REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1904.

VOLUME LXXI,

HARRY C. LINDSAY,
OFFICIAL REPORTER.

PREPARED AND EDITED BY
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LINCOLN, NEB.
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1907.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Arthur J. Evans. ... Benjamin F. Good...	David City. Wahoo.
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TABLE OF CASES REPORTED.

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE DISTINGUISHED IN THIS VOLUME.

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

Figures in parentheses indicate corresponding sections in Cobbey's Annotated Statutes.

NEBRASKA.

CONSTITUTION.

SESSION LAWS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1904.

STATE OF NEBRASKA, EX REL. CHARLES W. YOUNG, V. EDWARD ROYSE, MAYOR OF THE CITY OF BROKEN BOW, ET AL.*

FILED FEBRUARY 4, 1904. No. 11,877.

1. **Statutes:** CONSTRUCTION. Statutes *in pari materia* should be construed together and, if possible, effect given to all of their provisions. *Dawson County v. Clark*, 58 Neb. 756.

2. **Municipalities:** JUDGMENT: MANDAMUS. The levy of a tax under the provisions of sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes, with which to satisfy a judgment against a county, school district, or municipality, will not be enforced by a writ of mandamus where such proposed levy is in excess of constitutional or statutory limitations.

3. ———: WATER SUPPLY: TAX LEVY: LIMITATION. The provisions of subdivision 15, section 69, article I, chapter 14, Compiled Statutes, 1887, empowering cities of less than 5,000 population and villages to levy a tax of not exceeding 7 mills on the dollar valuation, for hydrant rentals or water furnished such city or village under contract, is a limitation on the taxing power to raise revenue to satisfy an indebtedness created for such purposes.

4. **Judgment Against Municipality.** A judgment against a municipality has the effect only of an audited claim or demand. It establishes the amount legally due, but gives no new right in respect of the means of payment; and, in an action to compel the levying of a tax to satisfy such judgment, a court will look behind the judgment and ascertain the nature and character of the

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* See former opinions, 3 Neb. (Unof.) 262 and 269.

indebtedness on which it is based, in order to determine the limit of the tax which may be levied for its satisfaction.

5. ———: TAX LEVY: LIMITATION. Where judgments have been obtained against a city of less than 5,000 population, for hydrant rentals, by a water works company operating under an ordinance and statute limiting a levy of tax for such purposes to a rate not exceeding 7 mills on the dollar valuation, and such tax has been levied, collected, and applied for such purposes each and every year during the existence of the contract, the court will not compel an additional levy in excess of the statutory limitation for the satisfaction of such judgments.

ERROR to the district court for Custer county: HOMER N. SULLIVAN, JUDGE. *Rehearing denied.*

O'Neill & Gilbert, for plaintiff in error.

C. L. Gutterson and *A. R. Humphrey, contra.*

HOLCOMB, C. J.

The relator, by means of the writ of mandamus, seeks to compel the authorities of the city of Broken Bow to levy a tax sufficient to pay judgments, aggregating something over $8,000, obtained by the Broken Bow Water Works Company against the city upon an indebtedness for hydrant rentals, and thereafter assigned to relator, who now claims to be the holder and owner thereof. Notwithstanding the cause has, in this court, heretofore been decided against the relator (*State v. Royse*, 3 Neb. (Unof.) 262, 269), it is insisted that the conclusion reached is erroneous because the court has overlooked, and failed to give due effect to, the provisions of the statute contained in sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes (Annotated Statutes, 10698-10702). These sections, being a part of the laws enacted under territorial organization, provide in substance that, when any judgment shall be obtained against any county, township, school district or municipal corporation and remains unpaid, it shall be the duty of the proper officers to make provision for the prompt payment of the same; and that,

if the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to pay current expenses and such judgment, it shall be the duty of the proper officers to at once proceed to levy and collect a sufficient amount to pay off and discharge such judgment. Provision is also made for application to a court of competent jurisdiction to compel the proper officers by writ of mandamus to proceed to levy a tax and collect the necessary amount of money to pay off such indebtedness.

If reference be had solely to the sections of the statute of which mention has just been made, then it would seem that the relator is entitled to the writ applied for. If, however, in determining the question of the plaintiff's right, we are not confined solely to the provisions of the sections mentioned, but must determine their force and effect as they bear upon, are connected with, and relate to other provisions of the statute regarding the same subject —that is, the question of the authority and power of those charged with the duty of levying and collecting taxes for the purposes authorized and provided by law—then a different conclusion may necessarily result from such considerations. In other words, if it be proper, as we think it is, we should invoke the familiar doctrine regarding statutes *in pari materia,* which are to be construed together and, whenever possible, effect given to all their provisions. *Dawson County v. Clark,* 58 Neb. 756. The sections of the statute appealed to by relator in this case also provide for the payment of judgments against counties and school districts by the same method of taxation, and yet it will not be seriously contended, we apprehend, that county authorities may, by mandamus, be compelled to levy a tax in excess of the constitutional limitation of 15 mills on the dollar. These sections have in this respect been construed, and it is held that the constitutional limitation must be respected. *Chase County v. Chicago, B. & Q. R. Co.,* 58 Neb. 274; *Deuel County v. First Nat. Bank,* 30 C. C. A. 30; *State v. Weir,* 33 Neb.

35. Nor ought it to be urged, in the face of prior decisions, that a school district against which a judgment has been obtained may be compelled to levy a greater tax than 25 mills on the dollar, which is the statutory limitation for all purposes, with certain specified exceptions, even though such judgment remains unsatisfied because the limit of taxation has been reached in meeting other demands. *Dawson County v. Clark*, 58 Neb. 756. With these observations in mind, we, in addition to what has heretofore been said, proceed to a very brief discussion of the relator's rights as we conceive them to be in the present controversy.

It is agreed that the judgments owned by the relator represent an adjudication of the liability of the city of Broken Bow, for sums due as hydrant rental or for water supply for fire protection furnished by the water works company to the city, under an ordinance enacted for that and other purposes, and under which the water works company is operated. It is further stipulated that the municipality, ever since entering into the contract out of which the judgments grew, has each year levied, collected and paid to the water works company a tax of 7 mills on the dollar valuation of the taxable property of the municipality and that the 10 mill levy for general purposes had also been exhausted. It is the contention of the city authorities that such levies have exhausted their power of taxation for water supply under the city's contract with the water works company and that no further nor greater sum nor tax can be lawfully required, and it was upon this ground that the relator was denied the relief demanded by the former opinions and judgment of this court. The statute under which the water company was authorized to construct its water works and enter into contract with the city, binding it to pay hydrant rentals, being the charter act governing cities of less than 5,000 population and villages, in conferring such powers upon the municipalities included within its scope, among other things, provided by subdivision 15, of section 69,

chapter 14, Compiled Statutes, 1887, that such cities or villages shall have power to make contracts with, and authorize any person, company or corporation to erect and maintain a system of water works and water supply, and to furnish water to such city or village, and to levy and collect a general tax, in the same manner as other municipal taxes may be levied and collected, to pay for water furnished such city or village, under contract, to an amount not exceeding 7 mills on the dollar in any one year, in addition to the sum authorized to be levied under subdivision 1 of that section, and that all taxes raised under this clause shall be retained in a fund known as a "water fund."

By subdivision I of this same section, such municipalities are authorized to levy taxes for general revenue purposes not to exceed 10 mills on the dollar in any one year, and by subdivision II, to levy any other tax or special assessment authorized by law. These several provisions, together with the sections hereinbefore referred to with reference to the levying of taxes to pay judgments, all relate to the powers and limitations of cities of the class under consideration to levy and collect taxes, and should, as we have observed, be construed together, and effect be given to all if possible. Not only does the statute limit the amount which may be levied for hydrant rentals or water supply to a sum not exceeding 7 mills on the dollar valuation of the taxable property, but also the ordinance under which the Broken Bow Water Works Company obtained its franchise and acquired its rights against the city for such rentals provides for the number of hyrants and the price per hydrant which shall be paid by the city as such rentals and in express terms declares that a sufficient tax, not exceeding 7 mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a

separate fund known as the "water fund," and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed. Under these restrictions and limitations as to the authority and power of the city officers to levy a tax for water supply or hydrant rentals, and the amount of taxes that may be levied for general purposes in any one year, may it be said that the relator is nevertheless entitled to a writ compelling the respondents to levy an additional tax under the provisions of the sections first mentioned, sufficient to pay the judgments obtained by the water company against the city, which are confessedly debts for water supply or hydrant rental arising under the contract and ordinance heretofore referred to? The answer must, we are satisfied, be in the negative, as it has been in the past as evidenced by the judgment entered in the cause.

The sections of the statute invoked as giving to the relator the right to an additional levy, now that his claim has been reduced to judgment, will not bear the construction sought to be placed upon it, and will not justify the unrestrained licensing of the taxing power of the municipality because, forsooth, a judgment has been obtained on a claim which otherwise, admittedly, would not entitle the relator to the relief now demanded. A construction of the sections of the statute relied on, as contended for, can not be accepted as giving the right to the relator to compel a levy of any tax necessary to pay the judgments, regardless of the nature of the indebtedness or the limitations, constitutional or statutory, placed on the taxing authorities. These sections can not be construed as though standing alone, but must be interpreted in the light of other provisions having a direct bearing on the same subject and, when so interpreted, must be given such force and effect as will follow such a construction. The legislative intent manifestly was to enforce the payment of a judgment by a levy of tax within statutory and constitutional restrictions and limitations, and not be-

yond and outside of them. These sections can not have the effect of rendering nugatory well defined limitations on the taxing powers of a municipality.

In *State v. City of Wahoo,* 62 Neb. 40, it is decided, unequivocally, by this court that city authorities can not be required by mandamus to levy a tax for water supply in excess of the limit of such tax existing at the time of the contract. If the judgment in the present case partakes of the same nature and belongs to the same class of indebtedness as would a claim arising on a contract not yet reduced to judgment, then the decision just cited becomes controlling and must necessarily preclude the relator from recovering in the present case. That the same rule is alike applicable to both cases is, we think, well settled on both principle and authority. A reading of subdivision 15 of section 69, *supra,* renders it manifest that the provision therein found as to the amount of taxes which may be raised, is a limitation of the power of city authorities to levy a tax for water supply purposes. It is granted as an additional power to that authorizing a levy of 10 mills on the dollar for general purposes. It expressly limits the tax for water supply to a rate not exceeding 7 mills on the dollar. Beyond this the city authorities have no power to go by contract or otherwise. This limitation of power was known to the water works company. It was incorporated in the ordinance under and by which their rights are measured and determined. Accepting, as we do for the purposes of this case, the conclusiveness of the judgment rendered against the city, the fact, nevertheless, remains that, for the satisfaction of the indebtedness arising under the contract for water rentals and the judgment obtained therefor, and in determining the relator's rights in the premises, recourse must be had to the power conferred by subdivision 15 of section 69, which limits the tax rate to 7 mills on the dollar. It would be strange, indeed, if, in the face of such limitation of the power of taxation, the city authorities might enter into a contract creating an un-

limited liability and, by reducing the demand to judgment, give them unrestrained power to levy a tax of any sum necessary for its satisfaction. This would be accomplishing by indirection that which could not be done directly and which, generally speaking, is not allowable. The legislative policy was, undoubtedly, as it is in matters of taxation generally, to limit the power of the taxing authorities within reasonable bounds, and to protect the property of the taxpayer against extravagance, incompetency or corruption in the management of the affairs of the corporation, by suitable restrictions on the power of taxation.

The authorities are quite uniform to the effect that a judgment against a municipality has the effect, only, of an audited claim or demand. It establishes the amount legally due, but gives no new right in respect of the means of payment. *United States v. County of Macon*, 99 U. S. 582; *Supervisors of Carroll County v. United States*, 85 U. S. 71; *United States v. County of Clark*, 95 U. S. 769. In *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L. R. A. 835, it is pertinently observed by Potter, J.: "As the statute with respect to a judgment does not fix its class, and does not authorize a special tax irrespective of statutory or constitutional limitation, it is obvious that we must have recourse to the claims themselves to determine to what class the judgment belongs, and whether any limit is imposed upon taxation, by which they may be enforced. The application of the converse of this proposition has not been infrequent. In the case of *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220, the court said: 'While the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.' This language was used in a cause wherein it was sought by mandamus to compel the levy of a tax to pay a judgment. The opinion in that case also recognizes that courts are powerless to require a tax to be levied

even to pay a judgment in excess of the constitutional or legislative limitation upon the taxing power."

It is urged that *Dawson County v. Clark, supra,* is authority for the position taken by relator and justifies the relief prayed for. We hardly think that case, at least those points decided therein which are now urged upon our attention, is authority supporting the contention of relator in the case at bar. In the case just mentioned, the court was considering the force and effect of article VI, chapter 77, Compiled Statutes, when construed in connection with subdivisions I and II of section 69, chapter 14, and, when so construed, it was held that subdivision II of said section 69 operated as an enlargement of the restrictions contained in subdivision I, and that article VI, chapter 77, authorized the levy of a tax to satisfy judgments against the municipality because of the provisions of the second subdivision. It was there determined only that power is conferred by article VI to levy taxes to pay judgments rendered against the corporation, and that this might be done even though the maximum amount of taxes authorized by statute to be assessed for general corporate purposes had been imposed. No discussion or consideration was given to the question of whether the nature of the claim on which the judgment was based was such as to come within some constitutional or special statutory limitation of the taxing power. The judgment there considered, and the claim upon which based, appears not to have been of the nature and character of the one here under consideration. It would probably be difficult, if not futile, for us to undertake to determine every character of demand reduced to judgment that might justly be satisfied by a special levy of taxes, in addition to other levies authorized by law, under the provisions of article VI, chapter 77. To illustrate, it may be suggested that a judgment for a tort obtained against a city might very properly be satisfied by a levy under the provisions of these sections, regardless of the amount of the levy for general purposes. Other lawful demands reduced to judg-

ment readily suggest themselves to one's mind as of like character. When, however, these sections are construed in connection with other sections of the statute or of the constitution, and such other provisions operate as a limitation of the power of taxation for a particular purpose or purposes, as we are constrained to hold the statute relating to the levy of a tax for water purposes does in this case, then an entirely different proposition is presented and a different principle must be applied. The case at bar, in principle, is more nearly analogous to that portion of the decision in *Dawson County v. Clark,* wherein it is held that section 11, subdivision II, chapter 79 of the Compiled Statutes, 1899 (Annotated Statutes, 11039), limits the amount of taxes which may be imposed by a school district to 25 mills on the dollar, and, where the maximum amount has been levied, an additional tax to pay a judgment can not be levied, notwithstanding the provisions of article VI, chapter 77. Applying the principle thus announced to the case at bar, as we think should be done, it follows that the relator is not entitled to the relief prayed for. Believing that the conclusion heretofore reached is the correct one, the judgment of affirmance should be adhered to, and the motion for a rehearing denied, which is accordingly done.

REHEARING DENIED.

DAVID C. JOHN, APPELLANT, V. WILLIAM J. CONNELL ET AL., APPELLEES.*

FILED FEBRUARY 4, 1904. No. 9,373.

1. Special Assessments: BOARD OF EQUALIZATION. A levy of a special assessment of taxes for benefits received by reason of a public improvement, is not invalidated because the city council, sitting as a board of equalization under the provisions of section 132, chapter 12*a*, Compiled Statutes, 1893, after meeting in pursuance

* See former opinions, 61 Neb. 267 and 64 Neb. 233.

of a regularly published notice and organizing for the purpose of equalizing such special assessment, correcting errors, etc., take a recess before the expiration of the time mentioned in the notice and prescribed by statute, provided, the city clerk or some member of such board shall be present to receive complaints, applications, etc., and give information; and providing, no final action is taken except by a majority of the members of such board in open session. *Medland v. Linton*, 60 Neb. 249, distinguished.

2. ———: ———. Where a board of equalization, in pursuance of published notice, meets at the office of the city clerk, organizes, transacts some business and then takes a recess, subject to the call of the chairman before expiration of the time mentioned in the notice, it will be presumed that the city clerk remained present at his office during the time stated to receive complaints, give information, etc., in conformity with the provisions of said section.

3. ———: ———: FINDING. A finding by the board of equalization that all real estate on which special assessments are levied, "are specially benefited and shall be assessed for the full cost of construction of such sewers according to the feet frontage," is not so fatally defective as to the requirements of a finding of uniformity as to invalidate the special assessment and render it subject to collateral attack.

4. ———: ———: NOTICE. The requirement of the statute that notice of the sitting of the board of equalization shall be published in three daily papers for a specified period of time, is met by the publication of such notice in two daily papers printed in the English language and one daily paper printed in the German language, when these are all the daily papers published in the city where the special assessment is to be made.

APPEAL from the district court for Douglas county: CLINTON N. POWELL, JUDGE. *Reversed in part.*

H. P. Leavitt, for appellant.

Connell & Ives, contra.

HOLCOMB, C. J.

The present litigation, which has dragged its weary length over a considerable period of time, has, as we view the record, become restricted to an inquiry relating solely to the validity of a certain special assessment of sewer

taxes on the real estate involved in the controversy, for benefits received. In the first opinion of the court, the question not being fully and clearly presented, it was held that no sufficient objection was shown to render the taxes invalid. On a rehearing before one of the departments of the commissioners, granted solely to investigate further this one question, the subject was inquired into and the special assessment of sewer taxes was held invalid and unenforceable on two grounds. One ground was that the board of equalization, required to pass upon and adjust special assessments of this character, was not shown by the record to have held a session at the time and place given in the published notice, as required by statute, and that the proceedings thereafter had were thereby invalidated. The other ground was that there was no finding by the board of equalization that the benefits to be derived from the public improvement were equal and uniform as to all the lots and tracts to be affected, as is required by statute. A reinvestigation of the case, having these two questions specially in view, results in a contrary conclusion to that last expressed.

On the first point, the opinion last prepared follows *Medland v. Linton,* 60 Neb. 249. That case, however, is to be distinguished, because the special assessment in the case at bar was made under a statute materially differing from the one construed in the *Medland* case. The original statute provided unequivocally and without qualification that the board of equalization must hold a session for at least one day, between the hours of 9 A. M. and 5 P. M., to correct errors, hear complaints, adjust inequalities, etc., before a special assessment for a public improvement could be levied. Following prior decisions, it was decided in the *Medland* case that the record must affirmatively show the holding of such a meeting in pursuance of a published notice, at the place and for the time stated, and that such proceeding was an essential condition to a valid exercise of the taxing power. The statute as thus construed was afterwards amended (sec. 132, ch. 12*a*, Com-

piled Statutes, 1893), so that, when the action was taken in the case at bar which is complained of, this section of the statute, among other things, provided:

"When sitting as a board of equalization, the council may adopt such reasonable rules as to the manner of presenting complaints and applying for remedy and relief as shall seem just. It shall not invalidate or prejudice the proceedings of such board that a majority of members thereof do not, after organization by a majority, continue present at the advertised place of sitting, during the advertised hours of sitting. *Provided,* the city clerk or some member of said board shall be present to receive complaints, applications, etc., and give information; and *Provided,* no final action shall be taken by such board except by a majority of all the members elected to the city council, comprising the same and in open session."

The record in the case at bar shows that, in pursuance of a regularly published notice, the council met as a board of equalization at the office of the city clerk and duly organized by electing a chairman. The record then discloses that the call or notice of its meeting was incorporated as a part of the proceedings; several petitions were received from property owners relating to other property than that here involved, and action taken thereon, the nature of which is not disclosed by the record. It is then recited: "Motion: That board take a recess subject to call of the chairman. Attest. John Groves, City Clerk." The next meeting of the council as a board of equalization was held on August 11 following, at which time, final action was taken on the special assessment complained of, together with numerous other matters then pending before the board. The record, as we construe it, affirmatively shows that a majority of the council sitting as a board of equalization met and organized, at the time and place, and in pursuance of the regularly published notice, and met at the office of the city clerk, who was present to record the proceedings of the board and perform his duties as such. Some business properly pertaining to the meeting was

transacted. Just how long, or covering what period of time, the board remained in session is undisclosed by the record. After the transaction of all or some of the business then before it, the board took a recess, subject to the call of the chairman. It is not necessary, says the statute, that a majority of the board continue present after they have regularly convened and organized, provided the city clerk or some member of said board shall be present to receive complaints, etc., and provided that final action be taken only by a majority and in open session. The record, we are of the opinion, discloses with sufficient certainty that these provisions of the statute have been complied with. Obviously it was deemed by the legislature sufficient if, after convening and organizing as a board of equalization, at the time and place provided in the notice, either the clerk or a member of the board should be present, at the place and during the time advertised for the presentation of complaints, petitions, etc., to receive such complaints, applications, etc., and give to such party any needful and proper information.

May we assume, without doing violence to the rule requiring the record to show affirmatively compliance with all essential conditions to a valid exercise of the taxing power, that the city clerk was present at the place of meeting of the board, which was his office, during the hours of the day mentioned, to wit, from 9 A. M. to 5 P. M., to receive applications, complaints, and give information, etc., as the proviso of the section referred to says may be done? The question must, we think, be answered in the affirmative. Here is an important city officer of a city of the metropolitan class, present at his office as a clerk of the board of equalization and to perform all duties that devolve upon him as such clerk. Manifestly it was his duty to receive complaints, if any were presented; and the statute says, in effect, that the board of equalization may convene and organize, and, if the clerk or a member of the board shall be present to receive complaints during the hours of their meeting, their personal attendance is not

otherwise required. We are quite well satisfied that no violence is done to any legal presumption, nor to the rule adverted to, in saying that substantial compliance with the section of the statute we are dealing with is disclosed by the record; and that the tax complained of can not be successfully impeached, because of the action of the board of equalization in the manner of proceeding, while equalizing the special assessment complained of. It is conclusively shown by the record that all orders, findings and other action taken affecting substantially the special assessment, the validity of which is challenged, was done by a majority of the board while in open session.

On the other point, the record recites as a part of the proceedings of the board of equalization that: "Having fully and carefully considered all complaints or objections, both written or verbal, and having examined the property adjoining and adjacent to said improvements, and having full and personal knowledge of the character of the said improvements and the special benefits to such property respectively by reason of said work;

"And whereas it appears that due notice of the sitting of the council as such board of equalization of date July 13, 1891, was duly published in the daily papers of the city as required by law;

"Therefore, be it resolved, * * * That all lots and real estate abutting on or adjacent to sewers in sewer districts aforesaid are especially benefited, and shall be assessed for the full cost of construction of said sewers according to their feet frontage and the usual scaling back process to the depth of said districts as created."

Although informal and not in strict conformity with the statutory requirement, we see no valid reason for saying the finding is insufficient and does not meet the demand of the statute requiring a finding that the benefits are equal and uniform as to all the property to be affected by the improvement. The finding that the property is specially benefited and should be assessed for the full cost of construction according to feet frontage, is tanta-

mount to a statement that the benefits are equal and uniform. If the property is benefited according to the feet frontage, it would seem that the benefits are equal and uniform. In *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, where a similar question was being investigated, the soundness of the views expressed in the last opinion in the case at bar on this point was seriously questioned, and it was argued that if error was committed in this regard, it should have been corrected by a direct proceeding and not by a collateral attack. In the *Portsmouth Savings Bank* case, it is held that a finding that the property is benefited "to the full amount in each case of said proposed levies," meets the requirement of the statute as to a finding of uniformity, as against an attack by injunction proceedings. The objection is, we are satisfied, untenable, and if the finding may be regarded as subject to attack collaterally, it is in the present case not so fatally defective as to invalidate the tax thereafter levied.

It is also argued by appellant, and it seems proper here to refer to the matter, that the notice of the meeting of the board of equalization was insufficient because of the manner of publication.

One of the sections of the charter act governing cities of the metropolitan class (sec. 85, chap. 12*a*, Compiled Statutes, 1893), provides, that the notice of the sitting of the board of equalization shall be given by publication in three daily papers of the city. The record discloses that there are but two daily papers published which are printed in the English language, and one in the German language. The notice in the case at bar, it appears, was published in all three of the papers mentioned, being printed in the German language in the German paper. It is quite true that, ordinarily, a publication of a legal notice in a foreign language, when not expressly authorized by statute, would not be a valid notice. In the instant case, however, we think an exception arises. The requirement of the rule as to publication of notice in the English language is met by the publication in both dailies printed in that language, they

being all the daily publications in the city printed in English. The legislature hardly contemplated an impossibility, nor that a publication of the notice in English in a German daily paper should be had in order to comply with the statutory requirement. We are not disposed to adopt such a construction. The object of the notice by publication is to give the greatest possible publicity. This can best be accomplished by the notice being printed in the German language in the German paper, when that publication must be resorted to in order to publish the notice in three daily papers. Its readers of course are accustomed to the use of the German language. If published in the English language, the notice would no doubt, in a large measure, fail of its purpose. If in the English language, a large number of the readers of the paper would not get the benefit of the notice which the law intends. The objection is not regarded as tenable. The judgment last rendered in this case is vacated and set aside, and the one rendered February 6, 1901 (61 Neb. 267), reinstated and adhered to.

JUDGMENT ACCORDINGLY.

LEWIS C. OLMSTED ET AL. V. ISAAC W. EDSON.

FILED FEBRUARY 4, 1904. No. 13,196.

1. **County Judge:** DEPOSITIONS: POWER TO COMMIT WITNESS. A county judge in this state has the same jurisdiction and powers in taking depositions that are conferred by law upon a notary public, including full authority to commit a witness for refusing to be sworn or give testimony in a proper case.

2. **False Imprisonment:** PETITION. A petition against a county judge, or a notary public, to recover damages for false imprisonment, based on such a commitment, must allege facts, not conclusions of the pleader, from which it appears that the officer proceeded without jurisdiction, or that the evidence sought to be elicited from the witness was of such a nature as to justify his refusal to testify.

3. Petition: DEMURRER. Petition examined, and *held* that a general demurrer thereto was properly sustained.

ERROR to the district court for Webster county: ED L. ADAMS, JUDGE. *Affirmed.*

L. H. Blackledge, for plaintiffs in error.

J. M. Chaffin, J. R. Mercer, J. S. Gilham and *Bernard McNeny, contra.*

BARNES, J.

This was an action to recover damages for an alleged illegal or false imprisonment. The suit was brought in the district court for Webster county, and the allegations of the petition were in substance as follows: That the defendant, Isaac W. Edson, was the county judge of Webster county, Nebraska; that the plaintiffs were, and had been for more than thirty years, husband and wife; that they resided in the vicinity of Inavale, and were well known to the defendants, as well as throughout a large part of Webster county; that on July 12, 1902, the defendant Ayers, as plaintiff, filed his petition and commenced his action in the district court for Webster county against the plaintiffs, and one Adelbert I. Walker, as administrator of the estate of Allen T. Ayers, deceased, and caused a summons to be issued therein for the defendants, the plaintiffs herein, only, and caused the said summons to be served on them, the answer day therein being fixed on August 11, 1902; that at the time of the acts complained of, no other summons had been issued in that action, and no appearance or other pleadings of any nature had been filed therein; that the defendant, Ayers, delivered said summons to the sheriff of Webster county for service, and also delivered therewith to the said officer a notice in customary form, stating that on July 15, 1902, the plaintiff in that action would take the depositions of the plaintiffs herein at the office of Fred E. Maurer, in Red Cloud, Webster county, Nebraska, and caused said notice and summons to be served on the plain-

tiffs, and on the 11th day of July caused a subpœna to be issued by the said Fred E. Maurer, as notary public, and served by the sheriff, commanding the plaintiffs to appear and give their depositions in said action before said Maurer as a notary public; that the plaintiffs appeared before said officer and made known to him that they were, and for many years had been, residents of Webster county, and that they had no present intention of absenting themselves therefrom, either permanently or temporarily; that neither of them was aged, sick or infirm so as to interfere with their being present and giving testimony at the trial of said cause; that no order of the district court or a judge thereof, authorizing or permitting the taking of their depositions, had been asked for or obtained; that the attempt to take their said depositions was not in good faith, but for the purpose of harassing and vexing them; that they were husband and wife, and that they each objected, on that ground, to either of them being required to be sworn or affirmed, or become or testify as witnesses on behalf of the plaintiff in said cause; that they thereupon refused to give their depositions; that the plaintiff Ayers, one of the defendants herein, requested the notary to commit the plaintiffs for contempt, which request was refused; that afterwards, on July 21, 1902, the defendants, Ayers and Edson, agreeing together, and well knowing the facts, maliciously, for the purpose of further harassing the plaintiffs, and illegally compelling them to give their depositions in said cause, caused another notice to be issued and served on them for the purpose of taking their depositions in behalf of said Ayers, in said cause, at the office of the defendant Edson, county judge, who thereupon issued a subpœna requiring the plantiffs to appear and give their testimony by deposition in conformity with such notice, which subpœna was duly served on the plaintiffs who, in obedience thereto, appeared before said county judge and made known to him substantially the same facts which had been made known to the notary public, and which facts and objections were reduced to writing, sworn

to and filed by each of the plaintiffs with the said county judge; that they thereupon again refused, for said reason, to submit or give their depositions before said judge as witnesses on behalf of said Ayers; that thereupon the defendant Edson, on the demand of defendant Ayers, knowingly, maliciously, arbitrarily and oppressively, without right, jurisdiction or authority of law, made and entered an order finding the plaintiffs guilty of contempt in refusing to give their depositions, and committed them to the common jail of the county until they should submit to be sworn or affirmed and give their depositions in said cause as witnesses for the plaintiff therein, which order was under the seal of said court, and a copy thereof was delivered to the sheriff of said county, who was the jailer, and by reason thereof the plaintiffs were committed to the common jail of said county and there confined for the space of 6 days, at the end of which time they were discharged upon the writ of habeas corpus by the judge of the district court for said county because said imprisonment was illegal; that by reason of said imprisonment plaintiffs suffered severe pain, anguish of body and mind, shame, humiliation and disgrace; that they also incurred a great expense, to wit, $150 for traveling expenses, attorney's fees and expense in defending said proceedings and procuring their discharge; that, by reason of all of which, they had been damaged in the sum of $10,000, for which sum they prayed judgment.

Defendant Nathan A. Ayers was not served with a summons, and did not appear in the case, so the action proceeded against the defendant Edson, alone. When the case came on to be heard, defendant moved to strike out that part of the petition which recited the proceedings before the notary public, and his motion was sustained. He thereupon filed a general demurrer to the petition, which was also sustained. The plaintiffs elected to stand on their petition, and a judgment of dismissal was entered against them, from which they prosecuted this proceeding in error.

It is contended that the court erred in sustaining de-

fendant's motion to strike, for the reason that the matter stricken from the petition was necessary to show malice, and that it was referred to later on in the pleading as having been substantially stated to the defendant in the plaintiffs' objections to being sworn. In our view of the case it is unnecessary to determine this question.

It is also contended that the court erred in sustaining the demurrer to the petition and in dismissing the action, and this assignment of error is the vital question presented for our consideration. If the petition stated a cause of action before the motion to strike was sustained, it was error to sustain said motion. On the other hand, if the petition did not state facts sufficient to constitute a cause of action, then the ruling on the motion was error without prejudice. We will therefore examine the petition as it was filed, and determine whether or not it stated a cause of action. It will be observed that the gravamen of the plaintiffs' petition was the act of the alleged illegal or false imprisonment on the part of the defendant Edson. It may be stated at the outset that, in order to state a cause of action in such a case, the petition must allege facts, not the conclusions of the pleader, from which it clearly appears that the officer acted without jurisdiction, or that the evidence sought to be elicited from the witness was of such a character as would justify him in refusing to testify. It is a familiar rule that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred on him by law. He is not liable for a mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority. *Atwood v. Atwater,* 43 Neb. 147.

Section 373 of the code expressly confers jurisdiction upon probate judges to take depositions. By law, the defendant had the same power and jurisdiction in that behalf that is conferred by the statute on a notary public. He therefore had jurisdiction of the subject matter, to wit, the

taking of the plaintiffs' depositions. As such officer he had the power, when the proper notice was produced and delivered to him, showing due and legal service thereof requiring the plaintiffs to appear before him and give their evidence in the form of a deposition, to issue his subpœna demanding their attendance at the time and place specified in said notice. This the petition alleges was regularly done. It is stated therein that when the plaintiffs appeared before the defendant as such officer, they refused to be sworn or testify. The excuse given for such refusal was that they were husband and wife, and as such could not be compelled to be witnesses one against the other. It was further claimed that the facts authorizing the taking of their depositions did not exist. It appears from the petition that the action in which they were required to testify was one against themselves and a codefendant of the name of Adelbert I. Walker, as administrator of the estate of one Allen T. Ayers, deceased. It is not alleged that the evidence sought to be elicited from them and preserved in the form of depositions was not against their codefendant, or was evidence sought to be elicited from one of the plaintiffs against the other. The proper and orderly thing for them to have done was to have taken the oath as witnesses and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have then made the proper objections which, undoubtedly, would have been sustained. The plaintiffs had been duly served with a summons in the case in which it was sought to take their evidence; notice of the time and place for taking their depositions had been regularly served and returned to the officer before whom they were to be taken, and the plaintiffs as the witnesses named in such notice were regularly before him at the appointed time and place. In short, all the steps essential to confer jurisdiction on the defendant as such officer to take their depositions had been duly taken. Plaintiffs' contention that such jurisdiction was ousted by a showing that none of the grounds enumerated in section 372 of the code for using

the depositions on the trial of the case existed at the time it was sought to take them, is untenable. That section is not a limitation on the right to take depositions, but on the right to use them on the trial of the case; that it is not essential that the reasons which permit their use at the trial should exist when they are taken, is obvious from the fact that one of such reasons is, that the witness is dead. As bearing on this point see *Wehrs v. State*, 132 Ind. 157, 31 N. E. 779; *In re Abeles*, 12 Kan. 451. That the witnesses were parties to the action in which the depositions were sought to be taken does not strengthen the plaintiffs' case, but rather weakens it, when it is remembered that taking the depositions of a party is the only substitute we have for a bill of discovery under our practice. Besides, so far as giving testimony is concerned, parties to the action are on precisely the same footing as other witnesses. Neither was the jurisdiction of the officer ousted by showing that the witnesses were husband and wife, and that the depositions were for use in an action to which they were both parties. It is true, generally speaking, that the husband can not be a witness against the wife, nor the wife against the husband, but each may be called as a witness for or against himself or herself; and it may have been the intention of the party taking the depositions to use such evidence against the party giving it alone. No presumption arises from the facts presented by the petition that it was the intention of the party seeking to take the depositions to use the evidence of either of the witnesses against the other. The officer having jurisdiction of the subject matter and of the parties, had full authority to commit the plaintiffs for their refusal to be sworn and give testimony. *Dogge v. State*, 21 Neb. 272; *In re Abeles, supra.*

It follows that the petition did not state facts sufficient to constitute a cause of action, and the demurrer thereto was properly sustained. This view of the case renders it unnecessary for us to pass on the ruling of the trial court on the motion to strike.

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

AFFIRMED.

GEORGE W. MAURER V. STATE OF NEBRASKA, EX REL. GAGE COUNTY.

FILED FEBRUARY 4, 1904. No. 13,326.

Mandamus: PUBLIC OFFICER: RETENTION OF MONEYS. When one, whose term as a public officer has expired, has made full, complete and truthful report of the public moneys which came into his hands during his incumbency, and of the disposition which he has made of them, but retains some of them under a claim of right, alleged to be unlawful, mandamus is not a proper action by which to litigate the claim.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed and dismissed.*

R. W. Sabin, Griggs, Rinaker & Bibb and *Hazlett & Jack,* for plaintiff in error.

H. E. Sackett, H. E. Spafford and *A. H. Babcock, contra.*

AMES, C.

This is a proceeding in error to reverse the judgment of the district court granting a peremptory writ of mandamus. The nature of the litigation is sufficiently disclosed by a stipulation contained in the record and which sets forth all the facts considered on the hearing as follows:

"It is hereby stipulated that for the purposes of the trial in this case, that in conjunction with the facts stated in the alternative writ and answer, the following facts are true:

"1st. The respondent reserves the right to object to any evidence on the ground that the writ does not state facts sufficient to constitute a cause of action or to grant the relief prayed for therein.

"2d. It is stipulated that the respondent received as fees of the county treasurer's office of Gage county, Nebraska, for the two years of 1898 and 1899, the total sum of $7,736.92; and out of this amount he retained the sum of $6,000 as his personal salary, and the balance of $1,736.92 he credited to the general fund of the county, and out of the general fund of the county he paid the help of the office during said two years the sum of $3,125.68, and that said amount was actually paid said help, and that said help was necessary for the running of said office, and that said office was run in an economical manner. That said salary of $6,000 and said sum of $3,125.68 paid help, exceeded the fees and commissions of the said office of county treasurer for said two years and term the sum of $1,388.76.

"3d. It is stipulated that the respondent as such treasurer made quarterly statements to the county clerk of said county in accordance with the statute, and that twice a year in accordance with law he filed a semiannual settlement statement with said county clerk showing, among other things, the amounts paid, time, and the manner in which the clerks and assistants were paid, and that the county board of said county approved the acts, doings, reports and statements of said respondent and made the same a matter of record in their public meeting as a board, by adopting a report in substantially the following form:

" 'That said George W. Maurer, county treasurer, has reported all collections made, also canceled all vouchers on hand for disbursements made; he has satisfactorily accounted for all moneys due to balance accounts, either by cash on hand, or balances due in the various banks of deposit.' "

Stipulation of Facts as to Second Term of 1900 and 1901.

"1st. It is stipulated that the respondent received as fees and commissions of the county treasurer's office of Gage county, Nebraska, for the two years of 1900 and 1901,

the total sum of $8,426.04; and out of this amount he retained the sum of $6,000 as his personal salary, and the balance of $2,426.04 he credited to the general fund of the county, and that out of the general fund of the county he paid the help of the office, during said two years, the sum of $4,362.64, and that said amount was actually paid said help as authorized by the county board of said county, and that said help was necessary for the running of said office, and that said office was run in an economical manner. That said salary of $6,000 and said sum of $4,362.64 paid said help, exceeded the fees and commissions of said office of county treasurer for said two years and term by the sum of $1,936.60.

"2d. It is stipulated that the respondent as such treasurer made quarterly statements to the county clerk of said county in accordance with the statute, and that twice a year in accordance with law he filed his semiannual statements including vouchers, showing receipts and disbursements of his office, and conditions of his office, and how his salary, and how, and the amount and manner in which the clerks and assistants of his office were paid, with the county clerk of said county, and that he had a semiannual settlement with the county board of said county for the year of 1900, and that his accounts, statements and reports were adopted and approved, and made a matter of record by said board in open session in substantially the following language at the first and second semiannual settlements:

" 'That said George W. Maurer, county treasurer, after carefully checking up his office and reports, receipts and disbursements together with the funds on hand, and in the different county depositories, find the same correct, and compares with the semiannual report of said George W. Maurer.'

"3d. It is further stipulated that the county board did not adopt the semiannual statements of the respondent filed for the year of 1901, which last semiannual statement was similar to the ones filed in the year 1900.

"4th. It is stipulated that as a part of the said sum of $1,936.60, paid out to clerks and assistants in said office in excess of fees and commissions for the years 1900 and 1901 of the second term, $657.56 were retained by said treasurer in the year 1901, and paid to said clerks and assistants.

"5th. It is further stipulated that on March 5, 1902, J. R. Plasters, the county clerk of Gage county, Nebraska, in conformity with instructions from the county board, made a demand on the respondent for the sum of $3,325.36, and on March 7, 1902, said respondent delivered to the relator the following communication in reply to said demand:

"'*To the County Board of Gage County, Nebraska, and to J. R. Plasters, County Clerk.*

"'GENTLEMEN: Your communication of the 5th of March, 1902, demanding of me the sum of $3,325.36 of moneys retained by me for service rendered by help in my office for the years 1898, 1899, 1900 and 1901 is received. In answer I will say there seems to be a difference of opinion between the board and myself as to the law in relation to the payment of help in the office of county treasurer which the county board has found necessary for the running of the office, and as there has been no more money retained by me than has actually been paid to the help in my office, and as I believe under the law I am entitled to retain, I must in justice to myself decline to comply with the request and demand of the board, as my reports and allowances have all been adopted save the last one of 1901. I will say, however, that I am prepared to meet any legal demand in this matter that it is found I may further owe.

"'Very truly yours, G. W. MAURER.'"

It distinctly appears from the foregoing recitals that the respondent during his incumbency of office made full,

complete and truthful report of all the public moneys which came into his hands, and of the disposition that he made of them. The only official delinquency with which he is charged is the unlawful retention of certain of such moneys after the expiration of his term of office. Is mandamus a proper remedy for their recovery? Section 646 of the code enacts that "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Is not this such a case? This court has held in several cases that a writ of mandamus may be issued after the expiration of the term of a public officer, to compel him to make report of the public moneys coming into his hands during his incumbency and, incidentally, to pay into the treasury sums so ascertained to be unlawfully retained by him. *State v. Shearer,* 29 Neb. 477; *State v. Boyd,* 49 Neb. 303; *State v. Russell,* 51 Neb. 774.

In a case where such a report has not been made and is requisite for the ascertainment of the amount of moneys, if any, in the hands of the alleged delinquent, there may be no "adequate remedy in the ordinary course of the law," but in a case in which such an uncertainty does not exist, and in which the amount of the money in the officer's hands, and the nature of the claim of right made by him to its retention, are distinctly and well known, we are unable to see why an ordinary suit at law is not a plain and adequate remedy. The above statute must be supposed to mean something, and we presume that among the objects of its enactment were to preserve to defendants their constitutional right to a trial by jury in the ordinary course of the common law, and to protect them from arbitrary arrests and penalties such as are the processes solely made use of to enforce obedience to peremptory writs of mandamus. The legislature has taken extreme pains to remove from our law and procedure the last vestiges of imprisonment for debt, and we think the court can not restore that remedy in direct violation of the statute mentioned.

It is recommended that the judgment of the district court be reversed and the action dismissed.

HASTINGS 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 reversed and the action dismissed.

REVERSED.

CHARLES H. FALSKEN V. FALLS CITY STATE BANK.

FILED FEBRUARY 4, 1904. No. 13,307.

Principal and Agent: INSTRUCTIONS. An agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable in damages to his principal, although his interpretation of them may be erroneous.

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

Francis Martin, Edward Falloon and *C. Gillespie,* for plaintiff in error.

Reavis & Reavis, contra.

AMES, C.

Farrington and Towle were loan brokers doing business at Falls City in this state. The plaintiff Falsken obtained through them a loan of $3,500 upon his note and mortgage upon a tract of land lying in that vicinity. Afterwards he loaned to Farrington $2,500 upon the note of the latter secured by collaterals. Falsken lived at Kansas City. On the 29th day of July, 1899, he transmitted through the mails to the defendant, the Falls City State Bank, the Farrington note and collaterals accompanied by the follow-

ing letter, as a copy of it appears incorporated into the bill of exceptions:

"KANSAS CITY, Mo., July 29, 1899. 914 E. 17 St.

"*Falls City State Bank.*—DEAR SIRS: Inclosed please find note for $2,540 against F. E. Farrington for collection and collateral bonds; Note of $2,500 in favor of F. E. Farrington and two Int. notes or coupons of $15 each attached to bond. You will give to F. E. Farrington as soon as my note is settled $2,000, Two thousand, to be paid Aug. 1-99 on my $3,500 loan and $75 to be paid on same Int. note also due Aug. 1-99, dated 2-7-95 due in five years. Send me receipt for $2,000 and Int. note from the said $3,500 note and mortgage holder against me. Said loan was made through Farrington & Towle and the balance $465 less your collection fee send me check.

"Yours truly, C. H. FALSKEN."

On August 1, 1899, Farrington satisfied his obligation with the bank and obtained a surrender of it and of his collaterals. On the same day, and as a part of the same transaction, the bank gave him two drafts on a New York bank for $2,000 and $105 respectively, and remitted to Falsken at Kansas City by draft $462.60, the aggregate of the three sums being the amount of the Farrington note. At or about the same time Farrington's receipt for the two thousand dollars, represented by the draft for that amount, was also sent to Falsken, but by whom is not certain and we think is immaterial. Farrington, who was or soon became insolvent, appropriated the New York drafts to his own use and failed to discharge to any extent the obligation of Falsken. Falsken is shown to have admitted in the following October that the receipt had come to his hands, and he testified that he learned in the following February that Farrington had not applied the money to the payment of the plaintiff's debt. He thereupon begun a series of attempts by solicitations and threats, direct and indirect, to obtain restitution from Farrington, which were continued through the summer of 1900, but were

unavailing. He seems not to have expressed any dissatisfaction with the conduct of the bank until these efforts had proved futile, although, in the meantime, he conversed more than once concerning the transaction with the officers of that institution.

Sometime in the fall of 1900, the transcript does not disclose the date, but apparently in October or November, Falsken begun this action, alleging a breach of the contract of collection as expressed by the letter of transmission of July 29, 1899, above copied, and praying judgment for $2,000 as moneys collected thereunder and not paid over or accounted for. The petition contains no allegation of fraud or of negligence. The answer, after admitting the contract and the collection of the money, contains what amounts to a plea of payment to the satisfaction and with the acquiescence, ratification and approval of the plaintiff. The reply is, in substance, a general denial of new matter. There were a verdict and judgment for the defendant, which this proceeding is prosecuted to reverse.

It will thus be seen that the sole question in the case is whether the defendant, acting in good faith, is justified by having paid out the money in the manner in which it did. The plaintiff contends that it is not, because, although the letter instructed the bank to pay the sum in controversy to Farrington as soon as it should be collected from him, it also directed it to send to Falsken a receipt for the money from the holder of the note and mortgage of the latter. But the two directions are not necessarily inconsistent, the holder was a nonresident, and it is not shown that the defendant or its officials knew either his name or whereabouts. The letter calls attention to the fact that the debt was contracted through Farrington and Towle, and expressly directs the payment of the money, not to the holder, but to Farrington, who thus appeared to be entrusted with the duty of seeing it applied to the desired use. It was "to be given to Farrington * * * to be paid on my loan." The bank was certainly not charged with the duty of payment either singly or jointly with Far-

rington, and if it was intended to be obligated to see to it that Farrington properly discharged his trust, that intent was not expressed, but must be inferred solely from the direction to the defendant to transmit a receipt from the holder to the plaintiff. The letter would have been literally complied with, if Farrington had paid the money to the holder, and obtained his receipt for it and delivered it to the bank for transmission. Under all the circumstances, we do not think that it was unreasonable to suppose that such was its intent, and, if so, the bank can not, of course, be held for the consequences of Farrington's default. The most that can be said, in behalf of the plaintiff, is that the letter was obscure and ambiguous with respect to a matter that afterwards turned out to be of vital importance. That it was so was due to the plaintiff's own fault or negligence, and he can not, with justice, be permitted to visit its consequences upon one who can not be accused of fraud or neglect, but, at the most, of an honest mistake. We do not think it is requisite to invoke the doctrine of ratification, but the conduct of the plaintiff for a year or more after he became fully acquainted with all the facts, tends very strongly to prove that he had the same understanding of his letter as did the defendant. It is surprising, if he supposed that his instructions had been violated to his damage in so large a sum, that he did not sooner demand reparation from the bank, especially when he encountered difficulty in obtaining restitution from Farrington. At all events, we think that the defendant is entitled to the protection of the rule that an agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions is not liable to his principal in damages, although his interpretation of them may be erroneous. *Minnesota Linseed Oil Co. v. Montague & Smith,* 65 Ia. 67, 21 N. W. 184; *Pickett v. Pearsons,* 17 Vt. 470; *Vianna v. Barclay,* 3 Cow. (N. Y.) 281.

Such being the case, the verdict is the only one that would have had support by the evidence, and the consider-

ation of alleged errors in the progress of the trial is not required.

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

HASTINGS 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

AFFIRMED.

ELVIRA M. ALDRICH ET AL., APPELLEES, V. MARANDA J. STEEN ET AL., APPELLANTS.*

FILED FEBRUARY 4, 1904. No. 13,172.

1. **Evidence:** DEEDS: MARRIAGE: VALIDITY. Evidence *held* not to show such total want of understanding, or such mania, affecting the transactions in question, as to avoid the deeds and marriage of Seth F. Winch for insanity, in the absence of fraud or undue influence.

2. ———: ———: UNDUE INFLUENCE. Evidence *held* sufficient to avoid, for undue influence, the deeds concerning all his property, of the value of many thousand dollars, made by a frail old man, who had shown symptoms of dementia, to his housekeeper, without consideration.

3. **Statute of Limitations.** Where the undue influence is alleged and shown to have continued to the grantor's death, 7 years later, only interrupted by his violent insanity toward the last, and the control of both person and property of the grantor lasted to the end, the statute of limitations against an action to set aside the deeds will not commence to run until his death as against his heirs.

4. **Marriage:** MENTAL CAPACITY. Mental weakness or even unsoundness, not proceeding to the extent of inability to contract in ordinary affairs, will not alone avoid a marriage.

5. **Divorce:** DECREE: COLLATERAL ATTACK. A decree of divorce obtained without collusion by a defendant on a cross-bill in a suit begun in a county where neither party resided, but by a resident of the state, whose motion to dismiss the cross-bill for want of

* Rehearing allowed. See opinion, p. 57, *post*.

jurisdiction was denied, and who contested its allowance at the trial but took no appeal, is not open to collateral attack by his heirs in claiming his property.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Decree modified.*

W. A. Saunders, W. F. Wappich and *Smyth & Smith*, for appellants.

Thomas & Nolan, contra.

HASTINGS, C.

This is an appeal from Douglas county. April 21, 1902, plaintiffs, two of whom were daughters and the third a granddaughter of Seth F. Winch, commenced suit, alleging their relationship; that he died February 11, 1899, at the hospital for insane at Council Bluffs, at the age of 77 years; that plaintiffs are his sole heirs; that the defendant Maranda J. Steen claims to have been Winch's wife at the time of his death, and has since married John J. Steen, who is joined as defendant, for that reason; that the other defendants claim to have acquired an interest in the land involved through Maranda J. Steen; alleged that Winch died seized of the real estate described, situated in Douglas county, and also of lots in the city of Chicago, and also of certain lands in Minnesota and of lots in Council Bluffs, Iowa; that on April 22, 1892, Winch conveyed to Mrs. Steen, then known as Maranda J. Mitchell, by warranty deed all of the real estate, except some lots in Council Bluffs and one lot in Chicago; that on April 25, Mrs. Mitchell reconveyed to him by warranty deed the same property, and on May 10, 1892, Winch by warranty deed again conveyed to her the real estate in Douglas county, subsequently caused to be conveyed to her the property in Chicago and in Council Bluffs, and in 1893, through one Foster, conveyed to Mrs. Steen the lands in Minnesota. That in 1900 Mrs. Steen conveyed a portion of the property to Alfred J. Norman, and in 1901 another portion to

George F. Morton, who on the same day conveyed to the defendant Gates, and afterwards, in the same year, she conveyed another portion of the property to George F. Morton, who conveyed it to the defendant, Mae L. Rice; that in 1902 Mrs. Steen and her husband conveyed to Mae L. Rice another portion of the property. It is alleged that each of the grantees in these conveyances took them with full knowledge of plaintiffs' rights; it is alleged that no title was conveyed by these several deeds, because the grantees knew of the insanity of Seth F. Winch and of his incapacity to convey, and, consequently, of the invalidity of Mrs. Steen's title. It is also alleged that by a sheriff's deed of December 20, 1894, the east one-fourth of lot 16, in Hawes' addition to the city of Omaha, was conveyed to Mrs. Winch for a consideration paid from the money of Seth F. Winch, procured from him when he was insane and acting under the undue influence of Mrs. Steen. It is alleged that in May, 1888, Maranda J. Mitchell took up her abode in Winch's house, first as a lodger and presently as a housekeeper, and remained with him until his death in 1899, in a state of illicit cohabitation and adultery; that she was 40 years of age when she came and Winch 66; that they lived together as man and wife, and were so reputed; that she was strong mentally and physically and a woman of prepossessing appearance; that Winch was feeble, and of feeble and unsound mind; that she acquired, and always retained, a great influence over him; that he was the owner of property to the value of about $100,000 in 1888, almost all of which was from time to time transferred to her; that, during all of the time of their connection, Winch continued in poor health and his mental powers weak; that he remained in this condition until in 1896 a complaint was filed at the instance of Mrs. Steen, charging him with insanity, and in 1898 another, on which the board found he was insane, and he was removed to St. Bernard's hospital in Council Bluffs, where he died, wholly insane; that when the conveyances to Mrs. Steen were made, he was incapable of understanding the nature

of the act and of making of deeds; that he was then mentally incapable of remembering the proper objects of his affection; that he was *non compos mentis,* did not understand the effect of his action and did not have mental capacity to transact ordinary business; that the deeds were induced by undue influence of Mrs. Steen; that, while they were living together in the state of adultery, she procured, besides these conveyances of real estate, mortgages, notes, moneys and securities without any consideration; that Mrs. Steen then had no income or property, and had worked at the trade of dressmaking; that she was assisted in procuring these conveyances by the family physician, Dr. Von Lackum; that, at the time of the first conveyance of real estate, April 25, 1892, there was pending and on trial, in the Cass county district court, a divorce suit, originally instituted by Winch, but in which his wife had filed a cross-bill and was asking alimony; and Mrs. Steen and Dr. Von Lackum procured the conveyance, by representing that it was necessary to prevent the wife from obtaining the property as alimony; that she fraudulently represented that the wife and the lawyers in the case would take the property from him, and he would have nothing left, unless it was conveyed to Mrs. Steen; that, before the making of the conveyances to Mrs. Steen, he had declared his intention to leave his property to his children, that, after the making of the deeds, he declared the property was his as much as it had ever been; that he was, and Mrs. Steen knew he was, easily influenced and deceived, and that Mrs. Steen procured these conveyances with full knowledge of his lack of mental capacity, and designing to defraud plaintiffs; that on May 16, 1892, she procured him to obtain a license and enter into the marriage relation with her; that the decree of divorce was rendered April 30, 1892, and the pretended marriage was therefore bigamous and void, and Winch, at that time, totally incapable of entering into a marriage contract; that the divorce action was filed by Winch in Cass county, Nebraska, against his wife, who resided in Providence, Rhode Island;

that neither party to the action had any residence or citizenship in Cass county, and the court acquired no jurisdiction over the person of either of said parties or the matter of said action; that the decree of divorce of April 30, 1892, in Cass county, was wholly void, and the parties never lawfully divorced, and the marriage to Mrs. Steen bigamous; that since January 1, 1897, Mrs. Steen had received all the rents and profits of the premises described in the petition, to the amount of $10,000.

Plaintiffs ask that the deeds be canceled and adjudged void; that title to the land be quieted in them, as heirs of Winch, and possession delivered; that the decree of divorce in Cass county be declared void, and the pretended marriage of Winch and Mrs. Steen set aside, and the defendants each enjoined from making any disposition of, or interfering with, the real estate, and that the defendants be required to account for the rents and profits since January 1, 1897.

Maranda and John J. Steen answered, admitting Winch's death on February 11, 1899; admitting the marriage of May 16, 1892, and that the parties lived together as husband and wife until Winch's death, and admitting the marriage to Steen; denied that Winch died seized of any of the property, and denied that in 1888 he owned property of the value of about $100,000; admit the making of the deeds of May 10, 1892, to the Omaha property, but deny the conveyance of the property in Chicago and in Council Bluffs; admit the conveyance by Foster and wife to Mrs. Steen of the land in Pine county, Minnesota, and of lot 9, block 4, Hoppe's Bonanza, an addition to the city of South Omaha, and admit the sheriff's deed as alleged to Mrs. Steen of the last described property; admit its conveyance to Norman, and say that she owned lot 22, block 12, in Brown's Park addition, since September 14, 1889, when she bought it from Winch for $500; that the deed of April 22, 1892, was never delivered to her, and the deed back of April 25, 1892, was made to reconvey the legal title to Winch, and, by mistake, included lot 22, in block

12, Brown's Park, which was never intended to be conveyed. The conveyance to Morton, and by Morton to Gates, is admitted; the conveyance to Mae L. Rice is also admitted; the defendants say that the deed of May 10, 1892, by Winch to Mrs. Mitchell was in payment of $1,250, and as consideration for an agreement between the parties of May 9, 1892, and the further agreement of May 10, that Winch was to transfer his property to Mrs. Mitchell and she was to marry him; that the written agreement was that she should take care of him during the remainder of his life, if she should outlive him, and attend to his burial, he to deed her such property as he wished her to have, in consideration of her services; that she had resided upon two of the lots in Omaha ever since her marriage with Winch, and was the owner and in absolute possession of the unconveyed portions of the real estate described in Douglas county, Nebraska, in Council Bluffs, in Chicago and in Minnesota; that Winch was of sound mind and memory, and in good bodily health, until 1896; that no undue influence was used to induce his making the deeds and delivery of property; admit her taking employment as Winch's housekeeper in 1888, and acting as such until the marriage with him on May 16, 1892, and deny any adulterous cohabitation; they deny the procuring of any complaint of insanity against Winch, and deny any request to reconvey the property; admit that Winch himself commenced the action in Cass county for divorce from his wife, and say that she appeared, and on her cross-bill a decree of divorce and alimony in the sum of $15,000 which was fully paid by Winch, was procured.

The answer further alleges conspiracy of Norman and the plaintiffs to institute this action and deprive her of her property. The answer also complains of misjoinder of the claims of insanity and of undue influence by the plaintiffs, and pleads that the alleged cause of action did not accrue within four years before the commencement of the suit and that it is barred by the statute of limitations. They ask a dismissal of the case.

Gates and wife answered, claiming a conveyance of lot 19, Winch's subdivision, an addition to the city of South Omaha, from Geo. F. Morton, August 17, 1901; that Morton bought the property of Mrs. Steen for $1,500, and conveyed it to Gates for the same amount; that the latter had no knowledge or information of any insanity or incapacity on Winch's part, and say that he was of sound mind on May 10, 1892, when he deeded the property to Mrs. Mitchell; these defendants also set up misjoinder, and also allege that plaintiffs' cause of action did not accrue within four years and was barred.

A similar answer was filed by Mrs. Rice and husband as to the property conveyed to them by Morton. Replies were filed, consisting of general and special denials.

Trial was had January 15, 1903, and decree entered for the plaintiffs. The court found generally for the plaintiffs. Found that Winch died in 1899, and that plaintiffs are his sole heirs, and that the mother and grandmother, Sarah Winch, was Seth F. Winch's wife, and died in June, 1898; that Winch in 1891 filed his petition in Cass county district court for a divorce from her; that she filed an answer and cross-petition for divorce; that April 30, 1892, she was granted a divorce upon her cross-petition; that it appears from the pleadings and record in this case that neither party ever resided or had any citizenship in Cass county, and that the district court of that county therefore had no jurisdiction, and the decree of divorce was wholly void; that Winch owned the real estate described, on May 10, 1892, and that he conveyed it to Mrs. Steen; that on June 1, 1893, he owned the property in Pine county, Minnesota, and conveyed it to Foster and wife, and they quitclaimed to Mrs. Steen, all without consideration, Foster acting merely for the purpose of conveying title to Mrs. Steen; that August 24, 1894, Winch procured a conveyance to be made to Mrs. Steen of a lot in Chicago, on which he had previously held a mortgage, and had this done without any consideration moving from Mrs. Steen; that in the same year, 1894, Winch procured a mortgage

to be foreclosed and the sheriff's deed to be made, conveying to Mrs. Steen, without consideration, lot 16, in Hawes' addition to the city of Omaha; that Winch died seized of lot 22 in block 12, Brown's Park, and that the same descended to the plaintiffs at his death, and that Mrs. Steen had no interest in it; that on May 9, 1892, and thereafter till his death, Winch was insane; and that all of the conveyances made by or under his direction to Mrs. Steen conveyed no title and were void, and should be delivered up and canceled of record; that Winch and Mrs. Steen went through the ceremony of marriage May 16, 1892, but that he was then insane and incompetent to enter into any marriage contract; that Sarah Winch was then his wife, and the Cass county court was without jurisdiction, and its judgment void; and that the attempted marriage was wholly void, and that no marriage between the parties was ever effected or consummated, by conduct or otherwise; and that Mrs. Steen acquired no interest, dower or title to Winch's estate because of such marriage. The court further finds that Mrs. Steen's alleged interest had been conveyed to Norman, Morton, Gates and Rice as alleged, but that each of them had notice of Winch's insanity at the time he conveyed the property to Mrs. Steen, and that all their deeds were void and should be delivered up and canceled. The court finds that the conveyances of lot 9, block 4, Hoppe's Bonanza, to Mrs. Steen, through Foster and wife, were void and should be canceled as a cloud over plaintiffs' title to that property. The court finds that the rents and profits of the premises from April 18, 1898, to the date of the decree were $9,314.03; that Mrs. Steen had made improvements upon the property since April, 1899, to the amount of $7,783.34; that she paid taxes amounting to $1,530.69; that the improvements and taxes were paid out of the rents, and that she was entitled to offset them; that Mrs. Rice had made valuable improvements to the amount of $169.11; that Gates' improvements to the value of $11.84 should be paid for by plaintiffs; that all of the defendants should be perpetually enjoined

from conveying, incumbering or interfering with the real estate, and that the title of plaintiffs should be quieted as against the defendants; and defendant Maranda J. Steen should forthwith convey to plaintiffs the real estate in Pine county, Minnesota, and in Cook county, Illinois, and turn over to plaintiffs the possession thereof. A decree was entered in pursuance to these findings. The parties, however, do not bring error, but have entered an appeal in this court.

Appellees say that the issues are: (1) Was Winch insane when he executed all of the deeds to Mrs. Mitchell, and when he attempted to marry her, and were the deeds and marriage void on that account? (2) Were the conveyances without consideration, and procured by Mrs. Mitchell by undue influence exercised through illicit sexual intercourse? (3) Was the divorce at Plattsmouth void for want of jurisdiction over the subject matter, and lack of consent on the part of the state; and was the marriage of Winch and Mrs. Mitchell consequently void, he being admittedly insane at the time his first wife died in 1898?

Practically the question is, was Winch insane on and after May 10, 1892, till the time of his death, as the trial court found? If not, were the deeds to Mrs. Mitchell procured by undue influences? Is the statute of limitations a bar against plaintiffs' recovery of this real estate on that ground? Is the decree of divorce in Cass county a nullity?

If, as the trial court found, Winch was wholly insane in 1892 when he made these deeds and contracted this second marriage, and remained so until his death, then the setting aside of all his transactions was right and should be affirmed. None of the grantees were ignorant of the actual conditions. If, on the other hand, he was simply weak and under undue influence as a frail old man, past three score and ten, the questions as to the statute of limitations and as to the jurisdiction of the Cass county district court to grant the divorce become important.

The testimony consists of nearly 1,400 pages of stenog-

rapher's notes, taken mostly from the lips of 67 witnesses. It is conceded that there is evidence tending to support the trial court's finding of insanity. Counsel frankly say that if this record is to be examined only to see if it contains evidence which, taken by itself and uncontradicted, would warrant the conclusion reached, then there is no use of going further and the decree should be affirmed. They also confidently assert that an examination of it all will show that the weight of evidence is against the learned court's sweeping finding of insanity; and they claim that the Cass county district court was not without jurisdiction to grant the divorce; and that any claim of mere undue influence in the procurement of these deeds is barred by the statute of limitations.

A somewhat careful examination of the testimony has been made. It shows that Winch was born in 1822, was married in 1847 in Providence, Rhode Island, living there with his wife until 1856, when he went to Chicago; his history from that time is not traced until his arrival in Logan, Iowa, in 1871; after 1856 he seems to have gone home, only occasionally, to Rhode Island, where his family consisted of the wife, three daughters and an epileptic son. In 1871 he located at Logan, Iowa. He was at that time possessed of considerable money; he seems to have engaged in the business of loaning money, in the name chiefly of his wife and of a sister in Chicago, from both of whom he held powers of attorney which were placed on record; his method seems to have been to take secured notes for the full amount of the loan and legal interest, and to exact from the borrower as much additional in the way of bonus as he could obtain, calling it a "chip" or "commission." In the collection of these loans he would frequently acquire the property on which they were secured; he seems to have prospered steadily in the loan business until the year 1885, but to have been from the first inception of it a man of eccentric habits and excitable temper; his actions, as related, amply justify the description of him in these terms by his brother-in-law,

quartermaster general Denis, of Rhode Island. In 1884 a judgment for $5,000 was recovered against him for assault by a young woman, who claimed he had enticed her to his rooms by a promise of the gift of a sewing machine; she had been employed in a family where he boarded for some years, and was just married. He seems to have had increasing troubles in his business at Logan, and to have been acquiring, in the meantime, some Omaha real estate; and in 1887, without entirely closing out his property in Harrison county, Iowa, he removed to Omaha, where he had erected an apartment house, in which he had rooms; in 1888 a woman, calling herself Mrs. Mitchell, a dressmaker, took lodging in the house, in rooms adjoining his; another lodger at the time, Mrs. Bowman, testifies that she had been preparing Mr. Winch's meals, but that, almost immedately after the arrival of the new lodger, the latter began to prepare his meals, and very shortly thereafter a door was cut between this new lodger's room and his, and that the rooms were occupied by them in common. The defendant, however, says that she was merely a lodger, and continued her work as a dressmaker, from the time of her entering the building in June, 1888, until November, 1888, when she took employment as Winch's housekeeper at $20 a month, with board, lodging and necessary clothing. She says that she continued in that capacity and position, without any improper relations, until May 16, 1892, when she and Winch were married in Council Bluffs, Iowa. The first wife's decree of divorce was rendered at Plattsmouth, on April 30 of the same year. One witness, however, testifies positively to spending a night in their rooms in 1891, and that Winch and the woman occupied the same bed, in the room next to the one where he slept.

Dr. Tilden, introduced by the plaintiffs to testify as an expert, heard the testimony introduced by the plaintiffs; he also, in the year 1896, and again in 1898, as a member of the Douglas county insanity commission, made a personal examination of Mr. Winch and, on both occasions,

found him insane, suffering from senile dementia, with delusions, especially as to his property. He was asked whether, taking the testimony which had been produced as true, Mr. Winch was insane prior to 1896, when he came under Dr. Tilden's personal observation. The opinion was expressed that he was previously insane. The doctor was then asked, whether, in view of all the evidence, he could fix the time when Mr. Winch became insane. He replied that he could give an opinion on that point, and was asked to do so. To this latter question no objection was made. The doctor then proceeded to recite some of the facts and testimony which led him to conclude that the disease began as far back as 1884, and that its first distinct manifestation was the assault on the young woman in Mr. Winch's rooms, at Logan, in that year, and finally gave it as his conclusion from the evidence that Mr. Winch was not capable of making the deeds, or entering into the marriage contract, in May, 1892, under which Maranda J. Steen claims the real estate involved in this action. Most of this evidence is without objection. Much of it seems obnoxious to the objection that the question was put in such a manner as to cover the very issue to be submitted to the court, a form which is condemned in many well considered cases. *Dolz v. Morris,* 10 Hun (N. Y.), 201; *Smith v. Hickenbottom,* 57 Ia. 733, 11 N. W. 664; *Clark v. Detroit Locomotive Works,* 32 Mich. 348; Rogers, Expert Testimony (2d ed.), sec. 26.

Dr. Akin, called on rebuttal, was asked a number of questions as to the leading writers on the subject of senile dementia, and their statements. He was asked as to who is generally recognized in that community as the best expert on mental diseases, and permitted to answer, over defendants' objection, that it was Dr. Tilden. Doubtless the court "is at liberty to examine other witnesses to aid it to determine whether he (the expert) is qualified to draw a correct conclusion upon the question relating to the science or trade in relation to which he is to be examined." Rogers, Expert Testimony (2d ed.), sec. 17. In

the present instance, however, the examination was not for that purpose, as the evidence by Dr. Tilden had already been submitted. The purpose seems to have been to induce the trial court to give additional weight to Dr. Tilden's conclusion as to Winch's incapacity. The decision seems to have followed Dr. Tilden's opinions, and it is earnestly contended that they are not well founded; that the utmost which the evidence shows as to Winch's condition, up to the time of the making of these deeds to Maranda J. Mitchell and contracting the second marriage with her, is only weakness and eccentricity, and nothing which will justify the finding that those acts are totally void.

It is conceded that in 1896 Winch was violently insane; that he never recovered; and died, demented, in St. Bernard's Hospital in Council Bluffs in 1899; that when he made these deeds and contracted this marriage he was 70 years old and feeble in health; that the trial court was justified in finding that nothing was paid for the deeds, and in finding that the $1,300, which defendant Maranda J. Steen says she let Winch have prior to that time, was wholly mythical, and that she herself had admitted as much in other litigation. Dr. Tilden bases his opinion that the disease had started in 1884 on the statements as to the assault upon Mrs. Rogers, together with some irrational conduct in regard to the removal of a fence, which Winch discovered, in midwinter, was over on his land a few feet. He ordered it immediately removed to his own serious detriment, by exposing his haystacks, as well as to that of the neighbor who was compelled to remove the fence. The testimony of the district attorney of Harrison county, and of the county clerk, to his lack of memory and excitability, and the testimony to the same effect by the witnesses Norman and Bolter, indicated a very great loss of memory, and the progress of the disease through 1888, 1889, 1890 and 1891. In these latter years, there was some evidence produced of his quarreling with the school children; witnesses swearing to his chasing the children with a shotgun, with a club and with a horsewhip. The

doctor cites evidence tending to show that in a number of instances he collected notes, gave receipts against them, then forgot the transaction, and brought suit on the notes. Some testimony by Judge Sullivan of Plattsmouth, who was the first wife's attorney in the divorce suit, was mentioned, that at the time he acted quite irrationally, boasted of his dissolute relations with numerous women, of improper relations with his first wife before he married her, would laugh and cry without cause for either. These things, all combined, in the opinion of Dr. Tilden, indicated that the disease, which had proceeded to complete dementia in 1896, had already become well marked in 1892, when these symptoms were observed. These symptoms are all gathered, as fully as counsel seem to have been able to do so, in question 5440, on page 816 of the testimony, asked on cross-examination of Dr. S. K. Spalding. The latter has 31 years' experience, 20 of it in Omaha; is a graduate of the Bellevue Hospital College of New York city; had made nervous and mental diseases a specialty, and is at present United States pension examiner in Omaha. In the years 1889, 1890 and 1891 he was a member of the school board. He had known Mr. Winch since the fall of 1889, first, as a member of the school board, he rented a room from him for school purposes, from that time until July, 1890, and in April, 1890, a new contract was made, renting the same room and another for the following year for the same purpose; this business the doctor personally transacted with Mr. Winch. While the rooms were occupied as a school room, the doctor was frequently there and had frequent talks with Mr. Winch. The rooms had to be repaired and some alterations made, which Mr. Winch did. His arrangements were well considered and rational. In the spring of 1890 he began to treat Mr. Winch for bronchial trouble, for which the doctor examined him and wrote a prescription; that he treated Mr. Winch for this trouble, occasionally, until some time in the year 1895, when he was consulted with regard to Mr. Winch's kidneys, and found him suffering from excessive uric acid, which

had produced lumbago pains in his back. Dr. Spalding observed no indications of mental disease or unsoundness while treating him, up to 1895, and thinks he was entirely sane up to that time. On cross-examination this question was asked of him:

Q. Supposing a man, 60 years of age, goes to the house of a neighbor in the winter time, on a farm, and has the line fence measured, and finds that the fence is over on his land at one end about a foot, and at the other end about two or three rods; he goes to the neighbor's house in the dead of winter, when the ground is frozen and the snow on the ground, and demands the immediate removal of the fence; holds one hand in his hip pocket and threatens with his fist with the other hand, and does this over the protest of the tenant, that if the fence is removed it will destroy his own crops as well as work an injury to the neighbor, who removes the fence; but in spite of that he proceeds and requires the neighbor to remove the fence; and, about the same time, he finds a young woman on the streets of the town where he lives, who has just recently been married; this young woman had lived in the family where he had lived, for a number of years; she was a virtuous, good woman; he asked her to go over to his office: said to her, "Come over, I want to give you a sewing machine. She went into the office; he locked the door and she said, "Where is the sewing machine?" His room—the room where he stayed, his bedroom, instead of his office. He locked the door upon her. She said, "Where is the sewing machine? I don't see any in the room." He answered, "Get down on that bed there, and I will show you the sewing machine." And they had a fight, and she screamed for help, and finally was able to make her escape. Four years after that event, and in the year 1888, this same man went from his house at 7 or 8 o'clock in the morning, at half past 7 or 8 o'clock in the morning, in a country town, in the summer time, in the month of June, when the people of the town were stirring about, in a public part of the town, in sight of the court house; and he went

with a pair of slippers, pair of drawers, and undershirt and straw hat, and nothing else on his person whatever; led one horse to water to a livery stable in the neighborhood; down one alley and out another alley; took that back, and led another horse and watered it, in this condition; later, in the same summer, and not long after that, he goes to this barn, the same barn, and demands the team of another man and wants to drive that team; the liveryman says, "You can't have that team"; and, in spite of that, he goes and gets a harness and says, "Now I want to drive that team." And the man still says, "You can't drive that team," and tells him to go away and leave the barn. A few years later than that, 4 years or 3 years later than that, he commenced a divorce suit against the wife by whom he had 6 children, in a county other than the county of his residence; and, in the preliminary motions to the divorce trial, he engages in conversation with the other lawyers, on the other side of the case, and says to them, and refers to his wife as a damned old bitch, and laughs, and, in the next sentence, he refers to his children and cries; and later on in the trial of the case, he testifies upon some matters in the case in an apparently rational manner; he a little later than this becomes embroiled—before this, in the years 1890, 1891 and 1892, he becomes embroiled in quarrels with school children of the neighborhood; he runs certain of the children with a shotgun; he runs others with a buggy whip; others with a club; he drives through the streets of the city where he lives with a sulky and a peaked jockey cap, behind a horse which he supposes is fast, although as a matter of fact it is not a fast horse; in the years 1891 and 1892, at different times, he called at the office of the clerk in the village first mentioned; he speaks to the clerk of the court, and demands the inspection of certain records and, when they ask what records he wants, he says he has forgotten what records he wants, and leaves the office; at other times he goes to the clerk's office, and asks for information about certain cases, or certain records, which the deputy clerk gives

him and explains to him fully, and within five minutes he comes back, and asks for the same information, saying he has forgotten; at these visits he talks to the clerk, and to his deputy there, secretly and confidentially about matters which are not of a secret character, but of public nature and public records; and takes them into the vault of the clerk's office in order to talk to them, at times, not always, and all of these things occur prior to the making of a deed, which he made on the 10th day of May, 1892; prior to this time, he also had a housekeeper come to his house in the year 1888; she stayed with him until the year 1892, at which time, after the making of certain deeds, he entered into the marriage relation, or attempted to enter into the marriage relation with her; prior to the time he was married to her, he lived with her in the same rooms; at times they occupied the same bed; their clothes were in the same wardrobe, and she exercised great influence over him; she attended the divorce trial against his first wife at the neighboring city, sat at the counsel table—attended him when he went to the lawyer's office concerning his divorce; took an active interest in the divorce case and in all proceedings relative to it. Putting these things together, and that he, in this deed of May 10, deeded all his property in the county where he lived; in subsequent deeds, he deeded all the property he had to this woman, including not only the lands, but notes and mortgages and all securities of every character, amounting to approximately $40,000 worth of property and lands, and this without any consideration, unless it was a few hundred dollars, or less than $2,000 at most; taking these circumstances into consideration, are you able to say whether the man that I have described was sane or insane at the date, 1892, when he made that deed?

A. Whether he was sane or insane?

Q. Yes, sir. I will add to that question, also, that he used a catheter from the year 1888 on, until the time he died. I will add these other elements, if you will permit me, that in 1896 he was declared insane by the insanity

commission of the county where he lived, and that he died in the asylum in 1899?

A. A part of his acts show the results of a self-willed sane man, and the other part show the results of an insane man. Of course the insanity part of it, when he was declared insane by the board, he was evidently insane, but the other parts—

Q. I am asking you now for your opinion as to his sanity or insanity in the year 1892?

A. I would say he was sane.

Some complaint is made of the unfairness of Dr. Spalding, and of the fact that senile dementia is even declared by him not insanity at all. There seems, however, nothing to indicate that he was unfair in describing his intercourse with Mr. Winch during the years from 1889 to 1895, and a number of witnesses, including Dr. Gibbs, and Dr. Bailey, a dentist, B. B. Wood of the Merchants National Bank and C. S. Rogers formerly of the same institution, where Mr. Winch had a bank account from 1887 to some time in 1896, George F. West, agent of the North Western R. R. Co., and Mr. Jamison of Hayden Bros., where Winch had an account, and other witnesses including Mr. Gates, testify that there was nothing in Mr. Winch's actions or manner during the years from 1890 to 1895 that impressed them as indicating mental unsoundness. It is true that some of them, like the chief defendant herself, weakened their statements by making their testimony apply to the years 1896 and 1899, when he was admittedly hopelessly insane, as the sister of Mrs. Steen writes to the witness Norman in September, 1896, a "raven maniac."

The evidence, however, taken as a whole, indicates that in May, 1892, Winch had become a weak and feeble old man entirely under the influence of Mrs. Mitchell, as she then called herself. His institution of the action for divorce in Cass county, and his subsequent attempt to dismiss it when the first wife appeared to contest, and the prominence of Mrs. Mitchell in that litigation, and the deed-

ing to her of the property 10 days after the decree was rendered, while Winch was alarmed at the prospect of the lawyers getting it, indicate great weakness on his part, and it is not improbable that there was already, as Dr. Tilden indicates, some mental unsoundness, enough, it would seem, to render the deeds voidable in connection with the lack of consideration, and the undue influence exercised by Mrs. Mitchell. It does not seem, however, that the evidence in this case warrants a finding that there was, at that time, any such total want of understanding or special delusion causing these deeds, as would render them void, in the absence of any fraud or undue influence. *Mulloy v. Ingalls,* 4 Neb. 115; *Dewey v. Allgire,* 37 Neb. 6. There can be very little doubt that a conveyance by Winch at the time in question, fairly made to one who paid a good consideration, would have to be upheld. There are no facts in this record on which such a deed could be set aside. The action of the trial court can therefore only be upheld on the ground that, in addition to the weakness of mind, there was fraud or undue influence in the causing of the transfers, and that the second marriage was void for some other reason than Winch's insanity. If he was capable of contracting, his second marriage was valid, unless the previous one stood in the way. Compiled Statutes, secs. 1, 2, chap. 52 (Annotated Statutes, 5300, 5301).

It is urged, however, that unless absolute insanity is found to exist in this case, the action was barred by section 12 of the code. It is true that this section has been held to bar, after 4 years, an action by the heirs of a former owner to set aside a deed for fraud and undue influence. *Kohout v. Thomas,* 4 Neb. (Unof.) 80. And an owner claiming fraud in the sale of the premises by an assignee in bankruptcy has been held subject to the same bar. *Hughes v. Housel,* 33 Neb. 703.

In *Parker v. Kuhn,* 21 Neb. 413, 433, it is held that a bill to redeem by a junior incumbrancer from a sale had by a prior lienholder is governed by section 16 of the code and must be brought within 4 years. In addition to the

above holdings, there are a great many more to the effect that a creditor's bill, claiming no interest in the title except through the fraud in the conveyance, must be filed within four years, under section 12.

These latter, manifestly, have nothing to do with section 6, which provides for the commencing of an action to recover "title and possession" of land within 10 years after it accrues. It is hard to see why this section 6 does not apply as well to a suit in equity brought by an heir to get title, who claims the deed of an ancestor is void, as it does to an action in ejectment based on the same claim. The holdings of this court, above given, seem to have settled, however, that the equitable action must be brought within 4 years.

Even this does not relieve the defendants in this case. The petition expressly alleges, and the facts show, that the control over Winch by his second wife continued steadily until his violent delusions necessitated physical restraint. This was procured by her and lasted to the end of his life. The procuring and holding of these deeds and of this property by such means was therefore a continuing act, which closed only with his death in 1899. This action was begun in April, 1902, by his heirs. No authorities have been cited to sustain a holding that a weakness and undue influence which could wrongfully cause the deeds in May, 1892, and which only increased as the years went on, would not excuse the bringing of an action by Winch while it lasted. It is not thought that any can be found. The fraud must be deemed to have continued till 1899, and the action therefore to be in time.

It remains to consider what is the effect of the Plattsmouth divorce and of the second marriage. The provision of section 1, chapter 25, Compiled Statutes (Annotated Statutes, 5324), that the marriages declared void by section 3, chapter 52 (Annotated Statutes, 5302), shall be so without any decree of divorce, would impliedly prevent all others from being so. Section 3 avoids marriages only between a white person and a negro of at least one-fourth

blood; marriages where either party has a husband or a wife, or is insane or an idiot, or the parties are too nearly related. Section 1, chapter 52, Compiled Statutes (Annotated Statutes, 5300), makes consent the essential requisite to civil contracts, which it makes marriages to be. Thus this state seems clearly to have adopted the prevailing rule that, while absolute inability to contract, insanity or idiocy, will avoid a marriage, mere weakness will not, unless it extend so far as to produce the derangement that avoids all contracts, by doing away with the power to consent. 1 Bishop, Marriage and Divorce (4th ed.), sec. 125. As we have concluded that this power was not destroyed in Mr. Winch until some time in 1895 or 1896, it follows that the marriage of May 16 was valid if the former one was no obstacle. That former marriage had been attempted to be dissolved by the Plattsmouth divorce. It is urged that section 45, chapter 25, Compiled Statutes (Annotated Statutes, 5369), forbids the marriage of a divorced person within 6 months after the rendition of the decree. The prohibition, however, extends only for 6 months after the decree. In the present case, if the divorce was valid, the continued cohabitation of the parties, under claim of marriage, after that time would make them man and wife. Winch's capacity lasted at least this long. *Eaton v. Eaton,* 66 Neb. 676.

The only remaining question is, whether or not the action of the district court for Cass county was so entirely without jurisdiction as to render the decree void. If the divorce decree was void, there was no marriage with Mrs. Mitchell. By the time the first wife died, June, 1898, Winch had become, and after that remained, hopelessly demented and incapable of assenting to a marriage. This question seems to have been carefully considered by the court at Plattsmouth after Mr. Winch, discouraged by the cross-bill, sought to dismiss his action, and have the cross-bill dismissed on the ground that the Cass county district court had no jurisdiction. This was refused, and no appeal taken. Section 6, chapter 25, Compiled Stat-

utes (Annotated Statutes, 5328), provides that a divorce may be granted in the county where the parties, or either of them, reside, on a petition by the aggrieved party. In this case the husband had applied in Cass county, though residing in Douglas, and had procured service on the wife by publication. The wife then exhibited a cross-petition. He then asked to dismiss. The district court held that he was estopped from denying his residence in Cass county, and must abide by the forum of his own selection.

Of course, the sole ground on which the motion to dismiss the cross-bill could be sustained would have been that section 6, above quoted, in giving jurisdiction "where the parties, or one of them, reside," impliedly forbade it to all other district courts of the state. No action of parties or of the court itself can enlarge the latter's powers over the subject matter. The law, alone, creates a tribunal.

In *Burkland v. Johnson,* 50 Neb. 858, the want of an acknowledgment of an arbitration agreement was held to prevent jurisdiction to render judgment on it, though all the parties were before the court. In *Anderson v. Story,* 53 Neb. 259, the county court was held to have no jurisdiction to examine the accounts of a foreign guardian, and the case was dismissed here for that reason, after having been litigated by the parties without objection in the county and district courts. In *Johnson v. Bouton,* 56 Neb. 626, it is decided that a district judge, at chambers, has no authority to dismiss an action for an injunction, and such act is void, though the parties agree that he may decide it there. In *Armstrong v. Mayer,* 60 Neb. 423, the right of the district court to entertain an appeal in forcible entry and detainer cases was denied, though both parties acquiesced and tried the case there.

In the present case, however, it is clear that an act of a party could confer jurisdiction. The first Mrs. Winch could have taken up her abode in Cass county at any time before the trial, and given the court full power under section 6 to hear the case. It seems probable that the action of plaintiff in filing there his petition and affidavit for

publication, had estopped him to object that she had not done so. That, in itself, was an implied statement that he resided in Cass county, on which she had a right to rely. Of course, if he was estopped, she, and any one claiming through her, must be, after she has acted on that estoppel. Section 11, chapter 25, Compiled Statutes (Annotated Statutes, 5334), provides that divorce cases shall be conducted as other suits in equity. Section 8 makes residence in the state essential. It seems clear that the effect of section 6, above cited, is not to limit the jurisdiction, but to provide for its exercise with due regard to parties' convenience. Of course, there was no authority of law for any publication of notice in Cass county. In the absence of any appearance by defendant, the whole proceedings would have been of no effect as against her. But she did appear and got the decree, and it does not seem that his heirs can collaterally assail it. The decisions seem to hold that appearance by a defendant in divorce cases confers jurisdiction of the person.

In *In re Ellis' Estate,* 55 Minn. 401, 23 L. R. A. 287, the claim of some heirs that their father's marriage was void because his first wife had been divorced in a county in Wisconsin, where neither party resided, was disallowed. As here, the parties had appeared, and alimony been awarded and paid. The court say that bringing the action in a wrong county is but an irregularity.

Estoppel on a party plaintiff to claim nonresidence, as affecting jurisdiction in a divorce proceeding, is distinctly held in *Ellis v. White,* 61 Ia. 644, 17 N. W. 28. In *Chichester v. Donegal,* 1 Add. Eccl. Rep. (Eng.) 13, entering appearance in London is held an estoppel to claim want of jurisdiction because of actual residence in Dublin. Other cases are cited in a note to *In re Ellis' Estate, supra.* Of course, as held in *People v. Dawell,* 25 Mich. 247, if neither party is actually domiciled in a state, no jurisdiction to act upon their status in that state's courts can attach. In the present case, there is no question as to jurisdiction in the state. That being so, it would seem that under the pro-

vision, that the rules of equity procedure shall apply to divorce proceedings, the ordinary rules of estoppel must apply.

Is it, however, necessary that it be held that the action of the Cass county district court was right, in order to make it conclusive? The question as to jurisdiction here is not as to the powers of the court, but whether those powers were brought into action by the facts of residence and the situation of the parties, brought about by their own acts. The question as to the court's jurisdiction under those facts was raised and decided. That decision remains entirely unmodified. Was not the court authorized and required to pass upon the existence of these facts and their effect, and is not its adjudication conclusive until reversed or modified? *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 50 C. C. A. 339; *Dowdy v. Wamble*, 110 Mo. 280; *City of Delphi v. Startzman*, 104 Ind. 343; *State v. Scott*, 1 Bailey (S. Car.), 294; *Strohmier v. Stumph*, Wils. (Ind.) 304.

We are satisfied that the decree of divorce is valid as against this collateral attack.

It is recommended that the decree of the district court setting aside the several deeds of conveyance be affirmed, and that so much of said decree as disaffirms the marriage of Seth F. Winch and Maranda J. Winch be reversed and set aside, and that the title to the several tracts of land therein set aside be decreed to be in said plaintiffs, subject to the dower right in said Maranda J. Winch and her grantees, if she has conveyed it.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is so far modified as to judge and affirm the validity of the marriage of Seth F. Winch and Maranda J. Winch, now Maranda J. Steen, as alleged in the answer and cross-petition of the said Maranda J. Steen, and that the title of the plaintiffs in

the lands described in the petition, by them inherited from their father, the said Seth F. Winch, is subject to the right of dower of the said Maranda J. Winch and her grantees, and, as so modified, the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed June 30, 1904. *Decree of district court affirmed:*

1. Divorce: JURISDICTION. The district courts of this state have no jurisdiction of the subject of divorce except such as is given them by the statute providing for divorce and alimony.
2. ———: ———: RESIDENCE. The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court.
3. Judgment: JURISDICTION: COLLATERAL ATTACK. When the record affirmatively shows the nonexistence of some fact necessary to the jurisdiction of the court over the subject matter of the action, a judgment pronounced therein will be void and may be collaterally attacked.

SEDGWICK, J.

Argument was had before the court upon the motion for rehearing in this case. The principal question discussed was the jurisdiction of the district court for Cass county in the divorce proceedings discussed in the former opinion. It appears that in those proceedings the court found that neither party was a resident of the county. In fact, after Mr. Winch had begun that action for a divorce, and his wife had filed her cross-petition asking for a divorce and alimony against him, he sought to dismiss the proceedings, and for that purpose challenged the jurisdiction of the court upon the grounds specifically alleged by him, that neither party was a resident of Cass county. This was not controverted by the cross-petitioner, but it was urged that Mr. Winch, by bringing the action in that county, was estopped to deny the jurisdiction of that court. This theory appears to have been adopted by the court and,

accordingly, the action was proceeded with upon the cross-petition, and a divorce decreed in her favor.

1. In *Cizek v. Cizek,* 69 Neb. 800, the second proposition of the syllabus is:

"Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist."

The jurisdiction of the district court to decree a divorce is given by section 6, chapter 25, Compiled Statutes (Annotated Statutes, 5328):

"A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on the application by the petition of the aggrieved party in either of the following cases."

There follows a statement of the grounds for divorce.

Section 8 places further restrictions upon the party applying for divorce:

"No divorce shall be granted unless the complainant shall have resided in this state for six months immediately preceding the time of filing the complaint, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage to the time of filing the complaint."

This language clearly is not intended to enlarge the jurisdiction of the court. We think the reasonable construction of these sections is that the district court has no jurisdiction in divorce cases unless one of the parties is a resident of the county. The place of residence of the parties, being a question of fact, must be investigated as other questions of fact are investigated. If the pleadings had presented that issue, and the record showed that evidence had been taken thereon by the court, the question whether a judgment rendered therein would be conclusive upon the parties as against a collateral attack, would be a very different question from the one presented here.

This record shows conclusively that neither party re-

sided in Cass county when the cause was begun, nor when it was tried.

In questions of jurisdiction over the person, the rule is that, when the record shows that no such jurisdiction exists, the judgment rendered against such party is void, and its validity may be shown in any action in which it may be called in question. *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722; *Fogg v. Ellis,* 61 Neb. 829. The same rule, of course, is applicable to questions of jurisdiction over the subject matter. We conclude that the divorce proceedings in Cass county were void, and that no rights can be predicated thereon.

2. Upon the question of the insanity of Mr. Winch at the time of the execution of the instruments attacked in these proceedings, and also upon the question whether those instruments were procured from him by undue influence, we are satisfied with the reasoning of the commissioner upon the former hearing, and also with the commissioner's discussion of the application of the statute of limitations to these proceedings. The claims of the defendants William H. Gates and Henry Rice are, in their brief, predicated entirely upon the validity of these conveyances, which were by the commissioner held invalid. This appears to dispose of all of the questions raised in the case.

The judgment of this court upon the former hearing modified the decree of the district court. That part of our former judgment is therefore vacated and the decree of the district court

AFFIRMED.

PARKE GODWIN ET AL. V. LOUIS HARRIS.

FILED FEBRUARY 4, 1904. No. 13,337.

1. **Lease: FORFEITURE.** In the absence of a statute providing otherwise, unless such demand is waived by the terms of the lease, a demand of rent on the day it becomes due is necessary to work a forfeiture of the lease for nonpayment.

2. ———: WAIVER. The lease in this case *held* to contain no waiver of such demand.

3. **Constitutional Law.** The amendatory act to section 1020 of the code of 1875, providing for demand of rent and forfeiture at any time after default, *held* unconstitutional as not properly entitled and not repealing the section sought to be amended, and leaving the common law requirement of demand on the rent day in force until the curative act of 1903.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Reversed.*

James H. Van Dusen, for plaintiffs in error.

F. A. Brogan, contra.

HASTINGS, C.

Plaintiffs in error, defendants below, and hereinafter called defendants, complain of a judgment for restitution in an action for forcible detainer. November 1, H. D. Estabrook leased the premises in question to the defendant Godwin for the "term from the first day of November, 1901, until the first day of December, 1901, and thereafter from month to month so long as the rent shall be paid and the other covenants of the lease kept and performed. * * * This lease not to be in force later than the 1st day of November, 1902." Godwin took possession and has held it ever since. The codefendant Brown is in possession of a portion of the premises under a sublease from Godwin; before the expiration of the lease an extension for two years, by mutual consent, was indorsed upon it and signed by the parties. By deed dated October 28, 1902, Estabrook conveyed the premises to the plaintiff Harris. The deed was delivered to Harris November 5, 1902. November 8, notices were served on defendant Godwin, by both Estabrook and Harris, of the sale and that his lease would terminate in 40 days, and that November's rent was payable to Harris and that it was demanded by him. On November 10 the formal three days' notice to quit was

served on defendants, they having paid no rent for November. November 14 of that year Harris commenced this action and, on the 26th day of the same month, recovered judgment for restitution, which was appealed by the defendants to the district court. The complaint is that the defendants neglected, failed and refused to pay the rent for the month of November, 1902, which rent was, as provided in the lease, payable on the first day of November, and the action is based on the assumption that, because of such nonpayment, the lease was terminated. Plaintiffs in error claim that the portion of section 1020 of the code, providing that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected or refused to pay the rent, or any part thereof, when the same was due," is unconstitutional and void: First, because it was added by way of amendment, and the amendatory act of 1875 contained no repealing clause, contrary to section 19, article 2 of the constitution of 1866; and second, because the provisions of the amendatory act of 1875 are not germane to the original section which the act purported to amend. It is therefore claimed that the title to the amendatory act does not indicate its subject, and the act is therefore obnoxious to another clause of section 19, article 2, which requires the subject of the act to be expressed in its title. It is argued that, the amendment of 1875 being void, the forfeiture for the nonpayment of rent can only be enforced in the manner provided by the common law. It is claimed that there is not enough in the act, without the amendment of 1875, to warrant proceedings against a tenant holding over his term and, at any rate, that these defendants can be held to be tenants holding over their term only by virtue of that special enactment of 1875, because the lease runs more than a year longer, and could be terminated according to its terms in three ways: By the expiration of its terms; by forfeiture for the nonpayment of rent; and by a sale of the premises, when the lease should be terminable by a forty days' notice.

Among the stipulations of the lease was one that "the second party further agrees that, if the said rent shall not be paid promptly at the time the same shall become due, then this lease shall at once terminate." The defendants claim that such provisions, while in form an agreement that failure to pay the rent shall terminate a lease, have always been construed as provisions in favor of the landlord. They may be waived by him and are waived unless due steps are taken by him to reenter and forfeit the lease.

It is then urged by the defendants that the forfeiture at common law, where there is no statute to aid it, must be a demand on the precise day the rent becomes due of the amount of the periodical payment; that such demand must be before sunset and continue until after sunset, with demand of possession at that time. This rent was due on November 1. Mr. Harris' deed was only delivered to him November 5, and payment of the rent was demanded by him on the 8th; notice to leave was served on the 10th, and this action brought on the 14th of the same month; there was therefore no demand of the money on the day that it became due, and none of the above formalities enacted upon the premises. Defendants claim that, since the statute is invalid and the common law requirements have not been complied with, there was in this action no demand and no forfeiture, and the judgment of restitution is consequently erroneous. They say that no statute of the state of Nebraska, except the void one contained in the amendment of 1875, abrogates this rule of the common law, and that the holdings in this state, that tenants failing to pay rent shall be deemed holding over their term, all rest upon this void statute. The defendants also claim that by the terms of the lease the rent was payable at the office of Estabrook's agent; that the demand for the payment of rent by Harris was in writing, and served by a deputy sheriff, and designated no place at which the rent should be paid; that no change of agent was made and, before the commencement of this suit, the rent was tendered to Mr. Estabrook's agent, who refused it. He had in

fact given Godwin notice on November 3, when the October rent was paid, that he could receive no more rent. Rights are also predicated on the notice from Estabrook and plaintiff, served November 8, stating that the premises were sold and that defendants' rights under the lease would terminate in 40 days from the receipt of that notice. It is urged that this is a complete waiver of any forfeiture for nonpayment of rent on November 1.

The position of the plaintiff, defendant in error here, appears on page 17 of his brief: "If we are correct in our position that, under the law of the state of Nebraska and under the terms of this lease, nonpayment of rent gives the lessor an option to be exercised at any reasonable time thereafter by demand and notice to terminate the lease for nonpayment of rent, then it follows," etc. He claims that the right to forfeit at any time after a default for rent, by a demand for it under the terms of this lease, existed independently of the act of 1875.

The only clause of the lease on which a forfeiture is claimed is, "If the said rent be not paid promptly at the time that the same becomes due, then this lease shall at once terminate, and the party of the second part agrees to surrender the immediate possession of the same." This clause, undoubtedly, would be sufficient at common law to warrant a forfeiture of the lease, if a demand were made with due formality of payment of rent on the day it became due and it were not paid. Does it waive such demand? If not, is the act of 1875 excusing such demand valid?

There can be no question, and none is raised by the plaintiff, as to the fact that at common law a demand, with all due formalities, must be made on the day the rent becomes due and before the tenant enters upon another term. The cases cited by defendants' counsel abundantly establish that this demand is required at common law, unless expressly waived. Ordinarily, such waiver is contained in the words "without further notice or demand" in the provision for the forfeiture, as in the case of *Pendill*

v. Union Mining Co., 64 Mich. 172, 31 N. W. 100. Of course, the same waiver might be expressed in other apt terms, but we do not find anything in this lease equivalent to it. It would seem that, in the absence of the clause of section 1020 of the code doing away with such demand and notice of forfeiture on the precise day that the rent becomes due, any demand after that day and before the arrival of the next rent day would not be good. Whether such demand must be accompanied with all the ancient formalities of the common law, it is not necessary to decide. If not made on the day it is due, and the tenant enters upon a new term, it is at common law deemed to be waived. The landlord is then held to be relying upon his action for the accruing rent. See the cases collected in 32 Cent. Dig. col. 370. It is certainly waived in this instance, so far as any forfeiture of November 1 is concerned, by the formal notice of November 8, that the tenancy would terminate in forty days from that date. This distinctly recognizes the tenancy as still existing at that time. There are, too, numerous cases holding that it is only the owner of premises at the time of a forfeiture who can avail himself of it. His grantee can not. *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

We are constrained to think that, in the absence of a statute permitting demand and forfeiture for overdue rent at any time, plaintiff had no right of action for forcible detainer in this case.

It remains only to consider whether the act of 1875 is open to the objections made to it. It seems clear, and no attempt is made by the plaintiff to dispute it, that it is obnoxious, under the former decisions of this court, to both of the objections made against it. Its subject is not expressed in its title, and it does not repeal the section which it seeks to amend.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES 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 remanded for further proceedings according to law.

REVERSED.

CHARLES W. OAKES, APPELLEE, V. ARTHUR C. ZIEMER ET AL., APPELLEES, AND SARAH GRUNINGER, APPELLANT.

FILED FEBRUARY 4, 1904. No. 13,358.

1. **Decree:** OPENING. The dismissal of an application made by a nonresident defendant to open a decree under the terms of section 82 of the code for want of notice, when such dismissal is based on defects in the answer tendered, does not bar a new application in which such defects are remedied.
2. **Res Judicata.** The first dismissal, however, bars another one on the same grounds as the first, unless it affirmatively appears from the record that such matters were not considered on their merits.
3. ———. The answer in the present case *held* to tender no issue as to the existence or the amount of the plaintiff's tax lien. The former answer, which was held insufficient, presented all the facts on which appellant bases a claim of right to open the decree merely for the purpose of redeeming. There being nothing in the record to indicate that this question was not heard upon its merits, it must be deemed settled by the former dismissal and its affirmance.

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

Ricketts & Ricketts, for appellant.

I. H. Hatfield and *S. L. Geisthardt, contra.*

HASTINGS, C.

In *Oakes v. Ziemer,* 61 Neb. 6, and in the same case on rehearing, 62 Neb. 603, the subject matter of this case has already been under consideration in this court. It is an attempt on the part of Sarah Gruninger, nonresident de-

fendant, to open a decree rendered against her and others in favor of Charles W. Oakes in foreclosure of a tax lien. A former application was dismissed by the district court in the following terms: "It appearing to the court that said application tendered no issue as against the plaintiff by the showing now on file, it is therefore by the court ordered that said application to open the decree of the court heretofore entered herein be, and the same hereby is, denied." The former proceeding, like this one, was an attempt to open up the decree under section 82 of the code because of appellant's nonresidence and of no actual notice to her of the pendency of Oakes' action to foreclose his tax lien. The present application was also dismissed by an order in the following terms: "This cause now comes on to be heard upon the motion of the defendant Sarah Gruninger, to open the judgment and decree of the court heretofore entered herein, and for leave to defendant to answer the plaintiff's alleged cause of action, and is submitted to the court; on due consideration whereof and being fully advised in the premises, the court finds that one application to open up the judgment and decree herein, made by the same defendant, has been overruled, and that the same question was therein adjudicated; it is therefore by the court ordered that said motion be, and the same is, overruled; to which ruling the said defendant Sarah Gruninger duly excepts, and is allowed forty days from the rising of the court in which to reduce her exceptions to writing, and the supersedeas bond herein is by the court fixed at the sum of $100." The defendant Gruninger appeals.

Was the former conclusion, as the trial court found, an adjudication upon the merits preventing the present one? Is the new matter in the answer now filed sufficient to warrant opening the decree? The answer to the first query seems to be governed by that to the latter one. The record shows that the dismissal of the first application was because, in the judgment of the court, the answer tendered with it presented no issue as against Oakes' petition. It is true that the order of dismissal merely speaks of no

issue "in the showing on file," but, as the only place in this showing where an issue could be tendered would be in the answer required to be filed with the application to open, it seems clear that the action of the trial court in the first case amounts to a finding that no sufficient answer was presented, and therefore no opening of the judgment could be had. This was clearly the basis of the affirmance of that action in all three of the opinions filed in it. No reason is seen why an insufficient answer should be any more conclusive of the merits when it is offered in connection with an application to open a judgment than it would be upon a direct demurrer.

In *State v. Cornell,* 52 Neb. 25, 38, the relator had failed to charge the tender of a bond, which was necessary to the accruing of any right to have a contract awarded him. A demurrer to his petition was filed; he asked leave to file an amended petition, and it was denied him; his action was dismissed; he began a new one, putting in the missing allegation; the dismissal was pleaded in bar; the plea, sustained by the lower court, was overruled in this, the court saying:

"The former adjudication determined no more than that the pleading, as presented, was insufficient; that the facts therein stated did not constitute a cause of action, not that the party presenting the pleading did not have a cause of action." Citing *Gould v. Evansville & C. R. Co.,* 91 U. S. 526. This case goes to the point for which it was cited and is supported by *Wiggins Ferry Co. v. Ohio & M. R. Co.,* 142 U. S. 396; 2 Black, Judgments (2d ed.), secs. 707-709; 1 Freeman, Judgments (4th ed.), sec. 267. Mr. Freeman, at the place cited, indicates that the authorities are in conflict, but that their weight is in favor of the proposition that, if it distinctly appears from the record that the decision was based upon the want of an allegation which was subsequently supplied, the second action, in which such defect is cured, will not be barred by the former's dismissal.

It is true that in this case counsel claim that the answer

is not directly passed upon; that it is the motion which is under consideration, and that the answer is, as the trial court seemed to indicate, a part of the showing in support of such motion, and that the appellant stands in the situation of one who, having set up a cause of action, fails to support it with sufficient evidence. This can hardly be the case. The presentation of a sufficient answer is one of the conditions for the consideration of an application to open a judgment. In the absence of such an answer the court would have no authority to look at the application. It seems to us clear that a record which shows the rejection of an application for want of a sufficient answer can not be held to be a bar to a new application upon a different answer which is sufficient. Of course, it would be a bar to any further application based upon the same answer or one identical in substance, and that, we take it, is the real ground of the trial court's conclusion in this case, that the present answer is substantially like the one passed upon in the dismissal of the former application. It was no doubt concluded that the present one was equally defective in the same way.

It is true that the answer now presented contains a denial verbally sufficient. The denial in the old answer was held bad for indefiniteness, and because it was based merely on want of information. The new answer admits title of Ziemer and that the property was subject to taxation in 1892 and 1893, and then contains a general denial, "except as admitted or modified." The admissions include one of plaintiff's certificate of tax sale, implied in an allegation that it was issued on January 5, and was void as the treasurer had no authority to make any public tax sale on that day, and in an allegation that it did not contain recitals necessary to make it valid if based upon a private tax sale. There is also an allegation that the certificate gave no authority to pay subsequent taxes, and a plea of a right to redeem from them. The answer therefore impliedly admits the tax sale certificate and the payment of subsequent taxes, and does not set up any

facts going to show that Oakes' purchase at tax sale and payment of subsequent taxes did not create a valid lien to the amount he claimed. The new answer contains an assertion in terms of a right to redeem, on the appellant's part, from Oakes' lien because of her mortgage on the premises. This right, however, if it exists, fully appears from the facts set up in the first petition.

The cross-petition contained in the present answer is not claimed to differ in any material respect from the cross-petition in the former answer, and would seem to confer no new right. The present answer, like the first one, seems to raise only the question of the right to redeem from plaintiff's decree and from the sale under it, because of the failure to receive personal notice of his action, and not because of any sufficient defense to it. It seems also that the two former opinions must be held to have adjudicated that the appellant had no such right; that her right to open the decree depended upon her not having simply an equity of redemption in the premises, which was sought to be foreclosed by that decree, but upon her having a substantial defense to the merits of the plaintiff's claim, or some part of it, which she had had no opportunity to present. We find nothing to indicate that such right of redemption was not as fully presented at the former hearing as it can be in this one, and such being the case the former decision has clearly become the law so far as this action is concerned. *State v. Cornell,* 52 Neb. 25, and cases there cited.

A final judgment will be presumed to have been upon merits, unless the record shows otherwise. *Durant v. Essex Co.,* 7 Wall. (U. S.) 107. As to the matters actually embraced in the first answer, the former dismissal is a complete bar. The formal denial can not be treated as raising an issue upon the question of the existence or amount of the tax lien. Whether or not the right of redemption, and the setting of it up, should be held sufficient to constitute an answer and to call for the opening of a judgment, it is not necessary for us to decide at this time.

This claim was as good under the former answer as it is now, and the former dismissal must be held to have settled it so far as this particular judgment is concerned.

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

OLDHAM, C., concurs.

AMES, C., having been of counsel, did not sit.

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

AFFIRMED.

J. H. CLINE, APPELLANT, V. F. A. STOCK ET AL., APPELLEES.*

FILED FEBRUARY 4, 1904. No. 13,050.

1. **Riparian Rights.** "A riparian's right to the use of the flow of the stream passing through or by his land, is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally." *Crawford Co. v. Hathaway*, 67 Neb. 325.

2. ———: SUBSEQUENT APPROPRIATION: PLEADING. A riparian proprietor, whose use of the stream for water power is impaired by subsequent appropriations of the water and whose loss thereby is not offered to be compensated, is not required, in an action to enjoin such appropriation, to set up specifically what rights are claimed by the appropriators severally or jointly. It is sufficient if he set out his own right, its priority and the injury to it, the fact of no compensation for its loss, and in general terms the wrongfulness of the appropriation.

3. ———: PETITION FOR INJUNCTION. It is not a fatal objection to a petition for injunction against a large number of defendants taking water from a stream at many points at long distances from plaintiff's mill, and persisting in doing so, and making arrangements to continue the practice to the injury of plaintiff's mill, without compensation, that it asks no other specific relief than the writ.

* Rehearing allowed. See opinion, p. 79, *post*.

APPEAL from the district court for Hitchcock county: GEORGE W. NORRIS, JUDGE. *Reversed.*

Samuel J. Tuttle and *A. S. Tibbets,* for appellant.

F. I. Foss, F. M. Flansburg, W. S. Morlan, Ralph D. Brown and *Hainer & Hainer, contra.*

HASTINGS, C.

The plaintiff in this action, after describing the character and course of the Republican river, alleges ownership, ever since 1873, by himself and his grantors, of a 200 barrel a day flouring mill erected upon his lands, through and along side which the river flows at Concordia, Kansas, requiring for its propulsion 70 horse power, 200 cubic feet of water a second under an 8 foot pressure; that this was abundantly furnished by the river until the facts complained of; that the mill cost him $25,000 and the water power was of the value of $3,000 a year; that since 1894 there has not been enough water to propel the mill during the months of June, July and August; that its volume has steadily diminished during that time, and for the last two years, including 1901, the river has been, during these months, entirely dry, and that this is because of the "unlawful and wrongful acts of the defendants and each of them"; that they have "diverted the waters of the Republican river and its affluents therefrom, pouring the same into the land adjacent, where they have become absorbed for irrigation purposes"; and plaintiff alleges his damage at $10,000 a year; he sets out that the amount of water taken by each of the several defendants amounts in the aggregate to 317 cubic feet, and 1,459 inches a second, and says this is taken mainly through the months of June, July and August; he says that the defendants have made plans, appliances and arrangements to continue this diversion of the water, and will do so, unless prevented by the court; that such diversion is contrary to the constitu-

tion of the state of Nebraska, and that of the United States, in taking away his riparian rights and so depriving him of his property without process of law; that plaintiff's priority and right to use the water was recognized by local customs, laws and decisions of the courts in the states of Kansas and Nebraska, and no offer of compensation has been made him; that the defendants' acts are contrary to section 2339 of the Revised Statutes of the United States and that this section acknowledges and confirms the plaintiff's rights; that the action for injunction is brought to save multiplicity of suits at law, and also for the reason that plaintiff has no adequate remedy at law. An injunction is asked against all of the defendants, restaining them from diverting the waters of that river and its affluents and not returning the same into the channel.

Separate demurrers were filed by the several parties. Most of them on three grounds: (1) Improper joinder of causes of action; (2) No facts sufficient to constitute a cause of action; (3) Because the petition is for an injunction alone, and shows no ground for one. One of the demurrers adds a fourth ground, a lack of jurisdiction, as it is an attempt to adjudicate matters in dispute between states.

The demurrers were sustained, and plaintiff elected to stand upon his petition, and judgment of dismissal was entered, from which the plaintiff appeals. He insists that his petition disclosed a right to an injunction; that as riparian owner he had the right to the unimpaired flow of the river; that he had such right by prescription dating from 1873; that, if the doctrine of appropriation is held to prevail, his appropriation was prior in time, was the best right, and is protected by the Nebraska and the federal constitutions; that this right has been impaired by the defendants; that his remedy at law is inadequate, and that the interposition of equity is necessary to prevent a multiplicity of suits.

Defendants, on the contrary, assert rights on the basis of the fact that the Republican river is meandered in the

United States survey, and should be held a navigable stream. It is sufficient to say as to this that the petition alleges that it is not a navigable stream, and sets up ownership of its bed and banks in the plaintiff, which is admitted by the demurrer.

The defendants also urge that the common law is in force in Nebraska, except so far as modified by statute, and that the common law permits no appropriation of streams and no prescriptive right as against an upper owner. This seems to be the effect of the holdings in *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798; *Slattery v. Harley*, 58 Neb. 575; *Crawford Co. v. Hathaway*, 67 Neb. 325, and *Meng v. Coffee*, 67 Neb. 500. In paragraph four of defendants' brief, they seek to find under the common law doctrine, that the stream as a whole belongs to each owner and that each has a right to a reasonable use of it, authority for their action in taking, as plaintiff alleges and the demurrers admit, all of the water out of this stream during the three summer months. The general statements of the rights of each riparian owner to a reasonable use of the stream are cited from various text writers and decisions. That any court has ever held that, in the exercise of common law rights, even a riparian owner was at liberty to take out all the water and leave the stream dry for three months in the year, these citations do not show. The most that has been held allowable in any of the cases cited was a reasonable diminution for purposes of irrigation in the amount of flow, and that equity would not enjoin the use of a stream for irrigation, merely that it might run by in unimpaired quantity for one who was making no use of it.

It is urged that the legislature in this state by section 43, article 2, chapter 93*a*, Compiled Statutes (Annotated Statutes, 6797), has provided, that the right to divert unappropriated water of natural streams shall never be denied, and that priority of appropriation shall give a better right between those using water for the same purpose, but that those using water for domestic purposes shall

have preference over all others; and those using it for agriculture have a preference over those using it for manufacturing; that the allegation of the petition that the diversion is unlawful is a mere conclusion; that the diversion of the water is presumed to be in accordance with law, and that, as the petition alleged that the water is "absorbed for purposes of irrigation," it will be presumed to have been taken out under rights derived properly from this state, therefore no right to interfere with it exists on the plaintiff's part. It is urged that the United States statute of 1866 has reference only to the public lands and furnishes no countenance to the riparian rights claimed by plaintiff, in the absence of any allegation bringing those rights under that statute. It is also urged that if there has been any interference with plaintiff's rights his remedy is, in the first place, not by injunction, but by a suit for damages; and, in the second place, he has shown such laches in permitting the irrigation works to go on, that he is entitled to no remedy in equity. It is finally urged that the action is an attack upon the sovereignty of Nebraska; that it is an action brought by one living in Kansas for the diversion of water within the state of Nebraska, and is an attempt by one without the state of Nebraska to assert a right which is in contravention of the laws of this state, and can not therefore be recognized by this state's tribunals. These several reasons may be summarized thus: (1) Use for irrigation purposes by the defendants appears from this petition; such a use by the upper proprietor is reasonable, even if it takes all the water in the stream, as against a lower proprietor who is already using it to propel his mill. (2) The statutes of the state of Nebraska give to the irrigation user priority over the user for manufacturing purposes, and this authorizes a taking of all the water in the stream for irrigation purposes, without regard to the injury that may be caused to lower proprietors, who are already using it for manufacturing purposes. (3) This mill is situated in the state of Kansas, below the point where the stream finally

passes out of the state of Nebraska; and this proprietor outside of the state has no rights in the stream which the legislature of Nebraska must respect or may not authorize Nebraska citizens to disregard. (4) Whatever injury may have happened to the plaintiff, and however perfect his right may be to the water, he has a remedy at law and may not resort to a court of equity to protect it, no matter what the multiplicity of suits which may be thereby rendered necessary at law.

As against these reasons raised by the defendants for refusing to interfere with their use of the water, plaintiff says that it nowhere appears in this petition that defendants are riparian owners, nor that they are taking the water by any right for irrigation or otherwise; that the only allegation on that behalf is that they are taking it out unlawfully and wrongfully and pouring it upon the adjacent land, "where it is absorbed for irrigation purposes," and that, any way, there is and can be no warrant in the laws of Nebraska for such a proceeding; that plaintiff has a vested right under his allegations which could not be taken from him for public purposes without compensation and with which private persons for their own purposes have no right to meddle at all. Plaintiff says that he is asking only for protection to a right as much secured to him by Nebraska laws as if he lived on this side of the state boundary.

It will be seen that the facts in regard to defendants' taking and use of the water do not appear. The only allegation as to that is that they take it out to the extent stated "mainly in the months of June, July and August," and that by "wrongful and unlawful acts," and turn it upon adjacent land, "where it is absorbed for irrigation purposes."

It would seem that the fact of plaintiff's residence beyond the border of this state, and that his mill is located there, ought not to deprive him of any rights which the laws of our state give to a lower riparian owner. Any attempt of our legislature to discriminate against him as compared with resident mill owners would be promptly

declared unconstitutional by the federal courts. Any such determination by the courts would seem to be equally obnoxious to the federal constitution. *Ex parte Virginia*, 100 U. S. 339, 347. It seems clear that the plaintiff should be allowed the same standing as one of our own citizens with a mill on this side of the state line. If he wants more than that, he should have brought his action in some other than a court of this state.

The question then presented on this demurrer is: Does the petition sufficiently disclose a right on plaintiff's part, and a wrong on defendants', to warrant the interposition by injunction which is prayed? The objection that the petition does not sufficiently allege a reasonable use by plaintiff can be upheld only on the theory that no other use is reasonable that interferes with irrigation. The right and reasonableness of use of water power to propel a flouring mill by a riparian owner needs no justification. It has been practiced and protected ever since English law began. The right of plaintiff then must be assumed, unless some stronger claim in defendants appears, or must be assumed.

Was it incumbent on the plaintiff to set out that defendants' claim was by appropriation for irrigation purposes under the Nebraska statute, and negative in advance the existence of such a right? It hardly seems so. The petition sets out a vested right by means of riparian ownership, that such right was in actual use and enjoyment, that without compensation, or tender of compensation, its enjoyment was wrongfully interrupted by defendants. At law this would be sufficient, in default of answer, to warrant the recovery of damages. Why should it not be held sufficient in equity, if the additional facts necessary to confer equity jurisdiction and to warrant an injunction are alleged? It may be granted that the statement that defendants' acts are "wrongful" is a conclusion. It is, however, fairly equivalent to saying they are without right. Is more than such a general negative of defendants' rights required of plaintiff, who sets up the impairment of a clearly recognized right of his own?

It is true that chapter 69, laws 1895, has recognized the appropriation of water for irrigation use as having preference over the use for manufacturing, and of such law this court takes judicial cognizance. It hardly seems, however, that, from an incidental allegation that defendants are wrongfully taking out of the channel and pouring it on the adjacent land, "where it is absorbed for irrigation purposes," we can or should assume that defendants have complied with the law, and have lawfully appropriated the water, and are taking it out under such right.

There seems no doubt that, as defendants' brief reiterates, this state is governed as to water rights by the common law, as modified by statutes. If this plaintiff has set up a right valid at common law, and negatived in general terms the holding of any right by proceedings under the statute on the part of defendants, and without admitting any facts showing such an appropriation by defendants, they should set up such facts if they are relying upon them. The statute giving preference to irrigation rights can only be available to defendants, when the facts showing their rights under it are before the court. Plaintiff has not set them up. He has negatived in general terms their existence. It is hardly probable that the trial court would have sustained any motion to compel plaintiff to set up the particulars of defendants' several claims of right to the water, and negative them specifically in his petition. It does not seem that the trial court should have sustained, or likely that it did sustain, these demurrers because of the lack of such particularity.

It seems that the petition sets out a common law right; that it does not disclose facts on which a defense of the alleged violation of that right can be rested, even if we were to assume that the Nebraska statute could place, and had placed, irrigation rights above mill owners'. It devolved upon the defendants to set up such a defense, if it existed, unless, as defendants claim, the demurrer should have been sustained because of no ground for an injunction, and of that being the only relief specifically

prayed for. It seems probable that this was the ground for the trial court's action.

While the circumstances of this case are somewhat peculiar, the allegations as to the multiplicity of suits seem indisputably sufficient to entitle plaintiff to equitable protection. Not only does the petition allege in general terms the necessity of such interposition of equity, but the specific facts alleged, the number of defendants in this action, the extent of country embraced in their operations, the length of time they have carried them on, the geographical facts which must be judicially recognized, such as the length of the stream and the semi-arid character of the country along its upper course, seem clearly to indicate such a multiplicity of interests as entitled plaintiff to resort to equity. *Shaffer v. Stull*, 32 Neb. 94; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364.

In the case of *Crawford Co. v. Hathaway*, 67 Neb. 325, it is said:

"But where * * * a large number of persons are claiming the right to divert and use the water of a stream, * * * and others as riparian owners whose rights have accrued prior to the statute and have not been divested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference with those rights by others under a claim of right may not be maintained."

If it be held that a use by defendants for irrigation purposes under a claim of right appears from this petition, then the right to resort to equity follows clearly from the decision in *Crawford Co. v. Hathaway, supra*. Surely, if a party on one side of such a controversy, involving many persons and many conflicting interests, may resort to equity for a determination of his rights, one on the other side may, also. The use of the writ of injunction to protect the owner of real estate from an invasion, under eminent domain, of rights for which no compensation has been provided, is well recognized. 1 Lewis, Eminent Domain (2d ed.), sec. 265, quoting *East & West R. Co.*

v. East Tennessee, V. & G. R. Co., 75 Ala. 275. The author says that this is properly referable to the doctrine that equity, for the protection of both parties, will enjoin unauthorized attempts to invade private rights in vindication of an alleged public one, a doctrine distinctly recognized in this state. *Johnson v. Hahn,* 4 Neb. 139; *Schock v. Falls City,* 31 Neb. 599.

There seems no doubt that the allegations of the petition are sufficient to show a right to the water power on plaintiff's part, and, on their face, sufficient to show an interference with that right by defendants. Doubtless, some 200 miles of the river's course lie between these parties plaintiff and defendant, but, if the plaintiff can establish his allegations as to his troubles and their cause, then defendants should either show a right to take away the water, or obtain one, or else let it go down the river channel.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES 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 remanded for further proceedings according to law.

REVERSED.

The following opinion on rehearing was filed January 18, 1905. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Riparian Rights:** PETITION: SUFFICIENCY. In an action by a lower riparian owner to enjoin irrigation corporations and others from diverting water from the stream to the injury of his mill, a petition which alleges that the defendants have been maintaining "dams and ditches and other appliances" upon the stream above his mill for seven years, by means of which they have during that time appropriated stated quantities of water for irrigation purposes, does not state a cause of action without alleging facts

showing that such appropriation and use of water by defendants is unlawful.

2. Use of Waters: PETITION TO ENJOIN. The allegations of the petition being consistent with the lawful use of the water by the defendants, they will be so construed as against the pleader.

3. ———: ———: ACTION FOR DAMAGES. Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use of water under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner whose mill privilege may be injured thereby; his remedy is an action for damages.

SEDGWICK, J.

A general demurrer to the petition was sustained by the court below. The character of the action and the principal allegations of the petition are substantially stated in the former opinion. It appears from the petition that it is sought to enjoin a continuation of acts of the defendants, which have been practiced continuously by them from the commencement of the year 1894, more than seven years before this action was begun. The allegations are that there has been a failure of water in the Republican river, at the mill in question, during the summer months of each year during all that time, and that that failure of water and the damage accruing to the plaintiff therefrom, have been occasioned and produced by the acts of the defendants set forth in the petition; a continuation of which acts it is sought to enjoin. There is no allegation in the petition purporting to explain this delay in commencing these proceedings. This leads us to examine what the petition shows in regard to the nature of these alleged wrongful acts, and the position of the respective parties with relation thereto.

Water for the purpose of irrigation is declared by the statute to be a natural want, and the statute also provides that the water of every natural stream is the property of the public, and is dedicated to the use of the people of the state; and those using water for agricultural purposes shall have preference over those using the same for manufacturing purposes. The statute provides a complete sys-

tem under which the right to use the public waters of the state must be obtained, and it defines, fixes and regulates those rights. The state board is given control of the public waters of the state and when, upon the application of an individual to appropriate water for agricultural purposes, the board allows the appropriation and duly adjudicates the right to the use of a certain quantity of water, the party who obtains such right, and appropriates and uses the water thereunder, acquires a vested interest therein. Canals and other works constructed for irrigation or water power purposes are declared to be works of internal improvement, and the right of eminent domain is extended to persons and corporations engaged in the construuction of such works. In *Bronson v. Albion Telephone Co.*, 67 Neb. 111, the court, in speaking of enjoining the telephone company from injuring private property in the maintenance of its lines, said:

"We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation."

This reasoning applies with greater force to the situation in this case. This, as is stated in the case last cited, is the rule where the construction of a railway causes damage to abutting owners.

"The abutting owners are not made parties to condemnation proceedings, nor can they enjoin construction of the road; but their remedy is in an action at law for damages. *Republican V. R. Co. v. Fellers,* 16 Neb. 169; *Chicago, K. & N. R. Co. v. Hazels,* 26 Neb. 364; *Atchison & N. R. Co. v. Baerner,* 34 Neb. 240. The same remedy is employed where a city, in improving a street, impairs the easement of the abutting owner. *City of Omaha v. Flood,* 57 Neb. 124."

If these defendants had made due application to the state board, and had obtained the adjudication of that board giving them the right to appropriate a given quan-

tity of the public water of the state for irrigation purposes, and, in pursuance of such adjudicated right, had constructed irrigation works, and had, during all that time, actually appropriated and used the amount of water allowed them under such appropriation, in the same manner and to the same extent that they propose to use the water in the future, a lower riparian owner could not enjoin the continued use of such water, but must rely upon his action at law to recover such damages, if any, as he might sustain thereby. We think there can be no doubt of the soundness of this principle.

The important question in this case then is, whether the petition which is demurred to contains allegations which bring the case within the prinicple above discussed. Upon reexamination of the question we are satisfied that it does. The defendants in the case are Farmers Canal Company, Riverside Canal & Irrigation Company, The Trenton Farmers Irrigation Association, The McCook Irrigation & Water Power Company, and other parties. The petition alleges that all of the defendants, "by reason of dams and ditches, and other appliances, have diverted the waters of the Republican river and its affluents therefrom, poured the same upon the lands adjacent for irrigation purposes, where they have become absorbed"; and it is directly alleged that this action is the cause of the plaintiff's injury. The exact quantity of water that each defendant has diverted, and is diverting, from the stream is stated in the petition.

The plaintiff in an equity case must plead the facts that entitle him to the relief asked. The petition contains no allegation as to the nature and character of the defendant corporations, except those above quoted. Under the rule that the allegations of a pleading must be construed against the pleader, we think that the allegations that these corporations diverted the water from the river and turned it upon adjacent lands for irrigation purposes, and that this is done by them by means of dams and ditches, and other appliances, and that the water is absorbed on these

lands, and that this has been continued for more than seven years, would require some further allegation from the pleader to show that the existing conditions were such as to entitle him to the injunction asked. The law requires these corporations, before so taking the water for irrigation purposes, to make application to the state board and have their right to do so determined, and the court will not presume that they have not done so in favor of a plaintiff who shows the conditions existing, and fails to show that their use of the water is unlawful. In this view of the proper construction of this petition, the trial court was right in refusing to allow an injunction, and this disposes of the case. We do not find it necessary to examine the other questions discussed by the commissioner in the former opinion, and are not committed to the propositions there advanced.

For the reasons above given, the judgment entered upon the former hearing is vacated, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

MICHAEL FRANK CLANCY V. GEORGE E. BARKER ET AL.*

FILED FEBRUARY 4, 1904. No. 13,174.

1. **Innkeepers:** DUTIES. In receiving a guest into his hotel, a hotel keeper impliedly undertakes that such guest shall be treated with due consideration for his comfort and safety.
2. ———: TRESPASS BY SERVANT: LIABILITY. A trespass committed upon the guest in the hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is a breach of such implied undertaking, for which the proprietor is liable in damages.
3. **Admissions by Manager.** It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning such trespass after it had been committed.

* Rehearing allowed. See opinion, p. 91, *post.*

4. ———. When such admissions are made a day after the trespass, and only remotely connected therewith, they are not admissible in evidence as a part of the *res gestæ*.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed as to defendant Barker; reversed as to the other defendants.*

John O. Yeiser, for plaintiff in error.

W. A. Redick and *W. J. Connell, contra.*

ALBERT, C.

The plaintiff in his petition filed in the district court alleges, in effect, that the defendants were the proprietors and operated a hotel in the city of Omaha; that on the 12th day of January, 1902, he entered such hotel with his wife and infant son for a temporary sojourn therein, whereupon he and the said members of his family were received as guests in said hotel by the defendants; that afterwards, and while they were thus guests in said hotel, the plaintiff's infant son entered a room of the hotel to speak or play with a porter or servant of the defendants, who, at the time, was in said room. Then follow these allegations:

"That the said porter and servant of defendants in said hotel, in said capacity at said time, violated all obligations of hospitality and patience due from said defendants, through said servants, to said infant guest, and the defendants thereby violated their agreement, duty and obligation of law with, and to, the plaintiff by the following conduct, to wit: The said porter, in attempting to have said infant son of plaintiff leave said room and corridor, where defendants did not want him, as instructed, and retire to his mother's room, and to have said infant cease his childish play and pretended annoyance, carelessly, imprudently, rashly, unnecessarily, negligently and foolishly picked up a revolver and pointing it at said infant, said: 'If you handle anything, this is what I will do to

you,' or similar words calculated to frighten the said infant out of his natural and childish playfulness and prevent his touching any of defendants' property, or being about said room or the halls; that the said infant threw up his hands when thus frightened and assaulted, and, by some means unknown to this plaintiff, the said pistol was carelessly and negligently discharged by the said defendants' servant as aforesaid."

The petition contains the usual allegations as to damages.

The defendants by their answers admit that the defendant administrator and corporation were the proprietors of the hotel and were operating it as alleged in the petition; that the plaintiff, his wife and infant son were received into said hotel as guests, at the date alleged in the petition, and that, while the plaintiff and the said members of his family were thus guests at the hotel, the son was seriously injured. But they specifically deny that the person described in the petition as their porter or servant was in their employ at the time the injury occurred, and that he was on duty, or in the performance of any duty, as porter or servant of the defendants at such time. They also specifically deny that the defendant George E. Barker was one of the proprietors of the hotel, or in any way interested in the same, or the operation thereof, save as president of the defendant corporation.

The evidence adduced by the plaintiff sufficiently shows that the plaintiff, his wife and infant son became guests at the hotel, intending to remain but a short time; that about three days after they were received in the hotel, and while they were guests therein, a servant of the proprietors of the hotel, who had waited upon the plaintiff and the members of his family during their stay at the hotel, was playing a harmonica in a room which was not one of those assigned to the plaintiff or any member of his family; that the plaintiff's infant son, attracted by the music, entered the room, the door of which was open; that thereupon the servant who had been playing the

harmonica took up a revolver and pointed it at the boy, saying, "See here, young fellow, if you touch anything, this is what you get." The revolver, by some means, was then discharged, the ball striking the boy, destroying one of his eyes and inflicting upon him other serious injuries. While there is no direct evidence that the person who inflicted the injuries was in the employ of the proprietors of the hotel, the evidence shows that he waited on the guests, carried water to their rooms and rendered such other services as are usually rendered by servants of a certain class about a hotel, and is amply sufficient to warrant a finding that he was the servant of the proprietors, and, for the purposes of this case, would have made him such, perhaps, in the absence of a contract of employment. There is no evidence tending to connect the defendant George E. Barker with the operation of the hotel.

At the close of plaintiff's case the court directed a verdict for the defendants, and from a judgment rendered on such verdict the plaintiff brings the record here for review.

The defendants insist, that the plaintiff having failed to allege that the servant wilfully or maliciously inflicted the injury, it was incumbent on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendants owed the plaintiff. We think they overlook the theory upon which this action was brought and prosecuted. The plaintiff by his petition and evidence obviously intended to commit himself unreservedly to the theory that his cause of action is *ex contractu*. A contract is alleged in the petition, the wrongful acts of the servant, which resulted in injury to the boy are alleged, not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract and consequent damages.

This brings us at once to the question, whether the act of the servant, resulting in the injuries complained of, con-

stitutes a breach of the implied contract between the plaintiff and the proprietors of the hotel for the entertainment of the former and his family. By the implied contract between a hotel keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is implied on his part the further undertaking that the guest shall be treated with due consideration for his safety and comfort. *Rommel v. Schambacher,* 120 Pa. St. 579; *Jencks v. Coleman,* 2 Sumner (U. S. C. C.), 221. In *Commonwealth v. Power,* 7 Met. (Mass.) 596, Shaw, C. J., said:

"An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

The foregoing language is quoted with approval in *Bass v. Chicago & N. W. R. Co.,* 36 Wis. 450. Substantially the same language is employed by the court in *Dickson v. Waldron,* 135 Ind. 507, 34 N. E. 506. See also *Norcross v. Norcross,* 53 Me. 163; *Pinkerton v. Woodward,* 33 Cal. 557, 585; *Russell v. Fagan,* 7 Houst. (Del.) 389; *Pullman Palace Car Co. v. Lowe,* 28 Neb. 239. The foregoing also show that the duties of a hotel keeper to his guests are regarded as similar to the common law obligation of a common carrier to his passengers. As regards the duty of a common carrier to his passengers, in *Dwinelle v. New York C. & H. R. R. Co.,* 120 N. Y. 117, 127, the court said:

"As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and, during its performance, to care for his comfort and safety. The duty of protecting the personal safety of the passenger and pro-

moting, by every reasonable means, the accomplishment of his journey is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it."

To the same effect are the following: *Pittsburg, F. W. & C. R. Co. v. Hinds,* 53 Pa. St. 512; *Goddard v. Grand Trunk R. Co.,* 57 Me. 202; *Chamberlain v. Chandler,* 3 Mason (U. S. C. C.), 242; *Pendleton v. Kinsley,* 3 Cliff. (U. S. C. C.) 417; *Bryant v. Rich,* 106 Mass. 180; *Chicago & E. R. Co. v. Flexman,* 103 Ill. 546; *Southern Kansas R. Co. v. Rice,* 38 Kan. 398. An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel keeper as regards his duties to his guests. Those duties spring from the implied terms of his contract and a failure to discharge them, and while it may in some instances amount to a tort, it amounts in every instance to a breach of contract.

If then the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limited to the proprietor himself. As a rule he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and if they be not thus treated there is a breach of the implied contract, whether the lack of such treatment is the result

of some act or omission of the proprietor himself, or of his servant or servants.

Neither do we deem it material whether the servant, at the time of the injury, was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor and an inmate of the hotel; his duty as to the treatment to be accorded the guests of the hotel was a continuing one and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Durnelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, is peculiarly applicable to this point:

"The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it, when the blow was struck. The blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

It is equally immaterial to this case, we think, whether the shooting was accidental or wilful. The servant in pointing a loaded gun at the boy committed a trespass, and as a result of such trespass inflicted serious and permanent injuries on the child. His acts, therefore, constituted a breach of the implied undertaking of his employers to treat the plaintiff and his family with due consideration for

their safety and comfort, for which breach his employers are liable in damages.

We are aware that there are cases holding contrary to the foregoing conclusion, but they do not seem to us to be based on sound reasons, nor upon just considerations of public policy, and are contrary to the weight and trend of modern authority.

The plaintiff offered to prove by one of his witnesses that the day following the accident one Mr. Bowman, the manager of the hotel, told the witness "that he had told the boys (referring to the porters and bellboys of the hotel) time and again to keep the kid (meaning the plaintiff's son) out of the elevator, halls and rooms of the hotel, and to keep him in his mother's room." The offer was rejected, and the plaintiff contends that the ruling of the court in that behalf is erroneous. We do not think so. It was not within the scope of the authority of the manager to bind his employer by the admission or declaration sought to be proved, and it was too remote in point of time and too detached from the injury to be admissible as a part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin,* 31 Neb. 103; *Commercial Nat. Bank v. Brill,* 37 Neb. 626; *Collins v. State,* 46 Neb. 37; *City of Friend v. Burleigh,* 53 Neb. 674.

As to the defendant George E. Barker, as we have seen, there is no evidence which would warrant a verdict against him. Hence, so far as he is concerned, the judgment of the district court is right, but as to the other defendants it is recommended that the judgment 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 judgment of the district court, as to the defendant George E. Barker, is affirmed and, as to the other defendants, the judgment is reversed and the cause remanded for further proceedings according to law.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed May 3, 1905. *Former judgment adhered to.* BARNES, J., *dissenting:*

1. **Master and Servant:** TORTS OF SERVANT. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment.

2. **Innkeepers:** ASSAULT BY SERVANT: LIABILITY. It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees who assist in the conduct of the hotel and in the care and accommodation of the guests. If damages result from such assault the hotel keeper is liable therefor.

SEDGWICK, J.

Since the filing of the former opinion in this case, *ante,* p. 83, the question principally discussed therein, and arising out of the same transaction, has been decided by the United States court of appeals for this circuit, *Clancy v. Barker,* 131 Fed. 161. The opinion of that court prepared by Judge Sanborn strongly states the reasons which led the majority of the court to the conclusion that the hotel company ought not to be held liable. In a dissenting opinion Judge Thayer upholds the views expressed in the former opinion of this court.

1. The first ground urged by counsel for holding the defendant liable we think is satisfactorily discussed in the majority opinion of that court. This relates to the doctrine of *respondeat superior* derived from the relation of master and servant. If there had been evidence showing that it was the duty of the employees of the hotel to prevent children from entering and playing in rooms which were not assigned to them, it might perhaps be contended that the boy Lacy was acting within the scope of his employment when the accident occurred. The evidence offered as tending to show that he was so acting was properly excluded, as shown in the former opinion, and it does not appear that there was any other evidence in the record upon this point.

2. Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employees, by which his guests are injured while they are in the hotel and are in his care, is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employees of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier of course is bound to use extraordinary care or, as is sometimes said, the utmost care for the safety of his passengers. The business engaged in is a dangerous one and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel keeper offers accommodations for strangers who are not acquainted with his employees and who have no voice in their selection. He undertakes to provide them with suitable accommodations and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping car have charge of the occupants of the car and have control of their conduct and behavior? Surely, if it is different in degree from the control that the hotel keeper has over his guests, it is not much different in kind. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so;

and is under obligation to select such employees as will look after the safety and comfort of his guests, and will not commit acts of violence against them so far as is reasonably within his power. It would seem that to relieve him from liability for injuries done to his guests by his employee, upon the sole ground that the employee was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar conditions, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply under modern conditions to the relations between an innkeeper and his guests.

Notwithstanding the great respect due to the court which has reached a contrary conclusion in *Clancy v. Barker, supra,* we conclude that our former decision ought to be adhered to.

FORMER JUDGMENT ADHERED TO.

BARNES, J., dissenting.

In this case I find myself unable to concur in the majority opinion, which adheres to our former decision. While I concurred in that decision when it was rendered, on a reexamination of the question as presented on the rehearing, I am convinced that the defendant should not be held liable. The facts which are the basis of the plaintiff's cause of action, briefly stated, are as follows: The plaintiff, Michael F. Clancy and his wife, with their infant son Freeman, who was about six years old, were stopping at the Barker hotel in the city of Omaha, and had been guests at the hotel for several days prior to the accident complained of. About 8:30 o'clock of the evening of January 15, 1902, Freeman left his mother's room and went down the elevator to the first floor of the hotel, as he says, "To get some ice water." Reaching that floor, he passed by a room where a boy of the name of Lacy, who was employed as a porter

or bellboy at the hotel, was playing a harmonica; the door being ajar he entered this room, apparently to satisfy his childish curiosity; another boy, who sometimes ran the elevator, was also in the room; both of these employees seem to have been off duty at the time, and engaged in amusing themselves in a room not occupied by any of the guests of the house. As the Clancy boy entered the room, young Lacy said to him, apparently in jest, "See here, young fellow, if you touch anything, this is what you get," at the same time pointing a pistol at him. The pistol was at that instant accidentally discharged, the ball striking the boy Freeman in the head, destroying one of his eyes and inflicting other injuries upon him which, however, did not prove fatal; and this action was brought by the father to recover damages alleged to have been sustained by him by reason of these facts.

The prevailing opinion does not place the right of recovery in this case on the ground of negligence or tort, for no negligence on the part of the defendants is alleged or proved; but bases such right solely on an alleged breach of the implied contract of an innkeeper that his guest shall be treated with due consideration for his comfort and safety; and so holds the proprietors of the hotel liable to both the father and his infant son for the damages sustained by them.

It must be conceded that, until recent years, the whole trend of authority supported and adhered to the common law rule that an innkeeper is not an insurer of the safety of his guest against injury, and that his obligation is limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitor. *Calye's* case, 8 Rep. (4 Coke) 32; *Sandys v. Florence*, 47 L. J. C. P. 598; *Weeks v. McNulty*, 101 Tenn. 495; *Curtis v. Dinneen*, 4 Dak. 245; *Sheffer v. Willoughby*, 163 Ill. 518; *Gilbert v. Hoffman*, 66 Ia. 205; *Overstreet v. Moser*, 88 Mo. App. 72; *Stanley v. Bircher*, 78 Mo. 245; *Stott v. Churchill*, 15 Misc. (N. Y.) 80, 36 N. Y. Supp. 476; *Sneed v. Moorehead*, 70 Miss. 690. It is claimed, however, that the more recent

cases have changed the rule, and to support this view we are referred, in the original opinion, to *Rommel v. Schambacher*, 120 Pa. St. 579. In that case it appears that on the evening of the 9th of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of Jacob Schambacher, and there found one Edward Flanagan; they both became intoxicated on the liquor furnished them by Schambacher. While the plaintiff was standing outside of the bar, engaged in conversation with the defendant, Flanagan pinned a piece of paper to his back and set it on fire. The consequence was that Rommel's clothes were soon in flames, and before they could be extinguished he was badly injured. On those facts it was held that the proprietor of a saloon is liable for injuries sustained by one who enters therein and becomes intoxicated, by reason of another, who also became intoxicated there, and who, in full view of the proprietor, attached a piece of paper to the former and set it on fire.

The sole ground of holding the proprietor liable was that he furnished the liquor which caused the intoxication of the two men, and allowed one of them, in his presence, to attach the paper to the other and set it on fire, when he could, and should, have prevented it. So it will be seen that there is nothing in the facts of that case, or in the matter actually decided, which supports the prevailing opinion.

Our attention is also called to the case of *Commonwealth v. Power*, 7 Met. (Mass.) 596, in which Shaw, C. J., said:

"An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, to so regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all

persons not conforming to regulations necessary and proper to such quiet and good order."

This language, it seems to me, comes far short of justifying the conclusion announced by the majority.

The case of *Dickson v. Waldron,* 135 Ind. 507, is also cited to sustain the prevailing opinion. The facts in that case were: George A. Dickson and others were lessees and managers of the Park theater in the city of Indianapolis; Waldron came to the box office of the theater and applied for a 10-cent ticket, giving the ticket seller, one Joseph Gordon, a silver dollar, and receiving from him his ticket and only seventy cents in change; one John Dickson was in the box office at the time with the ticket seller, and was in charge of and conducting the theater for and on behalf of the lessees. Waldron demanded of the ticket seller the right change; an altercation ensued; and the janitor of the theater, who was also a special policeman, was ordered by Dickson, who had reached through the window and grabbed Waldron and slapped him in the face, to arrest Waldron for a "vag." The janitor thereupon struck Waldron, knocked him down and beat him severely; some one interfered, and the janitor withdrew; then Gordon came out of the ticket office and, in the presence of the manager, assaulted Waldron and beat him shamefully; thereafter the janitor arrested Waldron and took him to the police station. On these facts it was held, as in *Rommel v. Schambacher, supra,* that the proprietor of the theater was liable for the injuries sustained by Waldron.

In the foregoing cases, and in some others, the courts have made use of the expression, "The liability of an innkeeper is like that of a common carrier." But it is nowhere held that the kind and extent of the liability of the innkeeper is the same as that of a common carrier. All of the other cases referred to are actions where common carriers were sued for injuries to passengers while being transported.

Our attention was also called, on the rehearing, to the case of *Curran v. Olson,* 88 Minn. 307, as sustaining plain-

tiff's contention. That was a case where a patron of a saloon fell asleep in his chair and a third person poured alcohol, which was furnished by the bartender in charge of the defendant's business, on the foot of the sleeper and set it on fire. The saloon keeper was held liable because the tort was committed in the presence and with the assent of his managing agent, when it was the duty and within the power of the agent to have prevented it. So, it seems to me, that in none of the cases to which our attention has been directed are the facts the same, or similar, to those in the case at bar, and I am of opinion that none of them fairly support the rule announced by the majority. On the other hand, I believe the great weight of authority to be with the defendants, and that the rule that an innkeeper is not an insurer of the safety of the person of his guest against injuries, and that his contract obligation is limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitors, should be adhered to. While my associates state that they do not intend to make the innkeeper an insurer of the safety of the guest, it seems clear to me that such is the effect of the prevailing opinion.

The case of *Clancy v. Barker*, 131 Fed. 161, which was an action for the infant Freeman Clancy, by the plaintiff herein, as his next friend, to recover for his injuries occasioned by the accident, which is the basis of this action, is commented on by the majority, and I take this occasion to review it. It was there held by the United States circuit court of appeals that the defendants were not liable. The plaintiff's contention there was the same as here, and Judge Sanborn, who wrote the prevailing opinion, said:

"The crucial question here, therefore, is whether or not an innkeeper is an insurer of the safety of the person of his guest while the latter remains in his hotel against the negligent and wilful acts of his servants, when they are acting without the course and without the actual or apparent scope of their employment. * * * Counsel for the plaintiff insists that the liability of the innkeepers should be extended in the case at bar even beyond that of

common carriers, so that the defendants should be held liable for the injuries inflicted by the wilful or careless act of their servant when he was not acting within the course or scope of his employment. The argument in support of this contention is that common carriers are liable for the negligent or wilful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employees. * * * There is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the trans-

portation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it. * * * The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper, in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. * * * The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts."

An examination of the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, cited in the prevailing opinion, discloses that the defendants' servants in every case were acting within the course or scope of their employment, and none of them hold the defendants liable for the wilful or negligent acts of their employees beyond that scope. I am much impressed with the prevailing opinion of Judge

Sanborn. The reasoning employed by him appears to be sound and is supported by the great weight of authority in both England and this country; and while I do not consider myself bound by that opinion, yet it seems to me to announce the better rule. I regret that different courts should arrive at different and inconsistent conclusions from the same facts, and practically in the same case.

Again, the supreme court of Dakota in *Curtis v. Dinneen, supra,* directly decided a similar question to the one presented in this case in accordance with the general rule, and in favor of the innkeeper. In that case the plaintiff, while a guest at the defendant's hotel, was assaulted by the defendant's husband, who was employed in and about the house, but not in the course of his employment. The court said:

"It is doubtless good legal doctrine that a master is liable to answer in a civil action for the tortious or wrongful act of his servant if done in the course of his employment in the master's service, even though the master did not know of or authorize such act, or may have disapproved of or forbidden it. The act must be done in the execution of the authority given by the master and in pursuit of the master's business, and must be within the scope of the servant's employment, or, unless it be ratified by the master, he (the master) will not be liable therefor."

And so it was held that an innkeeper is not liable for assault and battery committed on a guest by one of his servants, where the assault was not within the line of the servant's duty, and was not advised or countenanced by the master.

In a still later case, *Rahmel v. Lehndorff,* 142 Cal. 681, the supreme court of California, in a well considered opinion, held that an assault by a waiter in a hotel on a guest is not within the scope of the waiter's employment, or within the real or supposed scope of his duties so as to render the innkeeper liable for the tort. An innkeeper is not bound to protect his guests from acts of violence of

his servants, in the absence of negligence in employing a violent or disorderly person.

To my mind there are many other reasons why the contractual liability of innkeepers to their guests should not be held to be coextensive with, and the same as that of common carriers to their passengers. The agencies employed by common carriers to transport their passengers are extremely hazardous, and are not in any manner under the control of the passenger himself. They are used and controlled wholly by the servants of the carrier in transporting the passenger to his place of destination. During every moment of his journey he is in charge and under the control of the employees of the carrier, and so the carrier is held liable for the slightest negligence; while one who is the guest of the modern hotel or inn has the utmost freedom of movement; there is no danger or hazard connected with the business, and when a room is assigned to the guest it is his own to occupy or not, as he pleases; it is his domicile, from which he may exclude all intruders; and when, as in many cases, the guest lives constantly at the hotel, it is his home from which he may depart and to which he may return at any time, and at all hours of both day and night. Again, there are at all times other guests of the house with whom he necessarily is thrown in contact, and from whom he may possibly receive an injury; and it is believed that our former opinion goes to the extent of holding the proprietor of the hotel liable for such injuries, without any negligence on his part. The modern hotel is, to a certain extent, a public place. Any one may enter it for any lawful purpose, without the consent of the proprietor, and leave it without let or hindrance; and yet the effect of the prevailing opinion is that, for any injury inflicted by such a person to a guest of the house, the innkeeper would be liable, even if he had no reason to expect it, and could not in any way have prevented it. It seems clear to my mind that an ordinary nonhazardous and useful occupation should not be required to bear such an extraordinary burden.

Again, the thought intrudes itself, that the person injured in this case was an infant of such tender years that the defendants had the right to expect that its parents, who in reality were their guests, would prevent him from entering the rooms of the servants or other guests, or getting into places of danger; in other words, from roaming about the hotel at will, and unattended. It can hardly be said that the proprietors, knowing that the child was with his mother, and under her immediate care and control, impliedly contracted to relieve her of that duty, assume it themselves, and insure him against injury while in their hotel.

After mature reflection and a careful examination of the authorities, I am of opinion that the defendants should not be held liable for the injury complained of.

For the foregoing reasons, it seems clear to me that our former opinion should be vacated, and the judgment of the district court should be affirmed.

JOSEPH S. HOAGLAND ET AL. V. MARTHA E. STEWART.*

FILED FEBRUARY 4, 1904. No. 13,144.

Decree: REVERSAL: DISCRETION OF TRIAL COURT. Where the judgment of this court upon appeal in an equity case reverses the judgment of the trial court and remands the cause, but gives no further direction, the trial court is reinvested with discretion to proceed therein as furtherance of justice may require, and, unless such discretion is abused, its action will be sustained.

ERROR to the district court for Logan county: HANSON M. GRIMES, JUDGE. *Affirmed.*

W. V. Hoagland, for plaintiffs in error.

Wilcox & Halligan and *Strode & Strode, contra.*

GLANVILLE, C.

The defendant in error brought suit in Logan county

* Rehearing denied. See opinion, p. 106, *post.*

against the plaintiffs in error to foreclose a real estate mortgage on certain property, and secured a decree in her favor on the 16th day of May, 1900. An appeal was taken to this court, and the judgment reversed by an opinion prepared by the commissioners, which is found in 3 Neb. (Unof.) 142. The recommendation of the commissioners is as follows: "It is therefore recommended that the judgment of the district court be reversed and the cause remanded." The action of the court thereon is embodied in the following language: "The conclusions reached by the commissioners are approved and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed and the cause remanded." The plaintiffs in error, after mandate was filed in the district court, filed a motion therein asking judgment of dismissal. They also objected to the action of the district court in proceeding to a retrial of the cause, contending that, after the action of the supreme court upon their appeal, the district court had no jurisdiction to pursue any course in the proceeding other than to dismiss the action. Their motion and objections were overruled, and the court proceeded to try and determine the cause. Motion for a new trial was filed and overruled, and a petition in error filed herein. Numerous assignments of error are made, but there is no bill of exceptions, and the only question to be passed upon by this court is, whether it affirmatively appears that the trial court erred in proceeding to a trial of the cause. The contention of plaintiffs in error is based upon the following language contained in the commissioners' opinion heretofore referred to: "Upon this record the only judgment the district court could properly have rendered is one of dismissal. By section 594 of the code, this court is directed 'to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment.'"

In the opinion above referred to, the parties are designated as plaintiffs in error and defendant in error, and

section 594 of the code which prescribes a rule of action in this court upon proceedings in error is quoted. This section constituted section 594 of title 16 of the territorial civil code of Nebraska (Revised Statutes, 1867), entitled "Error in Civil Cases." Title 21 of that code is, "Appeals from the district to the supreme court," and section 683 therein provided, "The court may reverse or affirm the judgment, or render such judgment as the district court should have done." The provisions of this title are held to have fallen with the repeal of the chancery act (see *Irwin v. Calhoun & Croxton,* 3 Neb. 453), and section 683 is no longer found in our code, but the distinction between cases brought to this court upon error and appeal still exists. When the legislature again provided for appeal in equity cases, it did not make the sections governing procedure upon error applicable thereto, and we know of no rule of practice provided by statute, or established by this court, which prevents it from simply reversing or affirming the judgment of the lower court, or as an alternative, rendering such judgment as the district court should have rendered. The judgment of this court upon the appeal referred to might have been a formal judgment in favor of the defendant in the action, if in the opinion of the court such was the proper judgment to enter, but instead of rendering such judgment, the court had the power simply to reverse the judgment of the lower court and remand the cause without further direction, and that it did. In *Faulkner v. Simms,* 68 Neb. 299, this court said: "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." In *Topping v. Jeanette, supra,* it is said: "We are of opinion that the finding and decree are contrary to the evidence, and should be set aside. The ordinary course would be to render a new decree or to direct a decree for plaintiff in the district court. But we are not entirely satisfied with the former trial, and as it appears that a foreclosure suit is now pending, in which case, or on a new trial of this one, or upon consolidation, as the parties may be advised, the facts may be fully developed, we think the interests of justice would be subserved by remanding this cause for further proceedings only. Such course has been adopted frequently under like circumstances. *Clemons v. Heelan,* 52 Neb. 287; *Medland v. Linton,* 60 Neb. 249; *Nebraska Moline Plow Co. v. Fuehring,* 60 Neb. 316. We therefore recommend that the decree be reversed and the cause remanded for further proceedings."

This case was before the lower court without direction as to what steps it should take as a court of equity in the premises, and we are clearly of the opinion that, after its judgment in favor of the plaintiff in the action was reversed, the trial court had power, in the furtherance of justice, to allow a retrial of the issues made by the pleadings. It is not uncommon for courts to allow a party, either plaintiff or defendant, to withdraw a rest and proceed with further evidence. We think the trial court had discretion to do so in this case, notwithstanding anything contained in the judgment of this court. There is nothing in the record to indicate upon what application or showing the trial court based its action, and we can not say that it abused its discretion in pursuing the course it did. If the court had a right to exercise such discretion, then,

in reviewing its action upon a petition in error, it must affirmatively appear that it abused such discretion, or its action will be sustained. No abuse of discretion apppears.

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

By the Court: The conclusions announced in the foregoing opinion are approved, and it appearing that the adoption of the recommendation made will result in a right determination of the cause, it is ordered that the judgment of the district court be

AFFIRMED.

The following opinion on motion for rehearing was filed June 9, 1904. *Rehearing denied:*

1. Decree: REVERSAL: PROCEDURE IN DISTRICT COURT. The rule of this court is that, when a decree in equity is reversed and remanded generally without specific instructions, the lower court is to exercise its discretion in the further disposition of the case, in accordance with the judgment of this court and the law of the case as expressed in the opinion.

2. Commissioners' Opinions. An unofficial opinion of a court commissioner is not the opinion of the court. The conclusion reached is approved, and the recommendation adopted. The law of the case is to be derived from the judgment of the court, and the questions necessarily determined thereby.

SEDGWICK, J.

Upon this motion for rehearing, it is urged that the opinion upon which the decree of the district court was reversed, when the cause was here upon the first appeal, must be looked to and construed in determining the effect of the judgment of reversal then entered. The position can not be maintained, because the opinion was not made official; the reasons for reversal given by the commissioner were not adopted by the court; the conclusion only was approved. By the judgment entered, the decree of the dis-

trict court was reversed and the cause remanded generally, without specific instructions. The reasons for not approving the language of the commissioner's opinion are manifest. From the record of the trial in the district court, it appeared that the action was an ordinary one for the foreclosure of a real estate mortgage. The original notes had been lost. The plaintiff undertook to make proof with copies. Foundation was laid for the introduction in evidence of the copies in place of the lost notes. This foundation was held sufficient by the trial court, and the copies were received in evidence. This court found the foundation for secondary evidence to have been technically insufficient, and so reversed the decree of the district court. The question of the existence and validity of the notes and mortgage had not been investigated and was not passed upon by this court.

The rule of practice of some courts is that, in reversing a decree in equity of a lower court, the appellate court will give specific instructions to that effect if the condition of the case requires a further hearing in the lower court; and, if no such specific instructions are given, the trial court has no authority to further investigate the merits of the case. The rule of this court is that, unless a decree is entered in this court, or specific instructions are given, that is, when the case is reversed and remanded generally, the district court is to exercise its discretion in the further disposition of the case, consistent, of course, with the judgment of this court and the law of the case as expressed in the opinion. *Gadsden v. Thrush*, 72 Neb. 1. An unofficial opinion of a commissioner is not the opinion of the court. The law of the case, then, is to be derived from the judgment of the court, and the questions of law necessarily involved in the conclusion reached. Upon the first appeal the court adopted the recommendation of the commissioner, reversed the decree of the district court, and remanded the cause generally, without specific instructions. This left it to the discretion of the trial court to take such further proceedings as justice and

equity required. We are satisfied that the trial court did not abuse that discretion.

The motion for rehearing is overruled.

REHEARING DENIED.

CURTIS W. RIBBLE, ADMINISTRATOR, V. NETTIE FURMIN.

FILED FEBRUARY 4, 1904. No. 13,175.

1. **Appeal: FINAL ORDER.** An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie.
2. **Estates: CLAIMS: TIME OF FILING.** Upon such an appeal it appeared from the pleadings that the notice of the expiration of the time for presenting claims was published prior to making the order fixing such time. *Held*, That claimant is entitled to an order allowing her claim to be filed and directing a hearing thereon.
3. **Order: EVIDENCE.** *Held*, also, that such an order is clearly justified by the evidence.
4. **Jury Trial.** In a hearing upon such an appeal neither party is entitled to a jury trial.
5. **Appeal: PROCEDURE.** A judgment of the district court upon such an appeal, remanding the cause to the county court with direction to "permit the filing of the claim and to set a day for hearing, and to proceed to hear and pass upon the same," is not the proper judgment, but a hearing in the district court on such claim should be had in the same manner as though the appeal had been from an order disallowing the claim upon hearing before the county court.

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

A. S. Sands and *L. W. Colby,* for plaintiff in error.

George H. Hastings and *Robert Ryan, contra.*

GLANVILLE, C.

This is a proceeding in error seeking to reverse a judgment of the district court for Saline county, and was

argued and submitted with the two following cases, Curtis W. Ribble against Laura A. Ames, and the same plaintiff in error against Mary Hopkinson; and, the questions involved being identical the decision in this case will govern the other two. The judgment of the district court sought to be reversed was rendered in an action or cause appealed from the county court of that county, wherein the defendant in error was refused leave to file her claim, based upon a promissory note, against the estate of James M. Bullion, deceased. The district court heard the matter upon appeal and rendered the following judgment or order:

"It is therefore considered and ordered by the court, that the order of the county court be reversed, and the county court ordered to permit the filing of the claims and to set a day for hearing, and to proceed to hear and pass upon the claims."

Contention was made by the defendant in error, in this court, that the order in question was not a final order or judgment which could be reviewed upon error, and a ruling was made adverse to such contention by an opinion found in 69 Neb. 38. By the petition filed in the district court, upon which the cause was tried, it was alleged that one Sophy Bullion, widow of the deceased, was appointed special administratrix of his estate on the 15th day of January, 1901; that the defendant in error is a resident of the state of New York, and absent from the state of Nebraska; that on the 19th day of February, 1901, an order was made by the county court, providing that all claims should be filed against said estate on or before August 22, 1901; that the first publication of notice of the expiration of the time for filing claims was made on the 28th day of January, 1901, and the last on the 6th day of February, 1901, and that on the 12th day of April, 1901, the said Sophy Bullion was duly appointed as administratrix of said estate, and duly qualified. The petitioner then sets up an apparently valid claim against the estate upon a promissory note.

It seems that Sophy Bullion died pending the action, and that the plaintiff in error was appointed by the court as her successor, and has been substituted as administrator in her stead in these proceedings. His answer admits the appointment of a special administratrix; the making of the order requiring claims to be filed against such estate on or before August 22; and alleges the giving of due notice of the time for filing claims, by publication in a newspaper "more than six months prior to the time limited for the filing and barring of claims." By his pleadings he also raises the issue that an appeal would not lie from the decision of the county court in this regard, claiming that the same was entirely discretionary with the county court, and could be reviewed only upon error.

He now contends that the pleadings and evidence are not sufficient to sustain the judgment of the district court. We are of the opinion that in the condition of the pleadings, as above shown, the defendant in error was clearly entitled to file her claim against the estate at the time the same was presented to the county court in September, 1901. It will be noticed that in the petition it is alleged that the notice of the expiration of the time for filing claims was published before the order fixing such time was made, and that the answer alleged that it was given more than six months prior to August 22, which would also be before the date of the order. Section 214, chapter 23 of our statutes (Annotated Statutes, 5079), requires the commissioners appointed to examine claims against estates to give notice of the time limited for filing claims, within 60 days after their appointment, and that, in case the court shall examine such claims, the same notice must be given. It appears by both petition and answer that the notice in the case before us was made by publication prior to the date of the order. Such notice is a nullity, and the time for filing claims was not limited by the order of the court without publication after the order was made. The defendant in error had a right to file her

claim, and have the same examined at the time it was presented, and the judgment of the district court granting such right is clearly justified.

An examination of the evidence contained in the bill of exceptions leads us, also, to the conclusion that the defendant in error should have been allowed to file her claim when it was presented, even if the order of the county court limiting the time, made before the appointment of the general administrator, was valid, and due notice as required by law had been given. She was a nonresident of the state, and absent therefrom, and her claim, with the note, had been placed in the hands of William G. Hastings, who appeared for her on February 18, 1901, filing objections to the appointment of the widow, Sophy Bullion, as general administratrix. A hearing upon such objections was continued, and her appointment and qualification took place on the 17th day of April, 1901. Before that time her attorney, William G. Hastings, was appointed supreme court commissioner by this court, and, of course, ceased to practice as an attorney in the courts of this state. He omitted to turn the matter over to another attorney until in September of that year, and we think the entire evidence justifies the district court in holding that she should be allowed to file her claim, and have the same examined and passed upon.

While there are many assignments in the petition filed by plaintiff in error, but few are noticed in his brief, in which he says:

"Counsel will content themselves with referring the court, solely, to the deficiency of the evidence in the matter of the claimant's excuse for not presenting the claim within the time limited by the county court. It is submitted that no reasonable excuse whatever is given. It was pure and simple neglect, dilatoriness or carelessness on the part of claimant and her attorneys. The evidence shows that neither the applicant nor her attorneys were free from laches; that neither of them exercised common, ordinary diligence. If the evidence was the same before

the county court, there can be no question but what sound discretion was exercised in refusing to extend the time. However, the whole matter comes back to the first proposition, that the order of the county court, in refusing to extend the time to present claims, is not an appealable order, but rests in the sound discretion of the court, and can only be reviewed by proceedings in error."

We think the discretion in the county court in such a matter is the same kind of discretion a court of equity has in an action for specific performance of contracts, and is not to be arbitrarily exercised, but the court must, under section 218, chapter 23, Compiled Statutes (Annotated Statutes, 5083), extend the time as the circumstances of the case may require, when proper and timely application and showing are made. An order denying the claimant the right to file a claim is certainly a final order, from which an appeal lies from the county court to the district court under section 42, chapter 20, Compiled Statutes (Annotated Statutes, 4823).

Contention is made that a jury trial of the issue joined, as to the right to file the claim, should have been allowed. The matter was for the court to decide, and the right to a jury trial upon a hearing as to the validity of the claim may still be insisted upon, and is all that plaintiff in error is entitled to in that regard.

It is contended by the defendant in error that, under section 214, chapter 23, above referred to, no order could be made limiting the time for filing claims during the pendency of a special administration, but it will be noticed that such section reads, in part, "When letters * * * of special administration shall be granted by any probate court, or during any appeal from said order, it shall be the duty of the probate judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by the commissioners in this subdivision." It would seem, therefore, that the county judge might proceed to give notice and hear claims without waiting for the ap-

pointment of a general administrator, in which case, parties interested in the estate would have the same right to contest claims, and appeal from their allowance, as after such appointment. The right of an interested party to appeal from the allowance of a claim is not dependent upon the failure of the executor or administrator to appeal, since the enactment of section 42, chapter 20, *supra,* which has been held to repeal section 242 of chapter 23, allowing persons interested in the estate to appeal only after the expiration of the time allowed the executor or administrator to do so. See *Drexel v. Reed,* 65 Neb. 231. While, in the view we take of the case before us, it is not necessary to decide this point, we think it has been decided in principle in *Cadman v. Richards,* 13 Neb. 383.

It has been urged that the district court should have set a time for hearing therein upon the claim in question, and proceeded to a trial thereon, instead of formally reversing the judgment of the county court and remanding the cause for such action in that court. No petition in error was filed by the defendant in error in this court, and this contention was made only by counsel in oral argument. The closing sentence of the brief of the defendant in error is, "In any event, therefore, the judgment of the district court should be affirmed."

In the opinion announced by this court, written by POUND, C., disposing of the motion to dismiss this action, reported in 69 Neb. 38, it is said:

"It will be seen therefore that the district court clearly had the power to render a final judgment upon the merits of the claim. The order denying leave to file the claim was a final order since it in effect prevented a judgment and determined the proceeding, within the purview of section 581 of the code. When this order was appealed from and the transcript filed, the district court acquired jurisdiction of the whole matter and power to deal with it as though the application had been filed in that court originally. *Jacobs v. Morrow,* 21 Neb. 233. Even if the cause had been taken to the district court upon error, the same

course would have been proper. *Maryott & McHurron v. Gardner,* 50 Neb. 320. The legislature evidently intended that causes should be settled finally in the district court when taken there by appeal or error and that parties should not be compelled to go back and forth from the lower to the higher tribunal in matters involving small sums as is so often the case in more important causes brought in the district court and reviewed in the supreme court. Hence, it is doubtful whether any warrant is to be found for the course taken in the case at bar so far as the judgment remands the cause for further proceedings in the county court." This statement of the law affecting this question, made in this case, having received the approval of the court, should be held conclusive thereon.

While, as we have said, no petition in error was filed by the defendant in error, yet, that of the plaintiff in error is sufficient to bring the judgment before us in such a manner as to require us to reverse any portion thereof which we hold to have been erroneously made.

We recommend that the judgment and order of the district court be affirmed, in so far as it reverses the order denying defendant in error to file her claim made by the county court, and reversed as to that part remanding the cause to the county court for hearing upon the claim, and that the cause be remanded from this court to the district court with directions to proceed to a final hearing thereon in that court.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, reversing the order of the county court and granting leave to file the claim involved, is affirmed, and the order directing the county court to allow the filing of the claim is reversed, and the cause is remanded to the district court with directions to proceed to a final hearing thereon in that court.

JUDGMENT ACCORDINGLY.

OMAHA GAS COMPANY ET AL. V. CITY OF SOUTH OMAHA.

FILED FEBRUARY 4, 1904. No. 13,209.

1. **Petition:** DEMURRER. Petition examined, and *held* not subject to demurrer upon the ground of improper joinder of causes of action.
2. **Indemnifying Bond:** ACTION: EVIDENCE. In an action by a city against a gas company upon a bond given by the latter to indemnify the city against loss through the recovery against the city for injuries occasioned by open trenches dug by the company, the execution and delivery of the bond was admitted, and the evidence established the recovery of a judgment against the city for a personal injury resulting from an open trench dug by the company. *Held*, That there was a liability against the company on the bond, and that the city was entitled to judgment. *Held, further*, That evidence of the presence or absence of negligence of either the company or the city as related to the injury was immaterial.
3. **Instruction.** Instruction examined, and *held* properly refused.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

George E. Pritchett, for plaintiffs in error.

A. H. Murdock, contra.

KIRKPATRICK, C.

This is an error proceeding prosecuted from a judgment of the district court for Douglas county to reverse a judgment recovered by the city of South Omaha, hereinafter styled the city, against plaintiffs in error, the Omaha Gas Company, hereinafter styled the company, and Frank Murphy, its surety. Three grounds of error are relied upon for a reversal of the judgment: First, that the court erred in overruling the demurrer of the company upon the ground that there were two causes of action improperly joined in the petition; second, that there was not sufficient evidence to entitle the city to judgment, and that, on the evidence received, the company was entitled to

judgment; third, that the court erred in refusing to give instruction numbered 2, requested by the company. The questions raised by these various assignments of error will be considered in their order, so far as necessary to a right determination of the case.

That a correct understanding of the first contention may be had, it will be necessary to state very briefly the transactions out of which the controversy arose. Some time prior to November 25, 1897, the city, by ordinance, granted to the company, upon certain conditions, a franchise to excavate trenches in the streets and alleys, and to lay pipes and cross-mains, for the purpose of supplying the citizens of the city with gas. As a condition precedent to the exercise of the rights under the franchise, it was by ordinance provided, that the company should execute to the city a good and sufficient bond in the sum of $5,000, that it would indemnify and hold harmless the city from all loss and damages resulting from suits brought against the city, on account of accidents occasioned by the excavations.

Some time in November, 1897, one Burk accidently drove into one of the trenches dug by the company, and sustained injuries. In a suit against the city he recovered damages, the judgment being affirmed by this court, and the city satisfied the judgment by payment. The action at bar was brought by the city against the company for the amount of this judgment with costs. In its petition, the city set out a copy of the bond given by the company, and all other matters hereinbefore stated; and the company contends that no cause of action is stated upon the bond, and, also, no facts sufficient to entitle the city to recover over from the company for the Burk judgment. From a careful reading of the petition, we conclude that this contention of the company can not be sustained. The petition sets out a copy of the bond; the sureties thereon are made parties defendant, and are charged with liability in all respects as the company, and it seems quite clear that the petition contains but a single cause of action, and that,

one arising upon the bond. It therefore follows that the demurrer was properly overruled.

The next contention, relating to the sufficiency of the evidence, is to the effect that the company is shown to be free from fault, and that the injury to Burk was caused by the negligence of the city. The bond, which was given by the city to secure its franchise, contains a condition in the language following:

"The condition of this obligation is such, that, if the above bounden Omaha Gas Company, its successors and assigns, or any of them, shall well and truly indemnify, and save harmless, the City of South Omaha from, and against any loss resulting to said city, from damage suits brought against said city, from accidents resulting from the excavation of streets and alleys of said city, by said Omaha Gas Company, then, these presents to be void," etc. In its answer the company admitted the execution of the bond, and the excavation of the trenches by reason of which Burk was injured, and the testimony establishes the recovery of the judgment by him, its payment by the city, and the further fact that the gas company and Murphy, its surety, defendants, had due and timely notice of the pendency of Burk's suit, and were, by the city, invited to appear and take part in the defense; and it is further disclosed that the attorney for the company did, in fact, appear and assist in the defense. This being the condition of the record, it would seem absolutely to fix the liability of the company. Numerous authorities are cited by counsel upon both sides of this case, upon the question of the liability over in this kind of a case, but in the view we take of the matter, it will not be necessary to consider them. The right to recover upon the bond in suit does not depend upon the presence or absence of negligence on the part of either the city or the company, but rather, under the terms of the bond, upon whether the city has suffered a recovery, because of the excavations made by the company.

Instruction numbered 2, requested by the company,

presents the question of negligence of the company for the consideration of the jury. In view of what has just been said, the refusal of this instruction, it is apparent, was not error. Having reached this conclusion, it will not be necessary to consider the other errors urged. The judgment appears to be right, and it is therefore recommended that the same be affirmed.

DUFFIE and LETTON, CC., concur.

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

AFFIRMED.

ABRAM L. COVEY v. ANDREW J. HENRY.

FILED FEBRUARY 4, 1904. No. 13,360.

1. **Real Estate**: SALE: CONTRACT. A verbal contract with an agent or broker to sell land for the owner or to obtain a purchaser therefor is void.
2. **Petition**. SUFFICIENCY. A failure to state a cause of action in the petition can not be cured by averments in the reply.
3. ———: DEMURRER. Petition examined, and *held* not to state a cause of action.

ERROR to the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

A. A. Kendall, for plaintiff in error.

T. T. Bell, contra.

FAWCETT, C.

This case was originally commenced in the county court of Howard county, to recover the sum of $200, which plaintiff claimed to be due him from the defendant as a commission for finding a purchaser for defendant's land.

On the same day that plaintiff filed his petition in the county court, defendant filed an answer substantially admitting the allegations of plaintiff's petition, but claiming that one Harry L. Cook also claimed to have produced the purchaser for said land and demanded the commission, and alleging that he was unable to determine which of said parties was entitled to the commission, and deposited $200 in court, asking the court to determine the right of the parties to said money. On the next day the parties both appeared in county court, by their attorneys, and defendant asked leave to withdraw his answer and deposit, which leave was granted, and the answer and deposit were withdrawn. Subsequently, plaintiff filed an amended bill of particulars, to which an answer was filed, and, without any reply to said answer, the parties went to trial in the county court before a jury, which resulted in a verdict and judgment for the plaintiff for the sum of $150, from which the defendant appealed to the district court. In the district court the plaintiff filed his petition, which was an exact duplicate of the amended bill of particulars filed in the court below, and is as follows:

"Comes now the above named plaintiff and, for cause of action against the defendant, alleges, that on or about the — day of June, 1901, or some time previous thereto, the defendant was the owner of the south half of section eight, in township fifteen north of range ten west of the 6th principal meridian, in Howard county, Nebraska.

"That on or about that time the defendant, being desirous of selling said land, entered into an oral agreement with the plaintiff, and agreed that if the plaintiff would find a purchaser for said land, who would buy the same from the defendant, he, the defendant, would pay the plaintiff, for so doing, the sum of $200, and defendant stated his price for said land to be the sum of $8,000.

"That thereafter, to wit: on or about the 28th day of August, 1901, the plaintiff did find a purchaser for said land, viz.: one Charles Sumovich, and plaintiff took said Sumovich to said land and showed him the said land, and

the said Sumovich made a close and careful examination of said land, and was satisfied with the said land, and told plaintiff that he would go home and make arrangements for the money to pay for said land with, and would return to the defendant herein and would buy said land from the defendant.

"That the plaintiff then told the defendant that he had found a purchaser for said land, and told him what said Sumovich had said, and told him that said Sumovich would return, as he had said he would, and that he would buy said land from the defendant, and the defendant was then satisfied with said arrangement.

"That thereafter, on or about the 24th day of September, said Sumovich did return to St. Paul, and did go to said defendant as he had said he would, and he did buy said land from the defendant as he had said he would, and defendant sold said land to said Sumovich for the sum of $8,500.

"That, on the 25th day of September, the plaintiff, not knowing that said sale had been made, again called upon the defendant and told him that said Sumovich was in town, and that he had come to buy said land, and said defendant again promised, orally, that if said Sumovich did buy said land, he, the defendant, would pay the plaintiff the said sum of $200. That the defendant knew at that time that he had sold said land to said Sumovich, but concealed the fact from the plaintiff.

"Wherefore, the plaintiff says there is now due him from the defendant the sum of $200, agreed as aforesaid to be paid by the defendant, which the defendant refuses to pay, though often requested so to do, and for which sum the plaintiff prays judgment, and for the costs of this suit."

An answer was filed to this petition, a reply to the answer, and a trial had in the district court, which resulted in a verdict for the plaintiff for $100, which verdict, on motion of defendant, was set aside and a new trial ordered. Plaintiff then, by leave of court, filed an amended

reply. The first paragraph of the reply is a general denial. The second paragraph alleges that the law, requiring contracts between the owners of land and agents authorized to sell the same to be in writing, does not apply to such contracts as the one between plaintiff and defendant. The third paragraph alleges that said law is against public policy and, therefore, unconstitutional and void. The fourth paragraph alleges that the defendant waived the defense of the statute of frauds, by the filing of the answer and making the deposit in the county court, hereinbefore referred to. The fifth paragraph alleges that the making of said answer and the deposit of said money in the county court constituted a new contract, which related back to the original contract, and that said original contract was, therefore, taken out of the statute of frauds, and defendant ought not now to be allowed to plead said statute. The sixth paragraph is, in substance, the same as the fifth. The seventh paragraph alleges that defendant, having accepted the services of plaintiff, and having accepted that part of said contract which was beneficial to himself, should not now be allowed to repudiate that part of the contract which is detrimental to himself.

Defendant then filed a motion to strike from the amended reply all of paragraphs four to seven, both inclusive, for various reasons set out in the motion. This motion was overruled. Thereupon defendant filed the following demurrer:

"Comes now the defendant and demurs generally to the amended reply of the plaintiff filed herein, for the reason that neither the amended reply nor the petition, nor both, state a cause of action in favor of the plaintiff and against the defendant."

The demurrer was sustained, and plaintiff electing to stand on his petition and amended reply, the cause was dismissed at the cost of plaintiff.

There are six assignments of error, but they are all practically included in the first and second assignments: that the court erred in sustaining the demurrer to the

reply and petition, and erred in dismissing plaintiff's cause of action.

While the defendant, in his demurrer, says that he "demurs generally to the amended reply of the plaintiff filed herein," yet the trial court and the parties to the action seem to have treated it as a demurrer to both the reply and petition, and we shall treat it in the same manner.

Defendant, in support of his demurrer, relies upon section 74, chapter 73, Compiled Statutes (Annotated Statutes, 10258), which reads:

"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."

He contends that plaintiff's petition, upon its face, shows that his agreement with defendant was an oral agreement for the sale of lands, and does not allege any facts which would in any manner take the contract out of the statutory prohibition; that the petition does not state a cause of action, and that this defect in the petition could not be cured by any averments in the reply. The rule of practice contended for by defendant, that a cause of action can not be pleaded in the reply, is so well settled, that a citation of authorities is unnecessary, and if plaintiff must rely upon the allegations of waiver in his reply, he must fail in this action.

Plaintiff contends that the allegations contained in the last paragraph of his petition, taken in connection with his allegations as to the original oral agreement, take the case out of the statute, and entitle him to recover on the theory that "a past consideration is sufficient to support a promise, where the consideration was performed in pursuance to a previous request"; and relies chiefly on *Stuht v. Sweesy*, 48 Neb. 767, to sustain his contention. The rule of law here invoked is not only sound, but a well

established rule, and if it can be applied to this case it would entitle plaintiff to a reversal, and to an opportunity to have his case tried upon the merits in the district court. We have carefully examined *Stuht v. Sweesy,* but the facts in that case are so radically different from the facts in the case at bar that it can not be accepted as authority here. In *Stuht v. Sweesy,* Stuht had agreed in advance that a party wall should be built upon the lot line; he went with Sweesy to the architect and suggested various changes in the plans and specifications, so that the wall, when completed, would inure directly to his benefit, in the use of a building which he purposed subsequently to construct in connection with the said party wall. Sweesy made the changes in the plans and specifications suggested by Stuht, and went on and constructed the wall, Stuht inspecting it from time to time as the work proceeded, and being satisfied therewith. After the wall was constructed, Stuht promised to pay Sweesy for one-half the cost of construction of the wall up to and including the third story, according to the terms of an agreement which had formerly been made with one Chapman, which promise he subsequently failed to make good, and suit was brought to recover the amount. On the trial, Stuht sought to escape under the contention that the promise was within the statute of frauds and void because not in writing. In the opinion Mr. Commissioner IRVINE says:

"Whether a promise in such a case is within the statute of frauds we need not inquire. If it were it would be, in this case, taken out by part performance."

Sweesy was permitted to recover. We are unable to see how we can apply the rule, which was properly applied in that case, to the case at bar.

The section of the statute above set out is plain and unambiguous. The reasons which impelled the legislature to pass that act are well known to the courts and the profession generally. Innumerable suits were being instituted, from time to time, by agents and brokers, after

the owners of lands had sold the same, claiming a commission, on the ground that they had been instrumental in securing the purchaser; and, in many cases, owners of land were compelled to pay double commission on account of such claims. In order to prevent such disputes and protect property owners in just such cases as the one we are now considering, the legislature passed this act.

In considering a code provision similar to this section of our statute, the supreme court of California in *McCarthy v. Loupe*, 62 Cal. 299, say:

"Since the code, under the provisions of section 1624, an agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation or commission, can only be proved by the introduction of an instrument in writing."

In *Allen v. Hall*, 64 Neb. 256, in a very clear opinion by Commissioner BARNES, this court upheld this section of the statute, and applied it to a case where the facts were fully as strong, if not stronger, than those set out in plaintiff's petition in this case. See, also *Baker v. Gillan*, 68 Neb. 368; *Spence v. Apley*, 4 Neb. (Unof.) 358.

Plaintiff in error contends that there is a distinction between an agent to sell land and an agent to find a buyer; that in the one case the agent has power to make the sale and bind his principal, while in the other he has not. As between the seller and the agent this is a distinction without a difference, for in either case, if there were a valid employment, the seller would be liable to the agent for his commission if he made a sale, or found a buyer. The only difference to be found in this distinction is that, in the former case, the buyer could demand performance by the seller, while in the latter case he could not. But, it is apparent that this statute was not enacted to aid buyers in the enforcement of their contracts of purchase. It was designed, simply, to put an end to the ceaseless disputes and innumerable suits that were constantly arising between the owners of lands and curbstone brokers. The cases of *McCarthy v. Loupe* and *Allen v. Hall, supra,* were

both cases in which the plaintiffs claimed to have been employed to secure purchasers, and are therefore decisive of this question. The contention of plaintiff in error that the defendant, having received the benefit of plaintiff's services, can not be relieved of his liability to pay for the same, is also disposed of adversely to plaintiff's contention in *McCarthy v. Loupe, supra.*

We think the statute a wise one, and that it applies to the case at bar: that the allegations contained in the last paragraph of plaintiff's petition are not sufficient to relieve him from the provisions thereof; and, this being so, that the petition could not be aided by any averments in the reply; that, not having pleaded the estoppel (if any there were), by reason of the answer and deposit of defendant in the county court, in his amended bill of particulars in that court, he could not plead it in the district court and can not raise the question here.

The judgment of the trial court was therefore right and should be affirmed, and we so recommend.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

JOHN L. HODGES V. NATHAN GRAHAM ET AL.

FILED FEBRUARY 4, 1904. No. 13,363.

1. **Referee's Report:** STIPULATION: ESTOPPEL. Where parties consent that the report of a referee, containing the evidence taken by said referee and his findings of fact and conclusions of law, shall be submitted to the court, together with the objections and exceptions thereto, for determination on the merits by the court, they are precluded by such submission from assigning error by the court in setting aside the report and findings of the referee and substituting therefor the findings of the court.

2. **Review.** In such case this court will only consider the correctness of the findings and judgment of the district court.

3. **Evidence.** Evidence examined, and *held* to sustain the findings and judgment of the district court.

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

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, contra.

FAWCETT, C.

This is an action brought by plaintiff in error, hereinafter styled plaintiff, against the defendants in error, hereinafter styled defendants, alleging that about the first of January, 1894, the plaintiff and defendants entered into an agreement and contract of copartnership at Clay Center, Nebraska; the business of said copartnership to be to purchase, own and control a printing outfit then known as "The Progress," a newspaper outfit at Clay Center, Nebraska, and to publish said newspaper. That each member of said copartnership was to put into the business the sum of $127.20, which money was to be used in the purchase of the printing outfit, above described, the payment of the indebtedness due upon the same, and also to pay one claim due to the plaintiff from the former owners of said printing outfit, in the sum of $312.50. That they proceeded to and did purchase said printing outfit, and did run said newspaper. That the defendants have failed, neglected and refused to pay in the amount of money agreed to at the time, and have never paid into said partnership any other sum except the amount of $87.50 each; that they have neglected, failed and refused to pay any portion of the amount due to the plaintiff, and that, by reason of said failure, there is due and owing from the defendants to the plaintiff the said sum of $312.50, for which amount he prays judgment.

The matters in controversy in this case were, on May

23, 1900, by consent of both parties in open court, referred by the court to H. C. Palmer, to take the testimony and report his findings of fact and conclusions of law to the court. On November 9, 1900, the referee filed his report, containing all the evidence introduced before him, together with his findings of fact and conclusions of law. The findings of fact and conclusions of law were all in favor of plaintiff, and that plaintiff was entitled to recover a judgment against the defendants, and each of them, for the sum of $332.45 and interest from September 20, 1900, at the rate of seven per cent. per annum. To the report of the referee the defendants filed a large number of objections, and a motion for new trial. On November 11, 1901, the court set aside all of the findings of fact and conclusions of law of the referee, and awarded a new trial. On November 15, 1901, the court made an allowance to the referee of $50 for his services. On December 16, 1902, plaintiff filed a reply, and on the same day a subpœna *duces tecum* was issued to H. C. Palmer, referee, commanding him to appear before the court, and bring with him certain records which had been offered and read in evidence before him, as referee. On December 17, 1902, we find the following entry by the court:

"This cause coming on further to be heard, now come the parties to this action, in open court, and consent to the order or ruling of the court as follows: 'Order setting aside report of referee made November 11, 1901, is set aside.' Case set down for hearing upon report of referee and objections thereto, and motion for new trial. Court to act upon objections at present term of court and to enter final decision for merits, whatever the decision upon objections and upon the testimony taken before the referee. Rights of both parties to a bill of exceptions to be fully protected, and all the above by consent of parties, in open court, and this cause submitted to the court on report of referee, under above stipulation."

On March 13, 1903, the court entered its findings and decree, in which it set aside the findings and conclusions of

the referee, and entered findings of its own, finding generally for the defendants; overruled defendants' motion for new trial, and dismissed plaintiff's bill for want of equity.

The reason assigned by the court for setting aside the findings of the referee is that said findings were contrary to the clear weight of the evidence. Plaintiff contends that this is not so; that there is ample evidence in the record to sustain the findings of the referee, and that the court erred in setting the same aside. It is urged by defendants that plaintiff can not make such contention in this court, for the reason that, by the agreement, in open court, entered into December 17, 1902, hereinbefore set out, plaintiff consented to the submission of the case to the court upon the evidence taken by the referee, and that the court might make its own findings upon the merits, regardless of its rulings on the objections to the report of the referee. If the contention of the defendants is sound, then, the only question for this court to determine is, whether the evidence sustains the finding and judgment of the court. An examination of the record leads us to the conclusion that this contention of defendants is correct. After the order of the court entered November 11, 1901, setting aside the findings of the referee and granting a new trial, the parties seem to have been preparing for another trial of the case, which is shown by the settlement with the referee on November 15, and the filing of a reply and issuance of a subpœna on December 16, 1902. On December 17, when the parties were all in court, and, evidently, after discussing the matter, and all agreeing that the evidence taken before the referee was all the evidence that could be introduced in the case, and, in order to avoid the trouble, time and expense of another trial, it was agreed between them that the matter be submitted to the court upon the evidence contained in the report of the referee, and that the court should make such findings on the merits as it deemed proper. The court's entry made at that time is not as explicit as it might have been. The language is, "Case set

down for hearing upon report of referee and objections thereto, and motion for new trial. Court to act upon objections at present term of court and to enter final decision for merits, *whatever* the decision upon objections and upon the testimony taken before the referee." It is evident that what the court meant to say was: Court to act upon objections at present term of court and to enter final decision upon the merits, *regardless* of its decision upon the objections to the report of the referee. The entry further provides for the preservation of the rights of the parties to a bill of exceptions, and recites that the case is submitted to the court under that stipulation. We are confirmed in our construction of that entry by the court, by the court's own construction of it on page 145 of the record. The court says:

"And now, on this same day, this cause coming on further to be heard (the parties having agreed in open court that, in case the findings of the referee should be set aside, the court should make the proper findings upon the evidence as reported by the referee and pronounce judgment thereon), upon the evidence and arguments of counsel, and the court, being fully advised in the premises, doth find generally in favor of the defendants," etc.

We think this language of the court conclusively shows the true action and intention of the parties on that occasion. This being so, then, the only question for our consideration is, whether or not the court erred in its findings and judgment. While we are unable entirely to concur in the view of the district court in holding that the findings of the referee were against the *clear weight* of the evidence, we are unable to say that the court's own findings are not sustained by the evidence. The evidence, in our judgment, was conflicting, and, having been submitted to the district court by the parties, and the court having made its findings thereon, those findings must stand.

We recommend that the judgment be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

HELEN L. JONES V. ALICE S. DANFORTH.

FILED FEBRUARY 17, 1904. No. 13,362.

1. **Appeal and Error.** A litigant, who brings to this court an appealable case, can not have it considered in this court both as an appeal and as a proceeding in error.
2. ———: ELECTION. If, in an appealable case, a transcript of the proceedings in the district court is duly filed in this court, and all proceedings taken necessary to a review upon proceedings in error as well as upon appeal, the party bringing the cause here may submit the same either as an appeal, or as upon proceedings in error. If he makes no choice, it will be considered as upon proceedings in error.
3. ———: ———. After serving and filing his brief in this court, in which he presents only questions not reviewable upon appeal, a party will not, ordinarily, be allowed to delay the hearing, by abandoning his proceedings in error and submitting the cause as upon appeal. Nor will he be allowed to make such change, except upon just terms, when his opponent will be required to rebrief the case, or is otherwise put to cost or expense thereby.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Objections to application to have case considered as upon appeal. Objections overruled.*

Thomas H. Matters, for plaintiff in error.

Joel W. West, contra.

SEDGWICK, J.

After a decree was entered for the defendants in the district court in an action in equity, the plaintiff filed in this court, within the time allowed by law for taking an appeal or prosecuting proceedings in error, a transcript of the proceedings in the court below, and a petition in error.

A summons in error was issued and served upon some of the defendants in error, but, not having been served upon all of the necessary parties, objections were made to the jurisdiction of the court, and the petition and summons in error were dismissed. The plaintiff below then asked to have his case in this court treated as an appeal, and the question upon this motion is, whether the case may be now heard as an appeal in this court. Many decisions of the court have been cited by counsel. It seems to be thought that they are conflicting and irreconcilable. Judge Strawn, in his work on Supreme Court Practice and Forms, 217, 218, so regards them. In the earlier practice it was several times attempted to have a case considered in this court both in the nature of an appeal and as a proceeding in error, but this the court refused to do. In *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316, it is said:

"A case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and, having filed a petition in error, must be presumed to have selected that remedy."

This case and many others which follow it are said by Mr. Strawn to be in direct conflict with the holding in *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, in which it is said:

"If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election; and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa;* but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error."

This language is quoted, or cited, with approval in several subsequent cases. *Thomas v. Churchill*, 48 Neb. 266; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369; *Nebraska Land, Stock Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410; *Slobodisky*

v. Curtis, 58 Neb. 211. The conflict in these two lines of cases is more apparent than real. In *Monroe v. Reid, Murdock & Co., supra,* it appears from the opinion that "the case was one which could have been appealed, and counsel for plaintiff in error, judging from a statement in the brief filed, view the case as here by appeal and by proceedings in error, and that it can be so considered." The court then quotes with approval from the opinion of *Woodard v. Baird,* 43 Neb. 310, to the effect that a party can not have his case submitted and considered both as an appeal and as a proceeding in error, and says that he must elect which remedy he will pursue, and, having filed a petition in error, he must be presumed to have selected that remedy. It is not necessary to quote from nor cite any other cases where this language is held, because, in all of them, we find one of two conditions: Either the party is urging that his case shall be considered in both ways, and that he shall, at the same time, have the benefit of both forms of procedure, or else, without specifically insisting upon the right to both remedies, no election has been made before the submission of the case. In all of these decisions it is held that a party can not pursue both remedies at once, and that, if the record is in such condition as that either remedy might have been pursued thereon, and the party bringing the case to this court has not expressly indicated which remedy he desires to pursue, the court, in making an election for him, will treat the case as here upon proceedings in error. And in all these cases where the language is used, "having filed a petition in error," as the test of the remedy elected by the party bringing the case here, the facts were that not only had a petition in error been filed but all the necessary steps had been taken to entitle the defendant to a hearing upon his petition in error, and, the case being finally submitted to this court upon such a record, the court considered it as a proceeding in error. So that the language used by the court must, in each case, be construed in the light of the facts of the case; and,

when so construed, there is no conflict between this holding and the language used in the decisions following *Beatrice Paper Co. v. Beloit Iron Works, supra,* in which it is held that he may make his election at any time before he submits his case to this court. He may make his election before he finally submits his case; but, if he fails to elect which remedy he will pursue, and the court takes a submission of the case in that condition, in the absence of any other decisive test, the court will consider that, by filing a petition in error and taking all necessary steps for a hearing thereon, he has selected that remedy. This would be the necessary inference if, after having taken all the proceedings necessary to a hearing upon appeal, steps not necessary to an appeal but necessary to obtain a review in error are taken. Such action, unexplained, must mean that he is not satisfied to submit his case upon appeal, and desires to have it considered upon error proceedings.

Of course, if the time for filing a petition in error and procuring a summons in error to be issued and served had expired, he could not take such proceedings, and whether or not he had attempted to appeal would make no difference in that regard. An ineffectual attempt to appeal would not extend the time in which he might take proceedings in error. While the record is in such condition that it will support either proceeding, he may choose his remedy.

Filing a petition in error is not, in all cases, a conclusive test, but a litigant will not be allowed to trifle with his adversary and the court. If he serves and files a brief, which presents questions only reviewable upon proceeding in error, and his opponent has duly answered such brief, he ought not, afterwards, submit the case as upon appeal, and serve and file a brief which presents questions solely cognizable upon such proceeding, if, by so doing, the hearing of the case will be delayed. And even if such course will not delay the hearing of the case, it should not be allowed, except upon just terms.

In *Stewart v. Carter,* 4 Neb. 564, the case was first brought to this court upon appeal, but, upon motion of the appellee, the appeal was dismissed, and, although the time for appeal had expired, the appellant was allowed to file a petition in error upon his transcript, and the case was afterwards reversed on the error therein assigned. The same point was held in *Steele v. Haynes,* 20 Neb. 316. The case of *Irwin v. Nuckolls,* 3 Neb. 441, which appears to hold a contrary doctrine, was expressly overruled in *Cahill v. Cantwell,* 31 Neb. 158. In *Schuyler v. Hanna,* 28 Neb. 601, it is said:

"A liberal construction should be given all laws providing for appeals—such a construction as will not abridge the right. The mandatory part of the above quoted statute is 'that the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, * * * file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court.' On the filing of such transcript within the statutory time, this court acquires jurisdiction."

We are satisfied with this view, and think that the question at bar comes within its spirit. *Cahill v. Cantwell, supra,* was an attempted appeal from the county court to the district court, but it was not taken in time, and was dismissed upon motion of appellee. The question was whether the appellant was estopped from prosecuting a petition in error to reverse the same judgment. The court said:

"It may be stated as a general proposition that an appeal duly taken and docketed in time in the appellate court is a waiver of all errors and irregularities occurring prior to the entry of the judgment appealed from. In the case at bar the appeal was not perfected in time, and the attempt to appeal did not bar the right of the plaintiff in error to have the judgment of the county court reviewed on error."

In this case the error proceedings were never perfected. A hearing upon proceedings in error has been prevented

by technical objections. All steps necessary to perfect an appeal were taken within the statutory time, and it is not the policy of the law to prevent a hearing in the court of last resort under such circumstances.

It is urged that the statute prescribes that, in taking an appeal, the appellant must file his transcript in this court and have the same "properly docketed"; that this statute has not been complied with, because it was not docketed here as an appealed case. We do not see any merit in this contention. The appellant can not have the same properly docketed, in the sense that he may compel the clerk to make the entries in proper form. The intention of the statute must certainly be to require the appellant to do everything incumbent upon him to do, so that the case may be properly docketed, and when he has done that, he has done his part. Again, the words "properly docketed" can not be held to relate to nice distinctions in making the entries upon the record in correct form, but rather to the duty of doing what is necessary to have the case placed upon the docket of the court, so that it will be before the court in its proper order, and that adverse parties may raise such questions thereon as they see fit. If the question presented in this court was of such a nature that it might be determined either upon appeal or error proceedings, then a change of election as to the manner of presenting it would be immaterial, as was held in *Thomas v. Churchill,* 48 Neb. 266.

The objection to proceeding as upon appeal in this case is overruled.

OBJECTION OVERRULED.

STATE, EX REL. FRANK N. PROUT, ATTORNEY GENERAL, v. THOMAS J. NOLAN ET AL.

FILED FEBRUARY 17, 1904. No. 13,327.

1. **Quo Warranto:** ANSWER. An answer to a petition in quo warranto, which alleges that the respondents are holding the office in question by lawful appointment, under the provisions of a legislative act, and which sets forth the facts in relation thereto, is sufficient to put the validity of such act in issue.

2. **Legislative Act:** CONSTITUTIONALITY. A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it can not stand.

3. **Police Commissioners:** APPOINTMENT. The legislature may, by statute, confer upon the governor the power to appoint the board of fire and police commissioners for cities of the first class.

4. **Statutes:** REPEAL. Where general and special provisions of a statute come in conflict, the general law yields to the special without regard to priority in dates, and a special law will not be repealed by general provisions, unless by express words or by necessary implication.

5. ———: CONSTRUCTION. The several sections and provisions of a legislative act should be construed together, and harmonized if possible; and, if there is a conflict in them, general expressions must give way to special and specific provisions.

6. **City Charter:** VALIDITY. That part of the charter of South Omaha, providing for the election and defining the jurisdiction of the police judge, is separable from the rest of the act, and, if necessary, may be rejected without affecting the validity of the charter.

7. **Fire and Police Board:** LEGALITY. *Held*, That the respondents are the lawfully constituted board of fire and police commissioners of the city of South Omaha.

ORIGINAL application in the nature of quo warranto to determine the rights of respondents to office as fire and police commissioners of a city of the first class. *Writ denied.*

Frank N. Prout, Attorney General, Norris Brown, Smyth & Smith and *A. H. Murdock*, for relator.

F. A. Brogan and *James H. Van Dusen, contra.*

BARNES, J.

This original action in quo warranto was commenced by the attorney general for the purpose of testing the validity of chapter 17 of the laws of 1903, otherwise known as the South Omaha Charter, and more particularly that part of the act which provides for the appointment of a board of fire and police commissioners. To that end a petition was filed against the respondents, Thomas J. Nolan, A. L. Bergquist, William B. Van Sant, Alfred A. Nixon and George W. Masson, praying that they be required to show by what warrant or authority they assumed to act as fire and police commissioners of the city of South Omaha, and claimed to hold such public office. To this petition the respondents filed an answer, which was demurred to by the relator. Thereafter, by permission of the court, an amended answer was filed, in which respondents properly justified under the provisions of the act in question. The demurrer was not refiled but, it having been treated as though it applied to the amended answer, we will consider it as refiled, and thus the validity of that part of the act under which the respondents were appointed, and now hold their office, is put in issue. The act in question is chapter 17 of the laws of 1903 (Compiled Statutes, ch. 13, art. II), and will be hereinafter referred to as the charter.

It is stated in relator's brief that the answer is insufficient in form and substance, but, the amended answer having been filed after that part of the brief was written, and the defects of the original answer, if any, having been cured thereby, it is unnecessary to devote any further time to the pleadings, so we come at once to the consideration of the question of the validity of the charter. It may be stated at the outset that we should not declare a law void for slight and trivial reasons, but, if possible, sustain the legislative will. So, in the examination of this question, we will be governed by the rule, that a legislative act will not be declared unconstitutional, unless it is so clearly in

conflict with some provision of the fundamental law that it can not stand.

Section 63 of the act provides for a board of fire and police commissioners to consist of five electors of the city, appointed by the governor. It also makes specific provisions as to when and how the appointments shall be made, and term of office; it also defines the qualifications of members of the board, together with the powers and duties of that body; and the relator's attacks are particularly directed to this part of the charter. The general question relating to the constitutionality of such legislation has been before us several times. In the case of *State v. Broatch,* 68 Neb. 687, the validity of such a provision was the question before the court. The Omaha charter, which was in question in that case, provides for the appointment of a board of fire and police commissioners by the governor, and its validity was attacked by a proceeding in quo warranto. It was held:

"The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class"; citing *Redell v. Moores,* 63 Neb. 219. These cases clearly overrule all of the prior decisions of this court holding a contrary doctrine, and so, it may be considered as the settled law of this state that the section in question is constitutional, so far as that phase of the controversy is concerned. Again, it is apparent, from an examination of the whole act, that it was the purpose of the legislature to substantially reenact the charter of 1901 under which the city was conducting its affairs at the time the new charter was passed, with only such changes and amendments as would place the fire and police department of the city under the control of a board to be appointed by the governor of the state, instead of a board appointed by the mayor, and confirmed by the city council. It is clearly the duty of the state, in the exercise of its police powers, to maintain peace and good order, and protect the welfare of its citizens wherever they may be found within its borders.

And whenever it appears that any of its municipalities are, for any reason, unable to maintain such conditions of security and good order, it is proper for the legislature to enact such laws as will accomplish that end. Of late, it has been quite generally recognized that there are conditions existing in some of our cities, growing out of the appointment and management of their police departments, with which the local authorities are unable to successfully cope; and that an independent board, created by an authority entirely removed from, and in no way influenced by, local conditions, can best conserve the interests of the public in those matters. That policy first found expression in the Omaha charter of 1887, and was the subject of much litigation, and some conflicting decisions, until the principle was finally and firmly settled in the case of *State v. Broatch, supra*. And so, the legislature, in order to adopt this policy, reenacted the old charter with the changes above mentioned, and, in so doing, we are satisfied that it did not exceed its legitimate powers; if the legislature has attempted to go beyond its powers in authorizing this commission to control matters purely local, such provision might be held invalid, without rendering the whole act unconstitutional.

It is claimed, however, that section 63, in so far as it defines the powers and duties of the board, is in direct conflict with subdivision 78 of section 128 of the charter. This is one of the subdivisions of the section conferring general powers upon the municipality, and is as follows:

"In addition to the powers herein granted, cities governed under the provisions of this act shall have power by ordinance: To provide for the organization and support of a fire department; to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding one hundred ($100) dollars, and to make all necessary appropriation therefor, and to establish regulations for the

prevention and extinguishment of fires." And it is contended that this subdivision must prevail because it was passed last in point of time, or, in other words, appears last in position in the charter. This, it is insisted, works a repeal of section 63, by implication. Repeals by implication are not favored, and the courts will not declare them unless compelled to do so. And where there is a conflict between two sections of an act, one being a reenactment of a former provision, and the other a new provision inserted in the law as reenacted, the latter will stand because it is the latest expression of the legislative will. Sutherland, Statutory Construction (1st ed.), p. 210, sec. 156; p. 216, sec. 161; Endlich, Interpretation of Statutes, sec. 183; *Graetz v. McKenzie*, 3 Wash. 194; *Winn v. Jones*, 6 Leigh (Va.), 74; *Congdon v. Butte Consolidated R. Co.*, 17 Mont. 481; *Powell v. King*, 78 Minn. 83. But it is by no means certain that there is an irreconcilable conflict between the provisions of section 63 and the subdivisions and sections pointed out by the relator. Section 8 of the charter, which declares in a general way by whom the corporate powers shall be exercised, reads as follows:

"Each city governed by the provisions of this act shall be a body corporate and politic, and shall have power: First, to sue and be sued; second, to purchase and hold real and personal property for the use of the city, and real estate sold for taxes; third, to sell and convey any real and personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city; fourth, to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate and administrative powers; fifth, to exercise such other and further power as may be conferred by law. The powers hereby granted shall be exercised by the mayor and city council of such city, as hereinafter set forth, except when otherwise specially provided." Bearing in mind the exception above quoted, the rule that the several sections of the charter must be construed together and harmonized, if

possible, and the further rule that, where there is a seeming conflict between the several provisions of a legislative act, general expressions must give way to special and specific provisions, it is quite possible that the board and council may properly conduct the government of the city without serious conflict of authority.

It is also contended that the provision giving power to the governor to remove members of the board for misconduct in office is in conflict with section 84, which apparently gives the same power to the district court. If this be true it is not sufficient ground for declaring the whole act void, for that provision can be expunged from the charter, and it will still be so complete as to furnish ample authority for the proper government of the city.

It is further contended that the charter must be declared unconstitutional and void, because of its provisions relating to the election of the police judge and his jurisdiction. This contention can not be maintained. This question was under consideration and was settled in *Moores v. State,* 63 Neb. 345, and *State v. Moores,* 70 Neb. 48, where it was held that the provisions of the constitution creating a police judge in municipalities were self-operating, and that, in the absence of valid enactments in the charter providing for their election, they could properly be elected at the regular biennial elections.

Lastly, it is claimed that there are many other conflicting provisions in the various sections and subdivisions of the charter. Under the rules above stated nearly, if not quite, all of these apparent conflicts can be reconciled, and the irreconcilable ones, if any, are not of sufficient importance to invalidate the act. But none of these matters require our consideration. The only question involved in this action, in its present form, is the validity and the constitutionality of that part of the charter under which the respondents hold their office, and, as we have seen, that part of the act is valid. This action only tests the right of respondents to hold the office in question, and can not be used for the purpose of restraining a public officer, or

person exercising a public franchise, from doing any particular act or thing, the right of doing which is claimed by virtue of such office or franchise, and which constitutes a portion, only, or an integral part, of the rights, powers and privileges incident thereto. High, Extraordinary Legal Remedies (3d ed.), sec. 636; *State v. Evans*, 3 Ark. 585, 36 Am. Dec. 468; *People v. Whitcomb*, 55 Ill. 172.

The charter being valid, and the respondents having shown by their answer that they are holding the office in question by legal appointment thereunder, that they have qualified and are exercising the functions of their office, it follows that the relator is not entitled to the writ of ouster. The demurrer to the answer is overruled, the writ denied, and the action dismissed at the costs of the relator.

WRIT DENIED.

JAMES ROBINSON V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1904. No. 13,528.

1. **Murder:** PROOF. Where all of the elements necessary to constitute murder in the first degree are proved, a verdict of guilty will not be set aside because the state did not establish a motive for the commission of the crime.
2. **Instructions.** Instructions examined, and *held* properly given and refused.
3. ———. The repetition of an instruction is not reversible error, unless its effect is to mislead the jury.
4. **District Courts:** JURISDICTION OF CRIMES. Statutes examined, and *held*, that, by law, the territory defined by the legislative act of 1887 as Arthur county is attached to, and is within the jurisdiction of, McPherson county, and that the district court of that county has jurisdiction of crimes committed within such territory.

ERROR to the district court for McPherson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Beeler & Muldoon and *A. F. Parsons*, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *Wilcox & Halligan, contra.*

BARNES, J.

On the 17th day of December, 1902, an information was filed in the district court for McPherson county against James Robinson, charging him with murder in the first degree. It was alleged, in substance, that on the 20th day of June, 1902, he unlawfully and feloniously, and of his deliberate and premeditated malice, in the county of McPherson, and the state of Nebraska, did shoot and kill one Elmer Thayer. On this charge Robinson was tried, and found guilty of murder in the first degree, the jury fixing the penalty at imprisonment in the penitentiary for life. He thereupon prosecuted error, and will hereafter be called the plaintiff.

His first contention is that the verdict is not sustained by the evidence, because the state failed to prove a motive for the killing. This contention can not be sustained. The law is well settled in this jurisdiction, as well as in others, that, where all of the essential elements of the crime are present, a conviction for murder will stand, even if there be no evidence of motive for its commission. Proof of motive is not necessary to procure a conviction. Maxwell, Criminal Procedure (2d ed.), 208; *Schaller v. State,* 14 Mo. 502; *Crawford v. State,* 12 Ga. 142; *Sumner v. State,* 5 Blackf. (Ind.) 579; *People v. Robinson,* 1 Park. (N. Y.) 649. Proof of motive, however, is always competent evidence against the accused, and absence of apparent motive may always be shown, and is simply a circumstance for the jury to consider. Where the evidence discloses, as in this case, that the accused shot and killed his victim without apparent cause, and thereafter offered no explanation for his act, a verdict of murder in the first degree should be permitted to stand.

Plaintiff's second contention is, that the court erred in giving instruction numbered 1, requested by counsel for the state. The particular part of the instruction complained of is:

"Still it does not require that the premeditation and

deliberation, or the wilful intent and purpose, shall exist for any length of time before the crime is committed."

We have carefully examined the instruction, and find that it is a copy of the one given, and approved by this court, in *Carleton v. State,* 43 Neb. 373, and in *Sarary v. State,* 62 Neb. 166, 171. If the words above quoted were to be considered alone, it would seem that the exception thereto was well taken, but, when they are considered in connection with the other parts of the paragraph complained of, it appears that they are not at all misleading. The substance of the instruction is:

That it is not necessary for the state to prove that the premeditation and deliberation, or the wilful intent and purpose to kill, existed for any particular length of time before the homicide; and the language of the instruction is so plain that there can be no doubt about this. That this is a correct statement of the law there can be no doubt. The principle contained therein is also approved in the case of *Clough v. State,* 7 Neb. 320. We therefore hold, that the trial court did not err in giving the instruction complained of.

Plaintiff's third contention is, that the court erred in giving instruction numbered 7, on his own motion, because it was a repetition of the instruction above mentioned. In *Carstens v. McDonald,* 38 Neb. 858, and in *Carleton v. State,* 43 Neb. 373, 414, it was held:

"That a repetition of the same rule will not be ground for a reversal unless its effect was to mislead or confuse the jury."

It is true that, in the case at bar, the court twice stated, in substance, that no particular length of time prior to the act, during which the intention to kill existed and was deliberated upon, need be shown. But, each time, this was stated in connection with a definition of the elements necessary to constitute the crime of murder in the first degree. The necessity of deliberation and premeditation was impressed upon the jury; but it was also stated that it was not necessary to show that such deliberation and premedi-

tation existed any particular length of time before the killing. These instructions did not, in any manner, conflict with each other, and the jury could not have been misled or confused thereby.

The fourth assignment of error relates to the admission of certain evidence; and counsel complain because one of the witnesses was permitted to testify that he heard the defendant say "He had started one graveyard, and could start another." An examination of the record discloses that this testimony was admitted without either objection or exception on the part of the plaintiff, and it further appears that when the court's attention was called to it, by the plaintiff's motion to strike it from the record, the motion was sustained, and the matter withdrawn from the consideration of the jury. It is a familiar and well established rule that, in order to predicate error on the admission of evidence, there must be an objection and exception thereto. But, in any event, the matter, if at all objectionable, was promptly withdrawn from the consideration of the jury, in compliance with the plaintiff's request.

Lastly, plaintiff's counsel insist that, under the information and the proof, the district court for McPherson county was without jurisdiction to try the accused, and pronounce judgment against him. It is claimed that, while the information charges the crime to have been commited in McPherson county, the proof shows that it was committed in the territory defined by the legislature as Arthur county; that, by law, the unorganized territory defined by the legislature as Arthur county is attached to Keith county for election, judicial and revenue purposes, and that therefore the court had no jurisdiction in or over the territory where the crime was committed. This is the most serious question contained in the record, and requires a careful examination of the statutes in order to determine the merits of the contention. Section 146, article 1, chapter 18 of the Compiled Statutes (Annotated Statutes, 4495), provides:

"That all counties which have not been organized in the

manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial and revenue purposes; *Provided,* That Sioux county shall be attached to Cheyenne county for all the purposes provided for in this section; *Provided further,* That if no county lies directly east of such unorganized territory or county, then such unorganized territory or county shall be attached to the county directly south, or if there be no such county, then to the county directly north, and if there be no county directly north, then to the county directly west of such unorganized territory or county."

Section 147 provides: "The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory, the same as if it were a part of their own county." Before the legislative session of 1887, all of the unorganized territory within the boundaries of McPherson and Arthur counties lay directly west of Logan county, which was a duly organized county of this state, and was therefore, by law, attached to that county for election, judicial and revenue purposes. The legislature in that year passed an act which took effect March 31, by which the boundaries of McPherson and Arthur counties were defined. Shortly thereafter McPherson county was duly organized, as provided by law, but Arthur county was not then, nor has it since been, organized; and no such county exists, or is known, as a municipal or political subdivision of this state. That part of the territory defined as Arthur county, while it was situated directly west of the territory called McPherson county, and of Logan county, which was a duly organized county of the state, was also situated directly north of Keith county; and it is contended by plaintiff that the moment the legislature defined the boundaries of Arthur county, by operation of law, it became attached to Keith county for election, judicial and revenue purposes. We do not think this contention is sound. As we have seen,

before the passage of the act of 1887, all of the territory described as Arthur and McPherson counties was attached to Logan county. The act of the legislature defining the boundaries of these two counties did not have the effect of detaching either of them from that county. Until the inhabitants living within the unorganized territory, defined and named by the legislature as a county, take the proper steps necessary to organize it and make it one of the political or municipal subdivisions of the state, it is in no sense a county. It is still unorganized territory in which the inhabitants thereof may thereafter organize a county. Therefore, the territory in question remained attached to Logan county, the nearest organized county directly east of it, for election, judicial and revenue purposes, and when McPherson county was organized, which occurred shortly after the passage of the act, the unorganized territory which had been bounded by the legislature as Arthur county became instantly, as a matter of law, attached to that county for those purposes. So that at no point of time was the territory called Arthur county attached to Keith county. A like question arose in the case of *Ex parte Carr*, 22 Neb. 535. Carr was indicted in Cheyenne county in the year 1877, for the murder of one William Love, and was convicted and sentenced to the penitentiary for life. Some years afterwards a writ of *habeas corpus* was sued out to release Carr from his imprisonment. It was found that the place where the crime was committed was within the boundaries of the unorganized territory of Sioux county, which lay directly north of Cheyenne county. At that time there lay to the east of Sioux county several organized counties of this state, and considerable unorganized territory, some of which had been bounded and named, but not organized as counties. Construing the law above quoted, which, with the exception of the proviso attaching Sioux county to Cheyenne county, was in force at that time, this court said:

"Under chapter 10 of the Revised Statutes of 1866, all unorganized counties were attached to the nearest or-

ganized county directly east, for election, judicial and revenue purposes; therefore, where a murder was alleged to have been committed in the county of Sioux, the party accused of committing the same could not be indicted and tried for the offense in Cheyenne county, it being directly south of Sioux county." The court further said in the opinion: "This is not a case where there had been a change of venue, or the court had directed the finding of an indictment in Cheyenne county, if, indeed, it would have had any authority so to do. The prosecution was instituted in Cheyenne county as a matter of right, and was clearly without authority of law. The court thus being without jurisdiction, its judgment is a nullity and is held for naught."

We think this amply sufficient to dispose of the question raised by the plaintiff. But it further appears from the record that some time in the year 1891, and after the organization of McPherson county, a petition was presented to the commissioners of that county praying for an election to determine whether or not the territory of Arthur county should be attached to and become a part of McPherson county; that it was ordered by the board that the question be submitted to the voters at an election to be held November 3, 1891. It further appears that, after the election, the county commissioners found that a majority of the votes cast were in favor of the annexation of Arthur to McPherson county, and, by resolution, it was declared that the territory called Arthur county from and after January 1, 1892, was annexed to, and should become a part of, McPherson county. It does not appear by whom the petition was signed, but it is fair to presume that, in these proceedings, the county commissioners and the voters were acting under authority and by virtue of the provisions of sections 4 and 9 of article I, chapter 18 of the Compiled Statutes (Annotated Statutes, 4422, 4427), by which such proceedings are authorized. It further appears that since the 1st day of January, 1892, as a matter of fact, all of the territory described within the boundaries of both Arthur

and McPherson counties has been considered and treated as McPherson county. This condition has been recognized and approved by every department of the state, and the officers of McPherson county have been elected from that county and from the territory described and bounded as Arthur county, without discrimination. So we hold that the district court for McPherson county had jurisdiction to try, and pass sentence on, the plaintiff. The district court of McPherson county having jurisdiction over the territory described as Arthur county, it was not a material variance, and therefore not reversible error to allege in the information that the crime was committed in McPherson county.

In the case of *People v. Davis,* 36 N. Y. 77, the fourth count of the indictment charged the offense to have been committed in the county of Yates. The proof showed the crime was committed in the county of Seneca, 20 yards across the boundary line between the two counties. The statute gave either county jurisdiction of the offense, and the court held that the offense charged was local, but there was no misdescription of the place at which it was committed; the sales were at the defendant's storehouse in Romulus, and within 20 yards of the county line. For the purpose of criminal jurisdiction, an offense is committed on the boundary line between two adjacent counties if perpetrated within 500 yards of the boundary line, and there was no error in permitting the jury to render a general verdict. In *Willis v. State,* 10 Tex. App. 493, the court held that an offense committed on the boundary of any two counties, or within 500 yards thereof, may be prosecuted and punished in either, and the indictment may allege the offense to have been committed in the county where it is prosecuted. Proof that the offense was committed within 125 yards of a point located by the evidence within the boundary of the county is sufficient proof of the venue of the offense. It would thus seem that there is ample authority for us to hold that the district court for McPherson county had jurisdiction of the offense, and did

not err in refusing to direct the jury to return a verdict of not guilty for want of jurisdiction.

From an examination of the record, we are satisfied that the defendant had a fair and impartial trial in a court having jurisdiction of the offense; that the evidence is amply sufficient to sustain the verdict of the jury, and the judgment of the district court is therefore

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. SARAH N. STANWOOD.*

FILED JUNE 4, 1902. No. 11,619.

1. **Evidence as to Value:** MOTION TO STRIKE. The fact that a witness as to values, shown to be competent in that respect, testifies on cross-examination that in making his estimate he took into consideration, besides matters that were proper to be so considered, other matters that were not proper for that purpose, does not entitle a party to have the entire testimony of the witness upon that subject withdrawn from the jury and stricken from the record.

2. **Instructions:** WAIVER. If a party is entitled to have some particular matter affecting the weight or credibility of testimony brought especially to the attention of the jury by an instruction, he waives that right by omitting to ask for such instruction.

3. **Trial:** EVIDENCE: ERROR. When a witness as to the value of real property has testified that he has based his opinion, in part, upon his information as to prices obtained upon sales of other specifically described property in the neighborhood of that in controversy, it is error to exclude evidence of what the prices obtained at such sales actually were.

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

W. R. Kelly and *John N. Baldwin,* for plaintiff in error.

W. J. Connell and *Isaac E. Congdon, contra.*

* Rehearing allowed. See opinion, p. 158, *post.*

AMES, C.

This is a proceeding by the plaintiff in error to acquire an easement for right of way and depot purposes in a certain lot in Omaha. The testimony as to values was limited by an order of the court to five witnesses on each side of the controversy. The property owner produced five witnesses, who each testified generally to several years' residence in the city, and to a general knowledge of real estate values in the city, and in the neighborhood of the property in suit and of the lot in controversy itself. In the course of cross-examination it was brought out that their estimate of values was based, not only upon said general knowledge and the uses to which the lot was adaptable, but also upon the prices for which, according to their information, neighboring lots had recently been sold, and upon the revenues which could probably have been derived from the property, in conjunction with a building that might have been erected thereon at an estimated cost. On account of the admitted influence of this last mentioned element upon the judgment of the witnesses, the company moved that their testimony be stricken out. An order of the court denying the motion is assigned for error.

We think the assignment is not well made. The objection went to the weight to be given to the testimony of the witnesses, and not to their competency. The latter had been established by answers to preliminary questions upon the examination in chief and is not shaken by anything elicited, or attempted so to be, on cross-examination. If, in such case, the entire testimony could be excluded because the opinion of the witness appears to have been influenced in some degree by matters impertinent to the inquiry, it might reasonably be apprehended that no witness concerning the value of real estate could be found who could successfully withstand the test. The estimates of values in such cases are in their very nature in a large degree speculative and conjectural, and, in mak-

ing them, different minds will be influenced in varying degrees by a multitude of circumstances. That among such circumstances a competent witness has considered some that he ought to have disregarded, can not properly be held to totally discredit his entire testimony, so as to require the whole of it to be withdrawn from consideration. The case is analogous to one in which the witness is shown, upon cross-examination, to have been mistaken as to some important matter of fact, or even to have wilfully testified falsely. In all such instances, the testimony is not stricken out, but its weight and credibility, under proper instructions from the court, are left to the determination of the jury. That the witnesses in this case were sufficiently shown to be competent is too well established to be shaken, by repeated decisions of this court. *Burlington & M. R. R. Co. v. Schluntz,* 14 Neb. 421; *Omaha Auction & Storage Co. v. Rogers,* 35 Neb. 61; *Chicago, R. I. & P. R. Co. v. Griffith,* 44 Neb. 690; *Mullen v. Kinsey,* 50 Neb. 466.

At the conclusion of the trial the court gave the following instructions:

"Fourth. The jury are instructed that the appellant, Sarah N. Stanwood, is entitled to recover from the defendant railroad company, in this case, the fair market value of the property at the time of its taking, which was on the 10th day of December, 1898. By 'fair market value' is meant the value of the property at the time of the taking, considering its worth for any purpose for which it might reasonably be used in the immediate future, taking into consideration the capabilities of the property, and all the uses and purposes to which it was adapted or to which it might be applied in the immediate future, and any advantage, if any, that the property had, at that time or in the immediate future, by virtue of its position and situation, and for which it was then or in the immediate future available. The 'fair market value' is not what the property is worth solely for the purpose for which it is devoted, nor for the purpose for which the party condemn-

ing it proposes to put it; but it is the highest price the property will bring, at the time of the taking, for any and all uses to which it is devoted and adapted, and for which it is available.

"Fifth. You are further instructed that, in ascertaining from all the evidence in this case the value of said property so appropriated by the defendant company, you can not take into consideration prospective increases in the value of said property, or the improvements to the lots or land, in the immediate vicinity, which were not then in existence or in the course of construction. You can not indulge in speculation or conjecture in arriving at the value of the property so taken."

"Seventh. The jury are the sole judges of the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of the witnesses, it is your duty to take into consideration their appearance upon the witness stand, their manner of testifying, their interest or lack of interest, if any, in the result of the suit, their distinctness of recollection, means of knowledge, the probability or improbability of their statements, and the extent to which they have or have not been corroborated by the testimony of other witnesses, or by facts and circumstances admitted or proved upon the trial. You should not disregard the testimony of any witness unless, for any reason, you find it to be unreliable. If the testimony of the witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then, you have no right to disregard the testimony of such witness from mere caprice or without cause."

It is complained of these instructions, especially that numbered "fourth," that they are erroneous because of omitting to call specific attention to the above mentioned element of joint rental values of ground and building, and failing to tell the jury that such value was not proper to be considered by the witness or by themselves. In the foregoing discussion, we have assumed, without deciding,

that consideration of such conjectural rentals was objectionable for the reasons urged. Continuing upon the same assumption, we do not think the instructions taken together are liable to impeachment. They state the rule for determining the measure of damages, in so far as it can be properly said that there is any such rule, comprehensively and accurately. The plaintiff in error complains that there is a peculiar feature of the testimony, drawn out upon cross-examination, to which it was entitled to have the attention of the jury especially directed, as having a tendency to diminish its weight or call in question its credibility. If so, we think the company waived its right by failing to ask for an instruction treating of that precise matter. Following the analogy above instanced, if one of the witnesses had apparently testified to a wilful falsehood, it would probably not be contended that it would have been the duty of the judge, of his own motion, to advert to the matter in his instructions, further than to say generally that the candor and truthfulness of the witnesses were matters peculiarly within their own province, to be considered in deciding what degree of reliance should be placed upon their testimony. If the party liable to prejudice by the supposed false testimony had desired the court to go further, he might have asked a specific instruction to the effect that, if the jury found that any witness had been guilty of a wilful falsehood concerning any material matter in controversy, they would be at liberty, if they thought the circumstances warranted them in so doing, to reject his testimony in whole or in part, and if, in such case, the request had been denied, there is authority for holding that the refusal might have been successfully assigned for error. So, in this case, upon the assumption mentioned, if the company were of opinion that the improper element of damages so affected the judgment of the witnesses as to seriously impair or to destroy its value, it was their duty to ask a specific instruction concerning it, but, in the absence of such request, we do not think that the failure of the judge to give such instruc-

tion was so serious a sin of omission as to require a reversal of the verdict and judgment.

One other matter remains to be considered. It was elicited upon cross-examination of several of the witnesses for the defendant in error, that their estimate of values was influenced in some degree by the prices for which, according to their information, certain other specified lots in the vicinity of that in controversy had then recently been sold. After the alloted number of witnesses as to values, on both sides, had testified and been excused, the company produced another witness and made the following offer of proof by him:

"I offer Mr. McAllister to prove from his own actual knowledge of the sales in the year, latter part of the year, 1898, and during the year 1899, of the sales in the market, of property, lots in this vicinity, and to whose attention the witnesses for the plaintiff were called upon cross-examination. This witness will not be called for the purpose of giving his opinion as to the value of the lot. It is for the purpose of proving the sales in the market of the lots in question, referred to on the plat, which have been testified to on cross-examination by the witnesses for the plaintiff.

"I desire to offer this witness to prove by him, of his actual knowledge, of the sales hereinafter referred to, being conducted by him as the representative of one, either the purchaser, or vendor, or the owners in question of the lots in question, being either purchased or sold by the Union Pacific Railroad Company in the fall of 1898 and the year 1899; the principal pieces of property of which he has actual knowledge of the sales, terms and conditions, prices, etc., and to which I will ask him directly are: lots 1, 2 and 3 in block 204, part of lots 5 and 6, block 191; lots 7 and 8 in block 192, and lots 1 and 2 in block 231. I say in connection with this offer, that this witness has actual knowledge of the sales; that they were made during the period of time he conducted them for the defendant; and he knows exactly and accurately the amount

paid either by the company in the purchase or the amount received by it when it was vendor."

The offer was, upon objection, refused and the plaintiff in error excepted. In our opinion this ruling was erroneous. The testimony with respect to the prices obtained in these sales would not have been admissible upon direct examination, but was permissible upon cross-examination to test the fairness of the witnesses' opinions as to the value of the property involved in the action, and the degree of their competency to testify as to their value. *Spring Valley Waterworks v. Drinkhouse,* 92 Cal. 528. But how could the test be applied in the absence of evidence showing whether the specific information, upon which the witnesses confessedly relied, was or was not accurate and trustworthy? It is as though a witness to prove an *alibi* should testify that, at the hour when the offense was committed in Omaha, he saw the accused in conversation with some well known person in Lincoln. Can there be any doubt that such person could be produced to testify that the individual with whom he was talking, at the time and place named, was not the accused? The evidence offered did not tend, at least not directly, to establishment of the value of the lot in suit, but to the determination of the weight and significance to be attributed to the testimony of the witnesses who had given their opinions upon that subject. The witnesses had testified to the amount of probable rentals to be derived from the property, after a supposed building of a certain, but general, description should have been erected thereon, and to an assumed cost of such an erection. Suppose that, prior to the trial, such a building had been erected upon the same or exactly similar property similarly situated, would it not have been competent to prove the actual cost of the structure and the actual amount of its net revenues? It seems to us that it would, because by no other means could the test above mentioned have been applied. Conceding that the witnesses in such case properly base their estimates, in part, upon conjectural expenditures and

revenues, it can not, we think, be doubted that their guesses in this respect might be corrected or verified, as the event should turn out, by a comparison with realities. And, by a parity of reasoning, we think that, when witnesses testify as to what they suppose certain lots have brought at specific sales, and that such supposed prices have influenced them in estimating the value of the property in suit, it is competent to show what those prices actually were.

For these reasons we recommend that the judgment of the district court be reversed and a new trial ordered.

REVERSED.

DUFFIE, C., concurring in all save the last point in the syllabus.

I fully concur in the foregoing opinion, with the exception of the point embraced in the last syllabus.

The expert witnesses called by the plaintiff based their opinions of the value of the lot in question, to some extent, on what they had heard and understood had been paid for other lots in the vicinity, sold about the time condemnation proceedings were commenced. It was clearly the right of the defendant to show, if such were the fact, that the purchase price paid for the lots referred to by the witnesses for the plaintiff was less than the amount which these witnesses understood it to be. In this view, the offer as made by the defendant was wholly immaterial, as it was not proposed to show that the purchase price of the lots referred to was less than that which plaintiff's witnesses had said they understood to be the consideration received for them, and on which their opinion of the value of the lot in question was partially based. If the actual consideration paid, or agreed to be paid, for these lots was the same, or greater than the consideration, as understood by plaintiff's witnesses, it is evident that the rejecting of the evidence could not have injuriously affected the defendant.

The following opinion on rehearing was filed February 17, 1904. *Former judgment vacated. Judgment of district court affirmed:*

1. **Evidence as to Value.** The value of real property can not be shown by proof of independent sales.
2. ———: OFFER. When a witness as to the value of real estate has testified that he has based his opinion upon the prices obtained upon sales of other specifically described real estate in the neighborhood of that in controversy, an offer of evidence of the prices actually obtained at such sales must include an offer to prove that such prices were in fact different from what the witness, in basing his estimate of value thereon, understood them to be.

POUND, C.

After reading the record and examining the two opinions in this case, I feel constrained to disagree with each, and to take the position that the judgment should be affirmed. While the question is in dispute, the better rule, and the one adhered to in this jurisdiction, seems to be that the value of real property may not be shown by proof of independent sales. Witnesses, who show themselves competent, may give their opinion as to value, and thereupon, on cross-examination may be asked as to particular sales in the neighborhood. *Kerr v. South Park Commissioners,* 117 U. S. 379; 1 Jones, Evidence, sec. 165. But, it is said, if the witnesses to value may be cross-examined as to particular sales in order to test their knowledge, the test must be made effective by permitting further proof as to the facts and circumstances of the sales, so as to determine whether the witnesses correctly understood and stated them. On this ground, it is assumed that there is an exception to the general rule, and that proof of independent sales may be introduced following up such cross-examination. I have not been able to find any authorities in support of this proposition, and I can not accede to it. Every reason for excluding such evidence in the first instance applies to it when offered in support of cross-

examination, to test the opinion of an expert witness. It is obvious that when the sale of a particular tract for a particular price is shown, there are still many facts to consider, which may be very material. The nature of the sale, the situation of the parties, the relation of the lot sold to the one in controversy, and their comparative value, are only some of these questions. From an issue as to the value of the tract in controversy, the cause would soon branch into a series of disconnected controversies as to the facts and surrounding circumstances of an indefinite number of particular sales of other tracts. The parties can not know, until these collateral questions are raised, what they will be, nor are they prepared, always, to go into them in a satisfactory way. In the analogous case of cross-examination to impeach a witness, the cross-examiner must be satisfied with the answer given him, and is not suffered to enter upon an investigation of collateral questions. While I appreciate the desirability of proper opportunities to test expert evidence, I do not think the trial should be turned into a series of detached investigations of collateral questions, merely for this purpose. It is well settled that cross-examination of experts will be allowed a wide range; and this ought to suffice.

I do not think that the answers of the witnesses in the case at bar, on cross-examination, as to how far they took specified sales of certain other lots into account in their estimate of value, are entitled to the effect sought to be given them. None of the witnesses rested their testimony upon these sales. They agreed that such sales were to be considered, but one witness, at least, insisted that the lots in question were not similarly situated to the one in controversy, and the others testified rather to the general value as affected by the reports and current public understanding of the sales, than to the sales themselves.

I should recommend that the former judgment be vacated and the judgment of the district court affirmed.

By the Court: We think the foregoing opinion of Mr.

Commissioner POUND, together with the dissenting opinion of Mr. Commissioner DUFFIE upon the first hearing, correctly state the law upon the points discussed. The other points involved in the case, we think, are correctly disposed of in the opinion of Mr. Commissioner AMES upon the first hearing, *ante*, p. 150. The evidence offered was not competent as bearing directly upon the question of value of the real estate in controversy. If this were an open question in this state, as counsel for the company, in the brief filed since the last hearing, seems to regard it, the authorities cited and reasons advanced would be well worthy of consideration. *Omaha S. R. Co. v. Todd*, 39 Neb. 818, and *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, both recognize the rule stated by Mr. Commissioner POUND, and, although they are predicated upon a doubtful application of *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225, still, upon a question of this kind, they must be regarded as having committed this court to the doctrine which they announce. The third paragraph of the syllabus of the former opinion is incorrect, and is modified to conform to the opinion of Mr. Commissioner DUFFIE above referred to.

The former judgment of this court is vacated and the judgment of the district court is affirmed.

AFFIRMED.

MYRTLE TINDALL ET AL., APPELLEES, V. CHRISTIAN PETERSON ET AL., APPELLANTS.*

FILED FEBRUARY 17, 1904. No. 13,389.

1. **Homestead: SALE BY ADMINISTRATOR: VALIDITY.** A homestead of less value than $2,000 can not be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for the payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is absolutely void.

* Rehearing allowed. See opinion, p. 166, *post*.

2. ———. A homestead may be composed of contiguous parts of different governmental subdivisions.

3. **Life Tenant:** INCUMBRANCES. As a general rule a life tenant who, in order to preserve the estate, has paid off and discharged an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed.*

M. D. King, for appellants.

G. L. Godfrey, contra.

AMES, C.

This is an appeal from a decree quieting in the plaintiffs the title to certain real estate. On the 8th day of September, 1887, Thomas Tindall died intestate, and seized in fee of the lands in controversy, subject to two mortgages aggregating in [illegible] $602.00. He left surviving him a widow, Sarah J., and five minor children. Of the latter, three have since died without issue, and the survivors are the plaintiffs and appellees in this action. At and before the death of Thomas the lands were occupied as a homestead by himself and his family. The widow was appointed sole administratrix of his estate, and applied to the district court for, and obtained, a license to sell the homestead, or so much thereof as should be necessary for the payment of the mortgage debts, and of certain other claims proved and allowed against the estate of the deceased. The order granting the license required the execution of a bond to account for the proceeds of the sale, as is provided by section 75 of chapter 23, entitled "decedents," of the Compiled Statutes (Annotated Statutes, 4949). The administratrix executed such a bond, which was approved by the court, but, before the sale, she resigned her trust, and one Thomas B. Keedle was appointed to succeed her therein. It does not appear that Keedle executed a like bond, though he may have done so; the proceedings were not entered upon the journals of the court, and such pa-

pers as pertain to them are found among the files of the clerk's office only. The sale, having been advertised, was made by Keedle, at the specified date, to the widow as purchaser, and, upon being reported by him was confirmed by the court, and a conveyance was executed pursuant to it. Of the purchase price, $800, a sufficient amount was applied to the satisfaction of the mortgage liens and the procuring of their release, and the residue to the payment of claims allowed against the estate of the deceased. The money used for these purposes was procured by means of a new mortgage upon the premises for $800, executed by the purchaser, the widow. Afterwards, she conveyed the premises as in fee, subject to the mortgage, to one Windover, and then married him. Subsequently she died, and the lands came by mesne conveyances from her grantee to the defendants and appellants in the action. There is no question of laches or limitations involved. One of the plaintiffs, who appears by guardian, has not yet attained to his majority, and the other, at the beginning of the suit, had done so but recently.

The district court adjudged all the above mentioned proceedings and conveyances to be void, and to be canceled, and quieted the title to the premises in the plaintiffs. That they were ineffectual to convey the legal title or to deprive the heirs at law of their reversionary estate in the lands, we are ourselves convinced. It has been held by this court, that the estate which vests in the widow and children, in lands selected from the property of the husband, and occupied as a homestead at the time of his death, is absolute, and can not be lost by abandonment, or devested by sale upon execution on a judgment against the husband. *Durland v. Seiler,* 27 Neb. 33; *Baumann v. Franse,* 37 Neb. 807.

In *Guthman v. Guthman,* 18 Neb. 98, the court go so far as to say, in effect, that the homestead estate can not be conveyed or alienated by the widow, in any manner, during the minority of the children, or of any of them, and it appears to us that such is the correct doctrine, because,

otherwise, the heirs of the husband might be deprived of their reversionary interest, which is set apart and exempted to them by the statute, in as unequivocal terms as is the homestead interest itself. The principle of these decisions was reaffirmed in *Cooley v. Jansen*, 54 Neb. 33, where it was again expressly held that a sale of the homestead by an administrator, under a license for the payment of debts, is without authority of law, and that an administrator is not entitled to the possession, or to the rents and profits of the homestead, although its use, as such, has been abandoned. It is true that, in these cases, objection was made in the very proceedings by which the homestead was sought to be appropriated, instead of by collateral attack as in this case, but we think that circumstance can make no difference. The proceeding by an administrator to appropriate lands belonging to the estate to the payment of debts, contracted by the deceased in his lifetime, is correctly described by counsel for appellants as a proceeding *in rem*, but the very principle which is the foundation of the foregoing decisions, and from which they proceed, is that the administrator has neither title nor right of possession of the homestead, and therefore he can confer upon the court no jurisdiction over the same. It is, moreover, difficult to understand how minor children, often, as in this instance, of very tender years, can have any opportunity to object to such a proceeding after arriving at years of discretion, except by collateral attack. The statute does not save to them the right of direct impeachment by appeal or error after attaining their majority, and if they can not assail the proceedings indirectly, all that is requisite to deprive them of their estate is the connivance or collusion of the mother, who in most cases is their legal as well as their natural guardian. Neither do we think that the fact that the greater part of the proceeds of the sales was applied to the payment of the mortgage liens, was effectual to supply the want of jurisdiction. The mortgage debts had not been admitted or allowed in probate, and unless and until they

had been so, at least, the administrator, as such, had no interest in or concern with them. Even if they had been so, the statute, which furnishes the exclusive measure of his powers and duties, confers neither upon him, nor upon the district court, in probate proceedings, any authority to provide for their payment by a sale of the homestead. He has no duty to perform with respect to the homestead except, in proper cases, to see that it is correctly ascertained and set aside. The proceedings were so grossly irregular and faulty in several respects that their validity could, in any event, have been maintained with difficulty, if at all, but, the court having been without jurisdiction of the subject matter, it is not worth while to discuss them.

But there is a further contention that only a part of the lands sold were included within the homestead exemption. There are two 80-acre tracts, being, respectively, parts of different governmental subdivisions, but contiguous along their whole length, and separated only by an imaginary line. The dwelling house and other buildings and appurtenances were all on one of these tracts, but both were used and cultivated, indiscriminately and together, for the support of the deceased and his family, and the combined value of the two was very much less than $2,000, the amount exempted by the statute. The act exempts "the dwelling house in which the claimant resides and its appurtenances, and the land on which it is situated, not exceeding 160 acres," etc., and it is argued that, as the buildings were situated upon one only of these tracts, that alone constituted the homestead, and there are cited in the brief of appellants certain authorities which seem to support this view. *Woodman v. Lane,* 7 N. H. 241; *Kresin v. Mau,* 15 Minn. 87, but we think that the greater weight of authority, and the better reason, incline to the contrary opinion. *Clements v. Crawford County Bank,* 64 Ark. 7, 62 Am. St. Rep. 149; *Hodges v. Winston,* 95 Ala. 514, 36 Am. St. Rep. 241; 15 Am. & Eng. Ency. Law (2d ed.), pages 586, 587 and citations.

The statute does not use the word tract or its equiva-

lent, and says nothing about governmental surveys, and in our opinion the latter are not of controlling importance. The owner of the land has as good a right to define the word tract, as applied to his holdings, as has his predecessor in title. In such cases the uses to which the lands are put, and the nature and circumstances of their cultivation, and the manner of the application of their produce, are more significant of the intent of the claimant and of the real character of his occupancy, than are the surveys and monuments of their former owners.

But upon the facts disclosed by this record the appellants are not wholly without right in the premises. The statute and the selection of the homestead vested in the widow, upon the death of her husband, an estate for life, leaving a reversion in the heirs of the latter. There is no evidence of fraudulent intent on her part, or on the part of her grantees, by direct or mesne conveyance. The proceedings to which she became a party eventuated, not only in preserving her life estate, but in relieving the fee of an incumbrance which not improbably might have extinguished the reversion, and it is not unlikely that by such means she was enabled to rear and educate the children with greater comfort and care than she could otherwise have done. It is a general rule, subject to exceptions not applicable to the case at bar, that a life tenant, who in order to preserve the estate pays off an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen. In accordance with this rule the appellees ought not to be let into possession until they have discharged this equitable burden—that is, until they have paid, or have secured by a lien or charge upon the premises, the amount paid in satisfaction of the mortgages existing at the death of their father, with 7 per cent. annual interest on that amount from the date of the payment. The court found that the value of permanent improvements put upon the lands by the appellants equals the value of the use and occupation of the premises since the demise of the widow, so that a further accounting for

rents and profits is uncalled for, but, inasmuch as the rights of the parties can be best adjusted in the neighborhood in which the lands lie and the parties reside, and considerable time may be requisite for effecting that purpose, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law, and that each party be taxed with their own costs up to this time.

HASTINGS 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 reversed and the cause remanded for further proceedings in accordance with law, and that each party pay their own costs to this date.

REVERSED.

The following opinion on rehearing was filed May 5, 1904. *Former judgment of reversal modified:*

1. **Life Tenant**: REVERSIONER: INCUMBRANCES. Ordinarily, a life tenant who pays off an incumbrance upon the fee, will be entitled to be reimbursed by the reversioner or remainderman the amount so paid, less such sum as will equal the present value of the annual installments of interest he would have paid during his life, if the incumbrance had remained so long in existence, with lawful interest on the residue, so ascertained, from the date of payment.

2. **Minors**: EQUITY. Although minors may not be bound either by contract or by estoppel, equity will not lend its affirmative aid to enable them to take an unjust advantage of the mistakes or misfortunes of their adversaries.

AMES, C.

This case is before us on a motion in form for a rehearing, but which in fact calls for nothing more than a modification of the former decision of this court. The accuracy of the statement of facts in the former opinion, *ante*, p. 160, is not questioned, and it is not necessary to repeat them here. The first ground of the motion, which is by

the reversioners, appellees, is that the decision complained of improperly requires them to pay interest on the amount of the incumbrance on the premises at the time of the death of the father, between the time it was discharged by the life tenant, the mother, and her death. How considerable this interval was, is disclosed by none of the briefs, and as affecting the principle involved is perhaps immaterial. The subject matter of the equitable right of reimbursement on account of the payment of this lien, was not touched upon at the original hearing, so that we were both imperfectly informed as to the circumstances, and without the aid of counsel in the ascertainment of the principles applicable to the case.

There seems to be no question that the duty of a life tenant to preserve the premises from waste, includes the obligation to keep down the interest upon existing incumbrances. In case he pays the principal, the rule generally adopted is that the burden is apportioned between him and the reversioner or remainderman in such manner as that the tenant will "pay such a sum, as would equal the present value of the amount of interest he would probably have paid during his life, if the mortgage had continued so long in existence." Tiedeman, Real Property, sec. 66. Or, as is said in *Moore v. Simonson*, 27 Ore. 117, "The life tenant must pay the present worth of an annuity equal to the annual interest running during the number of years which constitute the expectancy of life, the balance, after subtracting the sum thus ascertained from the incumbrance, should be borne by those in remainder." 1 Washburn, Real Property (4th ed.), *96; 1 Story, Equity Jurisprudence (13th ed.), sec. 487; 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1223.

But it is suggested that the right of contribution is personal to the life tenant and expires with the termination of her estate, or, at most, survives to her personal representative and can not be availed of by her successors in the possession of the premises. Ordinarily, this is perhaps true, but the right is one of equitable creation, and the

authority that brought it into existence is doubtless competent to mold and modify it in its application to particular cases, in such manner that it shall not miss its original purpose of doing justice between the parties. As was said in the former opinion, there is no question of good or bad faith involved, and the arrangement by which the former incumbrance was discharged and the premises transferred to Windover, the second husband of the mother, was without doubt beneficial to her children who are the present complainants. The first mortgage was satisfied and the second mortgage was void, but the latter was accompanied by the personal obligations of the supposed purchasers whose conveyances were, perhaps, effectual to convey the life estate of the widow, and who satisfied the debt. In good faith they stepped into the shoes of the widow as respected her duties and obligations toward the land, and with regard to it toward the reversioners, and equity and good conscience require that they should be treated as having succeeded to her rights. Whether or not, practically, the same result might be worked out under the doctrine of subrogation, pure and simple, we are not interested to inquire.

To the proposition that the reversioners are not chargeable with the value of the lasting and valuable improvements in an accounting for the value of the use and occupation, we are unable to give our assent. As we have said and repeated, there is no suspicion of intentional wrong doing, but an appearance to the contrary, and, although it may be true that the heirs being minors can not be held to pay for benefits either by contract or estoppel, yet we think that, under the circumstances of this case, a court of equity will not lend its affirmative aid to enable them to profit by the misfortunes or mistakes of their adversaries.

We are of opinion that justice, as complete as possible, will be done between the parties, by so modifying the former decision of this court as to charge the appellants, as of the date when the first mortgage was paid off, with a

sum equal to the then present value of the amount of interest the life tenant, the mother, would have been required to pay during the actual continuance of her life, as shown by the record, and that the reversioners, the appellees, be required, before being let into possession, to pay, or charge as a lien upon the premises, the residue of the sum paid for the discharge of the mortgage, with 7 per cent. interest from the date of payment.

OLDHAM, C., concurs. HASTINGS, C., not sitting.

By the Court: It is ordered that the former decision of this court be so modified as to charge the appellants, as of the date when the first mortgage was paid off, with a sum equal to the then present value of the amount of interest the life tenant, the mother, would have been required to pay during the actual continuance of her life, as shown by the record, and that the reversioners, the appellees, be required, before being let into possession, to pay, or charge as a lien upon the premises, the residue of the sum paid for the discharge of the mortgage, with 7 per cent. interest from the date of payment.

JUDGMENT ACCORDINGLY.

DAVID BRADLEY & COMPANY V. JOSEPH BASTA ET AL.

FILED FEBRUARY 17, 1904. No. 13,403.

1. **Contracts: PRESUMPTIONS.** In the absence of fraud or imposition, persons of mature years and ordinary intelligence and education are presumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents.
2. **Agents: POWERS: LIMITATIONS.** A person dealing with an agent of limited powers, and who knows of the nature and extent of the limitation, is bound thereby.

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

Flickinger Brothers, for plaintiff in error.

George H. Thomas, contra.

AMES, C.

This is a proceeding in error to reverse a judgment rendered in behalf of the defendants. The action is to recover the purchase price of a gasoline engine sold and delivered upon a written contract. The contract is in the form of an order, which was obtained by the solicitation of an agent of the plaintiff, and is signed by the purchasers alone. It calls for an engine of certain specified number of horse power, and contains specific warranties as to material, construction and capacity to develop the specified power, and stipulates that it shall not be modified, nor any promises of agent, employee or attorney, not contained therein, be effectual, unless "in writing and ratified by the Council Bluffs office," the plaintiff's principal place of business. The document appears upon its face to express the entire agreement of the parties and to be complete in all respects. It was sent to, and received and accepted by, the principal managers of the plaintiff company, who shipped and delivered the engine accordingly, but the defendants refused to pay for the same. The defendants, however, contend that the delivery was not complete, because the contract stipulates that they shall have opportunity to ascertain whether the engine is in compliance with the terms of the warranty, and that, upon the application of certain practical tests, it has been ascertained that it is not so. But the alleged warranties, of a breach of which they complain, are not contained in the written contract, but are averred to have been made orally by the agent of the plaintiff antecedently to and contemporaneously with the signing of the latter. Or, more accurately speaking, it is alleged that the agent represented to them that the engine would be capable of making a certain number of revolutions a minute, and of causing a

certain number of revolutions a minute in a certain separator (threshing machine) belonging to them, and assured them that, if it should fall short of these representations in either respect, or of successfully and satisfactorily driving and operating the separator, the defendants should be under no obligation to receive or accept the engine, or to pay any sum for or on account of it, and that these statements and promises were the sole inducement to the defendants to execute and deliver the contract or order. It was further averred that it has been ascertained, by practical experiment and attempted use of the engine, that it is in a large degree incapable in all the respects mentioned, it being of the 10 horse power capacity stipulated in the contract, and the separator being a 16 horse power machine. All these oral representations are denied by the reply, and due exception was taken at the trial, both generally and specifically, to the introduction of evidence in proof of them. It is not claimed that they were fraudulently made, or that they were known to the plaintiff company until after the delivery of the engine, or that they were ratified by it in writing or otherwise, or that there was any mistake as to the contents of the written document, or that the engine did not answer the description therein given. There has been no offer to rescind or to return the engine, which is still retained by the defendants.

It will thus be seen that the alleged antecedent and contemporaneous oral agreement not only supplemented but, in important particulars, was inconsistent with, and superseded the written instrument. Indeed, if the defendants' version of the transaction is accepted, the real and substantial contract of sale was oral, to which the writing was only an incident; and, in support of this theory, they allege and testify that they finally consented to sign the latter and permit its transmission to the plaintiff, because of being assured by the agent that it would not modify or affect the oral agreement, but he said: "Boys, I wouldn't ask you to sign this order, but I've got to have it to get the

engine up here. The company will not ship it without." This statement was, we think, additional to the above quoted clause in the writing, a distinct and explicit notification to the defendants that the agent was exceeding his powers, and that the only contract or agreement of sale he had authority to make was that contained in the writing. It particularly challenged their attention to that document, and was equivalent to saying to them: "My principal has authorized me to make or accept a particular contract or agreement of sale and no other. The terms and conditions of that contract you will find recited herein, and anything other or different therefrom, the company will decline to consider." If, in response to this challenge, the defendants had read the instrument (and it does not appear that they did not do so), they could not have failed to observe therein the limitation upon the powers of the agent, denying to him in express terms authority to make any different, additional or supplemental agreement, whatsoever. The most that he could have done in that regard was to propose something new in writing, leaving it to his principal to accept or reject the same at its pleasure. It is a maxim of law that persons of mature years and ordinary intelligence and education, such as the defendants seem to have been, are presumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents. The inference is inevitable. The defendants must, upon this record, be conclusively presumed to have known that the alleged oral agreement with the agent was in excess of his powers, and that the writing, if it should be accepted by the plaintiff, and a delivery of the engine should be made pursuant to it, would furnish the complete and exclusive measure of the rights and liabilities of the parties to the transaction.

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

HASTINGS 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 reversed and a new trial granted.

REVERSED.

DEWITT Y. DORWART V. JOHN H. BALL.

FILED FEBRUARY 17, 1904. No. 13,414.

1. **Partnership:** ACTIONS. A partner's share of a single item of partnership profits, the result of a single transaction, may be recovered of a copartner who is retaining it, by an action at law, if all the other partnership dealings are settled between the parties.
2. **Directing Verdict:** EVIDENCE: ERROR. When plaintiff's evidence tends to establish such a state of facts, and was admissible under the pleadings, it is error to instruct the jury to return a verdict for defendant.

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

R. M. Proudfit, for plaintiff in error.

J. D. Pope, contra.

HASTINGS, C.

In this case, plaintiff sues to recover $50, which he alleges to be due on account of one-half of commissions earned by himself and defendant as real estate brokers, in partnership; he alleges a partnership existing between the parties on December 10; that on that day the $100 was paid in; that the defendant refused to pay over any share of it, but that on December 13 an accounting was had between the partners and all partnership debts paid in full, the partnership dissolved, and the $50 was then found due; that it has not been paid and judgment is asked for it, with interest from December 13, 1901. The answer denies all of the plaintiff's allegations; alleges that plaintiff bought out a former partner of defendant, and was

never himself accepted as such partner; that, during the time from December 1, 1901, to December 9, plaintiff remained about the office a part of the time but had no part in the business; that on December 9 plaintiff was told that he could not remain in the business, nor receive any share of the receipts; that after that date plaintiff attempted to take no further part in the business. A special denial of any settlement of firm accounts or firm indebtedness, and a denial of any contribution toward firm expenses by plaintiff, is also interposed. After hearing the evidence, the trial court instructed the jury to return a verdict for the defendant. A motion for a new trial was overruled and judgment entered on the verdict, from which the plaintiff brings error, and he now insists that his case should have been submitted to the jury. The defendant says that there is no evidence, either of a settlement of partnership accounts or of any receipt on defendant's part of the $100. The evidence by plaintiff indicates that on December 2, 1901, with the consent of Mr. Ball, and under agreement with the latter that he should have the rights of a partner, he purchased from C. M. Druse one-half interest in the firm of Druse & Ball, real estate, insurance brokers and loan agents; that the arrangement continued until the 13th of the same month, when it was dissolved; he testifies that there was one sale made of 160 acres of land, "and the commission for selling this was $100"; that, on a settlement had, Mr. Ball agreed to pay all of the office expenses, and that during the 11 days of plaintiff's connection with the business the only thing bought was some coal, which plaintiff purchased; that he sold to Ball his interest in the furniture for $45. The $50 commission was not agreed to be paid, Ball claiming that it really belonged to him, and, when plaintiff demanded it at the time of the settlement, declared he would not pay it until he had to. Mr. Littlefield, the purchaser of the land, says that Mr. Dorwart was introduced by Ball as being the latter's partner. It appears that Littlefield went to see the land, as Dorwart testified; he does not remember

the date, which Dorwart says, and Ball does not deny, was December 5, but it was in the forepart of December; that on the following day he closed the contract for the land; that he did this with Mr. Ball, who told him to say nothing about it to Mr. Dorwart, because he was going to dissolve partnership with the latter; that he paid at the office of Dorwart & Ball some money on the land contract. The other testimony seems to identify this payment as made on December 7. Defendant's account of the matter is that, at the time of the alleged settlement, he made Dorwart an offer to take the furniture and continue on in the same place, or for Dorwart to do so. "I said to him, I will take $50 for my share of the furniture, or I will give you $50 for yours and you can get out of the office, and I then told him that from that time on what he did was his, and what I did was mine, he was to keep all that he made and I was to keep all that I made."

Q. Now, was there anything at that time said about the expenses of the office, and partnership accounts?

A. No, sir. Defendant says that no disposition of the insurance business was made, and that the $45 was for the furniture; that Mr. Druse had the agency for some of the insurance companies, and himself, Ball, some; that he tried to get Druse's agencies transferred to Dorwart; that Dorwart at that time wanted this $50 from the Littlefield commission.

As to this the testimony is as follows:

Q. Was there anything said by you at this time about the $50?

A. He wanted me to give it to him.

Q. Did you agree to give it to him?

A. No, sir.

Q. What did you say about it?

A. I said it was made after we had dissolved.

Mr. Ball denies making settlement with Dorwart as to the office expenses; he admits, however:

Q. And you assumed the office expenses?

A. Yes, sir, but there was nothing said about this at the time of the settlement.

By the Court: Q. Was there anything said about this matter at any time?

A. No, sir.

He says that Dorwart said nothing about the rent; that he does not know whether or not stationery was bought. Mr. Ellsworth, the justice of the peace, who dismissed the case on the evidence, for lack of jurisdiction, after a jury was impaneled, was called and testified that Dorwart, in the trial before him, did not testify to any settlement with regard to expenses.

It seems clear that the foregoing evidence shows as to the receipt of the $100 commission, enough, standing uncontradicted as it does, to sustain a verdict finding that the $100 had been paid to Mr. Ball before Dorwart surrendered his interest in the business. As above stated, it seems from statements of Ball and Dorwart, and the purchaser, Mr. Littlefield, that the transaction must have been closed on the 7th, and the sale of the office furniture to Ball by Dorwart seems to have been upon the 11th. At least, that is the date under which Dorwart receipted for the $45 payment. There is nothing to indicate that there is any further outstanding claim against the partnership. It is expressly declared by both Ball and Dorwart that the only item of business done, out of which any profit could come, was this sale to Littlefield of the Stowell land. In this state of affairs it seems clear that, if it was true, as Dorwart testifies, that there was a settlement, and that Ball agreed to take the furniture at $45 and to settle the expenses, there could be nothing left to settle as to this partnership business except the one item of $100 of earnings, as to which Ball refused to give up any part, on the ground, as he himself says, that it was "made after they had dissolved."

To sustain the instruction for a verdict for defendant, we must assume all the facts indicated by plaintiff's evidence to be true, and still find that there is no cause of action. Assuming all the facts as true to which Dorwart testifies, a sale of his interest in the property, except five

chairs and a desk, which he took out, an agreement by Ball to pay office expenses during the time Dorwart had been in, a dissolution of the partnership, and the fact that this $100 was the only money earned during the partnership and that it had been paid in as above indicated by Littlefield's testimony, and by Ball's admission that it had been made, but after the partnership had been dissolved, do these facts entitle Dorwart to sue at law for the $50. It should be added, that it clearly appears that the partnership relation existed and was that of equal partners. Dorwart's own testimony, if taken as true, with Littlefield's and Ball's, would warrant a finding that there was a final settlement of the partnership business and accounts, except as to the division of the $100 commission, and that Ball received the $100. Can the question as to whether or not this money was really earned by the partnership be determined in an action at law between the partners? Of course, if we were to hold to the old doctrine, which required an express promise to pay a balance due in order to make it recoverable in an action at law from one partner by another, there could be no possibility of any recovery in this action.

There certainly does not appear to have been any promise made by Ball to pay this money. It is equally clear that there was no settlement and balance struck which would raise an implied promise to pay it. The obligation to pay it was explicitly repudiated by Ball.

The only ground on which a recovery could be had is one which is not expressly pleaded in plaintiff's petition, but one on which he should be allowed to recover, as the evidence is not objected to on that ground, if the ground itself is tenable. If a suit at law will lie for one single item of partnership profits, when it appears that everything else relating to the partnership has been settled, then, this case should have gone to the jury. A finding that this $100 commission on the sale of the Stowell land was the only item of partnership business unsettled, that Ball received it, and that it was partnership earnings, would have to be

sustained on this evidence, though Ball denies some of the statements.

Will an action at law lie for a single item unsettled in partnership accounts, when everything else has been disposed of? This question is not raised in the briefs, and was not on the argument of counsel. It is clearly against the technical reason for refusing to permit partners to sue for unsettled and undivided profits. Such profits belong to the firm though in the hands of a member. The recovery by any one must be against the firm, and a member can not be permitted to sue himself.

There are, however, many cases intimating, and some holding, that when the dispute is narrowed down to one item, a suit at law may determine it. Mr. Bates says (2 Partnership, sec. 865), that these are cases of single ventures and not properly partnerships, and so not subject to the rule as to partnership. *Mason v. Sieglitz*, 22 Colo. 320, is placed on that ground, and also that the suit for a single item is a clear right. In 15 Ency. Pl. & Pr. 1031, it is stated that an action at law, after dissolution, will lie for a share of a single item of partnership profits, "because in such a case there are no equities to be adjusted, and no accounting is necessary as would be the case had there been no settlement." It cites *Feurt v. Brown*, 23 Mo. App. 332, and the numerous Massachusetts cases holding that such an action will lie, when judgment for the amount claimed will be an entire termination of partnership transactions. *Brinley v. Kupfer*, 23 Mass. 179; *Wilby v. Phinney*, 15 Mass. 116; *Buckner v. Ries*, 34 Mo. 357; and *Whetstone v. Shaw*, 70 Mo. 575, might have been cited also.

In *Pettingill v. Jones*, 28 Kan. 749, it was held no error to refuse to instruct that plaintiff could not recover at law for profits of an alleged partnership, except after an accounting and settlement. That case, however, seems to have been one of a single venture. The present case, while showing only one item of earnings, relates to an undoubted partnership, though a brief one. A still

stronger case for plaintiff is *Clarke v. Mills,* 36 Kan. 393. See also 2 Bates, Partnership, sec. 866 and cases cited.

In *Lord v. Peaks,* 41 Neb. 891, a suit brought by one partner to recover from the other, for loss to the firm by reason of the defendant's engaging in other employments, contrary to an alleged partnership agreement, and for expense by the plaintiff in procuring the services of an expert accountant, rendered necessary by the negligence of defendant in keeping the firm's books, was dismissed on demurrer because no settlement of the partnership accounts was alleged. At the close of the opinion, the court refers to the claim that a dispute over a partnership transaction, involving but a single item, may be settled at law after everything else pertaining to the partnership has been settled, and says some of the cases so hold, but that there were no allegations bringing that case within the rule.

In the present case, it is sufficiently alleged that the other matters involved are settled. In fact a settlement as to the $100 and the finding of the $50 to be due plaintiff are alleged, but, in our view, this allegation might and should be treated as surplusage, if without it plaintiff has a cause of action. The general rule, as broadly laid down in *Lord v. Peaks, supra,* and in *Younglove v. Liebhardt,* 13 Neb. 557, of course, is that nothing can be recovered by one partner from another as to which the partnership relation must be invoked as the basis of the action. It must be due on a settlement agreement or on an assumpsit. The latter is given by the Massachusetts court in *Sikes v. Work,* 6 Gray (Mass.), 423, as the ground of allowing a recovery on a single item where everything else is settled, "Nor is it necessary that this (the balance due) should be a fixed, ascertained balance, as a result of a settlement of the accounts of the firm between the partners. It is enough if it appear that the firm is dissolved and that there are no outstanding debts due to or from the copartnership, so that the action of assumpsit to recover the balance due one of the firm will effect a final settle-

ment between the copartners." Citing *Wilby v. Phinney*, 15 Mass. 116; *Williams v. Henshaw*, 11 Pick. (Mass.) 79, and 12 Pick. (Mass.) 378; and *Capen v. Barrows*, 1 Gray (Mass.) 37. *Fargo v. Saunders*, 4 Allen (Mass.), 378, and *Gomersall v. Gomersall*, 14 Allen (Mass.), 60, are cited to the same effect in the note to *Williams v. Henshaw*, 12 Pick. (Mass.) 378, 23 Am. Dec. 614.

As is said by Commissioner IRVINE in *Glade v. White*, 42 Neb. 336, in a suit for partnership moneys discovered after a settlement to have been collected and unaccounted for by the partner who was transferring the accounts to his associate, the partnership transactions are alleged merely as inducement; the action is for money received which, *ex æquo et bono*, belonged to plaintiff. The cases applying the general rule are to be found collected in 38 Cent. Dig., col. 1789, and following. So far as we have been able to examine them, none of them deny, though some of them criticise, the holding that a partner's share of a single item of partnership profits, where everything else is settled up, can be recovered in an action at law.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES 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 remanded for further proceedings according to law.

REVERSED.

JOHN B. OSBORNE V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 17, 1904. No. 13,235.

1. **Action**: FRAUD. The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.

2. **Personal Injuries**: RELEASE: ESTOPPEL. A party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced on him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Connell & Ives and *John Q. Burgner*, for plaintiff in error.

B. P. Waggener, James W. Orr and *John F. Stout, contra.*

OLDHAM, C.

In this action the plaintiff in the court below, who is also plaintiff in error in this court, filed a petition in the district court for Douglas county, Nebraska, alleging that, while in the employ of the defendant railway company as a switchman in its yards at Omaha, he received serious personal injuries caused by the negligence and carelessness of defendant. It is not necessary to review the petition further than to say that, on its face, it stated a good cause of action. Defendant answered this petition, denying all the allegations of negligence, and pleaded, by way of accord and satisfaction, the payment of $200 to the plaintiff in settlement and full satisfaction of all injuries received on account of the accident, and the execution of a release in writing signed by the plaintiff and delivered to defendant at the time of the settlement. It is not necessary to set out at length the release, but sufficient to say that, on its face, it shows a perfect accord and satisfaction of the injuries sued for. Plaintiff, by way of reply to the plea of accord and satisfaction contained in defendant's answer, alleged, in substance, that he signed the release alleged in defendant's answer, and that he had received $200 at the time stated, but, that his signature to the re-

lease was procured by fraud and misrepresentation; that after he had recovered from the injury he applied to defendant's superintendent at Omaha for further employment; that the superintendent informed him that he had a position for him, but that it was necessary for all employees who had been injured, to go to the general office at St. Louis and see one Jones, from whom the superintendent at Omaha would be authorized to give him further and continuous employment. That pursuant to these directions, the plaintiff went to St. Louis and called upon the said Jones, who was the general claim agent of defendant; that Jones thereupon represented to him that he could use his services, and that there was a vacant place ready for him at Omaha, of which fact he had just been informed by a telegram from the superintendent at Omaha, and said he would allow plaintiff $2 a day for 100 days' services, the amount of time he had lost on account of his injuries, but not as damages, because defendant was not liable to plaintiff at all for the injuries. That Jones, thereupon, prepared the papers which he said were to that effect, and stated that the signing of the papers would provide plaintiff with all the employment desired. And, quoting now literally from the reply: "Thereupon, plaintiff believing said representations made as hereinbefore set forth to be true, and relying upon the same, signed his name to such papers as the said Jones directed, but without reading over the same or hearing them read, or knowing the contents thereof otherwise than stated by said Jones, as aforesaid; and plaintiff avers, that he was caused to believe and rely upon said representations, and to sign said papers in manner aforesaid, partly, by undue influence exercised upon him by said Jones, he, the said Jones, having acquired plaintiff's implicit confidence, purposely and with the intent, as plaintiff believes, of gaining improper advantage thereby." Plaintiff then alleges, that after his return from St. Louis in March, 1895, he applied to defendant for employment, and was put off from time to time until July, 1895, when he was given employment

either all or part of the time until February, 1896, when, without notice or just cause, he was discharged from defendant's employ. The reply further sets out, that the consideration on his part for signing the agreement was the promise of defendant to furnish him permanent employment in its service. It further sets out, that if the court and jury deem it proper they may take into consideration the $200, received in part payment of defendant's liability. After the filing of this reply, defendant moved for judgment on the pleadings. Pending the hearing of this motion and before judgment sustaining the motion was entered, plaintiff asked leave to file instanter an amended reply which, however, did not materially change the allegations as to procuring his signature to the written release. The court denied the request to file an amended reply, directed a judgment for defendant on the pleadings, and plaintiff brings error to this court.

The sustaining of the motion for judgment on the pleadings concedes the truth of every fact well pleaded in plaintiff's reply. The question then arises, do the facts pleaded sufficiently excuse plaintiff's neglect to read, or have read to him, the release which he signed before accepting the $200?

The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Now, construing liberally the allegations of the reply which charge fraud in procuring the signature to the release, they are that plaintiff desired permanent employment with defendant; that he was led to believe from a conversation with defendant's claim agent that, on signing the release tendered him, he would get $200 for his lost time, and permanent employment in defendant's service. The reply does not allege that plaintiff could not read and write, and in fact the record clearly shows that he could, for his name is signed twice in his own handwriting to the release. It is not alleged that, by reason of failing eyesight, or by reason of any disability, he asked the defendant's agent to read

the paper to him; nor is it claimed that he was too ignorant of the language to understand the purport of the release, had it been read to him. We can not find any case that goes so far as to relieve one from the effects of a written contract, which is signed by a person of ordinary intelligence who can read and write, and who, presumably, would know the contents of the instrument if read to him, where no art or deception was practiced upon him to prevent his reading of the contract, or having it read to him, before the signature was obtained.

The rule permitting release from signatures obtained by fraud has been as liberally construed in this jurisdiction as it has by any other courts of last resort in these United States, and we will notice briefly some of our own decisions on this question:

In *Cole Brothers & Hart v. Williams*, 12 Neb. 440, the defendant had signed a contract for certain lightning rods, which were alleged to have been represented as of a stipulated price. Defendant could read and write, but had not his glasses with him, and requested plaintiff's agent to read the terms of the contract. This the agent did, and misstated the price to be charged for the lightning rods. Other witnesses were present and testified to the transaction. Under these conditions, defendant was released from the contract because of the fraud perpetrated in procuring his signature.

In *Ward v. Spelts & Klosterman*, 39 Neb. 809, the defendant could neither read nor write, and alleged that his signature to a memorandum in writing was procured by fraudulent representation as to what the paper contained. This he was permitted to show.

In *Woodbridge Brothers v. De Witt*, 51 Neb. 98, the signature of the agent of defendant was procured to a bill of conditional sale, which was to operate as a chattel mortgage on a musical instrument purchased, and which provided for the payment of 10 per cent. interest per annum on deferred payments; this after the contract for the purchase had been fully made, and when plaintiff's agent was

leaving the store after having made the purchase. In this case the agent, presumably, could read and write, and signed the paper with the last name, only, either of herself or her principal, who was her son, on the representation of the member of the firm that it was nothing but a formal matter to complete the sale. Here, the defendant was relieved because of the artifice and deceit practiced in procuring the signature, which claim was corroborated by the manner in which the name was signed.

In the very recent case of *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, the plaintiff was permitted to be relieved from his signature to a release similar in substance to that pleaded in the suit at bar, by a clear preponderance of the evidence that the receipt had been misread to him when his signature was obtained. While the judgment first rendered in this case was reversed on a rehearing on January 6, 1904, this portion of the opinion was not reversed, and is still of judicial weight in the determination of this question. But in this case, the agent of defendant purported to read the written instrument to the plaintiff, and procured his signature by deception in misreading the contents of the paper signed.

As before stated, we think our court has gone to the extreme length in the cases commented upon, in relieving from contracts and settlements signed without reading, or having the same read, before affixing the signature; and, still, all these cases depend on facts, both alleged and proved, that tend to show imposition and deceit resorted to for the purpose of procuring the signature.

Now, in the case at bar, we do not think the facts alleged in the reply, or amended reply tendered, stated facts which showed such artifice and fraud to have been practiced upon the plaintiff as would excuse him from either reading the release which he signed, or asking to have it read to him, before signing it.

It appears from the record that the injury to plaintiff was received on November 9, 1894; that the settlement was made and the $200 paid to plaintiff on the first day of

March, 1895. It also appears from the allegations in the reply that plaintiff was employed by defendant part of the time during the years 1895 and 1896 following the settlement; and, yet, this suit was not instituted, nor was any claim made against the company by defendant, until November 5, 1898, or four days before the statute of limitations would have barred the claim. Such apparent laches on plaintiff's part in asserting his claim may, with much propriety, have influenced the trial judge in sustaining the motion for judgment on the pleadings.

In *Wallace v. Chicago, St. P., M. & O. R. Co.*, 67 Ia. 547, it is held that a party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced on him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms. Of like effect is the holding in *Muteer v. Missouri P. R. Co.*, 105 Mo. 320; *Lumley v. Wabash R. Co.*, 71 Fed. 21.

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

HASTINGS and AMES, 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.

ROBERT S. TRUMBULL V. VIOLA TRUMBULL.

FILED FEBRUARY 17, 1904. No. 13,384.

1. **Guardian and Ward.** There is a well defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers.

2. **Advice by Guardian.** Where advice is given by a guardian, which leads to a separation by the ward from husband or wife, the presumption is that the advice was given in good faith; but, where such advice is given by a stranger, the presumption is otherwise.

3. **Alienation of Affections: ACTION: DEFENSE.** In a suit for damages for alienation of affections, it is a good defense, on the part of a guardian, that he advised the ward from honest motives in a sincere belief that the advice given was for the moral and social good of the ward.

4. **Instructions.** Instructions examined, and *held* prejudicial.

5. **Error.** Paragraphs of a petition, which have been struck out on motion, should not be submitted to the inspection of a jury.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed.*

Thomas Darnell, L. C. Paulson and *George E. Hager*, for plaintiff in error.

J. C. Stevens and *M. D. King, contra.*

OLDHAM, C.

This is an action for damages brought by the plaintiff in the court below against the defendant, her brother-in-law, for alienating the affections of her husband. The material facts underlying the controversy appear to be that plaintiff's husband, Oscar Trumbull, was a minor between 19 and 20 years of age at the time of his marriage. That, before the marriage, plaintiff and her husband each resided in the village of Minden, Nebraska. Plaintiff was of the age of 26 years, and had been engaged in the millinery business for several years in the village of Minden. Her husband was working for the defendant, Robert S. Trumbull, his brother and guardian, in Minden, when he became acquainted with plaintiff. In October, 1901, plaintiff removed to the city of Hastings, Nebraska, and was employed as a saleslady in a dry-goods store at that place. Shortly after her removal to Hastings, Oscar Trumbull went there, and married plaintiff at that place on the 14th

day of October, 1901. The marriage license was procured without the consent of the guardian of Oscar Trumbull, on his statement in his application for a license that he was 23 years of age. After the marriage, plaintiff and her husband began housekeeping, and lived together as husband and wife, at Hastings, until the month of April, 1902, when the husband abandoned plaintiff, volunteered in the army of the United States, and has since refused to live with plaintiff. In the months of December, 1901, and January, 1902, the defendant, Robert S. Trumbull, wrote letters to his brother, at Hastings, urging him to abandon plaintiff and, according to plaintiff's testimony, persisted in writing similar letters, until he finally persuaded his brother to abandon plaintiff. Defendant, by way of answer to plaintiff's petition, alleges that he was the guardian and brother of plaintiff's husband, and admits that he wrote letters to his brother in the months of December, 1901, and January, 1902, urging him to abandon plaintiff, but alleges, in defense of his conduct, that at the time he wrote these letters he had no knowledge of the marriage of his brother to plaintiff, but believed he was living with her in a state of fornication; that he had reason to believe, and did believe, that plaintiff was an unchaste woman, and that she had been criminally intimate with his brother during her residence in Minden, and that he acted in good faith in advising his brother to abandon plaintiff. That, when he finally learned of the marriage of his brother to the plaintiff, he did not seek to persuade or induce his brother to abandon his wife. Defendant introduced testimony tending to support the theory of his answer, while the testimony of the plaintiff tended to show that defendant knew of the marriage before any of the communications were written to his brother. At the trial in the court below, the jury returned a verdict for plaintiff for $1,000 damages. There was a judgment on the verdict, and defendant brings error to this court.

Numerous allegations of error are charged in the proceedings of the lower court, in the briefs of plaintiff in

error, only one of which it will be necessary for us to examine, in view of the conclusion we shall presently reach. The instructions given by the court appear to have all proceeded upon the theory that defendant, as guardian and brother of plaintiff's husband, had no right to advise and counsel with his brother and ward concerning his marriage, if he knew he was married, or even if he did not know such fact. Evidently regarding this as the law governing the case, the learned trial judge, in paragraph 9 of the instructions given on his own motion, told the jury:

"If you find the plaintiff was married to the defendant's brother, as alleged, and you further find that the defendant had no knowledge of the fact that they were married, then, if the plaintiff had been unchaste, and the defendant, believing the same, did that or anything which caused his brother to abandon the plaintiff and alienate his affections from her, such fact—that she had been unchaste, and not a fit woman to become a member of defendant's family—would not be a defense to plaintiff's cause of action; but the fact that she was of such character, and the defendant did not know that they were married, should be taken into consideration by you in determining the amount of damages, if any, plaintiff has sustained."

In view of this instruction, and paragraphs 6 and 8 of the instructions immediately preceding it, the court practically directed the jury to find a verdict for plaintiff, and to only consider the evidence relied upon by defendant in mitigation of damages.

The court evidently regarded the defendant as a mere stranger interfering with the marital relations existing between plaintiff and her husband, and applied to him the most rigid rules ever enforced against intermeddlers in household affairs. In this we think the court erred. The relationship existing between parent and child, and guardian and ward, is of such a character as to warrant the parent or guardian to consult and advise the child or ward, in good faith and with proper motives, even in re-

spect to their marital relations, and no cause of action will lie against the parent or guardian for such advice, unless recklessly and maliciously given.

There is a well defined distinction, recognized by the authorities, between the privileges of parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers, particularly those of the opposite sex, in advising in these matters. Where advice is given by a parent or guardian, which leads to a separation by the child or ward from husband or wife, the presumption is that the advice was given in good faith; but, where such advice is given by a stranger, the presumption is otherwise; and, when an action for alienation of affections is brought against a parent or guardian, the gist of the action is the good faith in which the advice is given. Consequently, it is a good defense on the part of the parent or guardian to an action of this nature that they advise the child or ward from honest motives, in a sincere belief that the advice given was for the moral and social good of the child or ward. *Reed v. Reed,* 6 Ind. App. 316; *Hutcheson v. Peck,* 5 Johns. (N. Y.) *196; *Bennett v. Smith,* 21 Barb. (N. Y.) 439; *Glass v. Bennett,* 89 Tenn. 478.

As this case must be reversed for errors in instructions given, we think it might be well to suggest that an amended petition be filed by plaintiff on a new trial, in which the allegations of the original petition that were struck out on motion of the defendant at the former trial are eliminated. This suggestion is made in view of the fact that complaint is made by defendant that the petition, with all the original allegations, was sent to the jury, while deliberating, with the paragraphs that were excluded simply marked "out" on the margin. Paragraphs of petitions which have been stricken out on motion should not, under any circumstances, be submitted to the inspection of the jury.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings.

AMES and HASTINGS, 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 granted.

REVERSED.

HERMAN BODEN ET AL., APPELLANTS, V. RENA MIER ET AL., APPELLEES.

FILED FEBRUARY 17, 1904. No. 13,288.

1. Nonresidents: SERVICE OF PROCESS. Section 22, chapter 20, Compiled Statutes, provides: "All writs, notices, orders, citations and other process, * * * may be served in like manner as a summons in a civil action in the district court," and that "in cases where writs, notices, citations or other process can not be served as aforesaid in this state, the probate court may, in cases where it may be necessary, order the service thereof to be made by publication in some newspaper in this state in such manner as the court may direct." *Held*, That this section does not authorize the county court to order personal service on a nonresident minor, in proceedings had to vacate a judgment or order of such court in probate proceedings, no affidavit that service can not be made in this state being on file.

2. Constructive Service: AFFIDAVIT. Personal service, outside the state, in pursuance of section 81 of the code, is a nullity in the absence of an affidavit for service by publication.

3. Jurisdiction. Where jurisdiction has not been obtained by due service of process, a court acquires no jurisdiction over minor defendants by the appointment of a guardian *ad litem*, and the filing of an answer by such guardian.

4. Advancements: PROOF. Section 34, chapter 23, Compiled Statutes, provides: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." In an action to adjust advancements, *held*, that oral testimony is incompetent to prove the advancements.

5. **Estate: DISTRIBUTION.** In the distribution or partition of an estate, a debt due the estate from a distributee, or some person through whom he inherits by right of representation, which is barred by the statute of limitations, can not be deducted from the share of such distributee.

6. **Guardian ad Litem: DUTIES.** The appointment of a guardian *ad litem* is not a mere matter of form, nor are his duties merely perfunctory; he should prepare and conduct the defense of his wards with the same care and skill as though acting under a retainer.

APPEAL from the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

F. I. Foss and *R. D. Brown,* for appellants.

A. S. Sands and *J. H. Grimm, contra.*

ALBERT, C.

In March, 1900, Henry A. Boden died intestate leaving three children who are the appellants, and three grandchildren the issue of Albert H. Boden, a son who had died about a year before, who are the appellees, as his sole and only heirs at law. The grandchildren are under the age of 14 years.

Herman Boden, a son of the intestate, was appointed administrator of the estate, which appears to have been fully settled and closed up in the county court of Saline county sometime previous to the 19th day of April, 1901.

On the date last mentioned, the administrator filed a petition in that court alleging that, on the 1st day of January, 1889, the intestate had advanced the sum of $250 to his son Albert, in anticipation of his share in the estate of the intestate, and as evidence thereof the latter had executed his note to the intestate on said date for that amount, payable with interest one year after date; that on the 7th day of December, 1894, the intestate, in discharge of a certain debt of his son Albert to a third party, had executed his two notes to such third party, each for the sum of $1,570, payable respectively January 1, 1897, and Janu-

ary 1, 1898, after date; that none of said notes were paid during the lifetime of the deceased, but that the administrator, on the — day of June, 1899, had paid the sum of $3,006.48, the amount then due on the last two notes, in discharge thereof; that by reason of his inexperience and lack of counsel he had made such payment, although said notes had never been allowed as claims against the estate of the intestate, and for the same reason neither they, nor the note for $250 given as evidence of the advancement hereinbefore mentioned, had been reported or taken into account in the final settlement of the estate. It was also alleged that the widow of Albert H. Boden and his said children resided in the state of Colorado. The relief sought was that the estate be "opened up"; that he be credited with the amount paid by him in discharge of the two notes executed by the intestate to a third party, as aforesaid; and that the amount of the three notes be charged against the share of the estate going to the children of Albert H. Boden, as an advancement made to him by the intestate.

The county court set a time for hearing the petition, and issued process for service on the children of Albert H. Boden, and at the same time, in writing on the writ "specially deputized" Mr. B. V. Kohout to serve the same on said children and their guardian in the state of Colorado or elsewhere without this state. Mr. Kohout made service of the writ in Colorado and made return under oath.

The county court appointed a guardian *ad litem* for said children who answered on their behalf. Upon what appears to have been an *ex parte* hearing, the court granted the prayer of the petition, allowing the administrator the credit prayed, and charging the share of the children of Albert H. Boden with $4,372.18, the amount of the three notes, as an advancement made to their father in his lifetime.

Afterward Herman Boden, the administrator, in his own behalf, brought an action in the district court against all the other heirs of his father for the partition of certain

lands which were a part of the estate. In his petition he asked that the amount charged by the county court against the share of the children of Albert H. Boden be made a charge against their interest in the lands sought to be partitioned. These children were represented by guardians *ad litem,* who denied the jurisdiction of the county court to adjust the alleged advancements, and denied that the amount thus charged, or any portion thereof, was chargeable as an advancement against the share of the estate going to such children. The district court decreed a partition of the land, but refused to charge the alleged advancements against the share of the children. The other heirs appeal.

But two questions are presented by the appeal: (1) Had the county court jurisdiction in the proceedings had, to open the estate and adjust the alleged advancements? (2) If not, then should the district court have adjusted and allowed the advancements in the partition suit?

The record of the proceedings had in the county court previous to the filing of the petition to open up the estate and adjust the advancements is not before us. But the allegations and the prayer of the petition, as well as the proceedings had thereon, presuppose the existence of a decree of distribution and a final settlement of the estate; and the present case was tried in the district court, and argued in this court, on the theory that, after the petition for opening up the estate and for the adjustment of the advancements had been filed, service of process, or what would be equivalent thereto, was necessary to vest the county court with jurisdiction in the premises.

The appellants first contend that the county court acquired such jurisdiction by the service made on the appellees by Mr. Kohout, and insist that this contention is supported and established by section 22, chapter 20, Compiled Statutes (Annotated Statutes, 4806), which is as follows:

"All writs, notices, orders, citations, and other process, except in proceedings for contempt, may be served in like

manner as a summons in a civil action in the district court, and the service of the same by a copy thereof, left at the usual place of residence of the party to be served, shall be deemed equivalent to personal service thereof in cases where personal service is required by law; but to bring a party into contempt there must have been actual personal service of the process upon the disobedience of which the contempt is founded, and there must be actual personal service of all process in the proceedings for contempt. In cases where writs, notices, citations, or other process can not be served as aforesaid in this state, the probate court may, in cases where it may be necessary, order the service thereof to be made by publication in some newspaper in this state in such manner as the court may direct, and thereupon the same proceedings may be had as if such writs or other process had been served as aforesaid in this state. Nothing contained in this section shall limit or take away the power of the probate court or judge thereof to give notice or cause the same to be given by publication in the various cases provided by law."

The construction which the appellants would place on that section is shown by the following taken from their brief:

"It will be seen from the foregoing that the method of the service of writs, notices, etc., outside of the state is left entirely to the discretion of the county judge. He may have the notice served by publication when in his judgment 'it may be necessary,' but he is not required to employ this method."

We do not think the section will bear that construction. It contemplates two classes of cases: Those where service in the manner prescribed may be had in this state, and those where it can not. It not only provides how service "may" be made in the latter class of cases, but also how it "may" be made in the former. If, as the appellants claim, the provisions as to service in the latter should be held directory or permissive because of the auxiliary "may," then the provisions as to service in the former

should also be held directory or permissive for the same reason. In other words, that the entire section is merely directory, and in any probate matter the manner of service of process, original or otherwise, "is left entirely to the discretion of the county judge." That it was not the intention of the legislature to leave the manner of service of process in any such state of uncertainty seems too clear to admit of argument. The section should be read and understood, we think, precisely as though the legislature had used the term shall instead of may, and should be held to be no less mandatory. The section, thus construed, does not authorize service to be made outside the state in any other manner than by publication in some newspaper within the state. It is unnecessary to determine whether service might have been made in this case in pursuance of section 81 of the code, which provides for personal service without the state in cases where service may be had by publication, because it is admitted that no affidavit for service by publication was filed. Valid service in pursuance of such section can only be made after filing such affidavit. *Atkins v. Atkins,* 9 Neb. 191; *McGavoc v. Pollack,* 13 Neb. 535; *Rowe v. Griffiths,* 57 Neb. 488; *Albers v. Kozeluh,* 68 Neb. 522. Personal service outside the state, at best, is only a form of constructive service. *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897. That the requirements of a statute authorizing constructive service must be complied with in every material respect is elementary. Works, Courts and their Jurisdiction, p. 266, sec. 38; Alderson, Judicial Writs and Process, p. 313, sec. 142. That the service made by Mr. Kohout was not a substantial compliance with the provisions of the statute requiring service by publication in some newspaper is obvious, and was therefore ineffective. In *Hughes v. Housel,* 33 Neb. 703, the court say: "When the record of a cause, in which a judgment is rendered against a minor, discloses that the mode pointed out by the statute for obtaining jurisdiction had not been followed, the judgment is void on its face." In this case the

mode pointed out by the statute was wholly disregarded, and one not recognized adopted. It is not therefore a case of defective service, but of no service, and the proceedings predicated thereon are not voidable, but absolutely void, so far as affects the rights of the children of Albert H. Boden.

It is next contended that the county court acquired jurisdiction by the appointment of a guardian *ad litem* for the appellees, and the filing of an answer by him in their behalf. There are authorities which support this contention, but we think the better considered cases are against it. *New York Life Ins. Co. v. Bangs*, 103 U. S. 435; *Roy v. Rowe*, 90 Ind. 54; *Chambers v. Jones*, 72 Ill. 275; *Good v. Norley*, 28 Ia. 188; *Frazier & Tulloss v. Pankey*, 1 Swan (Tenn.), 75.

The appellants next insist that, even were the county court without jurisdiction to adjust the alleged advancements, it was within the jurisdiction of the district court to adjust them in the partition suit. There is no doubt that the district court, in a proper case, may adjust advancements in a suit for the partition of land. *Schick v. Whitcomb*, 68 Neb. 784.

But, while the three notes are frequently referred to in the argument as advancements, there is no competent evidence in the record that they or any of them were in fact such. In order that a gift or grant shall be deemed an advancement, it must be expressed in the gift or grant to be so made, charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. Section 34, chapter 23, Compiled Statutes (Annotated Statutes, 4934). That section by implication excludes parol evidence of an advancement. *Pomeroy v. Pomeroy*, 93 Wis. 262; *Bulkeley v. Noble*, 2 Pick. (Mass.) 337; *Bullard v. Bullard*, 5 Pick. (Mass.) 527; *Barton v. Rice*, 22 Pick. (Mass.) 508. The evidence relied upon in this case as showing that the notes, or any of them, were intended as advancements is exclusively parol, and, as we have seen, wholly incompetent for that purpose.

The alleged advancements then were, at best, no more than mere debts due the estate from the estate of the deceased father of the appellees. There is no doubt that in a proper case debts due the estate from the distributee, or the party from whom he claims by right of representation, may be deducted from his share of the estate. *Bowen v. Evans,* 70 Ia. 368; *Blackler v. Boott,* 114 Mass. 24; *Earnest v. Earnest,* 5 Rawle (Pa.), 213; *Girard Life Ins Co. v. Wilson,* 57 Pa. St. 182; *Snyder v. Warbasse,* 11 N. J. Eq. 463. The English courts hold that this rule applies even to debts barred by the statute of limitations, and that view has been adopted by the courts of some of our own states. But we think the better doctrine is that it does not apply to such debts. As was said in *Holt v. Libby,* 80 Me. 329:

"In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of testators. In many other instances the advances are intended as benefactions and gifts, conditioned on some unforeseen circumstance arising to make it expedient to regard them as debts." See, also, *Wadleigh v. Jordan.* 74 Me. 483; *Allen v. Edwards,* 136 Mass. 138; *Reed v. Marshall,* 90 Pa. St. 345; *Milne's Appeal,* 99 Pa. St. 483.

The note of $250 was due January 1, 1890, and was barred long before the death of either the payee or payor. The other two notes, as we have seen, are alleged to have been given on the 7th day of December, 1894, by the intestate in discharge of a certain debt, which his son Albert, father of the appellees, owed to a third party. The evidence as to that transaction is exclusively parol, and is to the effect it was agreed between the father and son that, in case the latter failed to repay the amount during the lifetime of the intestate, it should be deducted from his share of the estate. This evidence shows that immediately upon the giving of such notes, the father of the appellees became indebted to the intestate in the amount of the debt thus discharged, and the right of action accrued thereon that instant. The stipulation that such indebtedness should be deducted from the debtor's share of the intes-

tate's estate would not prevent the running of the statute, nor change the debt into an advancement. It is clear, therefore, that the entire indebtedness sought to be charged against the appellees was barred by the statute of limitations, and the court properly refused to enforce it against their share of the estate.

What has been said disposes of this appeal; but it may not be out of place to call attention to a matter not necessary to a decision. On the trial the gentleman who had been appointed guardian *ad litem* in the county court testified that the hearing on the petition to open up the estate and charge the advancements was set for one o'clock of a certain date; that he appeared in the county court at 1:30 o'clock of such date, and was informed by the county judge that the hearing on the petition had been closed; he then called the attention of the county judge to the answer which he had previously filed on behalf of the minors, and informed him that he did not think the petitioners were entitled to the relief asked; whereupon the county judge remarked that he examined into the matter, and was satisfied that the relief prayed should be granted. The foregoing shows to what extent the minors were represented in the county court. It also shows, we think, not only unseemly haste on the part of the county judge in the disposition of an important matter, but that both he and the learned gentleman who acted as guardian *ad litem* fell into a common error, namely, that the appointment of a guardian *ad litem* is a mere matter of form, and his duties purely perfunctory. Such is by no means the case. He should prepare and conduct the defense of his wards with as much care as though acting under a retainer. Any lower standard finds no justification either in law or the ethics of the profession.

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

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

EDWARD BROWN ET AL. V. N. S. BROWN ET AL.

FILED FEBRUARY 17, 1904. No. 13,316.

1. **Wills: CHILD OMITTED: EVIDENCE: BURDEN OF PROOF.** Section 149, chapter 23, Compiled Statutes, provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section." *Held* (1) That parol evidence is admissible to show whether such omission was intentional; (2) That the burden of proof is on the pretermitted child or grandchild to show that the omission was unintentional.

2. **Trial: NEW PARTIES.** Section 50*a* of the code, which provides for intervention before trial, does not curtail the power of a court to bring other parties before it, when satisfied that their presence is necessary to a proper determination of the cause.

3. **Harmless Error:** An erroneous ruling overruling a demurrer is error without prejudice, where the pleading assailed is afterwards amended, and the cause submitted and determined on the amended pleading.

4. **Trial: AMENDMENT.** When necessary to a proper determination of the cause, it is not error to permit an amendment to a pleading after trial, and reopen the case for a trial of the issues tendered by such amendment.

5. **Findings: EVIDENCE.** Evidence examined, and *held* insufficient to sustain the findings of the trial court.

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

Hainer & Smith, for plaintiffs in error.

J. H. Edmondson, M. F. Stanley and *O. A. Abbott, contra.*

ALBERT, C.

On the 18th day of February, 1901, an instrument purporting to be the last will and testament of Henry S. Brown, deceased, was admitted to probate in the county court of Hamilton county. The testator was the father of 13 children, ten of whom survived him. Three of his sons, George A., Hamilton J. and Albert H., died before the execution of the will. The first left four children, namely, Carrie, Nellie, Ethel and George; the second left three, Jennie, Ettie and Charles; the third left two, George and Mabel. The will, after making provision for the payment of the debts of the testator and for the support of the surviving widow, contains the following provisions:

"I give and bequeath one hundred dollars ($100) each to the following, my grandchildren, to wit, Carrie Brown, Nellie Brown, Ethel Brown and George Brown, and being children of my deceased son, George W. Brown; and to Jennie Brown and Ettie Brown, being children of my deceased son, Hamilton J. Brown; and being in the aggregate to my said six grandchildren the sum of six hundred dollars ($600). * * * After the payment of all my just debts, and the payment of said legacies to my said wife and grandchildren, and the setting off to my said wife of said real estate hereinbefore specifically mentioned, I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, of whatsoever it may consist and wheresoever situated, to such of the children of my own body begotten as shall survive me. Such surviving children to share the said residue of my estate share and share alike."

After the final report of the administrator with the will annexed had been filed, and before a hearing thereon, George and Mabel Brown, children of the deceased son, Albert H. Brown, by their next friend, filed a petition in the county court alleging, among other things, that "neither they nor their deceased father were mentioned

by name in said will," but, "that they were included in the general designation of 'children of my own body begotten.'" The prayer is as follows:

"Wherefore your petitioners pray that the court construe and declare the true meaning and intent of said testator, and that your petitioners may be adjudged and decreed to be included under the words 'children of my own body begotten' and entitled to an undivided one-eleventh (1-11) part of the estate of said Henry S. Brown, deceased, as residuary devisees, subject to the other provisions in said will contained, and, in the event the court should determine that your petitioners were not included, or intended to be included, under the words, 'children of my own body begotten,' that they may be adjudged and decreed to be entitled to an undivided one-thirteenth (1-13) part of the entire estate of the said Henry S. Brown, deceased, subject only to the dower and homestead rights of the widow of the testator, Angelina Brown."

The court found against the petitioners, and dismissed their petition; an appeal was taken to the district court. In the meantime, on the 8th day of January, 1902, five children of the testator commenced a suit in the district court against the other five for a partition of the real estate of which the testator died seized, which proceeded to a final decree confirming the respective shares of the parties to that suit to such real estate. There were other parties to the suit, but it is unnecessary to mention them. A sale had been ordered, and notice thereof published. On March 22, 1902, and about two hours before the time fixed for the partition sale, George and Mabel Brown, children of the deceased son, Albert H. Brown, and petitioners in the proceeding brought in the county court for a construction of the will, filed a petition of intervention in the partition suit, which, save in some minor details not necessary to notice at this time, was substantially the same as that filed by them in the proceeding for a construction of the will. The plaintiffs and defendants

in the partition suit joined in a motion to strike the petition of intervention from the files, for the reason that the application for intervention was too late, which motion was overruled. The plaintiffs and defendants then joined in a demurrer to the petition of intervention, which was also overruled. The plaintiffs and defendants then filed an answer to the petition of intervention, in which, after making a general denial, they set out the proceedings had for the probate of the will, insisting that, as no proceedings had been had or instituted to reverse, vacate or modify the decree admitting the will to probate, the questions raised by the petition of intervention were *res judicata*. The interveners filed a reply which amounts to a general denial. In the meantime the referees had made a sale of the lands, and on the 8th day of May, 1902, on the motion of all the parties, including the interveners, the sale was confirmed, and the referees were ordered to distribute the proceeds, except the sum of $2,000, which they were directed to hold to await the final decision of the court on the matters in litigation between the interveners and the other parties to the suit. Afterwards four of the plaintiffs, children of the testator, in open court withdrew all opposition to a decree in favor of the interveners, and asked the court to direct the payment to the interveners, out of the amount retained in the hands of the referees, of such portion thereof as should be deducted proportionately from the shares of the plaintiffs joining in such request, and the court entered an order in accordance with their request. Afterwards the appeal from the county court in the proceeding to construe the will and the suit between the interveners and the other parties to the partition suit having been consolidated, the issues in both were tried on the same evidence. The court held against the interveners on their contention as to the construction of the will, but held further that they had been unintentionally omitted from the will by accident or mistake, and were therefore entitled to a share of the estate by virtue of the provisions of section 149, chapter

23, Compiled Statutes (Annotated Statutes, 5014), relating to the omission of children or the issue of any deceased child from a will. Thereupon the interveners, over the objections of their opponents, were given leave to amend their petition of intervention in such a way as to make the allegation, "neither they nor their deceased father were mentioned by name in said will," read, "neither they nor their deceased father were mentioned by name in said will, but these petitioners were omitted therefrom by mistake or accident, unless they were included in the general designation of 'children of my own body begotten.'" It is unnecessary to go into details as to what followed the amendment. Eventually the parties were permitted to introduce evidence on the issues tendered by such amendment, and the court found in favor of the interveners, and entered a decree directing that the proportionate share should be paid from the proceeds of the sale retained by the referees. The defendants bring the record here for review on error.

An examination of section 149, supra, will dispose of some of the questions raised in this case; it is as follows:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section."

One question arising under this section is, whether parol evidence is admissible to show whether the omission was intentional? The decisions of other courts, based on statutes of a similar character, are in conflict. *Wilson v. Foskct,* 6 Met. (Mass.) 400, is a leading case in the affirmative. This case is reported and annotated in 39 Am. Dec. 736. To the same effect are the following: *Loricux v. Keller,* 5 Ia. 196; *Stebbins v. Stebbins,* 94 Mich. 304, 54 N. W. 159; *Moon v. Estate of Evans,* 69 Wis. 667, 35 N. W. 20. In the last case, the doctrine appears to

have been applied without question. Such evidence is held inadmissible in the following cases: *Estate of Garraud,* 35 Cal. 336; *In re Estate of Stevens,* 83 Cal. 322, 17 Am. St. Rep. 252; *Bradley v. Bradley,* 24 Mo. 311; *Pounds v. Dale,* 48 Mo. 270; *Chace v. Chace,* 6 R. I. 407. It is not easy to reconcile the doctrine of either line of authorities with the rule which requires the courts to give effect to the intentions of the testator because, in either case, a finding that the omission of a child or grandchild from the will was unintentional, is equivalent to a finding that the will does not reflect the intentions of the testator. When such fact is once established, what his intentions actually were becomes a matter of conjecture, because, had he made provision in the will for the pretermitted child, such provision of necessity would have resulted in a modification of the provisions made for the objects of his bounty Just how he would have modified the other bequests or devises to make provision for such child can rarely, if ever, be ascertained with certainty. However that may be, we are disposed to follow the cases holding that parol evidence is admissible to show whether the omission was intentional. In addition to the reasons given in cases supporting that doctrine, we find an additional reason in the language of our section 149, and the section immediately preceding it. Section 148 provides:

"When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, * * * *unless it shall be apparent from the will* that it was the intention of the testator that no provision should be made for such child."

The foregoing provision shows that the lawmakers worded the section under consideration advisedly, and with a view to express their meaning fully and clearly. If they saw the importance of limiting the evidence of the intentions of the testator in regard to posthumous children to the will itself, it is not at all likely that in the next section they would have left it a matter of specula-

tion, whether such proof should be limited to the instrument itself, or might be supplied by parol. We are satisfied that whether the omission was intentional or unintentional is a question of fact, which may be established by parol testimony.

Another question which has arisen under statutes similar to ours is, whether the burden of proof is upon the pretermitted child or grandchild to show that he was unintentionally omitted from the will, or whether it is upon those claiming that his omission was intentional. The Massachusetts statute, for present purposes, may be said to be substantially the same as our section 149, save that, instead of the clause, "and it shall appear that such omission was not intentional, but was made by mistake or accident," the Massachusetts statute reads, "unless it shall appear that such omission was intentional and not occasioned by mistake or accident." In *Ramsdill v. Wentworth,* 106 Mass. 320, it was held that the clear inference from the use of the words, "unless it appears," etc., is that the burden of proof is on those claiming that the omission of the child from the will was intentional. The difference between the Massachusetts statute and our own is important on the question of the burden of proof. There, the child or grandchild omitted from the will receives a distributive share, *unless it appear that the omission was intentional, and not occasioned by mistake or accident;* here, he receives such share, *if it appear that his omission from the will was not intentional, but was made by mistake or accident.* It seems to us that, under our statute, the inference that the burden of proof is on the pretermitted child is as clear from the words, "and it shall appear that such omission was not intentional, but was made by mistake or accident," as that drawn by the court in *Ramsdill v. Wentworth, supra,* from the words, "unless it appears," etc. Under section 149, a child omitted from the will must show two things: First, that he was omitted therefrom; second, that such omission was not intentional. It is only when he has shown both of those facts that he

is entitled to a share of the estate. The omission to provide for the child in the will, though unintentional, furnishes no ground for objecting to the probate of the will, but the remedy is after probate and by construction. *Doane v. Lake,* 32 Me. 268; *Schneider v. Koester,* 54 Mo. 500; *Pearson v. Pearson,* 46 Cal. 609. Hence, to hold that the burden of proof is on the parties claiming the omission was intentional, would be to hold, in effect, that, after the will has been admitted to probate as the solemn declaration of the testator's intentions as to the disposition of his property and those whom he had selected as proper objects of his bounty, it fails, *prima facie,* to express such intentions. It may be said that it is to be presumed that a testator would not intentionally fail to provide for a child or grandchild. If there is the slightest presumption of that kind, it is far weaker than the presumption that one, competent to make a will and to understand its contents, would forget or overlook one of his children or grandchildren. To fail to make provision for a child or grandchild in a will is a common occurrence; to forget or overlook them, under ordinary circumstances, is rare. In our opinion, the burden of proof was upon the interveners to show that their omission from the will was unintentional, and the result of accident or mistake. In reaching this conclusion, we have not overlooked *Stebbins v. Stebbins, supra.* The decision in that case is based on a statute worded like our own. The majority opinion merely holds that the evidence was sufficient to warrant the submission of the question whether the omission was intentional to the jury, and does not discuss the question of the burden of proof. In an able dissenting opinion, by Montgomery, J., concurred in by McGrath, C. J., that question is discussed at length, and the conclusion reached that the burden was on the party claiming that the omission was unintentional. On the facts stated, the majority opinion is not necessarily in conflict with the conclusion reached by the minority on that question. Hence, the dissenting opinion may be regarded as authority for the con-

struction we have placed on the section under consideration, and, so far as our research has extended, is the only attempt at a judicial interpretation of the language of that section.

Some of the questions presented by the record require more specific attention, and we shall now proceed to consider them. It is contended that the court erred in permitting intervention after a decree for a partition of the lands had been entered. This contention is based on section 50a of the code, which provides that "any person who has or claims an interest in the matter in litigation, * * * may become a party to an action between any other persons, * * * either before or after issue has been joined in the action, and before the trial commences." But, however that section may affect the right of a party to intervene, we are satisfied that it was not intended, and should not be permitted, to require a court to pursue an erroneous theory to a worthless decree, nor to curtail in any degree its power to do complete justice, so long as it retains jurisdiction of the cause and the parties. See section 46 of the code. The present case will illustrate our meaning. It is a suit in equity in which the children of the testator claim title in fee to the lands to the exclusion of all other persons. Proceeding on the theory that they were the exclusive owners in fee, the court entered a decree and directed a sale. It was then brought to the attention of the court that the interveners claimed an undivided interest in the estate. That such claim was brought to the attention of the court by their petition of intervention is wholly immaterial, so long as the court was satisfied that there might be some basis for the claim. Will it be claimed that the court was bound to disregard such claim, because it was not brought to its attention before decree, and to proceed to a sale of a doubtful title? To those who had actual knowledge of the interveners' claims, such claims, undetermined, would be more than likely to prevent a sale; a sale to one not having such notice would amount to a judicial fraud. The court still retained jurisdiction of

the cause and the parties, and it seems to us it was not only its right, but its duty, to hear and determine the claims of the interveners, although not presented until after decree. It is true the sale was made under the decree as it stood when the petition in intervention was filed, but that appears to have been with the consent of the interveners who joined in the motion to confirm, and who asked only a share of the proceeds. Although our attention has been called to no case directly in point, we are all of the opinion that, under the peculiar facts disclosed by the record, it was not error to permit the interveners to come into the case after decree.

It is argued, at some length, that the court erred in overruling the demurrer to the petition of intervention. As such petition stood when the demurrer was overruled, it was based on the theory that the interveners, who it will be remembered are grandchildren of the testator, were included within the term "children" in the residuary clause of the will. That theory, to our minds, is untenable. It is a familiar rule of construction that, ordinarily, words should be taken in the sense in which they are commonly used. It is a matter of common knowledge that, in ordinary conversation and the affairs of life, the word "child" is commonly used to designate a son or daughter, a male or female descendant of the first degree. Such is Webster's definition of the term, and such is its primary signification according to all standard lexicons. It is safe to say that, standing alone, it is never understood to mean grandchildren. Bouvier says: "The term children does not, ordinarily and properly speaking, include grandchildren or issue generally; yet sometimes that meaning is affixed to it in cases of necessity." *In re Estate of Chapoton,* 104 Mich. 11, 61 N. W. 892, the court, referring to the language of Bouvier said:

"We shall find this statement of Bouvier confirmed in many cases involving wills, although cases are not rare where the term 'children' has been held coextensive with 'issue' or 'descendants.' Such holdings are not put upon the

ground that the word 'children' has a technical or peculiar meaning in the law, but because such meaning is necessary to give effect to the instrument, or because of an evident intent upon the part of a testator. It is in deference to the rule that the intent is to be sought after and given effect in the construction of wills, which may be done to the extent of holding illegitimate children to be included in the term, 'children,' though the law ordinarily excludes them. See Bouvier, Dictionary, title Child, subdivision 3; *In re Curry's Estate,* 39 Cal. 529; 4 Kent, Commentaries, 345. In *Reeves v. Brymer,* 4 Ves. (Eng.) 692, cited by counsel, the court said that 'children' may mean 'grandchildren,' where there can be no other construction, but not otherwise. *Pride v. Fooks,* 3 De Gex & J. (Eng.) *252."

It is obvious, from the portions of the will heretofore set out, that no strained or unusual meaning of the word "children" is required to give effect to the instrument, or to carry out the intention of the testator. It is clear, therefore, that the interveners were not included in the residuary clause of the will, and that their original petition of intervention, based on the theory that they were thus included, failed to state a cause of action. But as the court found against that theory, and it was afterwards abandoned by the amendment to the petition of intervention, the overruling of the demurrer was error without prejudice.

It is next contended that the court erred in permitting the amendment to the petition to the effect that the interveners had been omitted from the will by accident or mistake. The amendment was made after the case had been tried, and after the defendants had interposed proper and timely objections to the petition of intervention, and to the introduction of evidence which would tend to support the issue tendered by the amendment. It is clear, therefore, that the amendment was not warranted as an amendment to conform to the proof, because it is a familiar rule that an amendment of that character is permissible only

where the evidence tending to sustain the amendment has been received without objection. But, after the amendment was made, the case was opened, and the parties were permitted to introduce evidence, and were given a hearing on the issue tendered by the amendment. What has been heretofore said on the question of the right of the interveners to come into the case after decree is applicable here. If the evidence taken before the amendment was offered was of such a character as to satisfy the court that it would be unable to convey a clear title by a sale of the lands, without a further investigation of the claims of the interveners, it was eminently proper to permit the amendment, and give all of the parties an opportunity for further investigation and hearing. Such a course, it seems to us, was in the interest of all parties to the suit, and one of which none should be heard to complain, especially when the interest of minors is involved.

Another contention of the defendants is that the finding of the district court, that the omission of the interveners from the will was unintentional, is not sustained by sufficient evidence. The testator was 76 years old. The evidence, on the one hand, tends to show that his memory was greatly impaired; on the other, that it was unusually retentive for a man of his years. There is little evidence bearing directly on what his intentions were with respect to the interveners at the time the will was made. On the part of the interveners, it was shown that, after the will was made, the testator repeatedly stated that he had made provision therein for all his grandchildren; that he had given them $100 each, except one who was an imbecile, to whom he stated he gave nothing because of his mental condition. That particular grandchild is not a party to this suit, and is not of the same parents as the interveners. On the part of the defendants, it was shown that, at the time the will was made, the attention of the testator was specifically called to the omission of the three grandchildren from the will, but, notwithstanding that fact, he executed it without any alteration, and showed by his words

and conduct that he was fully aware of the omission, and that it was intentional; that, after the will was made, he talked over the contents with a witness in the suit, and, in such conversation, the omission was pointed out to him, and he was asked why he had not provided for the other grandchildren, and he gave his reasons for the omission. The evidence further shows that there was some trouble between the testator and the interveners or some member of their family, the exact nature of which is not clearly disclosed. There is also evidence tending to show that the failure of the testator to recognize acquaintances on the street was due, rather to his defective eyesight, than to any impairment of memory.

By the pleadings on file in this suit, both the interveners and the defendants are committed to the theory that the will was duly admitted to probate. The decree of the county court admitting the will to probate is conclusive on all parties as to its due execution, and all questions affecting the competency of the testator to make a will. 2 Black, Judgments (2d ed.), sec. 635. Hence, it stands as one of the established facts in this case that the testator, at the time the will was made, was not lacking in testamentary capacity. In other words, it is conclusively established by the probate of the will that, at the time it was made, the testator possessed sufficient mind to understand, without prompting, the business about which he was engaged, the kind and extent of the property to be willed, the persons who were the natural objects of his bounty, and the manner in which he desired the disposition to take effect, because that is all included in the findings on which the decree admitting the will to probate is based. Schouler, Wills (3d ed.), sec. 68. In view of the fact that the will had been admitted to probate, and the testamentary capacity of the testator thereby set at rest, we think the evidence is insufficient to sustain a finding that the omission of the interveners was unintentional. As stated in a former part of this opinion, the burden of proof was on the interveners. The testimony adduced by them

is not wholly inconsistent with the theory that the omission was intentional. On the other hand, the testimony adduced by the defendants, at least a portion of it, is of such a character that it must either be rejected, or the omission held to have been intentional. None of the witnesses are discredited; on the contrary, it would seem that each gave the facts as he understood them. Hence, there is no ground for rejecting the testimony showing affirmatively that the testator knew of the omission, and that it was intentional. An examination of the entire evidence satisfies us that the finding of the district court is erroneous.

It is recommended that the decree of the district court be reversed and the cause remanded for further proceedings according to law.

GLANVILLE, C., concurs. FAWCETT, C., not sitting.

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.

JOHN P. SATTLER, ADMINISTRATOR OF THE ESTATE OF EMANUEL LEVERONI, DECEASED, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 17, 1904. No. 13,223.

1. **Common Carrier:** ACTION: CONTRIBUTORY NEGLIGENCE. A fast through train on defendant's road was sidetracked at a small way station to allow another through train to pass. Some fifteen minutes later, plaintiff's intestate left a car of the standing train, in which he was a passenger, and crossed diagonally the main track upon which the other train was approaching, at a time and in such direction that he could see the incoming train. He hurriedly went to a pump some 10 steps from where he crossed the main track, hurriedly procured a drink, and ran back toward his car, attempting to pass in front of the rapidly moving train

on the main track, and was struck by the engine and killed. *Held*, That deceased was guilty of such negligence as to preclude recovery.

2. **Directing Verdict.** When the evidence is not sufficient to warrant a verdict for plaintiff, the court should not submit the case to the jury upon the theory that it is so sufficient. A peremptory instruction for defendant in this case *held* warranted.

3. **Case Approved.** *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, approved and followed.

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

Matthew Gering, for plaintiff in error.

Woolworth & McHugh, contra.

GLANVILLE, C.

This case was before this court under the title *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, where a verdict for the plaintiff herein was set aside. Upon a second trial in the lower court, a verdict was instructed for the defendant company. To reverse the judgment entered thereon, the case is brought here, and, while there are many paragraphs in the petition in error, they are assignments of the same error in varied forms, and the only one that requires consideration is that assigned because of certain peremptory instructions. There is no contention on the part of the plaintiff that the evidence makes a better case this time than before, except as it is claimed that now the evidence establishes the fact that, on other days than the one when the accident occurred, the train on defendant's road, known as number 6, upon which the plaintiff's intestate was a passenger, occasionally took on and discharged passengers at this station. We fail to see any reason in the contention that this fact would change the status of the deceased on the day in question. He was a stranger in the locality, a through passenger from San Francisco to New York on a fast through train, and what may have been

done in regard to receiving passengers on this train, at any other time, has no bearing upon the question of any invitation on the part of the company for him to leave his car on this particular occasion. As we read the evidence, there is no indication of such invitation at this time. This change in the evidence is urged by plaintiff as a reason for holding that the deceased was, at the time of his death, a passenger upon the train within the meaning of section 3, article 1, chapter 72, Compiled Statutes (Annotated Statutes, 10039). We are satisfied with the reasoning and holding of the court upon the former hearing, and do not think there is any change in the evidence which requires any different holding on this question. But, even if we should hold differently, we think the negligence of the deceased was so gross as to be criminal within the meaning of the statute, and that the plaintiff is not entitled to recover under the clearly established facts of the case. The following statement is copied from the previous decision:

"There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alva from the west on schedule time at 2:52 in the afternoon. On its arrival at the station the train went upon a side track to await the arrival and passage of a west-bound train which was then due at that point; its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the side track, Leveroni left his train, crossed over the main track to the depot platform and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump and started on a run for his car, and in crossing the track upon which the west-bound train was approaching the station, was struck by

the approaching train and instantly killed. The eastbound train upon which he was a traveler did not move from the side track until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train."

The holding of the court which was decisive of the case is as follows:

"A through train between Denver and Chicago ran onto a side track at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about 100 feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about 50 feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed. *Held*, That, under the circumstances, he was not 'a passenger being transported over the road,' within the meaning of section 3, article 1, chapter 72, of the Compiled Statutes, and the railroad was not liable for damages on account of his death because of his own negligence."

The above statements of fact are substantially borne out by the evidence in the bill of exceptions now before us, and we note the following in addition. The deceased was a man who had gone from place to place, and from state to state, sufficiently to be familiar with railroad travel. He was a man, as alleged and testified, capable of earning $1,500 per year, and must, therefore, have been of good

intelligence. He was on a through fast train, not stopping at stations generally. His train pulled in on a side track at a very small village, and remained standing there some 15 or 20 minutes before he left the car, and it seems impossible that he did not know the reason for the stop. He then started quite diagonally across the main track and, in doing so, could easily see the incoming train from the east. He hurried to the pump, hurriedly drank, and started back to his car, attempting to cross the main track on a run, so closely in front of the incoming train that he was struck and killed. The distances and his hurried movements show that the train was in plain view when he first crossed the track. Common experience teaches us that the few passengers from his train, and the bystanders that were on the platform at such a time, would be so watching the coming train as to attract attention thereto. The weight of testimony introduced by plaintiff is that the train was coming at the rate of some 45 miles an hour, but some put it at 60. The weight of such testimony shows that the whistle was sounded something like a quarter of a mile away, but one witness says from 40 to 60 rods away. Plaintiff's diagram shows that it was not more than 10 or 12 steps from the pump to where deceased was struck. His deduction from the evidence as stated in his brief is:

"After the train had been on the side track nearly 15 minutes, the deceased crossed the track to a pump upon the company's ground to get a drink of water; he walked in a northeasterly direction from his car, where he could see for more than 2 miles east along the track. No train was in sight. While drinking, he heard a whistle, and, thinking it was his own train, instantly dropped the cup and ran in a southwesterly direction diagonally across the track, without turning his head. When on the south rail, he was struck and killed. The distance from the pump to the place where he was struck was about 32 feet."

Considerable attempt was made to have witnesses give their estimate of time in seconds as to the sequence of events when the accident occurred, but *movements* furnish

a much more reliable criterion than such estimates. Assuming that the train was running 60 miles an hour, and that the whistle was sounded but 60 rods away, which is all the testimony will warrant, more than 11 seconds would then be required for the train to reach the station. This would be time enough for one to run three times the distance from the pump to where deceased was struck. Again, if the deceased went, as testified, from the track to the pump, and had not time to drink before he ran back, and was struck, it is impossible that the train was not in sight when he first crossed the track. His movements clearly show, we think, that he must have known, and did know of the coming train, and that he miscalculated his ability to cross before it.

The language of the Pennsylvania court in the case of *Hess v. Williamsport & N. B. R. Co.*, 181 Pa. St. 492, 37 Atl. 568, may be quoted as apt and appropriate:

"The fires under the boilers were doing their work; the stroke of the lever was kept up; the exhaust of the engine did not cease; the rumbling of the wheels on the rails was not muffled; the undeniable fact is that there were sight and sound of this engine for half a mile before it reached the crossing. We say undeniable, because to deny it is out of accord with the proof and our observation and experience. We must, in the administration of justice, adopt that as truth which our ordinary senses demonstrate to be true. If this unfortunate man could see and hear, which is not questioned, then, before he drove on the track he saw and heard this coming engine and, miscalculating the speed of his own team as compared with that of the locomotive, met his death; the law calls this contributory negligence, and prohibits a recovery. 'One who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger.' *Myers v. B. & O. R. Co.*, 150 Pa. St. 386."

Complaint is made because courts sometimes take such cases from juries, urging that if juries could find one way, it can not be said that reasonable minds might not differ from the necessity of finding the other. It must be remembered that when a court submits a case to the jury upon such evidence as this, it, in effect, instructs the jury, as a matter of law, that the evidence is sufficient to support a verdict for plaintiff. If it is not, the court should refuse to submit the case to the jury upon the theory that it is so sufficient. To instruct a verdict either way in a proper case is not the invasion of the province of a jury, but to refuse to do so is the denial of a right inherent in the right of trial by jury, and unfair to the jury itself.

We are clearly of the opinion that the trial court did right in taking this case from the jury. This disposes of the only error complained of, and we recommend that the judgment be affirmed.

ALBERT, C., concurs. FAWCETT, C., not sitting.

By the Court: The conclusions announced in the foregoing opinion are approved and the judgment of the trial court is

AFFIRMED.

THE VILLAGE OF GRANT V. ISAAC W. SHERRILL.

FILED FEBRUARY 17, 1904. No. 13,399.

Municipal Corporations: POWERS. Section 69, chapter 12 of the laws of 1887, does not authorize or contemplate the issue of negotiable bonds by cities and villages to aid private parties in the construction of a system of waterworks for such city or village.

ERROR to the district court for Perkins county: CHARLES L. GUTTERSON, JUDGE. *Reversed and dismissed.*

B. F. Hastings, for plaintiff in error.

Hall & Marlay and *W. P. Hall, contra.*

DUFFIE, C.

March 6, 1889, an ordinance was adopted by the village authorities of the village of Grant calling a special election to be held on the 30th of March, 1889, for the purpose of voting on a proposition to issue bonds to the amount of $4,000, with interest coupons attached, for the purpose of aiding in the construction of a system of waterworks in said village. The election was called, and the proposition received a majority vote of the electors. May 18, 1889, the bonds were duly executed, and were registered in the office of the auditor of state on the 22d day of May, and were duly certified by G. L. Laws, secretary of state, and T. H. Benton, auditor of public accounts. This suit was brought by the defendant in error to recover upon 16 interest coupons, of $30 each, attached to said bonds.

It is conceded that defendant in error purchased the bonds before maturity, paying value therefor, without knowledge or notice of any defense thereto, except such as the law itself may impose. The district court gave judgment for the defendant in error, and the village has brought the record to this court for review. We do not deem it necessary to discuss any question raised as to the regularity of the proceedings surrounding the issue of the bonds. The rule has become of almost universal application that a *bona fide* purchaser may rely upon recitals, such as the bonds in this instance contain, against any defense of irregularity in their issue. But the question of power to issue a bond is one always open as a defense to its collection and, as we think the question of power in the village to issue the bonds in question will dispose of this case, we will confine ourselves to that particular question. The power claimed on the part of the village is found in subdivision 15, section 69, chapter 12 of the laws of 1887, and is as follows:

"To establish, alter and change the channels of water courses, and to wall them and cover them over, to establish, make and regulate wells, cisterns, windmills, aque-

ducts, and reservoirs of water and to provide for filling the same. Second: To make contracts with and authorize any person, company, or corporation to erect and maintain a system of waterworks and water supply, and to give such contractors the exclusive privilege for a term not exceeding 25 years to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and the residents thereof, and under such regulations as to price, supply and rent of water meters, as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village, or people. The right to supervise and control such corporation, as above provided, shall not be waived or set aside. Third: To provide for the purchase of steam engines, and for a supply of water for the purpose of fire protection and public use, and for the use of the inhabitants of such cities and villages, by the purchase, erection, or construction of a system of waterworks, and by maintaining the same; *Provided,* That all contracts for the erection or construction of any such work, or any part thereof, shall be let to the lowest responsible bidder therefor, upon not less than 20 days' public notice of the terms and conditions upon which the contract is to be let having been given by publication in a newspaper published in said city or village, and if no newspaper is published therein, then in some newspaper published in the county; *Provided, further,* That no member of the city council or board of trustees, nor the mayor, shall be directly or indirectly interested in such contract, and in all cases the council or board of trustees, as the case may be, shall have the right to reject any and all bids that may not be satisfactory to them. Such cities or villages may borrow money or issue bonds for the purpose, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, for the purchase of steam engines and for the purchase, erection or construction, and maintenance of such waterworks, or to pay for water furnished such city or village under contract, to an amount

not exceeding 7 mills on the dollar in any one year on all the property within such city or village as shown and valued upon the assessment rolls of the assessor of the proper precinct or township, in addition to the sum authorized to be levied under subdivision one of this section, and all taxes raised under this clause shall be retained in a fund known as 'water fund.'"

The authorities all agree that legislative authority is necessary to authorize counties, townships and school districts to borrow money and issue negotiable bonds, or to issue negotiable bonds in aid of any public enterprise. Such bodies exist for purposes of local and police regulation and, having the power to levy taxes to defray all public charges created, they have no implied power to make commercial paper of any kind, unless it is clearly implied from some express power which can not be fairly exercised without it. *Jury v. Britton,* 15 Wall. (U. S.) 566. It has been said that it is one thing to have the power to incur a debt and to give proper vouchers therefor, and a totally different thing to have the power of issuing obligations unimpeachable in the hands of third persons. *Claiborne County v. Brooks,* 111 U. S. 400. Thus the power to build a courthouse does not include the power to issue municipal bonds in payment therefor. *Hill v. Memphis,* 134 U. S. 198. In *Brinkworth v. Grable,* 45 Neb. 647, it was said:

"It is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so."

The question then is, does the statute above quoted authorize cities and villages to issue negotiable bonds to aid private parties in the construction of a system of waterworks for the municipality making the donation? The law, while clumsily drawn, is clear, we think, in providing two methods by which the municipality may secure the benefit of a water supply. First: "To make contracts with and authorize any person, company or corporation to

erect and maintain a system of waterworks and water supply, and to give such contractors the exclusive privilege for a term not exceeding 25 years to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and the residents thereof, and under such regulations as to price, supply and rent of water meters, as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village or people." Second: "By providing for the purchase of steam engines, and for a supply of water for the purpose of fire protection and public use, and for the use of the inhabitants of such cities and villages, by the purchase, erection or construction of a system of waterworks, and by maintaining the same." We have quoted the language of the statute relating to the two methods which the municipality may adopt. If the second method is adopted, the contract must be let to the lowest responsible bidder. Public notice must be given, and no member of the city council or board of trustees, nor the mayor, shall be directly or indirectly interested in the contract, and the municipality may borrow money or issue bonds for the purpose. If the first plan is pursued, then the municipality is authorized to levy and collect a general tax for the purchase of steam engines, or to pay for water furnished to an amount not exceeding 7 mills on the dollar in addition to the sum authorized to be levied for other purposes. Or, if a system of waterworks already constructed is purchased by the municipality, then bonds may be issued in payment therefor. Nowhere in the law do we find express or implied authority, authorizing a donation to be made to private parties, who may seek a franchise from the city for the use of the streets and alleys in which to lay mains, and to furnish water to the municipality and its citizens; and, even if such authority were found in the statute, we doubt very much the power of the legislature to authorize a donation for such a purpose. Under our constitution, donations can be made by municipal authorities only to aid in

works of internal improvement, and a system of water-works designed to supply municipalities and their citizens with water facilities is not, we think, an internal improvement within the meaning of that instrument. The bonds in question contain the following recital: "This bond is one of a series of eight bonds of $500 each issued for the purpose of aiding in the construction of a system of water-works for the use of said village under and by authority of chapter 14, Compiled Statutes of Nebraska, 1887, entitled 'Cities of the Second Class and Villages,' section 69." The bonds therefore bear upon their face ample evidence of their own invaldity, and no one can claim to be a *bona fide* purchaser of a bond which carries on its face indubitable evidence of its unlawful character.

We recommend a reversal of the judgment of the district court and a dismissal of the action.

FAWCETT, ALBERT and GLANVILLE, CC., concur.

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

REVERSED.

GEORGE W. MARSH, SECRETARY OF STATE, ET AL. V. ORVILLE M. STONEBRAKER.

FILED FEBRUARY 17, 1904. No. 13,498.

1. **Statutes:** TITLE TO. Chapter 124 of the laws of 1903 does not, in terms, vest title and ownership of the statutes therein mentioned in the officers to whom said statutes are to be delivered by the secretary of state.

2. **Act of Legislature:** CONSTITUTIONALITY. An act of the legislature will not be declared unconstitutional and void, on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state.

3. ———: ———: PUBLICATION OF STATUTES. The legislature is not prohibited by any provision of the constitution from granting to

a person the right to publish the statutes of this state, and making such statutes *prima facie* evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed and dismissed.*

F. N. Prout, Attorney General, and *Norris Brown,* for plaintiffs in error.

Frank M. Hall and *C. C. Marlay, contra.*

DUFFIE, C.

At its last session the legislature passed an act (Laws, 1903, ch. 124) in the following words:

"Be it Enacted by the Legislature of the State of Nebraska:

"Sec. 1. That J. E. Cobbey is authorized to prepare a statute of the state of Nebraska to be prepared and published without cost to the state.

"Sec. 2. Said statute shall contain the constitutions of the state and such other preliminary matter as has hitherto been published in the statutes and such matter as is usually published in first class statutes. All the public laws now in force or that shall be passed by this legislature arranged in chapters with proper headings and titles, the whole thoroughly indexed shall be annotated on the same plan as the 'Annotated Code' of 1901 published by him and published in two volumes.

"Sec. 3. The said statute shall be published as soon after the adjournment of this legislature as is practicable with first class work; and five hundred (500) sets of two volumes each shall be immediately delivered to the secretary of state to be distributed by him to members of this legislature and state officers as provided by law. The state shall pay therefor the sum of nine dollars ($9) per set of two volumes each.

"Sec. 4. The said statute shall be received in all the courts of the state as *prima facie* evidence of the law."

September 28, 1903, the defendant in error commenced this action in the district court for Lancaster county alleging, among other things, "that under and in pursuance of said act the said J. E. Cobbey had in preparation said statute; that the same will be completed, printed and published and ready for delivery in a short time and that it is the intention of the said J. E. Cobbey to deliver 500 sets of two volumes each to the secretary of state, and it is the intention of said secretary of state to receive and distribute the same for the state of Nebraska to the members of the legislature of said state and the said officers thereof, in compliance with section 3 of said act, unless restrained by an order of this court from so doing, and that, when said statutes are so by the said J. E. Cobbey delivered to the secretary of state, it is the intention of said auditor to draw his warrant upon the treasurer of the state of Nebraska for the payment of the same for the sum of $4,500, unless restrained by an order of this court from so doing." It is further alleged that "the act is unconstitutional in that section 4, article III of the constitution, fixes the compensation of members of the legislature at the rate of $5 a day during their sitting, and 10 cents for every mile they shall travel in coming to and returning from the place of meeting of the legislature; provided, however, that they shall not receive pay for more than 60 days at any one sitting, nor more than 100 days during the term, and that neither members of the legislature nor employees shall receive any pay or perquisites other than their salary and mileage: That it further infringes section 15, article III of the constitution, which provides that the legislature shall not pass local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunities or franchise whatever, and that the act grants to J. E. Cobbey a special privilege in the matter of publishing the Nebraska statutes." For these reasons an injunction was asked against the plaintiffs in error, enjoining them from receiving and distributing or paying for said statutes. A demurrer to this peti-

tion was overruled by the district court, and, plaintiffs in error having elected to stand upon their demurrer, a perpetual injunction was granted as prayed in the petition; and the case has been brought here on error.

The theory upon which the defendant in error seeks to sustain this action is, that the legislature, in the enactment of this statute and in the appropriation which was made to pay for the books, contemplated and intended that absolute title to them should pass to the members of the general assembly. The appropriation bill contains the following: "To pay for five hundred copies of the statutes for state officers and the present members of the legislature, the members of the next legislature and the counties of the state, $4,500." It is urged in argument that, unless it was intended to give the members of the legislature which passed the act absolute title to the books received by them, it would be unnecessary to provide for the delivery of another copy of the books to the members of the next legislature, and it is insisted that, if title to the books is vested in the members of the legislature by the terms of the act and of the appropriation, it is a perquisite within the meaning of the constitutional provision above referred to. On the other hand, the attorney general insists that title to these statutes does not pass under the act, that it was the purpose and intent of the legislature to provide each of the members with a copy of the statute to be used during their term of office, the better to qualify themselves for the performance of the duties imposed upon them as members of the legislature.

We apprehend that no objection can be taken to furnishing the members of the legislature and other state officers with copies of the general statutes of this state to be used during their terms of office. The executive, judicial and legislative officers must each alike have access to the general laws of the state, to enable them to perform their official duties in an intelligent manner, and it is as necessary that their offices be supplied with these statutes as with office furniture and other supplies. As we understand

from counsel for defendant in error, it is not contended that there is any constitutional objection against the state furnishing the use of these statutes to the members of the general assembly and other state officers, but it is insisted that the members of the legislature have no right to take these statutes from the capitol to their homes, or to have the use of them at any time except when the legislature is in session. With this contention we can not agree. No one but the chief executive can know when a special session of the legislature may be called, and, until the time when a member's successor is elected and qualified, he may be required on any day to resort to the capitol to consider some important interest of the state. During all of his term, he is entitled to the use of the statutes of the state as one of the incidents of the office which he holds, and as a means of informing himself in relation to his duty, when called upon to act officially as a lawmaker for the state. There is nothing in the terms of the act, as we read it, which pretends to vest in the officers furnished with these books an absolute title thereto, or anything more than the use thereof during their term. No party connected with this case is asserting title to these statutes under this act and, until some officer who is to be supplied claims title to the books delivered to him, and neglects and refuses to deliver them to his successor in office, we do not know how the question of title can be tried and determined. We can not in this case more than in any other determine a question in advance of a controversy. That the state has a right to purchase these statutes is not a question open to discussion. That question was before the court in *State v. Wallichs*, 12 Neb. 234, and it was there said:

"Whether this number were reasonable, or prodigal, under all the circumstances that should affect it, is not to be here considered. The legislature saw fit to designate the number 'required by the state,' and that designation is not subject to review. That is a matter with which neither the respondent nor this court has anything whatever to do."

Until the question of title to these books arises in a proper action, and between proper parties, we are not called upon to decide the question, or to give our views in advance of an actual case properly instituted. We can not declare a statute void upon the assumption that some one, at some future time, may use it as a basis for asserting an unjust claim to property delivered to him as a state official, and upon the presumption that the officers of this state will not surrender to the state, or to their successors in office, the property received from the state to enable them to intelligently perform their official duties if the property should, under the law, be surrendered either to the state or to their successors. The objection that this statute is obnoxious to the provision of our constitution against the granting of any special or exclusive privilege is not, in our judgment, well taken. Mr. Cobbey is the only party having these books. If the state wishes to purchase, it must purchase from him. It is true that there is another statute published, and which the state could purchase from another party, but we know of no prohibition resting upon the legislature to determine, for itself, which of these statutes it will buy for the use of the state officers. If this purchase from Mr. Cobbey is granting to him a special or exclusive privilege because he is the only person owning this particular kind of a statute, and the legislature is prohibited from dealing with him on that account, then it must refuse to deal with anyone who is the exclusive possessor of a certain kind of property, however great the need of the state may be for the use of such property. The state having, as we think, an undoubted right to make this purchase, it is not for the courts to interfere or to take any action in the matter. If at some future time, because of a claim of ownership made to these statutes by any officer to whom they may be delivered, the question of title shall arise, that question will be determined; together with the other question argued as to whether, if title does pass to the recipient, it constitutes a perquisite.

Because the decree of the district court prohibits the secretary and auditor of state from carrying into effect a law which, upon its face, is valid, we recommend that its judgment be reversed and the cause dismissed.

LETTON 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 dismissed.

REVERSED.

CITY OF SOUTH OMAHA V. MARY MEEHAN.

FILED FEBRUARY 17, 1904. No. 13,217.

1. **Action to Quiet Title: ADVERSE POSSESSION.** In an equitable suit to quiet title, a municipal corporation being defendant claimed title to the land in controversy by dedication as a public street, but offered no proof of this allegation. The plaintiff showed adverse possession in himself and grantor for more than 10 years prior to the commencement of the action. *Held*, That plaintiff was entitled to a decree.
2. ———: ———. Where one goes upon land under no color of title, but as a mere intruder, he can acquire title by adverse possession only to so much of the land as he actually occupies and uses for the period prescribed by statute.
3. **Evidence.** Evidence examined, and *held* sufficient to sustain a decree for plaintiff to so much of the land as she is shown to have used and occupied.

ERROR to the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Reversed with directions.*

A. H. Murdock, for plaintiff in error.

C. R. Scott and *E. H. Scott, contra.*

KIRKPATRICK, C.

This was an action to quiet title brought by Mary Meehan, defendant in error, against the city of South Omaha,

plaintiff in error. There was judgment for plaintiff in the lower court; this proceeding in error being prosecuted by the city. Plaintiff, in her petition in the lower court, alleged that the property involved in this suit, and which was described fully in the petition, was her absolute property because of adverse possession in herself and her grantors. For answer, the city pleaded its corporate existence as a municipality under the laws of this state; that the property described in plaintiff's petition was the property of the city by dedication as a public highway; that the possession of plaintiff and her grantors was permissive and temporary, and so continued until the passage of an ordinance by the city making the erection of any structure on the public highway a misdemeanor, and the presence of any house or building on the streets and alleys a nuisance; that, since the passage of the ordinance referred to, the plaintiff and her grantors have been guilty of maintaining a nuisance, and could not acquire title under possession. For affirmative relief, the city asked that the premises be awarded to it, and that its absolute title in fee be decreed. The reply filed by plaintiff was, in effect, a general denial.

The facts shown by the evidence may conveniently be stated, so far as necessary, in the consideration of the errors assigned and argued by the city upon which it relies for reversal. The first contention relates to the sufficiency of the evidence to prove all the elements essential, under the decisions of this court, to title by adverse possession, particularly, that plaintiff failed to show that she had held adversely, with the intention of holding it as owner, for 10 years or more.

This action was commenced in May, 1900. Plaintiff went into possession of the premises under an instrument dated in September, 1897. This instrument is, in form, a bill of sale, by which Melissa Buckner, a widow, in consideration of the sum of $85 grants, sells, transfers and delivers to plaintiff "the following described goods, chattels and personal property, to wit: That one and one-half story frame cottage on the west line of 26th street on P

street, and known as the Buckner property, in South Omaha. To have and to hold, all and singular, the said goods, chattels and personal property," etc.

There is sufficient evidence to establish that Mrs. Buckner, named as grantor in the instrument just referred to, built the house in 1886, and from and after that time, and up to the time of the transfer to plaintiff, had lived in the house and on the premises, during which period she maintained an open, continuous, exclusive and adverse possession thereof, claiming the property as her own. There is no conflict in the record as to the claim by plaintiff to the land on which the house stood, during the period of her occupancy after the purchase from Mrs. Buckner.

The contention based on this state of facts seems to be that, as the instrument from Mrs. Buckner to plaintiff only purports to transfer the title to personal property, goods and chattels, plaintiff succeeded only to Mrs. Buckner's rights to the property mentioned in the instrument, and therefore can not tack her own adverse possession to that of Mrs. Buckner. Our examination of the record leads us to the conclusion that there can be no question as to the intent of both parties, plaintiff and Mrs. Buckner, that the former should succeed to all the interest of the latter in the property in controversy. Nor do we see any serious difficulty in suggestion of counsel, that evidence as to the transfer to plaintiff by Mrs. Buckner of her rights to the land in dispute, tends to vary the terms of the bill of sale heretofore referred to. It is to be kept in mind that the claim of plaintiff is not based upon this bill of sale, which was introduced in evidence by defendant city, but rather upon an oral contemporaneous agreement, at the time of the making of the bill of sale, by which plaintiff succeeded to the rights of Mrs. Buckner in the land. We think it is well settled that the right of one person holding land adversely may be transferred to another verbally. *Murray v. Romine,* 60 Neb. 94. And if the testimony in this case is sufficient, and we think it is, to show that such transfer was made, then the possession of plain-

tiff may be tacked to that of Mrs. Buckner to make out her title by prescription. *Lantry v. Wolff*, 49 Neb. 374.

Plaintiff asked to have her title quieted in a strip of land bounded on the west by Railroad Avenue, sometimes called 27th street, on the east by 26th street, on the north by a line which would be made by extending the north line of P street from 26th street to Railroad Avenue, and on the south by a similar line made by extending the center line of P street from 26th street to Railroad Avenue. Counsel for the city contend that there is nothing in the proof to support a decree awarding this definite strip to plaintiff, the argument being that she was not shown to have ever been in the actual posession and use of all of this strip, so bounded. The evidence shows that the portion of the land which was not in actual use was so precipitous and bluffy as to make it unavailable for any purpose whatever, and some cases are cited by counsel for plaintiff to the effect that, where the land is cut up by streams, sloughs or bluffs, it is not practicable or possible for the claimant to be in the actual possession of every part of it, and that such actual possession is not required. *Tremaine v. Weatherby*, 58 Ia. 615.

In the case at bar, however, Mrs. Buckner was a mere intruder, entering upon the land without color of title. The rights of her grantee must, therefore, be tested by the same principles which would be applied to Mrs. Buckner. It is undisputed that all of the land described in the decree was not being actually used or occupied. Under the facts in this record, we can find no principle of law upon which the decree can be sustained as to the portion of the strip which plaintiff did not actually occupy.

"There is a marked distinction," says NORVAL, C. J., in *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, "between a possession acquired under a claim of right or color of title, and where possession of land is taken and held by a mere usurper or intruder. Where a party's occupancy is under a color of title, his possession is regarded as being coextensive with the entire tract described in the instru-

ment under which possession is claimed. On the other hand, where one enters without color of title, his possession is confined to the land actually occupied. It is firmly settled in this state that while color of title is not indispensable to adverse possession, yet, when the occupancy is without color of title, possession is limited to the land actually occupied," citing *Gatling v. Lane,* 17 Neb. 80; *Haywood v. Thomas,* 17 Neb. 237.

The rule announced in the cases cited by counsel for plaintiff, to the effect that actual possession and use of every portion of land claimed adversely is unnecessary to sustain the claim, where the character, situation and topography of the land makes this universal use impossible, applies, we think, only to adverse claimants holding land under some color of title, or under an instrument which defines with sufficient precision the exact boundaries of the land claimed to be occupied adversely. Under the facts in this case, we can see no escape from the application of the principle announced in the *Rickards* case, *supra,* that where the occupancy is without color of title, possession must be limited to the land actually occupied. We are, therefore, of the opinion that the learned trial court erred, in so far as he quieted title in plaintiff to any portion of the land in dispute, which the proof showed she did not actually occupy.

A further contention of the city is that the trial court erred in quieting title in plaintiff as against the city of South Omaha, because of the provisions of section 6 of the code, as amended by act of the legislature approved April 1, 1899, providing that the limitations upon an action for the recovery of real estate therein provided shall not be held to apply to a municipal corporation seeking to recover title or possession of a public street. The record shows that title by adverse possession had ripened in Mrs. Buckner, plaintiff's grantor, before the transfer of her interest to plaintiff, which occurred prior to the enactment of the amendment in 1899. We do not think it can be successfully contended, that the amendment referred

to can have the force of taking away a right of recovery upon a cause of action which had accrued prior to its enactment. A legislative enactment will always be construed to operate prospectively, unless the intent of the lawmaking power to the contrary is plainly expressed. *State v. City of Kearney,* 49 Neb. 337.

It may be added that, while it is satisfactorily established that there was a continuous user of the premises on which the house and other buildings were located under claim of ownership, it is also shown by the evidence that no portion of the property claimed by plaintiff was ever used by the city as a public highway, and, if further proof were needed that it never claimed or asserted title to the land as against the occupant during this long period, it would be found in the fact that, many years before the commencement of this action, 26th street was paved, and, at that time, a permanent curb was placed along the east line of the premises in controversy, extending through the entire width of P street, from which it would seem any rational person would be justified in inferring an abandonment by the city of any claim to the property occupied by plaintiff.

In its answer, the city laid claim of title to the premises by dedication as a public highway. There is no proof of any kind in the record that the city ever obtained title to the tract in this way or in any other. We know of no rule that entitles the city to the presumption that the tract of land in dispute was ever dedicated to the city as a public street. It is quite conclusively shown by this record, that no part of the disputed tract was ever used by the city as a highway. Many years before the commencement of this action, the city caused 26th street to be paved, and, at that time, laid a permanent stone curb along the west line of 26th street, extending the entire width of that street, as already stated. It would seem, therefore, that in any event the decree, in denying relief to the city of its affirmative prayer, was right.

We find the record without error, with the exception

already pointed out, and it is therefore recommended that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter a decree in favor of plaintiff, Meehan, in so much of the property described in her petition as, by the evidence, she may be shown to have actually occupied.

DUFFIE and LETTON, 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 to the district court, with directions to enter a decree in favor of plaintiff, Meehan, quieting title in her to so much of the property as, by the evidence, she may be shown to have actually occupied.

JUDGMENT ACCORDINGLY.

HENRY F. CADY V. FRANK G. USHER.

FILED FEBRUARY 17, 1904. No. 13,392.

Foreclosure of Mortgage: DEFICIENCY JUDGMENT. Where it is disclosed that the notes, to secure which a mortgage is given, are barred by the statute of limitations at the time of the commencement of the foreclosure proceedings, the mortgagee is not entitled, under the provisions of section 847 of the code as it existed prior to the legislative session of 1897, to a deficiency judgment, after the coming in of the report of the sale of the mortgaged property.

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

F. B. Donisthorpe, for plaintiff in error.

H. P. Wilson, contra.

KIRKPATRICK, C.

This is a proceeding in error prosecuted from a judgment of the district court for Fillmore county, denying

the motion of plaintiff in error, who was plaintiff below and who will be styled herein as plaintiff, for a deficiency judgment in a mortgage foreclosure proceeding. On October 5, 1901, plaintiff instituted a foreclosure proceeding upon a mortgage securing three promissory notes maturing January 26, February 26 and April 26, 1896, respectively. More than 5 years had elapsed after the maturity of the notes before the foreclosure proceedings were commenced. Among other defenses, the answer pleaded the statute of limitations. On February 12, 1902, a trial was had, resulting in a decree of foreclosure in favor of plaintiff for the sum of $1,466.25. The sheriff was directed to sell the premises included in the mortgage as upon execution. A stay was taken, and after its expiration, a sale was duly made, and, upon the return of the sheriff to such sale, it was disclosed that there was a deficiency amounting to $1,543.63. Plaintiff afterwards filed a motion for a deficiency judgment, which, on June 30, 1903, was denied on the ground that the notes in suit had been fully barred by the statute of limitations at the time the foreclosure proceedings were commenced.

It is contended by plaintiff that, because in the decree of foreclosure an amount was found due to the plaintiff from the defendant, and an order entered that, unless defendant made payment within 20 days, an order of sale should issue, this amounted to a final judgment against defendant, fixing his liability for the deficiency, and that defendant could not, at a subsequent time, be permitted again to defend. We are unable to accept this view. The finding and decree of foreclosure did not amount to a personal judgment against the defendant. *Alling v. Nelson,* 55 Neb. 161. The mortgage was not barred by the statute, and plaintiff was entitled to a decree of foreclosure; but, before a deficiency judgment could have been rendered, the court must have found from the evidence that defendant was liable on the notes in suit, and, as it was disclosed by the pleadings and the evidence that the notes were barred, plaintiff was not entitled to a deficiency

judgment thereon. It follows that the judgment of the trial court is right.

A second and equally valid reason is disclosed by the record why the judgment must be affirmed. On June 30, 1903, the cause seems to have been before the district court upon the motion of plaintiff for a deficiency judgment and the pleadings in the case, and judgment was entered against plaintiff dismissing his application for a deficiency judgment. Plaintiff was given 40 days within which to prepare and settle a bill of exceptions containing the evidence heard by the trial court, and we find this bill of exceptions in the record; but no motion for a new trial was ever filed in the case or ruled on by the trial court, and this would seem to preclude plaintiff from obtaining any relief in this court, even had the action of the trial court been erroneous, which clearly it is not.

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

DUFFIE and LETTON, CC., concur.

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

AFFIRMED.

HANS H. PETERSON, APPELLANT, V. JAMES W. FISHER, APPELLEE.

FILED FEBRUARY 17, 1904. No. 13,424.

Highway: COUNTY BOARD: JURISDICTION. If the public has acquired no right by prescription or dedication to a way across the land of an individual, the court may examine the proceedings by which it was attempted to lay out a highway across the same, to ascertain whether or not the county board had jurisdiction to act, and the lapse of time alone will not supply a jurisdictional defect in the proceedings.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed with directions.*

E. D. Kilbourn, for appellant.

S. S. Thornton, for appellee.

LETTON, C.

This action was brought by the plaintiff to enjoin the defendant as road overseer from entering upon his premises and removing a fence from a portion of the same, where defendant claims that a public road exists, the plaintiff denying the existence of the highway. It appears that, in 1876, a petition was filed with the county board of Antelope county, praying for the location of a road, part of which ran over the land where this dispute arises between sections 11 and 14. This petition was signed by 20 persons, citizens of Antelope county. A notice of the filing of said petition was filed with the county clerk of said county, with a certif cate of the posting of the same. On the 5th day of July, 1876, one Amos West was appointed commissioner to view and locate the road as petitioned for. West qualified according to law, and reported favorably upon said road, and, on the 2d day of January, 1877, the report of Amos West as commissioner of said road number 23 was accepted by the county board, and the clerk instructed to notify him to survey and plat the same according to law. Pursuant to these instructions, the commissioner employed a surveyor and chain carriers, laid out the road, and filed his field notes with the county clerk. Section 11 was then open prairie and section 14 was occupied. It is apparent from the testimony that a portion of the road, so located, has been traveled by the public for a great many years, but that the portion of the same lying between sections 11 and 14 has only been traveled, occasionally, for a portion of the distance along the line between said sections. It seems that the road between sections 12 and 13, immediately east of the disputed portion, is quite well traveled, and that the travel westward usually proceeds along the section line between

sections 12 and 13, the greater portion then turning north of the section line about 80 rods, thence going west again, but that a few persons have traveled on west between the south line of section 11 and the north line of section 14 for about three-fourths of a mile, to a point nearly north of the plaintiff's house, where they turned to the south and passed around by the plaintiff's house to the west again. The road between sections 10 and 15 running east of the disputed point is also a well traveled road The plaintiff is the owner of the northwest quarter of section 14 and the southeast quarter of section 11, and lives on the southwest corner of the northwest quarter of section 14. He testifies that there has been no travel along the disputed line because it is all full of gulches, and that two years ago he put up a fence upon the line across the disputed road.

The plaintiff contends that the proceedings by which the county board attempted to establish the road were defective and void for want of a proper petition and notice, and that no public road has ever been opened or used across the premises. The proceedings were had over 25 years ago. After the lapse of so many years, if there had been user by the public for ten years, the presumption would be that the proceedings to establish the road were regular, and the court would not examine the original proceedings for the laying out of the road to determine whether or not they are valid. *City of Beatrice v. Black*, 28 Neb. 263.

The question in this case is, whether the presumption arising from the long lapse of time since the attempted proceedings to lay out a highway, a portion of which is in dispute, is conclusive against the owner of premises over which the public has only occasionally traveled a portion of the disputed highway. In the case of the *City of Beatrice v. Black, supra*, it appeared that the proceedings to lay out the road were defective, and the court say:

"If a petition is duly presented to the proper tribunal praying for a public road from one point to another in

the county, and such petition is granted and the road located and opened for travel and is used by the public generally, the right in the public will become complete after 10 years, and the court will not look at the original proceedings to determine the validity of the road but to ascertain the extent of the location. * * * The rule would be different if the action was brought before the bar of the statute was completed."

In that case the court found that a legal highway existed by reason of the public having acquired an easement in the highway on account of the road being traveled and used by the public generally for over 10 years.

It is not the long period of time that has passed since the defective proceedings were had that renders them sacred from attack, but it is the prescriptive right gained by the public through its use and occupation of the highway for more than the statutory period of limitation. The lack of jurisdiction to act can not be supplied by the lapse of time. It may be that the defective proceedings may be considered by the court as defining the extent of the prescriptive right claimed, but not as a basis of the same. Perhaps the court may look to them to ascertain the extent of the claim of the public, in the same manner as it would have recourse to a deed giving color of title to determine the extent of an adverse possession claimed by an individual under it, but this is not determined. The evidence in this case shows that, while both east and west of the line between sections 11 and 14 the road was freely traveled by the public, yet it further shows that the main line of travel was turned aside on the east line of these sections, was diverted to the north, thence westward across section 11, thence southward after having passed over said section to a continuation of the original line running east and west. The plaintiff testifies that he had a gate at the east line of said section, and that a few persons came through the gate, passed along between the sections, thence southward to his house, but there is no evidence that any public work was ever done upon, or that the public in general

ever traveled on, the line between sections 11 and 14, and there is no evidence of travel between these sections for as long a period as 10 years. This being the case, no prescriptive right was acquired by the public as against the owners of the land in said sections, and, since the plaintiff in this case never recognized any right of the public to pass over his premises, it is apparent that, unless the original proceedings were valid, no public highway exists over the land of the plaintiff at the place in dispute. *Gehris v. Fuhrman*, 68 Neb. 325; *Engle v. Hunt*, 50 Neb. 358; *Hill v. McGinnis*, 64 Neb. 187.

The original proceedings were defective in this, that no petition signed by 10 landholders of the vicinity was ever presented to the county board, that there is no proof that any notice was ever posted upon the court house door, or that more than one notice was ever posted anywhere. These were essential prerequisites to the jurisdiction of the county board, and without them its action was a nullity. *Doody v. Vaughn*, 7 Neb. 28. For these reasons the proceedings were of no validity, and by the same the public acquired no rights as against the plaintiff.

Since no highway was legally established over the plaintiff's premises by legal proceedings, and none has been acquired by prescription, he is entitled to an injunction in this case.

We recommend that the cause be reversed and remanded, with directions to the district court to enter a decree in accordance with this opinion.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, this cause is reversed and remanded, with directions to the district court to enter a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

W. F. COOK V. STATE OF NEBRASKA.

FILED MARCH 2, 1904. No. 13,038.

1. **Criminal Law:** FALSE PRETENSES. To constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact; any representation or assurance in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute.
2. **Instruction:** ERROR. On the trial of one charged with the violation of section 125 of the criminal code, the giving of an instruction which, in substance, informs the jury that if they find that the representations relied on amount to a promise to perform a future act, such promise must be carried out in good faith, and a failure to fulfil it, with intent to defraud, will render the defendant guilty the same as though such representations related to a past event or an existing fact, is reversible error.

ERROR to the district court for Cheyenne county: GEORGE W. NORRIS, JUDGE. *Reversed.*

W. P. Miles, James L. McIntosh and *Hamer & Hamer*, for plaintiff in error.

Frank N. Prout, Attorney General, contra.

BARNES, J.

An information was filed in the district court for Cheyenne county against the plaintiff in error, charging him with the crime of obtaining money under false pretenses by falsely stating, on the 1st day of October, 1901, to one J. W. Wehn, that he, the plaintiff, was the owner of and had in his possession 150 head of yearling steers, branded with a "Y" on the right hip; that he also had in his possession and owned 100 tons of hay, all situated on his ranch in Banner county, Nebraska; that, by means of such false statements or pretenses, he procured a loan of money from the said Wehn, amounting to $1,200; that he gave his note therefor due in 6 months thereafter, and secured the payment thereof by a chattel mortgage on the

steers and hay above mentioned. The truth of these statements was properly negatived by the information; in fact the charge contained therein was sufficient.

On the 18th day of November, 1902, the plaintiff appeared at the bar of the court and entered his plea of not guilty. Immediately thereafter he was tried, found guilty as charged in the information, and was sentenced to the penitentiary for the period of 3 years. He thereupon prosecuted error. His petition contains several assignments, but we will only consider the one which alleges error in the instructions.

It may be said, however, in passing, that the proof showed that the representations set forth in the information were not made to J. W. Wehn, but to one Burke, and, in order to avoid the effect of this variance, Burke testified that he was the agent of Wehn, and that it was Wehn's money which was obtained from him by means of the representations in question. It is unnecessary, however, for us to determine whether or not this was a fatal variance.

It appears that the plaintiff denied that he made the representations set forth in the information. He admitted that he received the money; that he gave the note and mortgage in question, but claimed, and furnished considerable evidence tending to show, that in the conversation between himself and Burke, at the time he borrowed the money, he stated that he did not own all of the cattle described in the mortgage, but was borrowing the money for the purpose of purchasing them; that he agreed to purchase them, and also agreed that as soon as they were purchased he would brand them and place them on his ranch, thus making them subject to the mortgage, which he then and there executed. After the introduction of the evidence, the trial judge charged the jury, among other things, as follows:

"The defendant in this case admits the giving of the mortgage as claimed by the prosecution, but claims that he had an agreement and understanding with C. H. Burke that the money obtained by the giving of the said mort-

gage should be used by him for the purpose of buying steers, such as described in the mortgage; if you find from the evidence that at the time said mortgage was given the defendant did not represent to the said Burke that he had the steers therein described, but that it was understood and agreed between the defendant and said Burke that said money so obtained should be used by the defendant to purchase steers of that description, then the defendant could not be held liable by you for the representations contained in said mortgage, as to his having possession of such steers at said time, but if such agreement were made it would have been the duty of the defendant to use, in good faith, the money so obtained for the purpose of purchasing the steers, such as is described in said mortgage, but if you find that he did not use said money for said purpose, and at the time of obtaining said money he did not intend to purchase said steers as agreed upon, but intended to defraud the said Wehn out of the same, then the defendant would be liable the same as though he had falsely represented that he had in his possession the steers described in the mortgage."

By this instruction the jury were told, in effect, that the pretense or pretenses relied on by the prosecution need not relate to a past event or an existing fact; that if the representation or assurance related to a future transaction or a future promise, still the plaintiff would be guilty of the crime of obtaining money under false pretenses; and it is this instruction of which he complains.

It is a well settled rule of the criminal law that the pretense or pretenses relied on to constitute the crime must relate to a past event or an existing fact; that any representation, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute. Maxwell, Criminal Procedure, 129; *Dillingham v. State,* 5 Ohio St. 280. The misrepresentations must be of a fact and not a statement of an opinion, or the making of a promise. 1 McClain, Criminal Law, sec. 668. This rule is so well understood that it is

unnecessary to cite any further authorities to support it. The law department of the state, while not confessing error, does not contend that the instruction is a correct statement of the law. The giving of this instruction was prejudicial error, for which the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HOLCOMB, C. J., concurs. SEDGWICK, J., absent and not sitting.

SONEY FORD V. STATE OF NEBRASKA.

FILED MARCH 2, 1904. No. 13,296.

1. **Manslaughter.** Where one points a loaded pistol at another, although he has some reason to think it is not loaded, he is guilty of an assault; and if he pulls the trigger, thus causing the pistol to be discharged and the person assaulted is killed thereby, he is guilty of manslaughter.
2. **Instructions.** Instructions requested by the defendant examined, and *held* properly refused.
3. **Request for Instructions.** A defendant in a prosecution for murder, is ordinarily entitled to have the theory of his defense submitted to the jury by proper instructions; but where, by his own theory, he is guilty of manslaughter, and the jury so find, his rights are not prejudiced by a failure to give his instructions.
4. **Sentence Reduced.** The defendant, in sport or through mere wantonness, pointed a pistol at the deceased, having some reason to think that it was not loaded; and the deceased, apparently in fear, said, "Look out how you handle that revolver around here; you have got your finger on the trigger"; and the defendant replied, "I know it, and I will show you how it works." He thereupon pulled the trigger, and a shot followed which killed the deceased. On his trial the jury found defendant guilty of manslaughter. *Held*, That under these circumstances, a sentence of seven years in the penitentiary was excessive, and that the sentence should be reduced to four years.

ERROR to the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Affirmed. Sentenced reduced.*

Allen G. Fisher and *John M. Tucker,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

The state prosecuted Soney Ford in the district court for Cherry county for killing one Allen Rothchilds. The information charged him with murder in the first degree, and the jury found him guilty of manslaughter. The trial judge sentenced him to imprisonment in the penitentiary for the period of 7 years. To reverse this sentence he brings error, and will be called the plaintiff.

1. It is contended that the evidence does not sustain the verdict, and the special reason given for this contention is that it was not shown that the killing was done while the plaintiff was in the commission of an unlawful act. The facts, as shown by the record, are substantially as follows: The plaintiff is a colored man who had been a soldier in the regular army and was discharged while his command was at Fort Niobrara, near the village of Valentine, in Cherry county, Nebraska. After his discharge, he was employed in driving a team with which he carried passengers to and fro between the village of Valentine and the Fort. On the evening of December 24, 1902, at about 9 o'clock, the plaintiff started from Valentine to the Fort with 4 or 5 passengers, and on the way they concluded to stop at what is commonly known as the "Hog Ranch," a vile resort for men and women, situated near the Post. When they arrived at this resort, they tied the team and went into that part of the ranch called the dance hall. They found several persons there, both men and women, all colored; and after warming themselves at the stove the plaintiff danced a couple of times; after the dance was over, he went up to the platform that the piano stood on, and where Rothchilds sat, having the pistol with

which the shooting was done in his hand. He flourished it around, and the deceased said to him, "You should mind how you handle a gun around here; you have got your finger on the trigger"; and the plaintiff said, "I know I have, but I want to show you how it works." The pistol was pointed directly at Rothchilds' face, and was, at that instant, discharged; deceased fell from the piano stool where he was sitting, and the plaintiff ran up and tried to help him up; threw the revolver on the floor, and said to the bystanders, "Don't hurt me, I didn't mean to shoot him."

There was no evidence showing, or tending to show, any ill feeling between Rothchilds and the plaintiff, and no motive was shown for the killing. Of course there is some dispute in the testimony over minor particulars, but the foregoing fairly states the situation, and what occurred at the time the fatal shot was fired. It is evident from the record and the verdict that the jury acquitted the plaintiff of murder in the first degree and murder in the second degree, finding that there was no premeditation or deliberation, and that the shooting was done without malice; but did find that the killing was done unintentionally while the plaintiff was in the commission of an unlawful act. We think that the evidence fully sustains this verdict. The pointing of the revolver at the deceased and the pulling of the trigger, under the circumstances, was an unlawful act.

The pointing of a loaded revolver at another, if within range, is an assault, and the same is true if it is not loaded, if the person aimed at is not aware of the fact. Maxwell, Criminal Procedure (2d ed.), 81; *Beach v. Hancock*, 27 N. H. 223. As already indicated, to point a gun or pistol at a person who does not know but that it is loaded, and has no reason to believe that it is not, is an assault. 1 McClain, Criminal Law, sec. 233; *State v. Shepard*, 10 Ia. 126; *State v. Triplett*, 52 Kan. 678. In the case of *State v. Shepard, supra,* the defendant was indicted for an assault with a gun with intent to commit murder, but was

convicted of an assault only. At the close of the testimony the defendant requested the court to instruct the jury: "First, that they must find that the gun with which the alleged assault was committed, was loaded and in a condition to be fired off, or the presentation of it was no assault; second, that if they found the gun was not loaded, they would find the defendant not guilty; third, that if they did not find an intent to kill, they should find the defendant not guilty." The refusal to give these instructions was assigned as error. The court said:

"We do not think the court erred. Mr. Greenleaf (vol. 1, sec. 59) states that the presenting a gun or pistol at a person is an assault. But he adds, that 'whether it be an assault to present a gun or pistol, not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.' * * * After viewing the question in its various lights, we are inclined to hold with those who regard it as an assault, where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not." In *State v. Triplett, supra,* it was held:

"A person may be guilty of an assault upon another with a pistol without firing it at all, and if he does fire it, without intending at the moment of firing to hit the person upon whom he is charged with committing the offense, when the attitude or action of a party is threatening towards another, and the effect is to terrify, the offense of assault is complete. * * * The state interferes with and punishes evil conduct whenever, among other reasons, it tends to public disturbance or breaches of the peace, creates disquiet in the community, or inflicts on the individual a wrong entitling him to governmental protection."

The testimony discloses that when the plaintiff pointed the revolver at Rothchilds he put him in fear. The remark made by the deceased shows that he feared injury, therefore the assault, even without the firing of the pistol, was complete. And so it may be said with absolute certainty

that at the time the fatal shot was fired, although it was done unintentionally, the plaintiff was in the commission of an unlawful act.

2. It is further contended that the court erred in refusing to give the jury the following instruction requested by the plaintiff.

"You are instructed by the court that, if you are not convinced beyond a reasonable doubt by the evidence that the defendant discharged the pistol intentionally, and knew or had reason to believe it was then loaded, but on the contrary the evidence undisputed tends to the belief that it was accidental, and not done with any intent or desire to injure Rothchilds, you should acquit the defendant."

This instruction is so faulty that the court was justified in refusing to give it. As we have seen, the evidence was amply sufficient to convict the plaintiff of the crime of manslaughter, and the mere fact that the shooting was accidental, and not done with intent or desire to injure the deceased, did not entitle the plaintiff to an acquittal. At the time the fatal shot was fired, although the plaintiff had no intention or desire to injure the deceased, and although the shot was accidental, yet he was in the commission of an unlawful act, and the result of the shooting, together with this fact, clearly rendered him guilty of the crime of manslaughter. We hold, therefore, that the court did not err in refusing to give this instruction.

3. It is also contended that the plaintiff was entitled to have his theory of the case submitted to the jury. It is a sufficient answer to this contention to say that, by the plaintiff's own theory, coupled with the undisputed facts, he was guilty of the crime of manslaughter, and, the jury having found him not guilty of a greater offense, the failure of the court to give any other or more specific instruction relating to his theory in no manner prejudiced his rights.

4. Lastly, it is contended that the court erred in refusing to consider plaintiff's supplemental motion for a new trial, filed on the 9th day of February, 1904. The par-

ticular grounds of this motion are alleged to be newly discovered evidence material for the defendant, which could not, with reasonable diligence, have been discovered and produced at the trial, or within 3 days after the verdict was rendered; and such alleged newly discovered evidence is presented with the motion in the form of an affidavit. This affidavit is made by one Arthur N. Compton, one of the surgeons who attended the deceased from the day he was shot to the time of his death. The substance of the affidavit is that the doctor, during a professional visit to the deceased, asked him how the shooting occurred, and what caused it, and that the deceased answered as follows: "Ford did not intend to shoot me, it was an accident," or words to that effect. Even if this evidence were true and should be so accepted by the jury, still the plaintiff, under the circumstances, would be guilty of the crime of manslaughter. Again, the evidence was merely cumulative, and its effect would only strengthen the other evidence given on the trial, and which tended to show that the shooting was accidental. Indeed, the jury must have found that the shooting was unintentional, otherwise it would have found the defendant guilty of either murder in the first or second degree. Again, the affidavit and motion have not been preserved and brought here in the form of a bill of exceptions, and therefore we must refuse to consider it. For these reasons, we can not say that the trial court erred in refusing to consider the supplemental motion and grant a new trial thereon.

A careful examination of the evidence convinces us that the jury arrived at a correct verdict. It is apparent that the plaintiff was not actuated by any motive of hatred or revenge in his actions toward the deceased. It rather appears that he was having a good time just before the shooting occurred; that he had danced a couple of times with the women; that he had given an exhibition of what is called the "Buck and Wing" dance, and in fact was cutting quite a wide swath, to use a common expression; that while showing off, so to speak, he drew the pistol, which he had

some reason to suppose was not loaded, and with his finger on the trigger pointed it at Rothchilds; deceased was frightened, and told him to look out how he handled the pistol around there, that he had his finger on the trigger, and the plaintiff replied that he knew it, and he wanted to show him how it worked; that he pulled the trigger with the pistol pointed directly at the face of his victim, and the shot which followed was as much a surprise to the plaintiff as to any one. In this view of the case he was technically guilty of the crime of manslaughter, and while he ought to receive a reasonable amount of punishment for his criminal carelessness, and his uncalled for and unlawful act, yet it is our opinion that the sentence imposed by the trial court is too severe. The fact that plaintiff has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor treat him as having no rights. Our constitution provides: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." We think that a sentence of 7 years in the penitentiary, under all the circumstances, may fairly be said to be a cruel punishment, and under the power given us by section 509*a* of the code of criminal procedure we will reduce the sentence 3 years. The judgment of the trial court is reduced to imprisonment for 4 years and, as thus modified, is affirmed.

JUDGMENT ACCORDINGLY.

HOLCOMB, C. J., concurs. SEDGWICK, J., absent and not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. JOSEPH H. JAMISON.

FILED MARCH 2, 1904. No. 13,371.

Instruction. An instruction which is applicable neither to the issues nor to the evidence is prejudicially erroneous.

ERROR to the district court for Hall county: JOHN R. THOMPSON, JUDGE. *Reversed.*

J. W. Deweese, F. E. Bishop and *O. A. Abbott*, for plaintiff in error.

W. H. Thompson, contra.

AMES, C.

The defendant in error recovered a judgment in the district court in an action for damages for personal injuries. There was a general verdict accompanied by a series of special findings. The latter will be mentioned as occasion requires in the following discussion. The evidence is not appreciably contradictory, though contrary inferences, in some respects, are drawn from it by counsel.

There were two gangs of about 17 men each employed by the company and engaged in loading railway rails upon flat-cars. The rails were strung along beside the track, whence they had been removed and replaced by new rails, and the men were in charge of a foreman named McCarty. The cars were moved over and along the track by means of a locomotive as fast as the loading progressed. The rails weighed 560 pounds each, and it was customary to employ 16 or 17 men to take them from the ground and put them on the car, so that if each bore a proportionate share of the burden he would lift from 33 to 35 pounds. On the occasion in question 12 men were engaged, and each was required to lift approximately 47 pounds. In order that the men should successfully accomplish their task, it was indispensable that they should all exert themselves in the same manner simultaneously, that is, that certain prearranged movements should be made by all at the same time and, in order to effect this purpose, it was necessary that the series of movements should be made in a certain order of succession and in response to a preestablished code of signals. This series of signals and movements can not be better illustrated than by reciting

what was done in the instance in question, which was in the ordinary and usual manner of performing the task. The rail was lying easterly and westerly on the ground about two feet from the car, which was standing on the track north from it. The 12 men stood along the south side of the rail so that, ordinarily, their noses were, or should have been, about two and a half feet apart, the distances between their bodies being, of course, considerably less and varying with their sizes. A man named Sullivan stood at the east end of the rail, and the defendant in error Jamison at the west end of it. Sullivan having first indicated on what part of the car the rail was to be deposited, exclaimed, "We will give it to you," and simultaneously he and the men standing near him grasped the rail at and near its east end and raised it as far as his knees. This was a signal for all the men to take hold and raise the burden to a height even with the top of the car. Sullivan then gave the signal "up high," which was a signal that the rail should be lifted to a position about even with the shoulders of the laborers and resting upon their upturned palms, their faces, of course, being turned toward the car. When this position had been reached, Sullivan exclaimed "heave 'er," and the men, by a simultaneous impulse, threw the rail forward so that it alighted at the indicated place on the car. Sullivan and Jamison were both experienced and competent men and, for aught that appears, all the other men also were. But, on the morning of the day upon which this accident occurred, McCarty, the foreman, described to the men the nature of the service in which they were about to be engaged, and the code of signals and responsive movements to be observed, and cautioned them that they must avoid grasping the rail on the side of it toward the car, because of the danger of getting hurt by so doing, and personally and particularly cautioned Jamison in this respect, as did also one McIntyre, a fellow workman of the latter. On the occasion of the accident in question, which occurred at about 3 o'clock P. M., after the men had been engaged in this employment all the earlier

part of the day, Jamison, instead of standing on the south side of the rail and taking hold of it in the same manner as his fellows did, stood at the west end and grasped it with both hands, one on each side. What immediately followed, aside from the crushing of the fingers of Jamison's right hand so as to necessitate amputation, is a matter of inference and can not be made out with certainty. Nobody but himself knew of the fact until after the operation of loading had been completed, and the car and men had moved eastward into position for loading another rail.

The petition of the plaintiff in the district court alleges three acts of negligence on the part of the company, to one or all of which he attributes the injury. The answer, besides a general denial, pleads contributory negligence.

First, it is alleged, and the jury found that, at the time of the accident and during the progress of the operation of loading, the car begun slowly moving eastward and away from the plaintiff. This finding rests upon very slight evidence, and it is not shown how, if it be true, the fact contributed to the injury. The plaintiff himself says that it could have done so only by influencing the men to go through the movements more rapidly, and to throw the rail upon the car sooner than they would otherwise have done. But neither the plaintiff nor anyone else testifies to their having been so influenced. We think the finding immaterial.

Secondly, it is alleged that there was an insufficient number of men engaged in the work. The plaintiff testified and the jury found, that only 12 men joined in the loading of the rail, all the other witnesses, 3 in number, testified that there were 17. But that the force was insufficient the jury did not find, and that it was not so may be inferred from the fact that the identical force had been employed in the same operation during the preceding portion of the day without mishap or difficulty, and without objection. The plaintiff was a man 42 years of age, and had had years of experience in doing work of the same kind. If an insufficiency of force rendered the present

undertaking unnecessarily hazardous, he was fully aware of the fact, and according to a familiar rule of this court, by continuing in it, without objection, he assumed the extra risk himself. This finding is therefore immaterial.

Thirdly, it is alleged, and is found by the jury, that the signal to throw the rail upon the car was prematurely given before the west end was raised above the car. It is not specifically found to have been negligently so done, but there was a general verdict for the plaintiff, which this proceeding is prosecuted to review. This third finding, like the former, rests solely upon the testimony of the plaintiff and the following circumstances: The surface of the car was 4 feet above the track; the surface of the ground where the men stood was about even with that of the railway ties. The plaintiff, who is a man slightly under 6 feet in height, testified that the signal to throw was given when the rail was raised to a point about even with his hips, and that the east end, at that time, was probably 18 inches higher. He accounts for this circumstance by saying that an undue number of men were ranged near the east end. He is not corroborated in this respect, and it is not disputed that these men, except McCarty who was admittedly at his proper station at the east end, were fellow servants of the plaintiff, for whose fault in this regard the company would not be liable. The following instruction was excepted to and the giving of it is assigned for error:

"You are instructed that, when an employer places an employee under the direction and control of another and the latter in the exercise of the authority so conferred orders the former, with others, to do an act unusually dangerous, which they do, and thus exposes him to extraordinary peril, of the existence or extent of which he is not advised, the employer would be liable in the event of injury to such employee."

The instruction is obviously inapplicable both to the issues and to the evidence, and its submission to the jury was prejudicial error.

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

HASTINGS 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 reversed and a new trial granted.

REVERSED.

BENJAMIN F. PITMAN, APPELLANT, V. WILLIAM MANN, APPELLEE.

FILED MARCH 2, 1904. No. 13,439.

Mortgage Foreclosure: HOMESTEAD: FRAUD. One of the most salutary rules of the law is that one shall not profit by his own wrong. A man who has fraudulently executed and put in currency a mortgage upon his homestead, without procuring his wife to join therein, can not, in an action to foreclose the instrument, after her death, gain any advantage by his own wrong, unless he can make it appear that such advantage will accrue, at least in part, to some one, other than himself, belonging to some of the classes of persons sought to be protected by the homestead act.

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

Albert W. Crites, for appellant.

Michael F. Harrington, contra.

AMES, C.

William Mann was born in Great Britain a subject of the English crown, as was also a woman who afterwards became his wife, and with whom, for a time, he cohabited as such in that country. There are two sons, fruit of the marriage. In 1876, both the sons had arrived at maturity

and had gone forth from the parental home seeking their own maintenance. In that year, Mann and his wife separated, and he came to the United States. She remained in England, and they have not since been reunited. Shortly after coming here, he entered a tract of government land lying in Dawson county, in this state, as a homestead, and subsequently, upon making final proof, described himself as a widower having two sons then living, and procured a patent of the land. The sons also came to this country, but have neither of them ever resided upon the premises. One of them, unmarried, entered a tract of land as his own homestead, and obtained a patent of it upon final proof. The other, who is married, has lived apart except that, together with his wife, he at one time made his father a visit of a few weeks' duration. Mann, after procuring his patent, obtained a loan of money, and executed a mortgage upon the land as security for the payment of a negotiable note. In his application for the loan, and in the mortgage, he described himself as a widower. The note came into the hands of the plaintiff as a *bona fide* holder, for value, before maturity. After the death of the wife, this action was begun to foreclose, and resulted in a judgment for the defendant, because of the fact that the instrument lacks the wife's signature. Whether the mortgage is void for that reason is the only question in this case. If so, the defendant is the only person who will profit by that fact. We think that under circumstances like the foregoing he is estopped to assert it. The statute avoiding a conveyance or incumbrance of the homestead of a married person, without the signature of both husband and wife, was enacted with the evident purpose of protecting both of the parties to the marriage, and those persons composing their families and dependent upon them. During the lifetime of any of such persons it may be that a husband or wife, who alone has executed such an instrument, may successfully defend against it without the concurrence of his or her consort or the dependents of either; and it may even be that such a defense would be entertained if made by a

sole survivor of the family, who had executed the instrument without fraud or concealment with respect to the homestead character of the lands, but neither of these questions is involved in this inquiry, or intended to be decided.

One of the most salutary rules of the law is that one shall not profit by his own wrong. If a man who has fraudulently executed and put in currency a mortgage upon his homestead, without procuring his wife to join in its execution, can, in an action to foreclose the instrument, gain advantage by his own fraud, it must be because such advantage will accrue, at least in part, to some one, other than himself, belonging to some of the classes of persons sought to be protected by the homestead act. Counsel have cited us no authority exactly in point, and we have been unable to find any, perhaps, because the circumstances of the case are in some respects singular. The opinion of the supreme court of Kansas in *Adams v. Gilbert,* 67 Kan. 273, appears to us, however, to rest upon very similar, if not identical principles, and it arrives at practically the same conclusion. In that case a deed of the homestead made by the husband, and void because of the nonjoinder of his wife, was upheld because, after her death, his conduct was such as to raise an equitable estoppel in favor of a mesne grantee. We think an estoppel arising before her death will attach with equal force after her decease.

It is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree as prayed in the petition.

HASTINGS 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 reversed and the cause remanded, with instructions to enter a decree as prayed in the petition.

JUDGMENT ACCORDINGLY.

R. S. DICKENSON V. COLUMBUS STATE BANK.

FILED MARCH 2, 1904. No. 12,952.

1. **Pleadings:** AMENDMENTS. The allowance of amendments to an answer is not an abuse of discretion, even though a demurrer to the answer for lack of the supplied allegation has been overruled and objection made to the introduction of evidence, where opportunity is given the other party to produce additional proof, and no requirement of terms was asked for, and the amendments are as to material facts of which there is evidence.

2. **Evidence:** COMPETENCY OF WITNESS. Section 329 of the code allows evidence of an interested party against the representative of a deceased person, as to transactions with the deceased "in regard to the facts testified to" by the other party's witness, but no "further."

3. ———: PAYMENTS. Where the party representing the deceased has introduced evidence of certain payments made to the other party, that party may show to what the payments were applied and that it was with the deceased's assent, but may not show a long antecedent agreement had with the deceased that the items, to which the payments were applied, should constitute a lien prior to a mortgage held by deceased upon the property out of which the payments came.

4. **Liens:** PRIORITIES. Advancements by a mortgagee made to harvest and market a crop of hemp, under an oral agreement with the owner and another mortgagee that they shall be repaid out of the proceeds of the crop before the mortgages, warrant the application of the proceeds to such payment as against a subsequent mortgagee with notice, who is also the assignee with notice of the other mortgage.

5. **Error:** REVIEW. "Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence." *Hammond v. Edwards*, 56 Neb. 631.

6. **Finding:** EVIDENCE. Evidence *held* to sustain trial court's finding of amount due.

ERROR to the district court for Platte county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

Reeder & Hobart, for plaintiff in error.

A. M. Post and *Whitmoyer & Gondring, contra.*

HASTINGS, C.

Three errors are relied on by plaintiff in error in this action, who brought it in the trial court for an accounting for property on which he claimed a chattel mortgage lien. The accounting was had, but it was against plaintiff in the sum of $1,148.77. The essential question in the case is, whether certain advancements, made by the defendant, as is claimed, to preserve and harvest the crop of hemp which was the subject of the liens, shall be satisfied out of the hemp before plaintiff's mortgages, or shall be postponed in favor of the latter. The trial court held that the advancements were to be first paid. Plaintiff brings error and complains: First, that the trial court was wrong in permitting an amendment of defendant's answer to be made after the evidence was all taken, setting up, in effect, that the advancements were made by agreement with the owner and with the assent of plaintiff's assignor, Murdock & Son. The claim is that there was not sufficient evidence of such facts to justify the amendment, and that such evidence of them as there was had been introduced over plaintiff's objection. The second complaint is that, as the disputed part of plaintiff's claim rests upon a lien assigned to him by the surviving member of the firm of Murdock & Son, the testimony of defendant's president, who was also a stockholder, to transactions with the deceased, Murdock, was improperly admitted. It is finally urged that the evidence is entirely insufficient to show any right to have these advancements preferred to plaintiff's lien.

Counsel say that they waive none of the errors complained of, but they consider them prejudicial because they are embraced in these three. So far as the amendment is concerned, if the facts in the case are such as to call for it, there seems to have been no abuse of discretion. It is true that it was made after the evidence to the court was taken, and it seems to have been made after objection, based on the absence of the allegations of assent by the other parties to these agreements, had been overruled. But, abundant

opportunity was given to plaintiff to change his pleading or to put in additional evidence. The cause was continued, after the amendment, to the next term. An amendment to correspond with proofs was asked for by plaintiff and allowed to him. No attempt to add to evidence was made by the plaintiff, and no attempt to have terms fixed on which the amendment should be made. This objection should therefore only be considered in connection with the complaint as to the character of the proof.

Plaintiff objected to the evidence of defendant's president, Gerrard, as to transactions had with the deceased, Murdock, as being excluded by section 329 of the code. It was testimony of an interested party as to transactions with a deceased person against an assignee of the deceased. Unless testimony as to such transactions had been introduced by the other side it was inadmissible. There seems no doubt that Mr. Gerrard's interest as a stockholder of the bank is a "direct legal interest," and disqualified him under the terms of the statute. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709. It is claimed, however, that plaintiff had opened the door to Mr. Gerrard's testimony, by introducing his evidence as to a part of the transactions on his own behalf. Plaintiff had introduced Mr. Gerrard solely to testify as to receipts of money from the sale of this hemp. It was shipped by Mr. Jerome, the mortgagor. The drafts for it were remitted to Jerome, and by him were turned over to Mr. Gerrard. The deceased, J. S. Murdock, appears to have been a party to the application of $400 from these payments to the mortgage held by his firm on the hemp. The facts of the payments being proved, it is claimed that this admits testimony that they were applied upon advancements made, subsequent to the mortgage, to harvest and market the crop, and that the advancements were, by agreement of defendant with Jerome and with Murdock & Son, to be repaid before anything was to be applied upon the mortgages of either party. The introduction of proof of these payments undoubtedly warranted proof by defendant that they were applied upon the ad-

vancements. We are entirely unable to see, however, how proof of the payments and of their application, could waive the bar of the statute as to testimony by defendant's president and stockholder, Gerrard, with regard to the entirely antecedent agreement, that the mortgages should be postponed to the advancements for harvesting and manufacturing the hemp to fit it for market. It seems clear that, in permitting testimony of this antecedent transaction with the deceased, the trial court was in error.

As before stated, the trial was to the court, and the admission of incompetent evidence will not require a reversal, if there is enough competent evidence to uphold the judgment. Leaving out entirely those portions of the evidence of Gerrard as to transactions with J. S. Murdock, which were not a part of these payments which plaintiff had proved, there is still uncontradicted evidence of an agreement to prefer the advancements. In the first place, there is the fact that out of the first car-load of hemp, the proceeds of which were turned over to defendant, $512 were paid on these advancements of defendant, $100 on one mortgage note of defendant, $50 on another, and $100 on a note of Murdock & Son. Gerrard's testimony, as well as all of the facts, show that this was by arrangement with J. S. Murdock, and as to this the evidence is competent. This was evidently a part of the transaction of payment. Plaintiff had shown defendant's receipt of the money, and defendant had shown its application. Plaintiff's own testimony shows that this payment and another of $300 on the same note from the second car-load were both discussed by him with Murdock. The latter must have assented to defendant's application of the money from the first two car-loads of hemp sold. Mr. Jerome states that Murdock & Son were, at least, fully aware of the arrangement for advances from defendant to harvest the crop, and never objected. Mr. Gerrard states, and there is no denial, that H. I. Murdock, the survivor of the firm, was a party to the agreement. The trial court would not have been warranted in finding otherwise than that Murdock & Son were

parties to the agreement, that defendant should make these advancements and should be repaid for them in preference to the mortgages, its own and Murdock & Son's. It is clear that when plaintiff took his own mortgage on the tow, November 7, 1898, he knew of these advancements and knew, in part at least, what application had been made of the three car-loads of hemp which had been sold and the proceeds paid to defendant. He himself wrote the mortgage then made, and wrote the clause in it, "Subject to the claim of the Columbus State Bank." He admits knowing of the advancements when made, but denies knowledge of any agreement that they were to be a preferred lien on the hemp. It is clear, however, that he had ample knowledge to put him on inquiry, if not actual knowledge of the facts. It seems clear that the plaintiff is not entitled to claim any precedence over defendant's advancements by reason of the mortgage of November 7, 1898, when three of the five car-loads, the proceeds of which defendant received, had already been realized upon, and defendant's advancements were, most of them, more than a year old. It seems equally clear that the Murdock mortgage gives no such priority. It was bought by plaintiff with full knowledge of what defendant claimed, after plaintiff had examined notes and vouchers constituting defendant's claim. We have seen that there is no real doubt that Murdock & Son, while they held the mortgage, consented that it should be postponed to defendant's advancements. It is clear that defendant was entitled to apply the money it received to the payment of its advancements, and was entitled to satisfy the balance remaining due on its mortgages out of the property which plaintiff seized and shipped to New York.

So much of an opinion had been written and submitted as disposing of the case, when it was suggested that there was a complaint that the decree rendered was, in any event, excessive in amount. It was replied that the only claim of that kind was in the reply brief filed by plaintiff, in which was the statement that the decree for $1,148.77 must be excessive, as the bank's mortgages were $1,787.73,

advancements, including interest, were $2,653.65, making a total of $4,441.28; while payments aggregating $4,242.22 were admitted, leaving a balance of only $199.16, with interest, in any event. It was supposed that this discrepancy rested solely on the assumption that all of the defendant's evidence as to the application of these payments was incompetent, and therefore no showing as to the $400, paid by defendant on the Murdock mortgage from proceeds of the tow, was to be considered as in the record. That contention of plaintiff having been overruled, it was supposed that the discrepancy between the claims of defendant, less the admitted payments and the amount of the decree, was removed. That there might be no injustice done, another hearing was ordered as to this question of the amount.

Two objections are now made to the amount of the judgment: First, that it appears that defendant's note of $600, secured by mortgage bearing date August 24, 1897, was without consideration at the time it was given, and its real consideration was a part of the $2,653.65 of advancements claimed, and its amount should be deducted from them; second, that the real amount of advancements shown by the record was only $1,454.39, exclusive of interest. Both of these claims are entirely new ones, quite inconsistent with both the original and reply briefs of plaintiff in error. It is claimed that they should be considered now, as supporting the error assigned in the allegation that the findings of the trial court are not supported by the evidence. Defendant urges, on the other hand, that this new contention can not be considered under the assignment of error that the judgment is not sustained by sufficient evidence.

The decisions of this court seem to be clear that one who wishes to raise this question of error in the amount of recovery, must do so, in terms, in his motion for a new trial and in his petition in error. It is expressly made one of the grounds for a new trial in subdivision 5 of section 314 of the code. It is held that, to make it available in

actions *ex contractu,* it must be expressly called to the trial court's attention. *Hammond v. Edwards,* 56 Neb. 631; *Riverside Coal Co. v. Holmes,* 36 Neb. 858; *Nye & Schneider Co. v. Snyder,* 56 Neb. 754; *Wachsmuth v. Orient Ins. Co.,* 49 Neb. 590; *Montgomery v. Albion Bank,* 50 Neb. 652; *Beavers v. Missouri P. R. Co.,* 47 Neb. 761. We have, however, examined the record and, if the questions had been distinctly raised, there is evidence to sustain the trial court in its conclusion that the $2,653.65 were all advanced, and that it was additional to the loans evidenced by the notes. Mr. Jerome, while his attention was not apparently explicitly directed to the question of whether the advancements claimed included any part of the consideration for the $600 note, testifies that he received the consideration for the note and he received the advancements. It may be true that the statements made by the bank to Jerome, at the time, as to the application of the proceeds of the five cars of tow, are not alleged as accounts stated, and are perhaps not conclusive upon plaintiff, but they are certainly competent to refresh Mr. Gerrard's recollection, and he testifies that they represent the facts. Taking them as correct, and declining to assume, what nowhere appears from the evidence and is clearly contrary to these statements, that the $600 note should be charged against the advancements, the decree does not vary from a careful recomputation more than a few dollars, not more than different methods of computing so complicated a transaction will account for.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

JOSEPHINE G. PERRINE V. KNIGHTS TEMPLAR'S AND MASONS' LIFE INDEMNITY COMPANY.*

FILED MARCH 2, 1904. No. 13,400.

1. **Insurance Certificate: ACTION: VENUE.** An action upon a benefit certificate or insurance policy is transitory and not local in its nature, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof was located.
2. **Appearance.** The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; but, where the motion also challenges the jurisdiction of the court over the subject matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons.

ERROR to the district court for Jefferson county: CHARLES B. LETTON, JUDGE. *Reversed.*

Clark Varnum and *Montgomery & Hall,* for plaintiff in error.

Lamb & Wurzburg and *R. A. Clapp, contra.*

OLDHAM, C.

Plaintiff in this cause of action was the beneficiary named in a benefit certificate issued by the defendant, Knights Templar's and Masons' Life Indemnity Company, a mutual benefit association, organized and incorporated under the laws of the state of Illinois, and doing business throughout the several states of the Union. In 1900, the defendant, in compliance with the laws of this state governing mutual benefit associations, signed, sealed and delivered to John F. Cornell, auditor of the state of Nebraska, a power of attorney by which it constituted him, as auditor of the state, and his successors in office its attorney in fact, upon whom all lawful processes in any action or proceeding within the state of Nebraska might be

* Rehearing allowed. See opinion, p. 273, *post.*

served. Within six months after such power of attorney had been delivered to the auditor of Nebraska, the plaintiff instituted this suit in the district court for Jefferson county, Nebraska, by filing her petition, in which she alleged that defendant was indebted to her on her benefit certificate in the sum of $850. On the 3d day of August, 1900, summons was issued on this petition and delivered to the sheriff of Lancaster county, and service of summons was accepted by John F. Cornell as auditor of the state. When this summons was returned, objection to the jurisdiction of the court over the person of defendant was filed and sustained by the district court. An alias summons was thereupon issued and directed to the sheriff of Jefferson county, and service thereon was attempted to be had upon Charles Weston, successor of John F. Cornell, as auditor of the state. This service, on objection, was likewise quashed and plaintiff, by order of the court, was awarded a second alias summons. The second alias summons was accordingly issued and placed in the hands of the sheriff of Jefferson county, and service of the same was made by the sheriff of said county upon Charles Weston, auditor, in the county of Jefferson, on the 21st day of November, 1901. On the 23d day of December, 1901, defendant filed the following objections to the jurisdiction of the district court for Jefferson county:

"Comes now specially the above named defendant, for the sole purpose of objecting to the jurisdiction of the court and for no other purpose, and submits the court is without jurisdiction of the subject matter or of the person of the defendant, for the following reasons: (1) That there has been no service of summons herein. (2) That there has been no legal service of summons herein. (3) That the pretended service is under an alias summons issued without authority, and without a precipe having been first filed therefor. (4) That the defendant was never found nor served with summons in said county, and never could have been found and served with summons in said county. (5) That the defendant is a foreign cooperative

and mutual insurance company, doing business in the state of Nebraska only by virtue of license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson county or in the state of Nebraska, and the plaintiff is not now, nor ever has been, a resident or citizen of the state of Nebraska. (6) That, at the time of the filing of the petition in the above entitled cause, under which jurisdiction is claimed to have been obtained, defendant had neither property in nor debts owing to it in said Jefferson county, neither had it an agent in said Jefferson county, nor could it be summoned therein. (7) That the said petition herein, under which the second alias summons was issued, was filed on the 3d day of August, 1900, and summons issued thereon without a then present ability to serve the same upon the defendant, or its alleged agent or attorney, in said Jefferson county, Nebraska; that the said second alias summons, under which service is alleged to have been made, was issued more than one year after the filing of said petition under which it was issued, and after the court had twice sustained objections to its jurisdiction for the reason that, at the time the petition was filed and the cause commenced, no service of summons could be had upon the defendant in said Jefferson county. (8) No service of summons upon the auditor of the state of Nebraska in his official capacity can be made beyond the boundaries of said Lancaster county in said state, his official residence, and that no service of summons herein could be made upon the said auditor. (9) That no service could be had herein upon Charles Weston, auditor of public accounts, in said Jefferson county, or elsewhere. (10) That the alleged service of summons upon the said Charles Weston was and is void."

Affidavits in support of and counter affidavits were filed to these objections, and on the hearing thereof the court rendered the following order and judgment:

"Now on this 16th day of May, 1903, this cause came on to be heard upon the defendant's objections to the juris-

diction of this court; upon due consideration whereof the court doth sustain the objections of defendant as to jurisdiction. To which ruling of the court the plaintiff then and there duly excepts, and forty days from the rising of the court is given to plaintiff to prepare and present her bill of exceptions. And, thereupon, the following order was made by the court, to wit: 'This cause is hereby dismissed at plaintiff's costs.'"

To reverse this judgment, the plaintiff brings error to this court.

We are first asked to examine into the holdings of the court on the return of each of the summonses, the service of which were quashed by the order of the district court. This, however, we can not do in view of the fact that no final judgment was entered by the court when service was quashed on either of the former summonses, and plaintiff acquiesced in each of these orders by applying for and receiving leave from the court to issue its alias summons; so that our investigation will be limited to the action of the court in sustaining the objections to jurisdiction at its last hearing.

There are three special requisites of jurisdiction of courts in personal actions: The first of these is, jurisdiction of the person of the plaintiff; second, jurisdiction of the person of the defendant; and, third, jurisdiction of the subject matter of the action. As to the first requisite, the court was fully invested with it by the action of plaintiff herself in filing her petition and executing an undertaking for costs. Concerning the third requisite, the district court being a court of general common law jurisdiction was invested with jurisdiction of the subject matter of the controversy, if the action were personal and transitory in its nature. The fact that the cause of action was against a foreign insurance or beneficiary company and the beneficiary did not reside in the state, and that the contract was entered into in another state, would not oust the jurisdiction of the district court of this state of the subject matter of the controversy, if the defendant were found

within the state. The authorities all seem to agree that an action upon a benefit certificate or insurance policy is transitory and not local in its nature, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof was located. *Mohr & Mohr Distilling Co. v. Insurance Cos.*, 12 Fed. 474; *Northwestern Mutual Life Ins. Co. v. Lowry*, 20 S. W. (Ky.) 607; *Johnston v. Trade Ins. Co.*, 132 Mass. 432. And the same principle applies to actions on policies of fire insurance. *Insurance Co. of North America v. McLimans & Coyle*, 28 Neb. 653. It is therefore apparent that the district court for Jefferson county had jurisdiction both of plaintiff and of the subject matter of the controversy; and it also follows that, if either by proper service of process or by the voluntary appearance of the defendant in that court, it acquired jurisdiction of the person of the defendant, then defendant's objections should have been overruled.

It is obvious, from an examination of the objections filed, that defendant intended by its special plea to challenge the jurisdiction of the court, not only over the person of defendant, but also over the subject matter of the controversy. The question then arises, can a defendant, without entering a general appearance, challenge the jurisdiction of a court over the subject matter of a controversy there pending? The question of a right to challenge jurisdiction without an appearance has been before this court on numerous occasions, and the rule announced by LAKE, C. J., in the early case of *Crowell v. Galloway*, 3 Neb. 215, has always received our commendation. In that case the learned chief justice said:

"It is a general, and we think a wholesome rule of practice, that if a defendant intend to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this, and appear for any other purpose

at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process, and to have given the court complete jurisdiction over him for all the purposes of the action."

In *Elliott v. Lawhead,* 43 Ohio St. 171, defendant was served by publication, and filed a special appearance excepting to the service, and also challenging the jurisdiction of the court as to the subject matter of the controversy. In disposing of the case, Johnson, J., speaking for the court said:

"This motion assigns two reasons why it should be granted: First, want of legal and proper service; and, second, because the court had no jurisdiction of the subject matter. This last ground was in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance in the case. It amounted to a waiver of service, and gave the court jurisdiction over the person of defendant. It is true the defendant 'comes for the purpose of filing this motion and for no other purpose,' and had the motion been confined to want of proper service it would not have operated as an appearance. It was not so limited, but embraced an additional reason, to wit, the right of the court to hear and determine the subject matter. The rule is that where a defendant appears *solely* for the purpose of objecting to the jurisdiction of the court over the person, such motion is not a voluntary appearance of defendant which is equivalent to service. Where, however, the motion involves the merits of the case made in the petition, the rule is otherwise. *Handy v. Insurance Co.,* 37 Ohio St. 366; *Maholm v. Marshall,* 29 Ohio St. 611."

We therefore conclude that, by challenging the jurisdiction of the court over the subject matter of the controversy, the defendant entered a general appearance, and this being true, it is immaterial whether the service of summons upon the defendant, or rather upon its alleged attorney in fact, the auditor of this state, was properly or improperly made.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed December 7, 1904. *Judgment of reversal adhered to:*

Appearance: JURISDICTION. An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not.

OLDHAM, C.

This is a rehearing. The former opinion is found, *ante*, p. 267. The case is fully stated in that opinion. It is now urged that the objections raised by the defendant in error in the court below were to the jurisdiction of the court over the person of the defendant, and nothing more, because the grounds assigned relate alone to the jurisdiction of the person. The pleading filed in the court below states, "Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject matter or of the person of the defendant for the following reasons"; whereupon the reasons are set forth, ten in number. We are now urged to disregard the challenge therein made to the jurisdiction of the subject matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the "reasons assigned," there could have been anything considered by the court except the sole

question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court. We have taken our code from Ohio, and the practice of that state is analogous to ours. In *Smith v. Hoover,* 39 Ohio St. 249, the court said:

"The appearance of a defendant in court for the sole purpose of objecting, by motion, to the mode or manner in which it is claimed that jurisdiction over his person has been acquired, is not an appearance in the cause, or a waiver of any defect in the manner of acquiring such jurisdiction; while, on the other hand, the appearance for the purpose of contesting the merits of the cause, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not. In respect to this question, an important distinction is made between an objection to the jurisdiction of the subject matter of the suit, and of the person of defendant, although complete jurisdiction in the court to hear and determine the action is not acquired unless the court has jurisdiction over both the subject matter and the person. An objection to jurisdiction over the subject matter is a waiver of objection to the jurisdiction of the person, while an objection to the jurisdiction of the person is a waiver of nothing."

With these considerations in view we turn to the "reasons assigned":

"5. That the defendant is a foreign cooperative and mutual insurance company doing business in the state of Nebraska only by virtue of a license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson county or in the state of Nebraska, and the plaintiff is not now, and never has been, a resident or citizen of the state of Nebraska.

"7. That the said petition herein, under which the second alias summons was issued, was filed on the third

day of August, 1900, and summons issued thereon without a then present ability to serve the same upon the defendant, or its alleged agent or attorney, in said Jefferson county, Nebraska: that the said second alias summons under which service is alleged to have been had was issued more than one year after the filing of said petition under which it was issued, and after the court had twice sustained objections to its jurisdiction for the reason that, at the time the petition was filed and the cause commenced, no service of summons could be had upon the defendant in said Jefferson county."

The 5th objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject matter, and that he has done so both by his averments and by the evidence. And again, the 7th assignment, if it means anything, is a plea of *res judicata* of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization.

We therefore conclude that our former opinion is sound in principle and should be adhered to, and we so recommend.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

REVERSED.

WILLIAM VON DOHREN V. JOHN DEERE PLOW COMPANY.

FILED MARCH 2, 1904. No. 13,304.

1. Sale: IMPLIED WARRANTY. The law is well settled that the purchaser of personal property, under an implied warranty that the same is well made and reasonably suitable for the purposes for which it is purchased, has a reasonable time within which to test the same to determine whether or not it is as warranted, and such question is ordinarily one for the jury.
2. Contract: RESCISSION. After he has made the test, and has discovered all of the defects which he claims exist, and calls the attention of the seller thereto, and the seller refuses to make any changes but insists that the article is as represented, the purchaser must at once return it, or his right to do so will be lost.
3. ———: AFFIRMANCE. In such case, where the property is a corn sheller, purchased for custom work, and the purchaser continues to use the machine, after such refusal by the seller, for a day and a half, and until he has finished all the work he has on hand, and then keeps the machine in his shed for twenty-four days before offering to return it, it will be *held*, as a matter of law, that he has elected to affirm the contract as made.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John T. Cathers and *J. O. Detweiler,* for plaintiff in error.

F. A. Brogan, contra.

FAWCETT, C.

Defendant in error, hereinafter styled plaintiff, brought this action in the court below to recover from plaintiff in error, hereinafter styled defendant, the value of a corn sheller, which plaintiff alleges it sold and delivered to

defendant on June 13, 1901, for an agreed price of $487.18.

For answer, defendant admits that he ordered the sheller, admits that he refused to pay plaintiff therefor, and denies each and every other allegation contained in the petition.

For further answer, defendant alleges that he is a dealer in agricultural implements and purchased the sheller for one Fred H. Voss, to whom the said machine was delivered by plaintiff, on his order; that the machine was defective in several respects set out in the answer; that it would not do the work for which it was intended, in a satisfactory manner; that the machine was purchased from plaintiff under an implied warranty that it was a new machine, and a machine reasonably suitable and fit for the purpose for which it was intended and ordered, and that it would do the work for which it was intended to be used, in a reasonable, proper and suitable manner. For reply, plaintiff admits that it sold the machine to defendant on an implied warranty, as alleged, but denies each and every other allegation in defendant's answer, except such as are contained in plaintiff's petition.

The evidence shows that Voss took the machine to his home, near Millard, in Douglas county, and on June 13, 1901, set the same up for work and shelled corn with it that day. The machine not operating to Voss' satisfaction, he reported the matter to defendant who, in turn, reported it to plaintiff. That plaintiff's expert, one R. J. Teare, went to Millard a few days thereafter to inspect the machine, but Voss was not shelling that day, so it was agreed that he, Teare, should return again on June 25. On the 25th of June, Voss started to shell corn at the farm of John Seibord, about 6 o'clock in the morning, and continued to shell at that place until 6 in the evening. Mr. Teare appeared on the scene about 11 o'clock in the forenoon and inspected the machine, watching its operations until they quit for dinner. After dinner he again went out and watched the working of the machine for about three-quarters of an hour. He testifies that during all

the time he was there the machine was running perfectly and doing its work well in all respects; that Voss called his attention to the matters he was complaining about and wanted him to make several changes in the machine; that he refused to make any of the changes or do anything about the matter, except to give Voss an order on the defendant for the material for rebabbitting one of the boxes, which would cost about 40 or 50 cents, instructing defendant to charge the same to plaintiff; that Voss accepted the order and said he would have it done. He testifies, positively, that he then and there refused to make any of the other changes or betterments which Voss called for. This testimony is corroborated by the cross-examination of Voss, himself, as appears on page 55 of the bill of exceptions.

After this interview, Teare left the place and returned to his home in Omaha. Voss continued to run the sheller all that afternoon until 6 o'clock, at which time he finished the job of shelling he had for John Seibord. He then moved his machine to the farm of Henry Reimer, where he shelled something over 200 bushels of corn, after supper that evening. The next day, June 26, he moved the machine to Charles Seibord's, where he ran it all day and until he had finished the shelling at that place. Having finished all the work he had on hand, he then hauled the machine home, put it in his shed and permitted it to remain there from that time, June 26, until July 20, when he hauled it to plaintiff's place of business in Omaha, and demanded a rescission of his contract. Plaintiff refused to receive the machine, so Voss left it on one of the public streets of Omaha, near plaintiff's place of business, and went away. The machine has remained there until this time.

After both sides had rested, plaintiff moved the court to direct a verdict in favor of the plaintiff for the amount of its claim. The court overruled the motion, and submitted the case to the jury. After the jury had been out for some time, it returned and asked for further instruc-

tions, which the court gave, and, soon thereafter, the jury returned a verdict in favor of the plaintiff for the full amount claimed in its petition, with interest, upon which, after overruling defendant's motion for a new trial, the court entered judgment.

Numerous errors are assigned by defendant as to the giving and refusing of instructions, and particularly as to the giving of the instructions given by the court after the jury had once retired; and extended arguments are made in the briefs of the parties as to whether the contract was an executory or an executed contract. Under our view of the case, it is unnecessary to pass upon any of these questions. It is immaterial whether the contract is an executory or an executed contract, or whether the court correctly stated the law in its instructions or not, as, under the pleadings and evidence, there could not be any other result than the one which was reached. We think the court should have sustained plaintiff's motion to direct a verdict. The law is settled, beyond all question, that the purchaser of personal property like that in controversy, under an implied warranty, has a reasonable time to test the same to ascertain whether or not it is as warranted, and, ordinarily, this would be a question for the jury; but, after he has made the test, and has discovered all of the defects which he claims exist, and calls the attention of the seller to these defects, and the seller refuses to make any changes, but insists that the machine is as represented, the buyer must at once return the property. He can not keep it and use it for any length of time thereafter, and certainly he could not continue to use it until he had finished the work in hand, and then put it in his shed and keep it for nearly a month, and claim that he had acted with promptness or even within a reasonable time. When Teare told Voss, on the afternoon of the 26th of June, that he would not make any of the changes Voss demanded, and Voss continued to use the machine until he had finished all the work he had on hand, and then kept it for over three weeks in his shed before making any at-

tempt to return it, he thereby ratified the contract as made.

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

ALBERT and GLANVILLE, CC., concur.

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

AFFIRMED.

SIMPSON MCKIBBIN V. HENRY J. DAY ET AL.

FILED MARCH 2, 1904. No. 13,379.

1. **Venue:** SUMMONS TO ANOTHER COUNTY. In a personal action for the recovery of money only, where a resident of the county where the action is brought is joined with a resident of another county, to authorize service upon the latter in the county of his residence there must be an actual right to recover against the defendants jointly.

2. **Jurisdiction:** JOINT LIABILITY. Where the allegations of the petition in a case of that character are such as to include both a joint and several liability against the defendant, the jurisdiction of the court as to the nonresident on his several liability, is sufficiently challenged by a plea to the jurisdiction, setting forth the fact of his residence in another county, and the service of process upon him therein, and upon the return of a verdict which negatives a joint liability, he is entitled to a dismissal.

3. **Parties:** INSTRUCTION. In an action for false and fraudulent representations in the sale of property, where a copartnership and the alleged members thereof are made defendants, and the relationship of the other defendants to such copartnership is put in issue, it is error for the court to instruct on the theory that the individual members of the copartnership are the only parties defendant.

4. **Sale:** REPRESENTATIONS. Ordinarily, where a vendee has an opportunity for inspection, representations by the vendor, as to the value of the property, are regarded as mere expressions of opinion, and afford no basis for an action of fraud and deceit.

5. ———: FRAUD. But where such representations are based on

special knowledge of the vendor, which he obtained or pretends to have obtained, by handling the property or invoicing it, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

A. E. Harvey and *Stewart & Munger,* for plaintiff in error.

L. C. Burr, contra.

ALBERT, C.

Henry J. Day brought this action in the district court for Lancaster county against Simpson McKibbin, George J. McKibbin, John S. McKibbin and McKibbin Brothers, a copartnership. Service on all of the defendants save Simpson McKibbin was had in Lancaster county. Simpson McKibbin was a resident of Phelps county, and summons issued to that county for him and was served on him there.

The allegations of the petition are, in substance, as follows: That the defendant McKibbin Brothers is a copartnership composed of the other defendants herein. That, on a certain date, the plaintiff was the owner of certain real and personal property in Phelps county, and the defendants were the owners of a certain house and lot, stock of merchandise and store fixtures in the city of Lincoln. That, on said date, the defendants, with intent to cheat and defraud the plaintiff, and for the purpose of inducing him to exchange his said property in Phelps county for the property of the defendants, falsely and fraudulently represented to him that their said house was well built, in good repair, and would rent for $50 a month, and that the said house and lot were worth the sum of $8,000; that an invoice of the said stock of merchandise had been taken about four months before, that it invoiced $6,700; that the stock had been increased since such in-

voice, and said stock and fixtures were worth $7,000; that said stock was new and well selected, and had not been in the store more than one year; that the business conducted with said stock and fixtures was prosperous, and that the daily sales thereof had averaged $80 a day, as shown by the defendants' books.

The plaintiff alleges that he relied upon said representations, believed them to be true, and was thereby induced to make said exchange with the defendants. That the said representations were false, as the defendants well knew, in this: The said house was not well built, was not in good repair and would not rent for $50 a month; that the said invoice of stock, taken by the defendants, did not show the value thereof to be $6,700, and the said stock had not been increased since such invoice; that said stock was not new or well selected, but old and shop worn, and consisted of odds and ends of little value; that the business conducted with said stock and fixtures was not prosperous, and the daily sales thereof averaged much less than $80 a day; that the said stock of goods and fixtures were not worth to exceed $3,000, and the said house and lot were not worth to exceed $4,000. The damages are laid at some $6,000.

Simpson McKibbin, who, as we have seen, was not a resident of the county in which the action was brought and was not served with process there, filed a separate answer in which he interposed a plea to the jurisdiction of the court over his person, setting up the fact that he resided in Phelps county, was served with process in that county, was not a member of the firm of McKibbin Brothers and was not interested therein directly or indirectly. In his answer he admitted having made the trade set forth in the petition, but denied all the other allegations therein contained. The other defendants answered, denying all the allegations of the petition. A trial resulted in a verdict in favor of the plaintiff and against the defendant Simpson McKibbin, and in favor of George J. McKibbin and John S. McKibbin against the plaintiff. As to the co-

partnership, no verdict was returned. Simpson McKibbin, thereupon, again challenged the jurisdiction of the court and asked to be dismissed. His motion was overruled and judgment entered against him in favor of the plaintiff, and in favor of George J. McKibbin and John S. McKibbin against the plaintiff. From the judgment in favor of the plaintiff, Simpson McKibbin prosecutes error, and from the judgment in favor of George J. McKibbin and John S. McKibbin, the plaintiff brings error.

As to Simpson McKibbin, the principal question is that of the jurisdiction of the court to render judgment against him. The action is purely personal and for the recovery of money only, and does not fall within any exception to the general rule formulated in section 60 of the code, which requires actions to be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned. One of the latest cases construing that section is *Stull Bros. v. Powell,* 70 Neb. 152. In that case the authorities are collected and compared, and the conclusion deduced therefrom is that, to authorize summons to another county in personal actions for the recovery of money only, there must be an actual right to join the resident and nonresident defendants. In the body of the opinion it is said, in effect, that the right to maintain an action of that character against the nonresidents served in another county, would depend upon the plaintiff really having a right to recover from the resident defendants jointly with the others. That the plaintiff in this case did not "really" have such right seems to be established by the verdict of the jury.

But it is insisted that the petition not only shows a joint liability by reason of the partnership relations of the defendants, but also a joint liability independent of such relations, and that, while the defendant Simpson McKibbin in his plea to the jurisdiction denied that he was a member of the copartnership, he did not, in express terms, deny joint liability for the false and fraudulent representations. We do not think such denial was necessary. Under

our rules of practice, the allegations of the petition are sufficient to sustain a judgment against any or all of the defendants, because a cause of action against each defendant, severally, is included in the allegations showing a joint liability. But it is only for the purposes of the joint liability that service of process on Simpson McKibbin in another county was authorized. Hence, when he alleged in his plea to the jurisdiction that he was a nonresident of the county where the action was brought, and was not served with process therein, but was served in another county, he stated facts sufficient to defeat the jurisdiction of the court, so far as it was sought to obtain a judgment against him severally, and when it was established by the verdict of the jury that he was not liable jointly with his codefendants, or any of them, he was entitled to a dismissal. In *Penney v. Bryant*, 70 Neb. 127, this court held that, where a joint liability is asserted against several defendants in order to maintain an action against one or more of them in a county other than that where they reside or are found, the latter are not to be held upon a different or several liability, even though it be disclosed by the pleadings and proof.

As to the judgment in favor of the defendants George J. McKibbin and John S. McKibbin and against the plaintiff, we think it should also be reversed. In the statement of the issues to the jury, the court overlooked the fact that the firm of McKibbin Brothers, as such, was a party defendant, and whether the other defendants were members thereof was one of the issues in the case, and instructed on the theory that such other defendants were the only defendants. It is not difficult to see how this was prejudicial to the plaintiff. If, as alleged, the firm was a party to the transaction, each member thereof was liable because of that fact, whether he actually participated in said transaction or not. But as the issues were stated to the jury, it was necessary for the plaintiff to show that each defendant participated in the fraud, in order to hold him liable. The instructions would have warranted the

jury in finding in favor of some of the defendants, even though it were established that the firm was a party to the fraud, and the other defendants composed such partnership. It is obvious, we think, that the charge in that respect was erroneous. It was the duty of the court to instruct as to the issues, whether requested to do so or not. *Kyd v. Cook,* 56 Neb. 71; *Hanover Fire Ins. Co. v. Stoddard,* 52 Neb. 745; *Sandwich Mfg. Co. v. Shiley,* 15 Neb. 109. The jury made no finding as to the defendant firm. It is probable that, had the issues been properly stated to the jury, it might have been implied from the two verdicts in this case that they found in favor of the firm, but, as the cause was submitted, no such inference can be drawn, because there is nothing in the entire charge whereby the jury were instructed as to the authority of one partner to bind the firm, or as to the liability of each member for the act of every other member in respect to the partnership business.

As the case goes back for a new trial, another feature of the instructions should be noticed, and that is, the failure to distinguish between the representations in regard to the value of the house and lot and the amount for which said property would rent, and the other representations alleged to have been made by the defendants. The exchange was made, after the plaintiff had examined the property which the defendants gave him in exchange for his. He had equal opportunity with the defendants to ascertain the value of the house and lot, and the rental value thereof. Under such circumstances, their representations in that regard were mere expressions of opinion, and he would not be warranted in relying upon them. *Nostrum v. Halliday,* 39 Neb. 828; *McKnight v. Thompson,* 39 Neb. 752; *Crocker v. Manley,* 164 Ill. 282. Such expressions "are regarded as trade talk which every man of intelligence receives *cum grano salis.*" *Gordon v. Butler,* 105 U. S. 553; *Mooney v. Miller,* 102 Mass. 217. As to the value of the stock of goods and fixtures, a different rule would apply, because the representations in regard to their

value, according to the plaintiff's theory, appear to have been based on special knowledge of the defendants obtained by handling the goods and invoicing them. But, in its instructions to the jury, the court made no distinction between the representations made in respect to the value of the real estate or the amount for which it would rent, and the other representations of which plaintiff complained. There can be no doubt that this was error, and prejudicial to Simpson McKibbin. It will no doubt be avoided on another trial.

It is therefore recommended that the judgment in this case be reversed and the cause remanded for further proceedings according to law.

FAWCETT and GLANVILLE, 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.

HOWARD H. BALDRIGE ET AL., APPELLEES, V. JOHN COFFMAN ET AL., APPELLEES, IMPLEADED WITH JOHN R. CONKLIN, APPELLANT.

FILED MARCH 2, 1904. No. 13,276.

Partition: STATEMENT OF ACCOUNT. Where an action in partition involves an accounting of transactions between the parties extending over a long series of years, it is the duty of the trial court, by himself or a referee, to state the account, giving the items or classes of items and sums credited and charged to the respective parties, and the facts, in his opinion, affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence.

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

Billingsley & Greene and *R. H. Hagelin,* for appellant.

Baldrige & De Bord and *T. J. Doyle, contra.*

DUFFIE, C.

This is an action for partition. The real estate involved formerly belonged to Samuel Coffman and John R. Conklin. In 1884 these parties formed a partnership to own and operate a stock farm near Denton in Lancaster county, Nebraska, to buy, feed and sell cattle, hogs and horses. This partnership continued to transact business until some time in 1895, and no settlement of the partnership accounts was ever had between them. Conklin conveyed a one-half interest in the land to Mr. Baldrige, and Samuel Coffman conveyed a one-half interest to his son John Coffman. Baldrige, after obtaining his interest, conveyed one-half thereof to Mr. De Bord, and these parties brought this action to obtain partition of the land. One Thompson intervened, claiming a lien upon the land because of certain sales for delinquent taxes at which he was the purchaser. As his lien was established and allowed by the court, it will not be necessary to make any further reference thereto. Pending the suit Samuel Coffman died, and the case has been revived in the name of his heirs. These heirs claim that the land was part of the partnership assets of Coffman & Conklin, and that whatever interest Baldrige obtained by his deed from Conklin was subject to the payment of a debt of $30,000 or more, due to Samuel Coffman from the partnership of Coffman & Conklin. On the other hand, John R. Conklin claims that the partnership of Coffman & Conklin is indebted to him in a sum aggregating something like $40,000, that the land was part of the partnership assets and is subject to the payment of that claim. On the trial, the court found that the land was not partnership property but that Conklin and Coffman each owned an undivided one-half interest therein, and, in relation to the accounting asked for, the decree

recites: "And the court finds against the said John R. Conklin and John Coffman, Mary Coffman, Blanche Coffman, Charles Coffman, Gertrude Caine, Annette Morris, Kate C. Hale, William Coffman, administrator of the estate of Samuel Coffman, deceased, Rollo Moore, T. J. Doyle, guardian *ad litem* of Rollo Moore, upon the several petitions for an accounting, and that there is not sufficient evidence before the court upon which to make the accounting asked for therein." And it was decreed that the petition of the parties for an accounting be dismissed, without prejudice to a new action. From this finding and decree John R. Conklin has appealed.

We are inclined to believe that the court erred in dismissing the parties from court without making an accounting, and, until the accounting is made and it is determined whether there is anything due from one partner to the other, it would be useless to determine the legal rights of the parties to the land in question. If there was not sufficient evidence before the trial court to enable it to state an account between the parties in a satisfactory manner, we are certainly in no position to review the case if, in fact, there is any question for us to review. In *Hanson v. Hanson*, 4 Neb. (Unof.) 880, we have said:

"When an action in partition involves an accounting of transactions between the parties extending over a long series of years, it is the duty of the trial court, by himself or a referee, to state the account, giving the items or classes of items and sums credited and charged to the respective parties, and the facts, in his opinion, affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence."

In this case the partnership continued in business for ten years or more, no settlement having been made during that time. Accounts aggregating nearly a half million dollars are involved. Without any finding by the court as to what should be allowed or disallowed, with no opportunity for attorneys to point out errors made by the trial

court in allowing or disallowing one or several items on one side or the other of the account, with a distinct refusal of the court to pass upon the question at all because of the unsatisfactory state of the evidence, we are asked to take up the case and try it as an original action. This we can not consent to do. We have none too much time to devote to specific errors pointed out by parties who feel themselves aggrieved by the rulings of the district court when such rulings are made and, as in the *Hanson* case, we are compelled to recommend that the case be remanded to the district court, with orders to state an account between John R. Conklin and the heirs of Samuel Coffman, and to make a finding of facts showing the items allowed and disallowed on the account of each.

As the parties have acquiesced in the judgment of the district court so far as it established the tax lien claimed by Thompson, and finding Baldrige & De Bord the owners in fee of one-half of the land involved in the controversy, we recommend that the judgment of the district court be affirmed to the extent that it finds Thompson entitled to a lien for taxes and Baldrige & De Bord the absolute owners of a one-half interest in said land, and that it be reversed and remanded for a statement of the account between John R. Conklin and the heirs of Samuel Coffman.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is affirmed in so far as it establishes a tax lien in the land in suit in favor of Thompson and in so far as it establishes the right of Baldrige & De Bord to a one-half interest in said land, and is reversed and remanded to the district court, with directions to state an account between John R. Conklin and the heirs of Samuel Coffman.

JUDGMENT ACCORDINGLY.

A. F. HAISH V. ABNER DILLON.

FILED MARCH 2, 1904. No. 13,391.

Stating an Account. In stating an account, as in making any other agreement, the minds of the parties must meet, and the transaction must be understood by the parties as a final adjustment of the respective demands between them, and the amount then due.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed.*

Hague & Anderbery, for plaintiff in error.

Lewis C. Paulson and *J. L. McPheeley, contra.*

DUFFIE, C.

Plaintiff in error was plaintiff in the court below. He sued Dillon on an open account claiming a balance due of $65.60 for various items, including some work done for Dillon by a hired hand, one Capps. Dillon answered, first, by a general denial, and, second, that a full and final settlement was had between plaintiff and himself, in which it was found that there was a balance due the plaintiff of $30.60, provided, however, that Capps should verify the amount of work that was done by him in the way of husking corn for the defendant, and that, if the amount charged for his work in the settlement should be reduced by him, then the amount of such reduction should be subtracted from the $30.60 otherwise agreed upon. That Capps reduced the amount claimed by plaintiff for his work by $9, thus fixing the amount of $21.60 as the amount due the plaintiff. It was further alleged that this amount had been tendered the plaintiff before suit brought and that he refused to accept the same. The reply of plaintiff denied a settlement. The evidence shows that some time in December the parties met and agreed upon the different items of the account existing one against the other, except an item of $18 for 90 hours' work in husking

corn performed for Dillon by Capps, the hired man of Haish. Haish had a statement, which he claimed was furnished him by Capps, showing the number of hours that he worked, and it is conceded that if this statement is correct, the balance agreed upon between the parties was $30.60 in settlement of all accounts between them. It appears, however, that Dillon was not satisfied with the statement, and refused to agree to the amount until it was verified by Capps; that Capps afterwards, when called on, claimed that the statement was incorrect and that he had worked only one-half the time shown by the statement. It is now insisted by Dillon that Haish agreed to accept in full settlement of his claim $30.60, less any overcharge which Capps should say was made for his services.

It will be seen from this statement that Dillon defended upon the theory that an account had been stated between the parties, that a tender of the amount had been made, and that the action could not therefore be maintained; and in its third instruction the court told the jury: "Under the issues joined and under the answer filed, the burden of proof is on the defendant to prove by a fair preponderance of the evidence the settlement that he claims was made. Unless you are satisfied by a preponderance of the evidence that a settlement was made as alleged by him, then you will not consider such allegations in his answer." It will be seen from this instruction that the case was submitted to the jury upon the theory that what took place between the parties relating to a settlement had fixed and determined the amount due the plaintiff. In other words, that an account had been stated between them. We do not think that either the defendant's answer, or the evidence offered in support thereof, shows an account stated. The rule is uniform that in stating an account, as in making any other agreement, the minds of the parties must meet. *Lockwood v. Thorne,* 18 N. Y. 285; *Stenton v. Jerome,* 54 N. Y. 480; *Raymond v. Leavitt,* 46 Mich. 447; *McKinster v. Hitchcock,* 19 Neb. 100; *Hendrix v. Kirkpatrick,* 48 Neb. 670.

Bloomley v. Granton & Watkins, 1 U. C. C. P. 309, is a case very much in point. In that case the defendant admitted a certain balance due to the plaintiff, from which was to be deducted an unascertained debt due to the defendant, and also a balance on a certain account due by the plaintiff to his brother, which he had agreed should be paid by the defendant out of moneys coming to the plaintiff. It was held that this was not evidence of an account stated. The court said:

"The mere admission of the balance remaining on one part of a transaction or agreement, to be reduced by deductions concurrently agreed to be made on another part of such transaction or agreement, such deduction not being ascertained or admitted in point of amount, does not admit any specific sum as presently due, so as to amount to evidence of an account stated, either at that time or at any prior period; such admission only shows a liability to account, or a state of accounts unadjusted. Nor would proof of the amount of the counterclaim to be deducted, show an admitted balance of the residue sufficient to support the count on an account stated."

By Dillon's answer it is shown that the parties themselves never agreed upon the amount due from him to the plaintiff. Upon his own theory, the amount due was to be fixed by what should thereafter be stated by a third party. The minds of the parties never met upon the amount due. If they had, as well stated in the brief of plaintiff in error, this suit would never have been commenced. It was because the account never was settled that the parties are in court.

We recommend a reversal of the judgment and that the cause be remanded for another trial.

LETTON 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 another trial.

REVERSED.

KITCHEN BROTHERS HOTEL COMPANY V. WILLIAM DIXON, BY HIS NEXT FRIEND, DAVID KIMMEL.

FILED MARCH 2, 1904. No. 13,423.

1. **Fellow Servants.** A bell boy in a hotel, a part of whose duties consists in showing guests to their rooms, using the elevator for that purpose, and the elevator boy in charge of the elevator, both being employed and subject to the directions of the same master, are fellow servants.
2. **Petition: NEGLIGENCE.** Petition examined and *held* to charge negligence, causing the accident for which damages are sought to be recovered, to the acts of a fellow servant.
3. **Pleadings: ISSUES: EVIDENCE.** An issue not made by the pleadings may be regarded as an issue in the case, where evidence is introduced and received thereon without objection, but when objection is made that evidence offered is not within the issues, it is error to receive it, and to try and submit the case on the theory that such question is an issue in the case, if it is not in fact made so by the pleadings.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Reversed.*

B. T. White and *J. B. Sheean,* for plaintiff in error.

Jefferis & Howell, contra.

DUFFIE, C.

The defendant in error recovered judgment against plaintiff in error, in a suit brought to recover for injuries received by falling into the elevator shaft of the passenger elevator in the Paxton Hotel, in the city of Omaha. At the time of his injury he was a bell boy in the employ of the hotel company, and a part of his duties was to accompany and show guests of the hotel to said elevator and to their respective rooms in said hotel, by taking and accompanying said guests to and into said elevator to be carried as passengers to the floor upon which said guests had rooms. The elevator was operated by an elevator boy,

whose duties required him to put the elevator in motion and operate the same in transporting guests, and other persons having a right to be transported thereon, to and from the different floors of said hotel building. It was the duty of the elevator boy to keep the doors of the elevator shaft closed on each of the floors, when the elevator car was not stationed at a given floor ready for the entrance and departure of passengers into and from said elevator car. Paragraphs 8½, 9 and 10 of the petition are in the following language:

"8½. That at the times hereinafter and heretofore mentioned, it was the duty of the defendant to keep said elevator, elevator shaft and the doors leading to the car, in proper and safe condition, and it was the duty of said defendant to keep said elevator door on the first floor of the building herein mentioned closed at all times, except when the car of said elevator was standing at said floor ready to receive passengers and persons for transportation therein, and it was the duty of said defendant to keep the door of the elevator shaft at said floor in good order, so that the same would fasten from the inside and remain fastened in such manner that the same could not be opened from the outside without a key, and keep the same securely fastened at all times when said elevator car was not at said floor ready to receive passengers for transportation in said car; that the defendant negligently failed to provide a proper fastening for said door, and negligently failed to keep said door closed at the time of the injury herein complained of, while said car was above the first floor, thus leaving the shaft of said elevator open, unguarded and without proper lighting about said elevator and the shaft, or any other warning; that the defendant negligently kept for use on the first floor of said building, at said elevator shaft, a door, through which entrance to the said shaft and the said car was made, said door being negligently and carelessly constructed; that the same could be opened from the outside of said elevator shaft without a key, and that said door, on said occasion, was so negli-

gently and carelessly constructed and maintained that the same failed to catch when it was closed, all of which foregoing was well known to defendant herein, the plaintiff herein being ignorant at the time of said accident of the aforesaid conditions and the negligence of the defendant.

"9. That, at the time aforesaid, to wit: on April 6, 1901, between the hours of 11 o'clock and 12 o'clock P. M., the plaintiff was directed by the defendant to take the baggage of a guest of said hotel, and accompany said guest to a room which had been assigned to said guest above the first floor of said building; and, at said time, *the elevator man or boy in charge of the car of said elevator caused the door opening into the elevator-way, shaft or opening on the first floor of said building, where the plaintiff and said guest were, to be opened, and remain open while the said elevator man or boy stood near the said door or opening.*

"10. That, at said time, the defendant, well knowing the premises aforesaid, negligently and wrongfully left said door on said floor, where the plaintiff and said guest were, open, and the said elevator-way or shaft unguarded, and without any signal or warning; in consequence whereof the plaintiff aforesaid, while lawfully and properly on said ground floor in the building aforesaid, believing that the elevator car was there in the said shaft, and on the ground floor, in waiting and readiness to receive passengers for carriage, *and induced to so believe by the fact that said door was standing open as aforesaid, and by the further fact that said elevator man or boy, having charge of said car, was standing at or near said door and opening, apparently prepared to transport passengers in said car,* and believing then by entering said door he would be stepping into the aforesaid elevator car, and it being dimly lighted in and about said shaft and car, entered and passed through said door or doorway; and the said elevator car not being in that portion of the shaft, but at some place above the ground floor of said building at that time, without any fault on his part, the said plaintiff fell into, down and through said elevator-way or shaft, from the ground

floor of said building to the lower floor or basement thereof, among timbers and structures, in the bottom of said shaft."

We have copied the foregoing paragraphs of the petition for the reason that the court, in its instructions to the jury, and the defendant in error, in his argument in this court, assumed that the plaintiff below, in his petition, charged the defective condition of the lock or catch of the elevator door to be an act of negligence on the part of the defendant, and one of the proximate causes of the injury to the plaintiff below. The plaintiff below, in his testimony, in describing the accident and the causes that led thereto, states that, on or about midnight of the day the accident occurred, he was doing some work behind the counter in the Paxton Hotel office; that a guest arrived at the hotel and, after registering, desired to be assigned to a room; that plaintiff below was requested by the night clerk to show the guest to the room assigned to him; that he took the key of the room and the grip of the guest and started toward the elevator, the door of which stood open, the elevator boy who had charge at that hour being some 30 feet away, standing in the rotunda of the hotel; that he turned his head and indicated to the elevator boy that his services were required, and, supposing that the car of the elevator was standing on a level with the office floor, from the fact that the door was open, he stepped into the elevator shaft, and fell to the basement, some ten feet beneath, and on to the cross beams that supported the elevator, one of his legs being broken by the fall. It appears from other evidence in the case that, a short time prior to the accident, another bell boy had taken a guest to one of the upper floors of the hotel, using the elevator for that purpose, the boy in charge of the elevator being absent at the time in the water closet; that, according to the rules and customs of the hotel, he closed the elevator door at the upper floor, upon leaving the elevator with the guest in his charge, after starting the elevator on its way down to the office floor by pulling the rope which controlled its action,

it being the custom for the bell boys to use the elevator in showing guests to their rooms, but to use the stairway of the hotel in returning to the office. This bell boy, one Mulligan, states that, on entering the elevator with the guest, he closed the door, but he could not state whether the latch caught; and defendant in error insists that, on account of the defective condition of the latch or lock of the elevator door, it did not catch, and the door rolled back and opened of its own accord, and because of this defective condition of the lock, and of the negligence of the hotel company in not repairing the same so that it would catch and hold the door in place, the door came open, thus indicating to him that the car of the elevator was standing at the office floor, and that this negligence was the cause of his injury. As we read the petition, the negligence charged, and which caused the injury, was the act of the elevator boy in charge of the elevator in leaving the door on the office floor open, while in charge thereof, and while standing near the elevator entrance, the elevator car not being at the office floor.

The ninth paragraph of the petition, after reciting the direction of the clerk to the plaintiff below to show the guest to his room, then alleges: "And, at said time, the elevator man or boy in charge of the car of said elevator, caused the door opening into the elevator-way, shaft or opening on the first floor of said building, where the plaintiff and said guest were, *to be opened, and remain open while the said elevator man or boy stood near said door or opening.*" The car of the elevator, as alleged in the next paragraph, "*not being in that portion of the shaft, but at some place above the ground floor of said building at that time.*"

Whatever may have been the theory of the plaintiff below in framing his petition, it certainly does not charge that the defective condition of the lock of the door was the proximate cause of the injury, but it does charge, in explicit terms, that the injury arose from the elevator boy leaving the door open and standing in the vicinity, thus

indicating to the plaintiff below that the car of the elevator stood at the office floor, and that he might safely enter the door of the elevator. That the elevator boy, through whose negligence it is charged the plaintiff below was injured, was a fellow servant is amply sustained by the authorities. *Norfolk Beet-Sugar Co. v. Koch*, 52 Neb. 197; *McCarty v. Rood Hotel Co.*, 144 Mo. 397; *Stevens v. Chamberlin*, 40 C. C. A. 421, 51 L. R. A. 513, and note. That one servant can not recover from the common master for negligence of a fellow servant, where no negligence is charged against the master in employing, or keeping in his employ, the servant whose negligence caused the injury, is too well established to need a citation of authorities. The court admitted evidence of the defective condition of the latch or lock on the elevator door, and it is now insisted that, because the trial proceeded upon the theory that that was an issue in the case and one of the acts of negligence charged against plaintiff in error, it is too late to raise the question at this time. And *Colorado Mortgage & Investment Co. v. Rees*, 21 Colo. 435, is cited as an authority in support of this position. In that case it is held that a party desiring to take advantage of a variance between the declaration and the evidence should object to the evidence when offered, and point out wherein the variance consists, so that the other party may amend the declaration and thus avoid the objection. It appears only to have been made after the plaintiffs had closed their evidence, when the right to make it had been waived.

The better rule undoubtedly is, that a party who desires to take advantage of a variance between the pleadings and the proof offered by his adversary, should object to the introduction of the evidence upon that ground, and, if he allows the trial to proceed without objection, it is a waiver on his part, and he can not thereafter take advantage of the variance or say that the question concerning which the evidence was offered was not in issue in the case. In this case, however, the defendant did object to the evidence. The witness by whom the defective condition of this

lock was sought to be shown was asked this question: "How was this door on the first floor of the Paxton Hotel leading to the elevator? Describe the condition of the lock from February on to April. If you slammed the door shut, what was its condition, whether it would catch or not?" "Objected to as incompetent and no foundation laid and not within the issues and irrelevant. Overruled. Defendant excepts."

Here was a plain objection to the offer of this testimony, upon the ground that it was not within the issues and irrelevant. Whether a more particular objection was made in any argument addressed to the court, of course, is not shown by the record, but the objection clearly calls the attention of the court and the plaintiff below to the fact that the evidence offered was outside of the issues made by the pleadings. In this condition of the record, we think the proof was improperly admitted, and, being improperly admitted, it was error for the court to submit the case to the jury upon the assumption that the negligence complained of, and which caused the injury, was a failure on the part of the plaintiff in error to equip the elevator door with a proper catch, or to repair it, if out of order. The case having been submitted and apparently determined against the plaintiff in error upon an issue not made by the pleadings, we recommend a reversal of the judgment.

LETTON and KIRKPATRICK, CC., concur.

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

REVERSED.

FREDERICK DANIELSON V. JOHN J. GOEBEL.

FILED MARCH 2, 1904. No. 13,368.

1. **Contract for Sale of Land:** VALIDITY. Under the provisions of section 74, chapter 73, Compiled Statutes, 1901, a contract for the sale of land between the owner thereof and an agent or broker must be signed by the owner and broker, must contain a description of the land, and set forth the amount of compensation the agent is to receive for negotiating a sale, or it will be void and furnish no basis for recovery.

2. **Petition:** SUFFICIENCY. Petition examined, and *held* not to state facts sufficient to entitle plaintiff to any relief.

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

O. F. Martin and *W. A. Martin,* for plaintiff in error.

C. H. Whitney, contra.

KIRKPATRICK, C.

On December, 26, 1901, defendant in error, John J. Goebel, instituted an action against plaintiff in error, Frederick Danielson, in the district court for Cedar county, to recover a commission alleged to be due him for services performed in finding a purchaser for certain land owned by plaintiff in error. There was judgment in the district court against plaintiff in error in the sum of $235 and costs; to reverse which the cause is presented to this court upon error. Numerous assignments of error are presented for consideration, but, in the view we take of the case, all need not be considered.

It is first contended that the court erred in overruling an objection interposed by plaintiff in error, at the commencement of the trial, to the introduction of any testimony, for the reason that the petition failed to state facts sufficient to entitle plaintiff below to any relief. In the petition it is alleged that on the 24th day of February,

1901, plaintiff in error wrote a letter to defendant in error in the language following:

"Emerson, Neb., Feb. 24, 1901. John J. Goebel, Dear Sir: You sell all my land. If you sell it you get good commission. I have it in three real estate man's hands and then in myself. Whoever sells it gets the commission. The Matsen place I want $40 an acre for 160, and $25 for 80 of pastor. Yours Truly, F. Danielson."

It is alleged that, on receipt of this letter, defendant in error went out and secured a purchaser for the tract designated as the Matsen land, and thereupon wrote plaintiff in error the following letter:

"Hartington, Neb. Feby. 25th, 1901. Fred Danielson, Esq., Emerson, Neb. Dear Sir: Your letter dated Feby. 24th, 1901, at hand & contents noted, just having a customer for a farm close to town, I at once proceeded to look him up, and read your letter to him, and he and his wife went and looked it over, and before he went home he called at my office and informed me that he would take it, and told me to send for the deed; that the money was ready for the land any time, and if you did not want to send the deed here, you could deposit it in a bank at Emerson and he would remit it there. He is a good reliable man, and is able to pay all cash. He deposited $500 in the bank as part payment of the purchase price subject to your order. Now please execute deed and do as above stated, instructing the bank to pay me my commission oblige. Respt. John J. Goebel."

It is further alleged that the purchaser was willing and ready to pay the money and complete the purchase, and that plaintiff in error and his wife refused to execute the conveyance; and that they promised defendant in error that they would pay him his commission, notwithstanding they did not make the sale. It is not alleged that any other writing was signed by either of the parties than the two letters quoted above, and the question for determination is: Are the facts pleaded, tested by the provisions of section 74, chapter 73, Compiled Statutes, 1901

(Annotated Statutes, 10258), sufficient to entitle defendant in error to relief. The section referred to is in the words following:

"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."

The section quoted would seem to be too clear to require interpretation. The undoubted purpose of the legislature was to remedy an evil which had grown up in this state, as shown by innumerable actions brought by real estate brokers against the owners of real estate, to enforce the collection of commissions for negotiating sales which, in many instances, were never completed. To effectuate this purpose, they enacted the section quoted, which, in express terms, requires a written contract between the owner and the agent signed by both, and further requires that the contract shall describe the land to be sold and shall set forth the compensation to be allowed to the broker or agent in case of sale.

It can not be contended, we think, that the two letters quoted in the petition amount to such a contract as is contemplated by this statute. Whether the letter written by defendant in error contains a sufficient description of the land need not be determined, but it is manifest that it does not set forth the amount of compensation which the owner was to pay to the agent who negotiated the sale. Defendant in error made no answer to this communication until after he had entered upon the performance of the services for which he seeks in this action to recover. He seems, on receipt of the letter, to have gone out and procured a purchaser, and then to have written plaintiff in error, telling him that he had made the sale, and asking him to execute and send the deed, and to authorize the bank to pay his commission. We are not required to de-

termine whether, if the owner of real estate wrote to an agent, employing him to make a sale of his land, describing it and agreeing to pay a stipulated commission therefor, and the agent should answer in writing, accepting the employment on the terms stated, this might not constitute a valid contract within the statute. But the letters quoted do not present such a case. Plaintiff in error by letter authorized defendant in error to make a sale of all of his land, the latter answering that he had made a sale of the Matsen land. In neither of the letters is any reference made to the amount of compensation, and it is clear that the contract, assuming that the letters constituted one, does not meet the requirements of the statute, is void, and can not be made the basis of a recovery by the agent of a commission from the owner of the land. The petition fails to state facts sufficient to warrant a recovery, and the lower court erred in overruling the objection to the introduction of any evidence thereunder.

It is further contended that the statute in question is in conflict with the constitution, in that it interferes with the rights of persons otherwise competent to make their own contracts. We do not think it is necessary to reexamine this question after its exhaustive consideration in the opinion by the late chief justice in the case of *Baker v. Gillan,* 68 Neb. 368, where the enactment of this statute is held to have been within the power of the legislature under the constitution.

Numerous other assignments of error are made, some of which seem to possess merit, but, in the view we have taken, it becomes unnecessary to examine these and to pass thereon. For the error pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded.

DUFFIE and LETTON, 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.

REVERSED.

HERBERT H. GAFFEY V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY ET AL.

FILED MARCH 2, 1904. No. 13,418.

1. **Equity Court: POWERS.** When a court of equity has taken cognizance of a case involving the right of rival claimants to the possession of leased premises, with all parties interested in the premises in court, it has full power to do equity by placing the party whom it finds entitled thereto into possession of the premises.
2. **Findings: REVIEW.** Findings of fact made in a case tried to a court are entitled to the same weight as a verdict of a jury, and a judgment inconsistent with and contrary to the findings will be reversed.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

Charles O. Whedon, for plaintiff in error.

Hall & Marlay, contra.

LETTON, C.

This action was begun by the Northwestern Mutual Life Insurance Company of Milwaukee, a corporation, George Woods and Mark Woods, as plaintiffs, against Herbert H. Gaffey, as defendant. The petition alleged, in substance, that the plaintiff corporation is the owner of the building in the city of Lincoln, known as the "Burr Block." That the east basement room of the building has been let to the plaintiffs Woods for the term of six years, and no other persons have any right to the possession thereof. That the defendant Gaffey has broken into said room and, unless restrained by the court, will again break into it and deprive the plaintiffs of the use and possession of said property. The prayer is that the defendant be enjoined

and restrained from breaking into said east basement room in the Burr Block, from keeping the plaintiffs out of their property, or in any manner interfering with the plaintiffs or their property, and that at the final hearing of the case the injunction may be made perpetual. A temporary injunction was granted enjoining the defendant as prayed. The defendant's answer, in substance, is as follows: that he admits the Northwestern Mutual Life Insurance Company is the owner of the building, and denies every other allegation of the petition; and for a cross-petition alleges that, on or about the first day of March, 1892, he leased from the then owners of said building the room over which the controversy in this case arises, for a term of three years. That, at the expiration of the said three years, said lease was renewed for a second term of three years, and so on until the last day of February, 1901, when he entered upon the fourth term of three years, which will expire on the last day of February, 1904. That he has been in the exclusive possession of said premises, except as hereinafter stated, as tenant of said owners and of their grantee, the insurance company, plaintiff herein. He alleges that the insurance company desired to raise the floor of the room above his, and it requested the defendant to remove a portion of his stock of goods into a room underneath the sidewalk, which he did to accommodate the insurance company, and that the said plaintiff company then occupied a large portion of his said room with its appliances for raising the floor. He alleges that the plaintiffs Woods occupied the room immediately overhead as real estate agents and live stock dealers for about three years, and that the changes made by the plaintiff insurance company in the building deprived the plaintiffs George and Mark Woods of the room they had previously occupied. That the insurance company and the Woods Brothers, on the 22d day of July, 1902, conspired together to eject him; and, when this defendant was absent from his room, they went with a force of men into said room, forcibly ejected the defendant's clerk, and put out of

said room all the property belonging to the defendant except the office desk, safe and a chair; took the lock off the door, put another lock on and locked this defendant out of said room; and that ever since said date the plaintiffs have kept the said George Woods and Mark Woods in said room, and repeatedly put out the defendant's clerk and interfered with defendant's occupation of said room. That, after the plaintiffs had obtained possession wrongfully as aforesaid, they began this action, well knowing the falsity of the petition; and by their actions in ejecting the defendant, removing his goods, etc., the defendant has been damaged $10,000. He prays that the restraining order may be dissolved; that the plaintiffs' action may be dismissed; that a mandatory injunction may be awarded requiring the said George Woods and Mark Woods forthwith to vacate the premises; to restore to the defendant all the property which they removed from there, for the sum of $10,000 damages, and for a perpetual injunction against the plaintiffs to enjoin them from interfering with the defendant's possession of said basement room. A supplemental answer and petition were afterwards filed, a recital of the contents of which is not essential to the determination of the questions at issue here. The plaintiffs filed a reply alleging, in substance, that the defendant was only a tenant from month to month until in the month of May, 1902, at which time he vacated said room, surrendered the premises and turned the same over to the plaintiff insurance company, since which date he has not been a tenant of said room; that he notified the insurance company, when he vacated said premises, that he would not pay the rent they were demanding, and they could rent to some one else, and that as soon as the repairs were completed said insurance company rented said room to the plaintiffs Woods. That the defendant never asserted any rights to said room until after he learned the insurance company had rented the room to George and Mark Woods. The plaintiffs ask that the defendant's cross-bill may be dismissed, and that the temporary in-

junction heretofore granted may be made perpetual. A demand for a trial to a jury was made by the defendant, which was refused by the court, and this refusal is assigned as error. The case was tried to the court, and the court made the following findings of fact and conclusions of law, and entered the following judgment:

"(1) That the plaintiff is a corporation, as alleged in its petition, and is the owner of and in possession of lots seven (7) and eight (8), in block forty (40), in the city of Lincoln, Lancaster county, Nebraska, and that the building situate thereon is known as the 'Burr Block.'

"(2) That on or about the first day of March, 1892, the said defendant, Herbert H. Gaffey, leased from C. C. and L. C. Burr, being then the owners of said described premises, the east basement room of said building for a period of three years, at an agreed rental of $25 a month, and that the said defendant continued in uninterrupted possession of said premises up to and about the time of the controversy arising in this case.

"(3) That the plaintiff herein became the owner of said premises on or about the —— day of ——, and took possession thereof, but that for a long time prior thereto said premises were in possession of its receiver, appointed by the court in the foreclosure proceedings being had upon said premises, but that during all of said time the said defendant Gaffey was a tenant of such parties, in possession, and remained in the possession thereof up to the time hereinafter described. That the said defendant Gaffey was not made a party in the foreclosure proceedings, but waived all rights thereunder by oral agreement in reference to the occupancy of said east basement room with the receiver thereof, and by oral agreement entered into various and different contracts in regard to the rental thereof, both during the ownership of the said Burrs and the plaintiff herein, and that by reason thereof said written lease herein mentioned, as made with the said Burrs, was abrogated, annulled and vacated, and that at the time of the commencement of this action the said defendant Gaffey

was a tenant of the said plaintiff by virtue of an oral agreement, holding possession of said east basement room from month to month, and had no greater claim or rights thereto than herein found.

"4. That, in order that the said plaintiff company might make certain changes and improvements in and about the said premises, the said defendant, Gaffey, voluntarily upon his part, removed from the said basement room, so occupied by him, all of his stock of goods, wares, and merchandise, consisting of plumbing and packing goods, and a general stock of plumbers, steam and gas fitters goods, in which the said defendant was a dealer, and permitted the said plaintiff to enter said basement room for the purpose of remodeling and rebuilding a part of said building.

"(5) That said defendant stored said goods, so removed by him, in a room beneath the sidewalk immediately adjacent to the room so occupied by him, but the said defendant left a portion of his property in said basement room, the property so left by him consisting of his office desk, safe, work bench and iron pipe, but said property was used by him, and was incident to the conduct and management of his said business.

"(6) That the room beneath the sidewalk herein mentioned had been occupied by the said defendant ever since the making of the written lease first herein described, and that, in removing said stock of goods from said basement room to the sidewalk space aforesaid, the said defendant fully intended to move the same back into the said basement room upon the completion of the improvements then being made by the said plaintiff, as herein described, but that the removing of such merchandise to the sidewalk space, as aforesaid, was wholly the act of the said defendant Gaffey, and without direction on the part of the plaintiff, and without the said plaintiff's knowledge, but was done for no other purpose than a matter of convenience to the said Gaffey, expecting and intending to return to said basement room upon the completion of the improvements as aforesaid.

"(7) That, prior to the commencement of this action, and while the said defendant Gaffey was in possession of the said basement room, by having his office desk, safe and work bench therein, and while expecting and intending to move his wares and merchandise therein, the plaintiff company, without notice, and without legal proceedings being had, ejected the said defendant from the said premises by removing his office desk, safe and work bench so contained in said basement room, and without the defendant's consent, and without due process of law, caused to be placed other tenants therein, and placed other tenants in possession of said basement room; that the said defendant's property was removed from said premises during the defendant's absence and that the plaintiff by and through its agents, took forcible possession of said premises, and ever since said time has had possession thereof, and excluded the defendant Gaffey therefrom.

"(8) That the said defendant Gaffey, believing that he had a right to the possession of the said premises, with violence and force of arms sought to again reenter the premises and hold the same to exclusion of the tenants and occupants thereof, who had entered upon the occupancy of the premises by and through the acts of the plaintiff herein. That such tenants so procured by the plaintiff company, and who were in possession of said premises at the time of the commencement of this action, had never prior thereto occupied the same, or had an interest therein, but that their possession of said premises commenced at the time of the controversy arising in this action, and was by and through the acts of the plaintiffs.

"Wherefore, the court finds the following conclusions of law:

"(1) That the said defendant Gaffey was wrongfully evicted from said premises by the plaintiff company and, whether he was in default of the payment of rent, or otherwise unlawfully withholding said premises, is immaterial so far as this action is concerned. He had not relinquished possession of the premises, and, therefore, the only proper

remedy to which the plaintiff company could resort was by an action of forcible entry and detainer.

"(2) That the said defendant having removed his wares and merchandise voluntarily upon his part to a damp and insecure place, whereby they became damaged, yet the court finds that he would not be entitled to recover on account thereof, the said defendant having full knowledge of the character of such place and the dangers attending the storing of such merchandise in the place selected, and the plaintiff company would in no wise be responsible for any injury or damages flowing therefrom.

"(3) That, by reason of the unlawful seizure on the part of the plaintiff of the said defendant's property, and removing it from the premises without due authority of law, as is found by the court herein, the court finds that the said defendant was damaged in the sum of $50 and for which amount the defendant is awarded judgment.

"(4) That the said defendant having threatened to reenter said premises by force, the plaintiff company is entitled to a permanent injunction against the said defendant forever enjoining him from reentering the said premises for the purpose of taking possession thereof.

"It is ordered that each party pay their own costs.

"It is therefore considered and adjudged by the court that the said defendant, Herbert H. Gaffey, do have and recover of and from the plaintiff, The Northwestern Mutual Life Insurance Company, the said sum of $50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from this date until paid.

"It is further considered and adjudged by the court that the said defendant, Herbert H. Gaffey, be, and he is hereby, forever enjoined and restrained from reentering or attempting to reenter the premises hereinbefore described, for the purpose of taking possession thereof. It is further ordered and adjudged by the court that each party hereto, plaintiffs and defendant, pay their own costs herein, the costs of the plaintiffs being taxed at $44.96,

and the costs of the defendant being taxed at $28.12, for all of which execution is hereby awarded.

"To all of which both the plaintiffs and defendant duly except to each and every finding of fact and conclusion of law as found herein by the court. Each party is allowed 40 days in which to settle a bill of exceptions."

A motion for a new trial was filed and overruled, and the case has been brought to this court upon error.

The testimony has not been preserved by a bill of exceptions, and we are therefore compelled to accept the findings of fact made by the court as verity. The plaintiff in error in his petition in error makes 16 assignments; but, in the view that we take of this case, it will only be necessary to consider the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and sixteenth assignments, which assignments in effect present as error that, while the court in its findings of fact found that the defendant was rightfully in possession of the premises, and that the plaintiffs ejected defendant from the same wrongfully and forcibly, without notice and without legal proceedings, yet the fourth conclusion of law made by the court erroneously found that, the said defendant having threatened to reenter said premises by force, the plaintiffs are entitled to a permanent injunction against the said defendant forever enjoining him from reentering the said premises for the purpose of taking possession thereof; and also assigning as error that the judgment of the court, wherein it was adjudged that the defendant be forever enjoined and restrained from attempting to reenter the premises for the purpose of taking possession thereof, and adjudging that the defendant pay his own costs in the case, is inconsistent with the findings of fact made by the court and therefore erroneous.

It is evident from an examination of the findings of fact that the plaintiffs, at the time of the forcible and wrongful ejection of the defendant Gaffey from the room, were not entitled to the posession of the room, and were wrongful intruders therein. This being the case we fail

to understand why a rightful owner or tenant in possession of premises should be restrained from reoccupying his own premises, merely because a wrongdoer has taken possession.

It was argued that the trial judge should be presumed to have known facts which made the judgment rendered the proper one under the circumstances, but when the evidence is not preserved, and special findings of fact are made, a reviewing court can look only to these findings, taking them as absolute verity, to ascertain whether the judgment rendered is in conformity therewith. If the judgment is inconsistent with the findings, the court can not go outside of the record in search of facts to bolster up the judgment. Nor can it presume that the trial court based the judgment upon other facts than those ascertained and set forth in its special findings. *Oliver v. Lansing,* 57 Neb. 352.

It may be said that to allow the defendant to take forcible possession of the premises in controversy might lead to a breach of the peace, but his right to the possession of the premises having been fully tried and determined in this action, all parties to the controversy being before the court, it was within the power of the court to prevent anything of this kind, by directing the intruders who were parties to this action peaceably to deliver possession to the defendant, and the powers of the court were sufficient to enforce a compliance with this order. In other words, the parties having submitted the entire issue regarding the right of the possession of the premises to the court, and the court having found for the defendant Gaffey upon that point, he was entitled to the fruits of his victory as fully as if the action had been in the form of forcible entry and detainer. It would be but a poor satisfaction to a litigant if, after establishing the rightfulness of his cause, he should receive no relief, and further be compelled to pay the costs of his effort to obtain justice. The facts as found by the court entitle the defendant Gaffey to a mandatory injunction against the plaintiffs com-

manding them to restore to the defendant the possession of the premises, perpetually enjoining the plaintiffs Woods from interfering with his possession, and enjoining the plaintiff insurance company from interfering with the defendant's rights and privileges as a tenant from month to month of said premises. For these reasons the judgment of the district court should be reversed so far as the defendant Gaffey is enjoined and restrained from taking possession of the premises, and the costs by him incurred were taxed to him.

We recommend, therefore, that the cause be reversed and remanded to the district court, with directions to said court to render a judgment and decree ordering that the said defendant Herbert H. Gaffey do have and recover of and from the plaintiff, the Northwestern Mutual Life Insurance Company, the sum of $50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from the 28th day of March, 1903; that the injunction heretofore granted in this case be dissolved; that a mandatory injunction issue against the plaintiffs George Woods and Mark Woods, commanding them forthwith to vacate said premises, and to restore to the defendant his office desk, safe and work bench taken from said basement room; that the plaintiffs George Woods and Mark Woods be perpetually enjoined from in any manner interfering with the defendant's possession of said premises, and that the plaintiff insurance company be perpetually enjoined from interfering with the rights of said defendant to said room as tenant from month to month, and that the defendant recover his costs herein.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is reversed and remanded to the district court, with directions to said court to render a judgment and decree ordering that the defendant Herbert H. Gaffey do have and recover of and from the plaintiff, the

Northwestern Mutual Life Insurance Company, the sum of $50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from the 28th day of March, 1903; that the injunction heretofore granted in this case be dissolved; that a mandatory injunction issue against the plaintiffs, George Woods and Mark Woods, commanding them forthwith to vacate said premises, and to restore to the defendant his office desk, safe and work bench taken from said basement room; that the plaintiffs, George Woods and Mark Woods, be perpetually enjoined from in any manner interfering with the defendant's possession of said premises, and that the plaintiff insurance company be perpetually enjoined from interfering with the rights of said defendant to said room as tenant from month to month, and that the defendant recover his costs herein.

JUDGMENT ACCORDINGLY.

A. W. PADGET ET AL. V. CORNELIUS J. O'CONNOR.

FILED MARCH 2, 1904. No. 13,345.

1. **Promissory Note:** LEGALITY. Where an illegal transaction constitutes a part of the consideration for a promissory note, the other portion of the consideration being lawful, the illegality of the part taints the whole consideration, and the courts will not enforce the collection of such a note in the hands of the original parties.

2. **Directing Verdict.** Where there is conflicting evidence with regard to whether or not the holder of a negotiable promissory note is an innocent purchaser, for value, before maturity, the question is a question of fact for the jury, and it is error for the court to direct a verdict for the plaintiff.

ERROR to the district court for Cuming county: JAMES F. BOYD, JUDGE. *Reversed.*

Anderson & Keefe and *McNish & Graham*, for plaintiffs in error.

R. E. Evans, contra.

LETTON, C.

This action was brought by Cornelius J. O'Connor, as plaintiff, against A. W. Padget, T. J. Foley and John C. Sullivan, as defendants, to recover the amount due upon two promissory notes, on the face of which the said Padget and Foley appeared as makers, and John C. Sullivan as payee and endorser. O'Connor alleged he had purchased these notes before maturity, in the usual course of business, for a valuable consideration, from the defendant John C. Sullivan. The defense set up by Padget and Foley, in substance, is that the notes were given by Padget as principal, and Foley as surety, to one E. E. Sullivan, in part payment of the purchase price of a stock of liquors, saloon fixtures and the unexpired term of a saloon license in Bancroft, Nebraska. That, for the purpose of defrauding his creditors, E. E. Sullivan procured the notes to be made payable to John C. Sullivan, his brother, instead of to himself; that a part of the consideration for the same was illegal, being for the six months unexpired term of the license of E. E. Sullivan, and that Sullivan delivered the possession of the saloon to Padget, and Padget sold liquor for himself under Sullivan's license for six months, as agreed, and that O'Connor had knowledge of all these facts and was not an innocent purchaser of the notes. A further defense was, in substance, that the Fred Krug Brewing Company procured a judgment against E. E. Sullivan in the county court of Cuming county. That an execution was issued and returned unsatisfied upon said judgment. That garnishment proceedings were had after the return of said execution, and that Padget, Foley and the Citizens Bank of Bancroft, which was then in possession of the notes sued upon as agent of O'Connor,

were garnished in said action. That the bank answered admitting that it had possession of the two notes and delivered the same under the order of the county court to the court. That the court found that the notes were the property of E. E. Sullivan, and subject to the judgment of the Fred Krug Brewing Company. That Padget and Foley paid into said county court of Cuming county the amount due on said notes, and that the county judge marked them as paid, and applied the money in payment of the judgment of the Fred Krug Brewing Company against E. E. Sullivan. The plaintiff replied denying the allegations of the answers, and alleging that the notes had been made payable to John C. Sullivan in payment of a debt from E. E. Sullivan to him.

At the trial in the district court, the original notes were introduced in evidence. The record of the proceedings in garnishment before the county court of Cuming county was excluded from the jury upon the objection of O'Connor, and a verdict was directed for O'Connor against the defendants, Padget and Foley. From this judgment they prosecute error to this court.

At the trial, O'Connor testified that he purchased the notes from John C. Sullivan, by applying them in payment of a debt due from Sullivan to him for rent of land in the Winnebago reservation, and by paying the sum of $170 in cash to make up the amount of the notes; that he knew nothing of any transaction between the two Sullivans as to a transfer of the notes for the purpose of defrauding creditors, or whether it was for the sale of a license or not; that he did not know that a saloon license had been sold; that, at the time of the maturity of the notes, the notes were sent to the Citizens Bank of Bancroft for collection, by his direction.

L. H. Keefe, one of the attorneys for the defendants, testified that he had a conversation with Mr. O'Connor over the telephone, and that he asked O'Connor if he knew, at the time he bought the notes, that they were given for the stock of liquors, the fixtures and the unexpired term

of the license, and that O'Connor said that he had not bought the notes but had them for collection; that Sullivan had explained the transaction to him, and that he knew the license was included. Padget testified that the notes were given for the balance due upon the purchase of the saloon; that he was to give $1,597.83 for the fixtures, the liquors and the unexpired license; that the saloon was to be run by Padget, in the name of E. E. Sullivan, for the unexpired term of six months. O'Connor, in rebuttal, denies the conversation to which Keefe testifies, and, in turn, Keefe testifies denying a conversation which O'Connor says he had with him. At the conclusion of the testimony, the court sustained a motion for a direction to the jury to return a verdict for the plaintiff. A motion for a new trial was filed and overruled, and judgment rendered for the plaintiff. The plaintiffs in error complain that the trial court erred in excluding from the jury the record of the garnishment proceedings, whereby it was sought to prove that the notes had been paid. Upon an examination of the record, it appears that C. J. O'Connor, whose name appeared upon the back of said notes as indorser, indorsing the same to the Citizens Bank for collection, was not made a party to the garnishment proceedings. The notes show an indorsement in blank by John C. Sullivan, and also the indorsement, "Pay to Citizens Bank for return, C. J. O'Connor," and the protest attached thereto shows that the notice of protest was sent to John C. Sullivan at Hubbard, Nebraska, C. J. O'Connor at Homer, Nebraska, and to A. W. Padget at Bancroft, Nebraska. The fact that O'Connor apparently had an interest in these notes, would be apparent to the most casual observer when the garnishment proceedings were had. It would hardly seem necessary to say that O'Connor's claim of title to the notes could not be barred by garnishment proceedings to which he was not a party. The adjudication by the county court of Cuming county that the notes were the property of E. E. Sullivan, was an absolute nullity so far as O'Connor was concerned. The

record of the proceedings in garnishment was properly excluded by the court.

A more serious question, however, is presented by the action of the court in directing a verdict for the plaintiff. If the notes were based upon an illegal consideration, or upon a consideration a part of which was illegal, a defense sought to be made upon that ground between the original parties to the instrument would, if established, be a complete defense, and, if in the hands of any one but an innocent purchaser, the enforcement of the contract would be subject to the same infirmity. In the case at bar, Padget testifies that the notes were given in payment for a stock of liquors, for saloon fixtures and for the unexpired term of the license of E. E. Sullivan. That the agreement was that Sullivan should deliver possession of the saloon property and stock of liquors to Padget, and should allow Padget to run the saloon in Sullivan's name for six months, the length of time for which the license had been paid to the village of Bancroft. This testimony is uncontradicted. A license to sell liquor under the Slocumb law in this state is a personal privilege granted to the individual by the authorities, upon proof by him that he is possessed of certain qualifications, and in case he has not been guilty of certain prohibited acts. As a condition precedent to the issuance of the same, a petition praying the proper authorities to grant him a license must be presented, signed by a specific number of resident freeholders. One object of the law is to place it within the power of the resident freeholders of the ward or precinct to designate the individual whom they are willing should conduct the traffic in intoxicating liquors in their locality. The agreement between Sullivan and Padget, whereby Padget was to be allowed to conduct the liquor traffic under Sullivan's name for the unexpired term of Sullivan's license, was clearly an agreement to violate the laws of the state, and was illegal. A promissory note given with such an agreement as its sole consideration could not be enforced, and where, as in this case, the

illegal consideration forms a part of the whole consideration, the courts will not undertake to separate the legal from the illegal portions of the contract, but the whole consideration is tainted by the illegality of the part, and the contract will not be enforced.

"If any part of a consideration is illegal, the whole consideration is void; because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal." 1 Parsons, Contracts, 457; Norton, Bills & Notes (2d ed.), 276; *Taylor & Co. v. Pickett,* 52 Ia. 467; *Wilde v. Wilde,* 37 Neb. 891; *Wilson v. Parrish,* 52 Neb. 6; *McCormick Harvesting Machine Co. v. Miller,* 54 Neb 644; *McClelland v. Citizens Bank,* 60 Neb. 90. It is evident therefore that, if the illegality of part of the consideration be established, there could be no recovery upon these notes if the action had been brought by Sullivan against Padget and Foley. It becomes then a vital point in this case, whether or not the plaintiff, O'Connor, was entitled to the protection given by the law to an innocent purchaser of negotiable paper before maturity. As to this point, O'Connor's testimony in chief was to the effect that he was an innocent purchaser, but, upon cross-examination, it was developed that O'Connor had other dealings with the Sullivans; and the witness Keefe testified that O'Connor told him that he had not bought the notes, but that he had them for collection, and that he knew that the license was included in the consideration. There is a direct conflict in the testimony between these two witnesses. If O'Connor's testimony is to be believed, he was an innocent purchaser of the notes and should recover in this action. If Keefe's testimony is most credible, then O'Connor merely stood in the shoes of E. E. Sullivan, and the illegality of the consideration, if established, furnished a complete defense. Whether or not O'Connor was an innocent purchaser was a question of fact that should have been submitted to the jury. It is possible that, had the question

been submitted to a jury, it might have found that the witness Keefe gave the true story of the conversation with O'Connor, and that O'Connor was not an innocent purchaser or *vice versa*. For the errors committed in sustaining the motion to direct a verdict for the plaintiff and in directing such verdict, we recommend that the cause be reversed and remanded for further proceedings.

DUFFIE 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.

REVERSED.

STATE OF NEBRASKA V. INSURANCE COMPANY OF NORTH AMERICA.*

FILED MARCH 17, 1904. No. 13,470.

1. **Foreign Insurance Companies.** The state may impose on a foreign corporation, as a condition of coming into and doing business within its territory, any terms, conditions and restrictions it may think proper, not repugnant to fundamental laws.
2. ———: LICENSE TAX: CONSTITUTIONAL LAW. The provision of section 33, chapter 43, Compiled Statutes, entitled "An act regulating insurance companies," passed in 1873, declaring that, whenever the laws of another state shall require of insurance companies incorporated in this state the payment of taxes and license fees, or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, then all insurance companies of such states shall be required to pay for taxes and license fees an amount equal to the amount of such charges and payments imposed upon or required by the laws of such state of the companies of this state, is a valid exercise of legislative power in no way inhibited by the fundamental law of the state or of the nation.
3. **Reciprocal Tax.** The imposition of the reciprocal tax and license fees provided by said section 33 is a privilege or license tax imposed as one of the conditions upon which a company, subject

* Rehearing allowed. See opinions, pp. 335, 341, 348, *post*.

to such tax or imposition, is admitted into this state, to engage in business herein.

4. **Constitutional Law.** The fact that the exaction may not be demanded in advance, and as a condition precedent to the entrance of the company into the state to do business, does not change or qualify the principle justifying the levying of such tax as one of the conditions for engaging in business in the state; and the laying of such burdens and the imposition of such tax and license fees in no way violates the provisions of section 1, article IX of our constitution.

5. ———: FOREIGN CORPORATIONS. The fact that the exactions provided by said section 33 are required only of those companies having their domicile in other states, the laws of which discriminate against outside companies, is neither arbitrary nor unreasonable classification, and does not contravene the second clause of said section of the constitution.

6. **Statutes:** REPEAL BY IMPLICATION. While repeals by implication are not favored, yet, where the later statute contains matter so repugnant to the earlier that both can not stand, the provisions of the earlier law must fall to the ground, and be deemed to have been repealed by implication by the later act.

7. ———: ———. When the legislature in the later act refers especially to a former act, and excepts from the operation of the last act a portion of the former, the inference is warrantable that there was an intention to repeal by implication inconsistent and repugnant provisions of the earlier statute not embraced within the terms of the exception clause.

8. ———: CONSTRUCTION. Where the words of a statute are so plain, specific, and unambiguous as to admit of no other construction, the meaning which the words import must be held conclusively presumed to be the meaning which the legislature intended.

9. **Taxation:** CONSTITUTIONAL LAW. The provision of section 38, article I, chapter 77, Compiled Statutes, 1901, exempting insurance companies from all taxation save as therein expressed, is, in so far as it purports to exempt personal property of insurance companies from taxation, a violation of section 1, article IX of the constitution, and as to the taxation of such property is of no force and effect.

10. **Repugnancy.** Ordinarily, a statute repugnant in some of its features to some constitutional provision will yield only to the extent of the repugnancy and no further.

11. **Statutes:** VALIDITY. Where the act eliminating the unconstitutional feature is complete in all respects, and capable of enforce-

ment, it will be held valid and enforceable, except where the invalid portion was manifestly an inducement to the passage of the remainder.

12. ———: REPEAL BY IMPLICATION. Section 38, chapter 77 of the revenue act of 1879, as amended in 1887, being repugnant and inconsistent with the reciprocal tax feature of section 33, chapter 43, passed in 1873, to the extent of such repugnancy and inconsistency, repeals the latter mentioned section by implication.

ACTION by the state against the Insurance Company of North America to recover taxes imposed by section 33, chapter 43, Compiled Statutes: *Demurrer to answer overruled and action dismissed.*

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

Greene, Breckenridge & Kinsler, contra.

HOLCOMB, C. J.

In 1873 the legislature passed a law relating to the business of insurance entitled "An act regulating insurance companies." Compiled Statutes, 1901, ch. 43. The law took effect and was in force from and after June first of that year. By section 32 of the act it was provided that certain fees therein enumerated should be paid by every company doing business in this state to which the act applied. These fees were for services by the state auditor for filing, and making an examination of the first application; issuing certificates of license; filing annual statements; issuing certificates of authority; for copying papers and certifying to the same, etc. Section 33 of the act is set forth in full in the following language:

"Whenever the existing or future laws of any other state of the United States shall require of insurance companies incorporated by or organized under the laws of this state, having agencies in such other state, or of the agents thereof, any deposit of securities in such state, for the protection of policy-holders, or otherwise, or any payment for taxes, fines, penalties, certificates of authority,

license fees, or otherwise, greater than the amount required for such purposes, from similar companies of other states, by the then existing laws of this state, then, and in every such case, all companies of such states establishing, or having theretofore established an agency or agencies in this state, shall be and are hereby required to make the same deposit, for a like purpose, with the auditor of this state, and to pay said auditor for taxes, fines, penalties, certificates of authority, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed upon or required by the laws of such state, of the companies of this state, or the agents thereof."

In the case at bar, the state prosecutes an action to recover of the defendant insurance company, under the provisions of the section quoted, two per cent. of the amount of the gross premiums received by the defendant company in this state during the year 1902. The petition alleged, in substance, that while domestic insurance companies are by the laws of Pennsylvania, the domicile of the defendant, required to pay but eight mills on the dollar upon the amount of the gross premiums received, insurance companies of other states and countries are required to pay into the treasury of said state two per cent. on the amount of the gross premiums received by them respectively, and prays a recovery of a like percentage of the gross premiums collected in this state by virtue of the provisions of said section 33. By the answer filed, the validity of the section quoted and the legality of the demand made by the state are challenged on three different grounds. It is alleged that the attempted imposition of the amount sought to be collected is contrary to section 1, article IX of the constitution, providing for the levying of a tax by valuation and uniformity of taxation, and which section reads as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value

to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." It is also alleged that the section quoted is repealed by implication by the revenue law of 1879 (section 38, chapter 77, Compiled Statutes), and the amendatory section as enacted by the legislature in 1887. It is further alleged that the imposition of the tax sought to be collected is unauthorized, because no insurance company organized under the laws of Nebraska has ever had any agent or agency in the state of Pennsylvania, and has never been admitted to do business therein, and that companies created under the laws of Nebraska have never been able to comply with the laws of Pennsylvania with respect to the admission of insurance companies to transact business in said state. It is regarded as neither advisable nor proper to attempt a discussion or consideration of that part of the answer of the defendant last above referred to, and the same will not be further noticed in the further consideration of the case. The state has filed a demurrer to the answer of the defendant, raising thereby issues of law only in respect of the defenses interposed of which we have just made mention.

Section 33 of the act of 1873 may be euphemistically called by some a reciprocal provision in the insurance law; while counsel for defendant insists on its being more properly denominated by the more harsh appellation of a retaliatory measure. Whatever may be the proper designation of the act as to its nature and characteristics, such legislation seems to be generally regarded as eminently just and fair, and based upon acknowledged sound legal principles. Such an act asserts only the self-respect and dignity of a sovereign state, justly maintained in its business relations and dealings with other commonwealths.

While extending comity and inviting friendly commercial intercourse, it demands reciprocal equality and fairness as a basis for such transactions. The state, while ready to acknowledge the courtesy due to sister states and the corporations created under their laws, insists that our own corporations, formed and fostered under the laws of this state, shall receive the same consideration and protection which this state accords to the corporations coming here from other states to engage in business within the limits of our own state. The principle justifying legislation of the character under consideration seems to be so firmly established, and with such unanimity of sentiment, as evidenced by the opinions of the courts of last resort in the many adjudicated cases elsewhere, that it seems unnecessary to engage in any extended discussion in its support. It is said by the supreme court of Indiana in *State v. Insurance Co. of North America* (the company here litigating), 115 Ind. 257, 265:

"The principle that a state may impose on a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the constitution or laws of the United States, is firmly established by the decisions of the supreme court of the United States. *Bank of Augusta v. Earle,* 13 Pet. (U. S.) *519; *Lafayette Ins. Co. v. French,* 18 How. (U. S.) 404; *Paul v. Virginia,* 8 Wall. (U. S.) 168; *Ducat v. Chicago,* 10 Wall. (U. S.) 410; *Doyle v. Continental Ins. Co.,* 94 U. S. 535."

The authority and power of a state, by proper legislation, to impose additional burdens and conditions upon an insurance company of another state, where the laws of the state of its creation discriminate in favor of such company and against those of other states and countries, such as is sought to be done by the provisions of section 33, heretofore quoted, are recognized, approved and upheld by the supreme court of the United States and the supreme courts of several of the different states of the Union. With but one exception, in so far as our investigation of the matter

has extended, all the courts which have been called upon to express themselves on the subject are of one mind in maintaining the validity of such legislation. *Philadelphia Fire Ass'n v. New York,* 119 U. S. 110; *People v. Fire Ass'n of Philadelphia,* 92 N. Y. 311; *Phœnix Ins. Co. v. Welch,* 29 Kan. 672; *State v. Fidelity & Casualty Co.,* 77 Ia. 648; *Germania Ins. Co. v. Swigert,* 128 Ill. 237, and *State v. Insurance Co. of North America, supra.* The exception mentioned is from the supreme court of Alabama, which holds such legislation to be a delegation of legislative power, and therefore invalid. Upon legal principles of general application and under the authorities cited, it can hardly be doubted that the enactment of the provisions of section 33, heretofore quoted, is clearly a constitutional exercise of legislative power in no way inhibited by the fundamental law of the state or the nation. Were it solely a question of the power of the legislature to provide for the reciprocal features found in the above mentioned section, we should not hesitate to declare there is no legal obstacle in the way of the state's recovery in the present action.

It is contended, however, by counsel for defendant that, while the legislature may have the power to levy a tax on foreign insurance companies by way of a license or privilege tax, such power has not been exercised by the provisions of section 33, and that the exaction therein provided for is purely a tax for revenue purposes, and the test of its validity is to be determined by the application of the same principles as those governing the levying and collection of a property tax. It is argued that the license fees, authorizing the defendant to do business in this state, are provided by section 32, of which mention has been made, and that the company having once entered the state to engage in business must then be placed upon the same plane as all other companies engaged in a like business, and that the enforcement of the tax sought to be recovered violates the rule of uniformity required by section 1, article IX of the constitution. We find ourselves unable to

accept this argument as convincing. It is, we think, the manifest intention of the legislature to provide for the exaction which is sought to be imposed herein as a privilege or license tax as one of the conditions on which the company is admitted into the state to engage in business herein. That is, the legislature has declared, that the company's right and authority to enter and engage in business in this state is dependent on its compliance with the provisions of section 32 as to the fees therein required to be paid as a condition precedent, and also compliance with the provisions of section 33, whenever those provisions become applicable. The provisions of the latter section are an additional burden and exaction to those contained in section 32 on those companies, only, upon which the section is intended to operate. It says to the corporation doing business in this state having its domicile in another state, the laws of which discriminate against those companies engaged in a like business therein from other states or countries, that, in addition to the general requirements as to fees and licenses under section 32, you must also meet the same extra burdens and exactions required by the laws of your home state of outside companies doing business therein. The principle justifying the provision is in no wise changed or qualified, by reason of the fact that the exaction may not be demanded in advance and as a condition precedent to entrance into the state. It is sufficient if it is one of the conditions imposed, not only as a right to enter the state, but to continue to do business herein. It is an obligation assumed and is a part of the conditions to be complied with for the privilege of engaging in business in the state, and may be enforced in any proper manner when the exaction becomes due. What is said by the supreme court of Indiana in *State v. Insurance Co. of North America, supra,* is here quite apropos. Say the court:

"Moneys which have or may become due to the state from any foreign insurance company, under the provisions of the retaliatory section of our statutes regulating foreign

insurance companies doing business in this state, are or will be due and payable as a part of the terms or conditions of its entering this state and transacting business within its limits. Such retaliatory section of our foreign insurance company statutes, therefore, is not within our constitutional restrictions in relation to taxation."

In relation to a tax upon the gross earnings of insurance companies doing business in this state which, on principle, is of the same nature as the imposition sought to be enforced in the case at bar, in the very recent case of *State v. Fleming,* 70 Neb. 523, it is said:

"Relating to the provisions of sections 59 and 60, it is plain that the tax of 2 per cent. upon the gross earnings of the companies mentioned in these sections is a tax imposed, not upon their property, but upon their privilege of doing business in this state."

Such a tax, say this court, is not in any sense a tax upon the property of these corporations, but a privilege tax and, as such, is wholly unobjectionable.

There remains to be considered another feature of the provisions of section 33 in this same connection. It is urged that the selection, for the purposes of the exactions of the nature sought to be imposed in the present case, of those companies only having their domicile in another state, the laws of which discriminate against outside companies, is an arbitrary and unreasonable classification, not at all warranted under the second clause of section 1, article IX of the constitution, and that, because of such attempt at arbitrary classification, the act can not stand. As it occurs to us, a sufficient answer to this contention is that, when the principle underlying the right to levy a tax or exaction such as we are discussing is admitted or is established, there is included in the proposition the idea of reasonableness, and an acknowledgment of the propriety of the classification. In order to make the operation of an act of this nature effective, there must be a classification both as to states and the character of the burden. The principle would be of no utility, and there

could be no practical application, unless the companies against which the act should operate might, by the legislature, be restricted to those states, only, and to the kinds of burdens and exactions imposed by the laws of each individual state whose laws, in respect to the same matter, render the reciprocal legislation proper and necessary to effectuate the desired purpose. The classification is not only wholly devoid of arbitrary features, but is founded upon considerations of the most reasonable kind and altogether appropriate to the object sought to be attained. Say the supreme court of Kansas, in *Phœnix Ins. Co. v. Welch, supra:*

"It matters not whether this charge upon the plaintiff is to be regarded in the nature of taxation, or a license. In neither case is it justly obnoxious to the charge of inequality in the sense that would make it unconstitutional. The legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. * * * Here foreign insurance corporations are classified by the state from which they come, and when we consider the purposes of such classification it can not be held that there is anything arbitrary or unjust therein."

The rule announced in *Rosenbloom v. State,* 64 Neb. 342, on the subject of classification under the second clause of section 1, article IX, obviously gives warrant for the views expressed herein regarding the same matter.

The more serious problem to consider and determine in disposing of the present case, as we view the subject, is regarding the contention that section 33, chapter 43, or at least that portion thereof referring to the imposition and enforcement of a reciprocal tax, such as is herein sought to be recovered, is repealed by the enactment of the general revenue law of 1879 known as chapter 77, article I, of the Compiled Statutes, 1901, and especially section 38 thereof. The act is entitled "An act to provide a system of revenue." It, in express terms, repeals "all acts and parts

of acts inconsistent with the provisions of this act." Section 38, as originally enacted, provided for a tax upon the gross amount of premiums received by insurance companies within the state, during the previous year, and declared that "Insurance companies shall be subject to no other taxation under the laws of this state, except taxes on real estate, and the fees imposed by the chapter on insurance." Relative to the contention that this section, as originally enacted, repeals by implication that part of section 33, chapter 43, now under consideration, we are prone to the belief that the word fees should not be given a narrow and technical meaning, as argued by counsel for defendant, but rather be accepted in its broad and most comprehensive meaning, which, in view of the rule that repeals by implication are not favored, would probably justify the construction that all license fees or taxes in the nature of a privilege to do business in this state, as contemplated by both sections 32 and 33, would be included within the exception mentioned, and come fairly within the meaning of the words except "fees imposed by the chapter on insurance." It is profitless, however, to discuss this phase of the subject, as nothing could be gained thereby save, possibly, the ascertainment of rights and obligations of a moral rather than of a legal character. In 1887, section 38, chapter 77, as originally enacted, was amended by the legislature, the amending act being entitled "An act to amend section thirty-eight of an act entitled 'An act to provide a system of revenue.'" The section as amended provided for the levying of a tax on the net amount of premiums received instead of the gross amount, as before provided for. The section as amended also declared that "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873." It will be observed that, not only was the basis for levying a tax changed from the gross amount to the net amount of the premiums received,

but that also, in specific terms, it was declared that no other tax, fees, or licenses under the laws of the state should be exacted from such companies, except taxes on real estate and the fees imposed by section 32, only, of the act of 1873 regulating insurance companies. It is difficult to conceive of the use of more specific language which might be employed, with a view of prohibiting all other forms of taxation than the general tax provided by the amended section 38, chapter 77, and the fees imposed by section 32, chapter 43, being the act regulating insurance companies and passed in 1873. Judging from the language found in the amended section, it is difficult to escape the conclusion that the amendment was intended to, and necessarily did, have the effect of repealing by implication the provisions of section 33 of the act of 1873 under consideration. The two sections are so repugnant to each other that both can not stand. If the reciprocal tax sought to be collected in this action is now enforced, then, obviously, the company is subject to other taxes and fees, under the laws of this state, than a tax on premiums received, and taxes on real estate, and the fees imposed by section 32 of the act regulating insurance companies. It is manifest that, in the enactment of the revenue law of 1879 and especially the provisions found in section 38, the legislature had in mind the prior legislation affecting insurance companies, for the act of 1873 is specifically mentioned in the exception of the fees therein provided for, as not coming within the general exception of the laying of other taxes and impositions than those contemplated by section 38. As has been suggested, the exception in general terms of the fees provided for by the prior chapter on insurance, is probably susceptible of the construction that the reciprocal tax feature of section 33 of that chapter, as one of the conditions of an insurance company entering and engaging in business in this state, would come within the terms of the exception and would not be construed as being repealed by implication by the later act.

But, by the amendment of 1887 of section 38 of the

revenue act, the legislature has not only again referred to the prior chapter on insurance, but has gone to the extreme limit in the expression as to what fees provided for by that act shall come within the exception clause, and has said in words that need no explanation or construction that the fees provided for by section 32, only, of that chapter shall be exacted from the insurance companies doing business in this state, in addition to the taxes on premiums as provided by section 38 of the revenue act, and taxes on real estate. The maxim, *expressio unius est exclusio alterius,* would seem applicable, resulting in the warrantable inference that the legislature intended to exclude the reciprocal tax feature contained in section 33. Had there not been in section 38, as originally enacted or as amended, special reference to the prior chapter on insurance, but only an exception clause general in its character, we would, in construing such a statute, be warranted, perhaps, in saying that the exception referred only to taxes and impositions laid primarily for revenue purposes, and had no bearing on the chapter on insurance, because the chief object of the latter is regulation of the insurance business, rather than the raising of revenues. It may possibly be that the legislature did not fully appreciate the legal effect of the enactment of the amendment to section 38, but the thought suggests itself to one's mind that those especially interested in legislation favorable to insurance companies, who are usually in convenient calling distance with suggestions and advice during legislative sessions, by their shrewdness and *finesse,* have brought about a declaration by the legislature, in unmistakable terms, in the passage of the law which operates as a repeal by implication of the provisions of section 33 authorizing a reciprocal tax, as effectually as though the repeal was in express terms. The words in section 38 as amended are so plain, so specific, so unambiguous, that they admit of no other construction. The meaning which the words import must, we think, be held conclusively presumed to be the meaning which the legislature intended to convey; in other words,

the statute must be interpreted literally. "Even though the court should be convinced that some other meaning was really intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it." Black, Interpretation of Laws, ch. 3, sec. 26. *Stoppert v. Nierle,* 45 Neb. 105; *State v. Moore,* 45 Neb. 12; *Woodbury & Co. v. Berry,* 18 Ohio St. 456; *McCluskey v. Cromwell,* 11 N. Y. 593; *Doe v. Considine,* 6 Wall. (U. S.) 458. In an early case in this court, *People v. Weston,* 3 Neb. 312, in speaking of the repeal of statutes by implication, it is observed by Mr. Justice GANTT who wrote the opinion (p. 323):

"In the case of the *Town of Ottawa v. La Salle,* 12 Ill. 339, it is said that 'it is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. And when two acts are simply repugnant, they should, if possible, be so construed that the later may not operate as a repeal of the former by implication." Citing Dwarris, Statutes, 674; Bacon's Abridgment, title Stat. D; *Bowen v. Lease,* 5 Hill (N. Y.), 221; *Planters Bank v. State of Mississippi,* 6 Smed. & M. (Miss.) 628; *Hirn v. State of Ohio,* 1 Ohio St. 15.

In *State v. McCaig,* 8 Neb. 215, it is held that, where statutes or parts of the same statute are so repugnant to each other that both can not be executed, the latter is always deemed a repeal of the earlier. It is said in the opinion, quoting approvingly from *Brown v. County Commissioners,* 21 Pa. St. 37:

"Where two statutes are so flatly repugnant that both can not be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute

and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and the others which can not stand with them go to the ground." See also *White v. City of Lincoln*, 5 Neb. 505, 514; *Lawson v. Gibson*, 18 Neb. 137; *State v. Bemis*, 45 Neb. 724; *State v. Moore*, 48 Neb. 870; *State v. Magney*, 52 Neb. 508.

The attorney general, as we understand his presentation of the case, concedes that section 38, chapter 77, as amended does repeal by implication that part of section 33 under which a recovery is sought, if the amended section be held valid. But it is argued by him that such section is unconstitutional and, for that reason, can not have the effect of repealing section 33 of chapter 43 or any part thereof. It is urged in support of the contention, that the attempted legislation found in the original section and the amendment thereto is in direct violation of section 1, article IX of the constitution, providing for the raising of needful revenue by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his, her or its property and franchises, and that, because personal property of insurance companies is attempted by this section to be exempted from taxation, the fundamental law is violated. We are quite well satisfied that the attempted exemption from taxation of personal property is in direct contravention of the fundamental law. But, if such be the case, does it necessarily or legally follow that the entire section must be held invalid? We think not. The rule ordinarily is that a statute repugnant to some constitutional provision will yield to the extent of the repugnancy and no further. *Scott v. Flowers*, 61 Neb. 620; *State v. Karr*, 64 Neb. 514; *State v. Fleming*, 70 Neb. 523. The principle deducible from these several cases is of peculiar force and special application to section 38. The act is complete in all respects and is capable of enforcement. The unconstitutional feature is of a negative rather than of a positive character. The exemption from other taxes can not extend to personal property without conflicting with con-

stitutional provisions. As a question of practical application and results the matter is of but little importance, because companies from other states maintaining agencies in this state usually have but little, if any, personal property subject to taxation. But the provision attempting to exempt personal property, as to such exemption, must yield to the superior law, and the personal property of the insurance company held to be assessable, wherever found, as is all other personal property. In so far as the section permits personal property to escape taxation, it must be held without legal force and effect, but otherwise it stands as a valid legislative enactment. The legal result would be that insurance companies must pay taxes on their personal property, on their real estate, on the net amount of premiums received, and must also pay the fees provided by section 32 of chapter 43, and that no other tax, fees or licenses under the laws of this state can be lawfully levied on such companies. The law being valid in all other respects and capable of enforcement, and, by its express terms, being utterly repugnant and inconsistent with the reciprocal tax feature of section 33, so that one or the other must fall, we are driven to the conclusion that section 38, as amended in 1887, repeals by implication that part of section 33 of the act of 1873 providing for the exaction which is sought to be enforced in the case at bar. The answer in respect of this phase of the case states a good defense and, for the reasons given, the demurrer thereto should be overruled and judgment entered dismissing the action, which is accordingly done.

DISMISSED.

The following opinion on rehearing was filed June 30, 1904. *Demurrer to answer sustained:*

1. **Statute:** VALIDITY. Where a part of an act is unconstitutional, because contravening some provision of the fundamental law, the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever.

2. ———: REPEAL BY IMPLICATION. That part of the revenue act (Compiled Statutes 1901, ch. 77, art. I, sec. 38), providing "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873," being unconstitutional because attempting to exempt insurance companies from the payment of taxes on personal property, is void and of no effect for any purpose, and can not, therefore, operate as a repeal by implication of the provisions of section 33, chapter 43, Compiled Statutes, or any portion thereof.

3. **Insurance Companies: TAXATION.** The fact that a less reserve fund is required of domestic companies organized under the laws of this state, than is required of all companies doing business in the state of Pennsylvania under its laws, does not militate against the enforcement of the provisions of the reciprocal tax law on companies organized under the laws of Pennsylvania, and doing business in this state, such reciprocal tax law being otherwise applicable and enforceable.

4. **Reciprocal Tax Law.** The provisions of said section 33, chapter 43, Compiled Statutes, for a reciprocal tax on insurance companies organized under the laws of other states, whose laws discriminate against insurance companies organized under the laws of the state of Nebraska, apply and become operative from the time of the enactment of such laws by such other states requiring companies of this state to make deposits, or pay fines, taxes, penalties or license fees not required of all other companies, whether any company of this state shall have established agencies there or not.

5. ———. The act mentioned is in force and effect, and requires a foreign insurance company doing business in this state to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein, whenever the existing or future law of such other state shall require companies of this state to pay license fees, etc., for the privilege of doing an insurance business therein.

HOLCOMB, C. J.

Section 38, article I, chapter 77 of the revenue law, as it existed prior to the 1903 enactment, provided that every insurance company transacting business in this state should be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state, during the year previous, and at the same rate that

all other personal property is taxed. The section closed as follows:

"Insurance companies shall be subject to no other tax, fees or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873."

In the opinion handed down in this case, it is held that the provision quoted, in so far as it purported to exempt insurance companies from the payment of taxes on personal property, is in contravention of section 1, article IX of the constitution, providing for the raising of needful revenues, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his, her or its property and franchises, and it is also held that, notwithstanding the unconstitutional feature referred to, yet, the section as a whole would yield only to the extent of the repugnancy, and otherwise would be enforceable, and that the effect of the part of the section quoted, notwithstanding its invalidity in so far as it attempted to exempt personal property from taxation, was to repeal by implication the reciprocal tax feature found in section 33, chapter 43, Compiled Statutes. In arriving at the conclusion announced in the former opinion, the mind of the writer was centered especially on the exception clause contained in the sentence wherein certain exactions were excepted from the exemption generally of all other forms of taxation or other exactions; and, by applying the familiar rule that a statute will yield only to the extent of the repugnancy, it was believed that the legal effect was to add personal property to the exception clause, and that the section otherwise would remain a valid enactment and operate as a repeal by implication, as therein announced. Further consideration of the matter leads to the conclusion that the latter provisions of the section referred to, eleminating the unconstitutional part, were incorrectly construed. We are satisfied with the holding that the purported exemption of personal

property from taxes is an unconstitutional exercise of legislative power. We think there can be no doubt but that the attempted exemption of personal property from taxation contravenes the fundamental law, and that the section of the revenue act, in so far as it purports to do this, is invalid. *State v. Poynter,* 59 Neb. 417. We were, we think, in error in holding to the view that the section in this respect was invalid, and at the same time that it operated as a repeal by implication of the reciprocal tax provision of section 33 of the act of 1873. The effective words of the section, those which contravene the fundamental law and which must be held unconstitutional, are found in the clause, "Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state." These are the words which purport to exempt insurance companies from taxation on their personal property. Such attempted exemption is invalid, as was held in the former opinion. The legislature can not, after providing for a tax on net receipts, say that insurance companies shall be subject to no other tax, under the laws of this state. This language is as repugnant to the constitution as would be the case if no exception were made regarding taxes on real estate. Personal property can not be exempted any more than real estate, nor can both together. The words found in the invalid portion of the section, those which declare that insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state, are the only words which can effectuate a repeal by implication of the reciprocal tax feature of section 33 of the act of 1873. No language can be found which can be appealed to as repealing by implication the provisions of the act under which a recovery is sought in this case, except the language of section 38 quoted, and that which we say is inimical to the constitution. That part of the act, therefore, which attempts to relieve insurance companies from other taxes, fees and licenses than those mentioned, being void, for the reasons stated, is void for all purposes, and as though it had never been enacted

by the legislature, and therefore has no legal force and efficacy for any purpose. *Boales v. Ferguson*, 55 Neb. 565. Such being the case, there is no repeal by implication of any part of section 33, chapter 43 of the laws of 1873, and the former opinion holding to the contrary is therefore disapproved.

Having reached the conclusion just announced, it becomes necessary to consider one further point in the case, which was only mentioned, but not discussed or passed on in the former opinion. It is contended by counsel for the defense that the retaliatory law of this state can not be enforced against the defendant, a company incorporated under the laws of Pennsylvania, because no Nebraska company is incorporated, or can be incorporated, pursuant to the laws of this state, which does or can conform to the requirements made by the state of Pennsylvania of all insurance companies doing business therein. The argument in support of the proposition is predicated on the theory that a larger reserve is required of fire insurance companies doing business in Pennsylvania, by the laws of that state, than is required by companies organized and doing business under the laws of this state. It is said, companies created under the laws of this state do not maintain any such reserve, and are required to keep only a less percentage of their premiums, and that they may pay out the excess in dividends without violating any provisions of law. There is nothing in the argument which even remotely suggests the inability of Nebraska companies to fully, and in all respects, comply with the law and requirements of the state of Pennsylvania. The fact that they may operate upon a different plan or with a smaller reserve, under the laws of this state, than is required by the state of Pennsylvania, does not argue that they can not and do not measure up to the standard set by the laws of the latter state, and may not enter into that state, and engage in business therein, along with the domestic companies, or those organized under the laws of other states. If all are on common ground, in a fair field, with

no favors, there is no tenable ground for saying that Nebraska companies have not the ability to successfully compete with all others. If our companies do not engage in business in Pennsylvania, it may fairly be inferred that it is because of discrimination against outside companies, and not on account of the provisions of law, equally applicable to all companies, which may in some respects differ from the laws governing their creation and authority to do business in their home state. We may assume that the sole reason no Nebraska companies are doing business in Pennsylvania, if such be the case, is because of the severity of the restrictions imposed by the laws of Pennsylvania upon insurance companies organized under the laws of other states, which are not applicable to domestic companies. *Germania Ins. Co. v. Swigert,* 128 Ill. 237; *Phœnix Ins. Co. v. Welch,* 29 Kan. 672, and *State v. Fidelity & Casualty Co.,* 77 Ia. 648, all support the right of enforcement of the reciprocal tax law, regardless of the question of the establishment of an agency, or the attempt to do business, in the state against whose companies the law is made to operate. The law is effective when conditions it provides for are existent. If the laws of Pennsylvania are such as were contemplated by the legislature in the enactment of section 33, then those provisions are at once operative upon companies seeking to do business in the state, which are incorporated under the laws of that state, whether or not Nebraska companies have agencies established in Pennsylvania or whether, under the laws of this state, they may do business on a plan different from all companies doing business in Pennsylvania. In *Germania Ins. Co. v. Swigert, supra,* it is held, under a law in all essential features the same as the one under consideration, that the provisions of such a law apply, and become operative, from the time of the enactment of such laws, by other states, requiring companies of this state to make deposits or pay fines, taxes, penalties or license fees, whether any company of this state shall have established agencies there, or not. It is also held that such a

law is operative and in force, and requires a foreign insurance company, doing business in this state, to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein, whenever the existing or future law of any other state shall require companies of this state to pay license fees, etc., for the privilege of doing an insurance business therein. The other authorities cited fully support the Illinois case. The former judgment overruling the demurrer to the answer is vacated, and the demurrer is sustained. Judgment will be entered in conformity therewith.

JUDGMENT ACCORDINGLY.

The following opinions on motion for rehearing were filed March 23, 1905. *Rehearing denied:*

The judgment heretofore entered in this cause adhered to.

HOLCOMB, C. J.

It is contended that the reciprocal tax law is repealed by implication. If the law is in fact repealed by implication, it must be upon the ground that another valid law exists, the enforcement of which is necessarily so inconsistent and repugnant as that both laws can not stand; the former, in such a case, being held to be by implication repealed. This method of repealing is not, of course, favored by the courts, and such a repeal is never effected, save there is a subsequent valid enactment wholly repugnant to the older law. If there is no valid law, there can be no repeal, and no law can be held to effect a repeal by implication where it has no other purpose to subserve than that of repealing the prior enactment. That can only be accomplished by an express repealing statute. The act (Compiled Statutes, 1901, ch. 77, art. I, sec. 38) providing for taxing the net premiums of insurance companies says: "Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state." The

clause is followed by some exceptions, which need not be noted. Now if this clause is valid, of course it operates as a repeal by implication because its enforcement is utterly repugnant to the law providing for a reciprocal tax; if, however, it is unconstitutional because of its attempted exemption of personal property, then it can not be effective as a repeal by implication, because it would serve no purpose save as an express repeal of a prior statute. I find no authority which, as it seems to me, would justify the conclusion that, although the clause is unconstitutional in so far as it attempts to exempt personal property from tax, yet is valid for the purpose of effectuating a repeal by implication. The case is not the same as it would be were there some other property generally subject to taxes, but which the legislature might lawfully exempt.

The question is not of exemption of property that might be exempted, but of repeal by implication of an otherwise valid and enforceable statute. When this court said that an unconstitutional act is as ineffectual as though it had never been passed (*Boales v. Ferguson,* 55 Neb. 565), it stated what I conceive to be a truism, applicable to every word and syllable of an act held unconstitutional, whether it be a section, a part of a section, a sentence or a clause, which is found by the court to be in conflict with some higher law. What the courts have said in the way of what may be termed modifications, qualifications or exceptions to the rule, does not lessen the force of the proposition. An unconstitutional law is for all purposes as though it had never been passed. *Finders v. Bodle,* 58 Neb. 57. An Ohio case, *Treasurer of Fayette County v. Peoples & Drovers Bank,* 47 Ohio St. 503, 10 L. R. A. 196, holds that one part of a section may be void without affecting the validity of the remainder, unless both parts are so interwoven as to be inseparable. This is but an extension of the rule that one section may be upheld and another condemned. The point is not whether the parts are contained in the same section—for the distribution into sec-

tions is purely artificial—but whether they are essentially and inseparably connected in substance. This case distinctly recognizes the rule that a part, when it falls, falls for all purposes, and that another part may be held to be valid. A Utah case, *Konold v. Rio Grande W. R. Co.*, 16 Utah, 151, in terms, recognizes the rule that, when a part of an act is void, it can have no validity for any purpose.

"Obviously," say the court, "the provisions of this section are directly opposed to those of the constitution * * * and therefore can not have the force of law, and are void. * * * For like reasons, section 3197, relating to change of venue, is void, and ineffectual for any purpose."

And in *Steed v. Harvey,* 18 Utah, 367, 72 Am. St. Rep. 789, the rule that a part of an act, or of the same section, not dependent on another, may be held void, and the other valid, is recognized; but the same provision or section can not be held both void and valid. It seems to me that this undoubtedly announces the only rule that could be adopted with any degree of safety, or which could be intelligently applied in all cases where the question of the validity of a statute and its effect are to be considered and determined. In a United States supreme court case, *Supervisors v. Stanley,* 105 U. S. 305, a state statute on the assessment of the shares of bank stock conflicted in part with the United States statute authorizing deduction of debts, where that was the general rule in the state as to all other personal taxable property. The court held that the state statute was valid up to the point where it came in conflict with the congressional act, and that the taxation of bank stocks, without the allowance of deduction of debts, would render the taxes levied invalid only in so far as the tax debtor was entitled to deductions by virtue of the provisions of the act of congress. This, as I understand the case, is by the application of principles similar to those applied in the case of *Scott v. Flowers,* 61 Neb. 620, or to those sometimes applied to the taxation of the business of a corporation engaged in intrastate and interstate business, and the act is held to be valid so far as it affects

intrastate business, but not of force and effect as to interstate business. The court say, in *Supervisors v. Stanley*, 105 U. S. 305:

"In other words, in such a case, so much of the law as conflicts with the act of congress in the given case is held invalid, and that part of the state law which is in accord with the act of congress is held to be the measure of his (the stockholder's) liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and those to which it does, between the cases in which it violates the act of congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts. It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted the assessment was valid, and the tax paid under it a valid tax. That in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void."

In other words, the statute could be given a constitutional construction in that it permitted the assessment of shares where no debts were to be deducted, and this construction was given in preference to one holding it wholly unconstitutional. In *Poindexter v. Greenhow*, 114 U. S. 270, the new act was held to be absolutely void, and of no effect, as to the right of certain parties holding bonds of the state to pay taxes by surrender of coupons for interest, as this would amount to the impairment of the obligation of a contract, otherwise the law was valid and enforceable. By the application of the same principle, we might, perhaps, if it were found necessary to uphold the law, construe the statute applying to deficiency judgments as being applicable only to contracts entered into after the passage of the deficiency judgment law. This same rule seems to be applied in *Commonwealth v. Gagne*, 153 Mass. 205, 10 L. R. A. 442.

I think the second opinion in the case at bar announces the correct rule, and that the motion for rehearing should be overruled.

REHEARING DENIED.

BARNES, J., concurring.

The only question in this case is, whether or not the act of 1887, providing for a tax upon the net premiums of insurance companies, repeals so much of the insurance law of 1873 as provides for what is commonly called "The reciprocal tax."

An examination of our legislation affecting this question shows that the law relating to insurance companies, above mentioned, was passed at the legislative session of 1873, and has remained substantially the same from that day to this. Further examination discloses that when the general revenue law of 1879 was enacted it contained a section, to wit, section 38, almost identical in form and substance with the act of 1873, above mentioned, except that it provided for taxing insurance companies upon their gross premiums instead of their net premiums. In the act of 1879 it was provided:

"Insurance companies shall be subject to no other taxation, under the laws of this state, except taxes on real estate, and the fees imposed by the chapter on insurance."

Under this law, which was in force from the time of its enactment until 1887, no claim was ever made that the clause, above quoted, repealed the reciprocal tax law, either directly or by implication. On the contrary, the reciprocal tax was collected from, and paid by, all foreign insurance companies doing business in this state subject to taxation under the terms thereof, without objection. The act of 1887 (ch. 77, sec. 38), however, contains the following:

"Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state, except taxes on real estate, and the fees imposed by section 32 of an act

regulating insurance companies, passed February 25, 1873."

It will be observed that there is a slight difference in the wording of the two provisions, but they are in substance much the same. To me it seems quite doubtful if the legislature intended to change that part of the law relating to the reciprocal tax. Without doubt it was the intention of the lawmakers not to interfere with the operation of that law at all.

It is contended, however, that the clause in the law of 1887, last above quoted, repeals the reciprocal tax law, known as section 33 of the Compiled Statutes, relating to insurance companies. The repealing clause found in section 2 of the act of 1887 does not repeal section 33 of the statutes relating to insurance companies, in express terms; so, if that section is repealed at all thereby, it is by implication, and because it is in direct conflict with the clause last above quoted. Nothing else in the act of 1887 can be construed to affect the reciprocal tax law in any manner whatever. It is our unanimous opinion that so much of the last mentioned act as is quoted above is unconstitutional and void, because it exempts insurance companies from taxation on their personal property. It follows, then, that this clause falls to the ground, it goes out of the statute, and the law stands the same as though it had never existed, and had never been passed by the legislature, for any purpose. Conceding now the correctness of the view that the first clause of the act of 1887, which provides for taxing insurance companies upon their net premiums, is good and can be enforced, and must therefore stand, it by no means follows that the act operates to repeal the reciprocal tax law. That part of the act relating to the taxation of insurance companies upon their net premiums does not conflict with the reciprocal tax law in any manner whatever; and there has been no suggestion that both of these laws can not stand and be enforced together. We have, then, the proposition that the clause of the act which may be held to be valid is not in

conflict with, and therefore does not repeal, the reciprocal tax law by implication or otherwise. And that portion of the statute which, if valid, might have that effect, being unconstitutional and void, and discarded and rejected for every and all purposes, the reciprocal tax law is in no wise affected thereby. See laws of 1873, p. 443; laws of 1879, p. 291, section 38; laws of 1887, p. 569.

SEDGWICK, J., dissenting.

Section 38 of the revenue law, referred to in the opinion, required insurance companies to be taxed upon the premiums received by them in excess of the losses and ordinary expenses, and provided that this taxation should be in lieu of all other taxes, except taxes on real estate. This provision, if entirely valid, would relieve insurance companies from the reciprocal tax, so called, which this action was brought to enforce against this defendant, and would also relieve them from taxation upon their personal property. These companies could not be relieved from taxation upon their personal property, because of the requirement of the constitution that every person and corporation shall pay a tax in proportion to the value of his, her or its property. The tax upon premiums provided for by the statute is held valid and enforced, and the opinion discloses that the provision of this statute doing away with the reciprocal tax, on account of the new tax imposed upon premiums, would be valid, if it were not for the fact that the same clause of the statute also attempts to relieve the personal property of these companies from taxation. It does not seem to be in harmony with reason or authority to hold that a sentence or clause of a statute which attempts to accomplish several distinct purposes must be held to be unconstitutional, *in toto,* because some one of the several things sought to be accomplished is beyond the power of the legislature. Exempting insurance companies from taxation upon their personal property was not an inducement to this legislation or to any part of it,

Taxation upon premiums was the inducement to the exemption from other taxation. If this new taxation was sufficient ground for all of the exemptions allowed in consequence thereof, there seems to be no reason for denying to the legislature the power to make such of the exemptions provided for as are not forbidden by the constitution. It has been held:

"A law which is unconstitutional within certain limitations, if in terms it exceeds or fails to notice those limitations, may yet be entirely operative within its legitimate sphere, and properly held to have the application which thus confines it." *Commonwealth v. Gagne,* 153 Mass. 205, 10 L. R. A. 442. *Poindexter v. Greenhow,* 114 U. S. 270, 29 L. ed. 185; *Board of Supervisors v. Stanley,* 105 U. S. 305, 26 L. ed. 1044; *Treasurer of Fayette County v. Peoples & Drovers Bank,* 47 Ohio St. 503, 10 L. R. A. 196, and notes. *Steed v. Harrey,* 18 Utah, 367, seems to hold a contrary doctrine, but no satisfactory reason for such holding is given.

The conclusion reached in the opinion does not seem to me to be well supported by the reasons given. It may be that it can be supported upon other grounds. At all events the case has already been twice argued, and as the majority of the court are satisfied that no different result could be reached upon further consideration of the case, a further hearing does not seem advisable.

The following opinion on motion of state for judgment on the pleadings was filed February 8, 1906. *Motion sustained:*

1. Courts: CONSTRUCTION OF FEDERAL CONSTITUTION. The state courts are bound by the decisions of the United States supreme court regarding the proper construction of a clause of the federal constitution and its application to the question involved in the litigation.

2. Insurance: INTERSTATE COMMERCE. The business of insurance is not commerce, and the making of a contract of insurance is a

mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life. *New York Ins. Co. v. Cravens*, 178 U. S. 389.

LETTON, J.

This cause was argued and submitted to the court while Chief Justice HOLCOMB presided. Before his term of office expired he prepared the following opinion, which meets with our approval, and which expresses our views with clearness and perspicuity:

"This cause is submitted on the petition of the plaintiff, the state, the second amended and substituted answer of the defendant, and a motion filed by the state for judgment on the pleadings. The court has heretofore considered and decided the principal legal questions arising in this controversy on a ruling on a demurrer interposed by the state to the answer of the defendant. *State v. Insurance Co. of North America, ante* p. 335.

"Nothing new or essentially different from the questions already passed upon is presented by the defendant's second amended and substituted answer except that it is now alleged that the defendant's business of insurance of property against loss by fire, as conducted and carried on between it and the citizens of the different states of the Union with whom it contracts for indemnity, is interstate commerce within the meaning of the clause of the constitution of the United States concerning the regulation of commerce between the different states of the Union and the citizens thereof; that the tax sought to be enforced by the state in this action constitutes a direct imposition upon the insurance business of the defendant, and that the section of the statute of this state authorizing the exaction sought to be enforced amounts to a regulation of commerce among the states and of the instrumentalities enjoyed therein, in violation of clause 3, section 8, article I of the constitution of the United States. The question thus presented pertains to the construction of the federal

constitution and regarding which the ultimate and final decision rests with the United States supreme court.

"It is plausibly argued that the vast business of fire insurance, carried on, as it is, by the different companies and corporations of many of the states with the citizens of all the states of the Union, is so vital and interwoven with our industrial and commercial fabric that it is essential to the welfare, success and permanence of our institutions, and is in its nature a commodity, in the exchange of which the business should be properly classed as interstate commerce, entitled to the protection and coming within the provision of the clause of the federal constitution to which reference has been made. Without taking the time to engage in a discussion of the question as an original proposition to be decided upon a course of reasoning and logic based upon underlying principles, and under the rules pertaining to the proper construction of provisions found in the fundamental law of the land, we must content ourselves by saying that the question can hardly be regarded as an open one, and that we feel ourselves bound by the decisions of the highest judicial tribunal, whose special and peculiar function it is to construe a clause of the constitution of the kind and character under consideration, and apply it to questions of litigation as they may arise. It is not for us to ignore or seek to overturn the authoritative utterances of that august body, but rather to remand to it the question of whether its own opinions shall be approved and followed, or overruled, because upon further consideration they are believed to be erroneous or unsound.

"In *New York Fire Ins. Co. v. Cravens*, 178 U. S. 389, decided in 1900, by a unanimous court, it is held that 'The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.' In the opinion, after discussing and affirming the power of the state to

regulate in the manner attempted, as shown herein, it is by the court said: 'Further comment on this head may not be necessary, and we only continue the discussion in deference to the insistence of counsel upon the interstate character of the policy in suit. It is the basis of every division of their argument, and an immunity from control is based upon it for plaintiff in error, which, it seems to be conceded, the state can exert over corporations of its own creation. An interstate character is claimed for the policy, as we understand the argument, because plaintiff in error is a New York corporation and the insured was a citizen of Missouri, and because, further, the plaintiff in error did business in other states and countries.' And further it is observed: 'Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states? That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia,* 8 Wall. (U. S.) 168; *Liverpool Ins. Co. v. Massachusetts,* 10 Wall. (U. S.) 566; *Philadelphia Fire Ass'n v. New York,* 119 U. S. 110. That the business of marine insurance is not, is decided in *Hooper v. California*, 155 U. S. 648. In the latter case it is said that the contention that it is, "involves an erroneous conception of what constitutes interstate commerce." We omit the reasoning by which that is demonstrated, and will only repeat, "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality.'

"*Hooper v. California, supra,* fully supports the later case of *New York Life Ins. Co. v. Cravens.* In *Paul v. Virginia* it is said by Mr. Justice Field, speaking for the court: 'Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of

indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and there put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect —are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.'

"In *Crutcher v. Kentucky*, 141 U. S. 47, the question for decision was with reference to the validity of a state statute having for its object the regulation of agencies of foreign express companies, and it is held that the statute was a regulation of interstate commerce, so far as applied to corporations of another state engaged in that business, and was to that extent repugnant to the constitution of the United States. A consideration and comparison of the case last cited, with *Hooper v. California*, *supra*, will make clear and emphasize the holdings of the United States supreme court on the question of the conduct of the business of insurance not being of a character which brings it within the scope of the commerce clause of the constitution. In both cases, agents of the foreign corporations had been fined in the state courts, for doing business contrary to the provisions of the state statutes seeking to regulate the business of foreign corporations. Each of the statutes had been upheld in the state courts.

In the *Hooper* case the statute affected foreign insurance companies, while in the *Crutcher* case it was directed against foreign express companies. The principal question in each case argued on appeal to the federal supreme court was, whether the statute under which the conviction was had contravened the provision of the federal constitution with reference to the regulation of interstate commerce. In the *Hooper* case the decision of the state court was affirmed on the ground, distinctly stated, that the business of insurance carried on by a foreign corporation in the state of California did not involve interstate commerce and the state statute was therefore valid; while in the *Crutcher* case the decision of the state court was reversed for the sole and only reason that express companies were engaged in interstate commerce, and the law seeking to regulate the business of such companies came in conflict with the commerce clause of the federal constitution. In the *Crutcher* case, in pointing out the distinction between the making of contracts of insurance and interstate commerce, or the necessary instrumentalities thereof, it is said: 'The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of congress. The insurance business, for example, can not be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous.'

"With these clear and explicit expressions as to the proper construction of the clause of the constitution appealed to by the defendant in the case at bar, as it applies to the business of insurance, our duty appears reasonably plain, and we must hold to the view that the answer, in respect to the matter being discussed,

states no defense to the cause of action pleaded by the plaintiff."

With these views we are content, and for the reasons therein stated the plaintiff is entitled to judgment on its motion, and it is accordingly so ordered.

Judgment for plaintiff will be entered for the sum prayed for in its petition.

JUDGMENT FOR PLAINTIFF.

SEDGWICK, C. J., dissents.

JOSEPH W. WOODROUGH V. DOUGLAS COUNTY ET AL.

FILED MARCH 17, 1904. No. 13,594.

1. **Taxation.** CONSTITUTIONAL LAW. The sale of real estate for the payment of delinquent taxes, under the provisions of chapter 75 of the laws of 1903, entitled "An act to enforce the payment and collection of delinquent taxes and special assessments on real property," does not deprive the owner of his property without due process of law.
2. **Tax Sale:** COUNTY AS PURCHASER. Lands purchased by the county, under the provisions of this act, are held in trust for itself, the state, and all other political subdivisions entitled to any portion of such delinquent taxes. Such lands are not acquired by the state by escheat or forfeiture, and do not belong to the permanent school fund.
3. **Constitutional Law:** JURY. The proceeding provided for by this act is a suit in equity in the district court, and the owner of real estate in question therein, has no constitutional right to a jury trial.
4. ———: RELEASE OF TAXES. The sale of lands in such proceedings for what they will bring, though less than the amount of the decree for the taxes due and delinquent, is not a release or commutation of taxes, within the meaning of section 4, article IX of the constitution.
5. ———: STATUTES. The act is not vulnerable to the objection that its provisions are broader than its title; it is complete in itself, capable of enforcement, and is not open to the objection that it is amendatory of other laws.
6. ———: DELEGATION OF LEGISLATIVE AUTHORITY. The law provides for one of two methods of collecting delinquent taxes on real estate, and permits the county board to choose which method it will

pursue. This does not amount to a delegation of legislative authority.

7. **Cumulative Remedy.** The remedy provided for is declared by the act itself to be cumulative, and therefore it is not in conflict with, nor does it take away any other remedy provided by statute.

8. **Act Constitutional.** *Held*, That the act in question is not in conflict with any of the provisions of the constitution so as to invalidate it, and is a constitutional exercise of legislative power.

ORIGINAL action by Joseph W. Woodrough against Douglas county and others. *Dismissed.*

Joseph W. Woodrough, pro se.

Carl C. Wright, James E. English and *W. T. Nelson, contra.*

BARNES, J.

The plaintiff commenced this action against the county of Douglas, its board of commissioners, the treasurer of said county, and the city of Omaha, to restrain the officers of the county and city from taking the proper and necessary steps to enforce the payment and collection of the delinquent taxes and special assessments on real property, in said county and city, under the provisions of chapter 75 of the laws of 1903. The defendants have filed separate demurrers to the plaintiff's petition. No objection is raised to our jurisdiction to entertain this suit, and it is conceded that the pleadings are sufficient in form and substance to test the validity and constitutionality of the law. The act contains 48 sections, and on acount of its considerable length can not be quoted in full. Its provisions will be referred to in detail as occasion may require. Its objects, briefly stated, are: To clear the tax list of dead properties overburdened with taxes; to do this in such a way as to secure to the state, county and city all that the property will bring at a judicial sale made under the most favorable conditions; to litigate the questions involved as to the validity of the taxes and special assesments before instead of after the sale; to eliminate unnecessary items of cost, and allow the court

proceedings to be carried on at a trifling expense; and to secure to the purchaser at the sale a new and independent title to the real estate in question. Section 5 of the act provides, in substance, that the county treasurer shall prepare a petition addressed to the district court of his county, which shall be entitled "The state of Nebraska, plaintiff, against the several parcels of land therein described and all persons and corporations having or claiming any right, title or interest therein, defendants." It also prescribes the allegations which the petition shall contain, together with the prayer for judgment. Section 6 provides that the petition shall be filed with the clerk of the district court in the county where the lands are located, and the cause shall be docketed as a suit in equity; that the filing of the petition shall operate as the commencement of a several action against each parcel of real estate described in the petition, as well as the party having or claiming any interest, right, title or claim in or to such real estate, or any part thereof. Section 7 provides for service, by the publication of a notice of the commencement of the action, directed to all whom it may concern; the notice is required to be signed by the county treasurer, and must be published once a week for four successive weeks in some newspaper of general circulation in the county in which the lands are situated; and if no such newspaper shall be published in the county, then in some newspaper of general circulation within the judicial district. It is further provided that a complete list of the lands and lots described in the petition, together with the name of the owner of each particular tract, as shown by the county assessment roll of the preceding year, as well as a statement of the total amount of the taxes and assessments, and interest thereon to October 1 of that year, shall be published in connection with the notice. And section 8 of the law provides for the proper proof of such service by publication. The act does not require personal service of summons as provided for in our code, and for this reason the plaintiff's first contention is that the law

is in conflict with section 3, article I of the constitution, because, by its enforcement, persons will be deprived of their property without due process of law. It appears that every step necessary to give the court jurisdiction, excepting personal service of summons on the owner or owners of the lands to be affected by the decree, is provided for, and it only remains for us to determine whether the omission to provide for such service of summons renders the law unconstitutional.

The act in question was copied from the laws of the state of Minnesota, where it has been in force for many years, and where it has been uniformly held that the proceeding was an action *in rem,* and that the jurisdiction of the court over the land is not affected by the failure to provide for and obtain personal service of summons upon the owner. *McQuade v. Jaffray,* 47 Minn. 326. In the opinion in that case the court said:

"Under our statute proceedings to enforce the collection of real estate taxes are purely *in rem.* They are against the land, and not against the owner. The notice is addressed, not to the persons named in the list as owners, but to all persons who have or claim any interest in any of the tracts described in the list; and they are notified that, in case of default, judgment will be entered, not against them personally, but against such pieces or parcels of land. The judgment is against the land, and the name of the owner is not required to appear at all. It is elementary that no reference to the name of the owner is necessary in proceedings *in rem.* It is, however, a common practice in such proceedings to give the name of the owner, if known, 'for frankness' sake,' to increase the chances of his attention being called to the notice."

In *Pritchard v. Madren,* 24 Kan. 486, this identical question was before the court. The validity of a like law was challenged on the ground that the proceedings under it did not constitute due process of law, and the court said:

"While the ordinary process for the collection of taxes

is by sale by the treasurer, this statute authorizes the county, in case of failure to collect by the ordinary process, to foreclose the tax lien by proceedings in the district court. Is not this due process of law? Is there any constitutional requirement or inherent necessity compelling the collection of taxes by the single process of sale by county officers? Clearly not. The method of collection is not prescribed in the constitution, but is left to the legislative discretion; and because one method has hitherto been adopted, is no limitation on the power to adopt another. There is no inherent vice in collecting taxes by judicial proceedings in the courts, instead of by summary process of sale by county officials. The legislature may adopt either, or both. A collection in either way is by due process of law. A tax, when duly levied, becomes a lien upon the land, which may be enforced in such manner as the legislature shall prescribe. The mere remedy is always within legislative control. A change in it disturbs no vested rights. Again, objection is made to the proceedings in this case and the judgment rendered, on the ground principally that neither the land nor the owner was named in the title of the petition, that in the body of the petition and the judgment the land is alleged and found to be the property of another than the real owner, and also because while the owner was a resident the only notice given was by publication. Neither of these grounds of objection is well taken. The collection of taxes is a proceeding *in rem*. The land and delinquent taxes are correctly described in the body of the petition and in the publication notice. * * * If the petition fully and clearly states all the facts constituting a cause of action against this particular tract of land, facts sufficient to justify a decree of foreclosure against it, and due and legal service of all process or notice required is made, the jurisdiction of the court is complete," and it can not be said that the property is taken without due process of law.

We held in an early case that, in a proceeding *in rem*, it

was not necessary to bring the party, whose rights were affected, before the tribunal competent to pass upon the subject matter, by service of a summons. *South Platte Land Co. v. Buffalo County,* 7 Neb. 253. We have also held that a proceeding to foreclose a tax lien, by a purchaser at an ordinary tax sale, was against the land, and the owner and others having a lien upon the land need not be made parties to the suit, where it is alleged in the petition that the owners are unknown; that the purchaser at the foreclosure sale, in such a case, takes the land by a new and independent title, and that such proceedings are not open to the objection that the property of the citizen is taken without due process of law. *Leigh v. Green,* 64 Neb. 533. See also *Butler v. Copp,* 5 Neb. (Unof.) 161. The case of *Leigh v. Green, supra,* was taken to the supreme court of the United States, and affirmed by that tribunal on the 22d day of February, 1904. So it may be said that it is now well settled that a proceeding to foreclose a lien for taxes, brought by state or county officials, is a proceeding *in rem* to secure a judgment against the lands assessed, and the notice by publication to all parties interested to appear, is sufficient to confer jurisdiction over resident and nonresident landowners, without personal service of summons. *Winona & St. Peter Land Co. v. Minnesota,* 159 U. S. 526, 537; *Ball v. Ridge Copper Co.,* 118 Mich. 7; *Chauncey v. Wass,* 35 Minn. 1; *Bond v. Hiestand,* 20 La. Ann. 139; *Emmons County v. Thompson,* 9 N. Dak. 598. In *Winona & St. Peter Land Co. v. Minnesota, supra,* Justice Brewer, speaking for the supreme court of the United States, said:

"That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceeding shall be taken, notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law."

We therefore hold that the act is not vulnerable to this objection.

Plaintiff contends that the lands purchased by the county at the foreclosure sale are made the property of the state; that they are obtained by escheat or forfeiture and therefore belong to the permanent school fund; that the law requiring the funds arising from the redemption or resale of the lands to be distributed to the state, county and municipality, is in conflict with the constitution, and the whole act must be declared void. Lands purchased at a foreclosure sale are not acquired by escheat or forfeiture, in the sense used in the constitution. The words "escheat" and "forfeiture" have a distinct and definite legal meaning, and can never be construed to mean sale and purchase. By the terms of the act, the county is authorized to purchase the land the second time it is offered for sale, for the sole purpose of enabling it to collect the delinquent taxes. Ample provisions are made for the resale of the lands purchased by the county at a premium, and for redemption; the amount realized by the sale or redemption is to be applied to the payment of the taxes, and prorated in the manner specified in the act. The plaintiff states no reason and cites no authority in support of his contention; apparently he does not rely upon it; and we therefore hold that it is without merit.

Plaintiff further contends that the law is unconstitutional because the act makes no provision for a trial by jury. It will be observed that, by the terms of the law itself, the action by the county to foreclose the tax lien is declared to be a suit in equity. There never was, and there is not now, any constitutional or statutory right of a jury trial in an equitable action. *Sharmer v. McIntosh*, 43 Neb. 509; *Dohle v. Omaha Foundry & Machine Co.*, 15 Neb. 436; *Mayer v. State*, 52 Neb. 764.

Again, it is difficult to see how, in an action for the foreclosure of a tax lien, any disputed question of fact triable by a jury can arise. All of the proceedings relating to the levy and assessment of the taxes are matters of public record, about which there can be no dispute, and the court is simply required to pass upon the sufficiency of

these proceedings as a matter of law. Wherever this question has been raised it has been held, that acts providing for a summary foreclosure of taxes by state or county authorities are valid, although the title and right of possession to lands is determined without affording a trial by jury. *Ball v. Ridge Copper Co., supra; State Tax-Law cases,* 54 Mich. 350, 367.

It is next claimed that the act authorizes a release or commutation of taxes, and is in conflict with that section of the constitution which provides that "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Constitution, art. IX, sec. 4. The sale of land to satisfy a tax lien thereon is an extinguishment of the lien, which becomes merged in the title thus conveyed. Therefore it is not a release or commutation. A release is a discharge of a debt by act of the party; an extinguishment is a discharge by operation of law; a release is a voluntary relinquishment of a lien and right of action or an obligation. In a foreclosure the liens do not continue as incumbrances on the land, but by operation of law they are extinguished. In the proceeding to foreclose tax liens provided for in this act the liens are extinguished, and are not released either by the legislature or by the voluntary act of any public officer acting under authority from that body. Again, commutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor or of a single payment in lieu of a number of successive payments, usually at a reduced rate. The judicial sale of property under a decree of foreclosure, for what it will bring, although it be less than the amount of the

taxes assessed and delinquent against it, can not be said to be a commutation of taxes within the meaning of the constitution.

The provision of our constitution prohibiting the release or commutation of taxes was taken verbatim from section 6, article IX of the constitution of Illinois, adopted in 1870. An evil had grown up in that state which had commenced to break down the principles of uniformity and equality of taxation. Therefore the adoption of such an amendment to the constitution was necessary. After this provision was adopted the legislature of that state enacted a revenue law containing, in substance, the following provision: That whenever the county judge, county clerk and county treasurer shall certify that the taxes on forfeited land equal or exceed the actual value of said land, the same shall be offered for sale to the highest bidder, after first giving ten days' notice of the time and place of sale, together with a description of the lands sold. This section is still in force there, and has not been attacked as in conflict with that constitutional limitation. Plaintiff cites the case of *State v. Graham,* 17 Neb. 43, as sustaining his point and decisive of this question. An examination of that case discloses that it is not in point, and does not control this case. In 1881 the legislature passed an act to authorize county commissioners to purchase real estate at tax sales. The act contained the following provision for the release of taxes: "Whenever the county commissioners * * * have purchased any real estate * * * they may sell and assign the tax certificates issued upon such purchase for an amount not less than 50 per cent. of the amount expressed in such certificates." (Sec. 2, art. III, ch. 77, Compiled Statutes.) The difference in the procedure between that act and the one here in question is vital. The present act provides for a public sale to the highest bidder. The price of the certificate is fixed at the amount of taxes due without discount or commutation. The act contemplates a sale of the lands under a decree, not merely the sale and assign-

ment of tax certificates at private sale by the county board. Therefore, the decision in the case of *State v. Graham* has no application to the present act. Again, we find in the opinion in that case the following expression:

"If the property will not sell for sufficient to pay the delinquent taxes due thereon—an extreme case—it is possible the legislature may possess the power to authorize the sale for less than the taxes due."

If the land will not sell for the amount of taxes due, the most usual process of law would be to have the property sold under the judgment or decree of court to the highest bidder. This is in accordance with the usages of courts of equity in enforcing the collection of liens. It is the process resorted to in many states, and particularly in Illinois, where the constitutional limitation as to release and commutation of taxes is the same as ours. Again, to hold that real estate can not be sold, in a proceeding to foreclose a tax lien, for less than the amount of the taxes due and delinquent thereon would, in many instances, enable the owner to wholly escape taxation. It would only be necessary for him to neglect the payment of his taxes until they should amount to more than his property would sell for, and thereafter he could forever enjoy its use without contributing anything to the support of the commonwealth. Such a situation was never contemplated by the framers of the constitution. The plaintiff has failed to produce any authority which holds that such foreclosure proceeding constitutes a release or commutation of taxes within the meaning of the terms used in the constitution. And in the absence of precedent or authority, or of any well established principle of construction to demonstrate otherwise, it would seem that the act in this respect is not in conflict with the limitations of our constitution, and that its validity is free from doubt.

Plaintiff further contends that this law embraces many subjects not clearly expressed in its title; that it modifies and amends many sections of our statutes, and contains

no reference to any of them either in its title or otherwise; that for these reasons it is unconstitutional. The title of the act is: "An act to enforce the payment and collection of delinquent taxes and special assessments on real property." There can be no doubt but that this title is broad and comprehensive enough to cover every provision of the law relating to that subject. It is scarcely less comprehensive than that of the general revenue law, which has been held sufficient. Again, the law is complete in itself, and while it may seem to conflict with some other provisions of our statutes, yet it is declared by its terms to be a cumulative remedy only. It is a law special in its nature and provisions, and will prevail over general provisions of the statutes.

It is also contended that the act is void because it leaves the question of its enforcement to the arbitrary determination of the board of county commissioners, thus giving that body the power to suspend the operation of the general and other revenue laws, contrary to the provisions of section 1, article III of the constitution. There is nothing in this contention. This act, taken in connection with the general revenue law, simply provides two methods of enforcing the collection of delinquent taxes and special assessments on real property. It does not delegate legislative power to the county commissioners, but gives them the option of a cumulative remedy. The legislature has declared what the law shall be when it takes effect; also upon what contingency it shall be put in operation, and when that contingency happens it takes effect by legislative will. This does not amount to a delegation of legislative power. *State v. Sullivan*, 67 Minn. 379. The law governing the sale of intoxicating liquors in this state is prohibitory unless the county board deems it expedient to grant a license. This law, together with many others of a similar character, has been upheld by the courts, and the questions affecting the validity of such laws seem to be well settled. This identical question arose in determining the constitutionality of the irrigation act. That law

was attacked because it was claimed that it contained a delegation of legislative power to the county board. The act was upheld, and it was declared that its provisions did not amount to a delegation of legislative power. *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411. Such a law has received the approval of the highest court in the nation. *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112. The enforcement of the law in question is simply applying one of two methods of procedure to collect delinquent taxes, either of which the board is at liberty to choose. Therefore, it is not open to the constitutional objection that it is a delegation of legislative authority. *Dinsmore v. State,* 61 Neb. 418.

After a careful consideration of the whole subject, we are constrained to hold that chapter 75 of the laws of 1903 is an act complete in itself, capable of being enforced, providing for a cumulative method for the collection of delinquent taxes, which would otherwise be wholly lost to the commonwealth; that it in no manner conflicts with the provisions of our constitution so as to invalidate it, and there is no valid reason why it should not be enforced. Therefore, the several demurrers of the defendants to the plaintiff's petition are sustained, and the cause is dismissed at the plaintiff's costs.

JUDGMENT ACCORDINGLY.

FRED W. HORST ET AL V. NORA B. LEWIS ET AL.*

FILED MARCH 17, 1904. No. 12,826.

1. **Intoxicating Liquors: BONDS: LIABILITY.** Persons engaged in selling intoxicating liquors under license in this state are jointly and severally liable for all damages arising from such traffic, to the cause of which they have contributed, and such liability extends to the sureties upon their bonds.

* Rehearing denied. See opinion, p. 370, *post.*

2. **Action:** PARTIES: VENUE. All such persons and sureties may be joined as defendants in a single action to recover damages and, if a part of them do not reside, or can not be found, in the county in which the action is brought, summons may be served upon them elsewhere.

3. **Bonds:** SURETIES. A brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products.

ERROR to the district court for Madison county: JAMES F. BOYD, JUDGE. *Affirmed.*

Allen & Reed and *Charles F. Tuttle,* for plaintiffs in error.

S. O. Campbell, A. G. Wolfenbarger and *Samuel Tuttle, contra.*

AMES, C.

This is a proceeding in error to reverse a judgment for the plaintiffs, in an action by and on behalf of a widow and her minor children to recover damages from retail liquor dealers and their sureties, for having caused the death of the husband and father by furnishing him with alcoholic drinks. There are three principal defendants each having a separate license and place of business, and each having given a separate bond with sureties, but all are alleged, and two are found by the jury, to have contributed on the same day toward causing the intoxication resulting in the death complained of. Two of these principals, Horst and Loerke, reside and have their places of business in the city of Madison in Madison county, and the other, Smith, resides and has his place of business in the village of Humphrey in Platte county. The action was brought in Madison county, where Horst and Loerke and their sureties were served, and a summons was issued to Platte county where Smith and his sureties were served. Due but unavailing objection was taken to the jurisdiction of the court over Smith and his bondsmen, on

the ground that the service was unauthorized and void, and each of the principals and his sureties separately objected for misjoinder of causes of action and of parties defendant.

We think that none of these objections is valid. The policy of the statute, as settled by decisions of this court extending over twenty years, is to render all licensed liquor dealers jointly and severally liable for the consequences of intoxication to which they have in any degree contributed. *Kerkow v. Bauer,* 15 Neb. 150; *Elshire v. Schuyler,* 15 Neb. 561; *Wardell v. McConnell,* 23 Neb. 152. Counsel make a vigorous assault upon these decisions, especially the last cited of them, which they desire to have overruled. We are indisposed to recommend so radical a revolution in the jurisprudence of the state, the more so in view of the fact that the authorities assailed appear to us to announce an obvious and necessary interpretation of the statute. Defendants in such cases are treated both by the statute and by the foregoing decisions as joint wrongdoes, but the statute also creates a right of contribution among them, an element unknown to the common law relative to joint tortfeasors. In this latter respect, the attitude of licensed liquor dealers toward each other and the public is analogous to that of mutual guarantors, each for all and all for each. Each has, therefore, within the meaning of section 41 of the code, an interest adverse to the plaintiff in any civil action for damages growing out of the traffic to which he is alleged to have contributed, and is a proper party to such an action. Section 60 provides that an action may be brought in any county in which "the defendant, or some one of the defendants, resides, or may be summoned," and section 65, that where an action is rightly brought in any county, a summons may be issued to and served in any other county, against any one or more of several defendants. It is quite clear from the foregoing that this action was rightly brought in Madison county; that Smith was a proper party thereto, and that he was lawfully served in Platte county.

But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were properly served in any county in the state to which a summons was issued.

It is admitted by the pleadings that the defendant, the Krug Brewing Company, jointly with two other sureties, executed and delivered one of the bonds in suit, but it contended that the act was, as to the company, *ultra vires,* and that the instrument is therefore not obligatory upon it. The principal in this bond is the defendant Fred W. Horst. He carried on his business in a building belonging to the company and which he leased from it, and at the time he obtained his license, and of the execution and delivery of the bond, and as a part of the same transaction, he obligated himself to purchase beer for sale in his saloon exclusively from the company. It is alleged, and was proved to the satisfaction of the jury, that, in consideration of his agreement and of the renting of the building, the company executed the bond, and loaned or advanced the money used in obtaining the license. The articles of incorporation of the company contain the following grant of power: "The general nature of the business to be transacted by the corporation is to do a general business of manufacturing and sale of lager beer, ale, porter and malt, the erection of suitable buildings for the carrying on of said business, and to buy, sell, lease, rent, exchange or otherwise handle real estate in the state of Nebraska, or elsewhere, and the execution of such deeds and leases, bonds, mortgages, notes and trust deeds as may be proper in connection with such business." It thus clearly appears, as it seems to us, that the transaction above recited, in so far as it consisted of the leasing of the building and in securing a contract for the retailing of

beer, was within the express terms of the charter, and that the execution of the bond was, under the circumstances, a necessary incident thereto. We take it that there is no better settled principle of law, in this country, than that a grant of express powers includes within it implied authority to do any and all things necessary and convenient for the carrying of them into execution. In order that the company shall obtain revenues from its buildings, "in connection with its business," it must have tenants engaged in vending its products; and, in order that a tenant shall so engage, it is indispensable that he have a local license under the statute, and he can procure such a license only by giving a bond like that in suit. The procuring of the bond is the initial and an indispensable step toward procuring a tenant for the company's property and a customer for its beer, and is, we think, clearly within its charter powers.

These matters were pleaded in the reply in response to the defense of *ultra vires* tendered by the answer and the defendant complains because they were not stricken out upon motion as being a departure. We think the motion was properly overruled. The plaintiffs were not required to anticipate the defense, and the reply is solely responsive to the answer, and contains nothing inconsistent with the petition. It is incorrectly styled by counsel as the pleading of an estoppel. It goes merely to corroborate the allegation of the petition that the company became bound in the first instance by a valid contract. Perhaps the facts could have been proved without having been pleaded, but, if so, the pleading of them was mere surplusage which has wrought the company no injury.

Complaint is made that the trial judge, in stating the issue to the jury, copied largely from the petition, and in one instance, or more, referred them to that document, saying that the allegations of certain paragraphs of it were denied. That a more concise statement of the matters in dispute could have been made is probable, but it is not made to appear that the statement is incomplete or in

any respect misleading, or that the defense was prejudiced thereby. This court has held that, under such circumstances, mere error in form will not work reversal. *Murray v. Burd*, 65 Neb. 427.

Errors are assigned for the giving and refusal of a large number of other instructions, for the most part because the rulings in that regard were in accordance with the view of the rights and obligations of the parties, which the foregoing opinion approves. The discussion would be unduly prolonged by setting them forth in full, and no useful purpose would be subserved by so doing. We have examined them carefully, and are confident that they worked the defendants, or any of them, no damage. The evidence was conflicting in some respects, but there was sufficient to maintain all the issues on behalf of the plaintiffs, except as against Smith and his sureties, in favor of whom the jury returned a verdict, and it is recommended that the judgment of the district court be affirmed.

HASTINGS 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

AFFIRMED.

The following opinion on motion for rehearing was filed May 3, 1905. *Rehearing denied:*

1. **Intoxicating Liquors:** ACTION: PARTIES. Where different retail dealers in intoxicating liquors contribute by the sale of liquor to the intoxication of an individual which causes his death, such dealers and the sureties on their bonds, which are required by the statutes, may all be joined as defendants in one action, to recover for loss of the means of support by those who have suffered injury by reason of the death of such individual.

2. **Pleadings.** Where the plea of *ultra vires* is interposed by a defendant corporation in its answer, facts not inconsistent with the allegations of the petition may be pleaded in the reply, in the nature of an estoppel or to show that the corporation was, under

the circumstances, empowered to enter into the contract, the obligation of which is sought to be avoided.

3. **Bond:** CORPORATION AS SURETY. A brewing corporation, incorporated to do a general business of manufacture and sale of intoxcating liquors, and to erect suitable buildings for the carrying on of the business, to buy, sell, lease, rent, exchange or otherwise handle real estate, and the execution of deeds, leases, bonds, mortgages, etc., as may be proper in connection with its business, may become obligated as surety on a liquor bond of a licensed dealer, required to be given under the law regulating the sale of intoxicating liquors, where it appears that such undertaking is given with a view of renting its real estate and building in which the business is conducted, and to procure the sale of its products through such licensee.

4. **Evidence.** Evidence tending to prove that the minor sons of the deceased were required to devote all their time to the support of themselves and the family, of which they were a part, and were unable to attend the public schools, *held* properly admissible, in response to evidence on the part of the defendants tending to show that no pecuniary loss had been sustained by those claiming a right to recover for loss of support by reason of the death of the husband and father.

5. ———. Other evidence as to the payment of the debts of the deceased from the proceeds of the products raised on the farm, *held* not erroneously admitted.

6. **Expert Testimony.** Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally do not possess.

7. **Carlisle Table.** The Carlisle table of mortality or life expectancy is properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved.

8. **Declarations:** RES GESTÆ. Declarations, to be admissible as a part of the *res gestæ*, must accompany and be so connected as to be a part of the fact or transaction in controversy, and must tend to illustrate or explain it, such fact or transaction itself also being admissible in evidence.

9. **Errors:** REVIEW. Where there are numerous assignments of error, the reviewing court will consider and discuss such of them only as appear to be essential to a proper disposition of the cause under review, and to finally determine the matters involved in

the litigation. The fact that all assignments of error are not noticed and commented upon in the opinion, does not imply that they have not been considered and given due weight in arriving at a decision.

HOLCOMB, C. J.

An opinion has been filed in this case, resulting in an order affirming the judgment rendered in the trial court against the plaintiffs in error. *Horst v. Lewis, ante,* p. 365. The liability sought to be enforced against the defendants in the trial court, plaintiffs in error here, arises under the provisions of the statute regulating the sale of intoxicating liquors, popularly known as the Slocumb Liquor Law, Compiled Statutes, ch. 50 (Annotated Statutes, 7150-7184). The nature of the action and the material facts bearing on plaintiffs' right of recovery are fully stated in the former opinion. In the brief in support of the motion for a rehearing, also in the oral argument on the motion which was allowed in this case, it is earnestly insisted that not only are the questions directly passed on incorrectly decided, but that other errors relied on to work a reversal are well taken, and were entirely overlooked or ignored in the decision rendered. It is made a cause of bitter complaint that, whereas there were 166 alleged errors assigned as grounds for a reversal, but 3 of them were discussed in the opinion filed in the case. It is held in the opinion that persons engaged in selling intoxicating liquors under licenses in this state are jointly and severally liable for all damages arising from such traffic, to the cause of which they have contributed, and that such liability extends to the sureties upon the bonds the principals are required to give before engaging in the traffic; and that all such persons and their sureties may be joined as defendants in a single action to recover damages. It is also held that a brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products.

1. It is not believed that any useful purpose will be subserved, by a further discussion relating to the plaintiffs' right to join in one action the several defendants engaged in the sale of intoxicating liquors, who are alleged to have sold the deceased the liquors contributing to and producing the intoxication, which resulted in his death, and also the sureties upon the bonds of such licensed vendors of intoxicating liquors. Our statutes on the subject are peculiar and, in many respects, are dissimilar from those found in any of the other states the objects of which are the control and regulation of the liquor traffic. Our statutes have been so often construed by this court as permitting such a procedure that the question is no longer regarded by us as being an open one. It is felt that we are bound by these prior adjudications. No sufficient reasons have been advanced to justify a departure from them, and they are accordingly, as is held in the former opinion, followed.

2. The answer of the Krug Brewing Company, who is sought to be held as one of the sureties on the liquor bond of one of the principal defendants, presents the defense of *ultra vires* as to the obligation it undertook to assume, and its liability on such obligation. The reply alleges facts to the effect that the corporation was, under the circumstances, empowered to enter into the contract, and is estopped from availing itself of the plea of *ultra vires*. It is contended that the trial court erred in not striking from the reply these allegations of fact; that they in legal effect amounted to a departure from the cause of action alleged in the petition, and that such allegations, if proper and material, could only be made in stating a cause of action in the first instance. This contention is not believed to be well taken. The petition charged a liability against the brewing company, for the injury complained of, by reason of the obligation assumed when it executed the bond required by the statute as a prerequisite to the issuance of a license to the retail dealer to engage in the traffic. The defense of *ultra vires* must be affirmatively pleaded. It

would be unavailable under a general denial. *Citizens State Bank v. Pence*, 59 Neb. 579. The plea of *ultra vires* admitted the execution of the obligation and the liability arising thereunder, except for the alleged overstepping of charter powers of the corporation in entering into the contract. The defense partakes somewhat of the nature of a confession and avoidance. The execution of the contract is admitted, but the power to create a legal obligation thereunder as against the corporation is denied. The plea of *ultra vires* is not strictly defensive matter, as contended for by counsel, but is the allegation of new matter relied on as constituting a defense. The reply may, under such circumstances, consist of a denial of such new matter, and there may be alleged, in ordinary and concise language, any new matter not inconsistent with the petition. Code, sec. 109. The allegations of fact found in the reply are not inconsistent with those found in the petition. They strengthen and fortify the cause of action therein alleged. They answer the defense of new matter relied on as a complete defense to any legal liability on the part of the corporation. The averments therein found show why the plea of *ultra vires* can not be availed of, and why the contract should be enforced as executed. That this is a correct rule of pleading is recognized in *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 645, where, in speaking on the same question, it is said:

"The answer alleges that at the time and date of the execution of the note the corporation was without capacity to contract, or even legal existence. By the reply the plaintiff alleges facts which under the law estops, or at least denies, to the defendant the right to avail itself of that defense. This, I think, is one of the proper offices of a reply. It by no means abandons the cause of action as originally pleaded, but fortifies it by the new facts rendered necessary by the allegations of the answer."

3. Aside from the question of the proper rule of pleading, it is earnestly contended that the defense of *ultra vires* as it affects the brewing company is fully estab-

lished, and that the conclusion heretofore announced, to the effect that the corporation may become liable when the liquor bond is executed by it, as surety, to induce the licensee to lease a building from it and to deal exclusively in its products, is not justified by the record, and is contrary to the established facts relating to the question. By virtue of the bond executed by the principal and the brewing company, as surety, the former was permitted to and did engage in the business of selling at retail intoxicating liquors for the period of one year, the time for which a license was granted. The bond was a condition precedent to the issuance of the license. Those in authority and the public relied on the validity and sufficiency of the obligation. It was the only protection to the public against the evils and injury growing out of the traffic, which the statute seeks to guard against. The obligation was knowingly and voluntarily entered into by the corporation. It can not be fairly said, under the facts as disclosed by the record, that the execution of the undertaking was purely as an accommodation to the principal. That the corporation entered into the transaction with the view of furthering its own business and from considerations leading to pecuniary advantage to it in the prosecution of its business, is too obvious to admit of serious controversy. There is no question raised as to the authority of the agents of the corporation to enter into the contract. The sole question is whether, under the facts and circumstances as disclosed by the record, the corporation had the power to legally bind itself on an obligation in writing of this character. Manifestly it should not be relieved of the obligation thus assumed, and those who have suffered injury by reason of the traffic held to be remediless unless, by the application of sound legal principles, the corporation is clearly entitled to an acquittal of all legal responsibility because the act was in excess of its charter powers. By its articles of incorporation it is incorporated "to do a general business of manufacturing and sale of lager beer, ale, porter and malt, the

erection of suitable buildings for the carrying on of said business, and to buy, sell, lease, rent, exchange or otherwise handle real estate in the state of Nebraska or elsewhere, and the execution of such deeds, leases, bonds, mortgages, notes and trust deeds as may be proper in connection with said business." This court has said when speaking of the powers of corporations to make binding contracts:

"Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*." *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548. In respect of the subject of *ultra vires* when interposed as a defense in an action against a corporation, this jurisdiction is, we think, committed to the doctrine that the acts of a corporation, when challenged as being in excess of its powers, may be divided into two classes. The first has reference to those transactions constituting a contract between a corporation and a stranger dealing with it, when the act in question is one which the corporation has no power to perform under any circumstances, and regarding which the corporation may at all times avail itself of the defense of *ultra vires*. To the other class belong those transactions which may be engaged in by the corporation for some purposes, but not for others regarding which the defense of *ultra vires* may or may not be available, according to the circumstances of the particular case in which the question is raised. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*, 69 Neb. 220. The supreme court of California in *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543, 586, speaking of the second class observes:

"But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an un-

lawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract can not be enforced, otherwise, it can."

In a New York case, the doctrine is thus stated:

"Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who can not be presumed to have any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." *Bissell v. Michigan S. & N. I. R. Cos.*, 22 N. Y. 258-290.

It is clear that the acts under consideration are to be classed with those cases which hold that the contract may, under some circumstances, be valid and binding on the corporation, and regarding which the principle of estoppel may be relied upon to defeat the plea of *ultra vires*. Whether the assumption of the obligation of a surety on the bond of the person licensed to sell intoxicating liquors was under and in pursuance of an agreement with the principal to lease its real estate and building in Madison, where the liquors were to be sold, and deal exclusively in the products of the corporation, and whether these considerations were the sole inducement to the execution of the instrument are not, in our judgment, of controlling importance. Certain it is that the product of the brewing company must reach the hands of the consumer through the medium of the licensed retail vendor in such products.

It is evident that, by the execution of the liquor bond, the business of the corporation was intended to be promoted, and the objects for which it was organized advanced. The same may be said of its real estate and building occupied by the licensee. The execution of the bond resulted in a demand for the use of the building, opened up an avenue for the sale of its products, and brought in additional revenues to the corporation. It was manifestly for the purpose of furthering its business, and accomplishing the objects of its incorporation, as indicated by its articles, that it obligated itself as surety on the bond of its principal, and that these results naturally flowed from the action taken is abundantly proved by the evidence in the record. As is said in the former opinion, *ante*, p. 365:

"It thus clearly appears, as it seems to us, that the transaction above recited, in so far as it consisted of the leasing of the building and in securing a contract for the retailing of beer, was within the express terms of the charter, and that the execution of the bond was, under the circumstances, a necessary incident thereto."

4. Certain evidence was permitted to be introduced over the objections of the defendants, to the effect that the boys of the deceased had, since the death of their father, been unable to go to school, and that all their time had been required on the farm in order to support the family, and this is assigned as error. As we view the record, this evidence was admitted in response to certain testimony brought out by the defendants, whereby it was sought to establish the fact that the earnings of the family had been as great since the death of the husband and father as before, or, in other words, that no pecuniary loss had been sustained by those claiming a right to recover by reason of his death. To meet this character of evidence, it was shown that the sons were compelled to perform labor on the farm, when they should have been in school, and in this we think there was no prejudicial error. If the earnings of the father were such as to support his family, and permit his children to attend the public school, and after

his death, in order to earn this same measure of support, all of the time of the boys was required for labor on the farm, this certainly would be some competent evidence to explain the reason why the earnings had not decreased, and to establish the fact that pecuniary loss had been sustained by reason of the death of the father.

5. A similar objection is interposed to certain testimony relating to the payment of debts of the deceased out of the proceeds of the products of the farm. There was, we think, no substantial error in this. The evidence tended, on the whole, to more clearly present to the jury the manner in which the deceased had provided for his family; his ability to provide for them, and the actual loss of support suffered by his death.

6. A physician was called as a witness and permitted to testify, over objections, regarding the nature of the injury which it is claimed caused the death of the deceased, and that, in his opinion, "the wounds about the head were sufficient to produce death." It is contended the court erred in not striking out this testimony; that it involved no question of science, but concerned only such facts as come within the ordinary observation of all; that it was an invasion of the province of the jury and prejudicial to the defendant. The question is not so regarded by us. It seems manifest that the nature, extent, and seriousness of the fracture of the skull, for it was this the question related to, was one peculiarly within the knowledge of a physician and surgeon, whose skill and experience would render him especially fitted to more intelligently explain the probable result of the injury than could be done by the layman, and that it was of advantage to the jury to have such testimony before it, if any question as to the cause of the deceased's death, and how it was occasioned, was to be determined by them. The cause of the death of the deceased and the forces that led to it were proper subjects of inquiry. If death was occasioned by a fracture of the skull, after the chain of circumstances which produced the fracture were proved, testimony of an expert character, it

would seem, was properly admissible in order to prove that death resulted from the fractured skull. This is permitted, because the witness is supposed, from his experience and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally have not, and is thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. 2 Elliott, Evidence, sec. 1031. Applying the rule adverted to to the question here being considered, we think it must follow that there was no error committed in admitting the evidence complained of.

7. There ought not to be serious controversy as to the admissibility in evidence of the Carlisle table of mortality or life expectancy. *City of Friend v. Burleigh,* 53 Neb. 674. The proper foundation was laid by evidence showing the age of the deceased and the condition of his general health. The table was an item of legitimate evidence to be considered by the jury, in determining the probable duration of the life of the deceased and the pecuniary loss sustained by his premature death. The same objection urged against this item of evidence could be, with equal propriety, urged against the introduction in evidence of any standard work of science or art, or any portion of the same. *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; 1 Elliott, Evidence, sec. 417.

8. The statements of the deceased while on the road from Humphrey to Madison, as to where he obtained the whiskey then in his possession, which the defendants offered to prove and which were rejected, were, in our judgment, no part of the *res gestæ,* and therefore properly excluded. They were in time long removed from the transaction resulting in his death, and but distantly, if at all, related thereto. Declarations, which accompany and are a part of the fact or transaction in controversy and tend to illustrate or explain it—such transaction itself being admissible—are admissible as being so connected as to be a part of such fact or transaction. 1 Elliott, Evidence,

sec. 537. The proposed testimony was objectionable as coming within the category of hearsay evidence. The court committed no error in excluding it. Other alleged errors are considered and discussed in the former opinion and need not here be further noticed.

9. There are many assignments which can not be noted in detail. No good purpose would be accomplished by so doing. It is related that an advocate, when arguing before an eminent jurist, was admonished to consume no more time in the discussion of the point being argued as the proposition advanced was not believed to be sound. The counsel replied that he would comply with the court's wishes, but that he had a number of other points to argue equally as good as the one he was passing. It may be that there are other assignments of error as good as those we have considered. Our mature judgment, from a full examination of the record, is that they are no better, and that to consider each of them at length and in detail would extend this opinion to an unwarranted degree.

The work of this court could, if we were required to pass upon and formally discuss in the opinion every assignment of error found in each case brought here for consideration, be thoroughly blocked, and the court would entirely fail of its mission. It would become a forum for academic discussion of abstract legal propositions, rather than a court of last resort to finally determine and decide actual controversies between litigants. "The motion," to quote from another court, "assumes that various facts appearing in the record and certain authorities in the briefs have been overlooked. The only ground, apparently, for this assumption seems to be that they have not been specifically noticed or commented upon in the opinion. It would seem to be unnecessary to state, what every member of the bar must know, that to do that would impose upon the court an amount of useless labor, quite unreasonable to expect, and would swell opinions, which should only express the reasons of the court for its conclusions as concisely as possible, into essays on each subject involved in

the appeal. It does not follow that because a fact or an authority, deemed important by counsel, has not been noticed or commented upon in the opinion, it has not been considered and due weight given to it in arriving at the decision. In many cases, facts incorporated in the record and discussed at length by counsel, are considered by us wholly unimportant, and authorities from which long quotations are made inapplicable." *Dammert v. Osborn*, 141 N. Y. 564.

The judgment of affirmance heretofore entered is adhered to and the motion for a rehearing is denied.

REHEARING DENIED.

SOPHIA RAPP V. SARPY COUNTY.*

FILED MARCH 17, 1904. No. 13,428.

Burden of Proof. The burden of sustaining the affirmative of an issue involved in an action, does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end.

ERROR to the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Reversed.*

H. Z. Wedgwood, for plaintiff in error.

W. R. Patrick, contra.

AMES, C.

In an action against a county for negligently permitting a highway to become and remain out of repair, causing a personal injury to the plaintiff, a traveler thereon, the answer, besides a general denial, pleaded contributory negligence. The court gave the following instruction, which was excepted to:

* Rehearing allowed. See opinion, p. 385, *post.*

"The defendant has also pleaded contributory negligence on the part of plaintiff as a defense to this action. The burden of proving contributory negligence, by a preponderance of the evidence, rests upon the defendant, and, unless the defendant has so proved it, this defense is of no avail; but if the plaintiff's own testimony tends to show that she was guilty of any carelessness, which caused or aided in causing the injury complained of, then the burden of proof shifts, and it devolves upon the plaintiff to satisfy you, by a preponderance of the evidence, that she was not guilty of contributory negligence."

There was a verdict for the defendant. The instruction is palpably erroneous. It is a rule, as well of law as of logic, and one which, humanly speaking, is indispensable to the right decision of any controversy whatever, that the burden of proof, or of argument, rests upon him who maintains the affirmative of an issue. Not only so, but it abides with him continuously from the opening of the debate until its close. In certain instances, deficiencies of otherwise incomplete proofs are supplied by presumptions more or less conclusive in their nature, but, in such cases, their effect is upon the weight of the evidence required to maintain the issue, not upon the obligation of the party to produce a preponderance of the former. The distinction is of the uttermost practical importance, and courts and law writers ought scrupulously to abstain from the inaccurate and misleading expression that the burden of proof "shifts" during the progress of a trial. Oftentimes, it is true, the use of the term, because of the peculiar circumstances of particular cases, may work no harm; but there is always danger of its doing so, as it may very probably have done in this case, in which the jury were told that, if there was anything in the plaintiff's testimony *tending* to prove that her conduct was negligent, she was burdened with the responsibility of establishing a negative "by a preponderance of the evidence." This could not have been so. If she had admitted that she was negligent, or if her evidence had dis-

closed conduct on her part from which the law conclusively presumes negligence, the litigation would, of course, have been at an end, not because she would have thus assumed the burden of proof, but because she would have furnished the evidence requisite to enable the defendant to meet the requirement, in that regard, which the issue made of him. But the mere fact that her testimony tended to show that she was negligent, if it did so, went no further toward maintaining the issue tendered by the answer, than would have done evidence of equal weight and credibility produced by the defendant. All that can justly be said about it is that the fact that the testimony was her own, it being in the nature of an admission against her own interest, added immensely to its weight and credibility, but, even so, there may have been other evidence in the case tending with equal or greater strength in the opposite direction, and unless, upon the whole record, there was a preponderance showing her negligence, she was not precluded, upon that issue, from recovery. We think there is a practical unanimity among text writers and the better considered decisions to this effect. *Crowinshield v. Crowinshield,* 2 Gray (Mass.), 524; *Heinemann v. Heard,* 62 N. Y. 448; *Scott v. Wood,* 81 Cal. 398, and authorities cited in the opinion. The instruction quoted, which must have been inadvertently given, reversed this rule. If there was evidence in the case, whether in her own testimony or elsewhere, tending to prove that she was guilty of negligence, it was incumbent upon her to rebut it with other evidence of at least equal weight and credibility, of which the jury should have been permitted to judge, but more than this could not have been justly required of her.

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

HASTINGS 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 reversed and a new trial granted.

REVERSED.

The following opinion on rehearing was filed January 15, 1905. *Judgment of reversal adhered to:*

1. **Reaffirmed:** BURDEN OF PROOF. On rehearing former decision adhered to.

2. **Cases Disapproved.** The cases of *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71, disapproved in so far as opposed to the doctrine in this case.

LETTON, C.

At the argument upon rehearing, our attention has been called to the decisions of this court in *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71. In the *Featherly* case the jury were instructed:

"The establishment of negligence on the part of defendant, by a preponderance of the evidence, is necessary before you can find any verdict for plaintiff, in any event. If you find there was such negligence on the part of the defendant, then the burden of proof is on the defendant to show, by a preponderance of the evidence, the truth of its assertion that John Raley was negligent, and so helped to cause his own injury."

This instruction was held erroneous because the facts showed that the negligence of the deceased directly contributed to the injury, and it is said in the opinion:

"It is the settled rule in this state that, in an action for damages resulting from the alleged negligence of the defendant, when the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence on his part." Citing *Durrell v. Johnson*, 31 Neb. 796; *Union*

Stock Yards Co. v. Conoyer, 41 Neb. 617; *Omaha Street R. Co. v. Martin,* 48 Neb. 65.

The case was reversed upon the ground that the evidence on the part of the plaintiff justified a finding that his own negligence contributed to the injury, and that therefore the burden of proof was on him to show the absence of such negligence.

In the *Durrell* case it is held:

"The rule stated in *City of Lincoln v. Walker,* 18 Neb. 244, that where the plaintiff has proved his case without disclosing any negligence on his part, the burden of proving contributory negligence is on the defendant, does not apply where the plaintiff's own testimony tends to show contributory negligence." And the following instruction was held erroneous:

"The burden of proof in this action is upon the plaintiff to establish, by competent evidence, every material allegation of his petition. And the defendant in his answer having alleged contributory negligence on the part of the plaintiff, the burden of proof is upon the defendant to establish this allegation by a preponderance of the evidence." The reason given being that the plaintiff had stated facts in his testimony from which the jury could find that his own negligence had contributed to the injury. The court further say that, if the qualification, "unless you find from the plaintiff's own testimony that he was guilty of contributory negligence," had been added to the instruction, it would have been proper. It will be seen that this case affords no support to the doctrine that the burden of proof shifts.

Union Stock Yards Co. v. Conoyer, 41 Neb. 617, *Omaha Street R. Co. v. Martin,* 48 Neb. 65, and *Anderson v. Chicago, B. & Q. R. Co.,* 35 Neb. 95, merely hold that, where the plaintiff proves his case, without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant. So these cases are not in point as to shifting of burden.

In *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, the jury were instructed:

"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." The court say:

"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." The court continue: "It seems to be conceded that if these were in one instruction they would together correctly state the law. * * * 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 will be observed that the court does not pass upon the point now under consideration, but takes it as conceded that the law is correctly stated, hence, this case can hardly be said to announce the doctrine.

From a consideration of these cases, it will be seen that, while it is the settled law in this state that, where the plaintiff makes out his case without disclosing any contributory negligence on his part, the burden of proof is upon the defendant to establish that the plaintiff has been guilty of negligence, still, in only two decisions has it been said that, where the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury, the burden of proof shifts to the plaintiff to show the absence of such negligence on his part, and in one of these cases the opinion states the point was conceded by the parties.

There has been much confusion caused by a failure to

distinguish between the burden of proof and the weight of evidence. The burden of proof is always upon the party asserting a fact as the basis of his action or defense, and it never shifts during the progress of the trial. The weight of evidence, however, may change according to the necessities of the case in overcoming the evidence introduced by the opposite party. In an action for negligence, where the plaintiff has disclosed facts conclusively showing contributory negligence on his part, he has made no case, and the defendant is entitled to a peremptory instruction at the close of the plaintiff's case. If, however, the facts disclosed by the plaintiff, while tending to show contributory negligence, are not so clear that different minds can not well differ upon the proposition, then the defendant must produce his evidence. If he has pleaded contributory negligence as a defense, the burden is upon him to establish it. To controvert the evidence produced by the de-defendant, together with the facts tending to show contributory negligence which were shown by the plaintiff himself, the plaintiff must furnish sufficient evidence to overcome the weight of the defendant's evidence, as well as that which was disclosed by him tending to show such negligence on his part. In doing this, however, the burden of proof does not shift. The only duty imposed upon the plaintiff in such case is to overcome the weight of evidence, which is then against him upon this point. It is immaterial whether the evidence was furnished partly by himself or all by the defendant; it is a part of the affirmative defense pleaded by defendant, and which the plaintiff must furnish sufficient evidence to balance or overcome.

The cases of *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71, are disapproved in so far as opposed to the doctrine in this case.

For these reasons, we recommend the former decision be adhered to.

AMES and OLDHAM, CC., concur.

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

JUDGMENT OF REVERSAL ADHERED TO.

HOLCOMB, C. J., dissenting.

I am persuaded that, in the majority opinion, too much stress is laid on the question of shifting the burden of proof, and too little regard had to the shifting of the court from one position to another, and thus unsettling what, as it seems to me, should be accepted as a settled rule of remedial law in this state. Certainly if a long line of judicial decisions can settle a question, the one under consideration should be regarded as having been set at rest. The doctrine of *stare decisis* appears to me to be altogether ignored or at most to be given but scant consideration. I do not especially object to the rule held to and announced in the majority opinion. I can very readily subscribe to it if the question were an open one. What I protest against is the overturning of so many cases deliberately decided, and by a unanimous court, beginning in the early history of the state's jurisprudence, in order to establish a different rule regarding the merits of which there may exist some doubt. Stability and continuity in judicial decisions require our acceptance of the results worked out in the past by the laborious and zealous efforts of those who were, equally with us, striving to reach correct conclusions and establish sound rules and principles for the guidance of all. Unless these principles and rules, so announced, are so radically wrong as to be productive of more mischief by adhering to them than would result from their overthrow, they should remain undisturbed. Quoting from another, "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. The fundamental conception of a judicial body is that of one hedged about by precedents

which are binding on the court, without regard to the personality of its members." The majority opinion and the one to which it adheres not only overrule the two cases expressly mentioned but, in effect, overthrow a long line of decisions, the first of which is reported in the 18th volume of the Nebraska reports. The instruction which is condemned was in a case where negligence is alleged as the basis of recovery and is as follows:

"The defendant has also pleaded contributory negligence on the part of the plaintiff as a defense to this action. The burden of proving contributory negligence, by a preponderance of the evidence, rests upon the defendant, and, unless the defendant has so proved it, this defense is of no avail; but if the plaintiff's own testimony tends to show that she was guilty of any carelessness, which caused or aided in causing the injury complained of, then the burden of proof shifts, and it devolves upon the plaintiff to satisfy you, by a preponderance of the evidence, that she was not guilty of contributory negligence."

It is not to be doubted that the expression, "The burden of proof shifts," is inapt and inaccurate. It does not say, however, the burden shifts during the progress of the trial. When considered in the light of the case as made and submitted, it says nothing more than, when the plaintiff's own testimony tends to show that she was guilty of contributory negligence, then she assumes the burden of proving, by a preponderance of the evidence, that the defendant was guilty of the negligence charged, and that she was not guilty of contributory negligence, and this has been the settled law in this state for years. Suppose the instruction had said, the burden of proving contributory negligence was on the defendant, unless the testimony of the plaintiff is of such a character as to justify the jury in finding that her own negligence contributed to the injury. This would be stating the same proposition in another form. It would be a change in form but not in substance. The instruction can not be regarded as misleading or prejudicial, unless the rule heretofore an-

nounced is repudiated, as it is in the majority opinion. We do not have to go far in order to find the reason of the rule. And it is not opposed to any rule of law or logic. It is consistent with both. It is an essential element in pleading negligence, say this court, to plead an injury as the proximate consequence of a specific negligent act or omission of the defendant. *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Neb. 748. If it is essential to aver that the plaintiff was without fault, where is the inconsistency in requiring him to prove the truth of the averment by a preponderance of the evidence, especially when, in making his case, he offers evidence tending to show that he was guilty of contributory negligence? In some jurisdictions it is held, and very properly, that a plaintiff in an action for negligence must, in all cases, allege and prove, not only that the defendant was guilty of the negligence charged, but also that the plaintiff acted with due care—the latter, of course, disproving contributory negligence. This is the rule of common law. This is the reason for requiring the plaintiff to allege that the injury suffered was without fault on his part. Other jurisdictions hold that contributory negligence is purely a matter of defense to be pleaded in the answer, and that the burden of establishing it always rests upon the defendant. Why we should depart from the one position, held to for so long a period, in order to occupy the other, is beyond my comprehension. To be consistent, we ought also to overthrow the long established rule as to the pleadings to which I have adverted. The discussion in the majority opinion relative to the supposed confusion arising from the terms, "the burden of proof," and, "the weight of evidence," does not, in my judgment, help to elucidate matters. Evidence is not weighed in parcels like groceries or drugs. There is no practical way by which to determine where the weight of evidence rests at the different stages of the trial, unless it be of so conclusive a nature as to be ruled upon as a matter of law. The jury does not weigh the evidence by

piecemeal or in parcels. The evidence is weighed only after all has been submitted to the jury in support of, or to controvert, some issue of fact involved in the controversy. After all the evidence relating to any fact in issue has been submitted, it is for the jury to weigh it and announce its verdict. In weighing the evidence, the court declares the rule as to who assumes the burden of proof, that is, which litigant must furnish a preponderance of the evidence on any given allegation of fact in dispute. And if the required preponderance of the evidence has not been furnished, such alleged fact must be resolved against the party upon whom the burden rests. Relative to the question of on whom rests the burden of proof as to contributory negligence, this court, in a well considered and exhaustive opinion, in which the authorities are reviewed and the conflict of decisions noted, has laid down a rule whereby it has occupied what may be termed middle ground as between the rule, that the burden always rests on the plaintiff, and the contrary one, that it is purely a matter of defense. The rule as first announced is that, in an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant. *City of Lincoln v. Walker,* 18 Neb. 244. The corollary of the proposition is obvious, and it arises by the application of the rules of both law and logic. If the plaintiff in proving his case offers evidence tending to prove negligence on his part, then the burden of proving contributory negligence would not be on the defendant; and if it is not on the defendant, it having to rest somewhere, must necessarily fall on the plaintiff. This is what the court has said in the later case of *Durrell v. Johnson,* 31 Neb. 796. The judgment in that case was reversed, because the trial court did not do the very thing the trial court in the case at bar did do. In *Durrell v. Johnson,* the trial court instructed the jury that, the defendant having alleged contributory negligence, the burden of proof was upon him to establish

the allegation by a preponderance of the evidence. This court held the instruction erroneous, and said: Where the testimony of the plaintiff is of such a character as to justify the jury in finding that his own negligence contributed to the injury, it is erroneous to instruct the jury that the burden of proof of such contributory negligence is on the defendant. It is therein held that the rule stated in *City of Lincoln v. Walker, supra,* does not apply, where the plaintiff's own testimony tends to show contributory negligence on his part. This court said the instruction given would have been unobjectionable if there had been added this qualification: "Unless you find from the plaintiff's own testimony that he was guilty of contributory negligence." It is manifest that the instruction, as thus qualified and approved by this court as a correct expression of law, is substantially of the same purport as the one condemned in the case at bar. It thus appears that the court has faced about, and is now condemning what it formerly approved. In *Omaha v. Ayer,* 32 Neb. 375, the rule announced in the *Walker* case, *supra,* was reaffirmed. It is observed in the opinion that there was not such evidence of contributory negligence contained in the testimony of the plaintiff as to throw the burden of proving his contributory negligence upon the plaintiff. Of like import is *Anderson v. Chicago, B. & Q. R. Co.,* 35 Neb. 95, where it is held that, if the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. The court therein say, the same point was considered by this court in the case of *City of Lincoln v. Walker,* 18 Neb. 244, where, after a consideration of the conflicting authorities, it was ruled that, when the plaintiff makes out his case without showing negligence on his part, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. In *Union Stock Yards Co. v. Conoyer,* 38 Neb. 488, the rule announced in the *Walker* case was reaffirmed, as it was also in *Omaha Street R. Co.*

v. Duvall, 40 Neb. 29. In *Chicago, B. & Q. R. Co. v. Putnam,* 45 Neb. 440, it is said: The plaintiff need not plead the particular precaution he took to avoid injury, and that the allegation that the injury was inflicted without fault on his part was sufficient. It is, say the court, the established law of this state that, where the plaintiff proves his case without disclosing negligence on his part, contributory negligence is a matter of defense, the burden of proving which is on the defendant. The rule is reiterated in *Omaha Street R. Co. v. Martin,* 48 Neb. 65. In *Chicago, B. & Q. R. Co. v. Featherly,* 64 Neb. 323, following this long line of decisions, in an opinion concurred in by all the commissioners participating in the opinion, and approved by a unanimous court, an instruction was held erroneous and the cause reversed because, without qualification, the jury were instructed that the burden of proof was on the defendant to show, by a preponderance of the evidence, the truth of its assertion that plaintiff's intestate was negligent, and so helped to cause his own injury. And last of all, as late as March, 1903, by a like unanimous opinion concurred in by the commissioners and approved by the court, two instructions on the subject of the burden of proof on the question of contributory negligence were considered together and held to state the law correctly, which, when so considered, were substantially the same as the one condemned in the case at bar. In one of the instructions the jury were told that, if the 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. *New Omaha Thompson-Houston Electric Light Co. v. Rombold,* 68 Neb. 54. Such being the rule of law governing the question as to the burden of proof of contributory negligence, which has so often, for such length of time, been affirmed and reaffirmed after the fullest consideration and deliberation by the unanimous action of the court, I can not believe that we

are now justified in overturning what has been so firmly and repeatedly established as the law in this jurisdiction. The doctrine of *stare decisis* applies with full force. "Those things which have been so often adjudged ought to rest in peace."

HARLAN D. HEIST V. PETER JACOBY.

FILED MARCH 17, 1904. No. 13,199.

1. **Animals: USERS OF HIGHWAYS.** Act of February 25, laws 1875, page 190, entitled "An act to restrain sheep and swine from running at large in the state of Nebraska," *held* to have no relation to the protection of users of highways against unconfined hogs.
2. **Hogs on Highways: OWNER'S LIABILITY.** One whose sole fault is the permitting of young hogs of 60 to 100 pounds weight to go at large upon his own premises, so that they wander across the highway to a neighbor's cornfield, and in running back frighten a passer's horse, *held* not liable for injuries to the passer's equipage and person produced by such fright.

ERROR to the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

Hainer & Smith and *J. H. Edmondson,* for plaintiff in error.

John A. Whitmore, contra.

HASTINGS, C.

Counsel for plaintiff state, on page 4 of their brief, that the question in this case is whether or not the owner of swine, intentionally permitted to run at large on the public highway, is responsible for damages done by them, through the frightening of his horse, to one who was traveling along the highway in the exercise of due care? This is a fair statement of the question. It is not claimed that there was anything vicious or unusual about the hogs or their conduct. It is not even claimed that the owner knew that they were upon the highway; but he had permitted them to run at large, and the case may be briefly stated as presenting

the question as to whether leaving one's hogs unconfined is such an act of negligence as makes the owner liable for harm done by them in frightening a horse on the public highway.

Defendant's hogs, thus permitted to run at large, wandered across the highway running along defendant's premises and went upon the land of a neighbor. The plaintiff was driving by; the hogs ran out of the neighbor's cornfield, across the road, and apparently somewhat toward plaintiff's mare, with the peculiar noise of excited, running hogs; the mare whirled suddenly, upset the buggy, and broke plaintiff's arm; he demanded damages of the defendant, who admitted he owned the hogs and "let them run," but denied any liability for the injury. The trial court took the view that, assuming all this to be true, there was no neglect of any duty toward the traveling public on defendant's part in letting his hogs out, and that defendant was therefore not liable for the unforseseen injuries to plaintiff. Accordingly, after evidence tending to show the above state of facts had been produced, the jury were instructed to return a verdict for the defendant. A motion for new trial was overuled, and from a judgment on this verdict plaintiff brings error.

Plaintiff bases his case chiefly on the proposition that these hogs were, by statute in this state, required to be restrained from running at large; that, by consequence, they were wrongfully and in violation of law upon the public highway, and the owner therefore liable for any injury they might do in any way to a passer on the highway.

It seems to be conceded by the plaintiff that, if the hogs were rightfully upon the highway, the owner is not liable for any such unforeseen result as their frightening plaintiff's horse, there being, as above indicated, neither allegation nor proof of anything unusual or extraordinary in the hogs or their conduct, the sole negligence alleged being, allowing the hogs loose so that they could get upon the highway.

The defendant on the other hand seems to concede that, if the owner was violating the express statute of the state of Nebraska in permitting them upon the highway, or rather in leaving them out so that they could get upon the highway, he is liable for any damage directly resulting from their presence there. It is insisted, however, that there is no statute of Nebraska forbidding hogs to be upon the highway. It is claimed that the rule at common law is, merely, that one who permits his animals to go upon the highway, under such circumstances that damage to passers in the exercise of ordinary prudence might be reasonably expected to occur, is guilty of negligence and liable for its consequences. It is insisted that all of the cases cited by plaintiff, holding that a liability exists under similar circumstances to those disclosed in the present case, are where some statute expressly prohibits the animals' presence on the highway. It is also insisted that the provisions of the act of February 25, 1875, requiring sheep and swine to be "restrained from running at large in the state of Nebraska" do not in terms refer to highways; and that section two of the act, giving a lien upon trespassing hogs for damages to property, provides for its application to nothing more than trespasses upon private property. This act is the only statute which is claimed to have application to the present case. It is found at page 190, laws of 1875, and is as follows:

"An act to restrain sheep and swine from running at large in the state of Nebraska.

"Sec. 1. That from and after the first day of March, A. D. 1875, sheep and swine shall be restrained from running at large in the state of Nebraska.

"Sec. 2. That all damages to property committed by such stock so running at large, shall be paid by the owner of said stock, and the person whose property is damaged thereby, may have a lien upon said trespassing animal for the full amount of damages and costs, and enforce and collect the same by the proper civil action."

It is somewhat difficult to believe that this act was in-

tended in any way to protect passers along the highway against unconfined hogs. It is ordinarily supposed that, where any new right is conferred by statute, and a remedy at the same time provided for its vindication, the remedy so provided is exclusive; if the right previously existed, then the remedy furnished by the statute is cumulative. *Blain v. Willson,* 32 Neb. 302; *Keith & Barton v. Tilford,* 12 Neb. 271. The remedy here provided is merely a lien upon the trespassing animals for damages to property; no penalty is attached to the violation of the first section; it is not even declared unlawful to set the animals at large; no person is designated whose duty it is to restrain them; the provision is simply that the owner shall pay the damages to property, and the injured party is given a lien without being under the necessity of capturing the offending sheep or swine. It does not make the letting of the animals loose an offense against the state of Nebraska, and it does not in any way indicate that protection of the highway was in any manner within the purview of its enactment.

It is true that the title of the act indicates a purpose to restrain sheep and swine from going at large in the state of Nebraska. A law for that purpose can act only upon the owners or those in charge of the animals. It is also true that the act of 1871, known as the "Herd Law," was already in effect, providing a remedy for all trespasses by domestic animals upon cultivated lands, and giving a lien upon the stock by taking it up and substantially following the statute's provisions, but not otherwise. *Bucher v. Wagoner,* 13 Neb. 424. The purpose of this act of 1875 seems to have been to keep sheep and swine away from private premises, and remove the risk of their doing damage there, which was left by the herd law; to widen the remedy for damages done by them, and give a lien against them without capture of the animals damage feasant. The keeping of them off the highway can hardly have been in the legislator's mind. Some means for doing so would have been provided, had such been the purpose.

It is also to be said that the statutes on this subject and

decisions of the courts construing them, recognize a clear distinction between public objects in such legislation and the protection of private rights. A good example of this is the case of *Bates v. Nelson*, 49 Mich. 459, in which a provision that animals at large on public ground might be impounded, and, after having been so at large, might be taken up if found in private grounds, was construed. It was held that cattle which had merely passed through other private premises could not be so taken, the law being intended as a vindication of public rights.

In *Shepard v. Hees*, 12 Johns. (N. Y.) *433, a town by-law against hogs being allowed at large was held, from its connection, to apply solely to being upon the highway or coming from the highway, and to have no application to private injury by the animal's escaping from the owner's pasture into a neighbor's field.

In *McManaway v. Crispin*, 22 Ind. App. 368, and *Beeson v. Tice*, 17 Ind. App. 78, a statute allowing animals at large on uninclosed or common land to be impounded, was held to give only a private remedy, and to have no application to those merely in the public highway.

It would seem that the trial court was right in holding that this statute does not make one who suffers his swine to go upon the highway, *ex necessitate*, negligent and responsible for all the injurious consequences which result, whether naturally to be anticipated or not.

As above stated, the main contention of the plaintiff was based upon the proposition that the act of February 25, 1875, made the letting of hogs loose upon the highway an unlawful act, and defendant's doing so, *ex necessitate*, negligence. It is also claimed, however, with less confidence, that the permitting of them at large in the manner claimed in the present case was negligence in the absence of any statute—was an encroachment upon the public right of way, for whose consequences defendant should be held liable. A large number of cases are cited by plaintiff in error where injuries of the kind complained of in the present one have been held to establish a liability. A typi-

cal one is *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615. It is there held that the frightening by defendant's hog, unattended in the highway, of defendant's horse attached to a wagon, created a liability. But in Maine, as in Massachusetts, a statute forbids the presence of loose animals in a public road.

In *Parker v. Jones*, 1 Allen (Mass.), 270, it is held to be a right of the owner to depasture his land lying in the highway, but that he must do so with due regard for the safety of the traveling public, and in acordance with the laws of Massachusetts making it unlawful to permit one's animals at large in the highways. In that case, the owner of a cow had procured a keeper to attend her while grazing in the highway, and was held not to have violated the requirements of the statute. No case has been found where the mere permission by the owner, of his animals going free upon the highway passing his land, is held wrongful, in the absence of a direct prohibition by statute or ordinance. In this state it was long ago held, in *Delaney v. Errickson*, 10 Neb. 492, and same case on rehearing, 11 Neb. 533, that the English doctrine of a duty to keep one's animals on one's own close had no force in this state. The duty to confine animals was held not to have existed at the first settlement of the state, and to have been created by statutory enactment as the occasion was found to have arisen.

As it has been concluded that the only statute which is appealed to in this case has reference only to trespasses upon private rights, it would seem that the only thing which could be asked of defendant would be that he take no action, which a person exercising reasonable care and prudence would apprehend as likely to endanger the traveling public. *Haughey v. Hart*, 62 Ia. 96. Tried by this test the action of defendant in letting his hogs run can not be said to have been negligent. If the owner had been behind these hogs, driving them from his neighbor's cornfield across the road, it would have been a permissible use of the highway. No liability would have attached to

him in that case, if they had acted precisely in the same manner they did act, and produced the same result, unless, indeed, their original escape was, as against the general public, wrongful. If there was no violation of statutory duty in letting the hogs "run," it can not be said that it was a violation of the general duty to take reasonable precaution against endangering passers. An accident, such as happened, is not, ordinarily, to be anticipated from the mere fact of leaving young hogs at large.

Experiences like those of plaintiff in this case seem to indicate the need of legislation prohibiting the going at large on highways of domestic animals. Such legislation prevails, as we have seen, in many of the states. The time has apparently come for its enactment here, but it does not seem that it should be done by judicially extending a law passed for another and quite different purpose.

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

AMES and OLDHAM, CC., not concurring.

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

AFFIRMED.

HOLMES BLAIR V. JAMES A. AUSTIN ET AL.

FILED MARCH 17, 1904. No. 13,427.

Real Estate Broker: ACTION. Services as a real estate broker rendered for the owner of the land, without a written contract, can not be recovered for, as such, upon a *quantum meruit.*

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

Flansburg & Williams, for plaintiff in error.

W. M. Morning and *John J. Ledwith, contra.*

HASTINGS, C.

The main question in this case seems to be, whether the Nebraska statute, requiring all contracts for the selling of real estate between the owner and real estate brokers to be in writing, signed by both parties and fixing the amount of compensation, prevents any recovery specifically for a real estate broker's services in selling land, except such as is provided for by a contract answering these requirements?

The plaintiffs, defendants in error, brought suit in the district court to recover from Blair $325, alleging that they were real estate brokers, buying and selling real estate, for which services they charged their employers a commission; that in June, 1902, defendant owned all but 80 acres of a certain section of land in Lancaster county; that he then employed the plaintiffs to find a purchaser for the land and agreed to pay the usual commission, namely, 5 per cent. on the first $1,000 and 2½ per cent. on the rest of the purchase price; that plaintiffs did find a purchaser, with whom defendant entered into negotiations which resulted in a sale in February following; that just prior to the sale, the defendant, with full knowledge of their services and efforts, and that they had practically concluded the transaction, entered into independent negotiations with the purchaser, and conveyed to the latter the land for $12,000, and refused to pay plaintiffs' commission; that the reasonable value of plaintiffs' services was "the agreed and customary commission thereon," namely, 5 per cent. on the first $1,000 of the said purchase price and 2½ per cent. on the remainder, or $325, on which nothing was paid.

Defendant answered, admitting the ownership of the land; admitting the sale of it for $12,000; he says that in June, 1902, plaintiffs approached him and asked him to put a price on the premises; that he fixed the price at $22.50 an acre, and agreed to pay a commission of $50 on the first $1,000 of the consideration and $25 on each sub-

sequent $1,000; that said agreement was merely verbal and never reduced to writing; that plaintiffs submitted various offers from the final purchaser, but all were for a much less sum than $22.50 an acre, and were refused; that on October 8, plaintiffs, acting on behalf of the purchaser, offered $11,500 net for the premises, and advised the defendant that that was the best offer they could obtain from said purchaser; that they never effected a sale or made any other offer; that in February, 1903, one H. C. Young, a real estate broker, approached defendant with an offer of $12,000 from some purchaser for the land, though defendant did not know at that time who the purchaser was; that this offer was finally accepted and the sale consummated by Young; that plaintiffs had nothing to do with it and could not have effected the sale with the same purchaser, and that defendant paid to Young a commission of $300 for effecting the sale. The allegations of the answer were denied, and trial was had to the court without the intervention of a jury.

The court found: (1) Plaintiffs were real estate brokers, buying and selling real estate on commission; (2) That the defendant owned the land and agreed with plaintiffs in June, 1902, as stated in the answer; (3) that plaintiffs called the attention of James and Phil O'Brien to the land, and induced them to enter into negotiations for its purchase, and submit propositions to the defendant, the best one of which was for the sum of $11,500. This was not accepted but afterwards, by plaintiffs' efforts, the O'Briens were induced to offer $12,000; (4) That the O'Briens submitted this proposition through one McLaughlin, to whose attention plaintiffs had brought the land and its price; that defendant accepted this prosposition, knowing that the purchasers were the same parties who had negotiated for the land through the plaintiffs; (5) That the O'Briens preferred to obtain the land through McLaughlin, and whether or not the sale could have been concluded without his assistance, the trial court was not able to determine; (6) That McLaughlin and Young received $300 commission for the sale.

The trial court found as conclusions of law: (1) That plaintiffs were the procuring cause of the sale, and entitled to recover upon a *quantum meruit* the reasonable value of their services, of which defendant had availed himself with full knowledge; (2) That the agreement alleged in the petition, not being in writing, was void, but notwithstanding its invalidity, plaintiffs were entitled to recover the reasonable value of their services, if sufficiently alleged in their petition, and, in the event they were not sufficiently alleged, they should have leave to amend in accordance with the facts. As a third conclusion, the court found that it was impossible to determine whether plaintiffs could have concluded the sale without McLaughlin's assistance, and that their services were reasonably worth the sum of $150, and, had the sale been concluded without McLaughlin's aid, such services would have been worth $300. In consideration of McLaughlin's assistance, only $150 were allowed as the reasonable value of the services. Motion for new trial was overruled, and judgment entered on the findings for $150 and costs, and defendant brings error.

His contentions are as above suggested, that the statute permits no recovery for services of this kind, except upon a written contract, and that, in any event, there is no sufficient pleading of services to entitle plaintiffs to recover anything except an agreed contract price, which is certainly forbidden. It is also urged that the evidence does not support the finding that the sale was induced by the plaintiffs' efforts.

Dealing with the last question first, it appears that, immediately after the arrangement with the defendant, the plaintiffs wrote to the O'Briens and other parties in regard to the land, and advertised it in Lancaster county newspapers; plaintiffs were well acquainted with one of the O'Briens, who then lived at Courtland, and, as a result, the latter personally examined the land; a good deal of negotiating ensued until some time in October, when the O'Brien brothers made the offer of $11,500 for

the land; this was the last correspondence had by plaintiffs with the purchasers; at the time the $11,500 offer was submitted and refused, plaintiffs told the defendant they would see if they could do better; from time to time after that, plaintiffs say they saw one of the O'Brien brothers, and renewed efforts to make the sale, and about the last of January, 1903, found that the O'Briens were in communication, through McLaughlin, with the defendant. Mr. Bridges testifies that the reasonable value of such services was the ordinary commission charged, which would be $325 for a $12,000 sale; the O'Briens deny any negotiations after October 8, 1902, with plaintiffs, but Mr. Bridges positively swears to a number of interviews after that date; the value of the services is expressly based upon the ordinary and current prices for such services, and not upon any value of plaintiffs' time; their expenses are not stated by plaintiffs. Defendant testifies that the O'Briens were brought to him by Mr. Young about January 27 or 28; that he had heard nothing from Austin & Bridges since the preceding October; that Mr. Young offered to find a purchaser for $12,000, for a commission of $300; defendant admits that his introduction to the O'Briens as prospective purchasers of his land was through the plaintiffs in July, 1902; defendant, on discovery that Mr. Young's proposed purchasers were the O'Briens, hestitated to close the matter, fearing his liability to plaintiffs for another commission; and he says he took counsel on the subject. Mr. Philip O'Brien testifies to talking with McLaughlin in September, and then promised the latter if the land was purchased it should be from him. McLaughlin is described by the O'Briens as an "old friend"; Mr. James O'Brien testifies to the same general purport; McLaughlin states that he got the land for sale from Young. O'Briens thought that $22.50 was too much for the land and finally offered $12,000; if they could not get it for that, they would not take it at all; this offer was accepted by Mr. Blair through Young, and the sale completed.

It will be seen from this evidence that a finding either way as to the value of the services of plaintiffs to defendant might be sustained; on their testimony plaintiffs were the cause of the sale, and, according to O'Briens', Mr. Young's and Mr. McLaughlin's, their negotiations had been definitely broken off at the time the sale was effected. It remains therefore to consider the question as to whether or not the statute above mentioned permits any recovery in the absence of a written contract. In *Baker v. Gillan*, 68 Neb. 368, the statute was held to be constitutional. Does it do what is not done by the statute of frauds, prevent a recovery for the reasonable value of services actually rendered in pursuance of a void agreement? The doctrine that such services are a good ground for recovery, *quantum meruit*, is well established in Nebraska. *Riiff v. Riibe*, 68 Neb. 543. The decisions in other states are collected in 23 Century Digest, col. 2450. Does section 74, chapter 73 of the Compiled Statutes (Annotated Statutes, 10258), go further than that in respect to a contract which, by its terms, is not to be performed within one year? Both are alike void; in case of the latter, however, one who is employed under such a contract is entirely at liberty to recover for the value of services actually rendered by him. Ought the same rule to be applied in both cases? Should the courts set up an implied agreement precisely the same, in effect, as the forbidden express one? If any recovery is allowed, should it not be for losses and expenses incurred, where there are any, and not for services as such?

A somewhat careful consideration of the statute now under consideration seems to indicate a distinction. In the case of an agreement for services, void because not to be performed within a year, a recovery for services rendered is in no way interfered with by the statute. The latter does not make an agreement to do that particular work void unless in writing. Consequently, the statute of frauds is not in any way inimical to a recovery on the implied contract for the work actually done. On the con-

trary, such a right is one of the results of doing completely away with the void oral agreement. The statute now under consideration, however, provides that any agreement for the performance of services as a real estate broker shall be void unless in writing. Is it not as applicable to an implied agreement as to any other? Is it not, in effect, a forbidding of all recovery distinctly for services in selling land which are not provided for by a written agreement?

In the case of payments made on an oral agreement to convey land which the recipient refuses to perform, the recovery is, of course, and always, for the money paid, not for any loss of profits on the land bargain. In this case it does not seem possible that plaintiffs can have any recovery of commissions for making a sale. If they have incurred expenses in the transaction at defendant's request and which have redounded to his benefit, they could doubtless recover for it as money laid out and expended for his benefit and at his request. If they had shown an absolute loss of time which could and would have been valuably employed, except for its use at defendant's request upon his employment, they could probably recover for that as time devoted to defendant's profit at his request, but for services as a broker in selling land, reckoned in percentage as commission, a written contract seems to be necessary under this statute.

It is recommended that the judgment of the district court be reversed and the cause remanded, with leave to amend the pleadings.

AMES 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 remanded, with leave to amend the pleadings.

REVERSED.

OTOE COUNTY V. CHARLES DORMAN ET AL.

FILED MARCH 17, 1904. No. 13,445.

1. **Counties: ACTION: DEMURRER.** A demurrer is not the proper pleading by which to raise a question as to whether or not an action in the county's name by the county attorney was sufficiently authorized.
2. **Cause of Action.** A single transaction, causing a single item of damage, constitutes a single cause of action.
3. **County Commissioners: FRAUD: NEGLECT: ACTION.** The fact that the county commissioners have made a settlement with the treasurer, by which he is allowed to retain fees in excess of the statutory limit, does not, of itself, render the county commissioners liable for the excess of fees retained by the treasurer with their consent. A fraudulent participation on their part, with corrupt knowledge, of a wrong to the county, or else a change of situation owing to their negligence in failing to bring an action against him, which would prevent a recovery from the treasurer, would be necessary.

ERROR to the district court for Otoe county: LEE S. ESTELLE, JUDGE. *Affirmed.*

A. A. Bischof and *W. H. Pitzer,* for plaintiff in error.

John C. Watson and *W. F. Moran, contra.*

HASTINGS, C.

In this case, the county of Otoe sued the members of the board of commissioners for the year 1902, to recover $1,000 which it is alleged the commissioners, acting as a board, "wrongfully, unlawfully and negligently" allowed the county treasurer to retain. It is alleged that the law only permitted the retention by the county treasurer of $3,400 as fees, and he was allowed to keep $4,400. It is alleged that the county was damaged to the extent of that $1,000. To this petition demurrers were interposed by each of the three defendants to the action: (1) That the court had no jurisdiction of the defendants' persons; (2) Had no jurisdiction of the subject of the action; (3) Plaintiff

had no legal capacity to sue; (4) A defect of parties plaintiff; (5) Several causes of action improperly joined; (6) That the petition does not state facts sufficient to constitute a cause of action. The demurrers were sustained, and judgment of dismissal entered. From this judgment the county brings error; the error complained of being the sustaining of the demurrers.

The first four grounds of the demurrers are all based on the proposition that there is no allegation in the petition of any authorization of the action by the county commissioners. We are not cited to any authority for the proposition that an action on behalf of a municipality must be expressly alleged to have been authorized by the officers who have its matters in charge. It is not claimed that the attorneys who appear for the county are not members of the bar of Otoe county, and the rule is, that the appearance of a qualified attorney on behalf of a party competent to sue carries with it the presumption that he is authorized, until the contrary appears. *Vorce v. Page,* 28 Neb. 294. It does not seem that a demurrer on the first four grounds set up in this case, raises a question as to the authority of the county attorney and his co-counsel to bring the county into this action. That the county may sue, and may be sued, the statute provides. Compiled Statutes, chapter 18, article I, section 20 (Annotated Statutes, 4438).

The fifth ground, that there is an improper joinder of causes of action, is not applicable to this petition. The only wrong alleged is the wrongful, unlawful and negligent allowing of the treasurer to retain this money, and its allowance is alleged as a single act.

It remains therefore to consider the sixth ground, whether there is a cause of action alleged, whether the allowing of the $4,400, admitting that it was unlawful, wrongful and negligent, authorizes a recovery of the $1,000, or of any sum, against the defendants. It is urged in support of such a recovery: (1) That the action of the county board in settling the accounts of the county treasurer was

ministerial. This may be granted. (2) That the county board had no authority to allow more than the amount fixed by statute. This may also be granted. (3) That it is the duty of the county board to require payment into the county treasury of all fees earned in excess of his salary by the treasurer. This contention may be allowed also. The statutes certainly require the county board to adjust the treasurer's accounts, and authorize the proper action to recover any balance. Doubtless, these commissioners, if they refused to bring an action against the treasurer, or to authorize one, could be compelled to do so on a proper showing. (4) That the defendants are liable for all losses resulting from their action. As thus broadly stated it is not true. Great loss may result to the county from action of the board of county commissioners, for which they would not be liable at all. It might be granted that, if damage resulted to the county from their illegal or unauthorized action, they would be liable to it, but are they, because of a void order that he need not pay, liable for the loss of $1,000 in the county treasurer's hands which he has never paid in? It seems clear that something more than this is required. It seems clear that their action has not in any way prejudiced the right of the county to recover this money, or done away with the treasurer's duty to pay it over. It would seem that there should have been, at least, a demand for an action to collect it from the treasurer, and a refusal to bring one, before any liability for the $1,000 could accrue against the commissioners. Plaintiff's cause of action is simply that the commissioners, acting as a board, attempted to sanction the retention of this money by the treasurer. If such sanction is, as plaintiff claims, totally void, it has given no additional authority on the treasurer's part to hold the money; the fund is just as much the county's as it was before, and it has remained in the same hands.

It is to be said also that an action will not lie against a public officer, except for intentional wrongs or negligence

amounting to such a wrong, or a failure to perform something which is explicitly required of him by law. What is required of these commissioners is that they shall, at the proper time and in the proper way, cause an action to be brought against a defaulting treasurer. There is nothing in the statutes making them liable for failure to get the money out of him. It would seem clear that to warrant a recovery from these commissioners of this money, it must appear that they fraudulently and corruptly, by their official action, prevented the payment of it by the treasurer to the county's loss, not that they had merely wrongfully, unlawfully and negligently, but in good faith, sanctioned his retaining it. It does not seem possible to find that there is set forth in this petition a sufficient cause of action against the commissioners.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

FRANK B. SHELDON ET AL. V. GAGE COUNTY SOCIETY OF AGRICULTURE ET AL.

FILED MARCH 17, 1904. No. 13,471.

1. **Supplying Records.** The supplying of missing records is a matter resting in the sound discretion of a court and, unless it is abused, its exercise will not be interfered with.
2. **County Board:** ALLOWANCE OF CLAIM OF AGRICULTURAL SOCIETY: REVIEW. The application of an agricultural society for assistance from the county funds is a claim, and an appeal from its allowance by a taxpayer will lie to reexamine the facts as to the organization and competency of the society. No reexamination as to the public interest in assisting such a society is permissible.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed.*

E. O. Kretsinger, for plaintiffs in error.

L. W. Colby and *H. E. Sackett, contra.*

HASTINGS, C.

Two questions are presented in this case, which is an appeal from the action of the board of county commissioners of Gage county in allowing the claim of the Gage County Agricultural Society for $994.50 for holding a fair in August, 1901. When the appeal was presented in the district court for that county, it was discovered that there was among the files no certificate, such as is required by section 12, article I, chapter 2, Compiled Statutes (Annotated Statutes, 3019) showing payment of at least $50 dues into the treasury of such society. A motion was made for leave to supply the record; a certificate was found and filed. It was then insisted that it had not been filed before the county board, and a motion to strike it for that reason was made. At the hearing of this motion, affidavits were produced on both sides and oral testimony was taken. The court overruled the motion. This is plaintiffs' first ground of complaint. It is impossible to see that in this action there was any error; there is evidence to support the conclusion of the trial court that the certificate had been before the county board.

The other complaint is as to the dismissal of the taxpayers' appeal, on the ground that none would lie from the action of the commissioners in allowing this amount to the agricultural society.

Section 12, before referred to, provides that the county board may, at any time that it deems it for the best interest of the county, refuse to make the appropriation, or any part of it. Earlier in the section it is provided that the board "may, when they deem it for the best interest of said county, order a warrant to be drawn on the general funds of the county in favor of the president of the society." It is claimed, and the trial court seems to have

found, that this makes the whole matter discretionary with the board, and that in review of an abuse of discretion only error will lie. In brief, that this is not a "claim" against the county, from whose allowance a taxpayer may appeal under the provisions of section 38, chapter 18, article I of the Compiled Statutes (Annotated Statutes, 4456).

Doubtless, if the whole matter were entirely in the discretion of the county board, no appeal would lie from the exercise of such discretion. An appeal involves a hearing *de novo*. A matter which is entirely within the discretion of a specified tribunal can not be tried on its merits before another one. For an abuse of such a discretion, doubtless, the only remedy would be error. But an examination of said section 12 indicates that, before the board has any discretion to allow anything, the establishment of a society with a constitution and by-laws agreeable to the rules furnished by the state board of agriculture and with 20 or more resident members in the county is absolutely required, as well as the certificate before mentioned. It would seem that the word "claims" as used in the statute governing appeals from actions of county boards is used in the sense of an assertion or a pretension. The assertion by the agricultural society of a right to appeal to the discretion of the commissioners in reference to an allowance is a claim. If there is a competent agricultural society and its members have brought themselves within the law, from an exercise of the board's discretion in finding that the public interest requires the allowance, there can be no appeal. From their determination as to the existence of the antecedent facts, however, which are involved in this claim, there seems no doubt of a right to appeal, and that the court was wrong in dismissing the taxpayers' entire proceedings. There seems no reason for making a distinction between one class of claims and another, except such as the statute itself makes. One who has in a lawful and proper manner performed services for the county has an absolute right to an allowance

of his pay, but from such an allowance any taxpayer has the right of appeal. It is a claim against the county and comes within the provisions of section 38, article I, chapter 18 of the Compiled Statutes. An agricultural society, which has complied with the law, has the right to appeal to the discretion of the county board, and to take the latter's conclusion as to the public interest. If it can induce the board to believe that public interests require county assistence to be afforded, the society can obtain it. Is this any the less a claim against the county because it is not one of absolute right, but only of discretionary consideration at the hands of the commissioners? The taxpayer, by means of the law, has committed to the county board a discretion to say whether or not it is for the best interest of the people that assistance be extended to a duly organized agricultural society, which has complied with the law. That question must be considered settled. Whether there is such a society and whether or not it has complied with the law, are questions to be determined in the first place by the board, but finally by the facts, and as to these it seems clear that section 38, article I of chapter 18, authorizes an appeal.

For the reexamination of these questions of fact in the district court, if the appellants desire, it is recommended that the judgment dismissing the appeal be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment dismissing the appeal is reversed and the cause remanded for further proceedings.

REVERSED.

OTOE COUNTY V. JOHN G. STROBLE ET AL.

FILED MARCH 17, 1904. No. 13,446.

1. **County Board:** ALLOWANCE OF SALARIES. In allowing salaries fixed by statute, a board of county commissioners act ministerially.
2. ———: ———. There is no warrant of law for an allowance of extra salary to the chairman of a board of county commissioners.
3. **Illegal Allowance:** LIABILITY OF MEMBERS. Where, by the action of the board of county commissioners, a warrant is drawn upon the county treasury without any legal authority so to do, each member of the board voting for such illegal claim is jointly and severally liable to the county for the amount of money so disbursed.

ERROR to the district court for Otoe county: LEE S. ESTELLE, JUDGE. *Reversed.*

A. A. Bischof and *W. H. Pitzer,* for plaintiff in error.

John C. Watson and *W. F. Moran, contra.*

OLDHAM, C.

In many respects, this is a companion case to *Otoe County v. Dorman, ante,* p. 408. The difference in the two cases is that, in the instant case, the petition of plaintiff, in addition to charging defendants with liability for an over-allowance of assistance in the office of county treasurer, charges in the second, third and fourth counts thereof that, while the defendants were each exercising the duties of the office of county commissioner during the years 1901 and 1902, after allowing the different members of the board of county commissioners the full compensation fixed by statute for their services as members of such board, they also "wrongfully and corruptly" directed a warrant to be issued to each member thereof for the sum of $125 each, for services as chairman of the board during the years 1900, 1901 and 1902, respectively. In the fifth count of the petition it also charges that the board illegally directed warrants to be drawn in pay-

ment of livery hire to different claimants during the years 1901 and 1902. And, as in the case above referred to, demurrers were filed by each of the defendants to this petition; the demurrers were each sustained, plaintiff's petition was dismissed, and it brings error to this court.

In view of the conclusion reached in *Otoe County v. Dorman, supra,* we need not consider the right of the county attorney to institute this action without direction of the board, nor need we consider the sufficiency of the allegations of the first count of plaintiff's petition, as this count stands on all fours with the petition therein considered. But we think that the allegations of the second, third and fourth paragraphs of the petition in the case at bar stand on a different principle, and charge a good cause of action against the defendants.

Having determined that the act of the board of county commissioners, in approving the settlement of the treasurer and permitting him to retain an illegal allowance for deputy hire, was merely a void act, which would not protect him or his official bondsmen from a suit by the county for the recovery of the unauthorized amount retained, we held that to warrant an action against the members of the board for this act, the petition would have to show either that it was made by a wilful and corrupt agreement between the treasurer and the members of the board, or that the board had refused to authorize an action for its recovery, or that the bondsmen were insolvent so that the ultimate loss of the amount of money improperly retained was occasioned to the county by the illegal act of the board.

While adhering to what we said in the former case, we think a different question is presented in the allegations contained in the second, third and fourth counts of the petition in the case at bar. In allowing salaries fixed by statute, the board acts ministerially and is without any discretion. The compensation of county commissioners is fixed at $3 a day and mileage. There is no claim of any warrant in the statute for any additional

allowance for the chairman of the board. Members of the board of county commissioners are paid by warrants drawn on the treasury; consequently, when a claim is allowed and a warrant drawn, the funds of the county are depleted to the extent of the warrant. And by the allegations in the petition, which are admitted by the demurrers, the defendants, without any warrant of law, broke into the county treasury and took from it $375 without a shadow of authority so to do. We think in this unlawful raid on the funds of the county, each member of the board who voted for the allowance of these claims was a joint tortfeasor in the unlawful act, and that each are jointly and severally liable to the county for the loss so sustained. We therefore conclude that the second, third and fourth paragraphs of plaintiff's petition allege a good cause of action, and that the district court erred in sustaining a general demurrer to the petition.

We might say in passing that, from an examination of the cause of action alleged in the fifth count of the petition, we regard it as defective in failing to allege a wilful wrong by the members of the board in allowing claims for livery hire. In the allowance of claims of this character, the board acts in a *quasi* judicial capacity, and is only liable for an intentional and wilful disregard of duty. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further procedings.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.