In an action for malpractice in amputating part of plaintiff's hand and removing the metacarpal bone, it is proper to ask a professional witness for plaintiff, as a preliminary question, whether there is any method of cure without removing the bone.

3. ———: ———. In such action, a surgeon of thirty-five years' experience, who has inspected the amputated bone, may be asked to examine plaintiff's hand and state what ligaments would need to be severed in the operation, without a preliminary showing that the question can be answered from such inspection.

4. **Action for Malpractice**: INSTRUCTION. A charge in such an action

that defendants are not liable for the consequences of the operation if they acted "in a careful and skillful manner under the belief that it was proper," is too broad; the belief must have been one acquired in the exercise of due professional care and skill.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

F. B. Donisthorpe, for plaintiff in error.

S. W. Christy, Charles H. Sloan and *F. W. Sloan, contra.*

LOBINGIER, C.

This is an action for malpractice, alleged to consist in the negligent anl unskillful amputation of plaintiff's index finger and metacarpal bone, the removal of the latter having been, it is claimed, wholly unnecessary. Plaintiff also alleges that she "has suffered immeasurable pain, torment and anxiety of mind," and "has by reason of the premises wholly lost the use of said hand, wrist and arm." Defendants filed separate answers, alleging, in substance, that the operation was performed in a proper and professional manner, and that the condition of plaintiff's hand was due to lack of care on her part after defendants had been discharged. There was a verdict for defendants, and plaintiff brings this proceeding to reverse the judgment. A large number of errors are assigned, and exhaustive briefs are presented on both sides, but we find it unnecessary to discuss more than two of the questions raised.

Plaintiff called as a witness one Dr. Mozee, a regular physician and surgeon of thirty-five years' practice, who was asked to examine the metacarpal bone, which had been preserved after its amputation from plaintiff's hand. After testifying that "the head of the bone is necrosed," the examination of the witness proceeded as follows:

"Q. 1399. What would be the treatment by your school of those two spots of necrosis?

"Defendants object as incompetent, immaterial, as to

what the treatment would be of his school for those spots. Objection sustained. Exception.

"Q. 1400. State if there would be any remedy that could be used to cure the necrosis you have now spoken of, without the removal of the bone.

"Defendants object as incompetent, immaterial, irrelevant under the issues, leading. Objection sustained. Exception.

"Plaintiff offers to prove by the witness on the stand that the necrosis spoken of by said witness on the head of the metacarpal bone now in his hand, could have been removed and cured by scraping, or by the chiseling process known to the profession, without the removal of the metacarpal bone.

"Defendants object as incompetent, no foundation laid for the hypothesis, immaterial, irrelevant under the testimony so far taken. Objection sustained, and offer denied. Plaintiff excepts.

"Q. 1401. Please examine the hand of the plaintiff, and state what ligaments would have to be severed from the amputated bone you have just examined, and the scar you find on the hand, in the amputation and removal of that bone.

"Defendants object as no proper foundation laid, incompetent, immaterial. Objection sustained. Plaintiff excepts.

"Plaintiff offers to prove by the witness on the stand that in the removal of the metacarpal bone now in the hands of the witness, from an examination of the scar on the hand of the plaintiff, that the annular, palmar, and one of the main branches of the posterior annular ligaments would have to be severed, and that in the severing of said ligaments stiffness of the wrist would be caused.

"Defendants object, incompetent, immaterial, no proper foundation laid, and the offer not within the scope of the question propounded. Objection sustained."

This ended plaintiff's attempt to produce evidence of this character, and the above rulings are assigned in the peti-

tion in error. Defendants contend that it was improper to ask the witness if there was "any remedy" for necrosis without removing the bone, and that he should have been asked merely for the ordinary treatment. But the court had already refused to permit the witness to state what would be the treatment of his school, which was the regular or allopathic. And, as this was substantially the same question that counsel now contend was the proper one, plaintiff was necessarily driven to a different form of interrogatory. Moreover, the inquiry whether there was "any remedy" was merely preliminary, intended to show the knowledge of the witness, and to afford a basis, as the offer subsequently disclosed, for a question as to the proper remedy. Where the question is one of this character, more latitude should be allowed in its form. An attorney may not always know exactly what his witness will testify to, and where he is merely laying the foundation leading up to other evidence, it would often result in great injustice to confine the question to the same limits as if the examination had proceeded well into the subject.

Defendants also objected to the offer in support of question 1400, that it "was broader than the question," but as we read the offer it is narrower than the question. The latter was the inquiry as to "any remedy," while the offer was an inquiry as to a particular remedy or form of surgical treatment. The case of *Keens v. Robertson,* 46 Neb. 837, lends no support to defendants' objection. The question there was as to the building, while the offer related to the contents. Each pertained to a different subject. Here both offer and question relate to the same general subject-matter of remedies for necrosis. And if plaintiff could have proved, as he offered to do, that this disease could have been cured without the removal of the bone by a remedy "known to the profession," it would seem that defendants might easily have protected themselves by showing on cross-examination that the suggested remedy was "heroic or extraordinary," if such was the case. Certainly nothing was implied by the form of the question.

"Known to the profession" must be understood as being known to the whole profession, not merely to a part, or the most learned members of it.

The ruling on question 1401 is sought to be sustained on the ground that it "assumed that a surgeon could, from an inspection of the healed portion of the remaining hand and the scars thereon, determine what ligaments had been severed in the amputation." The question, however, was "what ligaments would have to be severed," not what ones had been. It would not seem to be necessary to prove that a surgeon of thirty-five years' experience could tell what ligaments would need to be severed in the amputation of the metacarpal bone, when he had already examined the latter, and was at the time examining the remaining part of the hand.

The offer in support of question 1401 is likewise objected to as not within the scope of the question. But here again the question was preliminary, and in such case the offer is not confined to the same limits as the answer would be. *Union P. R. Co. v. Stanwood,* 91 N. W. (Neb.) 191; *Hanson v. Township of Red Rock,* 7 S. Dak. 38, 40.

The materiality and importance to plaintiff of the evidence which her counsel thus vainly sought to place before the jury can best be understood in the light of defendants' theory of the case as elaborated in their brief. They contend that "the burden rests upon the plaintiff throughout the trial of the case, to prove: First, that the amputation was unauthorized and unnecessary, or that the surgical operation was performed in a negligent and unskillful manner; second, that damages resulted to the plaintiff directly traceable to such negligent malpractice." They further claim: "No physician or surgeon or other competent witness has testified that the same were negligent, unskillful or not the proper and ordinary treatment under the circumstances so testified to. This omission would, of itself, be fatal to plaintiff's recovery, even if no testimony had been offered in behalf of the defendants. * * * No competent professional witness has testified that the

present condition of the plaintiff's hand is the result of the surgical operation or treatment by the defendants. This omission is fatal to the right to recover." Now it was exactly this burden and these essentials which plaintiff was apparently attempting to meet by offering the testimony of Dr. Mozee. It can not be said, therefore, that the exclusion of this evidence was without prejudice. As is shown by defendants' counsel themselves, the evidence was vital to plaintiff's case, and, unless the grounds for its rejection were proper, the judgment ought not to stand.

Moreover, this appears to have been the only witness in behalf of the plaintiff on this point, and, if so, it was all the more important that no mistake should have been made in excluding his testimony. We can not overlook the well known fact that in actions of this kind it is always difficult to obtain professional testimony at all. It will not do to lay down the rule that only professional witnesses can be heard on questions of this character, and then, in spite of the fact that they are often unwilling, apply the rules of evidence with such stringency that their testimony can not be obtained against one of their own members.

It seems to us, therefore, that the evidence thus tendered by plaintiff should have been allowed to go to the jury. It certainly was material, and we can not presume that, had it been admitted, the result would have been the same.

In the ninth instruction the trial court charged the jury that "Although a diseased condition resulting in a malformed and useless hand was caused by the operation, the defendants are not liable if they performed the operation with the wife's consent, express or implied, in a careful and skillful manner, under the belief that it was proper to be performed." My associates are of the opinion that the rule here is stated too broadly, and that the "belief" which would excuse defendants from the consequences of an operation must have been a well founded belief acquired in the exercise of due professional care and skill. The authorities appear to lend support to this view. Thus in

West v. Martin, 31 Mo. 375, a request for the following instruction was held to be rightly refused: "If the defendant is a surgeon of ordinary skill, he is not responsible in this case for an error of judgment." The court said further (p. 378): "Whether errors of judgment will or will not make a surgeon liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. For there may be responsibility where there is no neglect, if the error of judgment be so gross as to be inconsistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of a case according to the standard indicated."

So in *Du Bois v. Decker,* 130 N. Y. 325, 330, the court say of the surgeon: "His judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot."

The other errors assigned are either, in our judgment, not well taken, or are not likely to occur on a retrial of the case. We recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.